

**JULY 2015**  
**ESSAY QUESTIONS 1, 2 AND 3**



# California

# Bar

# Examination

**Answer all 3 questions.**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

## QUESTION 1

Doctor implanted a valve in Patient's heart in State A, where both Doctor and Patient lived. The valve was designed in State B by Valvco. Valvco was incorporated in State C, but had its headquarters in State D.

Patient was visiting State B when he collapsed due to his heart problems. Patient decided to remain in State B for the indefinite future for medical treatment.

Patient sued Doctor and Valvco in state court in State B for \$100,000, alleging that Valvco defectively designed the valve and Doctor negligently implanted it. Another patient had recently sued Valvco alleging that it defectively designed the valve, and had obtained a final judgment in her favor after trial on that issue.

Doctor and Valvco each moved the state court to dismiss the case on the ground of lack of personal jurisdiction. The state court granted Doctor's motion and denied Valvco's.

Valvco then filed a notice in federal court in State B to remove the case. Patient immediately filed a motion in federal court to remand the case to state court. The federal court denied Patient's motion.

Relying solely on the judgment in the other patient's action, Patient then filed a motion in federal court for summary adjudication of the issue that Valvco defectively designed the valve. The federal court granted the motion.

1. Did the state court properly grant Doctor's motion to dismiss? Discuss.
2. Did the state court properly deny Valvco's motion to dismiss? Discuss.
3. Did the federal court properly deny Patient's motion for remand? Discuss.
4. Did the federal court properly grant Patient's motion for summary adjudication? Discuss.

## QUESTION 2

Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny “as joint tenants with a right of survivorship for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar.”

Subsequently, without Lenny’s knowledge, Martha conveyed all of her interest in Greenacre to Paul. She died shortly afterwards. Unaware of Paul’s existence, Lenny paid the property taxes.

Paul entered into a written lease of his interest in Greenacre with Sally for a two-year term at a rental of \$500 per month. At the end of the lease, Sally stopped paying rent, but continued to occupy Greenacre without Paul’s consent. After three months, Paul confronted Sally. Although they did not agree to a new lease, Sally paid Paul the three months’ rent she had not paid and resumed paying him monthly rent.

Lenny then attempted to sell his interest in Greenacre. He soon learned that Sally was occupying Greenacre and that Paul had acquired Martha’s interest.

Concerned about conflicting property interest claims regarding Greenacre, Lenny commenced a lawsuit seeking to quiet title against Oscar, Martha’s estate, Paul, and Sally, and to obtain from Paul an accounting and contribution for a share of the rent paid by Sally and for a share of the property taxes paid by Lenny.

1. What property interest in Greenacre, if any, is the court likely to find possessed by Oscar, Lenny, Paul, Sally, and Martha’s estate? Discuss.
2. Is Lenny likely to obtain an accounting and contribution from Paul? Discuss.

### **QUESTION 3**

Owen, a police officer, had a hunch that Dora might be selling methamphetamine from her house in the country. To learn more, Owen drove to Dora's house with a drug-detection dog and waited until she left.

Owen first walked the drug-detection dog around Dora's house. At his direction, the dog jumped up on the porch, sniffed the front door, and indicated the presence of methamphetamine.

Owen then propped a ladder on the back of the house, climbed to the top, and peered into a second-story bedroom window. He saw a small box on a bedside table, but could not read the label. He used binoculars to read the label, and saw that it listed ingredients that could be used to make methamphetamine.

Owen went back to his car, saw Dora return home, and then walked back to the house and crouched under an open window. He soon overheard Dora telling a telephone caller, "I can sell you several ounces of methamphetamine."

Dora was arrested and charged with attempting to sell methamphetamine.

Dora has moved to suppress evidence of (1) the drug-detection dog's reaction, (2) the small box, and (3) the overheard conversation, under the Fourth Amendment to the United States Constitution.

How should the court rule on each point? Discuss.



**July 2015**

**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

# **WILSON v. BELTON COMPANY, INC.**

Instructions

**FILE**

Memorandum from Christopher Schroeder to Applicant

Defendant's Memorandum of Points and Authorities in Support of  
Motion for Summary Judgment

Plaintiff's Memorandum of Points and Authorities in Opposition to  
Defendant's Motion for Summary Judgment; Declarations of  
James Wilson, Donald Rance, and Charles Nye

## **WILSON v. BELTON COMPANY, INC.**

### **INSTRUCTIONS**

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

# **SCHROEDER & CONLEY, LLP**

**Attorneys at Law**

**1090 Morrison Drive  
Orricksburg, Columbia**

## **MEMORANDUM**

**TO:** Applicant  
**FROM:** Christopher Schroeder  
**DATE:** July 28, 2015  
**SUBJECT:** Wilson v. Belton Company, Inc.

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We represent Belton Company, Inc. (Belton), one of the world's largest construction firms. Plaintiff James Wilson brought an action for damages against dozens of defendants, including Belton. In his complaint, Wilson claims that each of the defendants injured him by exposing him to asbestos while he was employed by Columbia Gas & Electric Company (CG&E).

After the end of discovery, we filed a motion for summary judgment on Belton's behalf, supported by a memorandum of points and authorities, arguing that there is no triable issue of material fact that Belton caused Wilson injury by exposing him to asbestos and that it is entitled to judgment as a matter of law on that basis. Wilson recently filed opposition to our motion.

Please draft a memorandum of points and authorities in reply to Wilson's opposition. Make sure to respond to Wilson's arguments that there is a triable issue of material fact as to causation. Do not include an introduction, a section on the factual background and procedural history, or a conclusion. I will draft them after I edit your memorandum.

Christopher Schroeder

Schroeder & Conley, LLP  
1090 Morrison Drive  
Orricksburg, Columbia  
(555) 267-8700

Attorneys for Defendant, Belton Company, Inc.

**IN THE SUPERIOR COURT OF DORMAN COUNTY**

**STATE OF COLUMBIA**

<p>JAMES WILSON, Plaintiff, v. BELTON COMPANY, INC., et al., Defendants.</p>	<p>Case No. 2015-02550  DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT</p>
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**I. INTRODUCTION**

Plaintiff James Wilson (Wilson) has sued dozens of defendants, including defendant Belton Company, Inc. (Belton), for damages for personal injury based on exposure to asbestos. In his complaint, he included causes of action for, among other things, negligence in performing insulation work and professional negligence in designing or building structures. Generally, he alleged that he was exposed to asbestos during his more-than-30-years of employment with Columbia Gas & Electric Company (CG&E), at two of CG&E's electricity-generating facilities, its Powerhouse in the City of Collins (the Collins Powerhouse) and its Powerhouse in the City of Martinville (the Martinville Powerhouse).

Belton now moves for summary judgment, showing that there is no triable issue of material fact as to causation and that it is entitled to judgment as a matter of law.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Between 1961 and 1993, Wilson was employed by CG&E as an electrician at two of its electricity-generating facilities—the Collins Powerhouse from 1961 to 1985 and the Martinville Powerhouse from 1985 to 1993—and was allegedly exposed to asbestos.

In 1972, about a decade into Wilson’s employment with CG&E, the United States Department of Labor’s Occupational Safety and Health Administration (OSHA) began “regulating asbestos exposure in general industry” and “thereby caused a significant decline in the use of asbestos.” U.S. Department of Labor, Occupational Safety and Health Administration, *Asbestos Standard for General Industry 1* (1972).

In 2012, Wilson was diagnosed with mesothelioma, a type of lung cancer associated with asbestos. That same year, he sued dozens of defendants, including Belton, for damages for personal injury based on exposure to asbestos. In a complaint containing causes of action for, among other things, negligence in performing insulation work and professional negligence in designing or building structures, he alleged that each and all of the defendants, without differentiation, jointly and severally, “negligently and otherwise tortiously researched, manufactured, fabricated, designed, built, modified, tested or failed to test, abated or failed to abate, warned or failed to warn of the health hazards, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, re-branded, manufactured for others, packaged, and advertised asbestos and asbestos-containing products at the Collins Powerhouse and at the Martinville Powerhouse, and negligently and otherwise tortiously did the same as to the Collins Powerhouse and the Martinville Powerhouse themselves.”

Belton answered, generally denying all of Wilson’s allegations.

Wilson and Belton then engaged in extensive discovery.

With discovery now closed, Belton has moved for summary judgment.

### **III. THIS COURT SHOULD GRANT BELTON'S SUMMARY JUDGMENT MOTION.**

Summary judgment may be “required to avoid a meaningless and wasteful trial.” *Visueta v. General Motors Corporation* (Colum. Ct. App. 1991); accord, *Andrews v. Foster Wheeler, LLC* (Colum. Ct. App. 2010).

As will appear, summary judgment is indeed required here to avoid a trial of this sort.

