

THE BRIEFING ROOM

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

December 2009

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THE BRIEFING ROOM

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SEX DISCRIMINATION

Female Police Officer Repeatedly Passed Over For Promotion Stated A Claim For Gender Discrimination Where She Arguably Had Superior Qualifications And Male Officers Frequently Disparaged Female Officers' Capabilities.

Karyn Risch was a seventeen year police officer with the Royal Oak Police Department in Michigan. Between 2001 and 2005, she repeatedly applied for promotion, but the Department promoted male candidates every time. Under the Department's promotional procedure, the written examination is worth 70%, performance reviews are worth 20%, and seniority is worth 10% of a candidate's overall score. The candidates are then ranked according to their scores and the police chief chooses one of the top three applicants on the list. If there is more than one vacancy, one more name is added to the list (e.g. if there are two vacancies, the Chief can select from the top four candidates). In 2002, Risch was ranked second and the Chief selected the third ranked candidate. From 2003 to 2004, Risch ranked second out of the five candidates, all of whom were male. The Chief filled three vacancies with the first, third, and fourth ranked candidates. From 2004 to 2005, Risch was third on the promotion list. The Chief again filled three vacancies and passed over Risch to promote two male candidates with lower scores.

Male officers frequently made degrading comments regarding the capabilities of female officers and expressed the view that female officers would never be promoted to command positions. For example, male officers said "The chief will never have a female on the command staff" and "None of you female officers will ever go anywhere." A majority of male officers told Risch that women do not belong on the police force.

Risch sued the City for gender discrimination in violation of Title VII. The district court granted summary judgment in favor of the City. The Sixth Circuit Court of Appeals reversed and remanded.

To establish a *prima facie* sex discrimination case, the plaintiff must show: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) there was a causal connection between her protected class and the adverse action. The employer then has the burden to show that it made the employment decision for legitimate, non-discriminatory reasons. Then, the burden shifts back to the employee to show that the employer's reason is a pretext for discrimination.

The Sixth Circuit Court of Appeals held that Risch established a *prima facie* case of discrimination. While the City then claimed that Risch was not promoted because the Department promoted better qualified applicants, the Sixth

Circuit found that Risch presented adequate evidence that the Department's reason for not promoting Risch was pretextual. The Sixth Circuit determined that Risch arguably had superior qualifications compared to at least two of the male candidates who were promoted in 2005. Risch ranked higher than both of them on the promotion exam. Moreover, although Risch's overall performance scores were slightly lower than those of Moore and Spencer, she outscored them in several performance categories. She outscored one of the male officers in judgment, quality of work, and public contacts, and she outperformed the other in quality of work, knowledge of work, and public contacts. In addition, she had far greater experience in the Department than either of them.

Moreover, the Sixth Circuit found that the degrading comments about female officers and women in general was evidence of pretext, even if the remarks were made by non-decisionmakers. Two of the men who made discriminatory remarks were sergeants in the command staff. Discriminatory statements made by managers can be used to establish the existence of a discriminatory workplace.

Risch v. Royal Oak Police Department (6th Cir. 2009)
581 F.3d 383.

■ EMPLOYMENT DISCRIMINATION

Harassment That Stopped As A Result Of Employer Action, And Subsequently Resumed, Did Not Constitute A Continuing Violation Bringing It Within The 180 Day Limitations Period.

A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Before an employee can sue his or her employer, the employee must file a charge with the

EEOC within 180 days of the alleged unlawful employment practice. However, the continuing violation doctrine allows a plaintiff to file suit based on events that are otherwise outside the statutory time period if the various acts, taken together, evidence one continuous unlawful employment practice. The continuing violation doctrine can significantly expand an employer's liability exposure in harassment lawsuits. But if an employer intervenes, then the employer is not liable for acts occurring before it intervened and outside the statutory period.

In this case, Jelinda Stewart worked for the Mississippi Transportation Commission (MDOT). Her supervisor, Jerry Loftin, made sexually explicit comments to her from the start of her employment. He would "hit" on her constantly and even tried to kiss her on several occasions.

In September 2004, Stewart complained to Loftin's supervisor about his conduct and Loftin was reprimanded. The MDOT also removed Loftin as Stewart's supervisor. Thereafter, for sixteen months, Loftin's harassment ceased. But, in December 2005, Stewart's supervisor retired and Loftin was restored as Stewart's supervisor. Loftin told Stewart that they should be sweet to each other and, over the course of a month, he told Stewart that he loved her approximately six times.

Stewart complained about the behavior and the MDOT immediately launched an investigation and placed Stewart on paid administrative leave while the investigation was pending. When the investigation was over, Loftin was moved to a different building and Stewart was reassigned to a supervisor named Travis Boyle. Stewart retained the same position, salary and duties, but her workload increased significantly and she was given greater responsibility. Stewart claimed that other employees were told not to fraternize with her, she was not allowed to close her office door, and that locks on her door were changed.

Stewart sued the MDOT for sexual harassment and retaliation in violation of Title VII. The district court granted summary judgment in favor of the MDOT. The Fifth Circuit Court of Appeals affirmed.

