California Bar Examination

Performance Tests and Selected Answers

July 2015

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2015 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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July 2015

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

WILSON v. BELTON COMPANY, INC.

Instructions

FILE

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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.

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

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

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*

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IN THE SUPERIOR COURT OF DORMAN COUNTY
STATE OF COLUMBIA

JAMES WILSON, Plaintiff, v. BELTON COMPANY, INC., et al., Defendants.	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

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

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

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

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

Charles Nye

July 2015

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WILSON v. BELTON COMPANY, INC.

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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)……………………………………………..

<u>Andrews v. Foster Wheeler, LLC</u>

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.

PT-A: SELECTED ANSWER 1

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

"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." *Andrews v. Foster Wheeler, LLC* (Colum. Ct. App. 2010). 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. *Id*.

Here, the Court should grant summary judgment because there is no triable issue of material fact as to causation based on negligent insulation work at the Martinville and Collins Powerhouses, and there is no triable issue of material fact as to causation based on professionally negligent design or building of both the Martinville and Collins Powerhouses. Otherwise, it would be engaging in a meaningless and wasteful trial.

A. There Is No Triable Issue Of Material Fact As To Causation Based On Negligent Insulation Work At The Martinville Powerhouse

There is no triable issue of material fact as to causation based on negligent work at the Martinville Powerhouse.

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). In order to show a triable issue of material fact as to causation based on exposure to asbestos for which a given defendant is responsible, the plaintiff must first 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." *Norris v. Crane Company* (Colum. Ct. App. 2008). 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." *Id*. Asbestos exposure "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." *Id*.

1. The Plaintiff Has Failed to Prove, By Expert or Non-expert Evidence, That It Is More Likely Than Not That He Was Exposed To Asbestos For Which Belton Is Responsible

Here, Plaintiff Wilson has failed to prove, by expert or non-expert evidence, that it is more likely than not that he was exposed to asbestos for which Belton is responsible.

With regards to non-expert evidence, Wilson, in Interrogatory 6, stated that he was exposed to "very heavy dust" resulting from the "rip out of insulation" at the Martinville Powerhouse. Wilson also stated that he recalled "workers performing modifications and overhaul work to the boilers at the Martinville Powerhouse on approximately seven different occasions" and that the work on the boilers "would last anywhere from two to twelve weeks." Based on this non-expert evidence, Wilson argues in his Opposition that "[i]t is a reasonable inference that the dust contained asbestos." Wilson Opp.

However, no such inference may be drawn from Wilson's statements. Wilson never specified that he saw asbestos being used at the Martinville Powerhouse. In fact, his declaration in support of his Opposition only states that he saw workers using bags of raw asbestos at the Collins Powerhouse. Instead, he describes only exposure to "very heavy dust." This description is even less specific than the description offered by the plaintiff in *Andrews*, who described the insulation as "raggedy beat-up dusty stuff." Wilson has failed to even describe the insulation itself, and no connection can be made between the "dust" he describes and asbestos. Given that the *Andrews* court found Andrews' description of "raggedy beat-up dusty stuff" insufficient as evidence that the insulation actually contained asbestos, the Court here should find that the description of "very heavy dust" is insufficient to show that Wilson was exposed to asbestos, let alone asbestos for which Benton is responsible.

Wilson argues that the inference is reasonable in light of expert evidence provided by Charles Nye, an asbestos consultant certified by the State of Columbia. In his Declaration, Nye stated that between 1961 and 1966, "boilers were commonly insulated with asbestos" and "[t]he 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. Nye Decl. Note that Nye specifies only the boilers at the Collins Powerhouse, and not the Martinville Powerhouse. Also, Nye's statement amounts to little more than speculation, since there is no actual evidence that the insulation used in the boilers at the Martinville or Collins Powerhouses contained asbestos.

In addition, even if Nye is drawing a reasonable inference from the design of the boilers themselves, there is no evidence that Belton even performed any insulation work during the time that Wilson worked at the Martinville Powerhouse. In his declaration, Wilson only points to the presence of "non-CG&E personnel" at the Collins Powerhouse. Donald Rance, in his declaration, only recalls seeing

Belton employees at the Collins Powerhouse, and even then, he states that he is "not positive" they were Belton employees. Therefore, Wilson has failed to identify any evidence showing that any work done by Belton caused the release of the "very heavy dust" into the air.

