Case Number S204221

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC.

Plaintiff and Respondent.

vs.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Respondent.

CRAIG H. MEDEIROS,

Real Party in Interest and Appellant.

Petition for Review of a Decision of the Court of Appeal
Third Appellate District Court Case No. C063863

Appeal from a Judgment of the Superior Court of the
State of California, County of Sacramento
Honorable Timothy M. Frawley, Judge
Case No. 34-2009-80000249

RESPONDENT'S ANSWER BRIEF TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Craig Medeiros (hereinafter "Petitioner") asks this court to review a published opinion of the Third Appellate District Court of Appeal's ("Third District") affirming judgment in favor of Respondent Paratransit, Inc.. *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2012) 206 Cal.App.4th 1319 affirmed the superior court's ruling that Petitioner committed misconduct for the purposes of unemployment insurance benefits by unreasonably refusing to sign a disciplinary memorandum. (*Paratransit*, supra, 206 Cal.App.4th at 1333.) Petitioner seeks review on the basis that *Paratransit* threatens the uniformity of decision and raises important questions of law. (California Rule of Court 8.500, subdivision (b) (1); Petition for Review, p. 1, hereinafter "Petition.") In doing so, Petitioner mischaracterizes the Third District's straightforward application of established law to the unique facts of this case, and creates conflict in case law where none exists.

The Petition asserts that four separate issues merit the intervention of this Court. The first issue asks whether an employee who fails to comply with an order of his employer can be found to have committed misconduct for the purposes of unemployment insurance benefits without a finding that the order is lawful and reasonable. As set forth below, this purported issue is not directly implicated by *Paratransit*, and lacks legal and factual support. Next, Petitioner contends in his second issue that this Court should

settle an important question of law regarding the effect of signing a document "as to receipt." As demonstrated herein, Petitioner has failed to show that such is a question warranting Supreme Court review. Petitioner's contention is likewise unsupported, and due to the fact bound nature of the inquiry in this case, *Paratransit* provides a poor vehicle for addressing the purported important issue. Petitioner further urges this Court, in his third issue, to grant review on grounds he untimely asserted for the first time in a Petition for Rehearing. Finally, Petitioner's fourth issue suggests, without legal or factual support, that the Third District applied the incorrect standard of a good faith error in judgment in finding him at fault for his refusal to sign the disciplinary memorandum.

The criteria of Rule of Court 8.500(b) are absent from this case. Petitioner proffers his dissatisfaction and disagreement with *Paratransit* and asks the Court to intervene on that basis; such is not a sufficient trigger for Supreme Court review. In sum, the Petition is meritless because: 1) it neither asserts a important question of law nor presents a necessity to secure uniformity of decision; 2) it is unsupported by the facts and applicable law; and 3) it asserts an issue that was not timely raised in the Court of Appeal. The Petition should be denied.

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ARGUMENT

POINT I

REVIEW SHOULD BE DENIED BECAUSE *PARATRANSIT* APPLIES ESTABLISHED PRINCIPLES OF INSUBORDINATION AND MISCONDUCT TO SPECIFIC AND PECULIAR FACTS

Petitioner contends, in his first issued presented, that whether an employee can be found to have committed misconduct for the purposes of Unemployment Insurance benefits without a finding that the employer's order is lawful and reasonable is an important legal question requiring Supreme Court review. (Petition, p. 9.) This case, however, presents no such question, and Petitioner must either misunderstand or mischaracterize *Paratransit* to argue that it does.

Paratransit conforms to the established law delineating the scope of misconduct sufficient to disqualify an employee from unemployment insurance benefits. Unemployment Insurance Code section 1256 provides that an individual who "has been discharged for misconduct connected with his or her most recent work" is disqualified from receiving unemployment benefits. (Unemployment Insurance Code, § 1256.) ("Section 1256.") Likewise, "[a]n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee." (Lab. Code, § 2856.) ("Section

2856.") California law has long recognized that a violation of section 2856 may qualify as misconduct for the purposes of section 1256 sufficient to disqualify the offending employee from collecting unemployment insurance benefits. (*Lacy v. Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1133; *Thornton v. Department of Human Resources Dev.* (1973) 32 Cal.App.3d 180, 185.)

