

THE BRIEFING ROOM

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

October 2009

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THE BRIEFING ROOM

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PUBLIC SAFETY OFFICERS PROCEDURAL BILL OF RIGHTS ACT

Officers Who Unsuccessfully Argued That A Perjured Statement Was Used To Terminate Them Could Not Later Assert A Claim For Damages Based On The Same Rejected Argument.

On February 2, 2002, Los Angeles Police Department Officers Andrew Buesa and Michael Cardenas arrested a suspect following a car and foot chase. The same day, the LAPD learned that the officers may have engaged in misconduct arising from the arrest. LAPD Sergeant Joe Losorelli began an internal affairs investigation into the misconduct. On August 15, 2002, Losorelli met with a deputy district attorney to determine whether criminal charges would be filed against the officers based on the February 2002 incident. On October 2, 2002, Losorelli provided the deputy district attorney a copy of his investigation and witness statements, and the same day, the district attorney's office opened its criminal investigation.

On December 2, 2002, Losorelli asked his superiors to toll the one-year statute of limitations against the officers because of the pending criminal investigation. He asked that the period be tolled from his August 15, 2002 meeting until the conclusion of the criminal investigation. The criminal investigation concluded on February 11, 2003, when the deputy district attorney decided not to seek a grand jury indictment. The LAPD filed personnel complaints against the officers on August 3, 2003 based on the February 2002 misconduct. LAPD ultimately terminated the officers. The officers filed a petition for writ of mandate seeking review of their terminations. The trial court denied the petition, finding that the investigation was tolled from July 31, 2002 when Losorelli met with the deputy district attorney until February 11, 2003. The officers did not appeal the trial court's ruling.

However, the officers filed a separate lawsuit under the Public Safety Officers Procedural Bill of Rights Act (POBR). They claimed that Losorelli furnished a false declaration regarding tolling, which LAPD then used in responding to the earlier petition. Specifically, they claimed that Losorelli intentionally testified falsely that the investigation against the officers was considered a criminal investigation beginning February 2, 2002. He also allegedly lied about presenting the case to the deputy district attorney on July 31, 2002, when the meeting actually took place on August 15, 2002, in order to extend the tolling period. In the POBR lawsuit, the officers

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For more information please see the full article on page 17.

were claiming damages such as lost pay and emotional distress, but not reinstatement. The trial court granted LAPD's motion for judgment on the pleadings. The California Court of Appeal affirmed.

The principal issue was whether the officers' POBR action for damages was barred by the final judgment following the trial court's denial of the officers' petition for writ of mandate. A final judgment will not be vacated merely because it was obtained by forged documents or perjured testimony because the public has an interest in finality in judgments. Thus, the Court found that the officers could not circumvent the final judgment on their petition for writ of mandate even if the petition was denied because of perjured testimony.

Because the tolling issue was actually litigated in the trial court's mandate proceeding, the officers cannot bring a new claim based on the allegedly perjured declaration as a collateral attack on the mandate decision. And the officers are precluded from bringing a separate action based on the perjured testimony.

Buesa v. City of Los Angeles (2009) ___ Cal.App.4th ___ [2009 WL 3153197].

PEACE OFFICER PERSONNEL RECORDS

Criminal Defendant's Pitchess Motion Was Properly Denied Where The Allegations Made In Support Of The Motion Were Inconsistent With The Defendant's Prior Interview Statements.

On March 25, 2007, Officers Meilleur and Barnes saw a pickup truck speeding. Rafael Galan, the driver, refused to pull over and a pursuit ensued. During the pursuit, Galan suddenly stopped, shifted into reverse, and quickly began backing toward the officers who were riding motorcycles. The officers had to swerve to avoid being struck by the truck. Then Galan started driving away again. The officers followed him and Galan again stopped, shifted into reverse, and began backing toward the officers so they had to swerve to avoid being hit. This

happened several times until Galan drove into a dead end and was arrested.

Sergeant Kirk interrogated Galan and Galan admitted that during the pursuit he had stopped his vehicle on two occasions, placed the vehicle in reverse, and backed in the officers' direction. He said that he did not intend to strike the officers with his vehicle, but he did come within close proximity of both motorcycle officers. Galan was later convicted of various crimes, including assault with a deadly weapon.

In his appeal of the convictions, Galan filed a Pitchess motion for complaints against the officers. He asserted that such complaints were material to showing that the officers fabricated the arrest report by falsely stating that he drove his vehicle in such a manner that it caused both of them to take evasive action on their motorcycles. The trial court denied the Pitchess motion. The California Court of Appeal affirmed.

On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. Here the Court found that Galan could not make such a showing because the factual scenario was internally inconsistent with his prior statement. During his interrogation, he admitted that he had stopped his car and backed into the officers' direction and came within close proximity of both officers. In light of this statement, it was not plausible that he was merely trying to get away from the officers and not trying to strike them with his truck. No reasonable person trying to evade arrest would twice stop, shift into reverse, and back his vehicle toward pursuing police officers and come within close proximity of the officers.

People v. Galan (2009) ___ Cal.App.4th ___ [2009 WL 3166506].



QUALIFIED IMMUNITY

Officer Not Entitled To Qualified Immunity Where He Provided A Coerced Statement To Prosecutor For Use In Criminal Case Against Minor.

Nicki Johnson contacted the City of Everett Police Department in Washington to report that her four year old daughter, A.B., had been sexually abused by an acquaintance Paul Stoot II. Officer Margaret Anders briefly interviewed A.B. and A.B. said that Paul had touched her genitals and pulled his penis out and put it on her. According to Nicki, A.B. had indicated that this had happened five times in the summer of 2002 while A.B. was living with the Stoot family. Paul was the 14 year old son of Paul Stoot. Anders prepared a report and the case was assigned to Detective Jonathan Jensen the next day. Jensen interviewed A.B.. Her answers were at times confused and/or contradictory. For example, when Jensen asked if Paul's penis had touched her face, A.B. responded no. But when Jensen asked if she had touched his "poo poo" (penis), she said no and then started talking about a boy named Preston. Then she said that Preston had put his penis in her genitals.

Jensen went to Paul's school and interviewed him without his parents present. Jensen explained Paul's rights to him and he signed a form indicating that he understood his rights and was willing to talk to Jensen. Jensen interviewed Paul for close to two hours. After Paul denied any wrongdoing 13 times, he eventually confessed. Paul then prepared a written statement consistent with his confession.

The prosecutor filed an Information charging Paul with child molestation. The superior court later found that the confession was inadmissible because Paul was incapable of waiving his rights due to his age, experience, background, and intelligence. The court also found that the confession was unlawfully coerced. The court dismissed the charges.

The Stoot family sued Jensen and the City under Section 1983 asserting various federal claims. The district court granted summary judgment in favor of Jensen on the basis of qualified immunity. The Ninth Circuit Court of Appeals reversed.

The Court found that A.B.'s statements were not sufficiently reliable to establish probable cause to seize Paul. However, the Court found that a reasonable

officer in Jensen's position could have believed that the victim's statements established probable cause. Thus, he was entitled to qualified immunity on the Stoots' Fourth Amendment claim.

Paul's confession was coerced in violation of the Fifth Amendment. And Jensen was not entitled to qualified immunity on the Fifth Amendment claim because, at the time of the interrogation, Jensen was on notice under clearly established law that if he failed to provide Paul with appropriate *Miranda* warnings or physically or psychologically coerced a statement from Paul, the use of the confession could result in a Fifth Amendment violation.

Stoot v. City of Everett (9th Cir. 2009) ___ F.3d ___ [2009 WL 2973229].

Public Officials Who Engaged In Plan To Replace White Managers With African-American Managers Were Not Entitled To Qualified Immunity.

Vernon Jones, who is African-American, was elected to be the Chief Executive Officer of DeKalb County, Georgia. Jones publicly announced his plan to have more African-American County administrators. To accomplish this goal, Jones and his administration implemented an aggressive restructuring program, focusing on the County's Parks and Recreation Department.

Becky Kelley, a white female, was the Director of the Parks Department. Jones made continuing efforts to limit her responsibilities. He forced her to hire a less qualified African-American applicant, Marilyn Drew, instead of a white applicant for a deputy director position. After Drew was hired, Jones demoted Kelley to a position with virtually no responsibilities. Meanwhile, Jones promoted Drew to Kelley's position. Kelley ultimately resigned.

