

FIRE WATCH

News and developments in employment law and labor relations for
California Fire Safety Management

OCTOBER 2020

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Fire Watch is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in *Fire Watch* should not be acted on without professional advice.



DAMAGES

City May Deduct Post-Termination Earnings From Award In Wrongful Termination Case.

In 2017, the California Court of Appeal concluded that the City and County of San Francisco wrongly terminated Paulo Morgado from his job as a police officer. As a remedy, the court directed the City to vacate Morgado’s termination and reinstate him pending an administrative appeal. The City did reinstate Morgado. But, the City then suspended him without pay retroactive to his 2011 termination. Morgado argued that the retroactive suspension was inconsistent with the court order. The court agreed and issued an order holding the City in contempt. The contempt order required the City to “unconditionally” vacate Morgado’s termination and suspension, and compensate him with front pay and benefits he would have earned between his termination and court victory.

Next, Morgado argued that the City was only partially complying with the court’s order. Instead of paying him in full, the City offset the payment owed to Morgado based on his post-termination earnings as a mortgage broker. Morgado argued that the City used his tax returns for the years he was employed as a broker and suspended as a police officer to deduct \$181,402. Morgado obtained a second order of contempt against the City directing it to repay the amount deducted. That ruling made its way to the California Court of Appeal.

On appeal, the sole issue was whether the “front pay”- or the future wages Morgado lost for the time between his termination and his court victory-- was subject to an \$181,402 deduction for the side income he earned during that time. In public and private employment cases, the governing remedial principle is that the remedy should return the employee to the financial position he would have been in had the employer’s unlawful conduct not occurred. Employees, however, are generally not entitled to recover in excess of make-whole damages.

The court first considered whether an employer can offset front pay. Morgado argued that front pay is immune to offset. The Court of Appeal disagreed. The court noted that there was no basis “in logic or fairness” to exclude front pay from the principle of “make-whole relief.” The court reasoned that the purpose is to make a wrongfully terminated employee whole. Thus, front pay must be subject to deduction to avoid overcompensation.

The court then evaluated whether the City could take a deduction for income generated by “moonlighting” or side employment. The court noted that if an employee would have earned such income regardless of his employment status, the income cannot be deducted from the wrongful termination compensation. Here, the court reasoned that if Morgado had not been terminated and suspended, he would not have been able to take up secondary employment as a mortgage broker and he would not have earned the disputed income. Thus, the City was justified in deducting the compensation from his front pay award.

Finally, the court analyzed whether the City calculated the \$181,402 deduction properly. The court noted that the \$181,402 was based on the total pre-tax income Morgado made as a broker. The court concluded that taking away \$181,402 from Morgado, when he earned only a portion of that figure after taxes, would deprive him of money that he was properly owed. The court remanded the issue for the parties to determine the proper post-tax amount of the deduction.

Morgado v. City & Cty. of San Francisco, 53 Cal. App. 5th 1216 (2020).

NOTE:

This case demonstrates the complexities of offsetting damages awards in employment cases. Agencies should ensure they are considering mitigating income when paying employees both back pay and front pay.

QUALIFIED IMMUNITY

Qualified Immunity Does Not Apply To First Amendment Retaliation Claim Against County.

Natia Sampson is the paternal aunt of a minor named H.S. In 2014, after learning that H.S.'s parents had been incarcerated, Sampson volunteered to become H.S.'s legal guardian. The Los Angeles County juvenile dependency court ordered H.S. to be placed in Sampson's care pending Sampson's guardianship application. The Los Angeles County Department of Children and Family Services (DCFS) assigned social worker Ahmed Obakhume to H.S.'s case.

While Obakhume was assigned to H.S.'s case, he commented on Sampson's appearance and marital status, urged her to end her marriage, touched her inappropriately, and attempted to coerce her into riding in his vehicle. After several months of unwanted advances, Sampson complained about Obakhume's conduct to his supervisor, Nicole Davis. In responding to Sampson's complaint, Davis said that Obakhume was "one of her best" social workers and the only one willing to work with H.S.'s biological parents. Obakhume's conduct continued.

Sampson also experienced two other issues dealing with DCFS officials. One issue was that DCFS required Sampson to supervise visits between H.S. and the biological parents, even though Sampson expressed her unwillingness to do so. The other issue was that when Sampson had difficulties obtaining a special type of funding for caregivers, DCFS officials continued to incorrectly tell her there were unsatisfied requirements.