Here, because the MDOT immediately investigated the harassing behavior in 2004 and the harassment stopped for 16 months, the Fifth Circuit determined that Stewart could not rely on the prior incidents in support of her harassment claim. The MDOT's action, i.e., reprimanding Loftin and removing him as Stewart's supervisor, successfully ended the harassment. It was not until 2006, when Loftin was restored as Stewart's supervisor, that Loftin harassed her by telling her he loved her. It is immaterial that the harassment resumed much later due to a subsequent decision unrelated to the remedial action of reassigning Stewart. And Loftin's 2006 conduct, standing alone, was not enough to state a claim for a hostile work environment. Although Stewart found that conduct subjectively offensive, the Fifth Circuit held that the conduct was not objectively severe or pervasive enough to support a sexual harassment claim.

The Court also found there was no legally actionable retaliation. Although Stewart was placed on administrative leave, she was paid for the three week duration and she was not required to use her accumulated leave time. Moreover, there was no stigma attached to the leave. Thus, it was not an adverse action. Likewise, Stewart's reassignment to a new supervisor was not an adverse action. Her job title, grade, hours, salary and benefits were not affected. Although she was given more work and responsibility, Stewart thrived, managed the workload well and received a promotion in 2007. Her success confirms that her transfer was not adverse in nature.

Stewart v. Mississippi Transportation Comm'n (5th Cir. 2009) 586 F.3d 321.

■ RACE DISCRIMINATION

African-American Firefighter Sues City Of New Haven Claiming That Lieutenant Promotion Exam Had A Disparate Impact.

In 2003, Michael Briscoe, who is African-American, applied for a promotion to lieutenant with the City of New Haven, Connecticut fire

department. The written portion of the exam constituted 60 percent of each candidate's overall score and the oral portion counted for 40 percent. Briscoe scored the highest of the 77 candidates on the oral portion of the exam, but his overall rank was 24th because he did not score well on the written exam.

The City initially refused to use the results of the promotional exam because the City found that the scores appeared to disproportionately benefit Caucasian candidates. As we reported in our **August 2009 Briefing Room**, in *Ricci v. DeStefano* the U.S. Supreme Court ruled that the City had to certify the results of the promotional exam because an employer's fear of litigation by racial minorities cannot justify race discrimination against white employees unless there is a strong basis in evidence for believing that the minorities could prove a disparate impact claim. The Court found that there was "no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there [was] no evidence — let alone the required strong basis in evidence — that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City."

Less than four months after the *Ricci* decision, on October 15, Briscoe who was one of the unsuccessful minority candidates in *Ricci*, sued the City alleging in his complaint that the oral portion of the exam is a better method to assess managerial and leadership skills and would have less disparate impact on African Americans. He further alleged that the norm among public safety agencies is to weigh the oral component of the exam at 70 percent. The top 13 ranked candidates from the 2003 written exam were all white, and none of them scored well on the oral exam. Briscoe contends that if the oral exam had comprised of 70 percent of the overall score, he would have ranked fourth overall and there would be three African Americans among the top 12 candidates.

This lawsuit, which is presently being litigated in the federal district court in Connecticut, is an early "fallout" from the *Ricci* case decision. We will keep you advised.

Briscoe v. New Haven (D. Conn. Oct. 15, 2009) Case No. 3:09cv1642.

■ DISABILITY DISCRIMINATION

Employee Did Not Have Claim Against Her Employer For An Alleged Failure To Accommodate Her Before She Advised Her Employer Of The Specific Accommodation She Needed.

In order for an employee to establish a claim under the Americans with Disabilities Act (ADA) for her employer's failure to accommodate a disability, an employee must present evidence showing that she attempted to engage in an interactive communication process with the employer to determine a reasonable accommodation, and that the employer was responsible for any breakdown that occurred in that process. When there is a communication breakdown, a court will isolate the cause of the breakdown and then assign responsibility. Courts have found that mentally disabled employees must make their employers aware of any non-obvious, medically necessary accommodations with corroborating evidence such as a doctor's note, or at least a verbal report from a doctor, before an employer may be required under the ADA's reasonableness standard to provide a specific accommodation the employee requests.

Renae Ekstrand successfully taught at Somerset Elementary School for the Somerset School District for several years. In 2005-2006, based on Ekstrand's request, the District changed her assignment from teaching kindergarten to first grade. The school reassigned her to a first-grade classroom with no exterior windows. Ekstrand told the principal that she had seasonal affective disorder, a form of depression, and would have difficulty working in a room without natural light. She requested to transfer to a classroom with natural light several times prior to, and during the first several weeks of the school year. Although there were two alternate rooms with exterior windows available, the District did not change Ekstrand's classroom.

Ekstrand identified the lack of natural light as an issue that would impair her ability to function, but soon identified other issues that exacerbated her depression, such as noise distractions from the adjacent common area, inadequate ventilation, and the untimely manner in

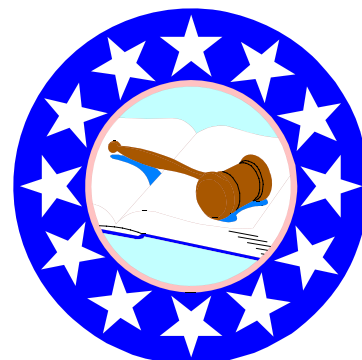
which the District installed various educational necessities, such as bulletin boards, a map, a desk, and a locking cabinet. The District worked with Ekstrand to fix these issues but did not reassign her to a different classroom.