Once Drew became director, she openly treated Michael Bryant, a white male deputy director, differently from black employees. She excluded Bryant from meetings and declined to allow him input into matters for which he was responsible, while seeking increased input from African-American managers. Drew also failed to provide him adequate support staff and equipment to perform his job. Finally, Drew required white managers to make appointments to speak with her,

while she maintained an open door policy for African-American managers.

Jones precluded John Drake, a white male assistant director, from applying for the director position. Drew then undermined Drake's authority with the deputy directors, removed many of his job responsibilities, and excluded him from having any input into the Department's operations.

Finally, Herbert Lowe, an African-American, was the Deputy Director of Strategic Management and Development. He refused to participate in the Jones administration's plan to eliminate the white managers and replace them with African Americans. Consequently, Jones moved Lowe's office to Jones' executive suite. Drew then hired Marvin Billups, an African American as the Deputy Director of Strategic Management and Development - the same position as Lowe. Drew later named Billups Deputy Director of Recreation Services, but Billups performed the same duties as when he was the Deputy Director of Strategic Management and Development. Jones' executive assistant, Richard Stogner, then drafted a 2004 budget proposal eliminating Lowe's position. Jones and the Board of Commissioners later approved the budget. Lowe resigned instead of accepting a lower paying position.

Kelley, Bryant, and Drake sued the County, Jones, Drew, and Stogner for race discrimination in violation of Section 1981 and the Equal Protection Clause. The district court refused to grant the defendants qualified immunity and refused to grant legislative immunity to Stogner. The Eleventh Circuit Court of Appeals affirmed the ruling refusing to grant qualified immunity, but reversed the ruling denying legislative immunity to Stogner.

A public official is not entitled to qualified immunity if he or she violated a constitutional right and the constitutional right was clearly established. The Court found that Kelley, Bryant, and Drake could each establish that the defendants created a hostile work environment in violation of their constitutional rights. The harassing behavior they endured was sufficiently severe or pervasive to alter the conditions of their employment. The defendants were not entitled to qualified immunity because reasonable officials would have known that discriminating against county managers based on their race was unlawful.

However, the Eleventh Circuit found that Stogner was entitled to absolute legislative immunity for

drafting the budget proposal that eliminated Lowe's position. Although Stogner was not himself a legislator, the immunity is justified and defined by the functions it protects and serves, and not by the person. The elimination of a public employment position is a legislative act. Consequently, regardless of Stogner's motives, he was entitled to legislative immunity with respect to the development of the 2004 budget.

Bryant v. Jones (11th Cir. 2009) 575 F.3d 1281.

Managers Who Transferred Employee After He Testified In Favor Of An Inmate At A Parole Hearing Did Not Violate A Clearly Established Employee Right.

In 2002, Ronald Matrisciano was promoted to Assistant Deputy Director of the Illinois Department of Corrections (IDOC). Prior to his promotion, he was responsible for ensuring that inmate Harry Aleman was safely transferred from the federal prison system to the Joliet IDOC facility in 2000. Aleman had previously been acquitted of murder charges, but it was later discovered that he had bribed the judge presiding over his murder trial. Aleman was retried and convicted for murder and sentenced to 100 to 300 years in prison. Aleman was housed for six months after his transfer. During that time, Matrisciano visited the Joliet facility two or three times a month to address inmates' concerns regarding the facility, and he met with Aleman during those visits.

In 2002, Aleman and his family asked Matrisciano to speak at a parole hearing before the Prisoner Review Board on Aleman's behalf. Matrisciano told the IDOC Director and Associate Director of his intent to testify at a Prisoner Review Board hearing. Matrisciano used a personal day to testify before the Board. Although he said he was not at the hearing in his capacity as Assistant Deputy Director, he said his testimony was based on his professional opinion, and he signed a prepared statement with his title. A few days later, the Director said that Matrisciano had "screwed up" and ordered that he be transferred to oversee the final construction phases of a new facility. Matrisciano's job title and salary remained the same, but his duties and responsibilities changed.

Matrisciano sued the Director and the Associate Director for First Amendment retaliation. The district court granted summary judgment in favor of the defendants. The Seventh Circuit Court of Appeals affirmed, finding that they were entitled to qualified immunity.

To determine if a government official is entitled to qualified immunity, the court considers: (1) whether a constitutional right had been violated, and (2) whether the right was clearly established at the time of the alleged violation. The Court here found that the individual defendants did not violate a clearly established right.

A policy making employee can be discharged when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies. But here, although Matrisciano was a policy maker, his speech did not criticize his superiors, the IDOC, or any of the IDOC's policies.

For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Aleman was an infamous prisoner and Matrisciano voluntarily made his first Prisoner Review Board comments on behalf of Aleman, without any special knowledge of Aleman's daily behavior in custody, such as a prison guard might be able to provide. There are no cases which would put the Director or Associate Director on notice that reassigning Matrisciano for testifying at Aleman's parole review hearing violated a clearly established constitutional right of Matrisciano. As such, they were entitled to qualified immunity.

Matrisciano v. Randle (7th Cir. 2009) 569 F.3d 723.

LABOR RELATIONS

PERB Grants City's Request To Seek Injunctive Relief And Court Grants Order Enjoining City's Essential Employees From Striking.

In proceedings in which **Adrianna E. Guzman** of our San Francisco office represented the City of Palo Alto, working with the City Attorney's office, the City obtained injunctive relief to enjoin essential

employees in its general bargaining unit, represented by SEIU Local 521, from striking.

In August 2009, employees represented by Local 521 authorized a strike. To ensure the City's ability to continue to provide essential public services to the public should a strike occur, the City sought Local 521's agreement that employees identified by the City as holding positions essential to public health and safety would not participate in the strike. Local 521 declined the City's request.

In early September, the City learned that its general employees were planning a "sick-out" for the day after Labor Day. The City asked Local 521 to renounce the "sick-out" and encourage the employees to return to work as the parties were still negotiating. Local 521 declined this request as well. Consequently, on September 8, approximately 25% of the employees in the general bargaining unit called in sick. The City then learned that employees were planning a "walk-out" on September 10. Again, the City asked Local 521 to renounce the "walk-out", and again Local 521 declined to do so. On September 10, employees delayed returning from lunch to participate in a rally led by Local 521.

When the City then began hearing rumors that a strike was imminent, it filed a Request for Injunctive Relief and an Unfair Practice Charge with the Public Employment Relations Board. In its request, the City argued that it had received information that Local 521 was planning to strike despite the fact that the parties were still negotiating and neither side had declared impasse, and that such a strike would be unlawful. The City also argued that even if the strike was not unlawful as to most employees, a strike by employees holding certain critical positions would still be unlawful because it would pose a direct and imminent threat to public health and safety. The City asked PERB to grant its request, and seek an order for injunctive relief.

On September 22, PERB granted the City's request for injunctive relief as to the essential employees, and issued a Complaint against Local 521. That same day, Local 521 held a press conference in which it announced that employees would take a "self-imposed furlough" day on September 24 to perform volunteer work in the community. On September 23, PERB went before Santa Clara Superior Court in San Jose to request a temporary restraining order (TRO) and order to show cause (OSC) for a preliminary injunction. Although the Court did not give leave for the City to intervene in

the proceeding as the real party in interest, the Court did hear from the City on various points during the hearing. After the City reduced its list of essential employees from 108 to 99, the Court issued a TRO/OSC as to all 99 employees, enjoining them from striking or engaging in any other work stoppage up through October 13, 2009, the date of the hearing on the preliminary injunctive relief request.

Note:

The law provides that if a union has participated in good faith negotiations, and any required impasse procedures, it may then, under the California Supreme Court's 1985 decision in the County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Ass'n. case, engage in a strike to the extent that such a strike does not pose a "substantial and imminent threat to the public health or safety." For example, law enforcement officers and firefighters cannot strike because of the substantial threat to public safety. Here the Union did not meet those conditions.

The question of whether Meyers-Milias-Brown covered agencies must seek injunctive relief exclusively from the PERB (as the City did in this case), which then decides whether such relief is justified, and if it so finds, then is the party seeking an injunction from the courts, or whether agencies may seek such relief directly from the courts, is presently pending before the State Supreme Court. Here the City was successful in persuading the PERB that a court injunction was appropriate, not a common occurrence.

Union's Failure To Request Negotiations After District Advised Union Of Proposed Policy Waived Union's Right To Negotiate Over The Policy After It Was Implemented.

