

Liebert Cassidy Whitmore

A Professional Law Corporation

6033 West Century Boulevard, Suite 500
Los Angeles, California 90045
T: (310) 981-2000 F: (310) 337-0837

575 East Locus Avenue, Suite 302
Fresno, California 93720
T: (559) 256-7800 F: (559) 449-4535

153 Townsend Street, Suite 520
San Francisco, California 94107
T: (415) 512-3000 F: (415) 856-0306

IPMA-HR Western Region Annual Conference – The HR Trek

“Legal Update / Trends in Employment Law in the Public Sector”

May 5, 2006
10:15am – 11:30am

Presented by:
Richard Whitmore

**Legal Update / Trends in
Employment Law in the
Public Sector**

*Presented by:
Richard Whitmore*

Discrimination - Gender

- An employer may be liable for harassment when its employees are harassed by an independent contractor.

*Dunn v. Washington County Hospital,
429 F.3d 689 (7th Cir. 2005)*

Discrimination - Pregnancy

- A female employee who is laid off after becoming pregnant may sue for discrimination where management lies about recommendations to retain her.

*Kelly v. Stamps.com Inc.,
(2006) 37 Cal.Rptr.3d 240*

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Discrimination – Disability

- If an employer has previously reinstated employees whose convictions had been expunged, an employee who had an expunged conviction and a history of mental problems could sue for discrimination when not reinstated.

Josephs v. Pacific Bell,
2005 DJDAR 14847 (Dec. 17, 2005)

Discrimination – Disability

- An employer may terminate an employee for using marijuana, even though the employee has a prescription for medicinal marijuana.

Ross v. Ragingwire Telecommunications Inc.,
(Cal App 2005) **review granted**

Discrimination – Disability

- An employer of commercial drivers may reject applicants with limited vision by utilizing the "safety-of-others" defense.

Equal Employment Opportunity Commission v. United Parcel Service, Inc.,
(9th Cir. 2005) 424 F.3d 1060

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Discrimination – Disability

- A failure to honor an employee's request that all accommodation discussions go through his lawyer may violate the duty to engage in an interactive dialogue.

Claudio v. Regents,
(2005) 134 Cal.App.4th 224, 35 Cal. Rptr.3d 837

Discrimination – Disability

- The duty to accommodate does not require a city to convert a temporary light duty position into a permanent one.

Raine v. City of Burbank,
(2006) 135 Cal.App.4th 1215 [37 Cal.Rptr.3d 899]

Discrimination – Disability

- A city police officer who retires on disability can sue for 'perceived' disability when his application for firearms instructor is rejected.

Todd v. City of Cincinnati,
436 F.3d 635 (6th Cir. 2006)

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Discrimination – Race

- If a minority employee objects to being called nicknames, then persistent use of those nicknames by another employee may create liability.

El-Hakem v. BJY Inc.,
(9th Cir. 2005) 415 F.3d 1068

Discrimination – Race

- Caucasian officers can sue for discrimination when the African-American chief refers to them as "those white boys," transfers them and disciplines them excessively.

Horsford v. The Board of Trustees of California State University,
(2005) 132 Cal.App.4th 359 [33 Cal.Rptr.3d 644]

Discrimination – Race

- Use of the term "boy" towards an African-American employee, without more, is enough to show racial animus.

Ash v. Tyson Foods, Inc.,
546 U.S. ____ (2006)

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Discrimination – Race

- When the only African-American management employee is the only demotion during a reorganization, he may sue for discrimination.

Cornwell v. Electra Central Credit Union,
2006 DJDAR 2500 (March 1, 2006)

Discrimination – Race

- A practice of intentionally treating white employees worse in the promotional process can create liability for a city.

Harman v. City and County of San Francisco,
2006 DJDAR 2165 (February 22, 2006)

Discrimination – National Origin

- An "English-only" policy may create a hostile work environment for Hispanic employees.

Maldonado v. City of Altus, Oklahoma,
433 F.3d 1294 (10th Cir. 2006)

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Harassment - Gender

- Female subordinates may sue for sexual harassment by a "bullying " supervisor, even though the supervisor also bullied males.

EEOC v. NEA,
(9th Cir. 2005) 422 F.3d 840

Retaliation

- An employer has engaged in adverse action if it transfers an employee who complains about misuse of funds, even if the transfer is not obviously punitive.

Patten v. Grant Joint Union High School District,
2005 DJAR 14587 (Dec. 19, 2005)

Retaliation

- A dramatic reduction in job responsibilities may constitute adverse action, permitting a retaliation claim.

Holcomb v. Powell,
433 F.3d 889 (D.C. Cir. 2006)

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Retaliation

- Failure to support an employee's application for disability retirement is not adverse action and does not give rise to a retaliation claim.

James v. Metropolitan Government of Nashville,
159 Fed.Appx. 686 (6th Cir. 2005)

Discipline – Due Process

- There is no violation of due process when a city's *Skelly* notice includes the investigative report but not all the documents referenced in the report.

Gilbert v. City of Sunnyvale,
(2005) 130 Cal.App.4th 1264, 31 Cal.Rptr.3d 297

Free Speech

- There is no First Amendment right for police officers to display offensive tattoos.

Inturri v. City of Hartford,
2006 WL 231671 (2^d Cir. 2006)
UNPUBLISHED

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Free Speech

- A city attorney's public statements about a contractor he is suing on behalf of the city are absolutely privileged.

Tutor-Saliba Corporation v. Herrera,
2006 DJDAR 1637 (Jan. 10, 2006)

Fair Labor Standards Act

- Canine officers cannot waive their right under the FLSA to compensation for time spent caring for their dogs, even if the time is "unauthorized."

Bull v. United States,
(2005) 65 Fed.Cl. 407

Fair Labor Standards Act

- Paramedics held not to qualify for firefighters' partial overtime exemption because they were not responsible for engaging in fire suppression.

Cleveland v. City of Los Angeles,
(9th Cir. 2005) 420 F.3d 981

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Fair Labor Standards Act

- Time spent donning required specialized protective gear is compensable time.

IBP Inc. v. Alvarez,
(2005) 126 S.Ct. 514

Fair Labor Standards Act

- Time spent by employees obtaining an employer-required medical verification for sick leave is not compensable time.

*Department of Labor Wage
and Hour Opinion,*
2005-3NA

Fair Labor Standards Act

- A city that requires a dispatcher to attend psychotherapy counseling must pay for her time traveling to the sessions.

Sehie v. City of Aurora, 432 F.3d 749
(7th Cir. 2005)

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Fair Labor Standards Act

- Money paid to firefighters as part of a sick leave buy-back program must be included in the regular rate of pay for FLSA overtime purposes.

*Acton v. City of Columbia, Missouri,
2006 WL 287976 (8th Cir. 2006)*

Fair Labor Standards Act

- Double-time for "short-call" callbacks, if occurring infrequently, need not be included in the regular rate of pay.

*Department of Labor Wage and
Hour Opinion Letter,
2005-36*

Family and Medical Leave Act

- Department of Labor allows employer to seek medical verification of illness if FMLA leave continues into a new year.

*Department of Labor Wage
and Hour Opinion,
(2005)*

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Military Service Benefits

- Department of Labor issues regulations covering veterans returning to civilian employment.

www.dol.gov/vets

Labor Relations

- An agency fee payer may file an unfair labor practice complaint against a union if the union fails to give the legally required notice.

Abernathy v. UPTE, CWA Local 9119,
PERB Dec. No. 1784-H (Dec. 1, 2005)

Labor Relations

- The required notice to agency fee payers must include specific fiscal information, but need not be an audited financial statement.

Yaron v. UPTE, CWA Local 9119,
PERB Dec. No. 1820-H (Feb. 16, 2006)

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Privacy

- Final HIPAA regulations issued by federal Department of Health and Human Services.

45 CFR Parts 160 and 164, 71 Fed. Reg.
(Feb. 16, 2006)

Privacy

- A return to work conditioned on a "needlessly broad medical release" entitles the employee to sue for violation of his privacy rights.

O'Connor v. Pierson, 426 F.3d 187 (2d Cir. 2005)

Personnel Law

- Using seniority to select among the top three on a promotional list violates the merit principle.

California State Personnel Board v. CSEA
(2005) 36 Cal.4th 748, 31 Cal.Rptr.3d 201

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Personnel Law

- There is no statutory requirement in California for public employers to purchase or maintain uniforms for employees.

Goshorn v. State of California
(2005) 133 Cal.App.4th 328, 34 Cal.Rptr.3d 635

Law Enforcement

- The cities participating in a joint police task force are not jointly liable for the death of one city's officer in task force training.

Authority for California Cities Excess Liability v. City of Los Altos, 2006 DJDAR 2113 (Feb. 22, 2006)

Workers' Compensation

- A police officer injured while playing basketball off duty is not entitled to workers comp benefits, even when the city required him to stay fit.

City of Stockton v. Workers' Compensation Appeals Board,
(2006) 135 Cal.App.4th 1513 [38 Cal.Rptr.3d 474]

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Retirement

- Government accounting standards impose new disclosure requirements on public agencies for retiree health obligations.

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DISCRIMINATION – GENDER

Hospital Could Be Liable For Sexual Harassment By Doctor Even Though Doctor Was An Independent Contractor, But Doctor's Nasty Remarks Made To Nurse To Coerce Her To Withdraw Sexual Harassment Complaint Did Not Constitute Adverse Employment Action.

Lisa Dunn was a nurse at Washington County Hospital. Thomas Coy was a doctor at the hospital, but was an independent contractor. According to Dunn, Coy made life miserable for women at the Hospital. Dunn filed an internal complaint with the Hospital, alleging that Coy had sexually harassed her. Following her complaint, Coy made nasty and uncivil comments to Dunn such as "paybacks are hell."

Dunn filed a federal lawsuit against the Hospital for sexual harassment. The District Court granted summary judgment in favor of the Hospital, concluding that the Hospital could not be liable for Coy's conduct because Coy was not a Hospital employee. The Seventh Circuit Court of Appeals reversed.

Under federal law, an employer can be liable for sexual harassment or discrimination regardless of whether the acts complained of are those of an employee, independent contractor or customer. Therefore, the Hospital could be liable for Coy's conduct. However, even though the Hospital could be liable for Coy's conduct, the Court concluded that Dunn could not establish a claim for retaliation because Coy's verbal comments to Dunn were insufficient to amount to an adverse employment action. In reaching this conclusion, the Court stated, "Talk is cheap; unless Dunn knew that Coy sabotaged the career of other nurses, his statements would not have dissuaded reasonable persons from protecting their own rights. Dunn did not offer evidence that Coy had damaged other nurses' careers; instead the record shows that she stood up to a windbag."

Dunn v. Washington County Hospital, 429 F.3d 689 (7th Cir. 2005)

DISCRIMINATION – PREGNANCY

Employer Was Not Entitled To Summary Judgment On Former Employee's Claims Of Pregnancy Discrimination, Where Employee Presented Sufficient Facts To Suggest That The Reason She Was Laid Off Was Because Of Her Pregnancy.

Megan Kelly worked for Stamps.com as the Vice President of Marketing, earning an annual salary of \$150,000. In the same year Kelly was hired by Stamps, the company's stock plummeted and lost 93 percent of its value. As a result, in 2000, Stamps laid off almost half of its employees. Kelly, as one of the employees that Stamps did not lay off, was offered stock options and a cash retention bonus to stay with the company. After the layoff, Stamps hired a new CEO, Bruce Coleman, and Kathy Brush, a consultant who was a marketing expert and turnaround specialist,

to reinvigorate the company. As part of the turnaround, the company again reduced its workforce by half. Kelly, who was seven months pregnant at the time and had been promised a paid maternity leave, was laid off during the second round of lay offs.