After the school year started, Ekstrand began experiencing fatigue, anxiety and other symptoms of depression. On October 17, she sought medical attention and went on a leave of absence for three months. While on leave, she twice requested a room switch. Her depression worsened and she was unable to return to the District for the remainder of the school year and the following school year.

Ekstrand sued the District for failing to accommodate her in violation of the ADA. The district court granted summary judgment in favor of the District. The Seventh Circuit Court of Appeals reversed in part and affirmed in part.

The Seventh Circuit found that the District was aware of Ekstrand's disability, but was not aware that natural light was a necessary treatment for seasonal affective disorder until November 28, 2005, when Ekstrand's psychologist advised the District that natural light was the key to her improvement. Thus, the District could not be liable for failing to reasonably accommodate Ekstrand prior to November 28, when the District responded to her other requests for accommodation but not her request for a different classroom. However, the District could be liable for its alleged failure to accommodate her after November 28, when the District was made aware of her need for that particular accommodation.

Ekstrand v. School District of Somerset (7th Cir. 2009) 583 F.3d 972.



■ PREGNANCY DISCRIMINATION

Court Overturns Jury Award For Pregnancy Discrimination Because Of Trial Court's Erroneous Jury Instruction.

In October 2004, the City of Santa Monica hired Wynona Harris as a bus driver trainee. Shortly into her 40-day training period, she was involved in a "preventable" accident. The City's guidelines state that preventable accidents are an indication of unsafe driving and those who drive in an unsafe manner will not pass probation. In mid-November 2004, Harris successfully completed her training period, and the City promoted her to the position of probationary part-time bus driver. As a probationary driver, Harris was an at-will employee. During her three month probation period, Harris had a second preventable accident.

On February 18, Harris reported late to work and consequently earned her first "miss-out." A miss-out occurs when an employee fails to give her supervisor at least one hour's notice that he or she will not be reporting for his or her assigned shift. Each miss-out or late report incurs 25 demerit points. Harris' supervisor testified that a probationary employee faces termination if he or she accumulates 50 demerit points in any rolling 90-day period. On March 1, Harris received a performance evaluation with an overall performance rating of "further development needed." Her supervisor allegedly told her that her rating would have been "demonstrates quality performance" but for the accidents. The evaluation also says "Keep up the great job!" under "goals to work on during the next review period." On April 27, Harris incurred a second miss-out. In early May, the Transit Services Manager told the Assistant Director that Harris was not meeting the City's standards for continued employment because she had two miss-outs, two preventable accidents, and had been evaluated as "further development needed."

About one week later, Harris walked by supervisor George Reynoso. Reynoso told Harris to tuck in her shirt because it was hanging loose, and Harris told Reynoso that she was pregnant.

Reynoso then asked her to get a doctor's note clearing her to continue to work. A few days later, Reynoso attended a meeting and received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list, and she was subsequently terminated.

Harris sued the City alleging sex discrimination and that the City terminated her because of her pregnancy. At trial, the City asked the Court to instruct the jury on the City's "mixed-motives" defense. Under the mixed motives defense, even if the employer's action was motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish that its legitimate reason, standing alone, would have induced it to make the same decision. Although there was substantial evidence of Harris' deficient performance which, standing alone, lawfully permitted the City to discharge her, the trial court refused to issue the mixed-motives jury instruction, and the jury returned a verdict in favor of Harris. The trial court denied the City's motion for judgment notwithstanding the verdict and a new trial. The California Court of Appeal reversed the trial court, set aside the jury verdict, and remanded the case for a new trial.

The Court found that the trial court's refusal to issue the mixed-motives jury instruction was erroneous and prevented the City from establishing that it would have terminated Harris for legitimate reasons alone, notwithstanding discrimination. Before learning of Harris' pregnancy, the City had documented five performance issues: two preventable accidents, two miss-outs, and a performance evaluation warning "further development needed." As an at-will employee, the City could have terminated Harris for any of these five issues. By failing to instruct the jury on the mixed-motives defense, the court denied the City a complete defense had the jury found that the City would have terminated Harris for performance reasons even if she had not been pregnant. The jury was improperly instructed that if it found that Harris' pregnancy was a motivating factor, the City was liable for discrimination.

Harris v. City of Santa Monica (2009) 101 Cal.Rptr.3d 61.

Note:

On November 30, the California Court of Appeal granted rehearing on this case. While the Court re-hears the case, this opinion cannot be cited as legal precedent.

SEXUAL HARASSMENT

Supervisor's Outrageous Sexual Harassment Constituted Constructive Discharge Of Female Employee, And Entitled Employee To Damages.

Brooke Anderson began working as the front office manager for Artifer U.S.A. in late December 2006. Her supervisor was Ramez Suliman. Suliman routinely made sexually explicit comments to Anderson about one of the company's female salespersons. Suliman persistently commented about how "beautiful and hot" Anderson looked despite her objections. In addition, he installed a webcam on Anderson's computer pointed at her chest. Every time she removed the camera, he would put it back so it would face her chest.

