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City and County of San Francisco v. Local 38: No Per Se Tort Liability for Illegal Public Sector Strikes

California public sector¹ labor relations laws have changed substantially in recent years. In 1985, the California Supreme Court found that the common law prohibitions against public employee strikes were no longer supportable.² In *County Sanitation District of Los Angeles v. Los Angeles County Employees Association*,³ public employees were given the right to strike in situations where a strike would not endanger the public health or safety.⁴ The decision reversed a series of appellate court decisions denying public employees the right to strike in the absence of a statutory grant of that right.⁵ The majority in the *County Sanitation* case, however, did not decide whether tort damages should be awarded to the employer in the event of an illegal public employee strike.⁶

In *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*,⁷ the court held that public employee unions who engaged in illegal strike activity were liable for damages proxi-

1. California Government Code § 3501(d) defines "public employees" as employees who work for a public agency of any county, city, city and county, district, or other political subdivision, excepting persons elected by popular vote or appointed to office by the Governor of the state of California. CAL. GOV'T CODE § 3501(d) (West 1980).

2. See generally *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660*, 38 Cal. 3d 564, 585, 699 P.2d 835, 849, 214 Cal. Rptr. 424, 438, cert. denied, 106 S. Ct. 408 (1985). See *infra* notes 51-67 and accompanying text (discussing the *County Sanitation* decision).

3. 38 Cal. 3d 564, 585, 699 P.2d 835, 849, 214 Cal. Rptr. 424, 438, cert. denied, 106 S. Ct. 408 (1985).

4. *County Sanitation*, 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

5. *Id.* at 570, 699 P.2d at 836, 214 Cal. Rptr. at 427. See *infra* note 25.

6. *Id.* at 586-87, 699 P.2d at 850, 214 Cal. Rptr. at 439.

7. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

mately caused to the employer as a result of the strike.⁸ In 1986, the California Supreme Court in *City and County of San Francisco v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38*⁹ (*Local 38*) reversed the holding of the appellate court in *Pasadena*.¹⁰ The *Local 38* court held that an illegal strike by public employees is not sufficient grounds for an award of per se tort damages to a city beset by an illegal strike.¹¹ According to the *Local 38* court, the remedies available when an illegal strike occurs are a matter for the California Legislature to decide.¹²

Part I of this Note will set forth the historical and legal background preceding the California Supreme Court's decision in *Local 38*.¹³ Part II will summarize the facts of *Local 38* and review the decision of the court.¹⁴ Part III of this Note will discuss the possible legal ramifications of the *Local 38* opinion.¹⁵

I. LEGAL BACKGROUND

At the turn of the twentieth century, common law decisions in the state and federal courts reflected the view that no employee, whether public or private, had a right to strike.¹⁶ At common law, employee groups who demanded better working conditions and higher wages were prosecuted for criminal conspiracy.¹⁷ Furthermore, courts fre-

8. *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*, 72 Cal. App. 3d 100, 111, 140 Cal. Rptr. 41, 48 (1977). *Pasadena* is the only reported appellate decision in the state which upheld a damage award to a public employer in the absence of specific legislation authorizing such an award. *City and County of San Francisco v. Local 38*, 42 Cal. 3d 810, 812, 726 P.2d 538, 540, 230 Cal. Rptr. 856, 858 (1986). Eight states authorize damages suits by statute. Note, *Damage Liability of Public Employee Unions for Illegal strikes*, 23 B.C.L. Rev. 1087, 1090 n.24 (1982).

9. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).

10. *Local 38*, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.

11. *Id.* at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861-62.

12. *Id.* at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861.

13. See *infra* notes 16-89 and accompanying text.

14. See *infra* notes 90-142 and accompanying text.

15. See *infra* notes 143-189 and accompanying text.

16. See, e.g., *Loewe v. Lawlor*, 208 U.S. 274, 308-09 (1908) (sustaining a judgment for treble damages against individual employee defendants of the hatters union who boycotted retail stores which continued to do business with their employer). A strike occurs when a majority of employees refuse to perform work for an employer, or interfere with the operation of an employer's business. CAL. LAB. CODE § 1118 (West 1971).

17. R. GORMAN, *BASIC TEXT ON LABOR LAW* 1, 1 (1976). Concerted activities were treated as common law conspiracies which were rendered criminal because of the illegality of an employee strike. Concerted employee activities commonly consist of strikes, picketing, and boycotts. *Id.*

quently granted sweeping injunctions against striking workers.¹⁸ Gradually, state and federal courts and legislatures acted to change grievance procedures as applied to private sector bargaining.¹⁹ In 1935, Congress passed the Wagner Act,²⁰ which recognized the right to strike as a legitimate aspect of collective bargaining for private sector employees.²¹ The California Legislature followed congressional legislation by enacting Labor Code section 923 in 1937.²²

Despite the advances made in private sector bargaining, state and federal courts and legislatures have been hesitant to grant the right to strike to public sector employees.²³ The California common law rule was that bargaining rights of public employees were contingent upon statutory authority.²⁴ This rule set the precedent for a series of California appellate court decisions which denied public employees the right to strike in the absence of a statutory grant of that right.²⁵ Prior to 1985, the state supreme court either declined to review such appellate court decisions,²⁶ or resolved the cases heard on other

18. *Id.* The injunction was a far more effective weapon against labor activity than was the criminal proceeding, because a temporary restraining order could be secured promptly in an ex parte proceeding. *Id. supra* note 17, at 2.

19. See 29 U.S.C.A. § 52 (West 1973) (codifying the Clayton Antitrust Act). The Clayton Act of 1914 granted private sector employees a right to strike and engage in other concerted activities. Such activities cannot be enjoined by a court. *Id.* See also 29 U.S.C.A. §§ 101-115 (West 1973 & Supp. 1987) (Norris-La Guardia Act); 45 U.S.C.A. §§ 151-188 (West 1986) (Railway Labor Act); 29 U.S.C.A. §§ 141-197 (West 1978 & Supp. 1987) (Wagner Act). *But see* United States v. United Mine Workers, 330 U.S. 258, 272 (1947) (holding the Norris-La Guardia anti-injunction Act inapplicable to public sector strikes).

20. 29 U.S.C.A. §§ 141-197 (West 1978 & Supp. 1987) (otherwise known as the National Labor Relations Act).

21. *Id.*

22. CAL. LAB. CODE § 923 (West 1971) (declaring that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees).

23. See, e.g., City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 2d 36, 45, 210 P.2d 305, 310 (1949) (holding that Labor Code section 923 applies only to private industry, and not to public employment); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 298, 168 P.2d 741, 745 (1946) (denying public employees the right to bargain collectively under the then recently enacted Labor Code section 923).

24. See Los Angeles Metro. Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal.2d 684, 687, 355 P.2d 905, 906, 8 Cal. Rptr. 1, 2 (1960). "In the absence of Legislative authorization public employees in general do not have the right to strike . . ." *Id.*

25. See, e.g., Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 669 (1979) (employees have no right to strike irrespective of an employers failure to comply with grievance procedures); Service Employees' Int'l Union, Local 22 v. Roseville Community Hosp., 24 Cal. App. 3d 400, 408, 101 Cal. Rptr. 69, 74 (1972) (absent specific legislative authorization, it is doubtful that public employees have the right to strike); Trustees of Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers, 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134, 136 (1970) (employees of the state college have no right to strike in absence of a statutory grant of that right); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 36, 80 Cal. Rptr. 518, 521 (1969) (public employees have no right to strike in the absence of an authorizing statute).