On May 25, 2006, the Metropolitan Water District advised the various employee organizations of proposed revisions to the District's operating policies. One of the revisions was to the long-term vehicle assignment policy. The revised policy allowed for the District to terminate vehicle assignments at any time and required effected employees to immediately return the vehicles to the District. The District's

memorandum advised the unions to contact the District if they had any questions or comments regarding the proposed revisions.

Between May 25, 2006 and June 16, 2008, the Union representing the supervisors never requested to meet and confer about the policy. The District implemented the policy on October 12, 2006. On June 16, 2008, the District notified the Union that it was terminating the long-term vehicle assignments of some supervisory unit members pursuant to the policy. The Union requested to meet and confer over both the decision to take away the vehicles and the effects of such a decision. The District declined the Union's bargaining demand, citing the Union's failure to request to meet and confer before the policy was implemented.

The Union filed an unfair practice charge alleging that the District failed to meet and confer in good faith. The PERB agent dismissed the charge. On appeal, PERB affirmed the dismissal.

A refusal to bargain is not an unfair practice if the refusing party had no duty to bargain. When an employer gives a union written notice of a proposed change to a matter within the scope of representation and provides reasonable opportunity to meet and confer over the change before implementation, the union's failure to request bargaining constitutes a waiver of its right to meet and confer over the change.

Here the District gave the Union written notice of its intent to adopt the long-term vehicle assignment policy almost five months before it was implemented. Although the District's memorandum did not specifically express a willingness to meet and confer over the changes, the memorandum did invite any questions or comments. Furthermore, once an employer gives appropriate notice of a proposed change, it is not required to invite bargaining. Consequently, the Union's failure to request to meet and confer over the proposed policy constituted a waiver of its right to bargain over the decision. The Union also waived its right to bargain over the effects of the decision because any effects of the policy were foreseeable when the District issued its memorandum.

Metropolitan Water District Supervisors' Ass'n v. Metropolitan Water District of Southern California (2009) PERB Dec. No. 2055M [33 PERC ¶ 144].

EMPLOYEE DISCIPLINE

Appeals Court Reverses Trial Court's Denial Of Employee's Petition To Set Aside Employee's Written Reprimand Because The Trial Court Had Not Exercised Its Independent Judgment In Reviewing The Evidence.

Cesar Wences is a Los Angeles Police Department officer. On April 3, 2005, he was off-duty at home in the City of Long Beach. Over the course of several minutes, a woman, later identified as Edie Rodriguez, repeatedly called Wences' residence to speak with a relative who lived with Wences and his family. Wences repeatedly told Rodriguez that the relative was not home. During the last call, Rodriguez told Wences' wife, "You don't know who you're f**king with. I know where you live. I'm going to get my homeboys and homegirls to go f**k you up." Wences did not consider the threat to be credible at the time.

Approximately 45 minutes later, Wences' wife told him that there were four people outside throwing "stuff" at his truck. Without looking out the window to assess the situation, Wences grabbed his personal firearm and stepped outside. Wences held his gun at a low ready position and approached the suspects. Rodriguez began advancing on Wences' wife and made stabbing motions with what appeared to be a knife, but later turned out to be a fork. Wences fired a single warning shot into the grass near Rodriguez and she fled. The three other suspects were taken into custody.

The Los Angeles Police Department convened a mandatory Use of Force Review Board and found that Wences' discharge of the firearm was "in policy," but that the drawing and exhibiting of his firearm prior to the shooting was "out of policy." The Department gave Wences a written reprimand for utilizing unauthorized tactics and inappropriately drawing his weapon in connection with the off duty shooting. Wences appealed the administrative decision, but the Chief of Police upheld the reprimand. Wences filed a petition for writ of mandate under Code of Civil Procedure section 1094.5 to set aside the sustained charges of misconduct against him and the official reprimand. Applying the substantial evidence standard, the superior court denied the petition. The California Court of Appeal reversed and remanded, ordering the superior court to apply the independent review standard.

Section 1094.5 governs judicial review by administrative mandate of any final decision or order rendered by an administrative agency. A trial court's review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved. If the administrative decision substantially effects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. Along with examining the administrative record for errors of law, the trial court would conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. On the other hand, if the administrative decision does not substantially effect a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence.

A right may be deemed fundamental on either or both of two bases: (1) the character and quality of its economic aspect; or (2) the character and quality of its human aspect. Here the trial court applied the substantial evidence test because it found that the administrative decision did not deprive Wences of any property or employment right, and does not affect him financially. However, the Court of Appeal disagreed.

In determining whether the Department's disciplinary action substantially effected a fundamental vested right, the court must focus on the nature of the right itself. Wences' right to his employment as a non-probationary peace officer is vested and fundamental. Although the administrative decision did not effect Wences financially, the reprimand may be considered by the Department in future personnel and disciplinary decisions and may adversely effect Wences' future opportunities for career advancement. As such, it implicates a right that is important to Wences in his life situation even in the absence of an immediate economic impact.

Wences v. City of Los Angeles (2009) 177 Cal.App.4th 305 [99 Cal.Rptr.3d 199].

Note:

Disciplined employees may rely on this case in future cases in which a court must decide what level of administrative appeal is required for low level discipline.

EMPLOYER LIABILITY

City Not Liable For On Duty And Off Duty Firefighters' Alleged Sexual Assault Of Citizen While Firefighters Used Fire Truck For Personal Gain.

A City of Sacramento Fire Department Captain allowed firefighters to attend the Porn Star Costume Ball and to drive a fire truck there and use it to "pick up" women. Some of the firefighters were on duty and some of them were off duty. Several of the firefighters were drinking and flirting with women. A female citizen was at the event working as a photographer. Firefighter Tom Mitchell, who was on duty, and firefighter Scott Singleton, who was off duty, invited the citizen to take photographs of them in the fire truck. The firefighters allegedly trapped the citizen in the fire truck and sexually assaulted her before she could escape.

The citizen sued the City and the firefighters for various causes of action, including sexual assault. The citizen alleged that the City had a policy of allowing firefighters to take the fire trucks to bars and parties, with captains present, to pick up on women and take women on their fire trucks. The trial court granted summary judgment in favor of the City, and the California Court of Appeal affirmed.

A public entity is vicariously liable for the torts of its employees committed within the scope of their employment. A willful, malicious, and even criminal act may fall within the scope of employment, but only if the act has a causal nexus to the employee's work.

The Court found that vicarious liability did not apply to the alleged sexual misconduct of the City's firefighters in this case. These firefighters did not even purport to be engaged in any duty of a firefighter. The alleged sexual assault was motivated for strictly personal reasons not related to their duties and performance as firefighters. Moreover, the harm to the victim was not a risk that may fairly be regarded as typical of or broadly incidental to the operations of a firefighter. And of course, the City gained no benefit from the enterprise that gave rise to the injury.

M.P. v. City of Sacramento (2009) 177 Cal.App.4th 121 [98 Cal.Rptr.3d 812].

SEX DISCRIMINATION

Female Pilot Denied Retraining Opportunities Given To Male Pilots Established A *Prima Facie* Sex Discrimination Case.

Tiffany Nicholson was a pilot for Cape Air. In 2004, she was one of eight pilots selected to launch the company's new service out of Guam. She was the only female among the eight pilots. One of the other pilots was Chuck White, with whom Nicholson had previously had a year long sexual relationship. The Company used two-pilot ATR 42 airplanes for the new Guam service. Because these planes were new to Cape Air's operations, all eight pilots received training on the ATR 42s. One of the training topics was crew resource management (CRM), which consists of communication and cooperation skills that enable the pilots and crew to ensure safety. During the training, two male pilots failed their check rides in the simulator. They were retrained to proficiency and passed on their second attempt. Nicholson passed all phases of training, including an "excellent" score in the CRM section.

After the pilots began flying the new routes, Nicholson's supervisors reported that she had communication and cooperation problems. One of the supervisors said that she had a "machismo" attitude and refused to provide assistance requested by her copilots. White refused to fly several scheduled flights with Nicholson, claiming that the tension in the cockpit made it unsafe. He later admitted that he had concerns about flying with Nicholson because of their prior relationship. Russell Price, Cape Air's Regional Administrator, formulated a plan to observe Nicholson's CRM skills in-flight. While observing Nicholson, Price twice removed her because of her inability to communicate effectively. The Company issued an action form prohibiting Nicholson from flying ATR 42s. The Company later terminated her.

