SCHOOL PERSONNEL & FINANCE
A Presentation for CSU Stanislaus

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Spring 2021
Areas of Relevant Law
[Not an Exhaustive List!]

- **Education Code**
  - County Offices of Education
  - Preschools/Early Childhood Education
  - K-12 School Districts
  - Community College System
  - California State University System
  - University of California System
Areas of Relevant Law
[Not an Exhaustive List!]

- **Education Code**
  - Hiring
  - Transfer
  - Evaluation
  - Time Issues
  - Classification
  - Status/Tenure
  - Layoff/Discipline/Release
Areas of Relevant Law
[Not an Exhaustive List!]

- **Education Code**
  - Sex and Drugs
  - Compensation
  - Student Discipline
  - Charter Schools
  - School Board Powers and Duties
  - Elections
  - Accountability (in progress…)
Areas of Relevant Law
[Not an Exhaustive List!]

- **Education Code**
  - Curriculum/Instruction
  - Budget & Finance
  - LCFF/LCAP
  - School Site Councils
  - AB 1200 etc.
  - Pension (STRS)
  - Much, Much More!
Areas of Relevant Law
[Not an Exhaustive List!]

- Government Code
  - EERA
  - CFRA
  - Pension (PERS)
  - PEPRA of 2013
  - Tort Claims/Liability
Areas of Relevant Law
[Not an Exhaustive List!]

- Government Code: Discrimination Under FEHA – 14 Protected Categories!
  - Age (40 and over)
  - Ancestry
  - Color
  - Religious Creed (including dress/grooming)
  - Denial of FMLA Leave
  - Marital Status
  - Medical Condition (cancer; genetic characteristics)
  - Genetic Information
  - Military & Veteran Status
  - National Origin (including language use restrictions)
  - Race
  - Sex (pregnancy, childbirth, breastfeeding & medical conditions related thereto)
  - Gender, Gender Identity & Gender Expression
  - Sexual Orientation
Areas of Relevant Law
[Not an Exhaustive List!]

- **Government Code**
  - Brown Act
  - Conflicts of Interest (1090, FPPA)
  - Board Members
  - Public Records Act (personal cell phones?)
  - Superintendent Contracts (approval; buyouts)
  - Administrative Procedures Act
  - Much, Much More!
Areas of Relevant Law
[Not an Exhaustive List!]

- **Labor Code**
  - Wage and Hour
  - Status (“key,” management, exempt, etc.)
  - Overtime
  - Stand-by time
  - Pay for training
  - Pay Withholding
  - Final wages/vacation payout
  - Sick Leave for all
  - More

[Image of a balance scale and a book labeled "LAW"

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Areas of Relevant Law
[Not an Exhaustive List!]

▪ “Specialty” Codes
  – Vehicle Code (licensing)
  – Penal Code (mandatory suspension/dismissal offenses; child abuse reporting)
  – Health and Safety Code (list of drugs/discipline)
  – Family Code (registered domestic partners; same sex marriage)
Areas of Relevant Law
[Not an Exhaustive List!]

- **“Specialty” Codes** (cont.)
  - Military and Veterans Code (military leave/return rights)
  - Business and Professions Code (alcohol on district property – now allowed!)
  - Public Contracts Code (bidding; use of force account labor)
Areas of Relevant Law
[Not an Exhaustive List!]

- California Code of Regulations
  - Title 2
    - DFEH
    - FPPC
    - Conflict Codes
  - Title 5 Education
  - Title 8 PERB
  - Title 9 Mental Health & Rehabilitation
  - Title 12 Military & Veterans Affairs
  - Title 13 Motor Vehicles
  - 28 in all!
Areas of Relevant Law
[Not an Exhaustive List!]

- **Federal Law/Regulations - Discrimination**
  - Age
  - Equal Pay/Compensation
  - Harassment
  - Pregnancy
  - Religion
  - Sex
  - Disability
  - Genetic Information (GINA)
  - National Origin
  - Race/Color
  - Retaliation
  - Sexual Harassment
Areas of Relevant Law
[Not an Exhaustive List!]