Therefore, Wilson has failed to identify any evidence showing that the "very heavy dust" he was exposed to contained asbestos or that Belton was even responsible for causing the release of this "very heavy dust." Without such evidence, "there was no exposure," and without exposure, "there can be no causation." *Andrews*. Thus Wilson has failed to prove, by expert or non-expert evidence, that it is more likely than not that he was exposed to asbestos for which Belton is responsible.

<u>2. The Plaintiff Has Failed to 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</u>

Even if this Court finds that Wilson did prove that it is more likely than not that he was exposed to asbestos for which Belton is responsible, Wilson must show, by expert evidence alone, that it is more likely than not that the exposure operated as a substantial factor in bringing about the injury.

Here, Wilson has provided no expert evidence indicating that asbestos exposure operated as a substantial factor in bringing about the injury. In *Andrews*, the court found that while it could presume that "respirable asbestos fibers released into a small sealed room would remain there indefinitely," it could not presume the same for such fibers released in a large open space. Similarly, the court in *Norris* found that Norris was exposed to asbestos in his sleeping quarters, which were likely quite small given that they were on a Navy ship. Wilson has provided no evidence that he was exposed to any fibers, let alone asbestos fibers, in a small sealed room where the fibers would remain indefinitely. In fact, there is

evidence that Wilson was always 45 or 50 feet away from the site of any insulation work, which indicates that the space in which Wilson would have been exposed was quite large. In that case, it is unlikely that any fibers would remain in the room indefinitely.

In any case, Wilson has failed to provide any expert evidence on whether it is more likely than not that the exposure operated as a substantial factor in bringing about the injury. Therefore, Wilson has failed to 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.

B. There Is No Triable Issue Of Material Fact As To Causation Based On Negligent Insulation Work At The Collins Powerhouse

There is also no triable issue of material fact as to causation based on negligent work at the Collins Powerhouse.

1. The Plaintiff Has Failed to Prove, By Expert or Non-expert Evidence, That It Is More Likely Than Not That He Was Exposed To Asbestos For Which Belton Is Responsible

Here, Wilson has failed to prove, by expert or non-expert evidence, that it is more likely than not that he was exposed to asbestos for which Belton is responsible.

With regards to non-expert evidence, Wilson, in his declaration, stated that he saw "non-CG&E personnel us[ing] bags of raw asbestos to insulate the boilers at the Collins Powerhouse." He states that produced "heavy dust," which he breathed in. Based on this non-expert evidence, Wilson argues in his Opposition that "[i]t is apparent that Belton did indeed expose him to asbestos at the Collins Powerhouse." Wilson Opp.

However, there is no evidence that specifically connects Belton to the insulation work at the Collins Powerhouse. Wilson stated that he believes that Belton was involved in the rip out and replacement of the insulation. However, this belief is not supported by any evidence beyond the fact that the workers were "non-CG&E personnel." Rance, in his declaration, stated that he recalled seeing Belton employees at the Collins Powerhouse and that he believed, but was not positive, that they were involved in designing and building a new unit for additional boilers. However, nowhere does Rance specify that Belton personnel were involved in insulation work.

As in his argument for negligent insulation work at the Martinville Powerhouse, Wilson will point to Nye's statement that the boilers at the Collins Powerhouse would not operate as designed and built without asbestos-containing insulation. However, this amounts to mere speculation, since there is no evidence that the boilers actually contained asbestos-containing insulation.

Therefore, Wilson has failed to identify any evidence showing that Belton was responsible for exposing Wilson to asbestos. Thus he has failed to prove, by expert or non-expert evidence, that it is more likely than not that he was exposed to asbestos for which Belton is responsible.

<u>2. The Plaintiff Has Failed to 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</u>

Even if this Court finds that Wilson did prove that it is more likely than not that he was exposed to asbestos for which Belton is responsible, Wilson must show, by expert evidence alone, that it is more likely than not that the exposure operated as a substantial factor in bringing about the injury.