A. A Defendant Is Entitled To Summary Judgment In An Action For Damages For Personal Injury Based On Exposure To Asbestos If There Is No Triable Issue Of Material Fact.

“To obtain summary judgment, the moving party must show that there is no triable issue as to any material fact and that it is entitled to judgment as a matter of law. There is no triable issue of material fact if the evidence would not allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion.” *Visueta*. Such is the evidence here.

B. Belton Is Entitled To Summary Judgment As To Any Claim Based On Professionally Negligent Design Or Building Of Any Structure Because There Is No Triable Issue Of Material Fact, Inasmuch As Any Such Claim Has Been Abandoned.

Belton is entitled to summary judgment as to any claim that Wilson might have raised in his complaint that it injured him by exposing him to asbestos as a result of professionally negligent design or building of any structures at either the Collins Powerhouse or the Martinville Powerhouse—or anywhere else. That is because Wilson has abandoned any such claim and has thereby admitted that there is no triable issue of material fact in that regard.

In his complaint, Wilson claimed that Belton injured him by exposing him to asbestos at both the Collins Powerhouse and the Martinville Powerhouse, as a result of both negligent insulation work and professionally negligent design or building of structures.

But in his responses to Belton's discovery requests, Wilson limited his claim against Belton to an allegation that Belton injured him by exposing him to asbestos *only* at the Martinville Powerhouse and *only* as a result of negligent insulation work.

Specifically, in a deposition, Wilson testified that he did not recall Belton's presence except at the Martinville Powerhouse, where he started working in 1985:

“Q: Do you agree that Belton had no presence at any CG&E site where you worked with the exception of the Martinville Powerhouse after 1985?

A: Yes.”

Wilson also testified that, while he was working for CG&E—presumably at the Martinville Powerhouse—persons whom he believed were Belton employees worked on boiler modifications and boiler outages that sometimes involved ripping out insulation. He stated that those persons performed that work while he was working on valves, pumps, and motors. He saw those persons doing so probably seven times, sometimes for as long as twelve weeks at a stretch and as short as two, that he worked in the same proximity as they did—he never specified how close—and that he breathed heavy dust which they produced and which he could have avoided only by removing himself from the site.

Subsequently, however, Wilson admitted that he did not know whether any of the persons whom he believed were Belton employees were actually Belton employees. He also admitted that he was always 45 or 50 feet away from the site of any insulation work. Lastly, he admitted that he did not know when any insulation that was being worked on had been installed or indeed whether it contained asbestos.

In addition to discovery by deposition, Wilson responded to a set of interrogatories, which, in effect, asked him to identify the “who,” “what,” “where,” “when,” “why,” and “how” of his exposure to asbestos. For example, Interrogatory No. 26 asked him to identify all asbestos and asbestos-containing products that he was contending that he had been exposed to. He responded by identifying various asbestos or asbestos-containing products connected with various defendants, but did not mention Belton. Likewise, Interrogatory No. 59 asked him to identify how he was contending that he had been exposed to asbestos. He responded by identifying how he had been exposed by various defendants, but did not mention Belton. Interrogatory No. 6 asked: “For each location where you contend that Belton was responsible for your exposure to asbestos, please state whether you have any evidence of Belton being present at the location when you worked there.” He responded: “I recall that Belton was watching workers performing modifications and overhaul work to the boilers at the Martinville Powerhouse on approximately seven different occasions. This work was being performed while I worked with the valves, pumps, and motors. On these approximately seven different occasions, the work on the boilers would last anywhere from two to twelve weeks. In some instances, this work involved the rip out of insulation. It resulted in very heavy dust, which I breathed. The only way to avoid breathing dust was to physically leave the site.”

Wilson also responded to a set of requests for production of documents. Request for Production of Documents No. 37 sought to elicit the basis of his claim of professional negligence in designing or building structures, by asking him to “produce all documents which support your contention that Belton engaged in professional negligence in designing or building any of the structures at any of the locations which you contend that Belton was responsible for your exposure to asbestos.” Wilson responded that he “has made no such claim, making it impossible to respond to this request.”

Therefore, in the course of discovery, Wilson limited his claim against Belton to an allegation that it injured him by exposing him to asbestos *only* at the Martinville Powerhouse and *only* as a result of negligent insulation work.

Consequently, Wilson has abandoned any claim alleging that Belton injured him by exposing him to asbestos as a result of professionally negligent design or building of any structure anywhere, and has thereby admitted that there is no triable issue of material fact in that regard.

C. Belton Is Entitled To Summary Judgment As To The Claim Based On Negligent Insulation Work At The Martinville Powerhouse Because There Is No Triable Issue Of Material Fact As To Causation.

Belton is entitled to summary judgment as to Wilson’s claim that it injured him by exposing him to asbestos as a result of negligent insulation work at the Martinville Powerhouse. That is because there is no triable issue of material fact as to causation.

“In any action for damages for personal injury based on exposure to asbestos, no matter what the nature of the claims alleged or the substance of the underlying theory, a plaintiff must prove various material facts by a preponderance of the evidence—including as to causation—in order to prevail.” *Norris v. Crane Company* (Colum. Ct. App. 2008).

In an action for personal injury based on exposure to asbestos, there can be a triable issue of material fact as to causation only if, “[a]t the threshold,” the evidence would allow a reasonable trier of fact to find, by a preponderance of the evidence, that the defendant exposed the plaintiff to asbestos in the first place. *Norris*. “Without exposure, there can be no causation.” *Andrews*.

In this action, there is no triable issue of material fact as to causation. The evidence would not allow a reasonable trier of fact to find, by a preponderance of the evidence, that Belton exposed Wilson to asbestos.

It is merely speculative whether there was any asbestos at the Martinville Powerhouse while Wilson worked there. OSHA had begun regulating asbestos exposure in general industry and had caused a significant decline in the use of asbestos-containing materials in 1972—more than a decade before Wilson arrived in 1985.

It is similarly merely speculative whether Belton performed any insulation work at the Martinville Powerhouse, negligently or otherwise, while Wilson worked there. The only evidence that Belton performed such work was Wilson’s deposition testimony that he *believed* that the persons performing such work were Belton employees. That evidence, however, was negated by Wilson’s subsequent admission that he did not *know* whether such persons were actually Belton employees.

It is also merely speculative whether any dust that Wilson may have breathed while he worked at the Martinville Powerhouse contained asbestos. There is evidence that Wilson was always 45 or 50 feet away from the site of any insulation work. There is no evidence about the aerodynamic properties of the site—whether it was open or closed, large or small, well-ventilated or not. *See Andrews* (requiring such evidence).

#### IV. CONCLUSION

For all of these reasons, this Court should grant Belton's motion for summary judgment and proceed to enter judgment in its favor.

Date: June 23, 2015

SCHROEDER & CONLEY, LLP

By: Christopher Schroeder

Christopher Schroeder

Attorney for Defendant,

Belton Company, Inc.

Margaret Ward  
Hassard, Baghdadi & Peterson, LLP  
Two Mission Center  
Orricksburg, Columbia  
(555) 659-5900  
Attorneys for Plaintiff, James Wilson

**IN THE SUPERIOR COURT OF DORMAN COUNTY**

**STATE OF COLUMBIA**

<p>JAMES WILSON, Plaintiff, v. BELTON COMPANY, INC., et al., Defendants.</p>	<p>Case No. 2015-02550  PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DECLARATIONS OF JAMES WILSON, DONALD RANCE, AND CHARLES NYE</p>
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**I. INTRODUCTION**

It is a fundamental rule of summary judgment that the evidence “must be” read *“in the light most favorable to ... the party opposing summary judgment.”* *Norris v. Crane Company* (Colum. Ct. App. 2008) (italics added).

In its Memorandum of Points and Authorities in support of its motion for summary judgment, defendant Belton Company, Inc. (Belton) violates this rule from beginning to end, twisting the evidence beyond its breaking point to read it in its favor.

We are confident that this Court will read the evidence in the light most favorable to plaintiff James Wilson (Wilson). But to remove the impediments Belton has placed in the Court's path, we submit accompanying declarations by Wilson himself, by Donald Rance, one of Wilson's former co-workers, and by Charles Nye, a State of Columbia-certified asbestos consultant. The Wilson, Rance, and Nye declarations present the evidence in its true light. They show that Belton injured Wilson by exposing him to asbestos *not only* at the Martinville Powerhouse *but also* at the Collins Powerhouse, and *not only* as a result of negligent insulation work *but also* as a result of professionally negligent designing or building of structures. They therefore show that there are indeed triable issues of material fact, including particularly as to causation, and that Belton is not entitled to judgment as a matter of law. The Court should accordingly deny Belton's summary judgment motion.