Kelly filed suit against Stamps, claiming that she had been laid off because she was pregnant. Kelly alleged that she was an excellent employee with a strong and consistent track record in her department. However, Coleman and Brush made comments alluding to her pregnancy and stated that Kelly had "checked out" from her work. Stamps filed a motion for summary judgment. In its motion, Stamps argued that it was engaging in corporate restructuring and consolidation, and therefore, had a legitimate business reason for laying Kelly off. The trial court granted Stamps' motion. The Court of Appeal reversed.

To establish her claim for discrimination under California's Fair Employment and Housing Act, Kelly had to establish that she was a member of a protected class and she was terminated, even though she was performing her job competently. In addition, Kelly had to present other evidence demonstrating that there was a discriminatory motive behind the termination. If Kelly established these prima facie elements, the burden of proof would shift to Stamps to present evidence that it had a legitimate, non-discriminatory reason for laying Kelly off. If Stamps presented such evidence, the burden again would shift back to Kelly to demonstrate that Stamps' reasons were a pretext for discrimination.

Here, Kelly met her burden of proof by demonstrating that, as a pregnant woman, she was a member of a protected class and that she was terminated despite the fact she was competently performing her job. The Court also found that Kelly had established that a discriminatory motive existed, where Kelly had presented evidence of Coleman's statements that Kelly had "checked out." Although Stamps presented evidence that it had a legitimate, non-discriminatory business reason for the lay off - corporate restructuring and consolidation - the Court concluded that Kelly had presented sufficient evidence to suggest that Stamps' stated reasons were pretextual.

In reaching this conclusion, the Court focused on the fact that Kelly's supervisors praised her work and had recommended to Coleman and Brush that Stamps retain Kelly. However, Coleman and Brush determined that Kelly should be laid off. Moreover, when Kelly questioned Coleman and Brush about why she was being laid off, Coleman lied to her and told her that her supervisors had not recommended that the company retain her. The Court found that Coleman's lie, coupled with his statements about her being "checked out", constituted sufficient evidence of pretext to preclude summary judgment.

Kelly v. Stamps.com Inc., (2006) 37 Cal.Rptr.3d 240

DISCRIMINATION – DISABILITY

Employee Who Was Fired After Employer Learned Of Misdemeanor Battery Conviction And Employee's Time In A Mental Hospital Can Bring A Claim For Discriminatory Termination And A Separate Claim For Discriminatory Refusal To Reinstate Following His Termination.

Joshua Josephs applied for a service technician position with PacBell. Because service technicians have unsupervised access to customers' homes, California law allows employers to obtain a detailed criminal history of individuals who apply to be and work as service technicians. On his employment application, Josephs checked "NO" in response to the question, "Have you ever been convicted of, or are you awaiting trial for a felony or misdemeanor?" PacBell hired Josephs.

Three months after Josephs began his employment, PacBell received a copy of Josephs's criminal history, which revealed that Josephs had been arrested in 1982 for attempted murder but was found not guilty by reason of insanity and that Josephs had been convicted in 1985 for misdemeanor battery on a police officer. In addition, PacBell learned that Josephs had been committed to and spent almost three years in a state mental hospital and changed his name upon his release.

After PacBell learned of Josephs's history, Josephs was terminated for making a false statement on his employment application. Josephs filed a grievance with PacBell. During part of PacBell's three-step grievance process, Josephs's misdemeanor battery conviction was expunged. Thus, Josephs argued that he should be reinstated because PacBell had reinstated other employees whose convictions were expunged. However, PacBell refused to reinstate Josephs, urging that Josephs was different from other employees since he had spent time in a "mental ward."

Josephs filed discrimination complaints with the U.S. Equal Employment Opportunity Commission (EEOC) and with California's Department of Fair Employment and Housing (DFEH). In his EEOC complaint, Josephs alleged that he was discriminated against when he was terminated and described PacBell's actions in refusing to reinstate him. In his DFEH complaint, Josephs alleged that he was discriminated against when he was terminated, but made no mention of PacBell's refusal to reinstate him.

Josephs then brought a federal lawsuit against PacBell, alleging that he had been discriminated against on the basis of a disability (his mental condition) in violation of the Americans with Disabilities Act and California's Fair Employment and Housing Act. Following a jury trial, Josephs was awarded compensatory damages. The jury concluded that PacBell's reasons for terminating Josephs was nondiscriminatory, because Josephs was terminated for lying on his employment application. However, after hearing evidence that three other employees had been terminated for failure to disclose prior criminal convictions on their employment actions, but had been reinstated or offered a conditional reinstatement, the jury found that PacBell had refused to reinstate Josephs because of his mental condition.

PacBell filed a motion for judgment as a matter of law and a motion for a new trial, arguing that a claim for discriminatory refusal to reinstate is not a separately actionable claim. Moreover, even if discriminatory refusal to reinstate were an actionable claim, PacBell argued that Josephs did not exhaust his administrative remedies pertaining to the claim. The district court denied PacBell's motions. The Ninth Circuit Court of Appeals affirmed.

The Ninth Circuit joined other federal circuits and unequivocally held that discriminatory refusal to reinstate is a separately actionable claim because refusal to reinstate is a "new element of unfairness" separate from termination. The Court further held that Josephs had exhausted his administrative remedies. Even though Josephs's EEOC and DFEH complaints did not specifically allege refusal to reinstate as a grounds for discrimination, during the course of an investigation of Josephs's termination allegations, an administrative agency would have learned of Josephs's allegations pertaining to refusal to reinstate.

Josephs v. Pacific Bell, 2005 DJDAR 14847 (Dec. 27, 2005)

Employee Fired For Using Medical Marijuana May Not Pursue Claim For Wrongful Termination Or Disability Discrimination Under California's FEHA.

Gary Ross suffered chronic back pain. After he failed to obtain relief from traditional pain medications, he received a physician's prescription for medical marijuana under California's Compassionate Use Act.

Ross applied for and was offered a position with Ragingwire Telecommunications as a lead systems administrator. As a condition to his employment, Ragingwire required Ross to submit to a drug test. Ross tested positive for Tetrahydrocannabinol (THC), the active chemical in marijuana. Ross provided Ragingwire with a copy of his physician's recommendation for the medical marijuana; however, Ragingwire terminated him because of his marijuana use.

Ross filed an action against Ragingwire, claiming that he was wrongfully terminated and discriminated against in violation of California's Fair Employment and Housing Act (FEHA). Ragingwire demurred to Ross's complaint on the ground that marijuana is an illegal substance under federal law and refusing to accommodate Ross did not violate public policy or the FEHA. The trial court sustained the demurrer and dismissed Ross's complaint. The Third District Court of Appeal affirmed.

Under FEHA, an employer may not discriminate against an employee based on the employee's physical condition or disability. Nevertheless, an employer may still perform mandatory drug testing of its employees and may fire or refuse to employ a person who fails a drug test. Although California's Compassionate Use Act allows for the possession and cultivation of marijuana for personal medical purposes, it only insulates Ross from being criminally prosecuted under state law. The Act does not address employment rights. Marijuana use is prohibited by federal law. An employer is not required to accommodate an employee's disability by allowing an employee to use illegal drugs. Thus, if an employee's drug use is illegal, an employer may terminate an employee or revoke a job offer. Here, Ross's marijuana use was illegal under federal laws; therefore, Ragingwire did not violate the law when it terminated his employment.

Moreover, the public policy behind the Compassionate Use Act is to provide relief to seriously ill patients - patients who are presumably too ill to work. The statute does not address employer liability for firing or failing to hire individuals who use marijuana pursuant to the statute. Therefore, the statute cannot be used as a basis for a wrongful termination in violation of public policy.

Ross v. Ragingwire Telecommunications, Inc., (Cal.App,2005) review granted.

United Parcel Service's Policy Of Refusing To Hire Persons With Monocular Vision As Commercial Drivers Does Not Violate California's FEHA.

Individuals with monocular vision suffer from a decrease in peripheral vision. Prior to 1988, the federal Department of Transportation (DOT) regulations barred individuals with monocular vision from driving any commercial vehicle, regardless of weight. In 1995, the DOT exempted lightweight commercial vehicles from its regulations. Thus, under existing DOT rules, individuals with monocular vision are permitted to drive lightweight commercial vehicles.

United Parcel Service, Inc. (UPS) operates approximately 67,000 package delivery vehicles. Of these vehicles, only 5,511 are classified as lightweight and exempt from the DOT regulations. UPS generally requires all drivers to pass the DOT's vision standards because the drivers will drive routes that are served by both large (regulated) and lightweight (non-regulated) commercial vehicles. However, after the DOT exempted lightweight commercial vehicles from its regulations, UPS implemented a "Vision Protocol," a vision test that is less rigorous than the DOT's vision test for regulated vehicles. Driver applicants who are vision impaired and cannot pass the DOT's vision test for regulated vehicles, but who can pass the Vision Protocol, may be hired to drive the lightweight vehicles.

Individuals who suffer from monocular vision and who could not pass the Vision Protocol brought suit against the package carrier, alleging that they had been discriminated against in violation of California's Fair Employment and Housing Act (FEHA) on the basis of their disability. After a series of motions for summary judgment, appeals and remands, the Ninth Circuit Court of Appeals addressed the following issues:

- Whether individuals with monocular vision are disabled with respect to the major life activity of seeing;
- Whether individuals with monocular vision are disabled with respect to the major life activity of working;
- Whether UPS may employ the "safety-of-others" defense to justify its Vision Protocol.

Under FEHA, a physical disability is a qualifying medical condition that "limits a major life activity." Here, the Ninth Circuit concluded that monocular vision was a disability that limited the major life activities of both seeing and working. To determine whether an individual is limited in a major life activity, FEHA compares the ability of an impaired individual with the

abilities of an unimpaired individual - not with the abilities of the average impaired individual. Thus, with respect to the major life activity of seeing, because the individuals demonstrated that their monocular vision prevented them from performing a variety of tasks that unimpaired individuals could easily perform, the individuals were sufficiently "limited" in the major life activity of seeing. With respect to the major life activity of working, even though the individuals could perform other jobs both within and outside of UPS, their exclusion from the single position of driving large, regulated commercial vehicles constitutes a limitation in working.

However, even though the Court found that the individuals were limited in the major life activities of working and seeing, the Court concluded that the FEHA's safety of others defense applied to UPS's Vision Protocol. This defense allows an employer to discharge or refuse to hire an employee with a disability if, because of the disability, the employee cannot perform his or her job in a manner that would not endanger the health or safety of others. This defense embodies the public policy that employers "need not wait for disaster to strike before taking action: [the employer] owes a duty to the public and its employees affirmatively to avert disaster, rather than simply wait and hope it does not occur."

Here, UPS demonstrated with sound objective and statistical evidence that there was an increase - albeit modest increase - in the risk of accidents involving individuals with monocular vision. Moreover, UPS demonstrated that the Vision Protocol did not categorically exclude all individuals with monocular vision; it only excluded those whose vision was substantially impaired. Thus, application of the safety-of-others defense to UPS was proper.

Equal Employment Opportunity Commission v. United Parcel Service, Inc., (9th Cir. 2005) 424 F.3d 1060

Note:

This case illustrates that under the terms of California's FEHA - as distinguished from the federal Americans With Disabilities Act (ADA) - it is relatively easy for any employee to establish that he/she is disabled based on any limitation (not a "substantial" limitation as under the ADA) on a major life activity.

Employer's Failure To Speak With Disabled Employee's Attorney, As Requested By Of The Employee, To Inquire About Possible Reasonable Accommodations For Employee's Condition, Precluded Summary Judgment For Employer.