Suliman gave Anderson unwelcome gifts, like money to buy "sexier" clothes and a bottle of wine so she and her husband would have sex. Suliman went to Anderson's home, said she looked good and grabbed her toward him. When Anderson's husband was out of town, Suliman called Anderson, tried to get her to meet him, and sexually propositioned her. The next work day, he told Anderson that he was really pissed at her and that after he got off the phone with her the day before, he had to have sex with another woman in order to stop thinking about Anderson. After Anderson walked away, she heard Suliman violently pull an office door frame off its hinges and the door splintered. Anderson left work and never returned. Suliman subsequently left her over a dozen angry voicemail messages.

Anderson filed a charge with the Department of Fair Employment and Housing (DFEH) for sexual harassment, sex discrimination, and failure to prevent harassment. After an evidentiary hearing, the DFEH ordered the Company and Suliman to pay Anderson over \$60,000 in

damages and imposed an administrative fine of \$25,000.

The DFEH found an abundance of evidence that Suliman sexually harassed and discriminated against Anderson. This unlawful conduct included frequent comments about Anderson's personal appearance and insinuations about her sex life with her husband. Suliman also gave Anderson unwanted gifts to buy sexier clothing and to enhance her sex life. Moreover, Suliman's sexual conduct included unwanted physical grabbing and sexual propositions. As a result of Suliman's conduct, Anderson was anxious, nervous, and frightened.

To establish constructive discharge, the employer must either intentionally create or knowingly permit working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. Here Anderson was constructively discharged as a result of Suliman's verbal assaults, physical grabbing, sexually explicit telephone calls and comments, and violent reaction. Suliman created working conditions so intolerable that a reasonable person in Anderson's situation would have no option other than to resign.

The Company failed to take all reasonable steps to prevent sexual harassment because it failed to provide a copy of its anti-discrimination and anti-harassment policy to Anderson, and failed to post the FEHA-mandated notices advising its employees of their rights and responsibilities concerning complaints of discrimination or harassment. Moreover, the Company and Suliman never undertook training in sexual harassment or discrimination prevention, nor trained their employees.

Dept. Fair Empl. & Hous. v. Artifer U.S.A. (Sept. 30 2009) No. 09-05-P, FEHC Precedential Decs. ____, CEB ____, p. ____.)



Note:

The last paragraph makes clear that here the employer failed to take any of the requisite steps to avoid, and to promptly address, sexual harassment in the workplace. The result would likely have been different had the employer's policies and actions been otherwise.

LABOR RELATIONS

Public Employment Relations Board Dismisses Union's Claim That Its Acceptance Of The City's Last, Best And Final Offer Resulted In A Binding Agreement.

In the spring of 2007, the City of Clovis and Operating Engineers Local 3 (Clovis Public Works Employees Affiliation) were negotiating a wage re-opener in their Memorandum of Understanding. They were unable to reach agreement. In July the City made its last, best and final offer of 3%. The Union rejected the offer, and declared impasse. The parties went to mediation, but were unable to resolve the impasse. In September the Union advised the City that the Union membership had voted down the City's proposal. The Union also filed an unfair labor practice charge against the City alleging bad faith bargaining.

The City took no further action and advised the Union that it considered the wage re-opener negotiations concluded. In February, 2008, the Union sent a message to the City proposing that if the City implemented its last offer, the Union would dismiss its unfair practice charge. The City did not accept what it considered to be an offer to settle the unfair practice charge.

The PERB's hearing officer (ALJ) concluded that the Union's message constituted an acceptance of the City's last, best offer, and that it resulted in a binding agreement. The ALJ found that the City's failure to implement the offer constituted an unfair labor practice. The City appealed the ALJ's decision to the Board, which reversed his decision.

The Board pointed out that Meyers-Milias-Brown Act (MMBA) Section 3505.4 does not mandate an agency to implement its last, best and final offer. The Board determined that the facts did not evidence an unconditional acceptance of the City's offer by the Union. Further, the Board concluded that inasmuch as under MMBA Section 3505.1 an agreement to be binding must be in writing and adopted by the City Council, there could be no binding agreement. The Board therefore dismissed the Union's unfair practice charge.

Operating Engineers Local 3 v. City of Clovis (2009), PERB Decision No. 2074-M.

Note:

Under the MMBA, after good faith negotiations and exhaustion of any required impasse procedures, an agency has three options: it may withdraw its last best offer or do so by a stated date if not accepted by the union; or it may leave the offer on the table, with the legislative body taking no action; or the legislative body may unilaterally implement the last, best and final offer by amending the appropriate ordinances, resolutions and rules, in which case there is no agreement. Assuming that the union does not accept the offer, MMBA Section 3505.4 reserves to the union the right to request negotiations for the following fiscal year.

PERS RETIREMENT

In Three Agencies CalPERS Reverses Decisions To Reduce Retiree Benefits.

Steve Berliner, of our Los Angeles Office, successfully appealed three different decisions by CalPERS reducing the retirement benefits of retirees at three agencies. In all three matters, CalPERS reversed its decision in response to the written appeals, and no hearing or further litigation was required.

In the first two, CalPERS reduced the reported final compensation by approximately \$2,000 and \$3,000 per month respectively. This

decrease would result in reductions of retirement benefits of similar amounts. CalPERS had determined that the excluded compensation was "final settlement pay", which are payments made in excess of regular pay given in contemplation of a separation from employment, such as a planned retirement. The employers both filed written appeals with CalPERS and requested formal hearings, arguing that the definition of final settlement pay was not met under either set of facts. In response, CalPERS reversed its decisions, provided the relief requested and did not require a hearing.