Despite Sampson's numerous complaints and DCFS's assurances they would remedy these issues, they never did.

In August 2015, the juvenile court granted legal guardianship of H.S. to Sampson. Thereafter, H.S.'s biological father absconded with H.S. in October 2015 during a visit that Obakhume had said could be unsupervised. Obakhume visited Sampson's house to discuss the incident and told her that the social workers "stick together" and "cover for each other."

A month later, with Davis' permission, Obakhume filed unsupported allegations that Sampson was neglecting and abusing H.S. DCFS then sought an order from the juvenile court to remove H.S. from Sampson's care. After significant litigation and a brief period in which H.S. was removed from Sampson's custody, the California Court of Appeal returned H.S. to Sampson's care realizing that DCFS's allegations of abuse and neglect were unfounded.

Sampson subsequently sued DCFS and four individual DCFS employees, including Obakhume and Davis, under 42 U.S.C. § 1983. Sampson alleged sexual harassment in violation of the Equal Protection Clause of the Fourteenth Amendment, retaliation in violation of the First Amendment, and other constitutional claims. The district court granted qualified immunity to DCFS on Sampson's First and Fourteenth Amendment claims and dismissed all other causes of action. Sampson appealed the district court's dismissal based on qualified immunity for her Fourteenth Amendment equal protection and First Amendment retaliation claims.

In order to state a claim under Section 1983, Sampson had to plausibly allege that she was deprived "of a federally protected right" and that the "alleged deprivation was committed by a person acting under color of state law." In Section 1983 actions, qualified immunity protects government officials from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To determine whether qualified immunity exists, a court will consider whether: 1) the person suing has plausibly alleged a violation of a constitutional right; and 2) the constitutional right was clearly established at the time.

The Ninth Circuit vacated the district court's grant of qualified immunity to DCFS on Sampson's First Amendment retaliation claim. The court reasoned that at the time of DCFS's misconduct, it was clearly established that the First Amendment prohibits public officials from threatening to remove a child from an individual's custody to chill protected speech. In other words, DCFS should have known that it was unconstitutional to retaliate against Sampson for speaking out about the sexual harassment she allegedly suffered. The court then

remanded the claim to the district court to determine whether Sampson could meet the first prong of the test, namely whether she plausibly alleged a retaliation claim under the First Amendment.

Regarding Sampson's Fourteenth Amendment equal protection claim, the Ninth Circuit affirmed the district court's grant of qualified immunity. The court noted that unlike Sampson's retaliation claim, the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time. However, the court nonetheless determined that moving forward, public officials, including social workers, violate the Equal Protection Clause of the Fourteenth Amendment when they sexually harass individuals while providing them social services.

Sampson v. Cty. of Los Angeles, 2020 WL 5405672 (9th Cir. Sept. 9, 2020)

NOTE:

While this case dealt with the Equal Protection Clause as it relates to social workers, prior case law clearly establishes the right under the Equal Protection Clause to be free from sexual harassment by public officials in the workplace.



NEW TO THE FIRM

English Bryant is an Associate in LCW's San Diego office, where she assists clients in all matters pertaining to labor and employment. Prior to joining LCW, English served as a legal advisor the San Diego County Sheriff's Department, handling high-level personnel issues, civil service hearings, and *Pitchess* motions, and overseeing Internal Affairs investigations and medical standards issues.

She can be reached at ebryant@lcwlegal.com.



FIRM PUBLICATIONS

To view these articles and the most recent attorney-authored articles, please visit: www.lcwlegal.com/news.

Partner [Pilar Morin](#), Senior Counsel [David Urban](#) and Associate [Anni Safarloo](#) authored the *Daily Journal* article, "Review New Title IX Regulations, Effective This Month," discussing the new Title IX regulations that went into effect August 14, 2020.

Partner [Gage C. Dungy](#) was quoted in the *Law360* article, "Newsome Takes Aim at 'Gap' in COVID-19 Paid Sick Leave Law," discussing the recent signing of AB 1867, which gives Californians who have been exposed to or test positive for COVID-19 access to paid sick time for the remainder of 2020.