## **II. THIS COURT SHOULD DENY BELTON'S SUMMARY JUDGMENT MOTION.**

A court may grant a motion for summary judgment made by a defendant *only if* the defendant shows that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. *See Norris; Mason v. Hansen* (Colum. Ct. App. 1992).

A defendant's summary judgment motion is a "drastic" remedy. *Norris*. Indeed, it is "disfavored" because it deprives the plaintiff of trial on the merits. *Ibid*. As a consequence, a court should deny such a motion except in exceptional circumstances.

As we shall establish, there are no exceptional circumstances present in this case. Belton attempts to show the absence of any triable issue of material fact that it injured Wilson by exposing him to asbestos. It ends up showing the opposite. In doing so, it necessarily shows that it is not entitled to judgment as a matter of law. This Court should accordingly deny its motion out of hand.

A. There Is A Triable Issue Of Material Fact As To Causation Based On Negligent Insulation Work At The Martinville Powerhouse.

To begin with, there is a triable issue of material fact as to causation based on negligent insulation work at the Martinville Powerhouse.

Belton fails to show that it did not expose Wilson to asbestos at the Martinville Powerhouse. Quite the opposite: It shows that it did. Quoting Wilson's response to Interrogatory No. 6, Belton admits that Wilson was exposed to "very heavy dust" as a result of its negligent insulation work at the Martinville Powerhouse involving the "rip out of insulation"; that he was exposed on "approximately seven different occasions"; that each exposure "last[ed] anywhere from two to twelve weeks"; and that he "breathed the dust" and could not avoid it. It is a reasonable inference that the dust contained asbestos. That is because, in light of the accompanying declaration of Charles Nye, who has been an asbestos consultant certified by the State of Columbia since 1984, it is a reasonable inference that the insulation contained asbestos. As Nye states—expressly as to the Collins Powerhouse but impliedly as to the Martinville Powerhouse as well—"boilers were commonly insulated with asbestos."

B. There Is A Triable Issue Of Material Fact As To Causation Based On Negligent Insulation Work At The Collins Powerhouse.

There is also a triable issue of material fact as to causation based on negligent insulation work at the Collins Powerhouse.

Here too, Belton fails even to attempt to prove that it did not expose Wilson to asbestos at the Collins Powerhouse. Instead, Belton argues that, by virtue of certain responses to discovery requests, Wilson somehow excluded the Collins Powerhouse as one of the sites of exposure. Wilson's discovery responses, however, are ambiguous or, in any event, are explained by his declaration. *Cf. Mason* (plaintiff offered a "credible explanation" for a "contradiction" between an interrogatory response and a declaration). Moreover, what controls is Wilson's complaint. *Cf. Andrews v. Foster Wheeler, LLC* (Colum Ct. App. 2010) (plaintiff failed to present claim clearly because "he did not even allude to it in his complaint"). Wilson's complaint, which Belton quotes, refers expressly to the "Collins Powerhouse." In light of the accompanying declarations of Wilson himself and of Donald Rance, one of Wilson's former co-workers, it is apparent that Belton did indeed expose him to asbestos at the Collins Powerhouse. As Wilson states: "[N]on-CG&E personnel"—evidently, Belton employees—"used bags of raw asbestos to insulate the boilers at the Collins Powerhouse and produced heavy dust. I was present in the vicinity and breathed the dust." For his part, Rance states that he saw these same "Belton employees at the Collins Powerhouse."

C. There Is A Triable Issue Of Material Fact As To Causation Based On Professionally Negligent Design Or Building Of Both The Collins Powerhouse And The Martinville Powerhouse.

Finally, there is a triable issue of material fact as to causation based on professionally negligent design or building of structures at both the Collins Powerhouse and the Martinville Powerhouse.

Yet again, Belton fails even to attempt to show that it did not expose Wilson to asbestos as a result of professional negligence in designing or building either the Collins or the Martinville Powerhouse. As before, Belton argues that, through certain discovery responses, Wilson excluded professional negligence in design or building as one of the manners of exposure. But, again, what controls is Wilson's complaint—which, as Belton quotes, refers expressly to "design[ing]" and "build[ing]." In light of Rance's declaration, it is apparent that Belton did indeed expose Wilson to asbestos as a result of professional negligence in designing and building both the Collins Powerhouse and the Martinville Powerhouse. Rance states that the specifications for both the Collins Powerhouse and the Martinville Powerhouse identified Belton as the designer and builder, and called for the use of asbestos-containing insulation.

### III. CONCLUSION

For all of these reasons, this Court should deny Belton's motion for summary judgment and proceed to trial on the merits.

Date: July 23, 2015

HASSARD, BAGHDADI & PETERSON, LLP

By: Margaret Ward

Margaret Ward

Attorney for Plaintiff,

James Wilson

## DECLARATION OF JAMES WILSON

I, James Wilson, declare:

1. I am the plaintiff in this action. I have personal knowledge of the matters set forth in this declaration, except as indicated otherwise. If called as a witness, I could and would competently testify to such matters.

2. I worked as an electrician at the Columbia Gas and Electric Company (CG&E) Powerhouse in the City of Collins (the Collins Powerhouse) between 1961 and 1985, and at the CG&E Powerhouse in the City of Martinville (the Martinville Powerhouse) between 1985 and 1993.

3. There were 10 boilers at the Collins Powerhouse and 8 boilers at the Martinville Powerhouse. While I worked for CG&E, boilers were overhauled every year or two. Boiler overhauls involved the rip out of old insulation and its replacement with new insulation.

4. I recall that, between 1961 and 1966, non-CG&E personnel used bags of raw asbestos to insulate the boilers at the Collins Powerhouse and produced heavy dust. I was present in the vicinity and breathed the dust. I believe that defendant Belton Company, Inc., was involved in the rip out and replacement of this insulation.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct, and that I executed this declaration in Orricksburg, Columbia, on July 23, 2015.

*James Wilson*

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James Wilson

## DECLARATION OF DONALD RANCE

I, Donald Rance, declare:

1. I am a former co-worker of plaintiff James Wilson at the Columbia Gas and Electric Company (CG&E) Powerhouse in the City of Collins (the Collins Powerhouse) and not a party to this action. I have personal knowledge of the matters set forth in this declaration, except as indicated otherwise. If called as a witness, I could and would competently testify to such matters.

2. I worked with Mr. Wilson at the Collins Powerhouse from 1961 to 1966 as a laborer. I recall reviewing specifications for the Collins Powerhouse, which was constructed in the early 1950s. The specifications identified defendant Belton Company, Inc. (Belton) as the designer and builder, and called for the use of asbestos-containing insulation.

3. I recall reviewing specifications for the CG&E Powerhouse in the City of Martinville (the Martinville Powerhouse), which was constructed in the mid-1950s. The specifications called for the use of asbestos-containing insulation. I believe, but am not positive, that the specifications identified Belton as the designer and builder.

4. I recall seeing Belton employees at the Collins Powerhouse. I believe, but am not positive, that they were involved in designing and building a new unit for additional boilers.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct, and that I executed this declaration in Orricksburg, Columbia, on July 23, 2015.

*Donald Rance*

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Donald Rance

## DECLARATION OF CHARLES NYE

I, Charles Nye, declare:

1. I am an asbestos consultant certified by the State of Columbia, and have been such since 1984, and am not a party to this action. I have personal knowledge of the matters set forth in this declaration, except for such matters as have been made known to me to form an opinion, in which case each such matter is of a type on which professionals in my field reasonably rely in forming opinions. If called as a witness, I could and would competently testify to such matters.

2. I have reviewed the Declaration of James Wilson, which accompanies Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, relating to the Columbia Gas and Electric Company Powerhouse in the City of Collins (the Collins Powerhouse).

3. In my opinion, based on all of my many years as a certified asbestos consultant, the insulation that covered the boilers at the Collins Powerhouse between 1961 and 1966 contained asbestos. At that time, boilers were commonly insulated with asbestos. The boilers at the Collins Powerhouse would not operate as designed and built without asbestos-containing insulation because they would lose temperature and pressure and expose workers to burn injuries.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct, and that I executed this declaration in Orricksburg, Columbia, on July 23, 2015.

*Charles Nye*

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Charles Nye



**July 2015**

**California  
Bar  
Examination**

**Performance Test A  
LIBRARY**

# **WILSON v. BELTON COMPANY, INC.**

## **LIBRARY**

**Andrews v. Foster Wheeler, LLC**  
Columbia Court of Appeal (2010)

**Norris v. Crane Company**  
Columbia Court of Appeal (2008)

**Visueta v. General Motors Corporation**  
Columbia Court of Appeal (1991)

## **Andrews v. Foster Wheeler, LLC**

**Columbia Court of Appeal (2010)**

Plaintiff Paul Andrews seeks reversal of the trial court's grant of summary judgment in favor of defendant Foster Wheeler, LLC in an action for damages for personal injury based on exposure to asbestos.

