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Education *Matters*

News and Developments in Labor Relations and Education Law for School and Community College District Administration

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CONTENTS

EMPLOYMENT
Labor Relations. 1
Disability Discrimination 4
Sex Discrimination 7
Race Discrimination 8
Racial Harassment/ Discrimination 9
National Origin Harassment/ Discrimination 10
Genetic Discrimination. 11
Affirmative Action. 11
Administrative Hearings. 12
First Amendment. 13
Military Leave Rights. 14
Employer Liability 14
Worker's Compensation 15
Attorney's Fees. 16

STUDENTS
Special Education 17

Save the Date. 20
Train the Trainer 21
Firm Profile 22
Firm Publications 22
Compliant EEO Plans 23
Mandatory Harassment Training 23
Bid and Contract Documents. . 24
Firm Activities 25

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EMPLOYMENT

LABOR RELATIONS

Under Educational Employment Relations Act, The Six-Month Statute Of Limitations May Be Tolled Under A Statutory Or Equitable Theory Under Narrowly Prescribed Circumstances.

Carmen Baprawski worked as a professor of counseling for the Los Angeles Community College District (District). In August 2004, Baprawski successfully negotiated a reassignment from a 10-month to a 12-month work year with the help of her exclusive representative, the Los Angeles College Faculty Guild (Guild). However, her reassignment was rescinded on August 31, 2004, after the head of the department filed a grievance objecting to the reassignment because it had not been handled according to proper procedures and he had not been asked to participate.

On September 14, 2004, the Guild filed a grievance alleging that the District had wrongfully rescinded Baprawski's reassignment in part because she engaged in protected activity by asking the Guild for assistance with her reassignment request. On November 1, 2004, the District denied the grievance at Step Two. The Guild did not file a request for arbitration within the ten days required by the collective bargaining agreement, or November 11, 2004. On November 22, the Guild told Baprawski that it would not take her grievance to arbitration. Baprawski and the Guild engaged in subsequent discussions about the matter but the Guild did not change its position. In March 2005, the Guild gave Baprawski written confirmation that it would not take her grievance to arbitration.

On April 6, 2005, Baprawski filed an unfair practice charge alleging that the District had rescinded her reassignment in retaliation for her protected activity. On May 31, 2005, the charge was dismissed and deferred to arbitration. However, Baprawski's grievance did not proceed to arbitration. On September 9, 2005, Baprawski filed a second unfair practice charge containing the same allegations.

On January 5, 2006, PERB's General Counsel issued a complaint alleging that the District had violated the Educational Employment Relations Act (EERA) by rescinding Baprawski's reassignment. The District denied any wrongdoing and affirmatively alleged that the unfair practice charge was untimely. The ALJ agreed with the District and dismissed the charge. The Board adopted the ALJ's decision.

Section 3541.5(a)(1) of the EERA provides that an unfair practice charge must be filed within six months of the alleged unfair practice in order to be

timely. Under certain circumstances, however, the six-month limitations period may be tolled under one of two theories: (1) statutory tolling; or (2) equitable tolling.

With respect to statutory tolling, section 3541.5(a)(2) provides that the six-month limitations period is tolled during periods in which the charging party is attempting to exhaust a contractual grievance/arbitration process culminating in binding arbitration. Time devoted to preparing to file the grievance, such as investigation, discovery, planning and preparation of documents, is also subject to statutory tolling. The "grievance machinery" is considered exhausted when the union and/or the grievant fail to take it to the next step of the contractual grievance process. The limitations period is tolled only while the grievance is being actively pursued, and not if the grievant knows that the union is no longer pursuing the grievance.

With respect to equitable tolling, the six-month limitations period may be subject to equitable tolling during the period of time a grievance is being pursued regardless of whether the process includes binding arbitration if: (1) the charging party is pursuing the grievance reasonably and in good faith; and (2) tolling will not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the other party. However, the six-month limitation period may only be extended equitably when a party is utilizing a bilaterally agreed-upon dispute resolution procedure.

In the present case, the ALJ found that Baprawski was entitled to statutory tolling for certain periods of time while she was pursuing the grievance. Specifically, she had been actively engaged in preparing for her grievance from the time the District rescinded her reassignment on August 31, 2004, until her grievance was filed on September 14, 2004. The grievance was then actively pursued until the District's Step Two denial on November 1, 2004. The Guild did not pursue the grievance beyond November 11, thus the contractual grievance procedure was exhausted on that date and tolling ended.

Consistent with PERB case law, the ALJ agreed that the statute was tolled during the pendency of the first PERB charge. However, tolling ended on May 31, 2005, when the first PERB charge was dismissed. Baprawski did not file the instant charge until September 9, 2005. She argued that the limitations period should be equitably tolled from June 3, 2005, through September 1, 2005, while she was pursuing her grievance and before she received final notice that the Guild would not take her grievance to arbitration. However, equitable tolling is limited to the period during which the charging party was utilizing the collectively bargained dispute resolution procedure. In addition, the informal discussions that occurred between Baprawski and the Guild, will not toll the statute of limitations under either an equitable tolling theory or statutory tolling theory.