- **Federal Law/Regulations** (cont.)
  - FMLA
  - Transportation & Drug Testing
  - Drug Free Workplace Act
  - Civil Rights (Title VII etc.)
  - FLSA
  - USERRA
  - More
Areas of Relevant Law
[Not an Exhaustive List!]

- **Constitutional Law**
  - Due Process
  - Equal Protection
  - Freedom of Speech/Expression
  - Freedom of Association
  - Freedom from Self-Incrimination
  - Freedom from Unreasonable Search & Seizure
Areas of Relevant Law
[Not an Exhaustive List!]

• **Constitutional Law** (cont.)
  – Religion: Establishment and Free Exercise
  – Right to Privacy (CA)
  – Fundamental Right to Free Education (CA)
  – More
Areas of Relevant Law
[Not an Exhaustive List!]

- **Case/Decisional Law/ Administrative & Agency Rulings**
  - State Courts
    - Courts of Appeal
    - California Supreme Court
  - Federal Courts
    - Ninth Circuit U.S. Court of Appeals
    - United States Supreme Court (SCOTUS)
Areas of Relevant Law
[Not an Exhaustive List!]

- **Case/Decisional Law/Administrative & Agency Rulings** (cont.)
  - Regulatory Agencies
    - EEOC
    - DFEH
    - PERB
    - Labor Commission
COVID – 19 Liability – What We Expected…

- Claims/litigation regarding exposure/infection
- Heightened concern:
  - Coverage unclear/exception
  - Workers compensation presumption
  - No COVID-specific liability protection (AB 1384/SB 4317)
  - Claim tolling
- Anticipated defenses:
  - Immunities
  - Causation challenge
Liability – What Has Happened...

- Special education cases
- Reopening cases
  - Continuity plan challenge
  - Constitutional challenge
- Claims regarding school closures/re-opening
Vaccines – What Can Be Required?

- Students
- Employees
  - EEOC Guidance
  - Bargaining
Vaccines – Implementation Challenges

- Employees who refuse
  - Disability/religious objection
  - Personal choice

- Impact on vaccinated employees
  - Working with non-vaccinated employees
  - Other accommodations for non-vaccinated employees
Finding the Right People

- Terms and conditions, legal protections, benefits, and obligations are determined by:
  - Status: permanent, probationary, intern, substitute.
  - Job Description
  - Collective Bargaining Agreement
  - Board Policy and Administrative Regulation
  - Classification: classified or certificated
  - Education Code
  - Title 5 California Code of Regulations
Who is on the Team? Finding the Right People

- Filling hard to fill positions –
  - Make your district THE go-to district
  - Recruit early – anticipate needs
  - Signing bonuses
  - Grow your own
  - Anticipate Needs
If You Could Turn Back Time…

Question:
If you could go back and have a chance to take a class or study an area in more depth what would the subject be?
If You Could Turn Back Time…

Answers:

– Psychology!
– Collective bargaining
– Leaves
– Certificated/Classified Discipline
Collective Bargaining - Teams

- Why is he/she on the team?
- Drawing on experience
- Valuing different perspectives
- Commitment to the process
- Manifest authority to bargain
- Board’s and Superintendent’s Roles
Collective Bargaining - Teams

- Lead Negotiator
- Educational Expert
- Operational Expert
- Financial Expert
- Who else might be on the team? Why?
Collective Bargaining - Those Not in the Room

- Students
- Board
- Superintendent
The Duty to Bargain in Good Faith

Duty to bargain in good faith:

- Not an obligation to reach specific outcome,
- but to bargain in good faith
Leaves, Leaves, Leaves…

- Types of Leaves?
  - Sick leave – classified/certificated (and everyone else??!!)
  - Vacation leave – classified
  - CTO leave - classified
  - Differential leave – classified/certificated
  - Industrial leave – classified/certificated
  - FMLA/CFRA leave – classified/certificated
  - Bonding leave – classified/certificated
  etc., etc., etc.
Leaves, Leaves, Leaves…

How to keep track?