In the third matter, CalPERS reduced the final compensation of a non-safety employee by 5% (the amount of a recent pay increase), asserting that the 5% represented an excluded conversion to compensation of non-reportable benefits. The key factor in CalPERS' initial decision was that the resolution granting the increase indicated that it was given in lieu of the benefit, which was simultaneously eliminated. The employer argued that the benefit that was eliminated was permanently eliminated, not just for a limited period of time, and therefore, was not a conversion of an excluded benefit. As in the previous two matters, CalPERS agreed with the legal arguments in the employer's appeal and reversed its decision without requiring a hearing.

■ REQUIRED EEOC POSTING

Employers Must Post The EEOC's New Workplace Poster.

The Equal Employment Opportunity Commission has revised and published the workplace notice that employers covered by federal anti-discrimination laws must post. The new notice includes requirements set forth by the new Genetic Information Nondiscrimination Act and the ADA Amendments Act.

The EEOC states that to comply with the posting requirements under the federal civil rights laws, employers can download and print an "EEO is the Law" poster supplement, provided on the EEOC's website, and post that document alongside the EEOC's September 2002 edition of the poster. In the alternative, employers can

download, print, and post the November 2009 version of the EEOC poster.

Employers can print the "EEO is the Law" supplement at:
http://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf

Employers can print the November 2009 edition of the poster at:
http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf

Employers can also order copies of the new posters in English, Spanish, Chinese, and Arabic from the EEOC. Information on ordering posters is available at:
<http://www1.eeoc.gov/employers/poster.cfm>

■ PANDEMIC FLU

Department Of Labor Publishes Frequently Asked Questions Regarding Pandemic Flu And Its Interactions With The Fair Labor Standards Act And The Family And Medical Leave Act.

On November 13, the Department of Labor (DOL) published frequently asked questions (FAQs) regarding the effect of pandemic flu under the Family and Medical Leave Act (FMLA). The FAQs address, among other things, whether an employee can take FMLA leave to care for a family member infected with the flu and whether an employer can require an employee who is showing symptoms of pandemic flu to go home. The DOL encourages employers to review their leave policies and consider providing increased flexibility to their employees and their families.

The DOL also issued FAQs regarding a pandemic flu and the Fair Labor Standards Act (FLSA). The FAQs address such issues as whether an employee can be required to perform work outside of the employee's job description and the option of telecommuting.

A full copy of the DOL's publication "Pandemic Flu and the Family and Medical

Leave Act: Questions and Answers" can be found at:
http://www.dol.gov/whd/healthcare/flu_FMLA.pdf

A full copy of the DOL's publication "Pandemic Flu and the Fair Labor Standards Act: Questions and Answers" can be found at:
http://www.dol.gov/whd/healthcare/flu_FLSA.pdf

■ FAMILY AND MEDICAL LEAVE ACT

Employee Who Retired Was Not Constructively Discharged Where School Officials Made Isolated Comments Suggesting That He Retire Early Due To His Health Problems.

Felix Lara was a custodian/building operator for Unified School District #501 in Kansas. During his last few years of employment, he suffered ill health and took three months of Family and Medical Leave Act (FMLA) leave in 2002 and 15 weeks of leave in March 2004, including 12 weeks of FMLA leave. In September 2004, he suffered an abdominal hernia at work and missed almost three months of work while on workers' compensation leave. On September 24, 2004, Lara sent the District notice of his intent to retire in August 2005.

Lara sued the District for age discrimination and FMLA retaliation. The district court granted summary judgment in favor of the District. The Tenth Circuit Court of Appeals affirmed.

For a discrimination or retaliation claim, a plaintiff must show that he or she was subjected to an adverse action. However, Lara was not terminated by the District, but rather he retired. Lara claims that he was actually discharged based on assertions of undesirable treatment at work. But an actual discharge does not occur when the employee chooses to resign rather than work under undesirable conditions. And to show that he was constructively discharged, Lara would have to show that the District deliberately made or allowed his working conditions

to become so intolerable that the employee has no other choice but to quit.

Lara offered evidence that the principal told him that he was having a streak of bad luck with his health and he hoped it would not continue. The human resources director, Jill Lincoln, also allegedly told him he was "too old" and was "getting on in age" and should consider early retirement because he was missing too much work, having too many medical problems, and costing the District money. Lincoln also told Lara that if he did not opt for retirement, she would transfer him to a District service center. Lara admitted that he did not know what duties he would be assigned at the service center and whether his pay would be effected. The principal also told Lara that he was costing the District quite a bit of money and that, with his health problems, he should retire and enjoy the good life. However, the principal never threatened him. No school official made any retirement-related comments to Lara after September 2004.

The Tenth Circuit found that Lara was not constructively discharged because the school officials made only isolated remarks about Lara's retirement plans, none of which were threatening or harassing. For an employee to be constructively discharged, there must be aggravating factors that make staying on the job intolerable. Although Lara alleges that Lincoln threatened to transfer him if he did not take early retirement, there is no evidence that the transfer would have had any materially adverse consequences on his working conditions. A lateral transfer is not an adverse employment action.

Lara v. Unified School District # 501 (10th Cir. 2009) 2009 WL 3382612.