While Michael Claudio was working at the School of Veterinary Medicine at the University of California at Davis, he contracted leptospirosis, a disease humans contract from animal urine and animal blood. Claudio became disabled from the disease, went on medical leave and filed a workers' compensation claim. While on leave, Claudio began to work with the University's vocational rehabilitation counselor to find another job that did not require him to work with animals. In the meantime, the University informed Claudio four different times that he was terminated from his employment at the University. Nevertheless, the vocational rehabilitation counselor continued to communicate with Claudio concerning alternative positions. After

Claudio was told that he was terminated, he requested that all communications with the counselor be with his attorney. The counselor contacted Claudio's attorney and learned that the law firm specialized in workers' compensation claims. Assuming that the attorney was only representing Claudio in his workers' compensation claim, the counselor believed that she did not have to work with the attorney concerning Claudio's employment-related claims. Therefore, the counselor checked Claudio's resume against the available positions and concluded that no suitable positions were available. Claudio was then formally terminated.

Claudio filed an action against the University, alleging a variety of claims, including wrongful termination, disability discrimination and whistleblower retaliation. The lower court granted summary judgment in favor of the University. Claudio appealed and the Third District Court of Appeal reversed.

Under California's Fair Employment and Housing Act, before an employer can terminate an employee on the basis of the employee's disability, the employer must engage in an interactive process to determine if the employer can reasonably accommodate the employee's disability. The interactive process is generally between the employer and the employee and attorneys are usually not involved. However, in this situation, the Court concluded that it was unreasonable for the counselor to bypass Claudio's attorney and proceed with termination. Thus the Court concluded that there was a triable issue of material fact as to whether the University actually engaged in the interactive process that precluded summary judgment.

Claudio v. Regents, (2005) 134 Cal.App.4th 224, 35 Cal.Rptr.3d 837.

Employer's Duty To Provide Reasonable Accommodation For Disabled Employee Does Not Require The Employer To Convert A Temporary Light-Duty Position Into A Permanent Position Which, In Effect, Would Create A New Position.

Mark Raine had been employed as a police officer for the City of Burbank Police Department since 1981. In 1995, the City re-assigned Raine to work as a school resource officer for the Burbank Unified School District, where he was to patrol school campuses while school was in session. One week after his re-assignment, Raine suffered a torn meniscus while on duty. Following his injury, the City re-assigned Raine to a temporary light-duty position at the front desk to accommodate him while he healed from his injury. Raine remained in this temporary light-duty position for six years, until his physician concluded that his disability was permanent. After learning that Raine's disability was permanent, the City told Raine that it had no available position for a sworn police officer with Raine's qualifications and limitations. Raine then took disability retirement.

Raine filed suit against the City, alleging that the City violated his rights under California's Fair Employment and Housing Act (FEHA) when it removed him from his front desk position. The trial court granted summary judgment in favor of the City and held that the City had no duty under the FEHA to make Raine's temporary front desk assignment permanent because that would, in effect, require the City to create a new sworn officer position. The Second District Court of Appeal affirmed.

California's FEHA prohibits an employer from discharging an employee because of the employee's disability. The FEHA also requires an employer to make reasonable accommodation for an employee's known physical or mental disabilities unless the accommodation would cause the employer "undue hardship." If an employee cannot be accommodated in his existing position, the employer must make an effort to determine whether another position is available. However, the FEHA does not require an employer to reassign an employee if there is no available vacant position. Following this reasoning, and borrowing from Ninth Circuit authority, the Court held that the FEHA does not require an employer to transform a temporary light-duty assignment into a permanent assignment to accommodate a disabled employee.

Here, the City's police department front desk position was permanently staffed by civilian employees called "police technicians" who are paid less and provided fewer benefits than sworn police officers. The City also uses the front desk assignment as a temporary light-duty assignment for sworn officers who are recovering from injuries. When the City learned that Raine's disability was permanent, it offered him a job as a police technician, but Raine refused the offer because he did not want to forfeit his police retirement benefits.

Although the City was required to provide Raine reasonable accommodation, including re-assignment if a vacant position existed, the City was not required to create a new front desk position for Raine.

Raine v. City of Burbank, (2006) 135 Cal.App.4th 1215 [37 Cal.Rptr.3d 899]

Employee's Evidence That Employer Regarded Him As Disabled Was Sufficient To Overcome Summary Judgment On Disability Discrimination Claim.

At the age of 37, Rick Todd was granted a disability pension due to degenerative disc disease acquired as a result of injuries he suffered during his work as a police officer for the City of Cincinnati. Todd applied for a position as a firearms instructor, but was not selected for the position.

Todd brought suit against the City for violations of the Americans With Disabilities Act (ADA), claiming that he was not selected for the instructor position because he was regarded as having a disability. The federal district court granted summary judgment in favor of the City and Todd appealed. The Sixth Circuit Court of Appeals reversed.

The ADA prohibits employers from discriminating against an individual because of a disability. The Act defines disability as "a physical or mental impairment that substantially limits major life activities" and includes individuals who are "regarded as having physical or mental impairments" that limit major life activities.

In opposition to the City's motion for summary judgment, Todd presented evidence that the officers making the hiring decision regarded him as disabled. Specifically, Todd presented evidence that several officials made notes during the interviewing process that they thought Todd should be rejected because of his medical disability. In addition, during deposition, one of the officials in charge of hiring testified that he had serious doubts that Todd could "physically do

the demanding work" required of the position. The Sixth Circuit concluded that the evidence offered by Todd created a triable issue of fact as to whether the officials in charge of hiring regarded him as disabled. Therefore, it was error for the lower court to grant summary judgment in favor of the City.

Todd v. City of Cincinnati, 436 F.3d 635 (6th Cir. 2006)

DISCRIMINATION - RACE

Supervisor's Persistent Use Of "Western" Nickname For Arabic Employee Over Employee's Objection Supports A Jury's Finding Of Racial Discrimination.

Mamdouh El-Hakem, who was of Arabic heritage, was an employee of BJY, Inc. and was supervised by Gregg Young, the company's Chief Executive Officer. El-Hakem alleged that during his employment with BJY, Young repeatedly referred to him as "Manny" rather than using his Arabic name, "Mamdouh." Although El-Hakem objected to being called Manny, Young persisted in using the nickname. El-Hakem suggested that, if Mamdouh was too difficult to pronounce, Young could refer to him as Hakem, his Arabic surname. However, rather than use Hakem, Young began to call El-Hakem "Hank." Young rationalized that a more "Western" name would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele. El-Hakem continued to object, but to no avail.

El Hakem then brought a federal lawsuit against his BJY and Young for employment discrimination among other things. Following the trial, the jury returned a verdict in favor of El-Hakem on the discrimination claim and awarded him over \$30,000 in damages. Young then filed a motion for judgment as a matter of law, arguing that he could not be liable for racial discrimination because "Manny" and "Hank" are not racial epithets. The district court disagreed and denied Young's motion. The Ninth Circuit Court of Appeals affirmed.

Under federal law, racial discrimination need not be based on an identifiable physical characteristic or feature such as skin color. Rather, racial discrimination can include conduct based on ethnic characteristics such as speech patterns, pronunciation, or names. Here, Young's persistent use of "Manny" and "Hank" instead of El-Hakem's Arabic name was sufficient to establish a claim for racial discrimination.

El-Hakem v. BJY Inc. (9th Cir. 2005) 415 F.3d 1068.

Caucasian Members Of University's Police Department Established Claims Of Retaliation And Discrimination By African-American Chief Of Police By Presenting Evidence Of Substantial And Detrimental Changes To The Terms And Conditions Of Their Employment.

Steven King, a Caucasian, was a lieutenant in the police department at California State University, Fresno. When the chief of police retired, King applied for the position of chief. Instead of King, Willie Shell, an African-American, was selected for the position. After Shell began, he removed King from the chain of command and later reassigned King to a non-law enforcement position outside the department. As King was packing up his belongings for the move, he overheard Shell comment to an African-American police officer that he was "moving those white boys out of here." King later resigned from his position at the University.

Richard Snow, a Caucasian, was a sergeant at the University's police department. When King was not selected for the chief of police position, Snow was overtly disappointed. Shell believed that Snow resented the fact that an African-American had been appointed to the position. Shell frequently asked another African-American police officer to report if Snow did anything that appeared to be racist, but the officer repeatedly said that she never observed any such behavior. On one occasion, Snow stopped a car on campus and confiscated a six-pack of beer. In his report, Snow documented the specific details of the time, date and method of disposing of the six-pack. However, when Snow's police vehicle was inspected, another officer discovered the six-pack in the truck. Snow was suspended with pay for two weeks for falsifying the report. In contrast, an African-American officer who lost a small quantity of marijuana after seizing it during a stop was not disciplined.

Daniel Horsford, a Caucasian, was an investigator for the University's police department. One of his duties involved reviewing police reports and presenting the qualifying reports to the district attorney's office for filing. Shortly after Shell arrived, a female officer was flagged down by a 17-year-old girl who reported that a prominent University football player, Michael Pittman, had struck her. She asked the officer to intervene. When the female officer went to Pittman's dormitory, Pittman was belligerent and the officer believed that had she arrested Pittman, a physical altercation would have ensued. The officer completed a report and recommended that the case be referred to the district attorney for prosecution. The following day, Horsford reviewed the report and believed it should be taken to the district attorney's office. However, Shell told Horsford that he was not to take the report to the district attorney and a case wasn't going to get filed just because an officer "got her feelings hurt." A few months later, Horsford was reassigned to the position of dormitory officer. Horsford was upset and told another officer that he "didn't know what [he] might do." The comment was relayed to Shell, who placed Horsford on administrative leave and required Horsford to submit to two psychological evaluations before returning to work. Horsford eventually resigned.

King, Snow and Horsford filed an action against the University for race discrimination, retaliation and constructive discharge. A jury returned a verdict in favor of each of the three men and awarded over a million dollars in damages to each. The trial court reduced the damages.

Nevertheless, the University appealed, arguing that the evidence was insufficient to support the verdict. The University argued that the men did not suffer an “adverse employment action” as defined by California’s Fair Employment and Housing Act (FEHA) and that the men did not present substantial evidence that the actions taken against them was due to their race.

The Fifth District Court of Appeal upheld the jury’s verdict. Under the FEHA, an adverse employment action is generally one which affects the terms, conditions or privileges of employment. Moreover, a jury may look to the treatment of an employee as a whole. “There is no requirement that the employer’s discriminatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries.” Here, the court found that the action taken against each man was substantial and detrimental and constituted adverse employment actions for purposes of the FEHA.

With respect to the University’s argument that the men did not present substantial evidence of discrimination, the Court concluded that the University was placing a more hefty burden of proof on the men than the law required. In an employment discrimination case, “a plaintiff’s burden is to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a substantial motivating factor in the employer’s actions toward the plaintiff.” Circumstantial evidence of motivation is not speculative evidence simply because it requires the jury to make inferences. Here, the men presented substantial evidence that would allow a jury to infer that the actions taken against the men were because of their race.

Horsford v. The Board of Trustees of California State University (2005) 132 Cal.App.4th 359 [33 Cal.Rptr.3d 644]

The Use Of The Term 'Boy' In Reference To An African-American Can, Alone, Constitute Evidence Of Racial Animus.

Anthony Ash and John Hithon, African-Americans, worked at a poultry plant owned by Tyson Foods. Both Ash and Hithon sought promotions to two open shift manager positions, but two white males were selected instead.

Ash and Hithon brought suit against Tyson, alleging they were not promoted because of their race. At the trial of the matter, the jury found in favor of Ash and Hithon and awarded both compensatory and punitive damages. Following the verdict, Tyson filed a motion for judgment as a matter of law. The district court granted the motion and ordered a new trial. Ash and Hithon appealed. The Eleventh Circuit Court of Appeals affirmed the district court's holding, finding that there was insufficient evidence to establish that Tyson acted with racial animus. Ash and Hithon then petitioned the United States Supreme Court for review. The High Court granted the petition and vacated the Eleventh Circuit's judgment.