- Invest in training an internal expert
- Professional development
- Develop a checklist – certificated, classified, ADA, FMLA/CFRA, differential, sick leave, PDL, bonding
- Develop flow charts and umbrellas.
- Memorize this word: Coordinate!
- Call legal counsel at the beginning of the process
Employee Leaves: Differential Leave
Know Where to Look

<table>
<thead>
<tr>
<th>Certificated Employees</th>
<th>Classified Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to five months per injury or illness per school year (Ed. Code, § 44977)</td>
<td>Up to five months per injury or illness per school year;</td>
</tr>
<tr>
<td>Salary less the amount which would have been paid to the substitute.</td>
<td>Unit member salary minus actual amount paid to substitute</td>
</tr>
<tr>
<td>Unless “50% Rule adopted.”</td>
<td>Unless “100 Day Rule” adopted.</td>
</tr>
</tbody>
</table>

(Ed. Code, § 44983)  
(Ed. Code, § 45196)
Employee Leaves: Differential Leave

Certificated Employees (Ed. Code, § 44977)

- Up to five months per injury or illness per school year (Veguez v. Long Beach U.S.D. (2005) 127 Cal.App.4th 406.)
- Cost of substitute is deducted from salary whether or not one is hired (unless 50% Rule – employee receives at least 50% of salary regardless of sub hired)
- Runs *consecutively* after exhaustion of sick leave
Employee Leaves: Differential Leave

Certificated Employees (cont.)
(Ed. Code, § 44977)

- Does not accumulate
- If the school year ends before the five-month period is exhausted, the employee may use the balance of the leave in a subsequent school year
Employee Leaves: Differential Leave

Classified Employees (Five Months)

- Runs concurrently with sick leave and other paid time off.
- Cost of substitute is deducted from salary only if a substitute is actually hired; if no substitute is hired, employee receives his/her full wage. (Ed. Code, § 45196; CSEA v. Tustin Unified Sch. Dist. (2007) 148 Cal.App.4th 510)
- Unless 100 Day Rule” is adopted (at least 50% pay for 100 total days inclusive if accrued sick leave; vacation comes after).
Employee Leaves: FMLA/CFRA

Employers must grant FMLA/CFRA leave entitlements to eligible employees for the following purposes:

- Employee’s own serious health condition
- Birth and care of a child (including bonding)
- Placement of a child for adoption or foster care
- Care for a spouse, child or parent with a serious health condition

Employee Leaves: FMLA/CFRA

The FMLA provides for additional leave entitlements including:

– To attend to a qualifying exigency arising from the fact an employee’s covered military family member is being deployed to a foreign country on covered active duty
– To care for a family member injured in the line of duty in active military service (26 weeks in a 12 month period)

Employee Leaves: FMLA/CFRA

Employees are eligible for FMLA/CFRA if he or she:

- was employed for at least 12 months
- was employed for at least 1,250 hours during the 12-month period immediately preceding the date leave is to begin
- [BUT! 1250 hours requirement no longer applicable to CFRA child bonding leave under Education Code]
- is employed at a worksite where the employer employs at least 50 employees within 75-miles of that worksite

(29 C.F.R. § 825.110(a); Cal. Code Regs., tit. 2, § 11087(d); Ed. Code, §§ 44977.5 and 45196.1.)
Employee Leaves: FMLA/CFRA & PDL

Assembly Bill 375 and 2393 (aka “Bonding Leave”):

- Adds Sections 44977.5 and 45196.1 to the Education Code providing up to 12 weeks differential pay to all certificated and classified employees who are absent due to maternity or paternity leave under CFRA.
- Must exhaust all accrued leave first; balance of time is differential up to 12 weeks.
- 1250 hours eligibility requirement does not apply (BUT 12 months employment does!)
Families First Coronavirus Response Act