The Third District applied this established law to the question of whether Petitioner's flat refusal to sign the disciplinary memorandum presented by his employer was misconduct. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1333, citing *Lacy*, *supra*, 17 Cal.App.3d at p. 1133.) In accord with *Lacy*, the Third District found the Petitioner's refusal to sign the memorandum violated his obligations under section 2856, because the order to sign was not a "new and unreasonable burden," and therefore not unlawful or unreasonable. (*Id.*) The court then addressed the related question of whether Petitioner's refusal was excusable as a good faith error in judgment—a question it could only reach after considering whether the order was lawful and reasonable. (*Id.*) Accordingly, Petitioner's suggestion that *Paratransit* neglects the threshold question of insubordination analysis is unsupported.

Petitioner's argument that *Paratransit* breaks with established precedent is equally unsupported. In the proceedings below, Petitioner urged the Third District to ignore the established analytical framework

provided by *Lacy* in favor of a novel rule that would find an employer's order *per se* unreasonable if it did not precisely conform to the language of a collective bargaining agreement (hereinafter "CBA"). The Third District rejected Petitioner's proposed rule, and characterized this line of argumentation as "red herring." (*Paratransit, supra,* 206 Cal.App.4th at p. 1327.)

Petitioner's argument was a distraction from the issue presented in *Paratransit* for two reasons. First, as noted by the Third District, Petitioner's refusal to sign the disciplinary memorandum had nothing to do with the terms of the CBA (*Id.*) Petitioner only asserted that the memorandum violated union rules well after his insubordinate refusal to sign anything without a union representative present, despite the fact that his *Weingarten* rights were not implicated. (*Id.* at 1330; *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251.) Second, while *Lacy*'s rule that misconduct occurs where an employee refuses an order from his employer that does not impose a new and unreasonable burden is well established (*Lacy, supra*, 17 Cal.App.3d at 1133), no California authority stands for the proposition that an order which does not precisely conform to the language of a CBA is *per se* unlawful and unreasonable. Petitioner requested below that the Third District create such authority, and break with the established precedent of *Lacy*, by applying an inapposite case which addresses public employees and the Education Code.

Moosa v. State Personnel Board (2003) 102 Cal.App.4th 1379 ("*Moosa*") is unnecessary to consideration of the issues presented in *Paratransit*. In *Moosa*, a public professor was demoted pursuant to Education Code section 89355, which in pertinent part provides for such a demotion in the event of "unprofessional conduct" and/or "failure to perform the normal and reasonable duties of the position." (*Id.* at p. 1383-1385; Education Code, § 89353, subds. (b), (f).) Following its interpretation of the Education Code, the *Moosa* court determined that section 89355 did not authorize the demotion of an employee public professor who failed to follow a directive not authorized by the applicable CBA. (*Moosa*, *supra*, 102 Cal.App.4th at pp. 1385-87.)

Education Code section 89535 is not at issue in the *Paratransit*, and neither are the terms "unprofessional conduct" and "normal and reasonable duties of the position." *Lacy*, and sections 1256 and 2856 are, however, at issue on the *Paratransit*—and absent from the court's reasoning in *Moosa*. Moreover, *Moosa* has never been applied outside the narrow confines of the Education Code and public employment. Accordingly, there is no conflict between *Paratransit* and *Moosa*. Petitioner's proposed application of *Moosa*, however, would conflict with *Lacy* to the extent that it would shift the analysis of whether insubordination amounts to misconduct away from well established authorities, and limit such to terms of CBAs. As set forth above, Petitioner's characterization of the *Paratransit* as avoiding the

threshold question of misconduct is without legal and factual support, and Supreme Court review of this issue is not warranted. (Cal. R. Court, § 8.500, subd. (b)(1).)

POINT II

REVIEW SHOULD NOT BE GRANTED BECAUSE THE EFFECT OF SIGNING A DOCUMENT "AS TO RECEIPT" IS NOT AN IMPORTANT QUESTION OF LAW

Petitioner argues that Supreme Court review is necessary to settle an important question of law not directly implicated by the ruling of *Paratransit*: the effect of signing a document "as to receipt." (Petition, p. 13.) Petitioner contends that the Third District ruled Respondent's order to sign the disciplinary memorandum was reasonable, because said memorandum stated under the signature line "employee signature as to receipt," and the Respondent stated that signing would not be an admission. (*Id.* at p. 13.) According to Petitioner, this amounts to the Third District finding "that as a matter of law, an employee must always believe whatever an employer says." (*Id.* at p. 14.) Petitioner's second argument, as his first, is lacking in support and reliant on mischaracterizations.