Ash and Hithon presented evidence to the lower courts that Tyson's plant manager, the individual responsible for not selecting them for promotion, referred to them on occasion as "boy." Ash and Hithon argued that the use of the term "boy" in reference to them constituted evidence of discriminatory animus. The Eleventh Circuit disagreed. According to the Eleventh Circuit, the use of the term "boy" could demonstrate racial animus if it was coupled with a racial modifier

such as "black" or "white," but concluded that the use of the term "boy" alone could not establish racial animus.

The Supreme Court flatly rejected this position. The Court held that the use of the term "boy" alone will not always demonstrate racial animus. However, other factors such as context, inflection, tone of voice, local custom and historical usage could be considered to establish that the term demonstrates racial animus.

Ash v. Tyson Foods, Inc., 546 U.S. ____ (2006)

Employer Was Not Entitled To Summary Judgment On Employee's Race Discrimination Claim Where African-American Employee Presented Sufficient Evidence To Suggest That His Demotion Was Due To His Race.

Raymond Cornwell worked for Electra Central Credit Union as Vice President and Chief Operating Officer. Cornwell managed Electra's branches and cash operations in addition to its lending business. Cornwell was the only African-American employee on the company's management team. While Cornwell managed Electra's lending operations, he increased the company's loan portfolio from \$65 million to \$85 million.

In 2001, Electra began restructuring its business. To assist in the restructuring, Electra hired Jim Sharp, a Caucasian to serve as Chief Executive Officer. Cornwell alleged that shortly after Sharp was hired, Sharp made comments during a management team meeting about women that Cornwell believed were "unprofessional" and "close to sexual harassment." Cornwell complained about the statements to Electra's Vice President of Human Resources, Bonnie Cottrell, but did not request that the company conduct an investigation.

In late-2001, Sharp announced that organizational changes in Electra's management were going to be made. Specifically, Cornwell's title was changed to Vice President of Lending and, while he retained responsibility over Electra's lending operations, he lost responsibility for Electra's branches and cash operations. Cornwell again spoke to Cottrell about the reorganization and mused about whether race had played a role in Sharp's decision to demote him. Cottrell advised Cornwell that she did not think that race was a factor in the reorganization, but suggested that Cornwell approach Electra's Board of Directors with his concerns. Cornwell approached the Board with his concerns, but following an investigation into Sharp's motives for the demotion, the Board ratified Sharp's decision.

Cornwell wrote a letter to the Board, wherein he proposed a two-years' severance package in exchange for absolving Electra from liability for employment discrimination. In the letter, Cornwell suggested that he had a diary documenting the "pattern of racist and sexist treatment" at Electra. Sharp interpreted Cornwell's letter as an effective resignation. Thus, when Cornwell arrived at work after he sent the letter, Sharp placed him on paid administrative leave pending resolution of the severance negotiations. An African-American female was hired to replace Cornwell. Settlement negotiations broke down when Cornwell refused to cooperate with the company's request for information and Cornwell was terminated.

Cornwell brought a federal lawsuit against Electra, claiming that he was discriminated against on the basis of his race when he was demoted, then terminated. Cornwell also alleged that he had been retaliated against for complaining about Sharp's inappropriate statements. The federal district court granted summary judgment in favor of Electra and dismissed the action. The Ninth Circuit Court of Appeals affirmed the district court's finding as to the retaliation claim and the discrimination claim based on his termination, but reversed the district court's ruling on Cornwell's claim for discrimination based on his demotion.

To establish a prima facie case of discrimination under federal law, a plaintiff must prove that he (1) belongs to a protected class; (2) performed his job satisfactorily; (3) suffered an adverse employment action; and (4) was treated differently than a similarly situated employee who is not a member of the plaintiff's protected class. If the plaintiff establishes a prima facie case, the burden shifts to the employer to produce evidence that its actions were taken for legitimate, nondiscriminatory business reasons. If the employer produces such evidence, the burden shifts back to the plaintiff to prove that the employer's stated reasons are only a pretext for discrimination.

Here, the Court concluded that Cornwell established a prima facie case of discrimination, but that Electra had produced legitimate, nondiscriminatory business reasons for its actions. However, the Court found that Cornwell had produced sufficient evidence to create a triable issue of material fact that Electra's stated reasons for demoting him were a pretext. Specifically, the Court noted that Cornwell was the only African-American on Sharp's management team and the only member of the management team that was demoted. In addition, Sharp admittedly excluded Cornwell from management meetings that involved topics within Cornwell's scope of responsibility and promoted a less experienced person to manage Electra's branch operations. Based on these findings, the Court found that a jury could conclude that Cornwell was demoted because of his race.

With respect to his termination, the Court held that Cornwell presented no evidence to suggest that he was terminated because of his race. Instead, the evidence suggested that Cornwell was terminated because he refused to cooperate in Electra's attempt to informally resolve the matter.

With respect to Cornwell's retaliation claim, the Court also concluded that Cornwell had presented no evidence to support his theory that the reason he was demoted and terminated was because of his complaint about Sharp's inappropriate comments. To establish a claim for retaliation, Cornwell had to demonstrate that (1) he engaged in a protected activity; (2) he was subject to an adverse employment action; and (3) a causal link between the protected activity and the adverse employment action exists. Here, there was no evidence that Sharp knew that Cornwell had complained about him. Therefore, Sharp's decision to demote Cornwell could not have been in retaliation for his complaints. In addition, Cornwell complained about Sharp in November 2001, but Cornwell was not demoted or terminated until July 2002. The lapse in time between the complaint and the adverse employment action undermines the inference that the adverse employment action was motivated by retaliatory motives.

Cornwell v. Electra Central Credit Union, 2006 DJDAR 2500 (March 1, 2006)

City Employee Who Established That City Had Custom, Practice And Policy That Resulted In A Violation Of Employee's Civil Rights Established City's Liability.

Allen Harman and two other white airfield safety officers at the San Francisco International Airport brought an employment discrimination suit against the City and County of San Francisco, alleging that the airport's promotional scheme violated their federal civil rights in that it discriminated against Caucasian males. At the trial of the case, a jury found that the City had an official custom or policy of intentionally discriminating against white males in promotional opportunities at the airport. The City filed a motion for new trial and judgment notwithstanding the verdict, arguing that the plaintiffs had failed to establish that the City was liable under the principles in *Monell v. New York City Department of Social Services*. The trial court denied the motion and the First District Court of Appeals affirmed.

In *Monell*, the United States Supreme Court held that a public entity may only be liable for a federal civil rights violation if the entity had a custom, practice or policy of violating civil rights. In other words, a public entity may not be liable for the actions of its individual employees unless the employees were acting pursuant to a custom, practice or policy that resulted in a violation of civil rights.

Here, where the plaintiffs presented evidence that the City's promotional scheme intentionally discriminated against white males - and the jury agreed - this evidence was sufficient to satisfy the plaintiffs' burden under *Monell*. Therefore, the trial court properly denied the City's motion for a new trial and judgment notwithstanding the verdict.

Harman v. City and County of San Francisco, 2006 DJDAR 2165 (Feb. 22, 2006)

DISCRIMINATION – NATIONAL ORIGIN

Tenth Circuit Overrules Summary Judgment In Favor Of City On Claim By Hispanic Employees That City's English-Only Policy Was Discriminatory.

Holmes Willis is the Street Commissioner for the City of Altus, Oklahoma. Willis received a complaint that because some employees were speaking Spanish over the City radio, other employees could not understand what was being said. After receiving this complaint, the City implemented an official policy which required employees to speak English during all work related communications and during the work day, unless another language was necessary to communicate with a citizen.

A group of Hispanic City employees filed a federal lawsuit against the City, alleging that the City's policy had a disparate impact on them. The District Court granted summary judgment in favor of the City on the employees' claims. The Tenth Circuit Court of Appeals reversed, and concluded that the employees had established that the City's policy disparately impacted them.

To establish a prima facie claim for a disparate impact under federal law, an employee was required to demonstrate that his or her employer has an employment practice that causes a disparate impact on the basis of race, religion, color, sex or national origin. If the employee meets this initial burden, the burden shifts to the employer to demonstrate that its practice is job-related and was implemented as a business necessity.

The Tenth Circuit concluded that the Hispanic employees established that the City's English-only policy had a disparate impact on them because it created a hostile work environment for Hispanics in the workplace. Holding that there is no reason to prohibit discriminatory impact claims predicated on a hostile work environment, the Court held that a jury could reasonably find that the fact the City forbade Hispanics from using their native language could be construed as an expression of hostility towards Hispanics.

The Court rejected the City's argument that it enacted the policy out of business necessity. Specifically, the Court noted that there was no evidence of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to the implementation of the policy. Furthermore, Willis admitted that he was unaware of any instance where the City's business was disrupted or delayed because Spanish was used instead of English. Thus, where the City did not present sufficient evidence to establish its English-only policy was a business necessity, the district court improperly granted summary judgment in favor of the City on this claim.

Maldonado v. City of Altus, Oklahoma, 433 F.3d 1294 (10th Cir. 2006)

HARASSMENT - GENDER

Ninth Circuit Holds That Supervisor's Bullying Conduct May Be Basis For Sexual Harassment And Discrimination Suit Even If It Is Not Sexually Charged.

Carol Christopher, Julie Bhend and Carmela Chamara were employed by the National Education Association-Alaska (NEA) and worked under its executive director, Thomas Harvey. The women alleged that Harvey would yell at them loudly and publicly for no reason and stand behind them while they worked. In addition, Harvey was physically aggressive and frequently used aggressive gestures to make a point such as shaking his fist in the women's faces, pumping his fist in their direction, or lunging towards them. As an example of Harvey's rough nature, Christopher testified that on one occasion she traveled from Anchorage to California to care for her dying sister over the Labor Day weekend. Due to her sister's condition, Christopher extended her trip by one day. Upon her return to the office, Harvey became irate at Christopher during a meeting for being behind in her work and said, "if you would have read your fucking e-mail, you would have known, but, no, you were out of town, so we've lost a day there."

The women filed charges with the Equal Employment Opportunity Commission, which then filed an action in federal court against the NEA, alleging that the organization created a sex-

based hostile work environment. The NEA moved for summary judgment, arguing that there was no evidence that Harvey's harassment was based on sex. The district court granted summary judgment in favor of the NEA and concluded that the women could not demonstrate that Harvey's conduct was "because of sex." The Ninth Circuit Court of Appeals reversed.

To establish a claim for hostile work environment or sexual harassment, a party need not demonstrate that hostile acts are overtly sex or gender specific. While sex or gender specific behavior is one way to establish discriminatory harassment, it is not the only way. "A pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate [the law]." Here, Harvey's behavior was not sex or gender related. Harvey did not make sexual overtures or lewd comments to the women. Instead, Harvey simply bullied the women. As such, the Ninth Circuit held that an alternative theory for sexual harassment or hostile work environment claims can be where "an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men."

The Court also noted that it made no difference that Harvey treated men in the same manner that he treated women because the ultimate issue is whether Harvey's conduct affected women more adversely than it affected men. Even if a supervisor uses epithets "equal in intensity and in an equally degrading manner against male employees," the supervisor may still be liable for his conduct toward women because courts look to whether a reasonable woman would be offended by the conduct.

Equal Employment Opportunity Commission v. National Education Association, Alaska, (9th Cir.2005) 422 F.3d 840.

RETALIATION

School Principal Established Claim For Whistleblower Retaliation When She Was Transferred From Large, Underperforming Middle School To Small, Over-Achieving Magnet School After She Reported To School Board That District Misrepresented Its Budget To Qualify For Additional Funding.

Colleen Patten was a principal at Foothill Farms Junior High School, an underperforming school that was eligible for special funding under the Immediate Intervention/ Under-performing Schools Program (II/USP). During Patten's first year as principal, the District discovered a \$127,000 surplus in the II/USP budget. The District asked Patten to reassign expenditures that the District had already incurred to the II/USP budget so that it would not lose the amount of unspent II/USP funds. Patten refused. Patten then attended a school board meeting and advised the board of the District's request. Three months later, Patten was transferred to another principal position at a much smaller junior high school comprised of high-achieving students. Patten brought suit against the District for whistleblower retaliation. The trial court granted summary judgment in favor of the District, finding that Patten could not succeed on her

retaliation claim because she could not demonstrate that she was subjected to an adverse employment action. The Court of Appeal reversed.