- April 1, 2020 – December 31, 2020
  - A temporary type for FMLA to protect jobs for people taking time off of work due to COVID-19
    - Caring for self or others with COVID like symptoms
    - Child care, school closures
Workplace Investigations
The Overview

- Weingarten Rule
- The Fifth Amendment
- Employee duty to cooperate and tell the truth
- Employer duty to promptly investigate
- Elements of appropriate investigation: *Silva v. Lucky Stores, Inc.*
Workplace Investigations
Concepts to Consider and Resolve

- District policy vs law.
- Anyone can sue for anything.
- Duty to protect the rights of all parties involved.
- The “he said she said” conundrum.
- Assigning an investigator.
- The attorney-client privilege.
- Investigation is not required to prove the truth.
Workplace Investigations
Strategic Advantages

- Jump start on potential litigation.
- Prepare defense strategy.
- Collect evidence before stale or forgotten.
- Limit potential liability.
  - Notify risk management or insurer.
- Designate expert witness.
- Control process.
- Adjust strategy as necessary.
Employee’s Right to Union Representation

Weingarten Rule

Weingarten rule –

- Right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action.
  - The rule is intended to create a balance of power between employer and employee.
  - Disregarding rule may constitute an unfair labor practice and result in rescission of discipline.
Employee’s Right to Union Representation
The California Rule

Right to union representation covers –
- Grievance meetings.
- Meetings to discuss the terms and conditions of employment.
- Meetings to discuss contractual entitlements.
- Interactive process meeting to determine reasonable accommodation.

> Continued…
Employee’s Right to Union Representation
The California Rule

*Continue employee right to union representation -*

- Prior to a body search, drug test, or alcohol test.
- Investigations when an employee is required to submit a written statement.

Remedy for violation –

- Rescission of discipline with make whole order including back pay & reinstatement.
  
  • *(County of San Joaquin (2018) PERB Decision No. 2619-M).*
Employee’s Right to Union Representation

To prove a Weingarten violation employee must prove -

1. An investigatory meeting.
2. Employee reasonably believed discipline possible.
3. Employee requested representation.
4. Employer denied the request.

Employee's Right To Union Representation

**Best practices continued –**

- Employer is not required to notify employee of Weingarten rule but…
- It is a best practice to notify employee in advance - either verbally or in writing - of the *general nature* of the meeting & matter under investigation.

**Scheduling meeting -**

- Who: employee or union (depending on relationship)…
- What: investigating complaint/allegation regarding…
- When: as soon as possible and provide 3 options…
- Where: district office or similar location.
Employee's Right To Union Representation

What happens when employee requests union representation during interview?

▪ Employer has two options –
  • Stop questioning, call representative, and wait for representative to arrive; or
  • Reschedule interview.

▪ Is union representation necessary when serving employee with discipline?
Employee's Right To Union Representation

Union Representatives Role –

- Cannot interfere or cross examine investigator.
- Cannot tell the employee what to say or answer on employee’s behalf.
- May assist and counsel employee.
- May take caucus.
- May request clarification.
- May comment on employee's behalf at the end of the interview.
The Fifth Amendment

- U.S. Constitution - Amendment 5 - Rights of Persons
  - “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”

- California Constitution – Article I, Section 15
  - “Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . .”
The Fifth Amendment
Legal Background

Lybarger v. City of Los Angeles 40 Cal. 3d 825 (1985) -

- Police officer refused to cooperate in workplace investigation based on right against self-incrimination; and
- Terminated for insubordination.
The Fifth Amendment
Legal Background

California Supreme Court Rule –

▪ Public employees have *no right to refuse to answer questions* during workplace investigations; but
▪ Special exception for police officers.
The Fifth Amendment

Model Lybarger Warning

- The District is conducting an internal investigation concerning XYZ. I have been asked to conduct the investigation on behalf of the District and you have been identified as a witness. As a District employee, you are obligated to answer my questions fully and truthfully and to cooperate with the investigation.