PERB has no authority to require a union to take a grievance to arbitration and should not dismiss a charge when the union has refused to arbitrate. In this case, the Guild's final decision not to take the grievance to arbitration was made in November 2004, and it never gave any indication that it would change its mind despite Baprawski's continuing requests. Therefore, the period between the dismissal of the first charge on May 31 and the filing of the instant charge on September 9, 2005, was not tolled. Accordingly, Baprawski exceeded the six month limitations period and the charge was properly dismissed.

Baprawski v. Los Angeles Community College District (2009) PERB Dec. No. 2059 [33 PERC 149].

Note:

According to the PERB website, this decision has been appealed. Thus, the rules announced in the decision may change at some time in the future.

Employees Must Affirmatively Request Union Representation In Order To Invoke Their Rights To Representation At An Investigatory Interview.

Wanda Shelton worked for the San Bernardino County Public Defender. On April 18, 2007, two of her supervisors called her into a meeting. She initially expressed reluctance to attend the meeting without union representation. There is a conflict in the evidence whether she then affirmatively requested representation at the meeting. Her supervisor

denied her representation at the meeting. Shelton filed an unfair practice charge with the Public Employment Relations Board, alleging that the County violated the Meyers-Milias-Brown Act by denying her the right to union representation.

An employee who is required to attend an investigatory interview with the employer is entitled to union representation if the employee has a reasonable basis to believe discipline may result from the meeting. The charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request.

The PERB Administrative Law Judge (ALJ) found that Shelton satisfied the first element of the test based on the record that she at least expressed her reluctance to attend the meeting without union representation. However, the ALJ concluded that she did not meet the second element of the test in that the meeting was not an investigatory interview. Accordingly, the ALJ dismissed the complaint.

The Board affirmed the ALJ's decision based on his finding that the interview was not investigatory, but overruled the ALJ regarding his rationale regarding the right to representation. The Board held that in accordance with PERB precedent, employees must affirmatively request union representation in order to invoke their rights to representation. Expressing reluctance to attend an investigatory interview without union representation is insufficient, standing alone. However, the Board concluded that based on the record, it found Shelton's testimony that she requested representation to be credible.

Shelton v. San Bernardino County Public Defender (2009) PERB Dec. No. 2058M [33 PERC 148].

Actual But Not Punitive Damages Are Appropriate For Union's Untimely Agency Fee Notices.

AFSCME District Council 33 (DC 33) represents City of Philadelphia employees for collective bargaining purposes. Non-union members pay a "fair share" fee instead of full union dues. DC 33 is affiliated with 14 local unions, and each employee is assigned to one local. DC 33 gives each non-member a breakdown of the chargeable expenses aggregated across all the locals, and not based on the employee's particular local. The fair share fee is a pro-rata amount of the aggregate. In December 1997, DC 33 sent each non-member an agency fee notice breaking down the fair share fee set to take effect in July 1998. It continued to collect fair share fees at the January 1998 rate until September 2000, when it issued another notice. The September 2000 notice included a breakdown of the fair share fee that should have taken effect in July 1998 and the fee that should have taken effect in 1999. In January 2001, DC 33 issued a notice breaking down the fee that should have taken effect in July 2000. The July 1998 rate was less than what the nonmembers were actually charged, but the July 1999 and July 2000 rates were more. By May 2001, DC had refunded each non-member those differences.

DC 33 relies primarily on one individual, Vernon Person, to calculate the fair share fee and prepare the notice. Person's wife fell ill in late 1998 and he stopped working temporarily to care for her, which is why DC 33 did not issue any notices between December 1997 and September 2000.

Some of the non-members filed a class action lawsuit against DC 33 and the City under Section 1983, alleging that they failed to comply with the requirements for collecting fair share fees. They argued that DC 33 had failed to provide advance notice of the fair share fees it ended up extracting between January 1998 and September 2000, and that the late notices did not contain an audited breakdown of expenses that was detailed enough to allow each non-member to determine whether the local portion of his or her fair share fee was proper. The district court found that DC 33 had failed to provide timely advance notices, but the notices that were eventually provided were sufficiently detailed. The district court also found that the proper measure of damages was actual damages. After trial, the district court found that DC 33 carried its burden of proving chargeability of the portion of the fair share fee attributable to the national union's "assistance to affiliates fee." The Third Circuit Court of Appeals affirmed.

A fair share fee notice must provide non-members with sufficient information to gauge the propriety of the fee. Disclosure must include the major categories of expenses, but absolute precision in the form of an exhaustive and detailed list of all expenditures is not required. The Court found that all the locals' expenses must undergo an independent audit, but the audit can be performed on an aggregate, rather than local-by-local, basis.

The non-members argued that DC 33 should be ordered to return the entire fee it collected as a form of restitution or punitive damages for knowingly failing to provide advance notice. Restitution is appropriate to prevent unjust enrichment or to deter future similar misconduct. Punitive damages are available where the defendant has acted with reckless or callous disregard of the rights and safety of others. DC 33's failure to provide timely advance notice was an excusable, one-time lapse of an otherwise dedicated employee, and not the result of willful and malicious conduct. As such, restitution and/or punitive damages were not warranted.

The Court also found that DC 33 could charge the non-members the "assistance to affiliates" fee paid to the national union because a fair share fee can include contributions to a pool of resources potentially available to the local even if it is not actually expended for that local in any particular membership year.