26. See, e.g., City and County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 137

grounds.²⁷ Strikes by public employees in California remained illegal until 1985.²⁸ In that year, the California Supreme Court decided *County Sanitation District of Los Angeles v. Los Angeles County Employees Association*,²⁹ holding that the common law prohibition against public employee strikes was no longer supportable.³⁰ Since the bargaining rights of public sector employees have traditionally been governed by statute, an analysis of the pertinent statutory enactments is necessary.³¹

A. California Statutory Enactments

1. The George Brown Act

In 1961, California passed one of the nation's first public employee relations laws,³² the George Brown Act.³³ The George Brown Act codified the emerging concept of public employee bargaining.³⁴ Under the George Brown Act, all public employers in the state were required to meet and confer with employee representatives at the request of the representatives.³⁵ Public employers were required to consider

Cal. Rptr. 883 (1977) (*hearing denied* June 30, 1977); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518, (1969) (*hearing denied* Nov. 12, 1969).

27. See, e.g., *International Bhd. of Elec. Workers, Local 1245 v. City of Gridley*, 34 Cal. 3d 191, 206, 666 P.2d 960, 969, 193 Cal. Rptr. 518, 527 (1983) (holding only that a city's revocation of recognized union status as a sanction for an assertedly illegal strike interferes with the policies and purposes of the MMBA); *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 918, 534 P.2d 403, 416, 120 Cal. Rptr. 707, 720 (1975) (holding only that strike settlement agreements are valid); *In re Berry*, 68 Cal. 2d 137, 157, 436 P.2d 273, 286, 65 Cal. Rptr. 273, 286 (1968) (invalidating an injunction against striking public employees as unconstitutionally overbroad and expressly reserving opinion on the question of whether strikes by public employees can be lawfully enjoined).

28. See *supra* note 25 and accompanying text. "Contrary to the assertions of the Court of Appeal, this court has repeatedly stated that the legality of strikes by public employees in California has remained an open question." *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660*, 38 Cal. 3d 564, 570, 699 P.2d 835, 838, 214 Cal. Rptr. 424, 427, *cert. denied*, 106 S. Ct. 408 (1985).

29. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985).

30. *County Sanitation*, 38 Cal. 3d at 573-86, 699 P.2d at 841-49, 214 Cal. Rptr. at 430-38.

31. See *infra* notes 32-50 and accompanying text.

32. The first state to pass such a law was Wisconsin in 1959. Seidman, *State Legislation on Collective Bargaining by Public Employees*, 22 LAB. L.J. 13, 13 (1971).

33. Cal. Stat. 1961, ch. 1964, §1, at 4141-43, *amended by* Cal. Stat. 1968, ch. 1390, §§ 1-12.5, at 2725-29 (codified at CAL. GOV'T CODE §§ 3500-3510) (currently the Meyers-Milias-Brown Act).

34. Cal. Stat. 1961, ch. 1964, §1, at 4141 (stating the purpose and intention of the George Brown Act).

35. Cal. Stat. 1961, ch. 1964, § 1, at 4142. Presumably, employers and employee representatives met whenever employee grievances occurred. *Id.*

proposals by employee organizations as fully as the employer deemed reasonable.³⁶ The scope of employee representation covered all matters regarding employment conditions, including wages and hours.³⁷ The George Brown Act, however, did not provide a statutory mechanism for enforcement in the event of either employer or employee non-compliance with the statute.³⁸

2. *The Meyers-Milias-Brown Act*

After several years of study and hearings,³⁹ the Meyers-Milias-Brown Act (MMBA),⁴⁰ governing local government employees,⁴¹ became operative in 1969.⁴² The MMBA sets forth basic policies⁴³ and guidelines⁴⁴ to improve communications between local public agencies

36. *Id.* The 1968 amendment substituted "consider fully" for "consider as fully as it deemed reasonable". *Id.*

37. *Id.*

38. Cal. Stat. 1961, ch. 1964, §1, at 4141-43.

39. The Assembly Committee on State Employment, Retirement, and Military Affairs held interim hearings on the subject of public sector bargaining rights. THE BUREAU OF NATIONAL AFFAIRS, THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYEE DISPUTES, 31-2 (1971) (a report of the joint conference of labor relations agencies which details the studies and hearings preceding the adoption of the Meyers-Milias-Brown Act).

40. CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1987) (amending the George Brown Act).

41. CAL. GOV'T CODE § 3501(d) defines a "local government employee" as an employee working for any public agency of a county, city, city and county, district or any other political subdivision. *Id.* § 3501(d) (West 1980). State employees are governed by the State Employer-Employee Relations Act (SEERA). *Id.* §§ 3512-3524 (West 1980 & Supp. 1987). Public school employees are governed by the Educational Employment Relations Act (EERA). *Id.* §§ 3540-3549 (West 1980 & Supp. 1987). State university and college employees are governed by the Higher Education Employer-Employee Relations Act (HEERA). *Id.* §§ 3560-3562 (West 1980 & Supp. 1987). The SEERA, EERA, and HEERA are administered by the Public Employment Relations Board (PERB). *Id.* §§ 3541-3541.5 (West 1980 & Supp. 1987).

42. See CAL. GOV'T CODE §§ 3500-3510 (West 1980 & Supp. 1987). The George Brown Act was amended in 1968, and in 1969 the MMBA became operative, superseding the George Brown Act. Cal. Stat. 1968, ch. 1390, §§ 1-12.5, at 2725-29 (operative Jan. 1, 1969). See Note, *Collective Bargaining Under the Meyers-Milias-Brown Act - Should Local Employees Have the Right to Strike*, 35 HASTINGS L.J. 523 (1984) (analyzing the MMBA and several judicial interpretations of the MMBA).

43. The preamble of the MMBA states that the intention of the MMBA is to promote the improvement of public sector employer-employee relations "by providing a uniform basis for recognizing the right of public employees to join organizations of their choice and be represented by such organizations in their employment relationships with public agencies." CAL. GOV'T CODE § 3500 (West 1980).

44. The major provisions of the MMBA are as follows: (1) public employees shall have the right to form and to join in the activities of employee organizations; (2) recognized employee organizations shall have the right to represent members in employment relations with public agencies; (3) the governing body of a public agency shall meet and confer in good faith regarding wages, hours, and conditions of employment with representatives of employee organizations; (4) if an agreement is reached by the representatives of the public agency and a recognized employee organization, a written memorandum of such understanding shall be

and their employees in California.⁴⁵ Although the MMBA protects the right of the employee to bargain collectively with the employer, the MMBA does not provide a statutory mechanism for settling disputes in the event that either side refuses to submit to mediation.⁴⁶ In addition, the MMBA does not include a provision expressly granting or prohibiting public employees the right to strike.⁴⁷ As a result of this legislative ambiguity,⁴⁸ California courts have continually been confronted with the task of discerning the legal implications of the MMBA.⁴⁹ In particular, the courts have had to decide whether the MMBA prohibits strikes by public employees.⁵⁰

prepared; and (5) if an agreement is not reached after a reasonable period of time, representatives of the public agency and the employee organization may agree upon the appointment of a mediator. *Id.* §§ 3502, 3503, 3505, 3505.1, 3505.2.

45. *Id.* § 3500 (stating the purpose and intent of the MMBA).

46. *Id.* § 3505.2 (providing for mediation if, after a reasonable period of time, the parties fail to reach an agreement). Either side can refuse to use mediation, and both sides must agree on the mediator to be appointed. *Id.*

47. *See id.* § 3509. Section 3509 of the MMBA simply states that Section 923 of the Labor Code is inapplicable to public employees. *Id.* Section 923 of the Labor Code grants private employees the right to strike. CAL. LAB. CODE § 923 (West 1971). *See* *Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist.*, 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 669 (1979). In that case, the court held that the strike conducted by the employees of the water district was illegal irrespective of the alleged failure of the employer to comply with the MMBA. The court further held that nothing in the MMBA granted the employees the right to strike. Instead, the employees should have petitioned for a writ of mandate compelling the employer to act in good faith according to the MMBA. *Id.*

48. The drafters of the MMBA purposefully worded the bill in an ambiguous manner in order for the bill to pass through the California Legislature. The drafters reached a compromise between the pro-labor groups and pro-management groups backing the bill by including the Section 923 disclaimer rather than a more explicit strike prohibition which pro-labor groups would not accept. Bogue, *The Supreme Court's Strike Decision: Implications and Ramifications*, 65 CAL. PUB. EMP. REL. 2, 2-4 (1985).