- Failure to answer questions or cooperate with the investigation may constitute insubordination and just cause for discipline up to and including dismissal.

- You are not required to waive the right against self-incrimination in a future criminal proceeding and statements you make in this investigation may not be used against you in an criminal matter.
The Fifth Amendment
Best Practices

- Law does not specifically require Lybarger warning for civilian employees but it is an *accepted best practice*.
- Lybarger warning notifies employee of consequences for not cooperating.
- Should employee refuse to cooperate resulting in discipline, employer has record of notice.
Employee Duty To Cooperate
And Tell The Truth

- Public employer may dismiss employee because refused to answer
  questions in workplace investigation. (*Spielbauer v. County of Santa Clara*,
  45 Cal.4th 704 (2009)).

- “Obey now and grieve later.” (*Elkouri & Elkouri, How Arbitration Works* 5-84
to 5-86 (8th ed. 2016)).

- Refusing to cooperate in an official investigation is clear insubordination.
  (*State of Ohio*, 126 LA 932 (Murphy Arb. 2009)).

- The defense of acting on “advice of counsel” does not *(depending)* excuse
  2016)).

- Employer had just cause to discharge employee for lying in course of
  workplace investigation. (*Schnuck Markets*, 134 LA 1176 (Suardi Arb.
  2015)).
The Investigation – Standard of Review

Legal Background

*Cotran v. Rollins Hudig Hall Intern., Inc* -

- Employee accused of sexual harassment.
- Employer investigated interviewing 21 people.
- Investigator determined more likely than not harassment occurred.
- Employee dismissed & sued for wrongful termination.
- Issue before Supreme Court:
  - Must employer prove alleged misconduct occurred in fact; or
  - Must conclusion be only fair, honest, and in good faith.
The Investigation – Standard of Review

The Cotran Rule

The question critical to the employer’s liability is not whether the employee in fact sexually harassed other employees but whether the employer:

• Acted in good faith,
• Conducted an investigation that was appropriate under the circumstances, and
• Had reasonable grounds to believe the employee committed the misconduct.

• (Cotran v. Rollins Hudig Hall Intern., Inc., 17 Cal.4th 93, 109 (1998)).
The Investigation – Standard of Review

The Silva Case


- Silva, the store manager, grabbed clerk’s buttocks.
- Clerk reported it to head clerk and he reported it to HR.
- Investigator interviewed clerk and another witness the same day.
- Investigator interviewed Silva the next morning but he denied it.
- Investigator interviewed co-workers.

➢ Continued…
The Investigation – Standard of Review

The Silva Case

- *Continue Silva v. Lucky Stores, Inc.*, 
  - Investigator met with Silva a second & third time allowing him to explain and offer ulterior motives for allegation.
  - Investigator prepared written report finding it was reasonable to conclude harassment occurred based on investigation.
  - Silva dismissed for violating Lucky’s sexual harassment policy.
  - Silva sued for wrongful termination & defamation.
The Investigation – Standard of Review

The Silva Case

The Silva v. Lucky Stores Rule -

- Employer not required to prove employee committed misconduct.
- Employer only required to prove it met Cotran standard:
  1. Did employer act in good faith in making decision to discipline.
  2. Did employer conduct an investigation appropriate under circumstance.
  3. Did employer have reasonable grounds to conclude employee committed misconduct.