To establish a claim for whistleblower retaliation, an employee must establish that: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action. Here, the Court found that Patten met each of the three elements. First, Patten engaged in a protected activity when she reported the District's intent to reallocate funds to maintain its special funding.

Second, applying the California Supreme Court's definition of "adverse employment action" recently set forth in *Yanowitz v. L'Oreal*, the Court concluded that Patten established that she was subjected to an adverse employment action. In *Yanowitz* the Supreme Court held an adverse employment action must materially affect the terms and conditions of employment and the test for materiality need not look only at ultimate business decisions (i.e. hiring, firing), but may also look to any employment action that would adversely affect an employee's job performance or opportunity for advancement. Here, although transferring from an underperforming school to a high achieving school may seem like upward movement, Patten argued that she would not have as much of an opportunity to make her mark as a young principal at the high achieving school as she would at the underperforming school. Furthermore, the high achieving school was a year-round school that conflicted with Patten's family schedule and interfered with her educational plans for the upcoming summer. Based on the facts presented, Patten successfully established that she was subjected to an adverse employment action.

Patten v. Grant Joint Union High School District, 2005 DJDAR 14587 (Dec. 19, 2005)

Dramatic Reduction In Work Assignments Constitutes Adverse Employment Action For Purposes Of Federal Retaliation Claim.

Christine Holcomb, an African-American woman, began working for the Federal Deposit Insurance Corporation (FDIC) as a secretary in 1991. Over the years, Holcomb advanced in the agency until she became a Grade 11 Program Specialist in the agency's Office of Diversity and Economic Opportunity (ODEO). In 1999, the ODEO underwent major restructuring and an Asian-American female attorney, Anna Mergele, was brought in to serve as chief of the complaints branch to reduce a backlog of unresolved discrimination complaints. Mergele was Holcomb's immediate supervisor.

Shortly after Mergele came to the ODEO, Holcomb applied, and was selected, for a year-long special assignment in the agency's Division of Compliance and Consumer Affairs to address Y2K related issues. When Holcomb left the ODEO to work on the special assignment, Mergele requested that Amy Del Valle, a Caucasian paralegal, be transferred from the legal division where Mergele had formerly been, to the ODEO.

Several months after she began her special assignment, ODEO advertised an opening for a new position, Grade 12 Program Specialist. Holcomb and Del Valle applied for the position and the personnel department identified them as the only two qualified candidates. Mergele, as the hiring authority, selected Del Valle. In January 2000, Holcomb filed an administrative complaint

alleging that she had been discriminated against when the ODEO failed to promote her and selected a Caucasian over her.

In March 2000, Holcomb's special assignment ended and she returned to the ODEO. Upon her return, Holcomb noticed a dramatic change in her job responsibilities, which had declined from program management to clerical duties. Holcomb complained to Vincent Johnson, the Deputy Director of the ODEO, about the reduction in duties and, in response, Johnson audited Holcomb's duties. The audit revealed that Holcomb was performing Grade 5 work, even though she was Grade 11.

Holcomb filed a federal lawsuit against the FDIC, alleging that the agency discriminated against her when it failed to promote her and retaliated against her by reducing her duties after she filed an administrative complaint. The federal district court granted summary judgment in favor of the FDIC and Holcomb appealed. The District of Columbia Circuit Court of Appeals affirmed summary judgment on Holcomb's discrimination claim, but reversed summary judgment as to Holcomb's retaliation claim.

To establish a prima facie case for discrimination, Holcomb was required to demonstrate that (1) she is a member of a protected class; (2) she applied for and was qualified for an available position; (3) despite her qualifications, she was rejected; and (4) either someone filled the position or it remained vacant and the employer continued to seek applicants. Holcomb, as an African-American who was qualified for the Grade 12 Program Specialist position, but was not selected, met her prima facie burden.

In response, under the Supreme Court's *McDonnell Douglas Corp v. Green* burden-shifting analysis, the FDIC was given the opportunity to demonstrate that its reasons for selecting Del Valle were legitimate and non-discriminatory. In this regard, Mergele testified that, in her opinion, Del Valle was more qualified for the position. The Court, which declined to play the role of "super-personnel department", noted that the qualifications of Holcomb and Del Valle were substantially similar and that it was not the Court's position to second guess the wisdom of Mergele.

Finding that the FDIC demonstrated that it had legitimate, non-discriminatory reasons for selecting Del Valle, the Court held that Holcomb did not produce sufficient evidence to establish that the agency's legitimate reasons were simply a pretext for discrimination. Therefore, the Court upheld the lower court's grant of summary judgment in favor of the FDIC on Holcomb's discrimination claim.

To establish her retaliation claim, Holcomb was required to present evidence that (1) she engaged in protected activity; (2) the FDIC took adverse employment actions against her; and (3) the adverse action was causally related to her exercise of her rights. Here, the FDIC argued and the district court agreed that Holcomb could not establish that she suffered an adverse employment action. The appellate Court rejected this contention. The Court noted that adverse actions are not confined to hirings, firings, promotions or other discrete incidents. Instead, adverse employment actions may constitute any instance where the employee experiences

materially adverse consequences affecting the terms, conditions or privileges of employment. Where Holcomb established that her job duties were dramatically decreased from program management duties to purely clerical duties, Holcomb met her burden of demonstrating that she was subjected to an adverse employment action and summary judgment should not have been granted on her retaliation claim.

Holcomb v. Powell, 433 F.3d 889 (D.C. Cir. 2006)

Employer's Failure To Support Employee's Disability Pension Application Is Not An Adverse Employment Action For Purposes Of A Federal Retaliation Claim.

Maralyn James began working at the Nashville Public Library in 1971 as a Librarian I. From 1971 to 1994, James received "outstanding" and "above average" performance evaluations. In 1994, James was transferred to the Library's main branch and was promoted to the position of Librarian 1-1/2. Shortly after her transfer, James began receiving poor performance evaluations that criticized James for her slow cataloguing skills. Despite her poor evaluations, due to a reclassification of positions, James became a Librarian II. Over the next several years, James was continually criticized for her slow work speed, and her performance evaluations noted that she was only cataloguing two titles per hour, when she should be cataloguing seven or eight titles per hour.

In January 2002, James filed a complaint with the U.S. Equal Employment Opportunity Commission. According to James, the continued criticism of her work performance created a hostile work environment and caused James to seek medical attention for headaches and high blood pressure. James then filed suit against the Library in April 2002, alleging hostile work environment harassment and retaliation.

As James's lawsuit was pending, the Library continued to give James assistance in trying to reach a performance goal of cataloguing six titles per hour. The Library offered to transfer James to a Library I position, but James refused and, instead, applied for a disability pension. The Library informed the Benefits Board that it had offered to accommodate James with a transfer, but James refused. Thus, because the Library board said it could accommodate James, her disability pension claim was rejected.

At the trial of James's lawsuit against the Library, James argued that the Library retaliated against her for filing a lawsuit by failing to support her disability pension application. The jury found in favor of James on her retaliation claim and awarded her \$42,000 in compensatory damages. The Library filed a motion to set aside the verdict. The trial court denied the motion and the Library appealed. In an unpublished decision, the Sixth Circuit Court of Appeals reversed.

Here, the Library argued that its failure to support James's disability pension application did not constitute an adverse employment action. The Sixth Circuit agreed, and held that the Library's failure to support James in her disability pension application did not result in a material change in her benefits of employment.

DISCIPLINE – DUE PROCESS

Court of Appeal Decision Limits an Officer's Right to Receive Investigation Materials under the Skelly Pre-Action Procedure and the Public Safety Officers Procedural Bill of Rights Act.

In a case handled by **Cynthia O'Neill** of our San Francisco office, the Court of Appeal upheld the termination of a City of Sunnyvale police officer.

Citizen informants reported to the Sunnyvale Police Department that illegal prostitution activity was taking place at a hostess bar in Sunnyvale known as the Crystal Palace. The Department initially opened the investigation and was later assisted by a number of federal and state agencies, including the FBI. During its investigation, undercover FBI agents followed the Crystal Palace proprietors' vehicle to the airport to pick up a prostitute. The undercover agents believed that they were spotted, because they saw the male proprietor writing down the license plate numbers of their surveillance vehicles. Several days later, Randall Gilbert, a Sunnyvale police officer, who was on duty as desk officer, accessed DMV files and made official inquiries to two license plate numbers. One of these license plate numbers matched that of one of the surveillance vehicles and the other license plate number was one digit off from the other surveillance vehicle. Following this computer inquiry, while on duty, Gilbert released the DMV information over the phone to an unidentified female. Based on this and other evidence connecting Gilbert to the prostitution activities at the Crystal Palace, the City commenced an internal affairs investigation into Gilbert and two other officers.

Following its investigation, the City served Gilbert with a notice of intent to discharge, along with a copy of the internal investigation report. The notice set forth the grounds of dismissal, but did not include copies of all documents that had been referenced in the report. Instead, the notice provided that if Gilbert desired copies of witness interviews and photographs, such would be made available to him.

Following his pre-disciplinary meeting with the City Manager, Gilbert was terminated. Gilbert appealed his termination to the City's personnel board and subsequently filed a petition for writ of mandate alleging, among other things, that: (1) his due process rights under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 were violated because he was not provided copies of all documents on which the notice of intent was based; and (2) his rights under the Public Safety Officers Procedural Bill of Rights Act (POBR) were violated because he was not provided with all materials on which the internal investigation report was based. The trial court denied the petition and Gilbert appealed.

The City prevailed in the Sixth District Court of Appeal, which affirmed the denial of Gilbert's petition. With regard to the *Skelly* issue, the Court noted that due process is a flexible concept.

An employee only has the right to be informed of the nature of the charges against him and the substance of the evidence supporting those charges. The internal affairs investigation report contained a detailed description of the evidence against Gilbert, and Gilbert was afforded the opportunity for a full evidentiary appeal following his discharge. Therefore, his due process rights under Skelly were not violated.

With regard to the POBR issue, under Government Code 3303(g), a public safety officer is entitled to “a transcribed copy of any notes made by a stenographer or . . . any reports or complaints made by investigators or other persons . . .” Gilbert argued that under section 3303(g), he was entitled to copies of “all the reports, complaints, and underlying data concerning the misconduct that was the subject of that investigation, including all of the reports and documents referred to and discussed in that report.” Rejecting the Fourth District Court of Appeal’s decision in *San Diego Police Officers Association v. City of San Diego* (2002) 98 Cal.App.4th 779, the Sixth District held that an officer is not entitled to all the material amassed in the course of the investigation. In *City of San Diego*, the Fourth Circuit held that peace officers should be entitled to protections similar to defendants in criminal proceedings, including the rights to investigators’ raw notes and tape recorded statements of witnesses. Here, in stark contrast, the Sixth District held that the POBR does not bestow upon peace officers discovery rights similar to those held by criminal defendants. Gilbert was provided with a copy of the internal affairs investigation report, which satisfied Gilbert’s rights under the POBR.

Gilbert v. City of Sunnyvale, (2005) 130 Cal.App.4th 1264, 31 Cal.Rptr.3d 297.

Note:

Due to the disagreement between the Fourth District and the Sixth District Courts of Appeal, there is a possibility that if Gilbert petitions, the California Supreme Court will grant review of this decision. As a matter of practice, we believe that this decision should be used as a “shield” rather than a “sword.” Particularly in connection with Skelly notices, we believe that as a general rule, it is better practice to provide an employee with all materials upon which an intended disciplinary decision is based.

FREE SPEECH

Federal Court Upholds City’s Ban Of Officers’ Display Of Tattoos.