Here, Wilson has provided no expert evidence indicating that asbestos exposure operated as a substantial factor in bringing about the injury. Wilson did state in his declaration that he breathed in the heavy dust caused by non-CG&E workers at the Collins Powerhouse. However, Wilson has failed to show that the dust remained in the air indefinitely and settled in his lungs. Therefore, Wilson has failed to prove that it is more likely than not that the exposure operated as a substantial factor in bringing about the injury.

3. The Plaintiff Has Admitted During Deposition That There Was No Triable Issue Of Material Fact As To Causation

The *Andrews* court found that the trial court properly concluded that there was no triable issue of material fact as to causation based on Andrews' admission in deposition and his responses to the interrogatories. In deposition, Andrews clearly admitted that he himself did not possess any evidence that he was exposed to asbestos for which defendant was responsible. Andrews also failed to identify any evidence regarding his exposure to asbestos in his interrogatories. The trial court thereby concluded that there was no triable issue of material fact as to causation based on Andrews' admission in deposition and his responses to his interrogatories.

Here, Wilson stated in his deposition that he did not recall Belton's presence at any CG&E site where he worked with the exception of the Martinville Powerhouse. This is akin to admitting that he possessed no evidence that Belton was responsible for negligent insulation work at the Collins Powerhouse. In addition, with regards to further discovery, Wilson failed to provide any evidence regarding his potential exposure to asbestos at the Collins Powerhouse, instead mentioning only the Martinville Powerhouse. It was not until his declaration in support of his opposition to the summary judgment motion, which came after discovery, that Wilson brought the Collins Powerhouse back into the picture.

Therefore, this Court should find that Wilson admitted during deposition that there was no triable issue of material fact as to causation based on negligent insulation work at the Collins Powerhouse and that Wilson failed to salvage this admission through the rest of discovery.

4. The Plaintiff Has Failed To Provide A Credible Explanation As To Why His Declaration Contradicts A Prior Discovery Statement

The Columbia Supreme Court has 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." *D'Amico v. Board of Medical Examiners* (Colum. Supreme Ct. 1974). There is only one exception: "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."

Here, Wilson's declaration in opposition to the relevant summary judgment motion contradicts a prior statement he made in his deposition. In his deposition, Wilson testified that he did not recall Belton's presence at any CG&E site where he worked with the exception of the Martinville Powerhouse. However, in his declaration in support of his opposition to this summary judgment motion, Wilson stated that he recalled "non-CG&E personnel" using bags of raw asbestos to insulate the boilers at the Collins Powerhouse and that he believed Belton "was involved in the rip out and replacement of this insulant." Wilson's belief as expressed in his declaration directly contradicts the statement he made in his deposition, when he stated that he did not recall Belton's presence at any CG&E site but the Martinville Powerhouse. Therefore, in order to raise a triable issue of material fact here, Wilson must offer a credible explanation for the contradiction.

Wilson has failed to do so. In fact, Wilson has failed to offer any explanation whatsoever. In his opposition, Wilson simply states that his discovery responses

are "ambiguous or, in any event, are explained by his declaration." Wilson tries to avoid offering a credible explanation by stating that "what controls is Wilson's complaint." However, that is patently false. The Columbia Supreme Court has explicitly held that a declaration that contradicts a prior discovery statement may only raise a triable issue of material fact if the party offers a credible explanation for the contradiction. It has not said anything about whether the issue was raised in the complaint.

If we are to look at the declaration itself, as the opposition states, in order to find a credible explanation, we only find Wilson's statement that he "believes" Belton was involved in the rip out and replacement of this insulation. No explanation is given for this belief, except that he saw "non-CG&E personnel" working at the Collins Powerhouse. Therefore, even if Wilson has offered an explanation by arguing that he simply did not remember, this explanation is not credible because Wilson is arguing that "non-CG&E personnel" means Belton personnel. With no other indication given from Wilson that Belton had a presence at the Collins Powerhouse, this attempt at an explanation will fail.

Since Wilson has failed to offer a credible explanation for why his declaration in opposition to a summary judgment motion contradicts his prior statement made during a deposition, he may not raise a triable issue of material fact as to causation based on negligent insulation work at the Collins Powerhouse.

