

THE BRIEFING ROOM

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW AND LABOR RELATIONS FOR CALIFORNIA LAW ENFORCEMENT

November 2009

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THE BRIEFING ROOM

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DISABILITY DISCRIMINATION

Successful Completion of Physical Safety Training Can Be An Essential Job Function for Prison Medical Staff.

Barbara Hennagir worked as a physician's assistant (PA) at the Utah Department of Corrections' (DOC) Central Utah Correctional Facility in Gunnison, Utah. The DOC proposed a requirement that medical staff become Peace Officers Standards and Training (POST) certified. After a medical technician was attacked by an inmate in 1999 and sued the DOC for her injuries, the proposal that medical staff be POST certified garnered further support.

In 2001, the DOC finally required medical personnel whose job duties required contact with inmates to obtain a POST certificate. POST certification required employees meet certain minimum standards of physical strength, flexibility, and endurance. Hennagir was unable to obtain her POST certificate because she had a medical condition which limited her physical capabilities. The DOC offered Hennagir a PA position at the Olympus facility. The DOC also told Hennagir that if she declined the offer, she would be terminated. Hennagir filed a grievance because the Olympus facility was over 100 miles from her home. The DOC also offered her another position at the Gunnison facility at the same salary auditing and coordinating contract care of inmates. Hennagir rejected the offer and the DOC terminated her employment.

Hennagir sued the DOC for disability discrimination, denial of reasonable accommodation, and retaliation in violation of the ADA and the Rehabilitation Act. The district court granted the DOC summary judgment, and the Tenth Circuit Court of Appeals affirmed.

In a disability discrimination case brought under the ADA, a plaintiff must show that she was qualified to perform the essential functions of the job with or without reasonable accommodation. Thus, the Tenth Circuit first considered whether POST certification was an essential job function. The Court found that the requirement was an essential job function because all PAs were required to be POST certified and because it was important to help staff recognize and deal with the severe physical risks associated with their employment in correctional facilities.

The Court also determined that there was no reasonable accommodation which would allow Hennagir to continue in her position. Hennagir's proposed reasonable accommodations were: (1) waiver of the POST certification requirements; (2) being "grandfathered" into her Gunnison PA position; and (3) alteration of her job title. The Court found none of these to be reasonable accommodations because they all required the DOC to effectively eliminate the essential job requirement that medical staff be POST certified.

Hennagir v. Utah Department of Corrections (10th Cir. 2009) 581 F.3d 1256.

Employer Who Required Employee To Submit To Physical Capacity Evaluation As A Condition Of Reinstatement After Medical Leave Violated The ADA, Unless Employer Could Prove The Requirement Was Job Related And Consistent With Business Necessity.

Kris Indergard worked as a consumer napkin operator for the Georgia-Pacific Corporation's (GP) mill facility in Wauna, Oregon. She took a medical leave to undergo surgery on her knees. She was on leave until March 21, 2005, when she was authorized to return to work with permanent work restrictions. GP's policy required employees to participate in a physical capacity evaluation (PCE), a type of fitness for duty evaluation, before returning to work from medical leave. Indergard's restrictions prevented her from participating in the PCE because the PCE for her position included a sixty-five pound industrial lift and carry requirement, which was not possible for her to complete under her work restrictions. In October, Indergard's doctor lifted her medical restrictions and GP scheduled her for a PCE with Vicky Starnes, an occupational therapist.

During the PCE, Starnes recorded Indergard's medical history and use of medication, alcohol, tobacco, and assistive devices. She recorded Indergard's weight, height, blood pressure, and resting pulse. She also measured the range of motion in Indergard's arms and legs, and Indergard's ability to lift various amounts of weight. In addition, Starnes measured and recorded Indergard's heart rate after she performed a treadmill test, and noted that she required "increased oxygen" and demonstrated "poor aerobic fitness." Starnes concluded that Indergard could not perform the sixty-five pound lift and carry requirement and recommended that Indergard not return to work. Starnes forwarded the results of the PCE to Indergard's orthopedic surgeon, who agreed with Starnes's assessment. GP informed Indergard that she could not return to work because it had no positions for which she was qualified.

Indergard sued GP for violating the Americans with Disabilities Act (ADA). She argued that the PCE was an illegal medical examination and that GP had discriminated against her because of a perceived disability or record of disability. The district court granted summary judgment in favor of GP, finding that the PCE was not a medical examination. The Ninth Circuit Court of Appeals reversed.

Under the ADA, an employer may not require a current employee to undergo a medical examination unless the examination is shown to be job-related and consistent with business necessity. However, an employer may make inquiries into the ability of an employee to perform job-related functions. The question in this case was whether the PCE was a medical examination under the ADA or simply an inquiry into whether Indergard was capable of performing the job-related functions of the position she was qualified to return to after her medical leave.

The EEOC provides that the following seven factors should be considered in determining whether a test is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment of physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test normally is given in a medical setting; and (7) whether medical equipment is used. The EEOC states that blood pressure screening and cholesterol testing and range of motion tests that measure muscle strength and motor function are considered medical examinations.

On the other hand, physical agility tests which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, are acceptable as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure).

The Ninth Circuit found that the PCE to which Indergard was subjected was a medical examination. Specifically, the PCE included range of motion and muscle strength tests, and Starnes measured and recorded Indergard's heart rate and breathing after the treadmill test. Starnes' recordation of Indergard's "increased oxygen" intake and "poor aerobic fitness" weigh heavily in favor of considering the PCE a medical exam. Moreover, as a licensed occupational therapist, Starnes was a health care professional. And she administered and interpreted the PCE. Indergard's treating orthopedic surgeon also made recommendations based on the PCE results. In addition, the PCE's broad reach was capable of revealing impairments of Indergard's physical and mental health, such as subjective reports of Indergard's behavior, communication, and cognitive ability.

Thus, the Ninth Circuit reversed the summary judgment order and remanded the case to the district court to address the triable issue of fact whether the PCE, a medical examination, was job related and consistent with business necessity.

Indergard v. Georgia-Pacific Corp. (9th Cir. 2009) 582 F.3d 1049.

Employer Found Liable For Failure To Accommodate Employee's Disability On Single Occasion, Notwithstanding The Fact the Employer Successfully Accommodated the Employee for Months.

A.M. worked as a cashier for Albertsons. In 2004, she returned to work after undergoing treatment for cancer. The cancer treatment affected her salivary glands, leaving her mouth very dry. To counter this, A.M. had to constantly drink water.

Consequently, she had to go to the bathroom to urinate frequently. A.M. told her managers about her need to have water with her at all times, and to use the bathroom frequently, and her managers said it was not a problem. She only had to let the managers know when she needed to go to the bathroom so they could cover for her.

In February 2005, Kellie Sampson began working as a supervisor at the same store as A.M.. On February 11, 2005, at 7:00 p.m., only Sampson, A.M. and a courtesy clerk were working at the store. Albertsons' policy was that a checker could never leave the front end of the store unattended. Courtesy clerks, like Hollis, were not allowed to operate the cash register. Consequently, only Sampson could relieve A.M.. Sampson had never worked with A.M. before and did not know about her disability or the accommodation that had been granted by the store managers.