Mitchell v. City of Philadelphia (3d Cir. 2009) 2009 WL 2731040.

DISABILITY DISCRIMINATION

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

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

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

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

Under the ADA, an employer may not require a current employee to undergo a medical examination unless the examination is shown to be job-related and consistent with business necessity. But an employer may make inquiries into the ability of an employee to perform job-related functions. The question here is whether the PCE was a medical examination under the ADA or simply an inquiry into whether Indergard was capable of performing the job-

related functions of the position she was qualified to return to after her medical leave.

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

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

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

Because the substance of the PCE clearly sought information about Indergard's physical or mental impairments or health and involved tests and inquiries capable of revealing to GP whether she suffered a disability, the PCE was a medical examination under the ADA.

The court reversed the summary judgment and remanded the case to the district court to address the triable issue of fact whether the PCE was job related and consistent with business necessity.

Indergard v. Georgia-Pacific Corp. (9th Cir. 2009) ___ F.3d _____ [2009 WL 3068162].

Employer Found Liable For Failure To Accommodate Employee's Disability On Single Occasion, Notwithstanding A Series Of Successful Accommodations.

A.M. worked as a cashier for one of the Albertsons supermarkets. In 2004, she returned to work after undergoing treatment for her cancer. The cancer treatment affected her salivary glands, which left her mouth very dry. To counter this, A.M. had to constantly drink water. Consequently, she had to go to the bathroom to urinate frequently. A.M. told her managers about her need to have water with her at all times and to use the bathroom frequently and her managers said it was not a problem. She only had to let the managers know when she needed to go to the bathroom so they could cover for her.

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

At about 8:00 p.m., A.M. told Sampson that she needed to take a break. Sampson asked A.M. if she could wait because a delivery truck was arriving. Awhile later, A.M. had a line of customers waiting for her at the checkstand. She called Sampson on the store intercom saying that she needed to go the bathroom.

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

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

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

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

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

A.M. v. Albertsons, LLC (2009) ___ Cal.App.4th ____ [2009 WL 2986423].

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

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

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

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

The current regulations require a person to show that he or she is unable to perform a class

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

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

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

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

SEX DISCRIMINATION

Under the Lily Ledbetter Act, Female Employee Could State A Viable Equal Pay Claim.

Mary Lou Mikula was a grant coordinator for Allegheny County, Pennsylvania. In September 2004, she requested that her job title be changed and her salary increased to be equal or greater than that of the fiscal manager, Ed Przbyla. She received no response. Mikula made similar requests in October 2005 and March 2006 and received no response. In March 2006, Mikula sued the County for violation of the Equal Pay Act.

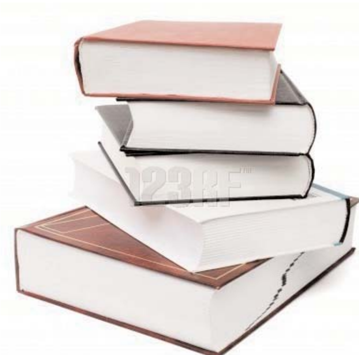
On August 23, 2006, Mikula received a letter from the County Human Resources Department stating that it had concluded that her allegations of discrimination were unfounded and that her current title and rate of pay were fair.

On April 17, 2007, Mikula filed a charge with the EEOC claiming that the County violated Title VII. She later amended her Equal Pay Act lawsuit to include the Title VII claim. Title VII requires a claimant in Pennsylvania to file a charge with the EEOC within 300 days of an unlawful employment practice. Thus, any claims based on challenged acts that occurred before June 20, 2006 are time barred. The district court granted summary judgment in favor of the County, finding that Mikula's claim accrued in September 2004 when she discovered the allegedly discriminatory pay discrepancy between herself and Przbyla. As such, her 2007 EEOC charge was untimely.

While Mikula's appeal was pending, Congress enacted the Lily Ledbetter Act, which provides that an unlawful employment practice occurs when an individual becomes subject to a discriminatory compensation decision or is affected by application of a discriminatory compensation decision, including each time wages, benefits, or other compensation is paid. The Third Circuit Court of Appeals affirmed the district court's ruling, finding that Mikula could not state a claim because a request for a raise that was never answered is not the adoption of a discriminatory compensation decision.

On rehearing, the Third Circuit held that Mikula's Title VII pay discrimination claim is timely as to paychecks that she received after June 20, 2006 (300 days before she filed her EEOC charge) if they reflect a "periodic implementation" of a previously made intentionally discriminatory employment decision. The Court also held that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied.

Mikula v. Allegheny County of Pennsylvania (3d Cir. 2009) ___ F.3d ____ [2009 WL 2889742].



RACE DISCRIMINATION

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

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

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

Dear met with Steward and Jennetten the following day and the supervisors explained their rationale for the reassignment. Jennetten told Dear that she needed to change. She said, "You need to change your voice and you need to change your facial expressions." After Dear's demotion, Gail Speer, a white nurse, replaced her on an interim basis. Dear filed a complaint with the EEO counselor alleging race discrimination. Dear was then permanently assigned to a staff nurse position in another unit.

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

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

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

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

Court Awards Summary Judgment To District In Case Involving Three Employees Claiming Race Discrimination and Retaliation.