Nicholson sued the Company alleging sex discrimination in violation of Title VII. The district court granted summary judgment in favor of the Company. The Ninth Circuit Court of Appeals reversed.

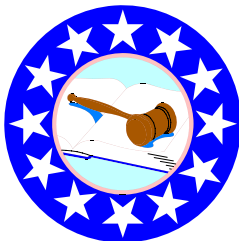
To establish a *prima facie* case of discrimination, a plaintiff must show that: (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment

action; and (4) similarly situated individuals outside her protected class were treated more favorably. Then, the burden shifts to the employer to set forth a legitimate, nondiscriminatory reason for the action. Then, the burden shifts back to the employee to show that the employer's stated reason was a pretext for discrimination. Here the Company asserted that Nicholson was not qualified for the position and no similarly situated individuals were treated more favorably.

The Ninth Circuit disagreed because subjective job qualifications should not be considered at the first phase of the burden shifting analysis. CRM skills are a subjective qualification. Nicholson was also able to show that two similarly situated male pilots were treated more favorably. When two male pilots failed the check rides portion of the training, the Company provided them extensive retraining and a second opportunity to pass that portion of the training. On the other hand, when Nicholson was performing deficiently, Price merely observed her flying. Price's observations were not equivalent to retraining because he did not offer any constructive criticism. The Company argued that CRM skills and piloting skills are not comparable. However, there was evidence that the Company treated CRM as a particular skill that can be retrained and refined, just like piloting skills. Consequently, the two male pilots were similarly situated.

Although the Company asserted that Nicholson was suspended from the ATR program due to her CRM deficiencies, Nicholson presented evidence of irregularities in her disciplinary proceedings. The Company procured letters complaining about Nicholson from other pilots. In addition, sex-related remarks about her machismo attitude and White's inability to work with Nicholson because of their prior sexual relationship suggest that the Company's nondiscriminatory reason for the adverse action could have been pretextual.

Nicholson v. Hyannis Air Service, Inc. (9th Cir. 2009) ___ F.3d ___ [2009 WL 2857198].



NATIONAL ORIGIN DISCRIMINATION

Polish Teacher Could Take Her National Origin Discrimination Case To Trial Where School Administrator Had Made Disparaging Comments About Polish People.

Anna Darchak is a Polish bilingual teacher who had a one-year contract with the Chicago Public Schools. Darchak noticed that the Hispanic students were receiving better treatment than the Polish students and she approached Principal Rosalva Acevedo with her concerns. Acevedo responded that Hispanic students are better than Polish students and deserve more than Polish people. If you don't want to do whatever I tell you to do, you can leave my school. Shortly thereafter, Acevedo gave Darchak a "cautionary notice" charging her with insubordination for refusing to follow the teaching schedule. When Darchak confronted Acevedo about the notice, Acevedo replied, "I brought you to this school and you stupid Polack pushed the teachers against me."

Acevedo assigned Darchak to a classroom with several native Spanish speakers. Darchak complained to Acevedo and Acevedo's supervisors that her assignment to the classroom violated the federal No Child Left Behind Act because she was not qualified to teach in a bilingual Spanish classroom. Acevedo subsequently recommended that the Board of Education not renew Darchak's one-year contract. The Board accepted the recommendation, and Darchak was terminated.

Darchak sued the Board for national origin discrimination in violation of Title VII and First Amendment retaliation under Section 1983. The district court granted summary judgment in favor of the Board. The Seventh Circuit Court of Appeals affirmed as to the First Amendment retaliation claim, but reversed as to the national origin discrimination claim.

The Seventh Circuit found that Darchak's deposition testimony regarding Acevedo's derogatory remarks about Polish people, combined with Acevedo's subsequent adverse actions, were sufficient evidence of discrimination to withstand summary judgment.

Darchak v. City of Chicago Board of Education (7th Cir. 2009) ___ F.3d ___ [2009 WL 2778227].

Note:

This case demonstrates the importance of harassment training so supervisors do not make the type of discriminatory remarks that can lead to liability for the employer.

FAIR LABOR STANDARDS ACT

Commuting Time, Using The Employer's Vehicle, And Pre-Shift Scheduling By The Employee Of His Daily Client Visits, Held Not Compensable; But The Employee Transmitting A Daily Work Report From Home After The Work Day Is Compensable Unless Found To Be *De Minimis*.

Mike Rutti worked for LoJack as a technician installing and repairing vehicle recovery systems. Most of the work is done at the clients' locations. Consequently, Rutti was required to travel to the job sites in a company-owned vehicle. The Company paid Rutti on an hourly basis for the time period beginning when he arrived at his first job location and ending when he completed his final job installation of the day.

Before he left for the first job in the morning, Rutti alleges that he would log onto a handheld computer device provided by the Company that informed him of his jobs for the day, map his routes to the assignments, and prioritize the jobs. He also completed some minimal paperwork at home. During the day, Rutti recorded information about the installations he performed on a portable data terminal (PDT) provided by the Company. At the end of the day, Rutti was required to upload data about his work to the Company. He would have to connect the PDT to a modem at home to transmit the information. Sometimes he would have to make more than one attempt to successfully transmit the information. He could upload the data any time after the work day between 7:00 p.m. and 7:00 a.m.

Rutti filed a class action suit against the Company alleging he was denied compensation for the commute time and pre-shift and post-shift work in

violation of the Fair Labor Standards Act. The district court granted summary judgment in favor of the Company. The Ninth Circuit affirmed as to the commute time and the pre-shift work, but reversed as to the post-shift uploading of PDT information.

Under the FLSA, the use of an employer's vehicle for commuting is not considered part of the employee's principal activities, and not compensable, if the use of the vehicle is within the normal commuting area for the employer's business and the use of the vehicle is subject to an agreement between the employer and the employee. The Ninth Circuit found that this requisite agreement can be a condition of the employee's employment. Consequently, here the Company could require Rutti to commute with the Company's vehicle without paying him for the commute time.

However, if an employer's restrictions on an employee's use of the employer's vehicle amounts to additional legally cognizable work, the commute time may be compensable. Here the Court found that, although the Company prohibited Rutti from carrying non-employee passengers in the car or from performing personal errands in the vehicle, these restrictions were not directly related to Rutti's principal activities for the Company and, consequently, they did not change the fact that the commute time is non-compensable.

Pre-shift activities are compensable if they are an integral and indispensable part of the principal activities for which people are employed. The work must be necessary to the business and performed primarily for the benefit of the employer in the ordinary course of that business. Furthermore, otherwise compensable time may be considered *de minimis*, and therefore not compensable, depending on (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.

The Court found that Rutti's morning activities are not integral to his principal activities. Receiving, mapping, and prioritizing jobs and routes for assignment are related to his commute, which is clearly distinct from his principal activities for the Company. In addition, Rutti could not show that the paperwork he performed could not be done after Rutti reached the job site. Even if these activities were compensable, the Court found that they would be *de minimis*.

On the other hand, Rutti's daily post-shift PDT transmissions to the Company appear to be part of the regular work of the employees in the ordinary course of business and are necessary to the business and performed primarily for the benefit of the employer. Even if the PDT transmissions took only five to ten minutes, there was sufficient evidence that technicians often would have to come back to the system to ensure that the transmission was successful, and, if not, send it again. There was also evidence of frequent transmission failures. Moreover, the aggregate amount of time and the regularity of the additional work suggest that the transmissions were performed as part of the regular work of the employees in the ordinary course of business. Thus, material issues of fact existed as to whether the PDT transmissions are *de minimis*.

Rutti v. Lojack Corp. (9th Cir. 2009) 578 F.3d 1084.

FAMILY AND MEDICAL LEAVE

The FMLA Prohibits Employers From Considering Employee's Use Of Protected Leave When Making An Employment Decision.

Eunice Hunter was a custodian for the Valley View Local Schools. From 2003 to 2005, she took intermittent periods of FMLA leave while she underwent three rounds of surgery for injuries resulting from a car accident. In 2005 she returned from her third round of surgery with permanent restrictions of no lifting, pushing, or pulling more than ten pounds; and no climbing stairs or ladders. The District placed Hunter on unpaid medical leave based on her medical restrictions and excessive absenteeism for the previous four years.

Hunter sued the District for retaliation in violation of the FMLA. The District filed a motion for summary judgment. In opposition, Hunter presented deposition testimony from the District superintendent who testified that Hunter's use of FMLA leave was one of two reasons she placed Hunter on involuntary leave. Nevertheless, the district court granted summary judgment to the District. The Sixth Circuit Court of Appeals reversed.