First, as explained in Point I, Petitioner's contention that the Third District was required to adopt his novel arguments concerning the CBA is inapposite. *Paratransit* conforms to the established authority of *Lacy* by considering whether the order to sign the disciplinary memorandum was new and unreasonable. Second, this particular dispute is trivial to the extent

that the applicable CBA did not mandate any specific language, and the language on the disciplinary memorandum ("signature as to receipt") is sufficiently clear so as not to suggest anything other than what it states. Third, Petitioner's proposed basis for review ignores many of the specific facts on which that *Paratransit* is grounded, and accordingly overstates the potential precedential value of this case.

Contrary to Petitioner's arguments, The Third District did not find that the disputed order was reasonable, but rather reviewed the superior's court determination that the order was reasonable under the substantial evidence standard. (*Paratransit*, *supra*, 206 Cal.App.4th at 1325.) In doing so, the Third District considered far more than the language of the memorandum stating "signature as to receipt," and the employer's assurances that the memorandum meant only what it said (Petitioner was acknowledging receipt). Facts considered the superior court and Third District, yet ignored by Petitioner in his attempt to secure review include: 1) Petitioner signed a nearly identical disciplinary memorandum in 2004 and was not fired; 2) an investigation of Petitioner's 2008 misconduct had already occurred, during which Petitioner did not ask for union representation; 3) following a full investigation, Petitioner, at the end of his shift, was called into a meeting to solely to inform him of predetermined discipline for the 2008 misconduct; 4) Petitioner claimed to be "tired at the end of his shift"; 5) Petitioner was asked about lying on his employment

application six years prior; 6) Petitioner's purported understanding that "the union had previously refused to assist employees who had signed disciplinary notices"; 7) Petitioner's claim that the union had advised him not to sign anything without a union representative present, without reference to the CBA, which was discounted by the Third District. (*Paratransit*, *supra*, 206 Cal.App.4th at 1329, 1332-1333.)

In sum, whether the assurances negated the admission represents only a fraction of the factual inquiry necessary for the Third District to consider the matter, and the Petitioner's simple formulation of notation and assurance ignores the complete factual backdrop that the lower courts considered. Furthermore, it is well-established that the significance of a failure to deny for purposes of an admission is a fact bound question, depending on the "surrounding circumstances" and the "temperament and disposition" of the party addressed. (*Baldarachi v. Leach* (1919) 44 Cal.App. 603, 609.)[1] Petitioner requests that this Court perform a highly fact sensitive inquiry, unlikely to bear any precedential value for future cases, let alone answer the general questions regarding inferences suggested by Petitioner. Accordingly, *Paratransit* does not satisfy the "importance"

[1] Petitioner misquotes *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956) 142 Cal.App.2d 653, 666, which does not state that a "failure to deny the truth of a statement constitutes an admission," but rather "the failure to deny the truth of a statement *may* constitute an admission by silence." (*Id.* at p. 666; see Petition, p. 13.) While a small oversight, it is nonetheless significant to the extent that it suggests silence requires a mandatory finding of an admission.

prong of California Rule of Court 8.500, and Supreme Court review is unwarranted. (Cal. R. Court, § 8.500, subd. (b)(1).)

POINT III

THE PETITIONER'S THIRD PROPOSED ISSUE WAS NOT TIMELY RAISED IN THE APPELLATE COURT

Petitioner urges this Court to review *Paratransit* on grounds he asserted for the first time in his Petition for Rehearing: Respondent did not establish the element of injury for the purposes of misconduct. (Petition, p. 15.) Here, the Third District's purported failure to analyze injury as an element of misconduct is a product of the issues presented to it. "An appellate court decides only the issues presented by the parties." (*Hampton v. Superior Court of Los Angeles County* (Young) (1952) 38 Cal.2d 652, 656.) ("*Hampton.*") Petitioner did not challenge the sufficiency of Respondent's showing of this element at the superior court in either his Opening or Reply briefs, but could have. (See Respondent's Request for Judicial Notice, Exhibit A [Petitioner's opening appellate brief], Exhibit B [Petitioner's reply brief].) The Third District accordingly did not address such in the Decision. (*Hampton, supra*, 38 Cal.2d at p. 656.) Petitioner later raised the issue in his Petition for Rehearing, yet "[i]t is well settled that arguments...cannot be raised for the first time in a petition for rehearing." (*Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1308.) Petitioner did not timely raise the issue he now presents for review.

(*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1013 [argument raised for the first time in a petition for rehearing, which could have been raised earlier, was not properly before the Supreme Court because the argument was not timely raised in the Court of Appeal].)

