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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BENJAMIN ZUCKER, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B281382 (Los Angeles County Super. Ct. No. BS159516)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Strobel, Judge. Affirmed.

Rains Lucia Stern St. Phalle & Silver and Richard A. Levine, for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney and Shaun Dabby Jocobs, Deputy City Attorney for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Benjamin Zucker appeals from a judgment denying his petition for peremptory writ of mandate. Plaintiff filed a petition against defendants, City of Los Angeles (the city) and Chief of Police Charlie Beck, seeking to overturn the finding of misconduct by the Board of Rights and the official reprimand. The Board of Rights conducted a hearing and found plaintiff, while off-duty, posted an improper remark on Facebook. Chief of Police Beck issued an official reprimand and suspended plaintiff for five days without pay.

Plaintiff contends there was no misconduct because his Facebook comment was protected by the First Amendment. In addition, he argues the finding of misconduct must be set aside because the Los Angeles Police Department (LAPD or department) did not have a policy regulating the use of social media by off-duty officers, and he was not formally charged with any violation of the Department Manual. Plaintiff also challenges the trial court's findings that: he engaged in misconduct; his Facebook comment reasonably resulted in impairment or disruption of public service; and there was a clear nexus between the conduct and the department. Further, he asserts the penalty of a written reprimand was excessive and an abuse of discretion. He also contends he was denied a fair hearing because the department failed to timely produce documents that were used at the administrative hearing. We find no error and affirm the judgment.

II. FACTUAL AND PROCEDURAL HISTORY

In 2014, plaintiff had been employed by LAPD for 19 years. He held the rank of police sergeant, and was a traffic enforcement supervisor at West Traffic Division. At the time, LAPD did not have a policy regarding the use of personal Facebook accounts, and plaintiff did not receive training on the issue.

On March 31, 2014, Police Officer Mark Cronin, who was the Los Angeles Police Protective League[1] director, posted on his Facebook profile a link to a Daily News article. The article was about Police Officer Victoria Debellis's lawsuit, and was entitled "LAPD officer says she was harassed because of gender, religion, suing City of Los Angeles." On the same day, while off-duty, plaintiff posted the following comment on Cronin's Facebook profile in response to the linked article: "I was born Jewish, raised Mormon and married to a catholic that is Japanese, Portuguese & German. NOW WHERE[']S MY MONEY? [¶] Kiss my ass ya greedy house mouse!" About 30 people who were LAPD employees or associated with Cronin saw the posts on Cronin's Facebook profile.

At the Board of Rights hearing, plaintiff explained his Facebook posting: "Well, what I meant by that is that, you know, we work in a city that's very diverse. Everybody has their own quirks. Everybody has their own issues. And you know, at what point in time do we stop suing and being so litigious and stop suing everybody for every little thing, in some cases even looking

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[1] The Los Angeles Police Protective League is a union that represents all LAPD sworn peace officers holding the rank of lieutenant and below.

to create a lawsuit, and actually get to work and do our jobs? That's what I meant by it."

As for his comment "Kiss my ass, ya greedy house mouse," plaintiff testified: "It means that I disapprove of all of this—all of these crazy lawsuits and, you know, we need to have people work the field and get police work done. You know, we have so many people inside that people on the outside are overwhelmed." Plaintiff defined "house mouse" as someone who did not work in the field. He indicated the term had "been around the department for a while." When asked if "house mouse" was a derogatory term, he stated: "Not necessarily, not in and of itself. If it's somebody that . . . works inside because they're injured, that's different. If it's somebody . . . that doesn't do police work because they don't want to do police work, then yes, I have a problem with that." Based on the news article, plaintiff knew Debellis was assigned to a desk job as part of the computer-aided dispatch analysis unit.

Plaintiff admitted that as a department supervisor, he should not comment on an ongoing lawsuit, and did not intend for Debellis to see his post. He was aware that other department personnel would see his post on Cronin's Facebook profile. Plaintiff testified he would not have made the comment directly to Debellis as a supervisor. He stated: "If I had posted as Sergeant Zucker and I said that in uniform or in context—or in the context of being a supervisor or a police officer, yes, that is not right. That wouldn't be right. But as Ben Zucker on my private page, with no nexus to the department, that's my First Amendment right."