<u>C. There Is No Triable Issue Of Material Fact As To Causation Based On Professionally Negligent Design Or Building Of Both The Martinville Powerhouse And The Collins Powerhouse</u>

There is no triable issue of material fact as to causation based on professionally negligent design or building of both the Martinville and Collins Powerhouses.

1. There Is A Factual Dispute As To Whether Belton Was Involved In Designing Or Building The Martinville And Collins Powerhouses

In order to raise a triable issue of material fact as to causation based on professionally negligent design or building, plaintiff must show that the defendant was actually involved in the designing or building of a structure.

Here, the only evidence that Wilson has presented on this matter is Donald Rance's declaration. In his declaration, Rance stated that he recalled reviewing specifications for the Collins Powerhouse and that the specifications identified Belton as the designer and builder and called for the use of asbestos-containing insulation. As for the Martinville Powerhouse, Rance stated that he recalled reviewing the specifications and finding that they called for the use of asbestos-containing insulation, but that he believed but was not positive that the specifications involved Belton as the designer and builder.

Given that this is a summary judgment motion and that doubts should be resolved in favor of the nonmoving party, this Court could find that there is a factual dispute as to whether Belton designed or built the Martinville and Collins Powerhouses.

2. Wilson Has Failed To Present A Clear Claim As To This Issue And Thus Belton Is Not Required To Challenge It

However, even if there is a triable issue, a defendant moving for summary judgment need only challenge a claim clearly presented by the plaintiff. *Andrews*.

Here, Wilson's claim that there is a triable issue of material fact as to causation based on professionally negligent design or building has not been clearly presented. In fact, when Wilson was asked to present all documents relating to

the basis of his claim of professional negligence in designing or building structures, Wilson responded that he had made no such claim, making it impossible to respond to this request. Therefore, in the course of discovery, Wilson limited his claims against Belton to negligent insulation work.

In his opposition, Wilson argues that what should control is his complaint, not his response during discovery. However, because Wilson abandoned this case during discovery after filing his complaint, he may not require Belton to challenge it. It would be unfair to require Belton to challenge this claim after Wilson has declined to provide discovery on the matter, especially since Belton has attempted to argue it through his own discovery (i.e., the Rance declaration).

Therefore, this Court should find that Belton is not required to challenge Wilson's claim that there is a triable issue of material fact as to causation based on professional negligent design or building.

3. Plaintiff Has Failed To Submit Expert Evidence Identifying The Standard Of Care And Describing The Breach By Belton

Finally, in order to survive summary judgment, a plaintiff must submit expert evidence identifying the standard of care and describing its breach. *Andrews.*

Here, Wilson has failed to submit expert evidence that identifies the standard of care for Belton's design and building of the Powerhouses and that describes Belton's breach. Therefore, the Court should find that this issue of material fact cannot survive summary judgment.

PT-A: SELECTED ANSWER 2

1)

Defendant's Memorandum of Points and Authorities in Reply to Plaintiff's Opposition Motion to Summary Judgment

III. THIS COURT SHOULD GRANT BELTON'S SUMMARY JUDGMENT MOTION BECAUSE WILSON HAS RAISED NO TRIABLE ISSUE OF MATERIAL FACT AS TO CAUSATION

A. The Court Must Grant Belton's Summary Judgment Motion Because Wilson Had Not Raised a Triable Issue of Material Fact as to Causation; Has Abandoned Some Claims and Has Not Presented Required Expert Evidence For the Negligent Design and Construction Claims

Summary Judgment is a "particularly suitable means to test the sufficiency of an opponent's case." *Visueta v. General Motors Corporation*. In fact, summary judgment is required to avoid a "meaningless and wasteful trial." *Id*. According to the Columbia Supreme Court in *Rutherford v. Owens-Illinois, Inc.*, summary judgment for the defendant is appropriate and "must" be granted in a plaintiff's action for damages for personal injury based on exposure to asbestos when plaintiff fails to carry his burden of presenting a triable issue of material fact as to causation. *Andrews v. Foster Wheeler, LLC citing Rutherford*. The Supreme Court requires that, in such an action the plaintiff bears the burden of proving causation by a preponderance of evidence, no matter what the nature of the claims alleged or the substance of the underlying theory. *Norris v. Crane Company, citing Rutherford*.