At about 8:00 p.m., A.M. told Sampson that she needed to take a break. Sampson asked A.M. if she could wait because a delivery truck was arriving and Sampson could not go to the front of the store. A while later, A.M. had a line of customers waiting for her at the checkstand. She called Sampson on the store intercom saying that she needed to go to the bathroom. Sampson said that she could not relieve A.M. because she was unloading merchandise. Seven to ten minutes later, A.M. still had customers

waiting to check out. She called Sampson again on the intercom saying that she really needed to go. Sampson again said that she was busy and could not come to the front of the store. A.M. said that she was going to go. Sampson did not give her permission to leave her checkstand, she simply hung up the phone. Unable to control herself, A.M. urinated while standing at the checkstand. She was having her menstrual cycle, and became wet with both urine and blood. A.M. was humiliated. When Sampson finally appeared several minutes later, A.M. cleaned herself up and went home.

A.M. sued Albertsons for failing to accommodate her disability in violation of the Fair Employment and Housing Act (FEHA). At trial there was evidence that Albertsons did not always document reasonable accommodations, even though the company considered the documentation crucial in light of the transient nature of store management. A.M. admitted that she did not tell Sampson about her disability. The jury awarded her \$200,000 in damages. The trial court denied Albertsons' motion for a new trial. The California Court of Appeal affirmed.

Under the FEHA, an employer that fails to make a reasonable accommodation for an employee's known physical disability engages in an unlawful employment practice. It is also unlawful for an employer to fail to engage in a good faith interactive process with the employee to determine an effective reasonable accommodation if an employee with a known physical disability requests one. The failure to accommodate and the failure to engage in the interactive process are separate, independent claims.

Albertsons argued a broad view of the failure to accommodate and alleged that A.M. failed to continue the interactive process in not notifying Sampson of her disability and of management's granting of the agreed-upon accommodation. The Court of Appeal rejected this argument, finding that it blurred the distinction between the two different violations of the FEHA. FEHA does not provide that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context.

Albertsons also argued that its February 2005 failure to accommodate was trivial because it constituted a single incident in the context of a much longer period of successful accommodation beginning in January 2004. However, the Court found that the FEHA does not allow for any failure to accommodate because even a single failure to make

reasonable accommodation can have tragic consequences for an employee who is not accommodated.

A.M. v. Albertsons, LLC (2009) 178 Cal. App. 4th 455 [100 Cal Rptr.3d 449].

EEOC Publishes Proposed ADA Regulations to Conform with the ADA Amendment Act of 2008.

On September 23, the EEOC published proposed regulations to conform to the ADA Amendments Act of 2008, which went into effect January 1, 2009. There is a 60 day comment period for the proposed regulations and then the EEOC will publish the final regulations.

The Act focused on expanding coverage under the ADA after courts had narrowed the definition of what constitutes a disability. The proposed regulations will differ from the current regulations by clarifying that an impairment need not prevent, or significantly or severely restrict, an individual from performing a major life activity for the impairment to be considered "substantially limiting" and the individual disabled under the ADA. A more "common sense" assessment will be required, comparing an individual's ability to perform a specific major life activity with that of most people in the general population. The proposed regulations also include a non-exhaustive list of "major life activities," including three new ones: sitting, reaching, and interacting with others.

In addition, the proposed regulations specifically state that impairments that are episodic or in remission meet the definition of disability if they would substantially limit a major life activity when active. Examples include epilepsy, multiple sclerosis, hypertension, asthma, diabetes, major depression, and bipolar disorder.

The current regulations require a person to show that he or she is unable to perform a class or broad range of jobs. The proposed regulations will instead only require an employee to show that he or she is substantially limited in performing or meeting the qualifications for a "type of work." A "type of work" may include jobs such as commercial truck driving or food service jobs. And job-related requirements can include frequent or heavy lifting, or prolonged standing or sitting.

The proposed regulations also state that an employer that asks if an employee needs a reasonable accommodation will not be deemed to regard that employee as disabled. Coverage under the "regarded as" prong is triggered only by actions prohibited by the ADA.

A full copy of the proposed regulations can be found at: <http://edocket.access.gpo.gov/2009/E9-22840.htm>

Questions and answers about the proposed ADA regulations are available at: http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html

SEX HARASSMENT/ DISCRIMINATION

Five Foot Tall, Female Firefighter Required to Undergo Driving Evaluations Because Of Concerns About Her Ability To Safely Operate Vehicles Was Not Illegally Harassed Or Discriminated Against Based On Gender.

Tonya Coffman, who is five feet tall, was a substitute firefighter for the Indianapolis Fire Department. In late 2003, the Department began to receive various e-mails from Coffman's colleagues expressing concern about her driving ability. Her co-workers were concerned because she needed to put the bench seat all the way forward and use the steering wheel for support. She also had difficulty reaching the pedals in some of the squad cars and had to look through the steering wheel to see out the front window. As a result of these e-mails, the Department required Coffman to complete a series of safety evaluations surrounding her driving. Despite receiving a favorable report after the evaluations, the concern about Coffman's driving persisted into 2004, and expanded into a criticism of her paramedic skills as well.

The Department conducted another round of evaluations and found that Coffman had deficiencies in a number of areas, including difficulty socializing with, and asking for help from fellow firefighters. Subsequently, a number of employees came forward with concerns about Coffman's well-being

because she was often alone or withdrawn and seemed to be defensive for no legitimate reason. Consequently, the Department ordered Coffman to attend a few fitness for duty psychological evaluations. After a short leave of absence, she returned to active duty.

Coffman sued the Department for gender harassment and discrimination in violation of Title VII, violation of the ADA, and violation of her due process rights. The district court granted summary judgment in favor of the Department. The Seventh Circuit Court of Appeals affirmed.

The Court found that Coffman's discrimination claim failed because she did not offer any evidence that the Department subjected her to the driving evaluations and fitness for duty evaluations because she is female. She could not identify a single incident where any firefighter engaged in behavior or made a comment suggesting a discriminatory attitude toward women.

Similarly, Coffman's sexual harassment claim also failed. The Court found that the driving evaluations and the fitness for duty evaluations were not demeaning, degrading, or hostile. Even assuming that the Department did not require these examinations out of concern for her well-being and the safety of others, requiring the skills and mental examinations is not hostile or discriminatory. Likewise, there was no evidence that Coffman was targeted for scrutiny on account of her sex.

Coffman also asserted that the Department violated the ADA by referring her to unnecessary psychological evaluations. The ADA prohibits employers from requiring a medical examination or inquiring whether an employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. A medical examination is job-related and consistent with business necessity when an employer has a reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform essential job functions or that the employee will pose a threat due to a medical condition.

Here the Department's decision to refer Coffman for the fitness for duty evaluations took place against the backdrop of two firefighter suicides in the preceding months. Coffman's well-being was essential not only to her safety but to the public at large. Multiple firefighters had expressed concern

that she was withdrawn and defensive. Although being withdrawn and defensive might not be job-related in many vocations, a fire department has an obligation to the public to ensure that its workforce is capable of performing mentally and physically demanding work.

Coffman v. Indianapolis Fire Department (7th Cir. 2009) 578 F.3d 559.

RACE DISCRIMINATION

Manager Demoted Because Her Department Staff Was In Open Revolt Against Her Based On Her Poor Supervision Could Not Establish Race Discrimination Or Retaliation Claims.

Deborah Dear, who is African-American, was a clinical nurse manager in the Emergency Department of the Hines Veterans Affairs Hospital in Illinois. Dear performed adequately in this supervisory position for approximately two years. Then, in 2006, Ruth Jennetten, Dear's direct supervisor, received several complaints from Department staff members about Dear's supervisory deficiencies. They threatened to walk off the job if Dear continued to be their supervisor. Dear inappropriately disciplined employees and denied them preferred schedules. Paula Steward, Dear's second level supervisor, noted that Dear had denied someone's use of leave even though the employee made the request four to six months in advance. Dear also admitted to having conflicts with various staff members in the Department.