■ DUE PROCESS

College Administrator Publicly Terminated For Dishonesty Was Entitled To Post-Termination Name-Clearing Hearing.

Douglas Rush was the President of Ozarka College in Arkansas. The Board of Trustees

began questioning Rush's performance when a committee he oversaw made suspicious purchases in violation of state law, and when he failed to follow Board policy and procedure during a nonrenewal of a teacher's contract. The Board questioned Rush about these incidents during two meetings. The press subsequently asked Rush about whether the Board was holding illegal meetings, and Rush responded that he believed the Board had held two illegal meetings.

In closed session, the Board discussed Rush's employment contract and Rush had the opportunity to respond. After the closed session, the Board resumed the open meeting and voted to terminate Rush's contract for dishonesty, insubordination, failure to comply with state laws, and willful disregard of Board policy after being warned that this would not be tolerated. Rush did not ask to speak during the open session. However, a month later he requested a name-clearing hearing and the Board denied the request.

Rush sued the Board members alleging that they retaliated against him for speaking to the press and violated his due process rights. The district court awarded the Board members summary judgment on Rush's First Amendment claim, but denied them qualified immunity on the due process claim because Rush's right to a name-clearing hearing was clearly established. The Eighth Circuit Court of Appeals affirmed.

To establish an unconstitutional liberty interest deprivation, the plaintiff must show that: (1) he was stigmatized by the statements; (2) those statements were made public by the employer; and (3) he denied the stigmatizing statements. Here Rush's employment was terminated in an open session of the Board for alleged misconduct including dishonesty – a stigmatizing charge. Thus, the Board violated his liberty interest.

Nonetheless, a government official is entitled to qualified immunity even if he or she violates an individual's rights if the right is not clearly established so that a reasonable official would not understand that he or she is violating that right. Here, Board members argued that it was objectively reasonable for them to believe that a second hearing was not required because

Rush had an opportunity to respond during closed session. However, a name-clearing hearing must occur at a meaningful time and in a meaningful manner. And Rush did not have an opportunity to respond after the stigmatizing statements were made. In addition, the closed session was not open to the public, so Rush was not given the opportunity to rebut the allegations to everyone who heard them. As Rush had a right to a post-termination name-clearing hearing and that right was clearly established, the Board members were not entitled to qualified immunity.

Rush v. Perryman (8th Cir. 2009) 579 F.3d 908.

■ FIRST AMENDMENT

Test For Public Employee Free Speech Rights Under The California Constitution Is the Same As Under U.S. Constitution.

Michael Kaye was a law librarian with the San Diego County Public Law Library. In March 2006, he wrote a lengthy email to his supervisor, which he copied to his coworkers. In the email, Kaye criticized the management of the library's reference department, including recent schedule changes. He also accused the management of being vindictive and unprofessional. The Library subsequently terminated Kaye for insubordination and serious misconduct.

Kaye submitted a post-termination administrative appeal to the Board of Trustees. A senior deputy from the County Counsel's office then contacted Kaye advising him that his employment was at-will by statute and his only right to appeal was through the Library's grievance procedure. The senior deputy's letter did not comment on the merits of Kaye's discharge. Kaye submitted a grievance and argued his position before the Board at an open session on November 29. The senior deputy attended the open session, but did not comment on or respond to Kaye's arguments. Rather, the Library director responded to Kaye's arguments. The Board deliberated in closed session with the senior deputy present. The Board reconvened in closed session on December 4 and upheld the termination.

Kaye sued the Board and the Library alleging, among other things, that his discharge violated the free speech clause in the California Constitution and that the Board violated the Brown Act. The trial court granted summary adjudication in favor of the library. The California Court of Appeal affirmed.

In *Garcetti v. Ceballos*, the U.S. Supreme Court set forth a two step analysis for public employee free speech cases. First, the court must determine whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment claim. If the answer is yes, then the question becomes whether the government entity had an adequate justification for treating the employee differently from any other member of the general public.

Kaye conceded that if *Garcetti* applies to his claim, his claim fails. But he argued that *Garcetti* should not apply to violations of the California Constitution's free speech clause because it is broader than its federal counterpart. The Court disagreed and found no reason *Garcetti* should not apply, pointing out that California courts routinely follow Supreme Court precedents in addressing public employee free speech matters.

Kaye also argued that the Board violated the Brown Act by using the same attorney who advocated on behalf of the Library to advise the Board in closed session. However, the Brown Act allows the Board to meet in closed session regarding employee discipline or dismissals. Moreover, the Brown Act does not limit whom the Board may choose to advise it when it conducts meetings involving employment matters.

To the extent that Kaye contends that the Board's choice of advisory counsel violated his due process rights, his claim would also fail. There is no evidence that the senior deputy county counsel actually represented the Library. The attorney only spoke to Kaye about the procedural requirements for him to challenge his dismissal and the attorney's actions were consistent with those of a legal adviser to the Board and not an advocate for the Library.

Kaye v. Board of Trustees of the San Diego County Public Law Library (2009) 179 Cal.App.4th 48 [101 Cal.Rptr.3d 456].

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FIRM PROFILE
Jennifer Rosner
Associate

Jennifer has extensive experience defending employers against harassment, discrimination, retaliation, and Section 1983 claims. She also has considerable experience with law enforcement issues, including the Public Safety Officers Procedural Bill of Rights Act, and defending law enforcement agencies in such areas as officer discipline and Pitchess Motion hearings.