In 2007, Andrews, then 70 years old, brought this action against dozens of manufacturers, suppliers, and contractors, including Foster Wheeler, with claims for negligence and strict products liability, for allegedly causing him to develop a disease—mesothelioma—as a result of exposure to asbestos as a laborer, deckhand, and gunner's mate for over 20 years in the United States Navy, including service on the *U.S.S. Brinkley Bass*.

In 2009, Foster Wheeler moved for summary judgment, claiming that there was no triable issue of material fact that Andrews' mesothelioma was caused by exposure to asbestos for which it was responsible.

In support of summary judgment, Foster Wheeler contended that there was no evidence that Andrews had been exposed to asbestos for which it was responsible. Andrews admitted in deposition that he had no knowledge of Foster Wheeler, of having worked with or in the presence of anyone working with Foster Wheeler products, or of ever being exposed to asbestos as a result of any action by or interaction with Foster Wheeler.

In his opposition, Andrews relied on some evidence about the *Brinkley Bass* and on an expert declaration from Keith Cole, an industrial hygienist. He contended that, as a result of visits to the *Brinkley Bass* boiler room after his arrival onboard in 1966, he was exposed to asbestos for which Foster Wheeler was responsible. Because of their aerodynamic properties, Andrews argued, respirable asbestos fibers that had originally been released into the air from asbestos-containing gaskets in Foster Wheeler condensers installed in the 1940s would remain in the environment indefinitely, including up to the time of his arrival.

The trial court granted summary judgment, concluding that there was no triable issue of material fact as to causation, and entered judgment for Foster Wheeler. Andrews appealed. We shall affirm.

“Previously considered a disfavored remedy, summary judgment is now recognized as a particularly suitable means to test the sufficiency of an opponent’s case” and “to avoid a meaningless and wasteful trial.” *Visueta v. General Motors Corporation* (Colum. Ct. App. 1991).

To obtain summary judgment, the moving party must show that there is no triable issue as to any material fact and that it is entitled to judgment as a matter of law. There is no triable issue of material fact if the evidence would not allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion.

In a plaintiff’s action for damages for personal injury based on exposure to asbestos, a trial court must grant a defendant’s motion for summary judgment if there is no triable issue of material fact as to causation. *See Rutherford v. Owens-Illinois, Inc.* (Colum. Supreme Ct. 1997).

Andrews first claims that the trial court erred by concluding that there was no triable issue of material fact as to causation based on his admission in deposition and his responses to the interrogatories. We disagree.

In deposition, Andrews clearly admitted that he himself did not possess any evidence that he was exposed to asbestos for which Foster Wheeler was responsible. Andrews does not contend otherwise.

Andrews’ admission in deposition might not have proved fatal had he salvaged it through his responses to Foster Wheeler’s interrogatories. He did not. In its interrogatories, Foster Wheeler called for Andrews to identify all evidence regarding his exposure to asbestos for which it was responsible. His responses made plain that he did not possess any such evidence

Andrews next claims that the trial court erred by concluding that there was no triable issue of material fact as to causation in spite of some evidence about the *Brinkley Bass* and the Cole declaration. Here too, we disagree.

The evidence about the *Brinkley Bass* was this: In 1945, some 21 years before Andrews had begun his service on the *Brinkley Bass*, four Foster Wheeler condensers had been installed in the ship's boiler room; the ship had recently been overhauled and was due to be overhauled again in the near future; during an overhaul sometime between 1966 and 1968, Andrews—who admitted he had never worked with a Foster Wheeler product—had visited the boiler room and had seen workers carrying out materials that he described as “raggedy beat-up dusty stuff,” which presumably contained asbestos.

In his declaration, Cole stated: He had studied the aerodynamic properties of respirable asbestos fibers, their release into the air, and their behavior once released; the removal of asbestos gaskets “from ship equipment, such as the Foster Wheeler condensers, would more likely than not release respirable asbestos fibers into the surrounding air”; “respirable asbestos fibers released during the removal of the original gaskets found on the Foster Wheeler condensers would contaminate the surrounding air”; “given the aerodynamic properties of respirable asbestos fibers, such fibers would remain where they had been released indefinitely and would be recirculated throughout various ship compartments.”

Relying on the foregoing evidence and declaration, Andrews argues that he succeeded in raising a triable issue of material fact as to causation—to the effect that Foster Wheeler condensers were onboard the *Brinkley Bass* at some point; overhaul work conducted on the ship would have included the removal of the condensers' allegedly asbestos-containing gaskets in a manner that would have released respirable asbestos fibers into the air; and such fibers would have remained in the ship's air for him to breathe in when he visited the boiler room on his arrival in 1966.

Andrews' argument fails. The fact of the matter is, he did not identify any evidence showing that Foster Wheeler's condensers were on the *Brinkley Bass* within 21 years of his arrival. Nor did he identify any evidence showing that Foster Wheeler's condensers actually contained asbestos. Neither did he identify any evidence showing that any work was done on Foster Wheeler's condensers that caused the release of respirable asbestos fibers into the air. Without such evidence, there was no exposure. Without exposure, there can be no causation.

Moreover, even if Andrews had identified such evidence, it would not have been enough. Cole stated in substance that Andrews, after boarding the *Brinkley Bass* in 1966, twenty-one years after the last known time Foster Wheeler's condensers were onboard, must have breathed in respirable asbestos fibers from those condensers, which had remained where they had been released because of their aerodynamic properties. Cole's statement, however, amounted to little more than speculation. *The aerodynamic properties of respirable asbestos fibers work in tandem with the aerodynamic properties of the environment in which they find themselves.* Even without evidence, we might be willing to presume that respirable asbestos fibers released into a small sealed room would remain there indefinitely. By contrast, we could not so presume for such fibers released in a large open space. Andrews failed to identify any evidence whatsoever describing in even the most general terms the aerodynamic properties of the *Brinkley Bass'* boiler room or any other part of the ship.

In a final attempt to avoid summary judgment, Andrews argues that there was a triable issue of material fact as to causation under the law applicable to a claim for damages for personal injury based on exposure to asbestos arising from professional negligence in designing or building structures.

This attempt fails as well.

First, there was no evidence that Foster Wheeler was even involved in designing or building any structure.

Second, a defendant moving for summary judgment need only challenge a claim clearly presented by the plaintiff. *See Moghadam v. Regents of University of Columbia* (Colum. Ct. App. 2008). Andrews did not present the claim in question clearly—indeed, he did not even allude to it in his complaint.

Third, to survive summary judgment, a plaintiff must submit expert evidence identifying the standard of care and describing its breach. *See Miller v. Lake County Flood Control Dist.* (Colum. Supreme Ct. 1973). Andrews did not submit any such expert evidence.

Affirmed.

**Norris v. Crane Company**  
**Columbia Court of Appeal (2008)**

Joseph Norris filed an action for damages for personal injury based on exposure to asbestos against Crane Company and 17 other defendants, claiming negligence, breach of warranty, and strict products liability. Norris served on the *U.S.S. Bremerton* as a sailor in the United States Navy between 1955 and 1957 and was diagnosed years later with mesothelioma, a form of lung cancer associated with asbestos.

In due course, Crane moved for summary judgment on the ground that there was no triable issue of material fact as to causation based on any exposure to asbestos for which it was responsible. Norris opposed the motion. The trial court agreed with Crane and granted the motion and entered judgment accordingly.

In *Visueta v. General Motors Corporation* (Colum. Ct. App. 1991), we stated that, although “[p]reviously considered a disfavored remedy, summary judgment is now recognized as a particularly suitable means to test the sufficiency of an opponent’s case.” *Ibid.* But even if no longer a “disfavored” remedy, summary judgment is still a drastic one. For that reason, we will affirm summary judgment only when compelled to do so.

Norris contends that there was a triable issue of material fact as to causation based on exposure to asbestos for which Crane was responsible. We agree.

In any action for damages for personal injury based on exposure to asbestos, no matter what the nature of the claims alleged or the substance of the underlying theory, a plaintiff must prove various material facts by a preponderance of the evidence—including as to causation—in order to prevail. *Rutherford v. Owens-Illinois, Inc.* (Colum. Supreme Ct. 1997). At the threshold, the plaintiff must prove, by either expert or non-expert evidence, that it is more likely than not that he or she was exposed to asbestos for which the defendant was responsible. *Ibid.* If the plaintiff passes that threshold, he or she must then prove, by expert evidence alone, that it is more likely than not that the exposure operated as a substantial factor in bringing about the injury. *Ibid.* Exposure to asbestos operates as a substantial factor in bringing about injury if it contributes *significantly* to the injury in light of such factors as the exposure's length, frequency, proximity, and intensity. *Ibid.*

It follows that there is a triable issue of material fact as to causation based on exposure to asbestos for which a given defendant is responsible if the evidence would allow a reasonable trier of fact to find that it is more likely than not that (1) the plaintiff was exposed to asbestos for which the defendant was responsible and (2) the exposure operated as a substantial factor in bringing about the injury.