In a case handled by **Pilar Morin**, **Alex Wong**, **Jennifer Rosner** and **Meredith Karasch** of our Los Angeles office, the Los Angeles Superior Court recently granted summary judgment in favor of a school district and against three employees alleging race discrimination, retaliation and failure to prevent discrimination and harassment under the Fair Employment and Housing Act.

The first plaintiff, a middle school special education teacher, claimed she was improperly and repeatedly disciplined due to her race and the fact that she had complained about the discrimination. This plaintiff was repeatedly written up and disciplined for arriving to school late, failing to sign in, failing to satisfactorily perform her responsibilities to participate in students' individualized education plans, and failing to attend meetings, among various other performance issues.

The second plaintiff, a financial manager, claimed she was improperly disciplined and then transferred to a different school location due to her race and the fact that she had complained about discrimination. The principal had received numerous complaints about this plaintiff's job performance and her rude and often hostile interactions with other students and staff. Such incidents included several altercations with other teachers and physically disciplining her son in front of other students, parents and staff on school property.

The third plaintiff, a middle school special education teacher's assistant, claimed she was demoted and improperly and repeatedly disciplined due to her race. The plaintiff was repeatedly written up and disciplined for failing to adequately supervise her assigned student (who suffered from seizures), reporting late to her post after breaks, falsifying her time records, and insubordination, among various other performance issues. This plaintiff had a lengthy disciplinary history starting in 2000.

All plaintiffs alleged that the discrimination and retaliation started upon the arrival of a new principal at the school in 2005.

In granting three of the District's summary judgment motions, the Court agreed that, given the plaintiffs' performance deficiencies and numerous complaints received by the principal about the plaintiffs' job performance, the District had legitimate business reasons for the disciplinary actions it took against these plaintiffs. The Court also found that the plaintiffs failed to demonstrate that those legitimate reasons were a pretext for discrimination or retaliation. The Court further found no factual bases for plaintiffs' failure to prevent discrimination claim because plaintiffs' discrimination and retaliation claims were adjudicated in the District's favor, and the District demonstrated that it maintained an anti-discrimination policy, conducted trainings and investigated plaintiffs' discrimination complaints.

RACIAL HARASSMENT/DISCRIMINATION

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

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

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

Aulicino applied for a supervisor position, which required candidates to have one year of service as an MVO and one year of full-time experience vehicle dispatching. It also preferred candidates to have a Class B driver's license. During Aulicino's interview, John tried to discourage and disqualify him. When Aulicino discussed his qualifications, John interrupted him and said that he knew all about it. John decided not to promote Aulicino and

told a colleague that he would not hire Aulicino and referred to Aulicino as a white f**k. John ultimately hired Joseph Johnson, an African-American, for the supervisor position. Johnson had some "fill-in" dispatching experience and a commercial learner's permit but no Class B license.

Aulicino sued the DHS for race harassment and discrimination in violation of Title VII. The district court granted summary judgment in favor of the DHS. The Second Circuit Court of Appeals reversed and remanded the case.

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

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

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

NATIONAL ORIGIN HARASSMENT/DISCRIMINATION

Employee Subjected To Persistent Harassment Could Take Case To Trial.

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

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

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

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

Furthermore, the Court found that Nazir raised triable issues of material fact as to his retalia-

tion claim. After Nazir went on a stress leave as a result of the harassment, Petersen asked him to voluntarily demote himself to mechanic. When Nazir refused and then returned to work, he complained about the continuing harassment and was terminated three weeks later following a less-than-thorough investigation.

Nazir v. United Airlines, Inc. (2009) ___ Cal.App.4th ____ [2009 WL 3235159].

GENETIC DISCRIMINATION

Interim Rules Implementing The Genetic Information Nondiscrimination Act Published.

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

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

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

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

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

AFFIRMATIVE ACTION

White School Administrator Could Take Her Challenge of District's Affirmative Action Policies to Trial.

Donna Humphries, a white female with a doctorate degree in elementary education, has been working as an elementary school counselor for the Pulaski County Special School District in Arkansas since 1989. Since 2001, she has applied for almost every elementary school assistant principal position that has been available in the District. Humphries asserts that the District preferentially hired black applicants.

Humphries sued the District for race discrimination in violation of Title VII. The district court granted summary judgment in favor of the District. The Eighth Circuit Court of Appeals reversed.

Humphries asserted that the District's affirmative action policies constituted direct evidence of unlawful discrimination. The District utilized biracial committees to select candidates for the assistant principal positions. The District's job posting also states, "THE DISTRICT WILL MAKE SPECIAL EFFORTS TO EMPLOY AND ADVANCE WOMEN, BLACKS, AND HANDICAPPED PERSONS." The District's published hiring goals also include having at least one minority administrator at each school and attaining a ratio of black administrators in proportion to the ratio of black certified personnel.

Over the District's denial, Humphries asserted that the District had a policy of hiring assistant principals such that at least one assistant principal at each school is of a different race than that school's principal. Humphries offered a statistical analysis of the fourteen assistant principal openings that were filled from October 2002 to August 2005, which arguably supported the existence of such a policy. The Eighth Circuit found that a reasonable jury could conclude that the District has a policy of pairing assistant principals with principals of

different races.