Steward asked Dear to compose a plan for improving the morale of the Department and submit it to Steward in ten days. Dear missed the deadline and, when she submitted the plan, it only addressed one of the numerous problems Steward had identified. Steward was afraid that the poor morale posed a threat to patient care so she temporarily reassigned Dear to a staff nurse position in another Department.

Dear met with Steward and Jennetten the following day and the supervisors explained their rationale for the reassignment. Jennetten told Dear that she needed to change. She said, "You need to change your voice and you need to change your facial expressions." After Dear's demotion, Gail Speer, a

white nurse, replaced her on an interim basis. Dear filed a complaint with the EEO counselor alleging race discrimination. Dear was then permanently assigned to a staff nurse position in another unit.

Dear sued the Secretary of Veterans Affairs for harassment, race discrimination, and retaliation in violation of Title VII. The district court granted summary judgment in favor of the employer. The Seventh Circuit Court of Appeals affirmed.

In a discrimination case like this one, the plaintiff must show, among other things, that her job performance is meeting her employer's legitimate expectations and that the employer treated similarly situated employees outside the protected class more favorably. Dear could not show that she was performing up to expectations at the time the VA decided to demote her. There was concrete evidence that her supervisory skills were lacking and she failed to comply with her own supervisor's order to compose a plan to handle the low morale in the Department. Moreover, she could not show that a similarly situated employee was treated differently because, although her interim replacement was less qualified than she, it is unlikely that an interim replacement could be considered similarly situated to a permanent employee.

Dear's retaliation claim similarly failed because she could not show that she was performing her job satisfactorily or that a similarly situated person received better treatment. And Dear's harassment claim failed because she could not offer evidence of racially offensive treatment. Jennetten's statements to Dear could not be objectively construed as racist because Jennetten was referring to Dear's inability to effectively interact with her subordinates. And there was no evidence indicating that the work environment was hostile for African-Americans.

Dear v. Shinseki (7th Cir. 2009) 578 F.3d 605.



RACIAL HARASSMENT/ DISCRIMINATION

Trial Court Failed To Properly Interpret Facts In Favor Of Plaintiff Employee On Employer's Motion For Summary Judgment In Race Harassment And Discrimination Case.

Thomas Aulicino worked as a Motor Vehicle Operator (MVO) at the Hinsdale Depot of the New York City Department of Homeless Services (DHS). From December 2001 to September 2002, Frank John, the fleet coordinator, made racially derogatory comments to or about Aulicino. He told Aulicino that it was alright for a DHS client to call him a "white mother f**k" and that Aulicino deserved it. On another occasion, he told Aulicino that white people are lazy. Aulicino's supervisor also told him that John had referred to him as a "white f**k" and had threatened to "get" him.

In 2005, Larry Singleton became Aulicino's supervisor. When Aulicino threatened to file a harassment complaint against Singleton, Singleton told Aulicino that he (Singleton) was an ex-felon, which Aulicino interpreted as a threat. Singleton also told Aulicino to "go back to Bensonhurst and tell everyone that you report to a black man who is making your life miserable." When Aulicino said that Singleton was creating a hostile work environment, Singleton said "I'll show you what a hostile work environment is." Aulicino considered transferring positions, but he felt that he had very limited options.

Aulicino applied for a supervisor position, which required candidates to have one year of service as an MVO and one year of full-time experience vehicle dispatching. It also preferred candidates to have a Class B driver's license. During Aulicino's interview, John tried to discourage and disqualify him. When Aulicino discussed his qualifications, John interrupted him and said that he knew all about it. John decided not to promote Aulicino and told a colleague that he would not hire Aulicino and referred to Aulicino as a "white f**k." John ultimately hired Joseph Johnson, an African-American, for the supervisor position. Johnson had some "fill-in" dispatching experience and a commercial learner's permit but no Class B license.

Aulicino sued the DHS for race harassment and discrimination in violation of Title VII. The district

court granted summary judgment in favor of the DHS. The Second Circuit Court of Appeals reversed and remanded the case.

The Second Circuit found that Aulicino established a *prima facie* case of discrimination because he was qualified for the supervisor position. Although he did not have a Class B driver's license or one year of full-time dispatching experience, neither did the person who was hired for the position. In addition, there was evidence that John made racially derogatory comments about Aulicino in relation to his candidacy for promotion.

For a hostile work environment claim, a court must consider (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating; (4) whether the conduct unreasonably interfered with plaintiff's work; and (5) what psychological harm, if any, resulted. Here, in considering the frequency of the conduct, the district court looked at a "five year" time period and found that the comments were cumulatively insufficient to establish a hostile work environment. But the Second Circuit found that the district court should not have considered the entire time period because the comments were primarily made in 2002 and then again in 2005. Considering the facts in the light most favorable to the plaintiff, the trial court should have discounted or disregarded the intervening period between comments by one supervisor and comments by another. In addition, the trial court did not give sufficient weight to Singleton's remarks to Aulicino which were physically threatening and, thus, fairly severe. Furthermore, Aulicino contemplated transferring to a different location, which suggests that the conduct interfered with his job.

Aulicino v. New York City Department of Homeless Services (2d Cir. 2009) 580 F.3d 73.

NATIONAL ORIGIN HARASSMENT/ DISCRIMINATION

Employee Subjected To Persistent Harassment Could Take Case To Trial.

Iftikhar Nazir, a man of Pakistani ancestry, was a supervisor of mechanics for United Airlines.

During his 16 years of employment, Nazir's co-workers persistently called him derogatory names based on his national origin, color, and religion. He complained to various different supervisors, including higher management, to no avail. Nazir's co-workers circulated flyers demeaning him based on his national origin. One of his co-workers also reported him to the FBI as a possible terrorist. Nazir's supervisor, Bernard Petersen, criticized him for not trying harder to make friends with the people who were harassing him. Petersen admitted that Nazir complained to him about the harassing behavior numerous times and that he never disciplined any of the harassers. In 2005, United Airlines fired Nazir after a specious investigation involving allegations that Nazir sexually harassed a third party contractor.

Nazir sued United Airlines for harassment and discrimination based on religion, color, ancestry, and national origin in violation of the Fair Employment and Housing Act. The district court granted summary judgment in favor of United. The California Court of Appeal reversed.

United offered evidence that Petersen, who terminated Nazir, was the same individual who previously promoted Nazir to the supervisor position. Such same actor evidence will often generate an inference of nondiscrimination. However, Nazir offered evidence suggesting that Petersen was forced to promote him to supervisor, and did not choose to promote him.

In addition, although United's policies said, "if there is any reason you would not be perceived as an unbiased investigator, choose another investigator." Nevertheless, Petersen lead the investigation into Nazir's alleged misconduct. There was also evidence undermining the thoroughness of the investigation.

Furthermore, the Court found that Nazir raised triable issues of material fact as to his retaliation claim. After Nazir went on a stress leave as a result of the harassment, Petersen asked him to voluntarily demote himself to mechanic. When Nazir refused and then returned to work, he complained about the continuing harassment and was terminated three weeks later following a less-than-thorough investigation.