When it is read, as it must be, in the light most favorable to Norris as the party opposing summary judgment, the evidence told the following tale.

The Navy commissioned the *U.S.S. Bremerton* in 1945. The *Bremerton's* boilers and pipes and gaskets were insulated with or contained asbestos to shield the crew from the heat produced. The Navy bought several types of valves from Crane and other companies; many of these valves had asbestos gaskets that had to be scraped out and replaced from time to time.

Norris joined the Navy in 1955 at the age of 19, and soon reported to the *Bremerton*. The ship was midway through a complete overhaul in dry dock. He continued to serve on the *Bremerton* until his honorable discharge from the Navy in 1957. He immediately went to work for Columbia Gas & Electric Co. (CG&E), and retired in 2003 at age 67. He was diagnosed with mesothelioma in 2005 at age 69.

In light of the foregoing, we are compelled to conclude that there was non-expert evidence that would allow a reasonable trier of fact to find that it was more likely than not that Norris was exposed to asbestos for which Crane was responsible. His sleeping quarters, like the rest of the *Bremerton*, were outfitted with valves, including Crane's. On several occasions, he saw shipmates working on valves in his sleeping quarters, scraping out the gaskets and thereby releasing respirable asbestos fibers into the air. Because his shipmates never cleaned up, he ended up breathing in the fibers.

We are similarly compelled to conclude that there was expert evidence that would allow a reasonable trier of fact to find that it was more likely than not that Norris' exposure to asbestos for which Crane was responsible operated as a substantial factor in bringing about mesothelioma. Every exposure to respirable asbestos fibers, such as the several exposures Norris received, increased the total dose in his lungs that led to the development of his disease. Each dose added more fibers, and the fibers thus added stayed in his lungs. All together, the doses contributed significantly to the development of the disease.

Hence, there was a triable issue of material fact as to causation based on exposure to asbestos for which Crane was responsible.

As a result, the trial court erred in granting Crane summary judgment.

Reversed.

## **Visueta v. General Motors Corporation**

**Columbia Court of Appeal (1991)**

Richard Visueta appeals from a summary judgment granted in favor of General Motors Corporation (GMC).

Visueta was driving his Chevrolet flatbed truck with a negligently maintained braking system. While doing so, he experienced brake failure, and struck a car driven by Richard Pilon and thereby caused Pilon's death.

Pilon's heirs filed a wrongful death action against Visueta. Visueta cross-complained against GMC, alleging that the lever to the parking brake was installed in an inaccessible location, making it impossible to reach during an emergency, and thereby constituted a design defect that caused Pilon's death. GMC moved for summary judgment. The trial court granted the motion and entered judgment accordingly.

Previously considered a disfavored remedy, summary judgment is now recognized as a particularly suitable means to test the sufficiency of an opponent's case. Indeed, when appropriate, summary judgment is required to avoid a meaningless and wasteful trial.

In moving for summary judgment, GMC claimed that there was no triable issue of material fact as to causation between the alleged design defect and Pilon's death—an element on which Visueta bore the burden of proof by the preponderance of the evidence. In support, GMC submitted evidence that Visueta improperly maintained the braking system and caused the parking brake to become inoperable; as a consequence, the location of the parking brake lever played no part in the accident; indeed, at no time did Visueta use or even attempt to use the parking brake; at his deposition, Visueta admitted that he could engage the parking brake by reaching down and pulling the parking brake lever located next to the gear shift. In opposition, Visueta submitted a declaration in which he contradicted the admission he made in his deposition, now claiming that he could *not* engage the parking brake. As noted, the trial court granted GMC summary judgment and Visueta appealed.

In *D'Amico v. Board of Medical Examiners* (Colum. Supreme Ct. 1974), the Supreme Court held that a declaration by a party in opposition to a summary judgment motion that contradicts a prior statement by the party in discovery cannot raise a triable issue of material fact. It allowed only a single exception: Such a declaration may raise a triable issue of material fact, even if it contradicts a prior discovery statement, if the party offers a credible explanation for the contradiction.

Visueta's declaration comes within the rule of *D'Amico* and not within its exception. That is because, in the declaration, Visueta contradicts his deposition admission and does not offer *any* explanation for the contradiction, credible or otherwise.

As a result, there was no triable issue of material fact that the location of the brake lever, even if it constituted a design defect, caused Pilon's death. Because Visueta had rendered the parking brake inoperable because of his negligent maintenance of the braking system, it made no difference where the parking brake lever was located. GMC had no liability.

Affirmed.

**JULY 2015**

**ESSAY QUESTIONS 4, 5 AND 6**



# California Bar Examination

**Answer all 3 questions.**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

## QUESTION 4

In 2008, Henry and Wendy married in California. Neither had saved any money before marriage. At the time of the marriage, Henry had a monthly child support obligation of \$1,000, which was deducted from his salary, for a child from a prior relationship.

In 2010, Wendy accepted a job at Company. At that time, she was told that if she performed well, she would receive stock options in the near future.

In 2011, Henry inherited \$100,000. He used \$25,000 to buy a necklace that he gave to Wendy as a holiday present. He used the remaining \$75,000 to buy a municipal bond that paid him \$300 per month.

In 2012, Wendy was granted stock options by Company, which would become exercisable in 2014, in part because she had been a very effective employee. Later in 2012, Wendy was injured in a car accident and made a claim against the person responsible.

In 2013, Henry and Wendy permanently separated and Henry moved away.

In 2014, Wendy settled her accident claim for \$30,000. Later in 2014, Wendy exercised her stock options and earned a profit of \$80,000.

In 2015, Wendy filed for dissolution.

1. What are Wendy's and Henry's respective rights regarding:
  - a. The necklace? Discuss.
  - b. The car accident settlement proceeds? Discuss.
  - c. The stock option profits? Discuss.
2. Should Henry be required to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

## QUESTION 5

Online, Inc. was duly incorporated as an Internet service provider. Its articles of incorporation authorized issuance of 1,000 shares of stock at \$1,000 par value.

Online initially issued only 550 shares to its shareholders as follows: Dick and Sam each received 200 shares and Jane received 150 shares. Online's Board of Directors (composed of Jane, Sam, and Harry) named Jane as the Chief Executive Officer and named Harry as General Counsel.

Online's business grew substantially in the following months. Still, Online was short on cash; as a result, instead of paying Jane \$10,000 of her salary in cash, it issued her 50 additional shares with the approval of its Board of Directors.

Looking to expand its operations, Online sought to enter a strategic partnership with LargeCo, Inc. Jane had learned about LargeCo through Harry's wife, who she knew was the majority shareholder of LargeCo. Jane directed Harry to negotiate the terms of the transaction with LargeCo. In the course of Harry's negotiations with LargeCo, LargeCo offered to acquire the assets of Online in exchange for a cash buy-out of \$1,000,000. Harry telephoned Jane and Sam; Jane and Sam agreed with Harry that the offer was a good idea; and Harry accepted LargeCo's offer.

Two days after completion of the transaction, LargeCo announced a joint venture with TechCo, which was solely owned by Harry. The joint venture was valued at \$10,000,000. In its press release, TechCo described the joint venture as a "remarkable synergy of LargeCo's new technology with TechCo's large consumer base."

The following week, Dick learned of LargeCo's acquisition of Online's assets. An expert in technology matters, he was furious about the price and terms of the acquisition, believing that the value of Online had been seriously underestimated.

1. What are Dick's rights and remedies, if any, against Jane, Sam and/or Harry? Discuss.

2. What ethical violations, if any, has Harry committed? Discuss. Answer according to California and ABA authorities.

## **QUESTION 6**

City Council (City) amended its zoning ordinance to rezone a single block from “commercial” to “residential.” City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.
2. Property Owner B, who had spent \$1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.
3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.



**July 2015**

**California  
Bar  
Examination**

**Performance Test B  
INSTRUCTIONS AND FILE**

**BARKER v. COLUMBIA DEPARTMENT OF  
ADMINISTRATIVE HEARINGS**

Instructions

**FILE**

Memorandum from Pearl Morton to Applicant

Opinion Memorandum Guidelines

Memorandum from Allan Lennox to George Field

Memorandum from George Field to Kristina Barker

Notice of Adverse Action of Dismissal

Unfair Practice Charge, Columbia Public Employment  
Relations Board

# **BARKER v. COLUMBIA DEPARTMENT OF ADMINISTRATIVE HEARINGS**

## **INSTRUCTIONS**

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**STATE OF COLUMBIA**  
**DEPARTMENT OF ADMINISTRATIVE HEARINGS**

**MEMORANDUM**

**TO:** Applicant

**FROM:** Pearl Morton, Chief Counsel  
Department of Administrative Hearings

**DATE:** July 30, 2015

**SUBJECT:** Barker v. Department of Administrative Hearings

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This morning I received a copy of an Unfair Practice Charge filed against our Department with the Columbia Public Employment Relations Board ("CPERB") by former employee, Kristina Barker, who was terminated for just cause, specifically, misuse of state resources. An informal settlement conference in the case is scheduled before CPERB on August 6, 2015. At the conference, a settlement judge will attempt to resolve the dispute short of formal hearing.