  • (Silva v. Lucky Stores, Inc., 65 Cal.App.4th 256 (1998)).
The Investigation – Standard of Review

Acted in Good Faith

Did employer act in good faith in making decision to discipline -

- Unbiased.
- Neither arbitrary nor capricious.
- Prompt.
- Competent.
- Following standard practice.
- Methodical.
- Timely.
- Fair.
The Investigation – Standard of Review
Reasonable Grounds to Conclude Employee Committed Misconduct

- Based on credible and relevant witness statements.
- Based on admissions by accused.
- Based on credible and relevant documents, emails, texts.
- Determined under preponderance of evidence standard – more likely than not – 51%.
- Judged against company policy for misconduct.
- Not trivial, arbitrary, unrelated to business need, or pretextual.
Workplace Investigations
Best Practices

- Respond promptly (24 hours!).
- Trained investigator who can testify as expert.
- Record witness interviews or prepare written summaries.
- Take notes and review for accuracy.
- Prepare written report of findings.
- Determine credibility.
- Apply standard - more likely than not.
- Determine violation of policy.
Complaint Policies & Regulations
Complaint Policies & Regulations

Complaint Procedures -
- 1312.1 BP/AR Complaints Concerning District Employees
- 1312.2 BP/AR/E Complaints Concerning Instructional & Library Materials
- 1312.3 BP/AR Uniform Complaint Procedures
- 1312.4 AR/E Williams Complaint Procedures
- 3320 BP/AR/E Claims and Action Against the District
- 4030 BP/AR Nondiscrimination In Employment
- 4119.11, 4219.11, 4319.11 BP/AR Sexual Harassment
  - Gamut Online: http://gamutonline.net/
  - California School Boards Association
Employee Discipline - Classified

Classified probationary employees -

- Six months or 130 days
- District may dismiss for any reason except illegal reason before completion of probation
Employee Discipline - Classified

Classified permanent employees may be disciplined or dismissed for cause per -

– Collective Bargaining Agreement, or
– Board Policy and Administrative Regulation

(Ed. Code, § 45113(b))
Employee Discipline - Classified

Classified discipline process includes -

- Written notice listing just causes
- Factual charges against employee, and
- Due process rights

(Ed. Code, § 45113)
Employee Discipline - Classified

May not base discipline on conduct arising -
– Before the employee become permanent, or
– More than two (2) years old
– Unless the cause was concealed/not disclosed by employee when it reasonably should have been

(Ed. Code, § 45113(d))
Employee Rights: Permanent Certificated and Classified

Permanent Certificated and Classified Employees

- Permanent (i.e., tenured) employees have property interests in their jobs.
- Permanent employees cannot be dismissed or suspended without cause.
- Pre-termination due process rights include notice and an evidentiary hearing.
  - (Ed. Code, §§ 44932 et seq., 45113, 45116, 45302 and 45304)
Employee Rights: Permanent Certificated

Causes for Dismissing Permanent Certificated Employee:

- Immoral conduct including but not limited to “egregious misconduct.”
  - Egregious misconduct – defined exclusively as immoral conduct that is the basis for an offense described in Ed Code sections 44010 or 44011, or Penal Code sections 11165.2 to 11165.6.
- Unprofessional conduct.
- Dishonesty.
- Unsatisfactory performance.
- Evident unfitness for service.
- Persistent violation of or refusal to obey the school laws of the state or reasonable regulations.
- Conviction of a felony or any crime involving moral turpitude.
  - (Ed. Code, § 44932)
Employee Rights: Permanent Certificated

Certificated Dismissal Proceedings Include:

- Two paths in the Education Code:
  - Conduct other than solely for egregious misconduct.
  - Dismissal based solely on egregious misconduct.
- Statement of charges submitted to board for action.
- Papers served on employee.
- Formal discovery.
- Evidentiary hearing before the Commission on Professional Competence or ALJ (if parties agree) – ALJ only automatic for egregious misconduct.
- Hearing – commences within 6 months or, for only egregious misconduct, within 60 days of employee’s demand for hearing.
  - (Ed Code §§44934, 44934.1, 44936, 44939, 44944, 44944.05, 44944.1)
Employee Rights: Permanent Certificated

Special rules for Unprofessional Conduct and Unsatisfactory Performance:

- Prior to suspending or dismissing certificated employee for unprofessional conduct or unsatisfactory performance must provide advance notice in writing and opportunity to correct conduct or improve performance.