Following the Ninth Circuit and various other sister circuits, the Court also concluded that evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination. If the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII. The Court found that Humphries raised a genuine issue of material fact concerning whether there was a specific link between the District's decision not to promote her and the District's various affirmative action policies. She also raised a triable issue as to whether the policies were valid - remedial and narrowly tailored to meet the goal of remedying the effects of past discrimination.

Humphries v. Pulaski County Special School District (8th Cir. 2009) 580 F.3d 688.

Note:

> *Of course, there would be no question that under California's Proposition 209 - California Constitution Article I, Section 31 - such affirmative action plans would be held illegal.*

ADMINISTRATIVE HEARINGS

Exclusionary Rule Is Not Generally Applicable To Administrative Hearings.

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

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

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

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

In administrative disciplinary proceedings, a balancing test must be applied and consideration must be given to the social consequences of applying the exclusionary rule and its effect on the integrity of the judicial process. In conducting the balancing test, one factor to consider is whether the evidence was obtained under circumstances which shock the conscience.

Even in an administrative setting, egregious violations of the Fourth Amendment might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. Courts also consider circumstances which may show that an unlawfully obtained confession was coerced.

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

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

Department of Transportation v. State Personnel Board (2009) ___ Cal.App.4th ____ [2009 WL 3353634].

FIRST AMENDMENT

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

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

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

For a First Amendment retaliation claim, the employee must show that the speech addressed a matter of public concern. Whether speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. While motive surely may be one factor in making this determination, the Second Circuit found that motive is not, standing alone, dispositive or conclusive of whether speech concerns a matter of public concern.

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

Note:

The Ninth Circuit Court of Appeals has similarly held that "motive should not be used as a litmus test for public concern; rather, content is the greatest single factor" in the inquiry as to whether speech addresses a matter of public concern. See Energy Savers, Inc v. Hansen *(9th Cir. 2004) 381 F.3d 917, 925. Most circuits have similarly found that motive should not be dispositive in determining whether a particular statement addresses a matter of public concern.*

MILITARY LEAVE RIGHTS

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

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

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

The Court also found that the VBIA does not apply retroactively. The VBIA provides that there is no statute of limitations for any person who "seeks to file a complaint." This language suggests that the VBIA was meant to apply prospectively. Moreover, there is a general presumption that a newly extended statute of limitations does not revive a previously barred claim. As Middleton's claim was more than thirteen years old before Congress enacted the VBIA, the VBIA could not have revived his claim because it had already been barred for nine years under the four year statute of limitations.

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

EMPLOYER LIABILITY

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

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

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

An employer is liable for the torts of an employee acting within the scope of his or her employment. Courts interpret actions within the scope of someone's employment very broadly. Under the "going and coming rule,"

an employee is not acting within the scope of employment while going to or coming from the workplace. But when an employee is engaged in a "special errand" or a "special mission" for the employer it will negate the "going and coming rule."

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

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

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

WORKERS' COMPENSATION

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

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

The workers compensation judge (WCJ) found that Esquivel's motor vehicle accident injuries were a compensable consequence of her existing industrial injuries. Esquivel's employer and insurance company petitioned the Workers' Compensation Appeals Board for reconsideration of the WCJ's decision. The Board reversed the WCJ's findings and award, finding that the accident occurred too remotely from Esquivel's home and her destination to reasonably assign the risk of injury en route to the employer. Esquivel appealed the decision to the California Court of Appeal, who affirmed the Board's order and decision.

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

Esquivel argued that her injury should be covered by workers' compensation because she had not materially deviated from her route to her medical providers' offices. However, the Court of Appeal held that there must be a reasonable geographic limitation on the employer's risk of incurring liability for such injuries. Consequently, the Court held that the employer bears the risk of incurring liability under the Workers' Compensation Act for an injury an employee suffers during travel to or from a medical appointment related to an existing compensable injury while the employee is traveling a reasonable distance, within a reasonable geographic area, to or from that appointment. Thus, a new injury that an employee suffers while traveling a reasonable distance, within a reasonable geographic area, to or from a medical appointment for examination or treatment

of an existing compensable injury is also compensable under the Act. Conversely, where the employee chooses for reasons unrelated to his or her need for medical treatment to travel to a distant location beyond the reasonable geographic area of his or her employer's compensability risk, and is injured while traveling an unreasonable distance from that distant location to a medical appointment related to an existing compensable injury, the employee incurs no liability under the Act.

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

Esquivel v. Workers' Compensation Appeals Board and Corrections Corporation of America San Diego Detention (2009) ___ Cal.App.4th ____ [2009 WL 3285360].

ATTORNEY'S FEES

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

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

That month Mach was assigned on three consecutive days to the patrol division. After his third shift, he left some of his traffic equipment outside of Horwath's door with a note stating that he no longer needed the equipment because he had been transferred indefinitely to patrol. Horwath thought that Mach overstepped his bounds by dumping his gear outside his door without speaking to him directly. Horwath conferred with his superiors, Deputy Chief John Moss and Chief Deputy Patrick Maher, who agreed that Mach should be transferred to patrol. Mach grieved the transfer, and the Sheriff decided to give him a second chance. But over the next six months, Mach failed to adhere to directives and his performance was unsatisfactory. The Department gave him repeated warnings, a written reprimand, and a one-day suspension. In August 2004, the Sheriff permanently transferred Mach to patrol. Mach was forty-seven years old and the deputy who permanently filled his position was also forty-seven years old.