The FMLA prohibits an employer from interfering with an employee's use of his or her FMLA rights, or from retaliating against an employee for exercising

his or her FMLA rights. Employers cannot use the taking of FMLA leave as a negative factor in employment actions; nor can FMLA leave be counted under "no fault" attendance policies. Consequently, the Sixth Circuit found that the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors.

The superintendent's testimony provides direct support for Hunter's FMLA retaliation claim because she admitted that Hunter's involuntary leave was based in part on her "excessive absenteeism," and the District included Hunter's FMLA leaves when reviewing her attendance record.

The District argued that it placed Hunter on involuntary leave because she was unable to perform the functions of her job. However, the superintendent admitted that the medical restrictions were not the only basis for the involuntary leave decision. Thus, summary judgment for the District was erroneous because a trier of fact must decide whether the District would have taken the same employment action against Hunter even if she had not taken the FMLA leave.

Hunter v. Valley View Local Schools (6th Cir. 2009) 579 F.3d 688.

Employee Who Was Ineligible For Leave Under The FMLA But Claimed That The Employer Told Her She Could Take The Leave, Could Not Assert A Claim For Retaliation After She Was Terminated.

Kathleen Nagle worked for the Acton-Boxborough Regional School District in Massachusetts as a part-time school monitor. In January 2004, Nagle requested to use Family and Medical Leave Act (FMLA) leave to care for her ailing husband. At the time of her request, she had only worked 554 hours in the preceding 12 months. To be eligible for FMLA leave, an employee must have worked at least 1,250 hours in the preceding 12 month period. But Nagle claims that George Frost, the District's deputy superintendent, told her that she could take FMLA leave. Nagle returned in April 2004 and sent Frost a letter thanking him for allowing her to take FMLA leave. He never responded to the letter.

In February 2005, Nagle took another eight weeks of FMLA leave to care for her husband. When she returned, she sent Frost another letter thanking him for granting her FMLA leave. He did not respond. Nagle claims that Frost told her she could take another FMLA leave if necessary, and she took more FMLA leave in May 2005. The District terminated Nagle's employment in July 2005 because the District had completed construction work on a new building and no longer needed monitors in the parking lots. Frost denies ever telling Nagle that she could take FMLA leave.

Nagle sued the District for retaliation in violation of the FMLA. The district court granted summary judgment in favor of the District. The First Circuit Court of Appeals affirmed.

An employee cannot be discharged for exercising his or her FMLA rights. Nagle admits that she was not eligible for FMLA leave, but argues that the District was estopped from denying her coverage because Frost allegedly told Nagle that she could take FMLA leave.

The First Circuit declined to apply equitable estoppel because anyone can claim, without any confirming proof, that some official or clerk misinformed the person about his or her legal rights. The public has a general interest in having the same rules enforced against everyone. Here Nagle has nothing in writing to confirm that any misrepresentation was made to her. Although the revised FMLA regulations require an employer to provide written rulings regarding FMLA decisions upon request, the new regulation does not apply to this case.

Nagle v. Acton-Boxborough Regional School District (1st Cir. 2009) 576 F.3d 1.

FIRST AMENDMENT

Employee Fired After Reporting Alleged Corruption States A Claim For First Amendment Retaliation.

Sandra Valentino worked as a secretary for the Village of South Chicago Heights. She became skeptical of the Mayor's hiring practices after the Mayor hired a water inspector with no prior public works experience, and who told Valentino that he was hired because he was a "vote getter" for the

Mayor and an active supporter of his campaign for office. The Village employed several of the Mayor's friends and relatives, including the Mayor's son-in law, three children, and Village Administrator Paul Petersen's three family members. Valentino became suspicious that the Village was "ghost payrolling" these individuals - that is, that the Village paid them salaries for hours that they did not actually work.

Valentino expressed her concerns regarding the nepotism to William Bramanti, the future head of Citizens Against Corruption. Bramanti then submitted a series of requests pursuant to the Freedom of Information Act for copies of the time cards and sign-in sheets for the Mayor's associates and relatives. Petersen initially denied the request, and then told another employee that Valentino "is going to get her butt canned," ostensibly because of her relationship with Bramanti. The Mayor ultimately overruled Petersen and released certain time records to Bramanti.

Meanwhile, Valentino began to make copies of the daily sign-in sheets in part to verify her suspicions regarding "ghost payrolling" and in part to determine if the Village was unfairly docking her pay when she was tardy, while not docking the pay of other Village employees. On February 28, 2003, Bramanti sent a letter to the citizens of the Village accusing the Mayor of "ghost payrolling" his relatives. The next business day, Petersen searched Valentino's desk and found copies of the employee sign-in sheets. Petersen then fired Valentino for "theft" of the sign-in sheets.

Valentino sued the Village for First Amendment retaliation. The district court granted summary judgment in favor of the Village. The Seventh Circuit Court of Appeals reversed.

To establish a *prima facie* case of unlawful First Amendment retaliation, Valentino would need to establish that: (1) she engaged in constitutionally protected speech; (2) she suffered a deprivation likely to deter her from exercising her First Amendment rights; and (3) her speech was a motivating factor in her employer's adverse action. The Court found that her speech was protected because her comments to Bramanti strongly implicate the public concerns of government corruption and waste caused by "ghost payrolling." The circumstantial evidence also suggests that her speech was a motivating factor for her termination. Petersen knew about Valentino's relationship with Bramanti

and he surreptitiously searched her desk right after Bramanti sent the letter to the citizens. Moreover, Petersen told another employee that Valentino was going to get fired.

Although the Village asserts that Valentino was fired for her "theft" of the office sign-in sheets, their stated reason is specious. The Village claimed that they were worried that the theft could lower office morale, foster identity theft, or constitute an invasion of the employees' privacy. However, the Court found that Valentino did not actually steal anything. She simply photocopied the sign-in sheets and stored them. The sign-in sheets were publicly displayed in the office and the Village had already released some of the information to Bramanti. Consequently, the copying of the sign-in sheets could not be an invasion of privacy. Moreover, Petersen singled out Valentino's desk to be searched immediately after Bramanti sent his letter to the citizens of the Village. These factors suggest that the Village's proffered reason for Valentino's termination was merely pretext for First Amendment retaliation, and summary judgment was inappropriate.

Valentino v. Village of South Chicago Heights (7th Cir. 2009) 575 F.3d 664.

DUE PROCESS

Employee's Due Process Rights Were Not Violated Where The Same Official Who Was Involved In Proposing The Termination Presided Over The Employee's Administrative Appeal.

Jerry Riggins was a police sergeant in Louisville, Colorado. In 2004, he experienced a psychiatric episode during which he complained that someone was after him, his hotel room was bugged, and there was a computer chip implanted in his head. The City placed him on administrative leave. In September 2004, Riggins' psychiatrist gave the City a report stating that Riggins was able to return to work, but that he would recommend a separate fitness for duty exam. The psychiatrist also stated that Riggins would likely be on medication for at least another six months, and, if Riggins discontinued his medications prematurely, he might risk a recurrence of his previous delusional symptoms.

The City hired a psychologist to conduct a fitness for duty examination. The psychologist said that Riggins was fit to return to duty, but that his return needed to be done in a carefully planned program with close supervision in order to monitor and assess his abilities to function safely and effectively as a police officer. However, a psychiatrist advised the City to use caution in having an employee who is taking anti-psychotic medications return to duty. Based on the various reports, Police Chief Bruce Goodman determined that Riggins was unable to resume his duties, and began proceedings to terminate Riggins.

The City's policies provided that a department director may impose dismissal upon the prior approval of the Human Resources Officer and the City Administrator. After obtaining the required approval, Goodman advised Riggins of his intent to terminate him. Riggins exercised his right to the City's three-step appeal process. Riggins and his attorney met with Chief Goodman and had the opportunity to appeal the termination decision. After Goodman rejected the appeal, Riggins met with the Human Resources Officer, who also upheld the termination. Finally, Riggins met with the City Administrator to appeal the decision. The City Administrator made the final decision to uphold the termination. Riggins's termination was not effective until after all three levels of appeal.

Riggins sued the City officials asserting violation of his due process rights because he was not afforded adequate pretermination due process and because of bias. The district court denied the City officials' motion for summary judgment on qualified immunity grounds. The Tenth Circuit Court of Appeals reversed.