Nazir v. United Airlines, Inc. (2009) 178 Cal. App.4th 243 [100 Cal.Rptr.3d 296].

GENETIC DISCRIMINATION

Interim Rules Implementing The Genetic Information Nondiscrimination Act Published.

On October 7, the Department of Labor, Internal Revenue Service, and Centers for Medicare and Medicaid Services released interim final rules prohibiting discrimination based on genetic information in health insurance coverage and group health plans. There is a 60 day comment period for the interim rules.

The proposed rules modify the Health Insurance and Portability and Accountability Act (HIPAA) to clarify that genetic information is health information. The rules prohibit the use and disclosure of genetic information by covered health plans for determining eligibility determinations, premium computations, applications of any pre-existing condition exclusions, and any other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.

The rules also restate the definition of genetic information as "information about the individual's genetic tests or the genetic tests of family members, the manifestation of a disease or disorder in family members of such individual (that is, family medical history), or any request of or receipt by the individual or family members of genetic services."

The Genetic Information Nondiscrimination Act and the implementing rules are intended to encourage individuals to participate in genetic testing, which can help better identify and prevent certain illnesses.

A complete copy of the interim rules can be found at:
<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=23182>

PENSIONS

Governor Signs Bill Providing For Two-Tier Pension Programs For Orange County Agencies.

Senate Bill 752, signed by the Governor, provides for a two-tiered retirement program for non-safety

employees of Orange County and Districts within the County. The Bill is an urgency measure that went into effect on October 11.

Under the new program, both current and future non-safety employees are given the choice between the County's current defined benefit plan, or to enroll in a hybrid plan that provides for a reduced defined benefit pension combined with a defined contribution plan. The objective is to reign in the County's skyrocketing pension costs, which have resulted in a \$3.1 billion unfunded liability.

Implementation of an SB 752 two-tiered program has been negotiated with the Orange County Employees Association, the largest of the County's employee organizations. This is in accordance with the Bill's provision requiring that implementation must be pursuant to a Memorandum of Understanding. However the Bill also authorizes the program to be applicable to non-represented employees.

The County has given the following example of how the new program will work. A thirty year employee who earns \$60,000 now pays \$700 a month under the current pension plan. The employee can retire at age 55 and receive a monthly pension of \$4,050. Under the new plan, that thirty year employee would retire at age 65 and receive a monthly pension of \$2,430 from the reduced defined benefit plan, but (1) would pay only \$360 a month, and (2) would decide how much to contribute to the defined contribution plan, which amount the County (or District) would match up to 2%. Thus the current defined benefit plan is more attractive in the long-term, i.e. a higher guaranteed pension upon retirement at a younger age, whereas the new hybrid plan is more attractive during employment because of the lower monthly cost to the employee.

Muir, *Governor approves two-tier pension for O.C. workers*, The Orange County Register (October 12, 2009).

Note:

In the shorter term, to the extent that the older, more expensive employees will choose to remain with the current defined benefit plan, while the newer younger employees choose the new hybrid plan, savings from the program will be minimized.

ADMINISTRATIVE HEARINGS

Exclusionary Rule Is Not Generally Applicable To Administrative Hearings.

Lee Kendrick worked for the California Department of Transportation (CalTrans). In 2004, he allegedly threatened Michael McBarron, his supervisor, after McBarron asked him to remove his tools from a CalTrans vehicle. Among other things, Kendrick shouted, "You treat me like an apprentice. The way you talk to me, I could knock you out!" McBarron had another CalTrans supervisor call the police because of Kendrick's threats. During an interview with the California Highway Patrol officer who arrived to investigate, McBarron indicated that Kendrick was capable of physical violence because he had previously been arrested on a weapons charge and previously threatened other co-workers. McBarron told the officer that he feared that Kendrick might physically harm him.

At that point, Kendrick returned from the field, walked to his personal vehicle, and began retrieving objects from it. The CHP officer approached Kendrick to make sure he was not retrieving a weapon. Kendrick denied making threats. The officer arrested him for making criminal threats, fighting, and using offensive words. The officer searched Kendrick and his vehicle and found a handgun, ammunition, marijuana, methamphetamine and objects Kendrick admitted using to ingest the methamphetamine.

CalTrans terminated Kendrick for discourteous treatment towards McBarron, shouting and threatening him, and violation of Caltrans policies prohibiting violence, weapons and drugs in the workplace. Kendrick's criminal charges were dismissed because the criminal court found that his arrest was unlawful and, consequently, the evidence obtained from it had to be suppressed. Kendrick appealed his termination and asked the State Personnel Board to apply the exclusionary rule to the evidence seized from his car and his person. An ALJ concluded that the exclusionary rule did not apply to the administrative appeal hearing. The Board disagreed and found that the exclusionary rule should apply to the disciplinary proceeding. Caltrans filed a petition for writ of mandate in the superior court challenging the Board's decision. The superior court granted the petition. The California Court of Appeal affirmed.

The exclusionary rule excludes evidence obtained from unreasonable searches and seizures in violation of the Fourth Amendment. It applies to criminal proceedings, but rarely applies to civil actions. Courts have also seldom applied the exclusionary rule in administrative cases, even ones involving severe penalties based on the admission of illegally seized evidence.

In administrative disciplinary proceedings, a balancing test must be applied and consideration must be given to the social consequences of applying the exclusionary rule and its effect on the integrity of the judicial process. In conducting the balancing test, one factor to consider is whether the evidence was obtained under circumstances which shock the conscience. Even in an administrative setting, egregious violations of the Fourth Amendment might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. Courts also consider circumstances which may show that an unlawfully obtained confession was coerced.

Here there are insufficient grounds for extending the exclusionary rule to this disciplinary proceeding. The public is entitled to be protected from a state worker who uses illegal drugs and carries a concealed weapon. And public employees are entitled to protection from a potentially dangerous coworker. Drug use on the job and possession of a readily available firearm also present a danger to the public.

Balanced against these dangers, the Court considered the deterrent effect of the exclusionary rule, which is designed to control the conduct of law enforcement officers. The CHP officer, and not Caltrans, seized the evidence. There is no reason to believe that the CHP fabricated a case that might lead to Kendrick's termination. And the law enforcement behavior was not egregious. Moreover, the CHP officer did not coerce Kendrick into admitting that he uses methamphetamine. Thus, the exclusionary rule should not apply to Kendrick's disciplinary appeal hearing.

Department of Transportation v. State Personnel Board (2009) 178 Cal. App.4th 568 [100 Cal Rptr.3d 516].



FIRST AMENDMENT

Speaker's Motive Is Not Dispositive In Determining Whether Speech Is On a Matter of Public Concern.

Bryan Sousa worked as a supervising sanitary engineer for the Connecticut Department of Environmental Protection. In 2002, he had a verbal and physical altercation with Jonathan Goldman, a lower-level Department employee. The Department suspended both employees for three days without pay. Subsequently, Sousa began making numerous complaints to Department officials, citing the discipline he received and focusing on what he alleged was workplace violence within the Department generally. After he sent his co-workers an email that arguably called into question his psychological state, he was placed on leave until he could undergo a fitness for duty evaluation.

When Sousa returned to work, he took a number of unauthorized leave days and he was ultimately terminated. He sued the Department and various individuals claiming he was retaliated against in retaliation for his complaints about alleged workplace violence. The district court granted summary judgment in favor of the Department, finding that Sousa's complaints were, in essence, employee complaints calculated to redress personal grievances and thus he was not speaking on a matter of public concern. The Second Circuit Court of Appeals vacated the judgment.