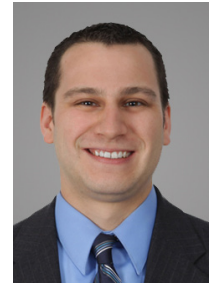
Partner [Brian P. Walter](#) and Associate [Alexander Volberding](#) authored the *Western City* article, "Best Practices to Avoid Employment Litigation Related to COVID-19," discussing how public agencies can avoid costly litigation in the era of COVID-19.

LCW

Congratulations to Our New Partners!



Introducing LCW's newest partners, Grace Chan & Michael Youril!



Grace Chan represents private educational institutions in all aspects of education and employment law. Grace works extensively in handling various employment and student issues, such as drafting employment agreements, employee handbooks, enrollment agreements and student handbooks, defending claims of alleged harassment and discrimination, among others. She regularly advises boards on governance issues, including updating bylaws, articles and board policies, and advising on board functions and operations, fiduciary duties and obligations, and risk management practices.

Michael Youril has extensive experience in retirement law including CalPERS, the '37 Act, and local retirement systems. Michael represents public agencies in all aspects of the CalPERS audit and determination process and in disability retirement proceedings. Michael regularly represents agencies before the Office of Administrative Hearings and various retirement Boards. Michael also litigates employment law actions in state and federal courts through all stages of litigation. He regularly litigates cases involving discrimination, harassment, retaliation, and whistleblower retaliation, among others. Michael has also litigated several individual and collective action cases brought under the Fair Labor Standards Act. Michael was named a Northern California Super Lawyers Rising Star in 2017 and 2020.

To view our tribute to Grace and Michael, and their remarks, please visit our [website](#).

Save the Date!

We're Going Virtual in 2021!

Attend the LCW Conference from wherever you are!

February 18 - 19, 2021

We're reimagining the LCW Conference and offering a flexible lineup to maximize your learning and networking opportunities. Stay tuned for more details!

<https://www.lcwlegal.com/events-and-training/lcw-conference>

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

- | | |
|--------|--|
| Oct. 7 | "Finding the Facts: Employee Misconduct & Disciplinary Investigations"
Central Coast ERC Webinar Shelline Bennett |
| Oct. 7 | "Finding the Facts: Employee Misconduct & Disciplinary Investigations"
South Bay ERC Webinar Shelline Bennett |
| Oct. 7 | "Labor Code 101 for Public Agencies"
Central Valley ERC Webinar Michael Youril |
| Oct. 8 | "Managing the Marginal Employee"
East Inland Empire ERC Webinar Christopher S. Frederick |
| Oct. 8 | "Managing the Marginal Employee"
Monterey Bay ERC Webinar Christopher S. Frederick |

Oct. 8	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” Mendocino County ERC Webinar Kristi Recchia
Oct. 8	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” San Diego ERC Webinar Kristi Recchia
Oct. 8	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” San Joaquin Valley ERC Webinar Kristi Recchia
Oct. 8	“Navigating the Crossroads of Discipline and Disability Accommodation” Orange County ERC Webinar Jennifer Rosner
Oct. 13	“Difficult Conversations” San Mateo County ERC Webinar Heather R. Coffman
Oct. 14	“Supervisor’s Guide to Public Sector Employment Law” North State ERC Webinar Jack Hughes
Oct. 14	“Family and Medical Care Leave Acts” San Gabriel Valley ERC Webinar Danny Y. Yoo
Oct. 14	“Family and Medical Care Leave Acts” Ventura/Santa Barbara ERC Webinar Danny Y. Yoo
Oct. 15	“Principles for Public Safety Employment” Bay Area ERC Webinar Suzanne Solomon
Oct. 21	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” Coachella Valley ERC Webinar Kristi Recchia
Oct. 21	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” Gold Country ERC Webinar Kristi Recchia
Oct. 21	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” Humboldt County ERC Webinar Kristi Recchia
Oct. 21	“Administering Overlapping Laws Covering Discrimination, Leaves and Retirement - Part 1” Sonoma/Marin ERC Webinar Richard Bolanos & Jessica A. Tyndall
Oct. 28	“Unfair Practice Charges and PERB” Central Valley ERC Webinar Che I. Johnson
Oct. 28	“Moving Into the Future” Monterey Bay ERC Webinar Erin Kunze
Oct. 28	“Human Resources Academy I” Ventura/Santa Barbara ERC Webinar Kristi Recchia
Oct. 29	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” Napa/Solano/Yolo ERC Webinar Kristi Recchia
Oct. 29	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” North San Diego County ERC Webinar Kristi Recchia
Oct. 29	“Maximizing Supervisory Skills for the First Line Supervisor - Part 2” West Inland Empire ERC Webinar Kristi Recchia