B. Wilson Has Not Met His Burden In Raising A Triable Issue of Material Fact As To Causation Based on Negligent Insulation Work At The Martinville Powerhouse.

The Supreme Court requires that, in such an action for personal injury based on asbestos exposure, the plaintiff bears the burden of proving causation by a preponderance of the evidence, no matter what the nature of the claims alleged or the substance of the underlying theory. *Norris v. Crane Company, citing Rutherford*. In such an action, to present a material issue of triable facts sufficient to avoid summary judgment, it follows that the plaintiff must submit evidence for a reasonable jury to find by a preponderance of evidence that 1) the plaintiff was exposed to asbestos for which defendant was responsible and 2) the exposure operated as a substantial injury in bringing about the injury using "expert evidence alone. *Norris v. Crane Company*. Wilson has not done so here with regard to the Martinville Powerhouse and summary judgment must be granted for Belton.

Wilson claims in his opposition to summary judgment motion that he has presented a triable issue of material fact as to causation based on negligent insulation work at the Martinville Powerhouse. Wilson claims that Belton fails to show that it did not expose Wilson to asbestos--but Wilson incorrectly states the burden. The burden is on Wilson to show evidence sufficient for a jury to find that Belton did expose Wilson to asbestos. *Visueta; Foster*. Wilson evidence does not do so. Wilson claims that he worked in the Martinville Powerhouse between 1985 and 1993. Wilson contends in his response to interrogatory No. 6, that during that time he witnessed Belton watch workers perform modifications to the boilers at the Martinville Powerhouse and from which the workers ripped out insulation and from which Wilson breathed in dust. Wilson does not claim that he knows the boilers contained asbestos or even that insulation he claims to have seen ripped out was asbestos. Instead, Wilson relies on his expert, Charles Nye,

to implicitly state that it is a reasonable inference the boilers contained asbestos since the boilers were commonly insulated with asbestos.

The evidence that Wilson puts forth is plainly insufficient to create a triable issue of material fact. In a remarkably similar case, the Court of Appeals affirmed a grant of summary judgment against the plaintiff in *Andrews v. Foster Wheeler*. The plaintiff in *Foster Wheeler* alleged he was exposed to asbestos remaining in the area from its construction some 21 years before he began employment there. The plaintiff alleged that the boilers had been overhauled while he worked there and had an expert submit a declaration that the asbestos fibers hung in the surrounding air and caused plaintiff's injury. The *Andrews* court found that the plaintiff failed to create a triable issue of material fact because plaintiff could not establish that the defendant's asbestos was ever present on the property, nor that the fibers he allegedly inhaled were even asbestos, and finally the expert's declaration did not provide evidence that the "aerodynamic properties of the environment" would cause the asbestos fibers to harm the plaintiff.

Here, Wilson has similarly failed to present such evidence. Donald Rance has stated he is not sure that Belton designed the Martinville plant and Wilson shows no other evidence that the boilers in the Martinville plant belonged to Belton. Moreover, Wilson presents no evidence that the insulation he saw being ripped out was in fact asbestos. Wilson relies on Nye to create an inference that the boilers contained asbestos. But when considered with Wilson's other evidence, that claim is at best speculative and insufficient. In his declaration, Wilson states that the boilers in the plant were overhauled every year or two. The overhaul would replace the old insulation with new insulation. Wilson did not work in the Martinsville plant until 1985, but in 1972 OSHA began regulating asbestos and thereby caused a significant decline. Thus, based on Wilson's own evidence there is a strong chance that the boiler, even if it belonged to Belton, did not contain asbestos by the time Wilson began to work at the plant. Thus,

Wilson's evidence is merely speculative and no reasonable jury could find for him. Moreover, the courts in *Andrews* and *Norris* required the plaintiff to provide, through expert evidence alone, that the asbestos caused a substantial injury to plaintiff. Even if Wilson established he was exposed to asbestos by Belton, "it would not have been enough" to avoid summary judgment since Wilson presents no expert testimony at all that shows the asbestos caused a substantial injury to plaintiff. Wilson himself claims that he inhaled some "dust" but presents no expert evidence that while he was "45 or 50" feet away from the insulation work that he would inhale the alleged asbestos because Wilson presents no evidence on the "aerodynamic properties of the environment" and the court cannot "presume such fibers released in a large open space" would cause a substantial injury to Wilson. *Andrews*.