For a First Amendment retaliation claim, the employee must show that the speech addressed a matter of public concern. Whether 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. While motive surely may be one factor in making this determination, the Second Circuit found that motive is not, standing alone, dispositive or conclusive of whether speech concerns a matter of public concern.

Sousa v. Roque (2d Cir. 2009) 578 F.3d 164.

Note:

The Ninth Circuit Court of Appeals has similarly held that "motive should not be used as a litmus test for public concern; rather, content is the greatest single factor" in the inquiry as to whether speech addresses a matter of public concern. See Energy

Savers, Inc. v. Hansen (9th Cir. 2004) 381 F.3d 917, 925. *Most circuits have similarly found that motive should not be dispositive in determining whether a particular statement addresses a matter of public concern.*

EMPLOYMENT LAW

U.S. Supreme Court Denies Review of FMLA, FLSA, and Due Process Cases.

We previously reported on the Seventh Circuit Court of Appeals decision, *Pirant v. USPS*, finding that an employee could not count the two hours she was suspended or the time she spent donning and doffing gloves, shoes, and a work shirt toward the 1,250 hour requirement for leave eligibility under the Family and Medical Leave Act.

The Eleventh Circuit Court of Appeals decision, *Gonzalez v. Deerfield Beach, Fla.*, in which the Court found that firefighter/emergency medical technicians who can be required to engage in fire suppression, but rarely actually engage in suppression duties, qualify for the partial fire protection activities exemption under the FLSA.

Also in our **February 2009 Briefing Room**, we reported on the California Court of Appeal's *Sandoval v. Los Angeles County Department of Public Social Services* case, where the Court held that an employee's failure to report to work for an extended period, and his failure to respond to notices ordering him to work, provided requisite due process, even though he alleged that he did not receive the County's notices.

On October 5, the U.S. Supreme Court denied review of these three cases.



MILITARY LEAVE RIGHTS

2008 Statutory Revision Providing for No Statute of Limitations for Claims Under the Uniformed Services Employment and Reemployment Rights Act Is Not Retroactive So As To Revive Previously Barred Claim.

Charles Middleton served in the US Air Force from 1960 to 1989. In 1993, he applied for two positions with the City of Chicago. The City did not select him for either position. In 2007, thirteen years later, Middleton sued the City claiming that it refused to hire him because of his military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). The district court granted the City's motion to dismiss and Middleton appealed. In 2008, Congress enacted the Veterans' Benefits Improvement Act (VBIA) which stated that no limitations period applies to USERRA claims. The Seventh Circuit Court of Appeals affirmed.

Congress has a four year "catch all" statute of limitations for claims arising under a federal statute enacted after 1990. Congress enacted USERRA in 1994 and did not include an express statute of limitations. Middleton argued that the four year statute of limitations did not apply to USERRA because USERRA replaced the Veterans' Reemployment Rights Act (VRRRA) which was enacted in 1974. When determining the substantive effect of an enactment, courts focus on the creation of new rights of action and corresponding liabilities. Although USERRA clarified the VRRRA in part, it also provided for the right to liquidated damages and a jury trial which were not available under the VRRRA. Because Middleton's complaint alleges that the City's violation of USERRA was willful and sought all just and proper relief, Middleton's claim sought the new remedies provided for in USERRA. And as Middleton's claim was made possible by and necessarily depended on USERRA, his claim arose under a cause of action enacted after 1990 and was subject to the statute of limitations.

The Court also found that the VBIA does not apply retroactively. The VBIA provides that there is no statute of limitations for any person who "seeks to file a complaint." This language suggests that the VBIA was meant to apply prospectively. Moreover, there is a general presumption that a

newly extended statute of limitations does not revive a previously barred claim. As Middleton's claim was more than thirteen years old before Congress enacted the VBIA, the VBIA could not have revived his claim because it had already been barred for nine years under the four year statute of limitations.

Middleton v. City of Chicago (7th Cir. 2009) 578 F.3d 655.

EMPLOYER LIABILITY

Employer Liable For Injuries to Pedestrians Resulting From Employee's Car Accident Which Occurred While Employee Was Returning Home From A Business Trip.

Marc Brandon worked for Warner Bros. Entertainment Inc. as the vice-president of anti-piracy internet operations. In August 2006, Brandon attended an out-of-town business conference sponsored by one of Warner's anti-piracy vendors. Warner paid for Brandon's airfare, hotel, and airport parking. When Brandon flew back to the Burbank airport at the end of his trip, he retrieved his car from the airport parking lot. He did not intend to go to his office, but instead planned to go home to walk his dogs. His office was on his route home and he drove by it without stopping and took his normal route home. He was then involved in a car accident where numerous pedestrians were injured.

The pedestrians sued Brandon and Warner in a personal injury action. Warner filed a motion for summary judgment in superior court. The trial court granted Warner's motion, and the California Court of Appeal reversed.

An employer is liable for the torts of an employee acting within the scope of his or her employment. Courts interpret actions within the scope of someone's employment very broadly. Under the "going and coming rule," an employee is not acting within the scope of employment while going to or coming from the workplace. But when an employee is engaged in a "special errand" or a "special mission" for the employer it will negate the "going and coming rule."

The Court of Appeal found that a special errand can include commercial travel such as the business trip in this case. Warner paid for Brandon's airfare, hotel, and airport parking which suggests that Warner expected to derive a benefit from Brandon's attendance at the conference. And it is reasonable to infer that Brandon would use the information he learned at the conference in his position as vice-president of Warner's anti-piracy internet operations.

Although Brandon was traveling along his normal commute route home, the special errand doctrine still applies because he was traveling from the airport to his home with no intention of going to his office. He was only coincidentally passing by his office. A special errand continues for the entirety of the trip, and because Brandon was traveling directly home without any intervening personal deviations, he was acting within the course and scope of his employment.

Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal.App.4th 427 [98 Cal.Rptr.3d 837].

WORKERS' COMPENSATION

Employer Is Not Liable for Employee's Injuries Sustained While Traveling to Medical Appointment for Her Industrial Injury From Outside a Reasonable Geographic Area.

Tania Esquivel was a correctional officer for the Corrections Corporation of America San Diego Detention. She lived in the City of San Diego and was being treated for industrial injuries by medical providers located within eight miles of her home. For reasons unrelated to her need for medical treatment, she drove about 130 miles to her mother's home in Hesperia in San Bernardino County. While she was in Hesperia en route from her mother's house to the San Diego offices of the medical providers, Esquivel suffered serious new injuries after she drove through a stop sign.

The workers compensation judge (WCJ) found that Esquivel's motor vehicle accident injuries were a compensable consequence of her existing industrial injuries. Esquivel's employer and insurance company petitioned the Workers' Compensation Appeals Board for reconsideration of the WCJ's decision. The Board reversed the WCJ's findings

and award, finding that the accident occurred too remotely from Esquivel's home and her destination to reasonably assign the risk of injury en route to the employer. Esquivel appealed the decision to the California Court of Appeal, who affirmed the Board's order and decision.

An injury that an employee suffers while traveling to a medical appointment for treatment of an industrial injury should be held to be an injury arising out of and in the course of employment for workers' compensation purposes, even if the existing injury was not a factor contributing to the new injury, and the journey to the medical appointment did not commence at the employee's place of employment. California courts have previously held that an injury an employee suffers in a motor vehicle accident while traveling to a medical appointment for treatment of an industrial injury is a compensable consequence of the industrial injury unless the employee has materially deviated from a reasonably direct route to the appointment for a purpose not germane to the treatment.