Five police officers employed by the City of Hartford, Connecticut, brought suit against the City alleging that the City’s policy of banning on-duty police officers from displaying offensive tattoos violated their First Amendment rights. The district court dismissed the officers’ suit. In an unpublished decision, the Second Circuit Court of Appeals affirmed.

The Court found that the City’s interest in having a police department that did not offend or appear unprofessional to the public outweighed the officers’ right to free expression. Moreover, although public employees do not lose their First Amendment rights by virtue of their

employment, it is well-established that public employees have more limited First Amendment rights than other employees.

Inturri v. City of Hartford, 2006 WL 231671 (2d Cir. 2006)

Trial Court Properly Granted City Attorney's Motion To Strike Claim For Defamation Where Allegedly Defamatory Statements Were Made By The City Attorney In His Capacity As A Public Official On A Topic That Was Within The Scope Of His Official Duties.

Dennis Herrera is the San Francisco City Attorney. After he was elected to office, Herrera filed a complaint against Tutor-Saliba Corporation, a construction company, alleging that the company had defrauded the City out of tens of millions of dollars. At a dinner hosted by the Chinese-American Democratic Club, as keynote speaker, Herrera urged support for a City ordinance that would allocate \$2.5 million dollars to a litigation budget for the Tutor lawsuit. During his speech, Herrera characterized Tutor as a "construction giant" that cheated minority contractors out of their fair share of City contracts and defrauded the City's programs designed to provide equal opportunity and fairness to minority and women-owned businesses. Herrera's speech was later posted on the City's official website.

After the speech, Tutor filed a lawsuit against Herrera for defamation arising out of Herrera's statements during his speech. In response, Herrera filed a special motion to strike, which argued that the lawsuit was filed in retaliation for Herrera's exercise of his free speech rights. The trial court granted Herrera's motion. The First District Court of Appeal affirmed.

Under California's anti-SLAPP statute, a defendant in a civil lawsuit may file a special motion to strike a complaint when the acts alleged in the complaint arose from the defendant's exercise of his right to free speech on a matter of public interest. Under the statute, the defendant bears the first burden of demonstrating that the acts alleged in the lawsuit are protected as defined by the statute. If the defendant can establish that the lawsuit arose out of statutorily protected acts, the burden then shifts to the plaintiff to demonstrate that he or she has a probability of prevailing on the claims in the lawsuit.

Tutor conceded that Herrera's speech at the dinner was a protected activity under the anti-SLAPP statute. Thus, the burden was on Tutor to demonstrate that it had a probability of prevailing on its defamation claim. Herrera asserted that Tutor would have no likelihood of success on the defamation claim because his statements were protected by the "official duty" privilege under California law. The official duty privilege provides immunity from lawsuits for any statement made by a public official so long as it is made while exercising policy-making functions and is within the scope of the official's duties. The Court agreed with Herrera and found that the official duty privilege would have immunized Herrera from Tutor's lawsuit.

Herrera is an elected official who has the authority to represent the City in legal proceedings. Herrera spoke at the dinner in his capacity as city attorney about the Tutor litigation, a matter that he was handling on behalf of the City. Based on these facts, the Court found that Herrera had

the authority and the duty to express his professional opinion about the merits of a lawsuit filed by the City and his speech in that regard was absolutely privileged.

Because Herrera's speech was protected by the official duty privilege, Tutor could not demonstrate that it had a probability of prevailing on the defamation claim in the lawsuit. Therefore, the trial court properly granted Herrera's special motion to strike.

Tutor-Saliba Corporation v. Herrera, 2006 DJDAR 1637 (Jan. 10, 2006)

FAIR LABOR STANDARDS ACT

Canine Enforcement Officers Did Not Waive Their Right to Overtime Pay under the FLSA Through a Collective Bargaining Agreement between Their Union and the Agency.

The U.S. Customs Service entered into a collective bargaining agreement with the National Treasury Employees Union (NTEU), the exclusive representative for Customs employees. The agreement provided that employees who are subject to the provisions of the FLSA may not work overtime unless specifically ordered or authorized to do so by their supervisor. The agreement further provided that officers may not perform work outside normal working hours unless specifically ordered or authorized by the employer to do so. The Customs Service refused to pay unauthorized overtime for working with dogs outside their normal work hours, arguing that the employees waived their right to seek pay for overtime that was not ordered by their supervisors by accepting the collective bargaining provisions. Sixty Customs Service canine enforcement officers brought suit, seeking unpaid overtime wages.

The Federal Claims Court held that the officers were entitled to overtime. The Court found that the employees' rights under the FLSA were substantive rights and could not be waived.

Bull v. United States, (2005) 65 Fed.Cl. 407.

Note:

Substantive rights granted to individual employees under the FLSA are not subject to waiver under a collective bargaining agreement.

Paramedics Held Not To Qualify For Firefighters' Partial Overtime Exemption Because They Were Not Responsible For Engaging In Fire Suppression.

In this case, 119 "dual function" paramedics employed by the City of Los Angeles sued to recover overtime compensation not paid by the City. These "dual function" paramedics are individuals who are trained in both fire suppression and advanced life support skills, as compared to "single function" paramedics, who are not trained in fire suppression. The 119 paramedics were assigned to work on paramedic ambulances and were responsible for providing medical care, transporting patients to hospitals, maintaining the ambulances and completing related paperwork. The paramedic ambulances do not provide fire protection services such as water, hoses, pumps, ladders, or fire suppression breathing equipment. Paramedic ambulances are only dispatched to fire calls where there is a need for advanced life support medical services. On average, paramedic ambulances are dispatched to fire scenes one to two times per year. None of the dual function paramedics in this case were ever ordered to perform fire suppression when working on a paramedic ambulance.

The Fair Labor Standards Act requires employers to pay overtime compensation at the rate of one and one-half times the employee's regular rate of pay when the employee works more than 40 hours in a workweek. However, an agency may designate a work period of up to 28 days instead of the usual 7 days as a basis for calculating overtime for employees engaged in "law enforcement and fire protection" activities under Section 7(k) of the FLSA. Relying on this "fire protection" exemption, the City classified the dual function paramedics as exempt and did not pay the paramedics overtime compensation unless they worked more than 204 hours in a 27-day work period.

The paramedics sued, challenging their designation as employees engaged in fire protection and seeking payment for unpaid overtime compensation based on a 40-hour week. Following a bench trial, the federal district court concluded that the paramedics did not qualify for the 7(k) exemption, and awarded them over \$5 million in unpaid overtime. The Ninth Circuit Court of Appeals affirmed.

The FLSA defines an "employee in fire protection activities" as one who "has the legal authority and responsibility to engage in fire suppression." Here, focusing on the following evidence, the Court concluded that the paramedics did not have the responsibility to engage in fire suppression: the paramedic ambulances do not carry firefighting equipment or breathing apparatuses, paramedic ambulances are only dispatched to fire scenes when there appears to be a need for advanced life support medical services, and the paramedics are not expected to wear fire protective gear. Moreover, no evidence was presented to the court that a dual function paramedic had ever been ordered to perform fire suppression. Thus, the paramedics should not have been designated as employees engaged in fire protection activities and were entitled to overtime compensation for hours worked above 40 in a 7 day workweek.

Cleveland v. City of Los Angeles, (9th Cir. 2005) 420 F.3d 981.

Note:

The City of Los Angeles is pursuing legal avenues to challenge this decision. It is now seeking a rehearing before an expanded panel of Ninth Circuit judges. We will keep you advised.

The Time That Employees Spend Between Donning And Doffing Required Protective Gear And Walking To Their Working Area Is Compensable Time Under The Fair Labor Standard Act.

Two lawsuits were brought by factory employees against their employers. In the first suit, employees sought compensation for time spent donning and doffing required protective gear and walking from the locker rooms to the production floor of the meat processing plant in which they worked. The federal district court found this time to be compensable and the Ninth Circuit Court of Appeals affirmed.

In the second suit, employees sought compensation for time spent donning and doffing required protective gear at the poultry processing plant in which they worked and for the time spent walking and waiting to don and doff the gear. The federal district court concluded that the walking and waiting time was not compensable and the First Circuit Court of Appeals affirmed.

In a joint decision, the United States Supreme Court affirmed the Ninth Circuit's holding and reversed the First Circuit's holding. First, the high Court held that the time employees spend walking between changing and production areas was compensable under the Fair Labor Standard Act. Under the FLSA, employees must be compensated for all time spent engaging in the "principal activities" of their job. Some employees' jobs require them to don and doff protective gear. Because donning and doffing protective gear is an "integral and indispensable" part of the principal activities, employees must be compensated for the time spent in such activities.

Second, the Court held that because donning and doffing the gear is an "integral and indispensable" part of the employees' principal work activities, the employees must be compensated from the time they begin to don the gear to the time they doff the gear. However, the employers need not compensate the employees for the time spent waiting to do the first piece of gear.

IBP Inc. v. Alvarez, (2005) 126 S.Ct. 514.

Employers Are Not Required To Pay Employees For Time Spent On Medical Visits To Obtain Sick Leave Verification.

An employer has a policy requiring employees to provide medical verification in order to count work absences as paid sick leave. Under the policy, the employer does not pay the employees for time spent obtaining the necessary medical verifications. The employer explained that this policy was precipitated by the fact that many employees used sick time over major holidays or on days on which a vacation request was denied.

The employees' union challenged the policy and argued that the time spent to obtain a medical verification was compensable under the Fair Labor Standards Act. The Department of Labor disagreed. In an opinion letter, the DOL opined that time spent attending medical appointments to obtain the necessary sick-leave verification was not compensable under the FLSA because the employees were spending the time for their own benefit, not the benefit of the employer. The FLSA provides that hours worked include time an employee is "necessarily required to be on the employer's premises, on duty or at a prescribed work place." The FLSA does not require employers to provide sick leave policies for their employees. Thus, "the FLSA implicitly recognizes that paid sick leave is not predominantly for the employer's benefit."

Department of Labor Wage and Hour Opinion Letter, 2005-3NA

City Is Required To Pay Police Dispatcher For Time Spent Traveling To Counseling Sessions Ordered By City.

In our **November 2003 Client Update**, we reported that a federal district court in Illinois held that a City was required to pay an employee for time spent traveling to counseling sessions ordered by the City. The Seventh Circuit Court of Appeals has now affirmed that decision.

Kari Sehie worked as an emergency dispatcher for the City of Aurora. One day, at the end of Sehie's eight-hour work shift, her superiors instructed her to stay and work another shift because her co-worker was ill. Sehie became very angry and, less than an hour into the second shift, Sehie abruptly left work. Sehie remained off work for several days, during which time she went to her personal therapist and took medication for stress. When she returned to work, she reported the absence as a work-related injury.

The City required Sehie to submit to a fitness for duty examination before returning to work. Following the examination, Sehie was deemed fit for duty. However, the physician recommended that she attend weekly psychotherapy for six months. Sehie attended the mandatory hour-long counseling sessions and spent two hours traveling to and from the sessions. The City did not pay Sehie for her travel time.

Sehie filed suit against the City. In her suit, Sehie alleged that the City violated her rights under the Fair Labor Standards Act when it did not properly compensate her for her time spent traveling to the mandatory counseling sessions. The federal district court ruled in favor of Sehie and the Seventh Circuit Court of Appeals affirmed.

The FLSA requires employers to compensate employees for all hours worked in excess of forty hours per week at the rate of one and one-half times the employee's regular rate of compensation, subject to certain exemptions. As a general rule, employees must be paid for all time an employee spends in "physical or mental exertion" for the primary benefit of the employer.

The City required Sehie to attend counseling sessions to enable her to perform her job duties and relate to her co-workers more effectively. Therefore, even though the counseling sessions also benefited Sehie, they were for the primary benefit of the City. Because Sehie's attendance at the

sessions was mandatory, the City was required to compensate her for the time she spent traveling to and from the sessions.