On April 1, 2014, Debellis viewed Cronin's Facebook profile and saw the posts, including plaintiff's comment. She found

plaintiff's Facebook profile and printed snapshots of it. One photograph depicted plaintiff in his uniform, while another showed a LAPD badge. On plaintiff's profile under "Work and Education," it stated "Los Angeles Police Department" and "City of Los Angeles." Debellis ran plaintiff's name through the LAPD roster and identified his rank and serial number.

Debellis made a complaint against plaintiff with the department on April 1, 2014. Her complaint was investigated by Sergeant Leonel Vargas, an Internal Affairs workplace investigator. During Debellis's interview with Vargas on September 8, 2014, she provided copies of Cronin's Facebook profile with the link to the article, plaintiff's Facebook comment, and various snapshots of plaintiff's Facebook profile.

On April 1, 2015, the department served plaintiff with a complaint, alleging one count of misconduct: "On or about March 31, 2014, you, while off duty, posted an improper remark on Facebook." The Board of Rights held a hearing on the complaint on September 30 and October 1, 2015.

On October 1, 2015, the Board of Rights found plaintiff guilty of the misconduct allegation and recommended he receive an official reprimand. The Board of Rights found plaintiff's Facebook profile showed "a clear nexus to the department" because it displayed a picture of plaintiff wearing his LAPD uniform, representing himself as an LAPD sergeant. The Board of Rights concluded: "Although in an off-duty capacity, he placed himself in a position where his actions were subject to on-duty scrutiny by other department employees, and may have some influence on the outcome of an unresolved litigation." On October 7, 2015, Chief of Police Beck adopted the recommendation of the

Board of Rights and issued an official reprimand. Plaintiff also was suspended for five days without pay.

On December 11, 2015, plaintiff filed a verified petition for writ of mandate pursuant to Code of Civil Procedure sections 1094.5 and 1085. Plaintiff alleged: his Facebook comment, posted while off-duty, was protected under the First Amendment; the Board of Rights and Beck's decisions were not supported by the weight of evidence; the penalty was excessive and an abuse of discretion; he was denied a fair hearing and administrative discovery; and he should not be disciplined because the department did not have a written policy prohibiting Facebook postings by off-duty employees.

On January 17, 2017, the trial court held a hearing on the petition for writ of mandate and denied it. Judgment denying the petition was entered on February 14, 2017. Plaintiff timely filed his notice of appeal.

III. DISCUSSION

A. Standard of Review

Code of Civil Procedure section 1094.5 governs judicial review of a final administrative decision. "'[D]iscipline imposed on public employees affects their fundamental vested right in employment, and therefore, when a public employee challenges an employer's disciplinary action in a mandamus proceeding, the trial court is required to exercise its independent judgment on the evidence. [Citations.]'" (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 314 (*Wences*); accord, *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 44.)

Accordingly, the trial court exercises independent judgment on the evidence when reviewing plaintiff's challenge of an official reprimand. (*Wences, supra*, 177 Cal.App.4th at p. 318.)

"The independent judgment test required the trial court to not only examine the administrative record for errors of law, but also exercise its independent judgment upon the evidence in a limited trial de novo. [Citation.] The trial court was permitted to draw its own reasonable inferences from the evidence and make its own credibility determinations. [Citation.] At the same time, it had to afford a strong presumption of correctness to the administrative findings and require the challenging party to demonstrate that such findings were contrary to the weight of the evidence. [Citation.]" (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 407 (*Candari*).)

On appeal, we review the record to determine whether the trial court's findings (not the administrative agency's findings) are supported by substantial evidence. (*Candari, supra*, 193 Cal.App.4th at pp. 407-408.) "We resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citation.] 'Where the evidence supports more than one reasonable inference, we are not at liberty to substitute our deductions for those of the trial court.' [Citation.]" (*Id.* at p. 408.)

B. Plaintiff Had Sufficient Notice of the Basis for Discipline

"Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure." (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445; *Brown v.*

State Personnel Bd. (1985) 166 Cal.App.3d 1151, 1164, fn. 5 ["Due process requires that the respondent be given 'notice . . . of the standards by which his conduct is to be measured.'"].) "It is a well-settled principle of constitutional law that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' (*Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391.)" (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763 (*Cranston).*) "'[T]he prohibition against vagueness extends to administrative regulations affecting conditions of governmental employment . . . .' [Citations.]" (*Id.* at pp. 763-764.)