Esquivel argued that her injury should be covered by workers' compensation because she had not materially deviated from her route to her medical providers' offices. However, the Court of Appeal held that there must be a reasonable geographic limitation on the employer's risk of incurring liability for such injuries. Consequently, the Court held that the employer bears the risk of incurring liability under the Workers' Compensation Act for an injury an employee suffers during travel to or from a medical appointment related to an existing compensable injury while the employee is traveling a reasonable distance, within a reasonable geographic area, to or from that appointment. Thus, a new injury that an employee suffers while traveling a reasonable distance, within a reasonable geographic area, to or from a medical appointment for examination or treatment of an existing compensable injury is also compensable under the Act. Conversely, where the employee chooses for reasons unrelated to his or her need for medical treatment to travel to a distant location beyond the reasonable geographic area of his or her employer's compensability risk, and is injured while traveling an unreasonable distance from that distant location to a medical appointment related to an existing compensable injury, the employee incurs no liability under the Act.

The Court declined to adopt a specific test here because Esquivel's travel was clearly outside a

reasonable geographic area. The Court found that such determinations must be made on a case-by-case basis with the following factors considered: (1) the location of the employee's residence; (2) the location of the employee's workplace; (3) the location of the office of the employee's attorney; (4) the location of the medical provider's office; (5) the place where the new travel-related injury occurred; (6) the distance between the employee's point of departure and the medical provider's office along a reasonably direct route to that office; (7) the additional distance the employee travels in the event he or she deviates from that reasonable direct route while en route to the medical provider's office; (8) the availability of medical providers in the fields of practice, and facilities offering treatment, reasonably required to cure or relieve the employee from the effects of the existing industrial injury; and (9) the reason or reasons for the employee's travel beyond a reasonable geographic area within which the employer ordinarily should bear the risk of incurring compensability liability in the event the employee is injured while traveling to or from the medical appointment.

Esquivel v. Worker's Compensation Appeals Board and Corrections Corporation of America San Diego Detention (2009) 178 Cal. App.4th 330 [100 Cal.Rptr.3d 380].

ATTORNEY'S FEES

Deputy Sheriff Required To Pay Portion Of Sheriff's Legal Fees Where He Failed To Abandon His Legal Claims Which He Knew Were Without Merit.

Michael Mach was a law enforcement officer with the Will County Sheriff's Department in Illinois. In September 2003, Mach's supervisor, Director Raymond Horwath, issued a memorandum to all traffic deputies stating that, due to budget concerns, they may be temporarily assigned to the patrol division. None of the traffic deputies were happy about this news.

That month Mach was assigned on three consecutive days to the patrol division. After his third shift, he left some of his traffic equipment outside of Horwath's door with a note stating that he no longer needed the equipment because he had been

transferred indefinitely to patrol. Horwath thought that Mach overstepped his bounds by dumping his gear outside his door without speaking to him directly. Horwath conferred with his superiors, Deputy Chief John Moss and Chief Deputy Patrick Maher, who agreed that Mach should be transferred to patrol. Mach grieved the transfer, and the Sheriff decided to give him a second chance. But over the next six months, Mach failed to adhere to directives and his performance was unsatisfactory. The Department gave him repeated warnings, a written reprimand, and a one-day suspension. In August 2004, the Sheriff permanently transferred Mach to patrol. Mach was forty-seven years old and the deputy who permanently filled his position was also forty-seven years old.

Mach sued the Sheriff for violating the Age Discrimination in Employment Act (ADEA). After discovery, the Sheriff moved for summary judgment, attacking all six of Mach's arguments. In his response brief, Mach abandoned five of the six arguments, leaving only the claim based on his transfer. The district court granted summary judgment in favor of the Sheriff. The court also ordered Mach to pay for five-sixths of the Sheriff's legal fees incurred in preparing the summary judgment brief. The Seventh Circuit Court of Appeals affirmed.

The ADEA prohibits an employer from discriminating against an employee because of his age. The Sheriff stated that he transferred Mach because of his well-documented poor job performance, and not his age. He was the lowest-rated traffic deputy for 2003 and the Sheriff transferred the officer with the next-lowest rating as well. Mach offered no evidence of discriminatory animus. In 2004, Horwath had told Mach he should transfer to patrol because he was nearing retirement, but this isolated stray remark is insufficient to create an inference of discrimination. In addition, the Sheriff, and not Horwath, made the transfer decision.

In an ADEA case, a prevailing defendant may obtain attorneys' fees if the plaintiff litigated in bad faith. The Court found that Mach litigated in bad faith because he knew that five of the six claims were "worthless" and "non-starters." He had two months between the close of discovery and the due date for the Sheriff's summary judgment brief to abandon his claims, but he waited until after the Sheriff filed his brief to do so. Because Mach permitted litigation to continue after discovery had erased any doubt that his arguments had even a chance of success, he inflicted unnecessary costs

upon the Sheriff. Consequently, the trial court's fee award strictly limited to five-sixths of the fees incurred for preparing the summary judgment brief was appropriate.

Mach v. Will County Sheriff (7th Cir. 2009) 580 F.3d 495.

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FIRM PROFILE
Joung H. Yim
Associate

Joung H. Yim is an associate in the Los Angeles office. Joung has an extensive background in litigation in the areas of labor, employment and education law. He represents public employers in harassment, discrimination and retaliation claims in State and Federal court.

In addition, he represents employers in administrative hearings, including disciplinary appeals and grievance arbitrations, as well as day to day advice on employment matters. Joung has extensive deposition and litigation discovery experience.

Joung received his Juris Doctorate from Loyola Law School, Los Angeles and his Bachelor of Arts degree in political science from the University of Michigan.

When not practicing law, Joung enjoys playing basketball and tennis and watching college football. He also enjoys his role as mediator when his two young children disagree.



Firm Publications

Frances Rogers of our Fresno office authored the article, "The 'Tip Pool' Just Got larger" which appeared in the September 16, 2009 issue of the Los Angeles/San Francisco Daily Journal. The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "Tip Pool".

Frances Rogers also authored the article, "Court Of Appeal Upholds Decision of Fair Employment & Housing Commission: Employer Is Liable for Terminating Employee Because of Pregnancy" which appeared on October 15, 2009 issue of Law360. The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "Pregnancy".

And finally, prolific **Frances Rogers** co-authored with **Judith Islas** of our Los Angeles office the article, "When Can You Record a Personnel Investigation Interview?" which appeared in the 2009 Fall Edition of The Communicator which is published by ACHRO/EEO. The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "Interview".

Train the Trainer Seminars

Teach Mandatory Harassment Training *Become a Certified AB 1825 Trainer*

Los Angeles - December 22, 2009

Time: 9:00 a.m. - 4:00 p.m.

Location: Liebert Cassidy Whitmore Offices
6033 West Century Boulevard., Suite 500, Los Angeles, CA 90045

Cost: \$1,500 each or \$1,350 each if ERC Member

Registration:

Visit www.lcwlegal.com for more information and to download the registration form or to register online.

Please contact us for more information on how to bring this training to your agency by contacting Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or (310) 981-2051.



Save the Date!



Liebert Cassidy Whitmore 12th Annual Public Sector Employment Law Conference

Please join us February 25 and 26, 2010.

By popular demand the 2010 conference will be held at the San Francisco Hyatt Regency.