"As a policy matter, on petition for review, the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. R. Court, § 8.500, subd. (c).) As demonstrated above, Petitioner did not timely raise the issue of Respondent's failure to establish an injury. Accordingly, Supreme Court review of this question of law is unwarranted. (Cal. R. Court, § 8.500, subd. (c).)

POINT IV

THE DECISION APPLIES THE PROPER STANDARD OF "GOOD FAITH ERROR IN JUDGMENT" FOR THE PURPOSES OF ELIGIBILITY FOR UNEMPLOYMENT INSURANCE BENEFITS

Petitioner suggests that Supreme Court review is necessary because the Decision articulates a narrow, and inaccurate, standard for "good faith error in judgment." (Petition, p. 16.) Petitioner merely assumes that because the Third District ruled against him, it must have used an improper standard.

First, to the extent that Petitioner argues that a good faith error in judgment must be considered from the worker's "standpoint, in light of the

circumstances facing her and the knowledge possessed by her at the time," (Petition, p. 17) *Paratransit* explicitly considered such matters *de novo*, including Petitioner's claim that "he 'was tired at the end of his shift, called into a meeting with two senior employees of [Employer], confronted with serious allegations he refuted, asked about lying on his employment application six years prior, faced with demands that he sign the disciplinary notice that confirmed the allegations, and was threatened with termination if he did not sign." (*Paratransit*, supra, at p. 1329.)

Second, the Decision sets forth the following standard for a good faith error in judgment, which by no means is artificially narrow or inaccurate:

> "Section 1256 must be read in light of section 100 of the Unemployment Insurance Code which was included in the code as a guide to interpretation and application of other sections of the code." (*Drysdale v. Department of Human Resources Development* (1978) 77 Cal.App.3d 345, 352 [142 Cal. Rptr. 495].) This latter section reads, in relevant part: "The Legislature ... declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed *through no fault of their own*, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Unemp. Ins. Code, § 100, italics added.) Fault is therefore the basic element for considering and interpreting the Unemployment Insurance Code. (*Drysdale* at p. 353; *Evenson v. Unemployment Ins. Appeals Bd.* (1976) 62 Cal.App.3d 1005, 1015–1016 [133 Cal. Rptr. 488].)

(*Id.* at p. 1328.) In addition to this general statement concerning the standard for finding a good faith error in judgment, *Paratransit* frames the issues in a manner sensitive to the facts of the case: "where an employee, in good faith, fails to recognize the employer's directive is reasonable and lawful or otherwise reasonably believes he is not required to comply, one might conclude his refusal to obey is no more than a good faith error in judgment." (*Paratransit*, supra, 206 Cal.App.4th at 1328.) According to Petitioner, this rather innocuous sentence amounts to an arbitrary limitation on good faith error in judgment sufficient to threaten the uniformity of review. (Petition, p. 17.) This fragment of language from *Paratransit*, however, does not purport to limit good faith error in judgment to such situations, or to be an exhaustive standard. (*Id.*) Uniformity of review is not threatened.

In sum, by framing the standard of good faith error in judgment in this manner, Petitioner asks this Court to re-determine whether the Petitioner's disobedience of his employer's lawful, reasonable order was a good faith error in judgment. To do so, this Court would apply the same standard used by the Third District, to the same facts before the superior court and Third District. Such a determination does not satisfy the "importance" prong of California Rule of Court 8.500, and renders Supreme Court review unwarranted. (Cal. R. Court, § 8.500, subd. (b)(1).)

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CONCLUSION

For the reasons set forth above, review should be denied.

DATED: August 13, 2012.

Respectfully submitted,

REDIGER, McHUGH & OWENSBY, LLP

By _____
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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)(1)]

The text of the Respondent's Brief consists of 3,101 words as counted by the Microsoft Word program used to generate this Brief.

DATED: August 13, 2012.

Respectfully submitted,

REDIGER, McHUGH & OWENSBY, LLP

By _____
LAURA C. McHUGH
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CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On August 13, 2012, I caused to be served the within **Respondent's Answer Brief to Petition for Review** in *Paratransit, Inc. v. Unemployment Insurance Appeals Board; Craig Medeiros*; California Supreme Court Case No. S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sac. County Sup. Ct. Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

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Attorneys for Real Party in Interest and Appellant, CRAIG MEDEIROS

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XXXX By personal service at address(es) above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of August 2012, at Sacramento, California.

LORRAINE L. RENFROE