Government officials are entitled to qualified immunity as long as their conduct does not violate clearly established law which a reasonable person would have known. Before a government employee is deprived of any significant property interest, the employee is entitled to: (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity to present his side of the story.

The City gave Riggins written notice of the charges against him, an explanation of the evidence, and several opportunities to present his side of the story prior to his termination. Consequently, the City officials did not violate his due process rights and they were entitled to qualified immunity.

Riggins also argued that he was denied the right to an impartial process because the same individuals who approved the initial decision to terminate him presided over the hearings contesting the decision. He argues that they had already made up their minds prior to presiding over the hearings. The Tenth Circuit found that the same supervisor could perform the investigative function prior to the adverse employment action decision and the adjudicatory function of providing an appeal hearing for the decision. Riggins failed to show any evidence of actual personal animus or bias with respect to the factual matters to be determined in the appeals process. Thus, the City officials were entitled to qualified immunity on Riggins' claim that he was denied an impartial hearing process.

Riggins v. Goodman (10th Cir. 2009) 572 F.3d 1101.

Note:

In the 2007 Flippin v. Los Angeles City Board of Civil Service Commissioners case, the California Court of Appeal held that an employee's due process rights were not violated where the same person who proposed the discipline also served as the Skelly officer.

MILITARY LEAVE RIGHTS

Employer Had No Duty To Reemploy Employee Where Employee Failed To Request Reemployment Within Ninety Days After Completing His Military Service.

Richard Erickson worked for the United States Postal Service (USPS). He also served in the Army National Guard Reserve. From 1991 to 1995, he was absent from his position with the USPS for a total of more than 22 months. From 1996 to 2000, he worked at USPS for only four days. In January 2000, USPS called Erickson to determine whether he intended to return to his position with USPS. Erickson said he would not report back to work until he completed his current tour of duty in September 2001. He said that he preferred military service to working for USPS.

In March 2000, USPS terminated Erickson's employment for excessive use of military leave. Erickson remained on active military duty until

December 31, 2005. On September 28, 2006, Erickson filed an appeal with the Merit Systems Protection Board alleging that USPS had violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) by removing him from his position based on his military service. The administrative judge found that Erickson was entitled to reemployment. He also found that USPS discriminated against Erickson based on his military service, but that Erickson had waived his USERRA rights by abandoning his civilian career in favor of one in the military. Erickson appealed the administrative judge's decision to the full Board, which found that Erickson's military service was not a motivating factor in his termination because the real reason was his absence regardless of its cause. The Board did not address whether Erickson abandoned his position. The Federal Circuit Court of Appeals affirmed in part and reversed in part.

An employer is prohibited from discriminating against an individual based on his or her military service. The Federal Circuit rejected the Board's finding that the real reason for Erickson's removal was his absence from work regardless of whether that absence was caused by his military obligation. The most significant consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To allow an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA. The Court also rejected USPS's argument that it needed to fill Erickson's position. Thus, USPS unlawfully discriminated against Erickson.

Service members also have a right to reemployment in their civilian jobs after completing their military obligations. USERRA requires an employee to provide timely notification to his employer of his intention to return to work. Employees who have served in the military for more than 180 days must submit an application for reemployment no more than 90 days after completing their military service. Because Erickson completed his military service on December 31, 2005, he was required to submit an application for reemployment with USPS by April 1, 2006. Erickson did not request reemployment until September 2006.

The Court remanded the case to the Board to determine if Erickson had waived his USERRA rights by abandoning his civilian career in favor of one in the military based on his stated preference for military

work, his long and distinguished military career during much of which he was absent from this Postal Service position, and his failure to take any steps to obtain reemployment with the USPS until he filed his appeal with the Board nine months after his separation from the military.

Erickson v. United States Postal Service (Fed. Cir. 2009) 571 F.3d 1364.

COMPUTER ABUSE

Employee Who Emailed Company Documents To His Personal Computer Did Not Access The Company's Computers In Violation Of Law.

LVRC operates a residential treatment center for addicted persons in Nevada. The Company hired LOAD, Inc. to provide email, website, and related services for the facility, and Christopher Brekka to oversee a number of aspects of the facility, including interacting with LOAD. The Company gave Brekka a computer to use. Because Brekka often commuted between Florida and Nevada, he emailed documents he obtained or created in connection with his work to his personal computer. Brekka had an administrative login for the Company's website so he could access usage statistics to manage the Company's internet marketing. In August 2003, Brekka and the Company entered into discussions regarding Brekka purchasing an ownership interest in the Company. At the end of August, Brekka emailed a number of the Company's documents to his personal email account. In September 2003, negotiations broke down, and Brekka ceased working for the Company.

Brekka left his Company computer at the Company and did not delete any emails from the computer, including the email which contained the administrative user name and password. After Brekka left the company, other Company employees had access to Brekka's former computer. At some point after Brekka left, the email with the administrative login information was deleted from the computer. In November 2004, the Company noticed that someone was logged into the Company's website using Brekka's old user name and password.

The Company sued Brekka in the federal district court alleging that Brekka intentionally accessed the

Company's computer without authorization, or in excess of his authorized access, in violation of the Computer Fraud and Abuse Act (CFAA). The district court granted summary judgment in favor of Brekka. The Ninth Circuit Court of Appeals affirmed.

The CFAA imposes criminal and civil penalties against a person who intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information from any protected computer. Here Brekka indisputably had authority to access the Company's documents and email them to his personal computer while he was employed with the Company. Consequently, Brekka did not access the Company's computers without authorization or in excess of his authorization.

The Company argued that Brekka acted in excess of his authorized access because he was acting in contradiction to his duty of loyalty to the Company. But the Court rejected the Company's argument, finding that the statute did not require that the individual's access be consistent with his or her duty of loyalty to the employer.

Finally, because numerous individuals used Brekka's Company computer after he stopped working for the Company, the Company could not show that Brekka was responsible for the login in November 2004. Various individuals could have used Brekka's administrative login and password as they were accessible on Brekka's former computer.

LVRC Holdings, LLC v. Brekka (9th Cir. 2009) ___ F.3d ___ [2009 WL 2928952].

PEACE OFFICER BADGES

Non-Sworn Public Employees With Limited Peace Officer Powers May Use A Badge That Resembles A Peace Officer's Badge.

In 2007, the California Attorney General opined that a private citizen cannot have an honorary badge that so closely resembles a genuine peace officer badge that it is likely to deceive an ordinary reasonable person into believing that the holder is a peace officer. A charter city has authorized a number of its employees to exercise limited peace officer powers. These employees include environmental control

officers, the director of water reclamation, environmental control technicians, city attorney investigators, parking district security officers, code compliance officers, refuse field inspectors, the director of animal control, animal license checkers, animal shelter attendants, animal health technicians, animal control officers, business license inspectors, and parking enforcement officers. The City has granted all of these classifications the authority to issue citations for violation of the laws they are charged with enforcing, and has granted many of them the authority to make arrests for such violations. The Attorney General opined that these designated employees with limited powers could use badges that resemble badges carried by peace officers in the course and scope of their duties.

State law recognizes that some individuals have peace officer status and others do not occupy peace officer positions but they may exercise some peace officer powers deemed necessary for the performance of their duties. Penal Code section 538(c) prohibits any person from wearing or exhibiting any badge or emblem which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer. However, here, the employees have limited peace officer duties. The law permits the display of a badge that truthfully represents the bearer to have the authority of a peace officer, whether or not the bearer is a full-status peace officer. Thus, public employees who have been granted limited peace officer powers in order to perform their official duties may display badges that resemble a peace officers' badge for use as identification in the course and scope of their official duties, provided that the badge accurately identifies the public employee by his or her specific limited-powers position.

Attorney General Opinion No. 07-1001, __ Ops.Cal.Atty.Gen. __ [2009 WL 2578329] (August 17, 2009).

Note:

Attorney General opinions are not binding authority, but they serve as persuasive authority for courts.

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Firm Publications

Steven Berliner of our Los Angeles office and **Alison Neufeld** of our San Francisco office co-authored the article, "Furloughs: The Devil's in the Details" which appeared in the August 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 "Furloughs".

Elizabeth Avedikian of our Fresno office and **Jeffrey Freedman** of our Los Angeles office co-authored the article, "Pay for Commuting and Off-the-Clock Work" which appeared in the October 1, 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 "Commuting".