George Field, our Human Resources Manager, advises that the facts set forth in the charge are correct. He adds, however, that Ms. Barker replied to all the questions at her interview by either denying wrongdoing or saying that she doesn't recall. Accordingly, the evidence supporting her dismissal came from other sources.

Mr. Field wants to know whether either of Ms. Barker's allegations is legally meritorious and what, if any, remedies would be available should finding(s) ultimately issue against the Department. Please prepare for my review an opinion memorandum to Mr. Field that is responsive to his inquiry. Please do not prepare a separate statement of facts.

**STATE OF COLUMBIA**  
**DEPARTMENT OF ADMINISTRATIVE HEARINGS**

**MEMORANDUM**

**TO:** All Attorneys

**FROM:** Pearl Morton, Chief Counsel

**DATE:** January 10, 2013

**SUBJECT:** Opinion Memorandum Guidelines

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We are frequently called upon to provide a memorandum to clients discussing our analysis of a particular matter. The following is the format for such a memorandum.

1. State each legal issue you are being asked to address.
2. For each issue, objectively analyze the client's legal position, discussing the applicable law, its application to the facts, and the possible conclusions or outcomes.

It is important to craft your memorandum for its recipient. Many opinion memoranda are written to lay clients so, although you must discuss the law, you should do so as clearly and straightforwardly as possible.

**STATE OF COLUMBIA**  
**DEPARTMENT OF ADMINISTRATIVE HEARINGS**

**MEMORANDUM**

**TO:** George Field, Manager  
Human Resources

**FROM:** Allan Lennox, Supervisor  
Hearing Reporter Unit

**DATE:** July 6, 2015

**SUBJECT:** Kristina Barker Theft of State Resources

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I am requesting the assistance of Human Resources to investigate possible theft of state resources by a hearing reporter under my supervision.

About a week ago, two of the four hearing reporters in our unit requested a meeting with me to discuss workload problems. At the meeting they complained that a disproportionate amount of the work was falling on them because hearing reporter Kristina Barker is frequently absent from work or produces untimely transcripts, so judges to whom Ms. Barker is assigned request their assistance in the courtroom. One of the hearing reporters, Terrie Dayton, said that she confronted Barker after seeing her work on what appeared to be transcripts not related to Department work. According to Dayton, Barker told her: "You had better mind your own business or you will be very sorry!" This caused Dayton not to report what she observed until the workload got so heavy that she could not remain quiet any longer. Dayton asked that I not tell Barker she complained because Dayton fears retaliation.

On the same day as the hearing reporter meeting, several judges also complained to me about Barker's backlog. As a result of the groundswell of complaints, I stayed after hours last Friday to do some of Barker's work and to try to determine what was going on. While looking for a file in her cubicle, I discovered two large piles of files under Barker's desk. The majority involved depositions she is preparing for a "Barker Court Reporting Services" in lawsuits unrelated to her work at the Department.

This discovery prompted me to look at the data on Barker's work computer. There I found electronic versions of all the non-work-related physical files under her desk. All of the files were prepared on her work computer. I also found in Barker's email boxes a slew of messages sent during work time to outside parties about the Barker Court Reporting Services deposition transcripts. I have preserved a copy of all the hard copy and electronic documents.

A further concern is that Barker's emails and attendance records revealed that Renato Humphrey, another low performing hearing reporter at the Department with attendance and productivity problems, may also be reporting for Barker Court Reporting Services on days he calls in sick. It looks like he also prepares the outside transcripts on work time and equipment. Humphrey was hired on the recommendation of Barker, whom I understand is his roommate. Because Humphrey is a relatively new employee, I do not have his password and could therefore not check his computer. I asked our Information Technology Unit to allow me remote access of Humphrey's computer, but was told that under the new statewide system, such access takes three or four weeks to obtain.

I think it is important that this matter be investigated without delay. We should also communicate the confidentiality policy to Barker again. I have determined that there is a real risk here that retaliation may occur, that testimony may be fabricated, and that evidence may be altered, destroyed or concealed.

Thank you for your assistance.

**STATE OF COLUMBIA**  
**DEPARTMENT OF ADMINISTRATIVE HEARINGS**

**CONFIDENTIAL**

**TO:** Kristina Barker, Hearing Reporter  
Hearing Reporter Unit

**FROM:** George Field, Manager  
Human Resources

**DATE:** July 7, 2015

**SUBJECT:** Investigatory Interview

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You are directed to attend an investigatory interview on July 16, 2015, at the Human Resources conference room at 45 Headlands Street, San Limon. During this interview you will be asked questions about your conduct as a Hearing Reporter. Special Investigator Justine Israel will conduct the interview assisted by your supervisor, Allan Lennox.

As information obtained during the interview may lead to disciplinary action being taken against you, you are entitled to have a representative present. During the interview, you must answer all questions honestly, accurately and thoroughly. To protect the integrity of the investigation, the policy of the Department of Administrative Hearings states: "In all investigations of employee misconduct, the employee under investigation shall not discuss the potential disciplinary matter with any other employee other than their representative." Therefore, you are not to discuss this potential disciplinary matter at any point with anyone other than your representative. Further, you are not to engage in any retaliatory action against anyone you believe may be involved in this matter. Failure to abide by these directives is an independent basis for taking disciplinary action against you, up to and including dismissal.

Thank you in advance for your cooperation. If you have any questions, please contact Ms. Israel at (555) 703-3580.

# **STATE OF COLUMBIA**

## **DEPARTMENT OF ADMINISTRATIVE HEARINGS**

45 Headlands Street  
San Limon, Columbia

### **NOTICE OF ADVERSE ACTION**

Name of Employee:	Kristina Barker
Social Security Number:	XXX-XX-3636
Civil Service Classification:	Hearing Reporter
Department:	Administrative Hearings
Work Address:	45 Headlands Street San Limon, Columbia

YOU ARE HEREBY NOTIFIED that you are dismissed from your position as a Hearing Reporter with the Department of Administrative Hearings. The effective date of this dismissal is the close of business at 5:00 p.m. on July 28, 2015. A copy of this adverse action will be placed in your official personnel file.

#### **BACKGROUND**

On February 8, 2010, you were hired as a Hearing Reporter at the San Limon office of the Department. Your duties consist of taking and transcribing verbatim notes of hearings and other proceedings before administrative law judges at the Department. On several occasions in the last year, you were given oral and written disciplinary counseling for your excessive absenteeism and tardiness and for excessive delay in producing transcripts of hearings you reported. You were repeatedly advised that failure to correct these work performance problems would result in further discipline, up to and including dismissal. You are the owner of Barker Court Reporting Services, which provides court reporting services for depositions in civil cases.

## **BASES FOR THE ADVERSE ACTION**

This adverse action is being taken against you for dishonesty, including theft of state resources as follows:

1. On 16 occasions in the past year, you called in sick to work when you were working for compensation as a hearing reporter for Barker Court Reporting Services in deposition proceedings in civil cases unrelated to your work at the Department.
2. In the past year, you used state resources, including work hours and equipment, to transcribe depositions for Barker Court Reporting Services in the proceedings referenced in paragraph 1, above, and to engage in communications related to those deposition services.

## **CONCLUSION**

Your above-described conduct constitutes theft of state resources. Your misconduct created a substantial backlog in the production of transcripts for Department judges who are under a statutory duty to resolve their cases in an expeditious manner. It also burdened other hearing reporters. Such untrustworthiness cannot be tolerated.

## **RIGHT TO APPEAL TO STATE PERSONNEL BOARD**

You have the right to appeal this action to the State Personnel Board, 801 Capitol Mall, Putnam City, Columbia, no later than thirty (30) calendar days after its effective date.