C. <u>Wilson Has Not Met His Burden In Raising A Triable Issue of Material Fact As To Causation Based on Negligent Insulation Work At The Collins Powerhouse and Also Has Abandoned the Claim Entirely.</u>

i) Wilson Abandoned His Claim:

The Columbia Supreme Court in *D'Amico v. Board of Medical Examiners* 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." The only exception is when the party offers a "credible explanation for the contradiction." The court in *Visueta* rejected a plaintiff's attempt to change his discovery answer from yes, to "no" on his opposition motion for summary judgment as sufficient to create a triable issue of material fact.

In his initial discovery responses, Wilson specifically stated that no Belton employee was present at the Collinsville Powerhouse. Wilson was asked in a deposition "Do you agree that Belton had no presence [at the Collinsville plant]?"

Wilson answered "Yes." Wilson now attempts to create triable issue of material fact by alleging in his summary judgment motion that "evidently Belton employees" used bags of raw asbestos at the Collinsville Powerhouse. Wilson claims his initial response was ambiguous, and in any event, his declaration offers a credible explanation. Wilson's initial answer of "yes" to a clear question is anything but ambiguous. Moreover, Wilson offers no explanation for the contradiction let alone a credible one; Wilson merely describes the facts he now uses to support his claim there is triable issue of material fact. He offers no explanation why his answer had changed from 'yes' in discovery to 'no' on his opposition motion to summary judgment. Accordingly, Wilson, just like the plaintiff in *Visueta*, is attempting to create a triable issue of material fact by changing his discovery response from a 'yes' to 'no' answer without any explanation for the inconsistency. The Supreme Court has explicitly said he cannot do so. Accordingly, Wilson has abandoned this claim and summary judgment should be granted for Belton on this ground alone.

i) Wilson Presents No Triable Issue of Material Fact

Even if Wilson had not abandoned his claim, as noted, Wilson bears the burden of producing a triable issue of material fact that Belton caused his injury: namely evidence that Defendant is responsible for the asbestos plaintiff was exposed to and expert evidence that asbestos served as a substantial factor in causing the injury. *See e.g., Norris*. This Wilson has not done. Wilson declares that during his time working at the Collinsville plant, he saw non-CG&E personnel used bags of raw asbestos to insulate the boilers and produce heavy dust. Wilson only claims he "believe[s]" that Belton was involved. Donald Rance says only that he recalled seeing "Belton employees at the Collins powerhouse," but he is "not positive, that they were involved in designing and building a new unit for additional boilers." Wilson says no more than he was present in the vicinity and he breathed the dust and presents no expert evidence that this asbestos exposure was a substantial factor in Wilson's injury.

Wilson's evidence is insufficient to create a triable issue of material fact just as the plaintiff's evidence in *Andrews* was not. Like in *Andrews*, Wilson cannot identify with any certainty that Belton is responsible for handling asbestos that could have been inhaled by Wilson. Both Wilson and Rance only "believe" that Belton was involved in either the replacement of the boiler or the boiler insulation. Moreover, Rance has stated the Collins Powerhouse was built in the early 1950s and Wilson states that boilers were overhauled and their insulation replaced every year or two. Accordingly, even if Belton built the initial boilers and did use asbestos, then it is mere speculation that the insulation ripped out in the 1960s when Rance and Wilson were present had asbestos. Moreover, as in *Andrews*, Wilson offers no expert evidence of the aerodynamic properties of the Collinsville Powerhouse. The court cannot presume that asbestos fibers "released in a large open space" would remain in the space or harm Wilson without greater evidence. Here, Wilson submits no expert evidence on this point as he is required to do under *Norris* and does not even offer how far away he was from the insulation. Accordingly, no jury could find that Wilson has submitted the required amount of evidence on this point and thus there is no triable issue of material fact. *Norris*.