- **Advance Notice Requirements:**
  - Unprofessional Conduct: 45 days.
  - Unsatisfactory Performance: 90 days.

  (Ed. Code, § 44938)
Employee Rights: Permanent Certificated

Suspension of Certificated Employee:

- May immediately suspend employee pending disciplinary action without pay for immoral conduct or willful refusal to perform regular assignments without reasonable cause.
  - Employee may appeal immediate suspension to OAH (MIRS motion), except for charges based solely on egregious misconduct.
- Employee is placed on immediate (mandatory) unpaid leave of absence when charged with sex offense or aiding or abetting unlawful sale, use, exchange to minors of controlled substance.
- No similar authority for classified employees unless District has adopted a merit system.
  - (Ed Code §§44939, 44939.1, 44940 and 45304)
Employee Rights: Permanent Classified

Causes for Dismissal & Suspension of Permanent Classified Employees:

- Written Board Policies.
- Collective Bargaining Agreement.

Classified Dismissal & Suspension Proceedings include:

- Written notice of causes, supporting facts, and policies violated.
- Skelly Hearing (i.e., meeting).
- Notice of right to evidentiary hearing before governing board or hearing officer.
- Who makes final decision on discipline – board or hearing officer?
- And who pays & timing?

  (Ed. Code, §§45113, 45116, 45302 and 45304.)
Part Two: Speech and Discipline

- Employees have Constitutional Rights at work.
- Freedom of Expression also protected under Education Code (Ed. Code §7052).
- District can limit these rights when:
  - Threats of harm to person or property.
  - Defamatory.
  - Disruption to district or school activities.
  - Reasonable time, place, and manner restrictions (Ed. Code, §7055).
Speech and Discipline

Analysis When Disciplining an Employee Based on Speech:

▪ Would you make the same decision regardless of the employee’s speech?
  – Employer may discipline employee, if the employer can show it would have made the same disciplinary decision in the absence of protected conduct. (*Mt. Health City Sch. Dist. v. Doyle* 429 U.S. 274 (1977)).

▪ Is the speech of public concern?
  – Balancing test between interest of employee, as a private citizen, in commenting upon matters of public concern and the interest of the employer in promoting the efficient operation of the public services it performs. (*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)).
Speech and Discipline

- Matters of Public Concern: comments on instructional methods, curriculum, administrative or board action on issues of management and policy, school funding, and advocacy of political or social views outside of work place. A subject of general interest, value, and concern to the public.

- Matters Not of Public Concern: employee dissatisfaction with conditions of employment, statements made pursuant to official duties, other personal matters (i.e., posting or viewing pornographic material on the computer).
Speech, Discipline, and Technology: The Great Enabler

Advice for the Digital Age: Never put anything in electronic form that you wouldn’t want viewed by a million people, including your colleagues, students, and supervisors.

- Review district technology use policy addressing what is appropriate and not appropriate use of technology.
- Video taken on phone?
- Off work conduct posted online?
Part Three: 
Progressive Discipline

What is Progressive Discipline:
Progressive discipline is the process of identifying, communicating, and attempting to correct employee performance or behavior that fails to meet mandated standards.

What is the Purpose of Progressive Discipline:
The purpose is to put employees on notice of (1) problems in their performance or behavior, (2) the steps needed to correct their performance or behavior, and (3) further discipline if there is not sufficient improvement.

Typical Steps of Progressive Discipline: Verbal, Written, Suspension, Dismissal.
Counseling or verbal warning, written warning or written reprimand, notice of unprofessional conduct or unsatisfactory performance, suspension, & dismissal.