Date: July 23, 2015

Allan Lennox

Allan Lennox

Hearing Reporter Supervisor

**STATE OF COLUMBIA**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**  
**UNFAIR PRACTICE CHARGE**

**Case No:** COL-UPC-987

**Date Filed:** July 29, 2015

**1. CHARGING PARTY:**

EMPLOYEE   X  

EMPLOYEE ORGANIZATION   X  

EMPLOYER   PUBLIC  

- a. Full Name: KRISTINA BARKER AND COLUMBIA STATE HEARING REPORTERS' UNION
- b. Mailing Address: 115 CLAYTON STREET, OAK GROVE, COLUMBIA
- c. Telephone Number: (555) 855-4554

**2. CHARGE FILED AGAINST (mark one only):**

EMPLOYEE ORGANIZATION       

EMPLOYER   X  

- a. Full Name: COLUMBIA DEPARTMENT OF ADMINISTRATIVE HEARINGS
- b. Mailing Address: 45 HEADLANDS STREET, SAN LIMON, COLUMBIA
- c. Telephone Number: (555) 703-3000
- d. Name, Title and Telephone Number of Agent to Contact:  
GEORGE FIELD, MANAGER, HUMAN RESOURCES, (555) 703-5390

**3. JURISDICTION**

The charging party hereby alleges that the above-named respondent is under the jurisdiction of the Columbia Public Employment Relations Act (CPERA) (Gov. Code section 12, et seq.). The Government Code section(s) alleged to have been violated are: 15, 15.5, and 19

**4. PROVIDE A CONCISE STATEMENT OF THE CONDUCT ALLEGED TO CONSTITUTE AN UNFAIR PRACTICE AND A STATEMENT OF THE REMEDY SOUGHT.**

*SEE ATTACHMENT*

\_\_\_\_ Kristina Barker \_\_\_\_\_  
(Type or print name)

\_\_\_\_ *Kristina Barker* \_\_\_\_\_  
Signature

\_\_\_\_ Columbia State Hearing Reporters' Union \_\_\_\_\_  
(Type or print name)

\_\_\_\_ *Nancy Castellano, Steward* \_\_\_\_\_  
Signature

## **Attachment to Unfair Practice Charge of Kristina Barker**

### FACTS

On July 7, 2015, Kristina Barker, former Hearing Reporter for the Department of Administrative Hearings, was given a memorandum by Human Resources Manager George Field, directing her (1) to attend an investigatory interview on July 16, 2015 into her "conduct" as a hearing reporter, and (2) not to discuss the matter with anyone other than her representative. The Department maintains and enforces a policy prohibiting employees from discussing employee disciplinary matters, including ongoing investigations of employee misconduct, with their co-workers. The confidentiality admonition was repeated at the interview, where Special Investigator Justine Israel and Supervisor Allan Lennox refused to provide, at Barker's and her union representative's request, the specific topics, the list of questions, and the nature of any charge(s) of impropriety the interview would encompass. Ms. Israel stated only that the subject matter and potential disciplinary charges would become evident from the line of questioning in the interview. Because of this, the Union was prevented from discussing the nature of the events with Ms. Barker to assist and counsel her in preparation for the interview. A week after the interview, Ms. Barker was fired for theft of state resources.

### UNFAIR PRACTICES

1. By refusing to provide Ms. Barker with the requested information before her investigatory interview, the Department interfered with Ms. Barker's and the Union's rights to representation.
2. By having and applying a blanket policy prohibiting Ms. Barker from speaking to anyone but her representative about the subject matter of the interview, the Department interfered with Ms. Barker's right to engage in concerted activity. No evidence supported prohibiting Ms. Barker from communicating with other employees concerning the investigation.

### REMEDIES SOUGHT

Ms. Barker requests reinstatement, back pay, restoration of benefits, and all remedies that in the view of the Columbia Public Employment Relations Board will effectuate the purposes of the Columbia Public Employment Relations Act.



**July 2015**

**California  
Bar  
Examination**

**Performance Test B**

**LIBRARY**

**BARKER v. COLUMBIA DEPARTMENT OF  
ADMINISTRATIVE HEARINGS**

**LIBRARY**

**Selected Provisions of the Columbia Public  
Employment Relations Act**

**Selected Provisions of the National Labor  
Relations Act**

**Roginson v. Columbia Public Employment Relations Board**  
Columbia Court of Appeal (1978)

**Pacific Telephone and Telegraph Company v.  
National Labor Relations Board**  
United States Court of Appeal, Fifteenth Circuit (1983)

**Banner Health System and James A. Navarro**  
Decision and Order of the National Labor Relations Board (2012)

**Columbia State Employees' Association v.  
Columbia Department of Mental Health**  
Unfair Practice Case No. S-CE-417  
Decision of the Columbia Public Employment Relations Board (1989)

## **SELECTED PROVISIONS OF THE COLUMBIA PUBLIC EMPLOYMENT RELATIONS ACT**

### **Section 12. Purpose of Act**

It is the purpose of this Act to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment. It is also the purpose of this Act to promote the improvement of personnel management and employer-employee relations within the State of Columbia by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and to be represented by those organizations in their employment relations with the state.

### **Section 13. Jurisdiction of the Columbia Public Employment Relations Board**

The Columbia Public Employment Relations Board is charged with administering and enforcing the Columbia Public Employment Relations Act. The Board's functions include investigating and determining claims that the Act has been violated.

### **Section 15. Employee Organizational Rights**

State employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

### **Section 15.5. Rights of Recognized Employee Organizations**

Recognized employee organizations and their representatives shall have the right to represent their members in their employment relations with the state. The scope of representation of the recognized employee organization is limited to wages, hours and other terms and conditions of employment.

### **Section 19. Unlawful Actions by State**

It shall be unlawful for the state to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
- (d) Dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
- (e) Refuse to participate in impasse procedures.

**Section 19.5. Unfair Practices; Procedures and Remedies**

The initial determination whether a charge of unfair practice is justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the Board. The Board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of this chapter.

## **SELECTED PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT**

### **Section 7. Right of Employees as to Organization, Collective Bargaining and Other Mutual Aid and Protection.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

### **Section 8(a). Unfair Labor Practices By Employers.**

It shall be an unfair labor practice for an employer:

1. to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
2. to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
3. by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein;
4. to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;
5. to refuse to bargain collectively with the representatives of its employees.

### **Section 10(c). Reinstatement, back pay remedies.**

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay if such individual was suspended or discharged for cause.

## **Roginson v. Columbia Public Employment Relations Board**

**Columbia Court of Appeal (1978)**

On August 16, 1976, plaintiff William Roginson, a janitor for the State of Columbia with a tenure marred by many complaints and counseling, got into a heated exchange with his supervisor and walked off the job. When plaintiff returned to work the next day, the supervisor directed him to go to the building manager's office to discuss his employment problems. Plaintiff refused to attend the meeting without the presence of a union representative and was dismissed, effective immediately. A hearing before the State Personnel Board (SPB) held that the dismissal was proper and the Madison County Superior Court affirmed the decision of the SPB. Plaintiff appeals from the decision of the Superior Court, contending that he was dismissed in violation of his statutory right to the presence of a union representative at the meeting with his supervisors. In this case of first impression, the threshold issue is whether a state employee is entitled, under the Columbia Public Employment Relations Act (CPERA), to the presence of a union representative during a meeting held with a significant purpose to investigate grounds for disciplinary action.

CPERA Section 15.5 provides that: "Recognized employee organizations and their representatives shall have the right to represent their members in their employment relations with the state."

Included within the scope of representation are matters relating to "wages, hours and other terms and conditions of employment ..." (*Id.*) The language of these sections appears to be taken from Section 7 of the federal National Labor Relations Act (NLRA). Federal courts confronted with the issue before us have consistently held that the action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of Section 7 that "[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection." *NLRB v. Weingarten, Inc.* (1975) 95 S.Ct. 959. Those courts held that the union representative whose participation the employee seeks is safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

CPERA is modeled on the NLRA and has imbibed the underlying federal policy. Because that is so, federal decisions interpreting the NLRA are unusually strong persuasive precedent in interpreting CPERA. Indeed, federal decisions interpreting the NLRA remain persuasive even where CPERA does not contain any provision comparable to the NLRA. There are no Columbia decisions analyzing the issue whether a state employee is entitled to the presence of a union representative during a pre-disciplinary investigative meeting under CPERA. But under the principles stated above, the rulings of *Weingarten* and its progeny must be deemed persuasive in interpreting CPERA section 15.5.

We therefore conclude that a state employee has a right to union representation at a meeting with his superiors held with a significant purpose to investigate facts to support disciplinary action and may not be dismissed for attempted exercise of that right.

Accordingly, the judgment is reversed.

**Pacific Telephone and Telegraph Company v.**  
**National Labor Relations Board**

**United States Court of Appeal, Fifteenth Circuit (1983)**

MERRILLEY, Circuit Judge:

Pacific Telephone and Telegraph Company petitions for review of an order issued by the National Labor Relations Board holding the company guilty of an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act.

By independent investigation in 1978, Pacific Telephone secured evidence that employee Robert Gharavi had installed unauthorized telephone equipment in his home during work hours. Company supervisors summoned Gharavi to an interview along with a union steward to act as Gharavi's representative. Gharavi and the steward inquired as to the purpose of the interview but received no information. After being told in the interview of the evidence in the possession of the company, Gharavi admitted having installed the unauthorized equipment in his home on company time. Gharavi was subsequently discharged for misuse of company time and equipment.