The court's conclusion in *Norris* is not to the contrary. In *Norris* the court declined to approve granting summary judgment against the plaintiff who established he was in the vicinity of the release of asbestos insulation because the fibers were released in his sleeping quarters. The court found that the plaintiff had submitted enough expert evidence for a jury to find that it was more likely than not the asbestos was a substantial factor in bringing about his injury. *Norris*. This case is heavily distinguishable. Wilson was not exposed to asbestos in his sleeping quarters as the plaintiff was in *Norris*; rather Wilson claims that he was exposed in a large factory. Wilson does not describe how close he was or the aerodynamic characteristics of the space. If the space was open air, it is not a fair inference on summary judgment to find that the asbestos exposure caused substantial injury to plaintiff. *Andrews*. To avoid summary

judgment, Wilson needs to submit sufficient expert evidence for a jury to find that asbestos exposure he complains of was a substantial factor in causing his injury. He has submitted none.

Accordingly, Wilson has failed to present a triable issue of material fact with regard to causation on his personal injury claim from asbestos exposure in the Collinsville Powerhouse and summary judgment must be granted for Belton. *See e.g., Rutherford*.

D. Wilson Has Not Met His Burden in Raising A Triable Issue of Material Fact as To Causation Based on Professionally Negligent Design or Building of either the Collins Powerhouse or The Martinville Powerhouse.

i) Wilson has Abandoned the Claims

The Columbia Supreme Court in *D'Amico v. Board of Medical Examiners* 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." *Visueta* citing *D'Amico*. The only exception is when the party offers a "credible explanation for the contradiction." Moreover, "a defendant moving for summary judgment need only challenge a claim clearly presented by the plaintiff." *Andrews*.

Here, in response to Discovery Production Request No. 37 which asked Wilson to "produce all documents which support your contention that Belton engaged in a professional negligence in designing or building any of the structures at any of the locations which you contend Belton was responsible for your exposure to asbestos" Wilson unequivocally responded that he has made no such claim." Wilson now seeks to create a triable issue of material facts for these claims inconsistent with his discovery response by interjecting facts in his

opposition to summary judgment motion. Wilson now claims merely that "what Controls is Wilson's complaint." Such a claim is not an explanation for the inconsistency let alone a credible one, as would be required to make a triable issue of material fact. *D'Amico*.

Moreover, Wilson's claim that what controls is the complaint, is incorrect. The plaintiff must present the claim clearly or Defendant is not required to challenge it in a motion for summary judgment. *Andrews* citing *Moghadam v. Regents of University of Columbia*. The Court in *Andrews* found that a plaintiff could not avoid summary judgment on a claim that was not alluded to in the plaintiff's complaint, but the court did not hold merely placing the claim, as Wilson did, in the complaint is sufficient. Wilson produced no evidence during discovery and now seeks to contradict his discovery responses with no explanation. Accordingly, Wilson did not clearly present the claim or support it with consistent evidence so that Belton must challenge it now.

Thus, Wilson has abandoned the claims for Professionally negligent design or building of both the Collins Powerhouse and the Martinville Powerhouse and summary judgment must be granted for Belton.

ii) Wilson has Failed to Carry His Burden of Raising a Triable Issue of Material Fact

Even if Wilson had not abandoned the claims, Wilson has failed to meet his burden in producing evidence sufficient to create a triable issue of material fact. A plaintiff seeking to avoid summary judgment in a personal injury action based on exposure to asbestos arising from professional negligence in designing or building structures, must present more evidence than simply the defendant was engaged in designing or building the structure. Rather, according to the Columbia Supreme Court in *Miller v. Lake County Flood Control Dist.*, the plaintiff must also submit "expert evidence identifying the standard of care and describing

its breach" to avoid summary judgment. *Andrews* citing *Miller*. Accordingly, the court in *Andrews* affirmed summary judgment against a plaintiff who submitted no expert evidence on duty and breach.

Here, Wilson does not submit evidence that Belton was involved in construction or design of the Martinsville Powerhouse plant, beyond Rance's declaration that he believes, but is "not positive" that the specification identified Belton as a designer. Additionally, and dispositively, Wilson's only expert, Charles Nye, offers no expert opinion or evidence that identifies the standard of care and describes Belton's alleged breach. Nye's declaration relates exclusively to his claim that boilers constructed between 1961 and 1966 were commonly insulated with asbestos. This evidence is plainly insufficient as it was for the plaintiff in *Andrews*. Thus, summary judgment for Belton on Wilson's claims of negligent professional construction and design must be granted.