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

The ADEA prohibits an employer from dis-

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

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

Mach v. Will County Sheriff (7th Cir. 2009) 580 F.3d 95.

STUDENTS

SPECIAL EDUCATION

Teacher Who Complained About Employer's Failure to Provide Adequate Services on Behalf of Students With Disabilities Had Standing to Bring Claim under the ADA and Section 504 of the Rehabilitation Act.

Susan Lee Barker was employed by the Riverside County Office of Education as a Resource Specialist Program teacher for students with disabilities. She brought suit against her employer alleging she had been constructively terminated arising out of an intolerable work environment. Barker's complaint alleged that her supervisors at the Riverside County Office of Education retaliated against her after she voiced concerns that the Office of Education was not complying federal and state law requrements pertaining to the provision of educational services to disabled students. She brought suit pursuant to the anti-retaliation provisions of both section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act ("ADA").

Beginning as early as 2003, Barker had expressed concerns to her supervisors that the special education services provided by the Riverside County Office of Education to its disabled students were noncompliant with federal and state law. In May 2005, Barker and a coworker filed a class discrimination complaint with the U.S. Department of Education's Office for Civil Rights ("OCR"). The complaint alleged that the Riverside County Office of Education denied its disabled students a free appropriate public education.

In June 2005, Barker's supervisors at the Riverside County Office of Education first learned that Barker filed the class discrimination complaint with the OCR. The complaint alleged that the County Office retaliated against her for advocating on behalf of her students with disabilities and for filing a complaint with the Office for Civil Rights. OCR investigated the complaint and found that the County Office had, in fact, retaliated against Barker. OCR also found that Barker had standing to bring the complaint under the IDEA and Section 504. Barker then filed a lawsuit in federal district court making the same allegations. The district court dismissed Barker's lawsuit for lack of standing, and Barker appealed.

On appeal, Barker alleged that Section 504 grants standing to individuals who suffer retaliation for attempting to protect the rights of disabled people, even if they themselves are not disabled. The County Office of Education argued that Section 504 only protects a "qualified individual with a disability." Because Barker was not disabled, the County Office argued, she could avail herself of the Rehabilitation Act's protection against retaliation. The Court disagreed.

The Court focused on the statutory language of Section 504 in making its determination. Section 504's anti-retaliation provision provides that the remedies for retaliation are available to "any person aggrieved" by a violation of Section 504. It does not limit the remedies to disabled persons. Moreover, anti-retaliation language from Title VI of the Civil Rights Act incorporated into Section 504 states, "No recipient or other person shall intimidate, threaten, coerce, or discriminate against *any individual* for the purpose of interfering with any right or privilege secured by Section 601 of [the Civil Rights] Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part." [Emphasis in opinion.] Again, the anti-retaliation provision provides a remedy to "any individual" and is not limited to disabled individuals.

The Court found that this language demonstrated a Congressional intent that any person could be protected by these provisions, and that such person need not be disabled nor have any close relationship with a disabled person to have standing to bring a claim. Moreover, the Court found that this was consistent with Congress' goal of protecting the rights of the disabled. Congress recognized that disabled persons may need others to assist them in vindicating their rights. The Court also noted that, while not binding, the OCR opinion that Barker had standing pursuant to Section 504 constituted persuasive authority upon which the Court could rely.

With regard to whether Barker had standing under the ADA, the Court reached the same conclusion. The anti-retaliation provision of the ADA, like the same provision of Section 504, applies to "any individual" who has opposed any violation of the ADA or who made or particpated in a related charge. In addition, a person cannot be subject to retaliation "on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part."

The ADA does not limit its protections to disabled individuals. The Court found the same Congressional intent that these provisions apply broadly, with the recognition that persons with disabilities often require the assistance of others to pursue their rights under the ADA. The Court specifically found the anti-retaliation provisions were directly applicable to Barker, because she had engaged in activities opposing her school's policies which violated the ADA, and because she had aided other individuals in the exercise and enjoyment of their rights protected by the ADA.

Based on its analysis of the plain language of the anti-retaliation provisions of the ADA and Section 504, the Court found that Barker had standing to bring a retaliation action against the County Office, despite the fact that she is not a qualified individual with a disability.

Barker v. Riverside County Office of Educ. (9th Cir. 2009) ___ F.3d ____, 2009 WL 3401986.

Court Finds that Section 504 Claims are Subject to the IDEA's Two Year Statute of Limitations, Rather Than a State's Personal Injury Statute.

Patrick P., a student, and his parents Rita and Michael P. sued the West Chester Area School District ("District"), alleging that the District failed to provide a free appropriate public education ("FAPE") in violation of the IDEA and Section 504 of the Rehabilitation Act. The federal district court granted summary judgment on behalf of the District. The court applied the IDEA's two year statute of limitations to the IDEA claims, while applying Pennsylvania's personal injury statute of limitations to the Section 504 claim.