Sehie v. City of Aurora, 432 F.3d 749 (7th Cir. 2005)

Eighth Circuit Holds That Sick Leave Buy Back Payments Must be Included in the Regular Rate of Pay.

The City of Columbia, Missouri has a sick leave buy-back program, pursuant to which firefighters who work 24-hour work shifts accumulate ten days of sick leave per year. After a firefighter has amassed six months' worth of unused sick leave, the firefighter may sell back the unused sick days to the City in exchange for a lump sum payment at a rate of 75-percent of the firefighter's regular hourly pay.

One hundred Columbia firefighters brought suit against the City, claiming that the City had violated their rights under the FLSA when the City did not include compensation received from their buy back of sick leave in their regular rate of pay. According to the firefighters, because this compensation was not included in their regular rate of pay, the City incorrectly calculated their FLSA overtime compensation. The district court granted summary judgment in favor of the firefighters and ruled that the City's sick leave buy-back compensation should have been included in the firefighters' regular rate of pay. Over a strong dissent, two Eighth Circuit Court of Appeals judges affirmed.

The FLSA provides that "all remuneration for employment paid to, or on behalf of, the employee" must be included in the employee's regular rate of pay for purposes of calculating overtime compensation unless a statutory exclusion applies. The Eighth Circuit first determined that the compensation paid under the sick leave buy-back program was "remuneration for employment" because the effect of the buy back program was to encourage firefighters to work their regular hours instead of using sick leave. Thus, the sick leave buy back program operated as a reward for the firefighters' work and was accordingly remuneration for employment.

In reaching this conclusion, the Eighth Circuit expressly rejected the holding of *Featsent v. City of Youngstown*, in which the Sixth Circuit held that compensation paid under a sick leave buy-back program was excluded from the regular rate of pay because the compensation was not being paid for work performed by the employee..

After determining that the buy back was remuneration, the Eighth Circuit held that the sick leave buy-back program did not meet any of the statutory bases for excluding compensation from the regular rate of pay.

The dissenting judge argued that the sick leave buy back amounts were excluded from the regular rate as "premium payments" for work in excess of their normal working hours. The dissent noted that a buy back payment is functionally equivalent to paying the firefighter a premium for showing up for work instead of calling in sick. Since the firefighter was paid his normal hourly rate on a day when he otherwise would have called in sick, and since those sick hours were cashed out at 75% of their value, the firefighter was paid at a premium rate of 175%

of his hourly rate for working that shift. Premium payments of at least 133% of an employee's hourly rate for hours worked in excess of an employee's normal schedule may be excluded from the employee's regular rate of pay. Thus, the dissent believed that the sick leave buy back payment was a premium overtime payment that should have been excluded from the firefighter's regular rate of pay.

The two Eighth Circuit judges who authored the majority opinion rejected the argument of the dissenting judge by noting that the sick leave buy back was compensating the employee for regular hours worked, not overtime hours worked. Premium pay for regular hours worked, such as a shift differential, is included in an employee's regular rate of pay. The only premium payments that may be excluded from the regular rate of pay are overtime premium payments.

Acton v. City of Columbia, Missouri, 2006 WL 287976 (8th Cir. 2006)

NOTE:

As noted above, this case is in direct conflict with Featsent v. City of Youngstown, a 1995 Sixth Circuit case. Neither case is binding on California employers, and the Ninth Circuit has not yet addressed this issue. Due to the conflict in the law and the strong dissent in the Eight Circuit's opinion, we believe that this decision should be read cautiously.

The Premium Paid When A Non-Exempt Employee Is Called Back To Work With Less Than Four Hours Notice Need Not Be Included In The Employee's Regular Rate For Calculating Overtime.

A collective bargaining agreement provides that employees who are called in to work outside of their regularly scheduled hours with less than four hours notice are paid double time for such hours - a practice referred to as "short-call". Employees are asked to work "short-calls" on infrequent and sporadic occasions, such as when another employee is ill.

In its Opinion Letter, the Department of Labor (DOL) responds to the following questions raised by these "short-call" premium payments:

Is the employer entitled to exclude the double time wage paid as a result of the "short-call" provision from the calculation of the employee's regular rate? And ...

Is the employer entitled to credit the double-time premium paid as a result of the "short-call" provision against the employer's overtime liability?

Under the FLSA, payments that are not made as compensation for hours worked may be excluded from the regular rate. The DOL's regulations discuss the types of premium pay that are not regarded as payment for hours worked. Included is one that provides that "extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule." Thus the Opinion Letter concludes that the "short-call" premium payments need not be included in the regular rate of pay calculation.

As to the second question, the Act specifies the forms of extra compensation that may be credited toward the employer's overtime liability. Examples are premiums paid for having worked more than the regularly assigned number of hours per day (e.g. 8 hours) or week (e.g. 37), or for having worked on a scheduled day off. However, premiums not based on time worked, as in this situation, are not creditable against overtime liability.

Department of Labor Wage and Hour Opinion Letter, 2005-36

FAMILY AND MEDICAL LEAVE ACT

Department Of Labor Allows Employers To Ask For New Medical Certification When Employee Continues On FMLA Leave Into A New Year.

The Family and Medical Leave Act (FMLA) entitles eligible employees to 12 workweeks of leave for a serious health condition during any 12-month period selected by the employer. An employer may establish the 12-month period as a calendar year, any fixed 12-month period, or a "rolling" 12-month period that is measured either forward or backward from the date the employee's leave begins. However, once an employer establishes a 12-month period, the same 12-month period must be applied consistently and uniformly to all employees.

At its discretion, an employer may require an employee to obtain a medical certification issued by a health care provider to verify that the employee or the employee's family member has a serious health condition. If an employer has reason to doubt the employee's medical certification, the employer may request second and third certifications - at the expense of the employer - to verify the serious health condition. An employer is also entitled to obtain re-certifications of the same serious health condition on a "reasonable basis."

In this opinion letter, the Department of Labor opined that an employer may reinitiate the medical certification process with the first absence in a new 12-month leave year, even if the employer requested certification in the previous 12-month leave year. For instance, if an employer's FMLA 12-month period was a calendar year and an employee was absent on FMLA leave from October to February, the employer could request medical certification in October and again in January.

Department of Labor Wage and Hour Opinion Letter, (2005).

MILITARY BENEFITS

Department Of Labor Issues Regulations On Employers' Rehiring And Benefit Continuation Responsibilities.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides employment and reemployment rights for employees who leave their civilian jobs voluntarily or involuntarily to serve in the military, military reserves or National Guard. The law also prevents employers from discriminating against employees on the basis of their military service.

Recent Department of Labor (DOL) regulations set forth new rules applicable to employers:

- As a general rule, employers must reinstate returning service members within two weeks after they apply for re-employment. ?
- Returning service members must receive the same seniority, status and pay they would have attained if they had remained continuously employed with the employer.
- Service members must follow specific timetables and procedures when reporting back to work. ?
- Service members have specific rights to continued coverage under their employer's health care and pension plan.

The DOL also clarified that the USERRA health care provisions are similar to those of COBRA. However, under USERRA, health care rights are not dependent on the size of the employer or whether the employer is a government entity. In addition, upon reemployment with an agency, a member must be reinstated in the health plan without any waiting period or exclusion.

http://www.dol.gov/vets/regs/fedreg/final/USERRA_Final_Rule.pdf

LABOR RELATIONS

PERB Finds Board Agent Improperly Dismissed Unfair Practice Charge Filed Against Union For Collecting Agency Fees Without Providing Proper Advance Notice.

Stephanie Abernathy is an agency fee payer to the University Professional and Technical Employees Union (UPTE) at the University of California, San Diego. Abernathy, along with numerous other individuals, filed unfair practice charges against UPTE, alleging that the Union violated the Higher Education Employer-Employee Relations Act (HEERA) when it collected agency fees without providing adequate notice.

In *Chicago Teachers Union v. Hudson*, the United States Supreme Court held that, prior to collecting agency fees, unions must provide nonunion employees with information regarding what the union claims are properly chargeable expenditures, and afford employees a prompt opportunity to challenge the amount of fee charged. Similarly, PERB regulations require unions to send written notice to nonunion members at least 30 days prior to the collection of agency fees that states that any fees subject to objection will be placed in an escrow account. UPTE acknowledged that it did not send out the requisite notices 30 days prior to the collection of agency fees.

In July, August and September 2004, UPTE deducted agency fees from its members without providing proper notice. However, in September 2004, UPTE sent out proper notice and reimbursed its members for the agency fees that had been deducted without proper notice, plus seven percent interest.

The PERB Board Agent dismissed Abernathy's charge, along with the other similar charges, based on a determination that Abernathy did not have standing to file an unfair practice charge because her agency fees were returned to her with interest; therefore, she suffered no harm. PERB disagreed.

An agency fee payer is harmed when a union violates the notice requirements. Even though there may have been no financial harm to Abernathy since UPTE returned her fees, Abernathy was harmed nonetheless.

Abernathy v. UPTE, CWA Local 9119, PERB Dec. No. 1784-H (Dec. 1, 2005)

Dismissal Of Unfair Practice Charge Against Union Was Proper Where Union Provided Statement Of Its Chargeable And Nonchargeable Expenses Along With An Independent Verification Rather Than A Formal Audit to Agency Fee Payers.

Orna Yaron filed an unfair practice charge against her union, UPTE, CWA Local 9119 alleging that the Union violated the Higher Employer-Employee Relations Act when it sent a notice to Yaron that did not contain the specific results of an audit recently conducted by the union as required by law. The Public Employment Relations Board (PERB) board agent recommended that the charge be dismissed and PERB adopted the recommendation.

Under *Chicago Teachers Union, Local 1 v. Hudson*, the United States Supreme Court held that an exclusive representative is required to provide a notice of agency fee payer rights to its members before collecting agency fees. However, under *Harik v. California Teachers Association*, the Ninth Circuit Court of Appeals held that a union need not include in its Hudson notice a formal audit. Instead, the union is only required to provide a statement of its chargeable and nonchargeable expenses, along with an independent verification that the expenses were actually incurred.

Here, the Union sent out the requisite notice required by Hudson, which included a list of its assets and liabilities and expenses it made. In addition, the Union included a letter from a

certified public accounting firm that performed an audit of the Union which verified that the stated information was accurate. Therefore, the Union did not commit an unfair practice when it did not include actual audit information in its Hudson notices.

Yaron v. UPTE, CWA Local 9119, PERB Dec. No. 1820-H (Feb. 16, 2006)

PRIVACY

Final Version of HIPAA Regulations Addressing Enforcement and Civil Monetary Penalties Take Effect March 16.

The Department of Health and Human Services has just issued the final version of regulations addressing enforcement of HIPAA's statutory and regulatory provisions. The final regulations amend the existing HIPAA privacy compliance and enforcement rules as well as the procedural requirements for imposition of civil money penalties. They take effect March 16.

The final regulations are extensive and detailed. They cover the enforcement process from its beginning, which will usually be a complaint or a compliance review, through its conclusion, which could include a formal hearing and appellate review. The following are some of the highlights.

- A covered entity may be fined a maximum of \$25,000 for each HIPAA violation. For example, if a single act violates different HIPAA requirements it may result in multiple penalties. The number of violations will be determined based on the nature of the covered entity's obligation to act or not act under the provision that is violated. The regulations also specify that each day of a continuing violation will constitute a separate violation.
- A covered entity is liable for violations committed by an agent if the agent acted within the scope of its authority. However, a covered entity that complies with the business associate provisions of the privacy and security rules (requiring a business associate contract with specific terms and requiring the covered entity to take reasonable steps to cure a breach or end a violation that is known to the covered entity) would not be liable for the actions of the business associate. The final rule presumes that workforce members (including independent contractors that are under the direct control of the covered entity) are a covered entity's agents.