- Most classified collective bargaining agreements outline disciplinary steps.
- Some certificated collective bargaining agreements outline steps up to 15 days of suspension.
Progressive Discipline

Purpose of progressive discipline -
– Notify employee of problems in performance or conduct
– Provide opportunity to correct
– Support and assist
– Does the punishment fit the crime?
– How have you treated others in similar circumstances?
– *Formal process to document problem discipline if no improvement*
Progressive Discipline

Standard process -
- Verbal Warning
- Written Warning or reprimand
- Suspension
- Dismissal
One Last Thought

- Be PREPARED
  - P – Participate in Training/Professional Development
  - R – Reflect on the District’s goals
  - E – Explore staffing, hiring, housing
  - P – Pore over your LCAP
  - A – Assemble your teams - bargaining/hiring
  - R – Reach out and get to know your neighbors
  - E – Embrace change – review new laws and identify hot button issues for next round of hiring, bargaining and personnel management
Rachel is a permanent classified employee of the District in the position of Typist Clerk at one of the schools. Her duties include typing, filing, performing duties as a receptionist and attendance clerk, and compiling and maintaining records. Rachel has not been the most impressive employee and in fact the following incidents have occurred.
TYPIST CLERK HYPOTHETICAL

- May 21, 2018: Rachel received a verbal warning from the principal about inappropriate usage of District technology, including using her work computer to search the internet for non-work related issues during work hours. She told her principal she would stop but was observed the next month using her computer for personal reasons during work hours.

- October 8, 2018: Rachel was observed by a colleague removing documents from the principal’s office without authorization and while the principal was out. The District took this matter seriously and investigated the incident. Following the investigation, Rachel was provided a written Letter of Reprimand because of her inappropriate and unprofessional conduct regarding the incident in the principal’s office.

- February 2, 2019: Rachel was provided a written Improvement Plan with specific areas in which to improve including recordkeeping, professional conduct, office organization and neatness, and communications with others.

- May 16, 2019: Rachel’s Classified Employee Performance Evaluation notes “Below Standards/Requires Improvement” in numerous areas including quality of work, productivity, knowledge of job, and communications.
TYPIST CLERK HYPOTHETICAL

Since May 2019, there have been no significant issues with Rachel. However, on December 15, 2019, the principal informs you that the prior week Rachel was arguing with the Health Tech in the school office in a loud manner and in front of students and visitors. The principal also informs you that she recently has observed Rachel using her computer for personal reasons during work hours and sleeping in the office during work hours.
TYPIST CLERK HYPOTHETICAL

- What are the issues?
- What should your next steps be?
- What are your options?
BUS DRIVER HYPOTHETICAL

Janet is a permanent classified employee assigned as a school bus driver. Her duty hours are 6:00 a.m.-9:45 a.m. and 12:30 a.m.-4:45 p.m. You are the Director of Transportation.

You recently discovered that during the current 2019-2020 school year, Janet had signed into the Transportation Department sign in sheet that she was present at work when in fact she was absent and she has arrived late to work but signed in on time. You check Janet’s attendance records and discover she has been absent 15 times this year; she was absent 53 times in 2017-2018; and she was absent 57 times in 2018-2019. Her recent performance evaluations also address her excessive absences. In her May 2019 evaluation you wrote, “Janet is encouraged to work with her supervisor during the next 90 days starting in August 2017 to maintain a good attendance.” In Janet’s May 2019 evaluation you wrote, “You are at the point where you have exhausted all leaves and are on unpaid status. Your attendance is a burden on your fellow employees and students who ride your bus, and affects morale in the department.”
BUS DRIVER HYPOTHETICAL

Not only have Janet’s absences been addressed in her evaluations but on February 26, 2019 you provided her a memorandum addressing her overage of personal illness and pattern of sick days on Fridays and in conjunction with holidays. In the memorandum you explain that her “excessive use of personal illness is disruptive to the ongoing scheduling of daily bus routes and to the staff in the transportation department.” You direct Janet to maintain good attendance and provide a physician’s verification of illness/injury for all future personal illness days. You also direct Janet to review the leave provisions in the collective bargaining agreement.
BUS DRIVER HYPOTHETICAL

Based Janet’s history and information -

- What is the appropriate disciplinary action?
- What if Janet provides a doctor’s note for each and every absence?
THANK YOU!

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