LCW Announces Scott Tiedemann to be the Next Managing Partner

Here's exciting news about the next milestone in the management of Liebert Cassidy Whitmore: Upon its founding in 1980, John Liebert managed the firm for its first fifteen years, at which time Melanie Poturica transitioned into the managing partner role. Now the time is approaching that Melanie too will have managed the firm for fifteen years, and she has asked her partners to select a managing partner that will transition the firm to the next generation of leadership. We are pleased to announce that the partners have unanimously selected Scott Tiedemann to assume that leadership role. To assure a smooth transition, Scott will co-manage the firm during our 2009-2010 fiscal year beginning October 1, 2009, and assume the role of sole managing partner October 1, 2010.

Many of our clients know and have worked with Scott. He joined Liebert Cassidy Whitmore in 2000, and became a partner in 2004. In that time he has excelled in a broad range of our practice. He has represented public agencies in litigation, administrative proceedings and negotiations.

Scott has become recognized for his expertise in representing public safety agencies. In that regard, he has successfully handled a number of reported appellate court decisions resulting in significant favorable legal principles.

Scott is one of our very popular trainers. He frequently speaks at national and statewide conferences on a variety of employment law subjects. He has published numerous articles in publications such as *The National Law Journal*, *Municipal Lawyer Magazine*, *The Daily Journal*, and *The Journal of California Law Enforcement*. He recently authored the CPER Pocket Guide to the Firefighters Procedural Bill of Rights Act.

Most importantly, Scott as an individual perfectly reflects the cultural values LCW brings to its client relations - first and foremost, integrity; high quality legal work; economical, practical and creative solutions; responsiveness and availability.

Scott received his Juris Doctorate from Loyola Law School where he received the American Jurisprudence Award in Legal Writing, was a member of the Moot Court Honors Board and was published in the *Loyola International Law Journal*. He received his Bachelor of Arts degree in English Literature from Loyola Marymount University.

Melanie will continue to remain fully active with the firm after October 2010, and is very much looking forward to being able to spending her time practicing law and working with clients.



New to the Firm



Liebert Cassidy Whitmore Welcomes New Associate

We are pleased to welcome associate **Todd Simonson** to our San Francisco Office and as a member of our law enforcement practice.

Todd has a particular expertise in public safety matters and regularly provides advice to police and fire management concerning the application of the Public Safety Officers' Procedural Bill of Rights Act and Firefighters' Procedural Bill of Rights Act. He has recently written articles for Bender's California Labor and Employment Law Bulletin on the *Spielbauer and Lybarger* decisions that deal with the law on conducting employee investigations.

Before joining LCW, Todd was a prosecutor for the Alameda County District Attorney's Office, represented peace officers in administrative, civil and criminal cases, and worked at a management-side firm representing public sector clients.

Todd earned his Juris Doctorate from the University of San Francisco School of Law while working full-time as a police officer for the City of Oakland. He earned his Bachelor's degree in Law and Society from the University of California, Santa Barbara.

Todd joins our team of attorneys with expertise in law enforcement related matters and a firsthand understanding of the issues daily confronted by police chiefs, sheriffs, and their respective executives. In keeping with our public safety clients' often fast-paced work environment, Todd is readily available to provide advice on subjects in need of an expedited response including administrative investigations, imposition of discipline, fitness-for-duty exams, personnel files, and leave rights. Todd also has significant experience in disciplinary proceedings, writs and appeals, policy review and drafting, employment and use-of-force litigation, and complex workplace investigations.

Todd's addition to our accomplished public safety team carries forth the Liebert Cassidy Whitmore tradition of bringing both legal acumen and practical knowledge to its client interactions.

New to the Firm

Liebert Cassidy Whitmore Welcomes Three New Associates

Paula Schaefer joins LCW's Los Angeles Office. Paula has over six years experience advising and representing school districts, community college districts and special districts in the areas of business, property and construction law. Paula can be contacted at (310) 981-2000 or emailed at pschaefer@lcwlegal.com.

Camille Townsend also joins LCW's Los Angeles Office. Camille provides representation and legal counsel to clients in matters pertaining to education, labor and employment law. Camille's practice focuses on litigation. Camille can be contacted at (310) 981-2000 or emailed at ctownsend@lcwlegal.com.

Todd Simonson joins LCW's San Francisco Office. Todd provides representation and legal counsel to Liebert Cassidy Whitmore clients in all aspects of public sector labor and employment law. Todd has expertise in public safety matters and regularly provides advice to police and fire management. Todd can be contacted at (415) 512-3000 or emailed at tsimonson@lcwlegal.com.

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.

Conference registration will be available this fall.

To make your hotel reservations online: <https://resweb.passkey.com/go/LCWL2>

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Train the Trainer Seminars

Teach Mandatory Harassment Training

Train the Trainer Refresher

Need to be re-certified as a trainer? Liebert Cassidy Whitmore is offering "Train the Trainer" refresher sessions to provide you with the necessary tools to **continue** conducting mandatory AB 1825 (Govt. Code Section 12950.1) training for your agency.

San Francisco - November 12, 2009

Fresno - November 12, 2009

Los Angeles - November 20, 2009

Time: 9:00 a.m. - 12:00 Noon

Location: Liebert Cassidy Whitmore Offices
6033 West Century Boulevard., Suite 500, Los Angeles, CA 90045
153 Townsend Street, Suite 520, San Francisco, CA 94107
5701 N. West Avenue, Fresno, CA 93711

Cost: \$1,000 each or \$900 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.



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.

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.

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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

October 1	"Public Sector Employment Law Update" Gateway Public ERC Santa Fe Springs Melanie Poturica
October 1	"Sick and Disabled Employees" and "Public Agency Issues During Lean Economic Times" Bay Area ERC Sunnyvale Richard Bolanos
October 1	"Legal Issues for Negotiators" and "Labor and Employment Relations Issues During Lean Economic Times" East Inland Empire ERC Fontana Steve Berliner
October 2	"Reductions in Staffing" and "Legal Issues Regarding Hiring" Central Coast Personnel Council (CCPC) Santa Barbara Michael Blacher and Joung Yim
October 6	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Labor and Employment Relations Issues During Lean Economic Times" South Bay ERC Hawthorne Michael Blacher
October 7	"Advanced FLSA" and "Advanced Labor Negotiations Roundtable" Central Valley ERC Kerman Richard Bolanos & Gage Dungy
October 7	"Managing Performance Through Evaluation" and "The Disability Interactive Process" Gold Country ERC Roseville Cepideh Roufougar
October 8	"Managing the Marginal Employee" and "Labor and Employment Relations Issues During Lean Economic Times" San Diego ERC Oceanside Bruce Barsook
October 8	"Discipline: Putting It into Practice Part I" LA County Management Attorneys (LACMA) Consortium Los Angeles Mark Meyerhoff
October 15	"12 Steps to Avoiding Liability" and "Labor and Employment Relations Issues During Lean Economic Times" West Inland Empire ERC Rancho Cucamonga Steve Berliner
October 16	"Name that Section: Frequently Used Ed Code and Title 5 Sections for Community College" Southern CA Community College Districts (CCDs) ERC Norwalk Peter Brown
October 21	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Performance Management: Evaluation, Documentation and Discipline" San Gabriel Valley ERC Alhambra Laura Kalty
October 21	"Exercising Your Management Rights" and "Public Sector Employment Law Update" NorCal ERC Concord Richard Whitmore and Deborah Glasser
October 21	"Public Sector Employment Law Update" Orange County ERC Anaheim Melanie Poturica
October 21	"Parent/Student Handbooks" Bureau of Jewish Education (BJE) Consortium Los Angeles Brian Walter and Lauren Liebes
October 22	"Handling Grievances" and "FLSA: New Developments and Hot Topics" Monterey Bay ERC Morgan Hill Richard Bolanos