Plaintiff asserts the misconduct allegation against him is unconstitutionally vague and violates his due process rights. He argues the Board of Rights' finding of misconduct must be set aside because LAPD had not adopted a policy regulating the social media activities of off-duty officers when he made the Facebook post on March 31, 2014. He also contends the department's allegation of misconduct did not reference any LAPD Manual violation, and no LAPD Manual section was introduced into evidence during the Board of Rights hearing.

Plaintiff was charged with one count of misconduct: "On or about March 31, 2014, you, while off duty, posted an improper remark on Facebook." The department did not discipline plaintiff based on a social media use policy because it is undisputed there was no such policy at the time plaintiff posted his Facebook

comment. However, plaintiff was subject to standards of conduct set forth in the LAPD Manual.[2]

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[2] Plaintiff argues that if the discipline was based on the Department Manual standards of conduct, they are unconstitutional prior restraints on speech, citing *Liverman v. City of Petersburg* (2016) 844 F.3d 400, 407 (*Liverman*). In *Liverman*, the police department had a social networking policy that prohibited employees from disseminating any information "'that would tend to discredit or reflect unfavorably upon the [department],'" including "'[n]egative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers.'" (*Id.* at p. 404.) The Fourth Circuit found the social networking policy squashed "speech on matters of public import at the very outset." (*Id.* at p. 408.) *Liverman* thus involved a social media policy that chilled potential speech, similar to the honoria ban struck down in *United States v. National Treasury Employees Union* (1994) 513 U.S. 454, 468-479 (*National Treasury*).

The LAPD standards of conduct do not, by their express terms, proscribe expressive conduct or operate as a prior restraint on speech on matters of public interest. Unlike the social media policy in *Liverman* and the honoria ban in *National Treasury,* which chill potential speech, this case involves a post-hoc disciplinary action. The United States Supreme Court has distinguished cases involving prior restraints on speech from post-hoc disciplinary actions. *National Treasury, supra,* 513 U.S. at pp. 466-467 ["Unlike *Pickering* [*v. Board of Ed. of Township High School Dist. 205, Will Cty.* (1968) 391 U.S. 563 (*Pickering)*] and its progeny, this case does not involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities. [Citations.] Rather, the Government asks us to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers"].)

The department based its allegation of misconduct in part on "conduct unbecoming an officer." LAPD Manual, volume 1, section 210.35 provides in part: "A police officer is the most conspicuous representative of government, and to the majority of the people, the officer is a symbol of stability and authority upon whom they can rely. An officer's conduct is closely scrutinized, and when the officer's actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life. Since the conduct of officers, on- or off-duty, may reflect directly upon the Department, officers must at all times conduct themselves in a manner which does not bring discredit to themselves, the Department, or the City."

Plaintiff argues that even if knowledge of LAPD Manual section 210.35 was imputed to him, it was constitutionally vague as applied to the alleged "improper remark" on Facebook. We disagree. In *Cranston, supra*, 40 Cal.3d at pages 763-770, our Supreme Court rejected a police officer's contention that the misconduct allegation against him based on "conduct unbecoming an employee of the City Service" was unconstitutionally vague. Although "the term '"unbecoming" has no inherent, objective content from which ascertainable standards defining the proscribed conduct can be fashioned'. . . . the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." (*Cranston, supra*, 40 Cal.3d at p. 765, citations omitted.)

Plaintiff argues that no reasonable officer would have known that LAPD Manual section 210.35 covered off-duty comments made on Facebook. We disagree. Conduct

"unbecoming an officer" under section 210.35 includes "on- or off-duty" conduct which brings "discredit" to the officer, department or the city. We conclude the department's allegation of misconduct against plaintiff was not constitutionally vague.[3]

C. Plaintiff's Due Process Right to a Fair Hearing Was Not Violated

Under Government Code section 3303, subdivision (g), a public safety officer under investigation that could lead to punitive action, including a written reprimand, is entitled to discovery, including "reports or complaints made by investigators or other persons." In addition, section 395 of the Board of Rights Manual provides that the department shall supply to an accused, certain materials, including the complaint investigation and rough notes of interviews. "Such material shall be furnished as soon as is practicable after the accused officer has selected the members for his or her Board of Rights. [¶] Where the accused has not been offered the material in a reasonable time to prepare a defense or has received incomplete discovery and notified the Advocate of the missing items, the accused may move that the Board grant a continuance to permit the accused to prepare a

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3 We would find no error even under application of a heightened vagueness standard. (See *Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 20 ["[E]ven to the extent a heightened vagueness standard applies, a [party] whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice"].)

defense to the material. If the request appears reasonable, the Board is encouraged to permit a reasonable continuance."