Oct. 29	“Public Sector Employment Law Update” Orange County ERC Webinar Richard S. Whitmore
Nov. 4	“Advanced Misconduct and Disciplinary Investigations” Central Coast ERC Webinar Shelline Bennett
Nov. 4	“Advanced Misconduct and Disciplinary Investigations” Humboldt County ERC Webinar Shelline Bennett
Nov. 4	“Advanced Misconduct and Disciplinary Investigations” South Bay ERC Webinar Shelline Bennett
Nov. 4	“Supervisor’s Guide to Understanding and Managing Employee’s Rights: Labor, Leaves and Accommodations” LA County HR Consortium Webinar Laura Drottz Kalty
Nov. 5	“The Art of Writing the Performance Evaluation” Gateway Public ERC Webinar Stephanie J. Lowe
Nov. 5	“The Art of Writing the Performance Evaluation” Mendocino County ERC Webinar Stephanie J. Lowe
Nov. 5	“Administering Overlapping Laws Covering Discrimination, Leaves and Retirement - Part 2” Sonoma/Marin ERC Webinar Richard Bolanos & Jessica A. Tyndall
Nov. 12	“Exercising Your Management Rights” Central Valley ERC Webinar Melanie L. Chaney
Nov. 12	“Exercising Your Management Rights” East Inland Empire ERC Webinar Melanie L. Chaney
Nov. 12	“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 1” Coachella Valley ERC Webinar GMK Attorney
Nov. 12	“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 1” San Gabriel Valley ERC Webinar GMK Attorney
Nov. 12	“Difficult Conversations” Napa/Solano/Yolo ERC Webinar Heather R. Coffman
Nov. 12	“Moving Into the Future” San Diego ERC Webinar Alysha Stein-Manes
Nov. 18	“File That! Best Practices for Employee Document and Record Management” Bay Area ERC Webinar Erin Kunze
Nov. 18	“File That! Best Practices for Employee Document and Record Management” North State ERC Webinar Erin Kunze
Nov. 18	“The Future is Now - Embracing Generational Diversity and Succession Planning” Gold Country ERC Webinar Jack Hughes
Nov. 19	“Prevention and Control of Absenteeism and Abuse of Leave” Imperial Valley ERC Webinar T. Oliver Yee
Nov. 19	“Difficult Conversations” NorCal ERC Webinar Heather R. Coffman

- Nov. 19** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
North San Diego County ERC | Webinar | Laura Drottz Kalty
- Nov. 19** **“Maximizing Performance Through Evaluation, Documentation and Corrective Action”**
San Mateo County ERC | Webinar | Christopher S. Frederick
- Nov. 19** **“Maximizing Performance Through Evaluation, Documentation and Corrective Action”**
West Inland Empire ERC | Webinar | Christopher S. Frederick

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training.

- Oct. 8** **“Maximizing Performance Through Evaluation, Documentation, and Corrective Action”**
City of Long Beach | Webinar | Stacey H. Sullivan
- Oct. 8** **“Understanding Our Unconscious Bias”**
Southern California Association of Governments (SCAG) | Webinar | Shelline Bennett
- Oct. 13** **“Bias Is A Four Letter Word - But It Doesn’t Have to Be”**
Riverside County District Attorney’s Office | Webinar | Suzanne Solomon
- Oct. 20** **“Legal Aspects of Violence in the Workplace”**
City of Stockton | Webinar | Kristin D. Lindgren
- Oct. 27** **“Key Legal Principles for Public Safety Managers - POST Management Course”**
Peace Officer Standards and Training - POST | San Diego | Mark Meyerhoff
- Oct. 27** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Stockton | Webinar | Brian J. Hoffman
- Oct. 28** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Millbrae | Webinar | Kelsey Cropper
- Oct. 29** **“Ethics in Public Service”**
Merced County | Webinar | Michael Youril
- Nov. 5** **“Ethics in Public Service”**
Merced County | Webinar | Michael Youril
- Nov. 5** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Millbrae | Webinar | Kelsey Cropper
- Nov. 5, 6** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
ERMA | Webinar | Heather R. Coffman
- Nov. 10** **“Creating an Ethical Mindset and Embracing Diversity”**
Midpeninsula Regional Open Space District | Webinar | Erin Kunze
- Nov. 17** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Glendale | Jenny Denny
- Nov. 17** **“Performance Management: Evaluation, Documentation and Discipline”**
City of Stockton | Webinar | Brian J. Hoffman
- Nov. 17** **“FLSA”**
Los Angeles World Airports (LAWA) | Los Angeles | Elizabeth Tom Arce