49. *See, e.g.*, *Building Material and Constr. Teamsters' Local 216 v. Farrell*, 41 Cal. 3d 651, 668, 715 P.2d 648, 658, 224 Cal. Rptr. 688, 698 (1986) (determining that the MMBA requires local public agencies to "meet and confer" with representatives of a recognized employee bargaining unit before eliminating employment positions in that bargaining unit); *International Bhd. of Elec. Workers, Local 1245 v. City of Gridley*, 34 Cal. 3d 191, 206, 666 P.2d 960, 969, 193 Cal. Rptr. 518, 527 (1983) (determining that a city's revocation of recognized union status as a sanction for an assertedly illegal strike interferes with the policies and purposes of the MMBA); *Fire Fighters Union, Local 1186 v. City of Vallejo*, 12 Cal. 3d 608, 617, 526 P.2d 971, 977, 116 Cal. Rptr. 507, 513 (1974) (determining that California courts may use National Labor Relations Act federal precedent in the interpretation of similar language under the MMBA); *Social Workers Union, Local 535 v. Ameda County Welfare Dept.*, 11 Cal. 3d 382, 390, 521 P.2d 453, 458, 113 Cal. Rptr. 461, 466 (1974) (determining the representative rights of public employees under the MMBA).

50. *See, e.g.*, *City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *City of San Diego v. American Fed'n of State, County, and Mun. Employees*, Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

B. California Case Law

In *County Sanitation District of Los Angeles v. Los Angeles County Employees Association*,⁵¹ the California Supreme Court concluded that the traditional common law prohibitions against all public employee strikes were no longer supportable.⁵² In doing so, the court for the first time recognized the right of public employees to strike.⁵³ The court began by noting that the state legislature did not directly address the issue of the general legality of strikes in the public sector.⁵⁴ The court stated that the omission was noteworthy because the legislature had expressly prohibited strikes for certain classes of public employees.⁵⁵ The court concluded that the absence of any such limitation on other public employees covered by the MMBA implied a lack of legislative intent to generally prohibit strikes by public employees.⁵⁶

Having determined that the MMBA does not expressly prohibit strikes by public employees, the court examined the traditional grounds for prohibiting strikes by public employees.⁵⁷ Finding the anti-strike

51. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, cert. denied, 106 S. Ct. 408 (1985).

52. *County Sanitation*, 38 Cal. 3d at 569, 699 P.2d at 849, 214 Cal. Rptr. at 438.

53. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438. Although *County Sanitation* is technically a 6-1 decision, four separate opinions make up the six-member majority. Only four justices were of the opinion that public sector strikes are not illegal. Those justices were Justice Broussard who wrote the "plurality" opinion, Justice Grodin, Justice Mosk, and Chief Justice Bird. *Id.* at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443. Chief Justice Bird wrote a separate opinion that concurs in all but the constitutional questions. *Id.* at 593-609, 699 P.2d at 855-66, 214 Cal. Rptr. at 444-55. Justices Kaus and Reynoso limited their concurring opinion to the question of whether public employee strikes are a tort for which damages may be recovered. *Id.* at 592-93, 699 P.2d at 854-55, 214 Cal. Rptr. at 443-44. Justice Lucas wrote the only dissenting opinion which advocated that the right-to-strike issue be left to the California Legislature. *Id.* at 609-13, 699 P.2d at 866-69, 214 Cal. Rptr. at 455-58.

54. *Id.* at 571, 699 P.2d at 839, 214 Cal. Rptr. at 428.

55. See, e.g., CAL. LAB. CODE § 1962 (West 1971) (expressly prohibiting strikes by firefighter employees).

56. *County Sanitation*, 38 Cal. 3d at 572, 699 P.2d at 840, 214 Cal. Rptr. at 429. For example, the prohibition against strikes by firefighters was enacted nine years before the passage of the MMBA and remains effective today. See CAL. LAB. CODE § 1962. The fact that the legislature felt it necessary to include an expressed strike prohibition in the Labor Code indicates that the preclusion of Section 923 of the Labor Code was not intended to serve as a blanket prohibition against strikes. *County Sanitation*, 38 Cal. 3d at 573, 699 P.2d at 840-41, 214 Cal. Rptr. at 429-30.

57. *Id.* at 573-79, 699 P.2d at 841-45, 214 Cal. Rptr. at 430-34. The arguments most commonly advocated against a public employee right to strike are as follows: (1) employees entrusted to carry out governmental functions may not impede those functions by striking; (2) the public employer is powerless to respond to strike pressure because the terms of public employment are fixed unilaterally by law and not bilaterally through bargaining; (3) a strike

arguments unpersuasive or outdated,⁵⁸ the court examined the effect which public employee strikes would have on labor-management relations.⁵⁹ The court noted that public employee strikes may actually enhance labor-management relations.⁶⁰ While the court conceded that such a concern was best left to the legislature,⁶¹ the court modified the state of the law to reflect modern developments in the public sector.⁶²

The court held that strikes by public employees are not unlawful unless or until such a strike creates a "substantial and imminent threat to public health and safety."⁶³ As a result of this holding, employees who provide an essential service to the local community

by public workers would force employers to make extraordinary concessions because governmental services are essential and/or monopolistic; and (4) government services are so essential that strikes by public employees are inherently improper. *Id.* See Bogue, *supra* note 48, at 4-6 (analyzing the *County Sanitation* decision).

58. The court responded to the first argument by noting that the concept of state sovereignty was vague and outmoded, and furthermore, the theory as a justification for governmental immunity from damage suits had been rejected. *Id.* at 575, 699 P.2d at 842, 214 Cal. Rptr. at 431. In response to the second argument, the court found that the MMBA granted public employees extensive bargaining rights and that most employment terms are arrived at through bargaining. *Id.* at 576, 699 P.2d at 843, 214 Cal. Rptr. at 432. Regarding the third argument, the court observed that several factors have tended to temper the "excessive power" of striking employees. For example, wages lost due to strikes are as important to public employees as they are to private employees. *Id.* at 577-79, 699 P.2d at 844-45, 214 Cal. Rptr. at 433-34. Finally, with respect to the fourth argument, the court noted that not all governmental services are essential. Even in the face of substantial inconvenience, public officials have demonstrated the ability to withstand strike pressure. *Id.* at 579-81, 699 P.2d at 845-46, 214 Cal. Rptr. at 434-35.

59. *Id.* at 580-84, 699 P.2d at 845-48, 214 Cal. Rptr. at 435-37. The arguments of the court favoring the right to strike include: (1) several states statutorily permit public sector strikes;² (2) disputes among public employees and their employer continue to occur regardless of the common law rule against strikes; (3) a credible strike threat may serve to avert, rather than to encourage, work stoppages; and (4) the right to strike represents a basic civil liberty which should not be denied unless such a strike would substantially injure paramount interests of the larger community. *Id.*

60. *Id.* at 580-84, 699 P.2d at 845-48, 214 Cal. Rptr. at 435-37. The court noted that in California, 46 public sector strikes occurred during 1981-1983. *Id.* at 580-81 n.27, 699 P.2d at 845-46 n.27, 214 Cal. Rptr. at 435-36 n.27 (citing *An Analysis of 1981-1983 Strikes in California's Public Sector*, 60 CAL. PUB. EMP. REL. 7, 9 (1984)). Injunctions obtained by employers to enforce the law have little effect in compelling the strikers to return to work. Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMP. REL. 2, 9 (1973). In fact, strikes lasted twice as long when employers imposed legal sanctions than when the employers did not attempt to impose sanctions. *Id.*

61. The court concluded that the policy questions involved in the strike issue were highly debatable and best left to the legislative branch. *County Sanitation*, 38 Cal. 3d at 591 n.39, 699 P.2d at 853 n.39, 214 Cal. Rptr. at 442 n.39.