- October 22 **"A Supervisor's Employment Relations Primer"**
North San Diego County ERC | Vista | Mark Meyerhoff
- October 28 **"Personnel Issues: Hiring, Reference Checks and Personnel Records and Files" and "FLSA"**
Los Angeles County Human Resources Consortium | Commerce | Peter Brown
- October 29 **"Privacy Issues in the Workplace" and "Public Sector Employment Law Update"**
Imperial Valley ERC | Imperial | Melanie Poturica
- 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 **"Discipline: Putting It into Practice"**
Gateway Public ERC | Pico Rivera | James Oldendorph and Scott Tiedemann
- November 12 **"Discipline: Putting It into Practice Part II"**
LA County Management Attorneys (LACMA) Consortium | Los Angeles | Mark Meyerhoff
- November 12 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Family and Medical Care Leave Acts"**
West Inland Empire ERC | Chino Hills | Michael Blacher
- November 12 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Finding the Facts: Disciplinary and Harassment Investigations"**
East Inland Empire ERC | Fontana | Jennifer Hong
- November 12 **"Supervisory Skills for the First Line Supervisor/Manager"**
San Diego ERC | Poway | Donna Evans
- November 13 **"An Employment Relations Primer for Community College District Administrators and Supervisors"**
Southern CA CCDs ERC | Santa Ana | Mary Dowell
- 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 **"Preventing Workplace Harassment, Discrimination and Retaliation" and "Performance Management: Evaluation, Documentation and Discipline"**
Orange County ERC | Costa Mesa | Laura Kalty
- November 19 **"Supervisory Skills for the First Line Supervisor/Manager"**
Humboldt County ERC | Fortuna | Frances Rogers

Customized Training Presentations

- October 1 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Indio | Linda Jenson
- October 1 **"Guide for Supervisors on Preventing Harassment, Discrimination and Retaliation"**
City of Fremont | Cynthia O'Neill
- October 6 **"Absenteeism Prevention" and "Exercising Your Management Rights"**
County of Sonoma | Santa Rosa | Richard Bolanos
- October 6, 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Torrance | Donna Evans

October 6	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Gage Dungy
October 7	"Preventing Workplace Harassment, Discrimination and Retaliation" Fairfield-Suisun Sewer District Fairfield Donna Williamson
October 7	"Managing Performance Through Evaluation" City of Alameda Kelly Tuffo
October 8	"Preventing Workplace Harassment, Discrimination and Retaliation" County of Sonoma Santa Rosa Kelly Tuffo
October 8	"Preventing Workplace Harassment, Discrimination and Retaliation" JFB Ranch Inc. Firebaugh Gage Dungy
October 14	"Guide for Supervisors on Preventing Workplace Harassment, Discrimination and Retaliation" County of San Luis Obispo San Luis Obispo Laura Kalty
October 15	"Preventing Workplace Harassment, Discrimination and Retaliation" San Benito County Hollister Richard Bolanos
October 15	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Glendale Jennifer Hong
October 16, 21, 22	"FBOR" City of Glendale Scott Tiedemann
October 16	"The Brown Act" Yuba Community College District Marysville Laura Schulkind
October 19	"Preventing Harassment, Discrimination and Retaliation in the School Setting/Environment" Conejo Valley Unified School District Thousand Oaks Michael Blacher
October 19, 28	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Anaheim Donna Evans
October 21	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Legal Aspects of Violence in the Workplace" City of Hesperia Donna Evans
October 21	"Issues and Challenges Regarding Drugs and Alcohol in the Workplace" City of Visalia Gage Dungy
October 22	"Preventing Workplace Harassment, Discrimination and Retaliation" Golden State Risk Management Authority Corning Gage Dungy
October 22	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Torrance Laura Kalty
October 22	"Preventing Workplace Harassment, Discrimination and Retaliation" Mesa Consolidated Water District Costa Mesa Connie Chuang
October 26, 29	"Discipline: Putting It Into Practice" County of Ventura, Human Services Agency Ventura Donna Evans
October 26	"Preventing Workplace Harassment, Discrimination and Retaliation" County of Sonoma Santa Rosa Jack Hughes
October 27	"Preventing Workplace Harassment, Discrimination and Retaliation" Los Angeles County Sanitation Districts morning session - Carson / afternoon session - Whittier Donna Evans
October 28	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Oakdale Cepideh Roufougar
October 29	"Conducting Investigations" and "Disability Interactive Process" County of Sonoma Santa Rosa Jack Hughes

- October 29 **"Labor Code 101 for Public Agencies" and "Privacy Issues in the Technological World"**
City of Beverly Hills | Michael Blacher
- November 4 **"Train the Trainer: Refresher"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett
- November 5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Jennifer Hong
- November 5 **"Principles for Peace Officer Employment" and "Ethics in the Public Service"**
Inyo County | Bishop | Gage Dungy
- November 9, 10, 16 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Bay Area Air Quality Management District | San Francisco | Laura Schulkind
- November 12 **"FBOR" and "Finding the Facts: Disciplinary and Harassment Investigations"**
North County Fire Protection District | Fallbrook | Connie Chuang
- November 12 **"Train the Trainer: Refresher"**
Liebert Cassidy Whitmore | San Francisco | Cynthia O'Neill
- 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 Temecula | Donna Evans
- November 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Saratoga | Jack Hughes
- November 18 **"Ethics in Public Service"**
City of Indian Wells | Peter Brown
- November 18 **"Applied Ethics"**
PMW Associates | San Clemente | Richard Kreisler
- 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

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.

- October 6 **"Preventing Harassment in the Workplace"**
National Public Employer Labor Relations Association (NPELRA) | Webinar | Mark Meyerhoff
- October 10 **"Reductions in Staffing: What To Do and When To Do It"**
California Association of Cemetery Districts Education Seminar | Ventura | Melanie Poturica
- October 14 **"Public Sector Employment Law Update"**
International Public Management Association (IPMA) of Central California | Madera | Shelline Bennett

October 15	"Engaging in the Interactive Process" Human Resource Association of Central California HR and Safety Conference Fresno Shelline Bennett
October 22	"EEO Plan Completion" and "EEO in the 21st Century" Association of Chief Human Resources Officers (ACHRO) Fall Institute Cathedral City Laura Schulkind
October 23	"Issues in Lean Times" Solano Napa Employment Advisory Council Fairfield Morin Jacob
October 23	"Understanding the Brown Act and Your Responsibilities" California Special Districts Association (CSDA) Clovis Shelline Bennett
October 23	"The New Family and Medical Care Leave Act" ACHRO Fall Institute Cathedral City Michael Blacher and Peter Brown
October 23	"A Mock Grievance Hearing" ACHRO Fall Institute Cathedral City Mary Dowell and Eileen O'Hare Anderson
October 23	"Town Hall Meeting" ACHRO Fall Institute Cathedral City Michael Blacher, Peter Brown, Mary Dowell, Melanie Long, Frances Rogers and Laura Schulkind
November 4	"The Laws Impacting Background Investigations" California Background Investigators Association (CBIA) Santa Barbara Mark Meyerhoff
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 5	"Making the Most of Arbitration" CalPELRA Annual Conference Monterey Bruce Barsook
November 5	"Leaves and the Disability Process: Are You Up To Date?" CalPELRA Annual Conference Monterey Peter Brown and Laura Schulkind
November 5	"Common FLSA Mistakes" CalPELRA Annual Conference Monterey Peter Brown
November 5	"Issues in Lean Times" CalPELRA Annual Conference Monterey Richard Bolanos, Morin Jacob and Donna Williamson
November 5	"Briefing Room - A Peace Officers Bill of Rights Case Update" County Counsels Association (CCAC) Employment Law Section Meeting Newport Beach Mark Meyerhoff
November 5	"Workplace Injuries and Leaves" CCAC Employment Law Section Meeting Newport Beach Michael Blacher
November 5	"Internal Affairs/Labor Relations Update" California University Police Chiefs Association (CUPCA) Executive Development Conference Pismo Beach Jack Hughes
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 16 **"FBOR Primer and Current Developments in the Law for Fire Chiefs"**
California Fire Chiefs Association (CFCA) Executive Leadership Institute | Fresno | Gage
Dungy and 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 17 **"Preventing Harassment in the Workplace"**
NPELRA | Webinar | Mark Meyerhoff
- November 18 **"Privacy Rights and Background Checks"**
California State Association of Counties (CSAC) Annual Conference | Monterey | Morin
Jacob
- 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 **"Legal Eagles"**
CCLC Annual Conference | San Francisco | Bruce Barsook, Mary Dowell, Eileen O'Hare
Anderson, Frances Rogers and Laura Schulkind
- November 20 **"Public Meeting Law for Community College Districts"**
CCLC Annual Conference | San Francisco | Mary Dowell and Eileen O'Hare Anderson
- November 20 **"Labor Negotiations for Educational Institutions during Tough Economic Times"**
CCLC Annual Conference | San Francisco | Mary Dowell
- November 21 **"Certified Ethics Training - SB 106"**
CCLC Annual Conference | San Francisco | Mary Dowell



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