Plaintiff argues he was denied a fair hearing because the department did not produce documents it received from Debellis until the day before the Board of Rights hearing. These documents, which included snapshots of plaintiff's Facebook profile, were introduced into evidence over his objection. Notwithstanding the untimely document production, plaintiff testified he wanted to proceed with the hearing: "Tim[4] called me yesterday talking about wanting to prolong it longer for discovery purposes, and I said, 'You know, I just can't do it anymore. I just want to get it done. Let it be what it is.'" The Board of Rights accepted the documents into evidence but indicated it would "review [the documents] and determine its overall evaluation to the facts of the case, knowing that the defense did not have time to completely evaluate or prepare for these items."

Plaintiff fails to show he was prejudiced by the late disclosure of documents. "[D]epartures from an organization's procedural rules will be disregarded unless they have produced some injustice." (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 990.) The record supports the trial court's finding that plaintiff's union representative, Tim Sands, "had the opportunity to review these documents and respond at the hearing." Sands indicated he reviewed the documents the night before. Moreover, plaintiff stated that he did not want to continue the proceeding. Plaintiff therefore was not prejudiced by the late disclosure of documents. We conclude the trial court

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[4] Tim Sands was plaintiff's union representative during the hearing.

properly found that defendants did not violate plaintiff's due process right to a fair hearing.

D. Plaintiff's Facebook Comment Was Not Protected by the First Amendment

"[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 417.) In determining whether a public employee's speech is constitutionally protected, we make two inquiries: (1) "whether the employee spoke as a citizen on a matter of public concern" and (2) if yes, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (*Id.* at p. 418, citing *Pickering,* 391 U.S. at p. 568.) "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." (*Garcetti v. Ceballos, supra,* 547 U.S. at p. 419, citing *Connick v. Myers* (1983) 461 U.S. 138, 147 (*Connick*).) Both inquiries are legal questions that we review de novo. (*Connick, supra*, 461 U.S. at p. 148, fn. 7 [whether an employee's speech addresses a matter of public concern is a question of law]; *Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 648 (*Chico*) [balancing of interests presents a legal question].)

1. Plaintiff's Facebook Comment Was a Matter of Public Concern

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' [citation] or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,' [citation.]" (*Snyder v. Phelps* (2011) 562 U.S. 443, 453.) "'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.' [*Connick, supra*, 461 U.S. at pp. 147-148]." (*Rankin v. McPherson* (1987) 483 U.S. 378, 384-385 (*Rankin*).) "In the absence of matters of public concern, public officials are not required by the First Amendment to run their office 'as a roundtable for employee complaints over internal office affairs.' (*Connick, supra*, 461 U.S. at p. 149.)" (*Chico, supra,* 232 Cal.App.3d at pp. 643-644.)

Plaintiff commented on a news article about Debellis's lawsuit against the city that was posted on Cronin's Facebook profile. "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." (*City of San Diego v. Roe* (2004) 543 U.S. 77, 83-84.) Plaintiff argues, defendants concede, and we agree that plaintiff spoke on a matter of public concern by commenting on a news article about litigation against the city by an LAPD employee.

At least one portion of plaintiff's comment, however, can fairly be interpreted as a personal insult: "Kiss my ass ya greedy house mouse!" "Although there is no bright line, speech relating

to public concerns is to be 'contrasted with speech "as an employee upon matters only of personal interest."' [Citation.]" (*Chico, supra*, 232 Cal.App.3d at p. 644.) Plaintiff's insult of Debellis is not necessarily protected by the First Amendment. (*Waters v. Churchill* (1994) 511 U.S. 661, 672 (*Waters*) [government employer may bar its employees from making offensive speech to members of public or coworkers].) Nonetheless, in determining whether particular speech rises to a level of public concern, "the threshold test is met when the challenged speech, viewed in context, relates to matters of public concern. Such speech does not become unprotected simply because it included a complaint which was personal to [the public employee.]" (*Chico, supra*, 232 Cal.App.3d at p. 648.) We therefore will assume, without expressly deciding, that the entirety of plaintiff's post related to a matter of public concern.