62. *Id.* The court noted that the case rule of California banned strikes by public employees because collective bargaining alone was contrary to public policy. The court further noted that the legislature "removed the underpinnings" from the old rule by sanctioning a system of collective bargaining for local government employees under the MMBA. Therefore, the state of the law had to be modified to reflect this change. *Id.*

63. *Id.* at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439.

cannot strike.⁶⁴ For example, the court noted that firefighters are expressly prohibited from striking under any circumstance.⁶⁵ Aside from noting that firefighters provide an essential service to the community, the court failed to give any further guidance for determining which public employees provide an essential public service.⁶⁶ Furthermore, the majority did not address the issue of whether an "illegal" strike gives rise to a tort action for damages.⁶⁷

C. Remedies Available to California Employers

Before the California Supreme Court enunciated the "right-to-strike" holding in *County Sanitation*, the courts granted several remedies to employers beset by illegal strikes.⁶⁸ A remedy frequently granted by the courts was injunctive relief. For example, when the *County Sanitation* dispute was before the trial court, the district had filed a complaint for injunctive relief and damages when approximately seventy-five percent of the district's employees went on strike after negotiations between the district and the union reached an impasse.⁶⁹ The trial court, relying on prior appellate court decisions,⁷⁰ issued a temporary restraining order against the striking employees.⁷¹ Similarly, in *City and County of San Francisco v. Evankovich*⁷² the court of appeal upheld an injunction against striking county employees.⁷³ The court held that the picketing was properly enjoined because

64. *Id.* at 580-81, 699 P.2d at 846, 214 Cal. Rptr. at 435.

65. *Id.* See CAL. LAB. CODE § 1962 (West 1971) (expressly prohibiting strikes by firefighter employees).

66. *County Sanitation*, 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439. See *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 686, (1979) (holding that the nature of a public service provided to the public determines the service's essentiality). See generally Comment, *Local Public Employee Right to Strike After County Sanitation District v. Los Angeles County Employees Ass'n*, 17 Pac. L.J. 533, 534 (1986) (discussing which public employees will fall within the "essential public services" exception to the *County Sanitation* holding).

67. *County Sanitation*, 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443. Since the court found the strike in question not to be unlawful, the court did not have to decide the question of damages. *Id.* at 586-87, 699 P.2d at 850, 214 Cal. Rptr. at 439.

68. See, e.g., *Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist.*, 90 Cal. App. 3d 796, 153 Cal. Rptr. 666 (1979); *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, Local 1050*, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977); *City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

69. *County Sanitation*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

70. See *supra* note 25 and accompanying text (discussing appellate court decisions which held that public employee strikes were per se illegal in the absence of a specific statutory grant). *Id.*

71. *County Sanitation*, 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

72. 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977).

73. *Id.* at 49, 137 Cal. Rptr. at 888.

the activity advocated a strike by public employees, which was not a permissible objective under state law.⁷⁴

The termination of striking workers was another court sanctioned remedy available to public employers. In *Almond v. County of Sacramento*,⁷⁵ the court of appeal upheld the discharge of striking civil service employees for being absent without leave.⁷⁶ The court noted that even if the striking workers had worthy grievances, the statute covering public employees did not authorize striking as a means of settling employer-employee differences.⁷⁷ Since the workers were absent without leave, they were not entitled to reinstatement.⁷⁸ The same appellate court later upheld the termination of district employees who went on strike to protest the alleged failure of their employer to comply with the MMBA.⁷⁹

A third remedy available to employers was tort damages. The court of appeal in *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*⁸⁰ held that tort damages could be recovered based on the union's alleged inducement of breach of contract, and that the union was liable for any harm resulting from such an unlawful act.⁸¹ Since the union aided and abetted an illegal strike causing material injury to the district, the court concluded that the union was liable for per se tort damages.⁸²

74. *Id.* at 49, 137 Cal. Rptr. at 887-88. The San Francisco unions sought to distinguish prior cases on the grounds that there was no showing that the union's strike was violently conducted or induced violence. The court found the distinction immaterial. *Id.* See *Trustees of Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers*, 13 Cal. App. 3d 863, 868, 92 Cal. Rptr. 134, 137 (1970) (picketing by employees of the state college was enjoined because such conduct was not permissible under state law, and the conduct included and incited actual violence and disrupted the operation of the college). But see *In re Berry*, 65 Cal. 2d 137, 157, 436 P.2d 273, 286 65 Cal. Rptr. 273, 286 (1968) (invalidating an injunction against striking public employees as unconstitutionally overbroad).

75. 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

76. *Id.* at 36, 80 Cal. Rptr. at 521.

77. *Id.* at 38, 80 Cal. Rptr. at 522.

78. *Id.*

79. See *Stationary Eng'rs, Local 39 v. San Juan Suburban Water Dist.*, 90 Cal. App. 3d 796, 153 Cal. Rptr. 666 (1979). In that case, the court observed that correct recourse for grieved employees is to petition for a writ of mandate to compel the employer to act in good faith. *Id.* at 801, 153 Cal. Rptr. at 669. See also *International Bhd. of Elec. Workers, Local 1245 v. City of Gridley*, 34 Cal. 3d 191, 666 P.2d 960, 193 Cal. Rptr. 518 (1983). In *Gridley*, city employees petitioned for a writ of mandate to compel the city to meet and confer with the union in accordance with the provisions of the MMBA. Furthermore, the union sought an injunction requiring the city to reinstate union members to employment. The court held that the city's revocation of the union's recognized status interfered with the policies of the MMBA and that the employees were entitled to notice and a hearing before dismissal. *Id.* at 206-07, 666 P.2d at 969-70, 193 Cal. Rptr. at 527.

80. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

81. *Pasadena*, 72 Cal. App. 3d at 111-12, 140 Cal. Rptr. at 48.

82. *Id.* at 113, 140 Cal. Rptr. at 49.

D. The Effect of County Sanitation on Employer Remedies

With the California Supreme Court decision in *County Sanitation* recognizing the right of public employees to strike, the remedies traditionally available to public employers have been reduced.⁸³ The court reduced the remedies available to a public employer by redefining what actions constitute wrongful conduct by employees.⁸⁴ Under *County Sanitation*, when public employee unions resort to a strike, trial courts are required to determine whether the strike poses a substantial and imminent threat to the public health and safety before granting injunctive relief.⁸⁵ Presumably, if public employees continue to strike in defiance of a valid injunctive order, the employer may properly terminate the striking employees.⁸⁶

Although the majority of the court in *County Sanitation* did not decide the question of whether an employer could recover damages in tort for an illegal strike, the concurring opinion by Justice Kaus expressed a general aversion to the application of tort remedies in the field of labor relations.⁸⁷ Justice Kaus expressed his view that the judiciary should not embrace tort damages as appropriate compensation to cities beset by strikes without first receiving legislative endorsement.⁸⁸ Despite the forceful concurring opinion by Justice Kaus, the question of whether an employer may recover damages in tort for an illegal strike remained unanswered by the majority in *County Sanitation*.⁸⁹

83. *County Sanitation*, 38 Cal. 3d at 586, 699 P.2d at 850, 214 Cal. at 439.

84. *Id.* A strike by public employees does not constitute wrongful conduct unless or until such conduct presents an imminent threat of harm to the public. *Id.*

85. *Id.* at 587 n.36, 699 P.2d at 850-51 n.36, 214 Cal. Rptr. at 440 n.36. The court stated that an employer must "clearly demonstrate" that the strike in question presents a "substantial and imminent" threat to the health or safety of the public. *Id.* at 586, 699 P.2d at 850, 214 Cal. Rptr. at 439. The scope of review will ordinarily be limited to determining whether reasonable grounds existed for the trial court's determination. *Id.* at 587 n.36, 699 P.2d at 850-51 n.36, 214 Cal. Rptr. at 440 n.36.

86. See *supra* notes 75-79 and accompanying text (discussing the termination of public employees).

87. *County Sanitation*, 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443 (Kaus, J., concurring) (expressing the view that the courts should not "embrace the solution" of damage suits as a remedy for public employee strikes).