Speaking Engagements

- Oct. 9** **“Layoffs, Furloughs, & Concessions - Negotiating in Challenging Times”**
League of California Cities 2020 Annual Conference | Webinar | Peter J. Brown & Laura Drottz Kalty
- Oct. 9** **“Telecommuting Policies - Hot Topics & Key Issues to Consider”**
League of California Cities 2020 Annual Conference | Webinar | T. Oliver Yee & Kristi Recchia
- Oct. 28** **“Labor Negotiations from Beginning to End”**
Municipal Management Association of Southern California (MMASC) Annual Conference | Webinar | Kevin J. Chicas
- Nov. 4** **“Defining Board & Staff Roles and Relationships”**
Special District Leadership Academy (SDLA) | Webinar | Mark Meyerhoff
- Nov. 5** **“Defining Board & Staff Roles and Relationships”**
Special District Leadership Academy (SDLA) | Webinar | Mark Meyerhoff
- Nov. 6** **“Labor and Employment Litigation Update”**
League of California Cities 2020 City Attorneys’ Conference | Webinar | Brian P. Walter
- Nov. 6** **“Battle Lessons from Trial Warriors”**
League of California Cities 2020 City Attorneys’ Conference | Webinar | Geoffrey S. Sheldon & Jennifer Rosner
- Nov. 13** **“Harassment Prevention Training”**
California State Association of Counties (CSAC) Virtual Annual Meeting | Webinar | Jack Hughes
- Nov. 16** **“The Independent Contractor Compliance Review: Overlapping Issues & Legal Compliance”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Gage C. Dungy & Elizabeth Tom Arce
- Nov. 17** **“Layoffs, Furloughs, And Concessions: Navigating & Negotiating During Financially Challenged Times”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Richard Bolanos & Shelline Bennett
- Nov. 17** **“Negotiating Retirement And Health Benefits In Tough Economic Times”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Steven M. Berliner & Jack Hughes
- Nov. 18** **“Telecommuting Policies: Hot Topics & Key Issues To Consider”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Kristi Recchia & T. Oliver Yee
- Nov. 18** **“Managing Public Safety Employee Injuries And Illnesses: Navigating The Interactive Process, Labor Code 4850 And Similar Laws So That They Can Either Be Returned To Work Or Retired”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| J. Scott Tiedemann & Jennifer Rosner
- Nov. 19** **“Legislative & Legal Update”**
Public Employer Labor Relations Association of California (PELRAC) | Webinar | Peter J. Brown
- Nov. 19** **“Meet & Confer Obligations During An Emergency: Lessons Learned From COVID-19 & Preparing For The Next Crisis”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Peter J. Brown & Che I. Johnson

- Nov. 19** **“FLSA Hot Topics And Legal Updates”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Lisa S. Charbonneau & Brian P. Walter
- Nov. 20** **“Labor Relations Game Show!”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| J. Scott Tiedemann & Laura Drottz Kalty
- Nov. 20** **“Recent Developments In Public Sector Labor And Employment: A National Perspective”**
California Public Employer Labor Relations Association (CALPELRA) 2020 Annual Training Conference | Webinar
| Peter J. Brown & Will Aitchison

Seminars / Webinars

For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

- Oct. 15** **“New Changes To The California Family Rights Act - SB 1383 - What You Need To Know”**
Liebert Cassidy Whitmore | Webinar | Peter J. Brown
- Oct. 22** **“2021 Legislative Update for Public Safety”**
Liebert Cassidy Whitmore | Webinar | Geoffrey S. Sheldon
- Nov. 9** **“Train the Trainer Refresher: Harassment Prevention”**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

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