2. The Department's Interest in Effective Operations Justifies Restriction on Plaintiff's Speech

"Once it is determined that the speech addresses a matter of public concern, the court must balance the employee's interest in making the statement against the public employer's interest in promoting efficiency." (*Chico, supra*, 232 Cal.App.3d at p. 648.) When balancing these interests, we consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." (*Rankin, supra*, 483 U.S. at p. 388.) In particular, a police department "has a

substantial interest in developing 'discipline, *esprit de corps*, and uniformity.'" (*Kannisto v. City and County of San Francisco* (9th Cir. 1976) 541 F.2d 841, 843, quoting *Kelley v. Johnson* (1976) 425 U.S. 238, 246.)

Plaintiff asserts the department "must demonstrate actual, material and substantial disruption" to justify restriction on his First Amendment right, relying on *Roth v. Veteran's Administration* (9th Cir. 1988) 856 F.2d 1401, 1407. We disagree. A government employer's showing of the potential disruptiveness of the speech is sufficient to outweigh its employee's First Amendment right. (*Waters, supra*, 511 U.S. at pp. 680-681; *Connick, supra*, 461 U.S. at p. 152 ["[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest[ed] before taking action."].)

Here, the department's showing of the potential disruptiveness of plaintiff's Facebook comment outweighs plaintiff's First Amendment right. While the speech involved a matter of public concern because plaintiff commented on a news article, it also included a derogatory statement directed at Debellis. Plaintiff made the comment on Cronin's Facebook profile, knowing other department employees would see his post. Debellis saw plaintiff's Facebook comment and filed a personnel complaint against him after determining he was a LAPD employee through his Facebook profile. Vargas investigated Debellis's complaint that she "felt that improper remarks had been made about her on a Facebook posting."[5] Vargas reviewed

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[5] Plaintiff argues Vargas's testimony about Debellis's reaction to plaintiff's Facebook comment is uncorroborated hearsay evidence that cannot be used to demonstrate likely or

the Facebook documents provided by Debellis and "deduced that this was a Facebook page of an [LAPD] employee." Debellis's complaint of plaintiff's derogatory statement, and the resulting investigation show that the Facebook comment impaired harmony among co-workers and caused potential disruption to department operations. We accordingly conclude plaintiff's Facebook comment is not protected by the First Amendment.

E. Substantial Evidence Supports the Finding of Misconduct

Plaintiff was disciplined for making an inappropriate Facebook comment while off-duty. Government employees may be disciplined for off-duty misconduct. (*Cranston, supra*, 40 Cal.3d at pp. 760, 770 [upholding discharge of off-duty police officer who led five fellow police officers and highway patrol car on high speed chase over wet, slippery streets]; *Hankla v. Long*

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actual disruption of the workplace. To the contrary, a public employer may discipline an employee based on hearsay complaints. (*Waters, supra*, 511 U.S. at p. 676 ["[E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. . . . [A] manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay."]) Even if Debellis's statements to Vargas cannot be used to show disruption in the workplace, plaintiff forfeits this issue because he did not make a hearsay objection during the administrative hearing. (*Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1061.)

Beach Civil Service Com. (1995) 34 Cal.App.4th 1216, 1225-1226 [upholding termination of off-duty police officer who shot and injured another driver after traffic dispute]; *Anderson v. State Personnel Bd.* (1987) 194 Cal.App.3d 761, 771-772 [upholding termination of off-duty highway patrol officer who exposed himself naked in his home within view of neighbors, for bringing "embarrassment and discredit to the law enforcement agency he served"].) Discipline for off-duty misconduct is justified if: "(1) the misbehavior [causes] discredit to the agency; and (2) there [is] a rational relationship between the misconduct and the person's employment." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 50 (*Deegan*).)