88. *Id.* See *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 917, 534 P.2d 403, 416, 120 Cal. Rptr. 707, 719 (1975). In that case, the court held that the question as to what sanctions should be imposed on public employees who engage in illegal strike activity was complex and raised significant issues of public policy best left to the legislature. *Id.*

89. 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443 (Kaus, J., concurring). Since the court held that the strike in question was not illegal, the correctness of the *Pasadena* holding did not have to be considered. *Id.* at 592 n.40, 699 P.2d at 854 n.40, 214 Cal. Rptr. at 443 n.40.

II. THE DECISION

In *City and County of San Francisco v. Local 38*,⁹⁰ the California Supreme Court addressed the question of whether an illegal strike is a per se tort for which damages may be recovered.⁹¹ According to a majority of the supreme court,⁹² an illegal strike is not, in itself, a sufficient basis for the award of tort damages.⁹³ Furthermore, the remedies available when an illegal strike occurs are matters for the California Legislature.⁹⁴

A. *The Facts*

In 1976, defendant Local 38 and every other San Francisco building and trade union went on strike against plaintiff City of San Francisco.⁹⁵ The City successfully moved for a preliminary injunction against the striking unions and their leaders in *City and County of San Francisco v. Evankovich*.⁹⁶ The unions appealed the injunction order of the *Evankovich* court.⁹⁷ Before the appeal was decided by the court, the parties to the strike reached a settlement agreement.⁹⁸ Nevertheless, the *Evankovich* court retained the case because of the important public issues presented.⁹⁹

90. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).

91. *Local 38*, 42 Cal. 3d at 812, 726 P.2d at 538, 230 Cal. Rptr. at 857.

92. Although *Local 38* is technically a 6-1 decision, five justices concurred in the six-member majority. Those justices were Chief Justice Bird, and Justices Mosk, Reynoso, Panelli, and temporary Justice Feinberg. *Id.* at 819, 726 P.2d at 544, 230 Cal. Rptr. at 862. Justice Lucas wrote the only dissenting opinion, affirming the holding of the lower court to award the plaintiff city tort damages. *Id.* at 819-21, 726 P.2d at 544-45, 230 Cal. Rptr. at 862-63.

93. *Id.* at 819, 726 P.2d at 544, 230 Cal. Rptr. at 862.

94. *Id.*

95. *Id.* at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.

96. 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977). See *supra* notes 72-74 and accompanying text (discussing the *Evankovich* decision).

97. *Local 38*, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857. See *infra* note 99 (discussing the primary issue in the *Evankovich* appeal).

98. *Id.* at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.

99. *Id.* See generally *City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977) (companion case to *Local 38*). The principal issue argued in the *Evankovich* appeal was whether the injunction issued against the striking public employees was affected by the enactment of section 527.3 of the Code of Civil Procedure. This section limits the right of a court to enjoin a strike. See CAL. CIV. PROC. CODE § 527.3 (limiting the right of a court to interfere with the normal process of dispute resolution between employers and recognized employee organizations). The appellate court held that section 527.3 was inapplicable to strikes by public employees. *Evankovich*, 69 Cal. App. 3d at 50-53, 137 Cal. Rptr. at 888-91.

The City subsequently filed the present action for tort damages allegedly suffered as a result of the strike.¹⁰⁰ In return for dismissal from the City's tort action, all of the unions, except defendant Local 38, signed consent decrees agreeing to refrain from striking for five years.¹⁰¹ The City proceeded to take the separate case for damages to trial against Local 38.¹⁰² During the trial, the court instructed the jury that the strike was illegal.¹⁰³ The trial court then directed the jury to find the defendant union liable if they found either that Local 38 conspired to engage in a strike with other labor unions, or that Local 38 was a concurrent tortfeasor with other labor unions engaged in a strike.¹⁰⁴ The jury returned a verdict for the city of \$4,080,000 in compensatory damages for lost revenues, increased operating expenses, and employee overtime.¹⁰⁵

The union appealed from the trial court decision.¹⁰⁶ Before the appeal was decided, the California Supreme Court decided *County Sanitation*.¹⁰⁷ In *County Sanitation*, the supreme court held that public employee strikes are illegal only if the strike endangers public health or safety.¹⁰⁸ Based on the *County Sanitation* holding, Local 38 challenged the findings of the *Evankovich* court which found Local 38's strike illegal.¹⁰⁹ The court of appeal, relying on the doctrine of collateral estoppel, refused to review the prior decision of the *Evankovich* court regarding the strike's legality.¹¹⁰ The court of appeal upheld the damage award of the jury in the trial court.¹¹¹ Following

100. *Local 38*, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.

101. *Id.*

102. *Id.* at 813, 726 P.2d at 539, 230 Cal. Rptr. at 857.

103. *Id.* The trial court relied upon the *Evankovich* decision which found the San Francisco strike to be illegal. *See City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 49, 137 Cal. Rptr. 883, 887 (1977).

104. *Local 38*, 42 Cal. 3d at 813, 726 P.2d at 539, 230 Cal. Rptr. at 857.

105. *Id.* The trial court rejected the union's claim that wages and salaries saved should be set off against damages incurred. The court stated that the salaries of the striking workers, whether paid or unpaid, had no bearing on the subject of damages. *Id.*

106. *Id.*

107. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied* 106 S. Ct. 408 (1985). *See supra* notes 51-67 and accompanying text.

108. *County Sanitation*, 38 Cal. 3d at 592, 699 P.2d at 854, 214 Cal. Rptr. at 443.

109. *Local 38*, 42 Cal. 3d at 813, 726 P.2d at 539, 230 Cal. Rptr. at 857.

110. *Id.* at 813, 726 P.2d at 539, 230 Cal. Rptr. at 857-58.

111. *Id.* at 813, 726 P.2d at 539, 230 Cal. Rptr. at 858. The appellate court relied on *Pasadena* to uphold the damage award. *Id.* *See Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 111, 140 Cal. Rptr. 41, 48 (1977) (holding that tort damages may be recovered by a public employer beset by an unlawful strike). *See supra* notes 80-82 and accompanying text (discussing the *Pasadena* decision).

the appellate court decision, the union petitioned the supreme court for review.¹¹²

B. The Majority Opinion

The issues presented to the California Supreme Court for review included whether the union was collaterally estopped to deny the illegality of the strike, whether damages were an available remedy for an illegal strike, and the appropriate measure of damages.¹¹³ The supreme court decided the case by determining that per se tort damages are not an available remedy for an illegal strike.¹¹⁴ By determining that tort damages could not be assessed against the striking union, the court avoided discussion of the other issues presented on review.¹¹⁵ The court held that in the absence of a breach of an explicit no-strike clause,¹¹⁶ or other tortious acts occurring during the conduct of the strike,¹¹⁷ the illegality of a public employee strike is not grounds for a damage suit by the employer.¹¹⁸ In reaching this conclusion, the court examined the two legal theories articulated by the *Pasadena* court in support of damage recovery.¹¹⁹

The first theory advanced by the *Pasadena* appellate court was that damages could be recovered for tortious inducement of breach of contract.¹²⁰ Since the city did not allege a contractual relationship with the striking workers,¹²¹ the *Local 38* court did not address the

112. *Local 38*, 42 Cal. 3d at 813, 726 P.2d at 540, 230 Cal. Rptr. at 858.

113. *Id.*

114. *Id.*

115. *Id.*

116. See, e.g., *A.I. Gage Plumbing Supply Co. v. Local 300 of the Int'l Hod Carriers*, 202 Cal. App. 2d 197, 205-06, 20 Cal. Rptr. 860, 865 (1962) (upholding a damage award for breach of a provision in a collective bargaining contract whereby the union guaranteed that there would be no strikes occasioned by jurisdictional disputes).

117. See, e.g., *Fibreboard Paper Prod. Corp. v. East Bay Union of Machinist, Local 304*, 227 Cal. App. 2d 675, 697-98, 39 Cal. Rptr. 64, 78 (1964) (upholding a damage award for employer when union's violent picketing and threats of violence caused the warehousemen to stay away from their jobs and the company to lose sales).