Gharavi filed charges with the Board, as did the union. The Board ruled that Pacific Telephone had violated Section 8(a)(1) and deprived Gharavi of rights guaranteed by Section 7 of the Act, by holding investigatory interviews about his potential improper conduct without informing Gharavi of the subject matter of the interviews. It determined that Gharavi had not been discharged for cause. The Board entered cease and desist orders and also ordered Gharavi reinstated with back pay.

The questions presented on this petition are (1) whether the Board permissibly construed the *Weingarten* right (*NLRB v. Weingarten, Inc.*, U.S. (1975)) to include the right to be informed prior to the interview of the subject matter of the interview and the nature of any charge of impropriety it may encompass, and (2) whether the grant to Gharavi of reinstatement and back pay was within the Board's statutory authority. These questions require an examination of the Board's construction of Section 7 and its view of the nature of the employee's right to act in concert as approved and accepted by the court in *Weingarten*. This Court will uphold the Board's construction of the Act if it is reasonable or permissible.

The answer to the first question depends upon the nature of the employee's right to act in concert. In *Weingarten*, the Supreme Court held that Section 7 of the Act created the statutory right of an employee to union representation at any investigatory interview conducted by the employer that the employee reasonably fears may result in his discipline. The Court recognized that it is a violation of Section 8(a)(1) to compel an employee to appear unassisted at an interview which may put his job security in jeopardy. The Board regarded this as a dilution of the employee's right under Section 7 of the Act to act collectively to protect his job interests and an unwarranted interference with his right to insist on concerted protection rather than individual self-protection against possible adverse employer action.

Because the right to insist on concerted protection against possible adverse employer action encompasses union representation at interviews such as those here involved, the securing of information as to the subject matter of the interview is no less within the scope of that right. Without such information and conference, the ability of the union representative effectively to give the employee aid and protection would be seriously diminished. If the right to a prior consultation and therefore the right to representation is to be anything more than a hollow shell, both the employee and the employee's union representative must have some information as to the subject matter of the investigation.

This information need be nothing more than that which provides the representative and employee the opportunity to become familiar with the employee's circumstances. The employer does not have to reveal its case, the information obtained or even the specifics of the misconduct to be discussed. A general statement as to the subject matter of the interview that identifies to the employee and his representative the misconduct for which discipline may be imposed will suffice.

We therefore affirm the decision of the Board holding that Pacific Telephone violated Section 8(a)(1) by failing to inform Gharavi as to the subject matter of the interview.

The second question presented is whether the Board's order that Gharavi is entitled to reinstatement and back pay is entitled to enforcement.

Section 10(c) of the Act provides in part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay if such individual was suspended or discharged for cause."

In determining that Gharavi had not been discharged for cause, the Board declined to take into consideration the confessions the employee made during his interview. The Board ordered reinstatement and back pay despite Gharavi's confession during the interview.

We hold that the plain language of Section 10(c) does not allow for such a construction. Where employees are clearly discharged for cause and not for attempting to assert their *Weingarten* rights by requesting union assistance at an investigatory interview, Section 10(c) precludes an order of back pay and reinstatement. Here it clearly appears that the company discharged Gharavi for cause. The order for reinstatement and back pay was beyond the authority of the Board and is not entitled to enforcement.

## **Banner Health System and James A. Navarro**

**(2012)**

### DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Banner Health System (Banner) operates a hospital in Phoenix, Arizona, which provides inpatient and outpatient medical care. James Navarro has worked as a sterile processing technician at the hospital for 3 years. Sterile processing technicians are responsible for the proper care and handling of all surgical instruments.

While Navarro was at work on February 19, 2011, the large steam sterilizer used for sterilization of surgical instruments broke. With several surgeries scheduled at the hospital that day, Navarro's supervisor instructed him to use a low temperature sterilizer or hot water from the coffee machine to clean the instruments. Navarro refused to follow his supervisor's instructions because they did not in his opinion constitute safe, established procedures. After a lengthy argument between the two, Navarro's supervisor advised Navarro that he had been insubordinate in refusing to implement his directives.

The supervisor requested Banner's human resource department to investigate the circumstances surrounding Navarro's refusal to comply with the supervisory directives and to issue Navarro a disciplinary counseling for insubordination. On February 21, a human resources consultant interviewed Navarro about the events of February 19.

Every Banner employee is required to sign a confidentiality agreement, which states:

I understand that I may hear, see and create information that is private and confidential, including patient information; employee information such as salaries and disciplinary action that is not shared by the employee; copyright computer programs; business and strategic plans; and other internal documents. If I fail to keep this kind of information confidential, I understand that I could be subject to corrective action, including termination.

Banner applies this policy to all investigatory interviews of employees, during which human resource consultants direct employees not to discuss the matter with their co-workers while the investigation is ongoing. The purpose of the “confidentiality admonition” was to protect the integrity of the investigation from the negative effects of employees sharing their recollections. Navarro was given this confidentiality admonition during his investigatory interview on February 21.

Navarro thereafter filed an unfair labor practice charge with the National Labor Relations Board alleging that the confidentiality agreement and admonition prohibiting employees from discussing salaries and discipline violate Section 8(a)(1) of the National Labor Relations Act. This Board issued a Complaint. After a full hearing, the administrative law judge found that Banner’s maintenance and application of the confidentiality policy and admonition did not violate Section 8(a)(1). We disagree.

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities. An employer may not, without violating Section 8(a)(1), discipline or otherwise threaten, restrain or coerce employees because they engage in protected concerted activities.

Central to the protections provided by Section 7 is the employees’ right to communicate to co-workers about their wages, hours, and other terms and conditions of employment.

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. No legitimate and substantial justification, however, exists where an employer routinely prohibits employees from discussing matters under investigation.

In this case, the administrative law judge found that Banner's prohibition was justified by its concern with protecting the integrity of its investigations so that employees may give their own version of the facts and not what they have heard another employee state. Contrary to the judge, we find that Banner's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights.

Rather, in order to minimize the impact on Section 7 rights, it was Banner's burden to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover-up. Banner's blanket approach clearly failed to meet those requirements. Accordingly, we find that, by maintaining and applying a policy prohibiting employees from discussing ongoing investigations of employee misconduct, Banner violated Section 8(a)(1) of the Act.

**Columbia State Employees' Association v.**  
**Columbia Department of Mental Health**

**(1989)**

Unfair Practice Case No. S-CE-417

DECISION OF THE COLUMBIA PUBLIC EMPLOYMENT RELATIONS BOARD

In response to an unfair practice charge filed by the Columbia State Employees' Association (CSEA), on January 12, 1989, this Board, after formal hearing, determined that the Columbia Department of Mental Health (DMH) violated subdivisions (b) and (c) of Section 19 of the Columbia Public Employment Relations Act (CPERA) when it implemented a change in the scheduling system of nurses working at Metropolitan State Hospital (Metropolitan) without notifying CSEA or giving it an opportunity to negotiate on the change. At the time of hearing in this matter, the parties agreed to defer the issue of the appropriate remedy until the Board ruled on CSEA's charge. Having found a violation, the appropriate remedy is now addressed.

In Section 19.5, the Board is given "the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

**ORDER**

Pursuant to Section 19.5, it is hereby ORDERED that the DMH, its director and representatives, shall, within ten work days of service of this Decision, post at all work locations where notices are customarily placed copies of the Notice attached hereto as an **Appendix** signed by an authorized agent of DMH. The posting shall be maintained for a period of 30 consecutive days. DMH must also notify the Board of the actions taken to comply with this Order.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
STATE OF COLUMBIA

After a hearing in Unfair Practice Case Number S-CE-417, *Columbia State Employees' Association v. State of Columbia Department of Mental Health (DMH)*, in which all parties had the right to participate, it has been found that the DMH has violated subdivisions (b) and (c) of Section 19 of the Columbia Public Employment Relations Act (CPERA). DMH violated the Act when it failed to meet and confer with the California State Employees' Association (CSEA) before implementing a change in the nurses' scheduling system at Metropolitan State Hospital (Metropolitan).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer with the CSEA on the scheduling system of nurses at Metropolitan.
2. Continuing to implement the new scheduling system at Metropolitan until we have met and conferred with the CSEA.
3. Denying the CSEA rights guaranteed it by CPERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF CPERA:

1. Rescind implementation of the new scheduling system at Metropolitan and reinstate the scheduling system used prior to such implementation.

DATED:

STATE OF COLUMBIA  
DEPARTMENT OF MENTAL HEALTH

By \_\_\_\_\_

Authorized Agent

**THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE DAYS FROM THE DATE OF POSTING.**