Prior to joining Liebert Cassidy Whitmore's Los Angeles office, Jennifer practiced employment, business and general civil litigation. She has experience with managing cases from inception through trial and has served as lead counsel in both Superior and Federal Court cases.

Jennifer earned her Juris Doctorate from Loyola Law School in Los Angeles and her Bachelor of Arts in History from University of California, Los Angeles.

While not practicing law, Jennifer enjoys playing tennis, traveling, reading and spending time with family.



Firm Publications

Steven Berliner and **Camille Townsend** of our Los Angeles office co-authored the article, "New Law Proposes Paid Sick Leave for H1N1 Virus" which appeared in the November 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 "H1N1".

Suzanne Solomon and **Cynthia O'Neill** of our San Francisco office co-authored the article, "Employment Testing: Avoiding the Pitfalls of *Ricci v. Destefano*" which appeared in the November 2009 issue of the California Public Employee Relations Journal (CPER). The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "Ricci".

Conference Brochure and Online Registration Now Available



Join us February 25 & 26, 2010, in historic San Francisco, CA for the **12th Annual LCW Public Sector Employment Law Conference**.

The 2010 conference will be at the Hyatt Regency San Francisco located on the Embarcadero waterfront which overlooks San Francisco Bay.

Conference registration is now available online at www.lcwlegal.com.
To make your hotel reservations online: <https://resweb.passkey.com/go/LCWL2>

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The Briefing Room is a publication that discusses law enforcement issues that may impact your agency. The publication is distributed by Liebert Cassidy Whitmore and is available to law enforcement agencies. If you know someone who would benefit from this publication, it would be our pleasure to add them to the distribution list. Please send their name, agency, address, city, state, zip, phone number, fax number and e-mail address to info@lcwlegal.com.

Clients of Liebert Cassidy Whitmore may receive the newsletter either via surface mail or e-mail. Non-clients may receive it via e-mail.

If you have any questions, call Cynthia Weldon at (310) 981-2000.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Workshop Training

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	"Advanced FLSA" Gateway Public ERC Huntington Park Peter Brown
December 3	"Discipline: Putting It into Practice" Central Valley ERC Clovis Gage Dungy
December 9	"Exercising Your Management Rights" and "Labor and Employment Relations Issues During Lean Economic Times" North State ERC Red Bluff Richard Whitmore
December 9	"Disaster Service Workers - If You Call Them, Will They Come" and "Prevention and Control of Absenteeism and Abuse of Leave" Bay Area Community College Districts (CCDs) ERC Pleasanton Jack Hughes
December 10	"An Employment Relations Primer for Community College District Administrators and Supervisors" Southern CA CCDs ERC Lancaster Michael Blacher
December 11	"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment" and "Reductions in Staffing" 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	"Handling Grievances" and "Prevention and Control of Absenteeism and Abuse of Leave" Imperial Valley ERC El Centro Mark Meyerhoff
January 13	"Public Sector Employment Law Update" and "Exercising Your Management Rights" San Joaquin Valley ERC Oakdale Richard Whitmore
January 13	"Leaves, Leaves and More Leaves" and "Advanced FLSA" San Gabriel Valley ERC Alhambra Peter Brown
January 14	"Handling Grievances" LA County Management Attorneys (LACMA) Consortium Los Angeles Peter Brown
January 14	"Embracing Diversity" and "12 Steps to Avoiding Liability" Napa/Solano/Yolo ERC Vacaville Cynthia O'Neill
January 14	"Discipline: Putting It into Practice" West Inland Empire ERC Upland James Oldendorph and Mark Meyerhoff
January 15	"Creating a Culture of Respect" and "Hiring the EEO Way" Southern CA CCDs ERC Mission Viejo Laura Schulkind

January 15	"Employee Due Process Rights and 'Skelly:' A Guide to Implementing Classified Employee Discipline" and "Managing Performance Through Evaluation" Central Coast Personnel Council (CCPC) Santa Barbara Pilar Morin
January 15	"Annual Review of Your School's Employment Handbook and Rules" Bay Area Jewish Schools (BAJS) Consortium Palo Alto Donna Williamson
January 20	"Checking References: The Most Important Part of the Hiring Process" Gold Country ERC Webinar Kelly Tuffo
January 20	"Supervisory Skills for the First Line Supervisor/Manager" Central Valley ERC Hanford Frances Rogers
January 21	"Performance Management: Evaluation, Documentation and Discipline" and "Public Sector Employment Law Update" South Bay ERC Gardena Melanie Poturica
January 27	"A Guide to Labor Negotiations" North State ERC Chico Jack Hughes
January 29	"California Code of Regulations: Education Code and Title V" and "Sick and Disabled Employees" Central CA CCD ERC Bakersfield Peter Brown