118. *Local 38*, 42 Cal. 3d at 819, 726 P.2d at 543-44, 230 Cal. Rptr. at 862.

119. *Id.* at 814, 726 P.2d at 540, 230 Cal. Rptr. at 858 (citing *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 111, 140 Cal. Rptr. 41, 48 (1977)).

120. *Id.* In *Pasadena*, the teachers were certificated employees working under contract. Although the contract contained no explicit prohibition against strikes, the court reasoned that the obligation not to strike was implicit in the terms of the contract. This reasoning was based on the fact that all public employee strikes were illegal prior to *County Sanitation*. Consequently, allegations that the union induced the workers to breach this term of their contract stated a cause of action for damages. *Id.*

121. *Id.* at 814, 726 P.2d at 540, 230 Cal. Rptr. at 859. Presumably, *Local 38* went on strike while renegotiating the terms of the employment contract. See *City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 46, 137 Cal. Rptr. 883, 885 (1977).

question of whether inducement by a union to strike in breach of contract gives rise to liability.¹²² Nevertheless, the court affirmed the right of an employer to sue for breach of an explicit no-strike clause contained in an employment contract.¹²³

The second theory of the *Pasadena* court was based upon the assumption that an illegal strike was tortious per se.¹²⁴ The *Local 38* court rejected the theory of per se tort because the theory lacked legal precedent,¹²⁵ and because the legislature is better suited to make determinations concerning labor-management relations.¹²⁶ To support the second objection, the *Local 38* court observed that the judiciary has steadily been withdrawing from the field of labor relations.¹²⁷ Paralleling this withdrawal of judicial intervention has been a steady growth of statutory and administrative regulation limiting the scope of a damage remedy.¹²⁸ The *Local 38* court reasoned that an injustice would result if a few public employee unions were held liable for damage awards when teachers' unions, state employees, and many local employee unions, administered under separate statutes, would not be liable for the same conduct.¹²⁹ In addition, the *Local 38* court

122. *Local 38*, 42 Cal. 3d at 810, 726 P.2d at 538, 230 Cal. Rptr. at 856. The case went to the jury solely on the theory that an illegal strike is tortious per se. *Id.*

123. *Id.* at 819, 726 P.2d at 544, 230 Cal. Rptr. at 862. In affirming the right of an employer to sue for breach of an explicit no-strike clause, the *Local 38* court rejected the reasoning of the *Pasadena* court that a clause prohibiting illegal strikes is implied in every employee contract. *Id.*

124. *Id.* at 814, 726 P.2d at 540, 230 Cal. Rptr. at 858 (citing *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 112, 140 Cal. Rptr. 41, 48-49 (1977)). The *Pasadena* court held that an act is "tortious per se" when there is a breach of the legal duty to abstain from injuring the persons or property of another when one performs an act not authorized by law which causes a substantial material loss to another. That breach constitutes the commission of a tort for which an action in damages will lie. *Pasadena*, 72 Cal. App. 3d at 112, 140 Cal. Rptr. at 48-49. See CAL. CIV. CODE § 1708 (West 1985) (stating that every person is bound to abstain from injuring the person or property of another).

125. *Local 38*, 42 Cal. 3d at 814-15, 726 P.2d at 541, 230 Cal. Rptr. at 859 (citing *City of Fairmont v. Retail Wholesale*, 283 S.E.2d 589 (W.Va.1980) (rejecting the per se tort theory of *Pasadena* on the grounds that the striking hospital workers had no written employment contracts); *Lamphere School District v. Lamphere Federation of Teachers*, 400 Mich. 104, 252 N.W.2d 818 (1977) (declining to provide the common law remedy of a tort action)).

126. *Local 38*, 42 Cal. 3d at 815, 726 P.2d at 541, 230 Cal. Rptr. at 859.

127. *Id.* at 815-16, 726 P.2d at 541, 230 Cal. Rptr. at 859.

128. *Id.* at 816, 726 P.2d at 541, 230 Cal. Rptr. at 860. See, e.g., CAL. GOV'T CODE §§ 3512-3524 (State Employer-Employee Relations Act); 3560-3562 (higher education employer-employee relations); 3540-3549 (Educational Employment Relations Act); 3541-3541.5 (administration of public educational employment by the Public Employment Relations Board (PERB)).

129. *Local 38*, 42 Cal. 3d at 816, 726 P.2d at 542, 230 Cal. Rptr. at 860. Teachers' unions, state employees, and many local employee unions are administered by PERB. See *El Rancho Unified School Dist. v. National Educ. Ass'n.*, 33 Cal. 3d 946, 961, 663 P.2d 893, 902, 192 Cal. Rptr. 123, 132 (1983) (holding that the authority of PERB to adjudicate unfair labor practices preempts superior court jurisdiction to award damages for an unlawful strike); San

referred to the *County Sanitation* case.¹³⁰ The *Local 38* court cited the language of *County Sanitation* which called for "judicial restraint" in matters of labor relations.¹³¹ Finally, the *Local 38* court noted that several other state supreme courts have disallowed the remedy of tort damages in the field of labor relations.¹³² The court rejected the assertion that the allowance of damage awards would deter illegal strikes, explaining that the deterrent effect of a possible damage award varies inversely with the strength of the union.¹³³ The court feared that in many cases the threat of damages would actually prolong any strike which did occur.¹³⁴ The *Local 38* court further noted that the availability of a damage suit to the employer would exacerbate any existing imbalance in bargaining power between employer and employee.¹³⁵ Therefore, the *Local 38* court disapproved of *Pasadena's* per se tort theory.¹³⁶ The court held that the selection of remedies for an illegal strike is a matter for the legislature.¹³⁷

C. The Dissenting Opinion

A forceful dissent by Justice Lucas criticized the *Local 38* decision as inconsistent with the court's recent *County Sanitation* decision to

Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 12-14, 593 P.2d 838, 845-47, 154 Cal. Rptr. 893, 900-02 (1979) (holding that the legislature intended PERB to have exclusive jurisdiction over remedies against strikes which could be classified as unfair labor practices). See CAL. LAB. CODE § 1420 (defining unlawful employment practices).

130. *Local 38*, 42 Cal. 3d at 817, 726 P.2d at 542, 230 Cal. Rptr. at 860 (citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, Local 660, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985)).

131. *Id.* (citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, Local 660, 38 Cal. 3d 564, 591 n.39, 699 P.2d 835, 853 n.39, 214 Cal. Rptr. 424, 442 n.39 (1985)).

132. *Id.* at 817-18, 726 P.2d at 542-43, 230 Cal. Rptr. at 860-61 (citing *City of Fairmont v. Retail, Wholesale, 283 S.E.2d 589* (W.Va.1980) (rejecting the per se tort theory of *Pasadena*); *Lamphere Sch. v. Lamphere Fed. of Teachers*, 400 Mich. 104, 252 N.W.2d 818 (1977) (rejecting a damage suit against a teacher's union); *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 1282, 600 P.2d 1282 (1977) (rejecting the theory of per se tort)).

133. *Id.* at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861.