The Court of Appeals disagreed with the district court's application of the state personal injury statute of limitations to the Section 504 claim. The Court noted that the question of the applicable statute of limitations for Section 504 claims was a case of first impression - Section 504 does not provide its own statute of limitations. Generally, courts will import an analogous state statute of limitations in the absence of one in a federal statute. On the other hand, a court may borrow a statute of limitations from an analogous federal law where that law "clearly provides a closer analogy than the available state statutes."

The District argued that the Court should use the statute of limitations of the IDEA, since it

is so analogous to Section 504. Courts had, in the past, used analogous state statutes, because the IDEA did not contain a statute of limitations. However, in 2004, Congress added a statute of limitations to the IDEA. In light of that recent change, the District argued, the Court should use the IDEA's statute of limitations.

The Court looked to the purposes of the IDEA and Section 504 to determine if they were substantially analogous. The Court noted that the IDEA and Section 504 do similar statutory work. They are parallel in that they both protect the rights of disabled children. Both statutes prohibit discrimination, and both require FAPE. As the Court noted, Section 504 "is certainly closer in subject matter and goals to the IDEA than to the Pennsylvania personal injury statute, which deals with torts against personal property."

Similarity between statutes is not sufficient to require the application of the same statute of limitations. In fact, the Supreme Court has held that analogous state statues must be used unless to do so would frustrate federal policy. Here, the Court found that use of the Pennsylvania personal injury statute could frustrate federal policy behind Section 504. The IDEA provides two very specific exceptions to its statute of limitations where a parent has been prevented from requesting a due process hearing because of either: (1) specific misrepresentations by the school that it had resolved the problem: and (2) the school's withholding of statutorily required information from the parent. The Pennsylvania statute of limitations does not contain the same exceptions. In addition, tolling principles that would affect the application of state statutes of limitations would not affect the IDEA statue of limitations.

In this case, the Section 504 claims were premised on the IDEA claims. The Court concluded that it would not make sense to apply two different statues of limitations, especially since Congress has expressed an interest in promptly resolving disputes under the IDEA. As a result, the Court held that the IDEA's limitations period is a better fit for Section 504 education claims, and provides a "closer analogy" than Pennsylvania's statute of limitations.

P.P. v. West Chester Area School Dist. (9th Cir. 2009) ___ F.3d ____ 2009 WL 3526372.

Note:

This is a 3rd Circuit case, so is not precedential in California. However, according to the opinion, the 3rd Circuit is the first Circuit to address this issue.

§

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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.

Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please send your name, agency, address, city, state, zip, phone number, fax number and e-mail address to info@lcwlegal.com.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of ***Education Matters****.*

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

FIRM PROFILE
Joung H. Yim
Associate

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

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

Before joining LCW, Joung represented many school districts in matters pertaining to collective bargaining, education code issues, government code issues, charter schools, and wage and hour claims.

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

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

Firm Publications

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

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

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

Compliant EEO Plans

From Model Plan to Your Plan: Developing Compliant EEO Plans That Work

California Community College Districts are required to develop their own Equal Employment Opportunity Plans- which must be compliant with the State Chancellor's regulations, the Education Code, the California Constitution (including Proposition 209) and federal law. Unfortunately, these sources of law (and the cases that interpret them) are dynamic, conflicting and difficult to navigate.

Liebert Cassidy Whitmore has developed a three hour introductory-level workshop designed to walk supervisors and managers through each step in developing their EEO plans. The workshop will explain the current state of the law and offer participants practical suggestions for creating a compliant EEO Plan.

To schedule a training at your District, contact Anna Sanzone-Ortiz at (310) 981-2051 or asanzone-ortiz@lcwlegal.com.

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. Classes 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.

Public Works Bid and Contract Documents Service from LCW

Are You Taking Unnecessary Risks with Your Public Works Bid and Contract Documents?

The bid and contract documents we've reviewed have truly run the gamet in terms of meeting legal requirements and addressing potential problems and liabilities that may arise on a public works project.

Don't let bid and contract documents increase your liability. Liebert Cassidy Whitmore will be offering a subscription service* to model bid and contract documents including:

<u>Prime Contractor Bid and Contract Documents</u>

1. Notice to Bidders
2. Instructions to Bidders
3. Bid Form
4. Bid Bond
5. Certification of Disabled Veteran Business Enterprise Certification
6. Non-Collusion Declaration
7. Designation of Subcontractors
8. Good Faith Effort Worksheet for Disabled Veteran Business Enterprise Certification
9. Agreement Between Owner and Contractor
10. General Conditions
11. Escrow Agreement
12. Fingerprinting Notice and Acknowledgement
13. Payment Bond
14. Performance Bond

<u>Consultant Agreements</u>

15. Agreement for Architectural Services
16. Engineering Services Agreement
17. Construction Management Agreement
18. Agreement for Inspection Services
19. Agreement for Materials Testing Services

The subscription service is available for $600 for the initial set of the above bid and contract documents, with annual updates of the entire set provided for $100. All documents will be provided to you electronically so that you can insert your specific, relevant information.

For more information or to enroll for the service, contact Cynthia Weldon at (310) 981-2055 or cweldon@lcwlegal.com.