"The nature of the misbehavior and its effect on the public service rather than the time or place of its occurrence should be the determinative factors. If the misconduct bears some rational relationship to the employment and is of a character that can reasonably result in the impairment or disruption of public service, it should be no less a cause for discipline . . . simply because it occurred outside of duty hours. In determining whether an employee should be disciplined, whatever the cause, the overriding consideration is whether the conduct harms the public service." (*Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 550-551.)

Plaintiff contends there is insufficient evidence to support the trial court's finding that he engaged in misconduct under LAPD Manual section 210.35 for conduct unbecoming an officer. Plaintiff argues the trial court's finding that his off-duty Facebook comment caused discredit to the department is not supported by substantial evidence. We disagree.

Plaintiff's statement, "Kiss my ass ya greedy house mouse," was directed at Debellis and posted on Cronin's Facebook profile, which was viewed by other LAPD employees and members of the public who were Cronin's Facebook friends. This comment brought discredit to the agency. The comment included a personal insult. Debellis, the target of the insult, was offended by it and filed a personnel complaint against plaintiff. In addition, plaintiff admitted that as a supervisor, he should not comment on an ongoing lawsuit. And the board concluded that plaintiff's comment "may have some influence on the outcome of an unresolved litigation."

Plaintiff admits his comment would have been inappropriate if said at work, but argues the relevant inquiry is whether officers knew that an off-duty Facebook post would constitute discrediting conduct. Under LAPD Manual section 210.35, "conduct unbecoming an officer" encompasses off-duty conduct: "Since the conduct of officers, *on- or off-duty*, may reflect directly upon the Department, officers must *at all times* conduct themselves in a manner which does not bring discredit to themselves, the Department, or the City." (Emphasis added.)

Plaintiff also contends there is insufficient evidence to support the trial court's finding that there was a clear nexus between his Facebook comment and the department. Plaintiff, however, posted his comment on the Facebook profile of Officer Cronin, the Los Angeles Police Protective League director. The Board of Rights noted, "Cronin's Facebook page clearly displayed a picture of him in [a] LAPD uniform with his badge and other insignia displayed." The trial court found the phrase "WHERE IS MY MONEY" and the term "house mouse" suggest the poster was a police officer. These inferences were not based on speculation

or conjecture. Plaintiff commented on a news article about Officer Debellis's harassment lawsuit by asking, "NOW WHERE['S] MY MONEY?" The trial court reasonably inferred the poster "was also an officer that could choose to sue the LAPD." Moreover, "house mouse" is not a term commonly used by the general public; rather, it is a term that is used by department personnel.

In addition, plaintiff's Facebook profile showed he was a LAPD employee. Under "Work and Education," he listed "Los Angeles Police Department." Plaintiff's Facebook profile also had a picture of him in a LAPD uniform and a picture of a LAPD badge. Substantial evidence supported the trial court's finding of a clear nexus between the Facebook comment and the department.

F. The Penalty of Official Reprimand Was Not an Abuse of Discretion

"'[I]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of discretion.' [Citations.]" (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217; accord, *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1106.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed." (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) There is no abuse of discretion if reasonable minds can differ as to the propriety of the penalty. (*Deegan, supra*, 72 Cal.App.4th at pp. 46-47.)

Plaintiff does not dispute that an official reprimand is one of the lowest forms of discipline. The Board of Rights recommended the penalty of an official reprimand based on the totality of the evidence. The Board of Rights took into consideration plaintiff's "exceptional employment history," his "underlying motivation," the favorable testimony of his character witnesses, and his minimal disciplinary history. The Board of Rights also credited him for accepting responsibility for violating the department's policy of respect for others, and for making changes to his Facebook profile as a result of the investigation.

But the Board of Rights determined discipline was warranted because "[t]he department policy and procedures have been set forth to govern the conduct and behavior of police officers and we are held to a higher standard due to the position that you hold." The Board of Right explained: "The purpose of discipline is to modify the employee's behavior, to set expectations for other employees, and to assure the public that the department strives to maintain the public trust by holding employees accountable." The Board of Rights carefully considered all the evidence before recommending the penalty of an official reprimand. We find no abuse of discretion.

IV. DISPOSITION

The judgment is affirmed. Defendants, City of Los Angeles and Charlie Beck, shall recover their costs on appeal from plaintiff Benjamin Zucker.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.