134. *Id.* The *Local 38* court noted that a striking union negotiating a settlement would have to consider that the employer could sue in tort for enormous damages. Therefore, a sensible union would insist, as a term of settlement, that the employer waive any rights to tort damages. The union could further threaten to prolong the strike until the employer agreed. *Id.*

135. *Id.* (citing Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 293 (1969)). The court noted that if the union is the more powerful of the two, the employer would be unlikely to threaten a damage suit against the union for fear of aggravating relations. In contrast, the availability of a damage remedy to a powerful employer would increase the employer's advantage over a weaker union. *Id.*

136. *Id.*

137. *Id.*

grant public employees the right to strike in the absence of statutory authorization.¹³⁸ Justice Lucas noted that in both *Local 38* and *County Sanitation*, a majority of the supreme court overruled prior precedent in the absence of legislation mandating such action.¹³⁹ Furthermore, Justice Lucas noted that unlawful public strikes can result in devastating financial injury to the affected municipality.¹⁴⁰ Nevertheless, the majority's holding in *Local 38* confined the remedies available to affected public agencies and municipalities to injunctive or administrative relief.¹⁴¹ Justice Lucas found this limitation on a municipality's right to sue, absent statutory authorization, to be not only short-sighted and unsound, but also an unprecedented discrimination against California municipalities.¹⁴²

III. LEGAL RAMIFICATIONS

The decision of the California Supreme Court in *Local 38*¹⁴³ disallowed damage suits by employers beset by illegal strikes until the legislature speaks to the contrary.¹⁴⁴ *Local 38*, however, does more than decide the narrow question of tort damages as a remedy. Several possible ramifications may arise from the decision due to the important questions left open by the *Local 38* court.

A. California Charter Cities

The supreme court's decision in *Local 38*, holding that an illegal strike is not grounds for a damage suit by an employer, did not discuss situations in which city charters¹⁴⁵ contain antistrike provisions.¹⁴⁶ Silence by the court in this matter is important because several cities and counties are governed by city charters containing

138. *Id.* at 819, 726 P.2d at 544, 230 Cal. Rptr. at 862 (Lucas, J., dissenting). Justice Lucas found the majority's recent decision to restrain from tampering with legislative treatment of public strike issues "to ring particularly hollow". *Id.*

139. *Id.*

140. *Id.* at 820, 726 P.2d at 545, 230 Cal. Rptr. at 863.

141. *Id.* at 819-20, 726 P.2d at 544, 230 Cal. Rptr. at 862.

142. *Id.* at 820-21, 726 P.2d at 545, 230 Cal. Rptr. at 863. Justice Lucas noted that all other persons enjoy a right to sue for damages proximately caused by the conduct of another, absent legislative limitations upon such a right. *Id.*

143. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).

144. *Id.* at 819, 726 P.2d at 544, 230 Cal. Rptr. at 862.

145. See CAL. GOV'T CODE §§ 34450-34454 (West 1968 & Supp. 1987) (cities chartered under the constitution).

146. CAL. GOV'T CODE § 34450 (West 1976). Any city or county may propose or revise a charter to govern the city or county. *Id.*

explicit no-strike clauses.¹⁴⁷ As a matter of fact, the subject city of *Local 38*, San Francisco, adopted an antistrike provision in its charter while *Local 38* was pending before the appellate court.¹⁴⁸ Because the provision was adopted after the strike, the *Local 38* court was not compelled to address the no-strike provision in the San Francisco charter when discussing the appropriateness of tort damages.¹⁴⁹ Therefore, the level of reliance to place on charter no-strike clauses remains an open question. °

California cities governed under the framework of constitutionally authorized city charters are theoretically free from state interference in the management of municipal affairs.¹⁵⁰ The relationship of a city government to public employees has historically been considered a municipal affair.¹⁵¹ Recently, however, the state courts have held that labor relations are matters of statewide concern.¹⁵² Because labor relations are subject to control by the state, the issue centers around the language and intent of the MMBA and whether the act will supersede city charters containing no-strike provisions.¹⁵³

147. See Taylor, *Los Angeles Co. No-strike Law Fails First Court Challenge*, 58 CAL. PUB. EMP. REL. 10, 10 (1983). Anti-strike provisions have been passed by voters in the City of San Diego, the County of San Diego, the County of Los Angeles, and the City and County of San Francisco. *Id.*

148. San Francisco, Cal., Charter § 8.401-1 (added July 7, 1976). The new amendment states that public employees who receive fixed schedules of compensation shall not engage in a strike or conduct hindering, delaying, or interfering with work at city and county facilities. *Id.*

149. *Local 38*, 42 Cal. 3d at 816 n.5, 726 P.2d at 542 n.5, 230 Cal. Rptr. at 860 n.5. The court stated that San Francisco city employees are subject to the MMBA only to the extent that the provisions of the MMBA are not inconsistent with the city charter. The San Francisco charter amendment, however, did not become effective until 1977, one year after the strike in question occurred. *Id.* at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857. See also San Francisco, Cal., Charter § 8.401-1 (added July 7, 1976).

150. See CAL. CONST. art. XI, § 5. In effect, section 5 says that when a city charter provides the city legislative body with power to legislate concerning municipal affairs, municipal ordinances and regulations pertaining thereto are effective regardless of whether state law exists on the same subject. *Id.*

151. See Witt, *State Regulation of Local Labor Relations: the Demise of Home Rule in California?*, 23 HASTINGS L.J. 809, 809 (1972) (examining the relationship between the state and charter cities in California with respect to municipal labor relations).

152. See, e.g., *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963) (holding that labor relations is an area of statewide concern in which the legislature can pass laws to be applied to charter cities); *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 492, 500, 129 Cal. Rptr. 893, 898 (1976) (adopting the reasoning of *Professional Fire Fighters*).

153. See Grodin, *California Public Employee Bargaining: The MMB Act in Relation to Local Charters and Ordinances*, 36 CAL. PUB. EMP. REL. 2, 2 (1978). Whether and to what extent the qualifying language of the MMBA reflects a willingness on the part of the legislature to permit local regulation of covered subjects is an issue of legislative intent rather than of constitutional principle. *Id.*

The MMBA was established by the state to direct labor and management in communications during local labor disputes.¹⁵⁴ The preamble to the MMBA states that one of the purposes of the statute is to improve personnel management and employer-employee relations in the public sector.¹⁵⁵ The preamble then declares that nothing contained within the MMBA shall supersede the provisions of existing state law, and the charters, ordinances, and rules of local public agencies which provide other methods for administering employer-employee relations.¹⁵⁶ Read literally, the language could be interpreted as permitting local governments to conduct public labor relations in a manner contrary to the provisions in the MMBA if the city so votes by charter amendment or ordinance.¹⁵⁷ This argument has been used by charter governments to justify the adoption of local no-strike legislation.¹⁵⁸ Since the MMBA does not mention strikes, the cities have exercised their "home rule"¹⁵⁹ authority and enacted local legislation to fill the void left by the MMBA.¹⁶⁰

Charter cities may now be uncertain as to the legality and effectiveness of such local legislation.¹⁶¹ The uncertainty derives from the approach of the state supreme court in *County Sanitation*.¹⁶² Had the court examined the MMBA and found in the language an implied grant of the right to strike, local charters could not conflict with such a legislative pronouncement.¹⁶³ The state statute would simply

154. CAL. GOV'T CODE § 3500 (preamble to the MMBA).

155. *Id.*

156. *Id.*

157. See Grodin, *Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 724 (1972). See also Grodin, *supra* note 153, at 3-4. On the other hand, the nonsuperseding clause of the MMBA could be read to apply only to provisions of charters, ordinances, and rules of local public agencies which were in existence at the time the MMBA was enacted. *Id.* Whether the word "existing" limits only state law, or state law and charters, ordinances, and rules, is difficult to discern from the word order of the statute. *Id.*

158. Bogue, *supra* note 48, at 10 (discussing the implications of the *County Sanitation* decision on cities governed by charter).

159. See Witt, *supra* note 151, at 809. The concept of "home rule" was incorporated in the California Constitution in 1879 by a number of provisions that were designed to guarantee California cities some degree of autonomy. *Id.*

160. See Taylor, *supra* note 147, at 10.

161. Bogue, *supra* note 48, at 10.

162. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).