A series of presentations focused on the special issues impacting law enforcement are planned, including:

- * Public Safety Update
- * Conducting Effective Public Safety Investigations
- * An Outsider's Guide to Public Safety Personnel Issues
- * Public Safety: Does Anyone *Not* Retire On Disability Anymore?

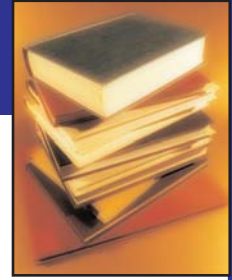
The conference brochure, complete with descriptions for all classes, as well as registration material will be on our website -- www.lcwlegal.com -- by the end of the month.

We hope that you can join us.

The conference brochure, complete with descriptions for all classes, as well as the registration material is available at www.lcwlegal.com

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Mandatory Harassment Training



One of the key components of Government Code Section 12950.1 (also known as AB 1825) is the provision requiring training in the prevention of harassment to all supervisory employees **once every two years** and to **new supervisors within 6 months** of their assumption of a supervisory position.

Liebert Cassidy Whitmore has scheduled a series of informative and interactive presentations that will meet this requirement. Class times are 9:30 a.m. - 11:30 a.m. and 1:30 p.m. - 3:30 p.m.

Please visit www.lcwlegal.com to register for the following scheduled classes.

December 2, 2009
Fresno

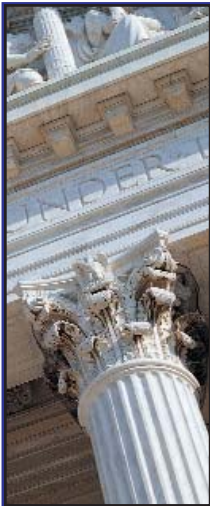
December 9, 2009
Los Angeles

December 16, 2009
San Francisco

Please contact us for more information on how to bring this training to your agency by contacting Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or (310) 981-2051.



Mandated Ethics Training



Do you have newly elected officials required to receive Ethics Training? Did you have training two years ago? Then it's time for Mandated Ethics Training!

*AB 1234 mandates that if a local agency provides any type of compensation, salary, or stipend to a member of a legislative body, or provides reimbursement for actual and necessary expenses incurred by a member of a legislative body in the performance of official duties, then **all** local agency officials shall receive a minimum of 2 hours of ethics training by January 1, 2007, and every two years thereafter.*

Please visit www.lcwlegal.com to register for the following scheduled classes.

December 3, 2009
9:30 am - 11:30 am
San Francisco

December 10, 2009
9:30 am - 11:30 am
Fresno

December 17, 2009
9:30 am - 11:30 am
Los Angeles

Please contact us for more information on how to bring this training to your agency by contacting Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or (310) 981-2051.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Workshop Training

- November 10 **"Managing Performance Through Evaluation" and "Advanced FLSA"**
San Mateo County ERC | Foster City | Richard Bolanos
- November 10 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Managing the Marginal Employee"**
Bay Area ERC | Newark | Suzanne Solomon
- November 12 **"Finding the Facts: Disciplinary and Harassment Investigations" and "Preventing Workplace Harassment, Discrimination and Retaliation"**
East Inland Empire ERC | Fontana | Jennifer Hong
- November 12 **"Family and Medical Care Leave Acts" and "Preventing Workplace Harassment, Discrimination and Retaliation"**
West Inland Empire ERC | Chino Hills | Michael Blacher
- November 12 **"Discipline: Putting It into Practice"**
Gateway Public ERC | Pico Rivera | James Oldendorph and Scott Tiedemann
- November 12 **"Supervisory Skills for the First Line Supervisor/Manager"**
San Diego ERC | Poway | Donna Evans
- November 12 **"Discipline: Putting It into Practice Part II"**
LA County Management Attorneys (LACMA) Consortium | Los Angeles | Mark Meyerhoff
- November 17 **"Advanced FLSA" and "Sick and Disabled Employees"**
Coachella Valley ERC | Indio | Peter Brown
- November 18 **"Supervisory Skills for the First Line Supervisor/Manager"**
South Bay ERC | Torrance | Donna Evans
- November 19 **"Performance Management: Evaluation, Documentation and Discipline" and "Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County ERC | Costa Mesa | Laura Kalty
- November 19 **"Supervisory Skills for the First Line Supervisor/Manager"**
Humboldt County ERC | Fortuna | Frances Rogers
- December 2 **"Supervisory Skills for the First Line Supervisor/Manager"**
Napa/Solano/Yolo ERC | Vacaville | Kelly Tuffo
- December 2 **"Disability Discrimination/Family and Medical Care Leave/Workers' Compensation/Disability Retirement: Administering Overlapping Laws"**
Central Coast ERC | Santa Maria | Michael Blacher & Doug Bray
- December 3 **"Discipline: Putting It into Practice"**
Central Valley ERC | Clovis | Gage Dungy
- December 3 **"Advanced FLSA"**
Gateway Public ERC | Huntington Park | Peter Brown
- December 9 **"Prevention and Control of Absenteeism and Abuse of Leave" and "Disaster Service Workers - If You Call Them, Will They Come"**
Bay Area Community College Districts (CCD) ERC | Pleasanton | Jack Hughes

- December 9 **"Exercising Your Management Rights" and "Labor and Employment Relations Issues During Lean Economic Times"**
North State ERC | Red Bluff | Morin I. Jacob
- December 11 **"Reductions in Staffing" and "Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"**
Central CA CCD ERC | Fresno | Mary Dowell & Frances Rogers
- December 16 **"Current Developments in Workers' Compensation" and "12 Steps to Avoiding Liability"**
Ventura/Santa Barbara ERC | Santa Barbara | Doug Bray and Connie Chuang
- December 16 **"A Guide to Labor Negotiations"**
San Joaquin Valley ERC | Merced | Jack Hughes
- December 17 **"Prevention and Control of Absenteeism and Abuse of Leave" and "Handling Grievances"**
Imperial Valley ERC | El Centro | Mark Meyerhoff

Customized Training Presentations

- November 2 **"Preventing Harassment, Discrimination and Retaliation in the School Setting/Environment"**
Franklin-McKinley School District | San Jose | Laura Schulkind
- November 3 **"Guide for Supervisors on Preventing Harassment, Discrimination and Retaliation in the Independent School Setting/Environment"**
Chadwick School | Palos Verdes Peninsula | Michael Blacher
- November 3 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Monterey Regional Water Pollution Control Agency | Marina | Jack Hughes
- November 3, 4 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Violence in the Workplace"**
City of El Segundo | Donna Evans
- November 5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Jennifer Hong
- November 5 **"Principles for Peace Officer Employment"**
Inyo County | Bishop | Gage Dungy
- November 6 **"12 Steps to Avoiding Liability"**
Inyo County | Bishop | Gage Dungy
- November 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Biscomerica | Rialto | Donna Evans
- November 9, 10, 16 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Bay Area Air Quality Management District | San Francisco | Laura Schulkind
- November 10 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Tulare | Shelline Bennett
- November 12 **"Train the Trainer: Refresher"**
Liebert Cassidy Whitmore | San Francisco | Cynthia O'Neill
- November 12 **"Train the Trainer: Refresher"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett
- November 12 **"FBOR" and "Finding the Facts: Disciplinary and Harassment Investigations"**
North County Fire Protection District | Fallbrook | Connie Chuang
- November 12 **"Managing the Marginal Employee" and "12 Steps to Avoiding Liability"**
County of Sonoma | Santa Rosa | Jack Hughes