*Subscription service begins **<u>January 2010.</u>**

MANAGEMENT TRAINING WORKSHOPS

Firm *Activities*

Consortium Workshop Training

November 10 **"Managing Performance Through Evaluation"** and **"Advanced FLSA"**
San Mateo County ERC | Foster City | Richard Bolanos

November 10 **"Preventing Workplace Harassment, Discrimination and Retaliation"** and **"Managing the Marginal Employee"**
Bay Area ERC | Newark | Suzanne Solomon

November 12 **"Finding the Facts: Disciplinary and Harassment Investigations"** and **"Preventing Workplace Harassment, Discrimination and Retaliation"**
East Inland Empire ERC | Fontana | Jennifer Hong

November 12 **"Family and Medical Care Leave Acts"** and **"Preventing Workplace Harassment, Discrimination and Retaliation"**
West Inland Empire ERC | Chino Hills | Michael Blacher

November 12 **"Discipline: Putting It into Practice"**
Gateway Public ERC | Pico Rivera | James Oldendorph and Scott Tiedemann

November 12 **"Supervisory Skills for the First Line Supervisor/Manager"**
San Diego ERC | Poway | Donna Evans

November 12 **"Discipline: Putting It into Practice Part II"**
LA County Management Attorneys (LACMA) Consortium | Los Angeles | Mark Meyerhoff

November 17 **"Advanced FLSA"** and **"Sick and Disabled Employees"**
Coachella Valley ERC | Indio | Peter Brown

November 18 **"Supervisory Skills for the First Line Supervisor/Manager"**
South Bay ERC | Torrance | Donna Evans

November 19 **"Performance Management: Evaluation, Documentation and Discipline"** and **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County ERC | Costa Mesa | Laura Kalty

November 19 **"Supervisory Skills for the First Line Supervisor/Manager"**
Humboldt County ERC | Fortuna | Frances Rogers

December 2 **"Supervisory Skills for the First Line Supervisor/Manager"**
Napa/Solano/Yolo ERC | Vacaville | Kelly Tuffo

December 2 **"Disability Discrimination/Family and Medical Care Leave/Workers' Compensation/Disability Retirement: Administering Overlapping Laws"**
Central Coast ERC | Santa Maria | Michael Blacher & Doug Bray

December 3 **"Discipline: Putting It into Practice"**
Central Valley ERC | Clovis | Gage Dungy

December 3 **"Advanced FLSA"**
Gateway Public ERC | Huntington Park | Peter Brown

December 9 **"Prevention and Control of Absenteeism and Abuse of Leave"** and **"Disaster Service Workers - If You Call Them, Will They Come"**
Bay Area Community College Districts (CCD) ERC | Pleasanton | Jack Hughes

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

Customized Training Presentations

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

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

December 9 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Liebert Cassidy Whitmore | Los Angeles | Donna Evans

December 9 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Fresno | Gage Dungy

December 9 **"Maximizing Performance Through Evaluations for K-12 Districts"**
Carpinteria Unified School District | Carpinteria | Mary Dowell

December 10 **"Ethics in Public Service"**
Liebert Cassidy Whitmore | Fresno | Gage Dungy

December 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Jennifer Hong

December 14 **"Ethics"**
Chabot-Las Positas Community College District | Pleasanton | Donna Williamson and Laura Schulkind

December 15 **"Preventing Discrimination"** and **"Handling Grievances"**
County of Sonoma | Santa Rosa | Jack Hughes

December 16 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Liebert Cassidy Whitmore | San Francisco | Kelly Tuffo

December 16 **"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"**
State Center Community College District | Fresno / Reedley | Shelline Bennett

December 17 **"Ethics in Public Service"**
Liebert Cassidy Whitmore | Los Angeles | Donna Evans

December 22 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | Los Angeles | Laura Kalty

Speaking Engagements

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

November 4 **"Navigating the Ins and Outs of Public Safety Employment Law and Practices"**
California Public Employer Labor Relations Association (CalPELRA) Annual Conference | Monterey | Scott Tiedemann

November 4 **"Labor Relations Game Show"**
CalPELRA Annual Conference | Monterey | Melanie Poturica

November 4 **"The Laws Impacting Background Investigations"**
California Background Investigators Association (CBIA)| Santa Barbara | Mark Meyerhoff

November 5 **"Internal Affairs/Labor Relations Update"**
California University Police Chiefs Association (CUPCA) Executive Development Conference | Pismo Beach | Todd Simonson

November 5 **"Common FLSA Mistakes"**
CalPELRA Annual Conference | Monterey | Peter Brown

November 5 **"Workplace Injuries and Leaves"**
County Counsels Association (CCAC) Employment Law Section Meeting | Newport Beach | Michael Blacher

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

December 3	**"Student Free Speech and the Internet"** CSBA Annual Conference | San Diego | Pilar Morin
December 4	**"Student Free Speech and the Internet"** CSBA Annual Conference | San Diego | Michael Blacher
December 4	**"Charter School Update"** CCSA | San Diego | Donna Williamson
December 5	**"Current Negotiation Issues for the Educational Employer"** CSBA Annual Conference | San Diego | Bruce Barsook
December 7	**"Legal and Disciplinary Issues Update"** Redwood Empire Municipal Insurance Fund | Ukiah | Richard Whitmore
December 16	**"Risk and Liability Associated with the ADA"** Public Agency Risk Managers Association (PARMA) Central Valley Chapter | Fresno | Gage Dungy

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