163. *Id.* See *supra* note 152 and accompanying text. Since labor relations are a matter of statewide concern, a state statute would preempt any conflicting local legislation. *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 492, 500, 129 Cal. Rptr. 893, 898 (1976). See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 294, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963) (holding that labor relations is an area of statewide concern in which the legislature can pass laws to be applied to charter cities).

preempt any conflicting local provisions.¹⁶⁴ The *County Sanitation* court, however, found the MMBA to be silent regarding the right to strike.¹⁶⁵ Furthermore, the *Local 38*¹⁶⁶ court deferred to the bargaining structure of the MMBA, and not to the San Francisco charter, when determining the availability of tort remedies.¹⁶⁷ The approach of the supreme court in these two cases may indicate that only the state legislature may resolve the ambiguities of the MMBA.¹⁶⁸ Because the ability of a city to take part in labor relations by enacting antistrike legislation remains an open question, city employers should not place a great deal of reliance on local no-strike legislation when negotiating with public employees.¹⁶⁹

B. Future California Legislation

The addition of antistrike amendments to California city charters indicates that public employers are hesitant to allow public employees to strike.¹⁷⁰ Given this sentiment, a significant aspect of the *Local 38* decision is that the court deferred to the legislature to determine what remedies were available to California employers beset by illegal strikes.¹⁷¹ Furthermore, the court construed *County Sanitation* as a decision paying deference to the legislature.¹⁷² This signal from the court indicates that the time is ripe for the California Legislature to review the effectiveness of the present statutes pertaining to public employer-employee relations.¹⁷³

In the spring of 1986, members of the California Legislature introduced a senate bill which proposed prohibiting local and state

164. Bogue, *supra* note 48, at 10. See, e.g., *Los Angeles Co. Fed. of Labor v. County of Los Angeles*, 160 Cal. App. 3d 905, 908, 207 Cal. Rptr 1, 2 (1984) (holding that the "meet and confer" provision of the MMBA preempts any limitation on meeting and conferring with recognized employee unions found in a city charter).

165. *County Sanitation*, 38 Cal. 3d at 571, 699 P.2d at 839, 214 Cal. Rptr. at 428. See *supra* notes 54-56 and accompanying text.

166. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).

167. *Local 38*, 42 Cal. 3d at 816, 726 P.2d at 542, 230 Cal. Rptr. at 860.

168. See Bogue, *supra* note 48, at 10 (discussing the views of both labor and management attorneys as to whether local no-strike provisions are valid after the *County Sanitation* decision).

169. *Id.* The responses from both labor and management indicate that local no-strike charter provisions may not survive under the new state of the law. *Id.*

170. See *supra* note 147 (listing California cities that have enacted antistrike amendments to their city charters).

171. *Local 38*, 42 Cal. 3d at 815, 726 P.2d at 541, 230 Cal. Rptr. at 859. See *supra* notes 126-137 and accompanying text (discussing the *Local 38* case).

172. *Local 38*, 42 Cal. 3d at 817, 726 P.2d at 542, 230 Cal. Rptr. at 860.

173. *Id.* at 819, 726 P.2d at 543, 230 Cal. Rptr. at 861. See generally Comment, *supra* note 66, at 534 (proposing a model statute designed to facilitate effective dispute resolution in California's public sector).

public employees from engaging in strikes.¹⁷⁴ Similar legislation has been introduced in 1987 which proposes to amend the California Constitution to prohibit strikes by public employees.¹⁷⁵ These bills may indicate the direction of future labor legislation.¹⁷⁶

Alternative solutions to an outright ban on public employee strikes have been proposed by several commentators in the field of labor-management relations.¹⁷⁷ One alternative solution advocates the repeal of the bulk of current legislation governing public employees by the California Legislature.¹⁷⁸ In place of the repealed statutes, the legislature would propose a comprehensive, preemptive state law applicable to most public employees.¹⁷⁹ The proposed legislation would also contain a mechanism for resolving disputes that reach impasse.¹⁸⁰ Presumably, meaningful impasse procedures would help deter the occurrence of public employee strikes.

One impasse procedure which has been successful in private sector bargaining is binding arbitration.¹⁸¹ Under binding arbitration, a dispute which is not settled during the steps of the grievance procedure¹⁸² is appealable to final and binding decision by an arbitrator mutually acceptable to both parties.¹⁸³ Binding arbitration is usually successful because the parties have committed themselves to accept the decision of the arbitrator as final and binding.¹⁸⁴ Currently, the MMBA provides for optional mediation when negotiations reach

174. See S.B. 1679, 1986-87 Leg., 1st Reg. Sess. (1986).

175. See A.C.A. 7, 1987-88 Leg., 1st Reg. Sess., 1987 Cal. Laws.

176. See, e.g., FINAL REPORT OF THE ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, 1973-1974 Cal. Leg., 1st Reg. Sess. 6-24 (Mar. 15, 1973) [hereinafter FINAL REPORT] (proposing to modify the current state of public employee labor law); Staudohar, *A New Alternative to the Strike-Arbitration Choice*, 17 CAL. PUB. EMP. REL. 22 (1973) (examining compulsory arbitration statutes throughout the country); Comment, *supra* note 66, at 534 (proposing a model statute designed to facilitate effective dispute resolution in California's public sector).

177. See generally FINAL REPORT, *supra* note 176, at 24 (summarizing the principal recommendations of the advisory council). Generally, the council proposed that the code sections governing local government employees, state employees, school district employees, and firefighters be repealed. In place of these statutes, a comprehensive, pre-emptive state law applicable to most public employees should be enacted. The statute should be administered by the Public Employment Relations Board. *Id.* See *supra* note 41 (detailing the various code sections presently governing public employees).

178. FINAL REPORT, *supra* note 176, at 24.

179. *Id.* at 177 (proposing alternative solutions for resolving strikes that reach impasse).

180. *Id.* at 177-80.

181. The council defined "grievance" as a dispute over the interpretation or application of the terms of a collective agreement. *Id.* at 192.

182. *Id.* at 178.

183. *Id.* at 179.

184. CAL. GOV'T CODE § 3505.2 (providing for mediation if, after a reasonable period of time, parties to the negotiations fail to reach an agreement).

an impasse.¹⁸⁵ There is no compulsion on the employer to do more than confer in good faith and try to reach an agreement.¹⁸⁶ If an agreement is not reached, the employees usually resort to a strike in order to receive their employment demands.¹⁸⁷ Theoretically, if binding arbitration became a compulsory method of dispute resolution in the public sector, employees would have little reason to resort to strike action over grievances.¹⁸⁸ Compulsory arbitration would provide employers and employees with a forum to resolve their differences.¹⁸⁹

CONCLUSION

In *City and County of San Francisco v. Local 38*,¹⁹⁰ the California Supreme Court held that the illegality of a public employee strike is not grounds for a damage suit by the employer. The court further held that the selection of remedies for an illegal strike is a matter for the state legislature. A question remains, however, whether state courts will refer to local no-strike charter provisions when determining the availability of tort damages to remedy an illegal strike. The *Local 38* court opened the door for the California Legislature to take action and enact a comprehensive legislative scheme to address the current needs of labor and management in the public sector.

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185. *Id.* See also *Placentia Fire Fighters, Local 2147 v. City of Placentia*, 57 Cal. App. 3d 9, 21, 129 Cal. Rptr. 126, 135 (1976). Parties may agree to place disputed matters in the hands of a mediator, but are not required to do so. *Id.*

186. See, e.g., *City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 46, 137 Cal. Rptr. 883, 885 (1977). In that case, the union threatened to call a strike against the City in order to force the City to capitulate to the unions' wage demands. *Id.*

187. See FINAL REPORT, *supra* note 176, at 185. Compulsory arbitration occurs when the parties are required by government mandate to submit bargaining issues in dispute to an outside third party for a binding decision. Staudohar, *supra* note 176, at 22 (1973).

188. See FINAL REPORT, *supra* note 176, at 185. A number of states have provided in their public employment bargaining statutes that unresolved grievances go to binding arbitration. *Id.* at 182-83. Those states are Alaska, Hawaii, Kansas, Louisiana, Massachusetts, Minnesota, Oklahoma, Pennsylvania, and South Dakota. *Id.* at 183. The authors of the report, however, ultimately rejected compulsory arbitration in favor of voluntary submission to binding arbitration on the part of both parties. *Id.* at 188-89.

189. 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986).