November 16	"Employee Due Process Rights and Skelly: A Guide to Implementing Public Employee Discipline" City of Indian Wells Donna Evans
November 17	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Saratoga Jack Hughes
November 17	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Temecula Donna Evans
November 17	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Tehachapi Connie Chuang
November 17	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Tulare Shelline Bennett
November 18	"Ethics in Public Service" City of Indian Wells Peter Brown
November 20	"Preventing Workplace Harassment, Discrimination and Retaliation" Sun Valley Packing Fresno Gage Dungy
November 20	"Train the Trainer: Refresher" Liebert Cassidy Whitmore Los Angeles Laura Kalty
November 20	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Shelline Bennett
December 1	"Preventing Harassment, Discrimination and Retaliation in the Independent School Environment" Crossroads School Santa Monica Michael Blacher
December 1	"Ethics in Public Service" and "Preventing Workplace Harassment, Discrimination and Retaliation" City of Carlsbad Donna Evans
December 2	"Preventing Workplace Harassment, Discrimination and Retaliation" Liebert Cassidy Whitmore Fresno Gage Dungy
December 3, 10	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Violence in the Workplace" City of El Segundo Donna Evans
December 3	"Ethics in Public Service" Liebert Cassidy Whitmore San Francisco Jack Hughes
December 4	"Shared Governance" San Bernardino Community College District San Bernardino Mary Dowell
December 4	"Code of Ethics" Superior Court of California, Orange County Santa Ana Mark Meyerhoff
December 7	"Preventing Workplace Harassment, Discrimination and Retaliation" Bay Area Air Quality Management District San Francisco Laura Schulkind
December 7	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Ethics in Public Service" City of Carlsbad Donna Evans
December 7, 8, 9	"Harassment, Discrimination, Retaliation, Gender Diversity" and "POBR" Imperial County El Centro Mark Meyerhoff and Laura Kalty
December 8	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Anaheim Donna Evans

December 9	"Preventing Workplace Harassment, Discrimination and Retaliation" Liebert Cassidy Whitmore Los Angeles Donna Evans
December 9	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Gage Dungy
December 9	"Maximizing Performance Through Evaluations for K-12 Districts" Carpinteria Unified School District Carpinteria Mary Dowell
December 10	"Ethics in Public Service" Liebert Cassidy Whitmore Fresno Gage Dungy
December 14	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Glendale Jennifer Hong
December 14	"Ethics" Chabot-Las Positas Community College District Pleasanton Donna Williamson and Laura Schulkind
December 15	"Preventing Discrimination" and "Handling Grievances" County of Sonoma Santa Rosa Jack Hughes
December 16	"Preventing Workplace Harassment, Discrimination and Retaliation" Liebert Cassidy Whitmore San Francisco Kelly Tuffo
December 16	"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment" State Center Community College District Fresno / Reedley Shelline Bennett
December 17	"Ethics in Public Service" Liebert Cassidy Whitmore Los Angeles Donna Evans
December 22	"Train the Trainer: Harassment Prevention" Liebert Cassidy Whitmore Los Angeles Laura Kalty

Speaking Engagements

LCW appreciates the invitation to address professional organizations and associations. To learn how you can have an LCW presentation at your association meeting, contact info@lcwlegal.com.

November 4	"Navigating the Ins and Outs of Public Safety Employment Law and Practices" California Public Employer Labor Relations Association (CalPELRA) Annual Conference Monterey Scott Tiedemann
November 4	"Labor Relations Game Show" CalPELRA Annual Conference Monterey Melanie Poturica
November 4	"The Laws Impacting Background Investigations" California Background Investigators Association (CBIA) Santa Barbara Mark Meyerhoff
November 5	"Internal Affairs/Labor Relations Update" California University Police Chiefs Association (CUPCA) Executive Development Conference Pismo Beach Todd Simonson
November 5	"Common FLSA Mistakes" CalPELRA Annual Conference Monterey Peter Brown
November 5	"Workplace Injuries and Leaves" County Counsels Association (CCAC) Employment Law Section Meeting Newport Beach Michael Blacher
November 5	"Briefing Room - A Peace Officers Bill of Rights Case Update" CCAC Employment Law Section Meeting Newport Beach Mark Meyerhoff

November 5	"How To Win FLSA Lawsuits By Police Officers: Trial Strategies And Lessons" CalPELRA Annual Conference Monterey Brian Walter
November 5	"Leaves and the Disability Process: Are You Up To Date?" CalPELRA Annual Conference Monterey Peter Brown and Laura Schulkind
November 5	"Issues in Lean Times" CalPELRA Annual Conference Monterey Richard Bolanos, Morin Jacob and Donna Williamson
November 5	"Making the Most of Arbitration" CalPELRA Annual Conference Monterey Bruce Barsook
November 6	"Elimination of Bias: Taking a Closer Look at Gender and Race Bias in the Legal Profession" CCAC Employment Law Section Meeting Newport Beach Laura Kalty
November 17	"Preventing Harassment in the Workplace" National Public Employer Labor Relations Association (NPELRA) Webinar Mark Meyerhoff
November 17	"The MCLE Required Hour on Elimination of Bias in the Legal Profession" Occidental College Alumni Attorneys Century City Jeffrey Freedman
November 18	"Privacy Rights and Background Checks" California State Association of Counties (CSAC) Annual Conference Monterey Richard Bolanos
November 19	"Public Sector Employment Law Update for California's Community Colleges" Community College League of California (CCLC) Annual Conference San Francisco Mary Dowell
November 20	"Labor Negotiations for Educational Institutions During Tough Economic Times" CCLC Annual Conference San Francisco Mary Dowell
November 20	"Public Meeting Law for Community College Districts" CCLC Annual Conference San Francisco Mary Dowell and Eileen O'Hare Anderson
November 20	"Legal Eagles" CCLC Annual Conference San Francisco Bruce Barsook, Mary Dowell, Eileen O'Hare Anderson, Frances Rogers and Laura Schulkind
November 21	"Certified Ethics Training - SB 106" CCLC Annual Conference San Francisco Mary Dowell
November 21	"Equity and Diversity in the Face of New Budget Realities" CCLC Annual Conference San Francisco Laura Schulkind
December 2	"Retirement Issues Panel" Association of California Water Agencies (ACWA) Fall Conference San Diego Steven Berliner
December 3	"Student Issues and Discipline Panel: Supreme Court Decisions and Employee Free Speech Issue" California Counsel of School Attorneys (CCSA) San Diego Laura Schulkind
December 3, 4	"Legal Issues Schools Face with Families in Crisis" California School Boards Association (CSBA) Annual Conference San Diego Judith Islas
December 3	"Student Free Speech and the Internet" CSBA Annual Conference San Diego Pilar Morin
December 4	"Student Free Speech and the Internet" CSBA Annual Conference San Diego Michael Blacher
December 4	"Charter School Update" CCSA San Diego Donna Williamson

- December 5 **"Current Negotiation Issues for the Educational Employer"**
CSBA Annual Conference | San Diego | Bruce Barsook
- December 7 **"Legal and Disciplinary Issues Update"**
Redwood Empire Municipal Insurance Fund | Ukiah | Richard Whitmore
- December 16 **"Risk and Liability Associated with the ADA"**
Public Agency Risk Managers Association (PARMA) Central Valley Chapter | Fresno | Gage
Dungy



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