Other topics covered include procedures for hearings, appeals, waiver of penalties, public notice of imposition of penalties, and collection of penalties. The final regulations may be accessed at: 45 CFR Parts 160 and 164, 71 Fed. Reg. (Feb. 16, 2006); and <http://edocket.access.gpo.gov/2006/pdf/06-1376.pdf>.

Note:

HIPAA only applies to "covered entities." That is, (1) A health plan; (2) A health care clearinghouse; and (3) A health care provider who transmits any health information in electronic form. Particularly for those agencies that have self-funded health plans, provide their employees with flexible spending accounts, or operate hospitals or other medical centers, compliance with the HIPAA regulations may be required.

School Board Was Not Entitled To Summary Judgment On Teacher's Claim That Board Violated His Substantive Due Process Rights When It Ordered The Teacher To Release His Medical Records To The Board Or Not Return To Work.

Thomas O'Connor was a tenured teacher at a public school in Connecticut. O'Connor was put on paid administrative leave while the school board investigated complaints from parents, students and colleagues that he had used foul language and made sexual remarks to students. After the investigation, the school superintendent concluded that O'Connor had violated the school's standards of conduct. However, the superintendent allowed O'Connor to return to work, provided he submit to a psychiatric evaluation and sign an authorization for the release of his medical records to the examining psychiatrist and the school board. O'Connor submitted to the evaluation, but refused to sign a release for his medical records.

O'Connor sued the school, alleging that it invaded his privacy in violation of his rights to substantive due process. The federal district court granted summary judgment in favor of the school. The Second Circuit Court of Appeals reversed.

To prevail on a substantive due process claim, a plaintiff must establish that the government's conduct is arbitrary, irrational and "shocks the conscience." Although the Board could require O'Connor to undergo a medical examination and provide the examining physician with medical records, the Court concluded that the Board's request that O'Connor provide it with a copy of his medical records was arbitrary. Furthermore, "if the Board intended to injure or spite O'Connor by insisting on a needlessly broad medical release as a condition of his reinstatement, that intent would plainly support liability."

O'Connor v. Pierson, 426 F.3d 187 (2d Cir. 2005)

Note:

The importance the law places on privacy rights in personal medical information is illustrated by such statutory enactments as California Civil Code § 56, which prohibits a health care provider from disclosing medical information regarding a patient without first obtaining an authorization. Also, the federal Health Insurance Portability and Accountability Act imposes requirements to protect individually identifiable health information of patients.

PERSONNEL LAW

State Supreme Court Holds That A Collective Bargaining Agreement That Requires Selection of the Most Senior of the Three Top Ranked Eligibles Violates Constitutionally Mandated Merit Principle of State Civil Service System.

The California State Employees Association (CSEA) and the Department of Personnel Administration negotiated collective bargaining agreements (MOUs) for state civil service employees. The MOUs contain provisions for pilot programs known as "post and bid" that apply to a limited number of appointments and promotions. Under the pilot programs, "bid notices" regarding available positions are posted by the employing department at various sites where job announcements are normally posted. Eligible employees may bid for posted positions by submitting a completed bid form provided by the department. Selection of the person to fill a position is based upon eligibility and seniority. The most senior eligible bidder within the departmental geographic area is entitled to the position. The California State Personnel Board (SPB) sought a writ of mandate to prohibit implementation and enforcement of the MOUs' "post and bid" provisions. The superior court granted the writ, finding that the MOU violated the constitutionally mandated merit principle of the civil service system. The CSEA appealed.

The California Court of Appeal reversed. The California Constitution mandates that permanent appointment and promotion in the civil service must be made based upon merit ascertained by competitive examination. A promotional list must include the names and addresses of the three individuals with the highest standing, from whom one person will be selected for the position or promotion. In the case of certain classifications, the promotional list will be divided into ranks, with selection to be made from those in the three highest rankings.

As discussed in our January 2004 Client Update, the Court of Appeals ruled that the MOUs preserved the requirement of competitive testing and the rule of three or of three ranks. The negotiated procedure simply dictated which qualified candidates would be selected and based the selection on seniority. Since seniority is an objective factor that does not promote a spoils system of governmental employment, the Court ruled that the system devised by the MOUs was permissible.

The State Supreme Court has now reversed the Court of Appeal. The high court concluded that depriving state employers "of the ability to interview eligible candidates and base their hiring decision on a broader range of criteria bearing on fitness and efficiency" is in conflict with the merit principle because "greater seniority does not necessarily equate to greater ability, efficiency or productivity."

California State Personnel Board v. California State Employees Association, (2005) 36 Cal.4th 758, 31 Cal.Rptr.3d 201.

California Public Entities Are Not Statutorily Required To Pay For Purchasing And Maintaining Work Uniforms.

A group of public employees filed a class action lawsuit against their respective employers seeking reimbursement for the cost of purchasing, cleaning, replacing and maintaining their required work uniforms. The employees premised their lawsuit on Labor Code section 2802, which requires employers to indemnify employees for all necessary expenses incurred by employees "in direct consequence of the discharge of their duties" including the cost of maintaining and purchasing uniforms.

The trial court dismissed the lawsuit following demurrers by the public entities. The First District Court of Appeal affirmed, holding that the Labor Code provision did not apply to the various public entity defendants.

With respect to cities and counties, the California Constitution grants the governing body of cities and counties with the authority to provide for "the number, compensation, tenure and appointment of employees." California courts have consistently held that payment to employees for work uniforms is part of the employee's compensation. Thus, according to the California Constitution, it is up to the cities and counties - not the state legislature - to determine whether to reimburse employees for the cost of maintaining and purchasing uniforms.

Likewise, with respect to the Regents of the University of California, as a statewide administrative agency, the California Constitution provides that the Regents may adopt policies to manage their own internal affairs. These policies hold a status equivalent to a statute. Because of the Regents' unique constitutional status, it is not subject to general laws relating to employee compensation.

Last, as to the State, a Government Code section expressly provides that state employees shall be responsible for the purchase of uniforms required as a condition of employment. The Government Code also requires the State to provide an annual uniform allowance for the replacement of uniforms. However, there is no statute that requires the State to pay for the cost of maintaining or cleaning uniforms.

Goshorn v. State of California, (2005) 133 Cal.App.4th 328, 34 Cal.Rptr.3d 635.

Note:

Of course provisions in labor agreements may, and commonly do, provide for such benefits.

LAW ENFORCEMENT

Agreement Signed By Chiefs Of Police Of Three Cities To Create Joint Task Forces Did Not Constitute Joint Powers Agreement, Imposing Joint Liability.

The police departments of Mountain View, Palo Alto and Los Altos work together on a regular basis to provide personnel to service emergency calls in each of the cities jurisdictions. In 1992, the chiefs of police of the three cities signed an agreement to create special task forces. The document outlined the composition of the task forces, the command, control and call-out procedures, and training for members of the task forces.

In 1994, a Palo Alto reserve police officer was accidentally and fatally shot by a Mountain View police officer during a training session with the joint task force. The officer's heirs brought suit against Mountain View. Following a settlement between Mountain View, Palo Alto and the heirs, Mountain View's excess carrier, Authority for California Cities Excess Liability, brought suit against Los Altos, seeking contribution from Los Altos for its proportionate share of the settlement. According to the excess carrier, the 1992 document constituted a joint powers agreement between the cities and obligated Los Altos to contribute to the settlement. The trial court entered summary judgment in favor of Los Altos. The Sixth District Court of Appeal affirmed.

A public entity is only liable if a statute so provides. Under the Government Code, a City may be held liable on a contract only if the contract is in writing, approved by the city council, and signed by the mayor or by another city officer designated by the city council in an ordinance. Here, the 1992 agreement was not approved by Los Altos's city council. Moreover, Los Altos had no statute or ordinance that authorized its Police Chief to act on behalf of the City. Therefore, the agreement did not obligate Los Altos to contribute to the settlement of Mountain View's claims.

Authority for California Cities Excess Liability v. City of Los Altos, 2006 DJDAR 2113 (Feb. 22, 2006)

WORKERS' COMPENSATION

Police Officer Who Injured Leg While Playing Basketball Off-Duty Was Not Entitled To Workers' Compensation Benefits, Despite City's Policy That Officers Stay Fit.

Sean Jenneiahn is employed as a police officer for the City of Stockton. While off-duty, Jenneiahn hyperextended his leg during a pick-up game of basketball. The game was held at a facility owned and operated by the Stockton Police Officers' Association.

Jenneiahn filed a claim for workers' compensation benefits, asserting that he was entitled to benefits because of the City's general policy that all police officers maintain good physical condition. The Workers' Compensation Judge (WCJ) concluded that Jenneiahn was entitled to benefits because Jenneiahn reasonably believed that the City expected him to engage in cardiovascular activities such as basketball. The Workers' Compensation Appeals Board (WCAB) upheld the WCJ's finding. The Court of Appeal annulled the award.

Under the Labor Code, an employee who injures himself in the course and scope of his employment is entitled to workers' compensation benefits. However, injuries that arise out of voluntary participation in an off-duty recreational, social, or athletic activity that is not part of the employee's work-related duties are not compensable, except where the employee reasonably believes that he is required or expected to engage in such activities.

Here, the evidence did not support a finding that Jenneiahn reasonably believed that the City expected him to engage in a pick-up game of basketball. While Jenneiahn was required to stay fit, he knew that he was not subject to any kind of physical fitness testing. Jenneiahn did not incorporate basketball games into a regular workout routine and testified that he would have stayed fit even if he did not play basketball. Furthermore, the basketball game was played on property that was not owned by the City and was not sponsored, condoned, or encouraged by the City. Therefore, the WCAB erred in concluding Jenneiahn was entitled to workers' compensation benefits for his injury.

City of Stockton v. Workers' Compensation Appeals Board, (2006) 135 Cal.App.4th 1513 [38 Cal.Rptr.3d 474]

RETIREMENT

Local Governments Will Be Required To Value And To Publicly Report Each Year The Long Term Cost Of Its Retiree Health-Care Insurance Obligations.

Until now, the great majority of state and local governments that provide retiree health-care benefits have recorded the cost on a pay-as-you-go basis, with budgets reflecting only the actual expense paid to or on behalf of retirees each year. A rule issued by the Government Accounting Standards Board (GASB 45) will soon require every unit of government to publicly disclose the cost of its health-care obligations to its current and future retirees by indicating the dollar amount on its balance sheet.

Under GASB 45, agencies that are not pre-funding this liability, must disclose the liability for thirty years into the future by showing it on their annual balance sheets. The fiscal implications of this requirement are huge. For example, according to news accounts, the City of Duluth, Minnesota, hired an actuary to calculate the cost of providing its long term retiree health care benefits, and it came to a total of \$178 million.

Also, it can be expected that there will be an impact on the cost of borrowing by governments in that there will appear a big debt on balance sheets that had not been there before.

Under GASB 45, implementation is staggered, depending on an agency's revenues in the 1998-1999 fiscal years as follows:

Fiscal Year 1998-99	Implementation
\$100 Million or More	FY 2007-2008
\$10 Million to \$100 Million	FY 2008-2009
Under \$10 Million	FY 2009-2010

Implementation of GASB 45 requires (1) an actuarial determination of the cost of an agency's retiree health-care 30 years into the future; (2) considering alternatives to minimize the obligation; (3) determinations whether to pre-fund this liability, and/or how to fund the liability.

Clearly, agencies will search for ways to minimize this potentially significant obligation that has been brought to the fore by GASB 45. Likely there will be pressures to reduce benefits. This can be accomplished for future employees, subject to the political process. However, for current employees, a change in retiree benefits is subject to the bargaining process. In so far as current retirees are concerned, it is likely to be subject to some limitations as a legally vested benefit.

For agencies looking to restructure these post-employment benefits, we are available to help you develop a strategy, work with you on its implementation, and to satisfy your legal obligations prior to changes in your retiree health insurance program.