Customized Training Presentations

December 1	"Preventing Harassment, Discrimination and Retaliation in the Independent School Environment" Crossroads School Santa Monica Michael Blacher
December 1, 7	"Ethics in Public Service" and "Preventing Workplace Harassment, Discrimination and Retaliation" City of Carlsbad Donna Evans
December 1	"Legal Issues Update" Orange County Probation Department Santa Ana Scott Tiedemann
December 2	"Preventing Workplace Harassment, Discrimination and Retaliation" Cloverdale Fire District Cloverdale Jack Hughes
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 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	"Harassment, Discrimination, Retaliation, Gender Diversity and POBR" Imperial County El Centro Mark Meyerhoff and Laura Kalty
December 7	"Preventing Workplace Harassment, Discrimination and Retaliation" Bay Area Air Quality Management District San Francisco Laura Schulkind
December 8	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Montclair Donna Evans

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	"Maximizing Performance Through Evaluations for K-12 Districts" Carpinteria Unified School District Carpinteria Mary Dowell
December 9	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Gage Dungy
December 9	"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment" Reedley College Reedley Scott Tiedemann
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	"Preventing Workplace Harassment, Discrimination and Retaliation" Mariposa County Mariposa Gage Dungy
December 14	"Ethics" Chabot-Las Positas Community College District Pleasanton 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 16	"Preventing Workplace Harassment, Discrimination and Retaliation" Point 360 Burbank Mark Meyerhoff
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
January 5	"Managing the Marginal Employee" and "12 Steps to Avoiding Liability" County of Sonoma Santa Rosa Jack Hughes
January 6	"Disability Interactive Process" and "Conducting Investigations" County of Sonoma Santa Rosa Jack Hughes
January 14	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Livingston Gage Dungy
January 19	"Workplace Security" and "FLSA" County of Sonoma Santa Rosa Jack Hughes
January 20	"Preventing Workplace Harassment, Discrimination and Retaliation" Fresno County Employment Opportunity Commission Fresno Shelline Bennett
January 26	"Managing the Marginal Employee" County of Ventura, Human Services Agency Ventura Donna Evans
January 26	"Labor & Employment Relations Issues During Lean Economic Times" Employer Risk Management Association Ontario Donna Evans

January 27 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of South Pasadena | Laura Kalty

January 28 **"Conflict of Interest" and "Ethics in Public Service"**
City of Beverly Hills | Donna Evans

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.

December 2 **"Retiree Pension and Health Benefits"**
Association of California Water Agencies (ACWA) Fall Conference | San Diego | Steven Berliner

December 2 **"Understanding Special Education Law"**
California School Boards Association (CSBA) Annual Conference | San Diego | Laura Schulkind

December 3 **"Retirement Issues"**
Sacramento Valley Division City Managers Meeting | Yuba City | Cepideh Roufougar

December 3 **"Fire Chiefs Legal Update"**
League of California Cities Fire Chiefs Leadership Seminar | Monterey | Todd Simonson

December 3 **"Student Free Speech and the Internet"**
CSBA Annual Conference | San Diego | Pilar Morin

December 3 **"Student Issues and Discipline Panel: Supreme Court Decisions and Employee Free Speech Issues"**
California Council of School Attorneys (CCSA) | San Diego | Laura Schulkind

December 3, 4 **"Legal Issues Schools Face with Families in Crisis"**
CSBA Association Annual Conference | San Diego | Judith Islas

December 4 **"Charter School Update"**
CCSA | San Diego | Donna Williamson

December 4 **"Green Construction"**
CCSA | San Diego | Rachel Gardunio

December 4 **"Student Free Speech and the Internet"**
CSBA Annual Conference | San Diego | Michael Blacher

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

January 12 **"The Top 10 Pointers on Conducting an Effective Investigation"**
Professionals in Human Resources Association (PIHRA) Annual Legal Update | Garden Grove | Laura Kalty

January 13 **"How Do Schools Avoid Practices Which Can Be Considered Collusion"**
Bureau of Jewish Education Heads of Day School Meeting | Encino | Michael Blacher

January 13 **"The Top 10 Pointers on Conducting an Effective Investigation"**
PIHRA Annual Legal Update | Ontario | Laura Kalty

January 14	"Substance Abuse for Attorneys" Greater Inland Empire Municipal Lawyers Association Meeting TBD Melanie Poturica
January 14	"The Top 10 Pointers on Conducting an Effective Investigation" PIHRA Annual Legal Update Universal City Laura Kalty
January 21	"Public Sector Employment Law Update" International Public Management Association - Human Resources (IPMA-HR) Chapter Meeting Encinitas Richard Whitmore
January 23	"Wage and Hour Issues for Heads of School and Board Members" California Association of Independent Schools (CAIS) Trustee/School Head Conference San Francisco Brian Walter and Donna Williamson
January 23	"Annual Legal Update for California Independent Schools" CAIS Trustee/School Head Conference San Francisco Michael Blacher, Melanie Poturica
January 27	"Public Sector Employment Law Update" IPMA-HR Mother Lode Chapter Roseville Richard Whitmore
January 28	"Labor Relations" National Public Employer Labor Relations Association (NPELRA) Academy II Phoenix Donna Williamson
January 28	"Public Sector Employment Law Update" Redwood Empire Municipal Insurance Fund Rohnert Park Richard Whitmore
January 28	"Crisis Management: How to Approach Chaos in an Organized and Thoughtful Manner" Independent School Business Officer and Administration Seminar Los Angeles Michael Blacher and Melanie Poturica
January 29	"Labor and Employment Issues in Lean Economic Times" Northern California Municipal Human Resources Management Group Conference Napa Richard Whitmore



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