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

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

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

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

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.

<u>Section 19</u>. 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.

<u>Section 19.5</u>. 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.

<u>Pacific Telephone and Telegraph Company v. National Labor Relations Board</u>

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.

PT-B: SELECTED ANSWER 1

MEMORANDUM

TO: Mr. George Field, Human Resources Manager
FROM:
DATE: July 30, 2015
SUBJECT: Barker v. Department of Administrative Hearings

Dear Mr. Field,

In accordance with your request, the counsel's office for the Department of Administrative Hearings ("the Department") has prepared this memorandum assessing the legal merits of Ms. Barker's allegations relating to her termination and any potential remedies that might be available to her.

The Columbia Public Employment Relations Act ("the CPERA"), Section 15, provides state employees with "the right to form, join and participate in activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Additionally, Section 15.5 of the CPERA recognizes rights of employee organizations and their representatives to "represent their members in their employment relations with the state", limited in scope to matters concerning "wages, hours and other terms and conditions of employment." Finally, the Columbia Employment Relations Board ("the Board") will determine whether a state has violated these rights under Section 19 of the CPERA by denying the rights or interfering with, restraining, or coercing employees because of their exercise of these rights.

Ms. Barker alleges that the Department has interfered with these rights. Thus, this memorandum will consider the merits of her claims, specifically: 1) whether the Department interfered with Ms. Barker's and the Union's rights to representation by refusing to provide Ms. Barker with the specific topics, list of questions, and nature of the charges of impropriety that interview would cover; 2) whether the Department

interfered with Ms. Barker's right to engage in concerted activity by having and applying a blanket policy prohibiting Ms. Barker from speaking to anyone but her representative about the subject matter of the interview; and 3) whether Ms. Barker is entitled to reinstatement, back pay, restoration of benefits, or any other remedies, in the event that the Department interfered with her rights.

In a case called *Roginson v. Columbia Public Employment Relations Board*, the Columbia Court of Appeal recognized that the CPERA is modeled on the National Labor Relations Act ("the NLRA") and has imbibed the underlying federal policy. As a result, the Columbia Court relies on federal interpretations of the NLRA, considering it persuasive precedent as to interpretations of the CPERA provisions, as well as where the CPERA does not contain any comparable provision. Thus, some of the law relied on in assessing Ms. Barker's allegations will be based on interpretations of the NLRA.

1) Whether the Department interfered with Ms. Barker's and the Union's rights to representation by failing to provide Ms. Barker with the specific topics, list of questions, and nature of the charges of impropriety that interview would cover.

Ms. Barker is alleging that the Department's failure to provide information as to the subject matter of the investigatory interview violated her rights under Section 15 of CPERA to be represented by the union. Because Ms. Barker and her representative were not provided with the basic subject matter of the interview, which would have put them on notice and allowed the representative to provide Ms. Barker with adequate aid and helpful consultation, the Department interfered with Ms. Barker's rights under CPERA.

In the case of *Pacific Telephone*, a federal court of appeal interpreting the comparable NLRA provision found that the employee's right to insist on concerted protection, which encompasses the right to union representation at investigative interviews under a case called *Weingarten*, also entitles the employee to information as to the subject matter of the interview. In *Pacific Telephone*, the employee was summoned to an interview to investigate his wrongful conduct and potential punishment. During the interview the employee and his representative inquired as to the purpose of

the interview, but received no information in response. In discussing whether an employee's right to union representation at such an interview included the right to information to allow the employee to conference with and receive aid from the representative, the *Pacific Telephone* court recognized that "without such information and conference, the ability of the union representative effectively to give the employee aid and protection would be seriously diminished." Accordingly, the court held that in order for the employee's rights to be "anything more than a hollow shell", the employee and the union representative must be provided with some information as to the subject matter of the investigation.

The court went on to define the information requirement, noting that the employer only need provide the employee with the opportunity to become familiar with his circumstances. An employer need not reveal his case, his evidence, or specific acts of misconduct it is aware of. But the employee is entitled to a general statement as to the subject matter of the interview that identifies the misconduct for which discipline may be imposed.

This case law means that the Department was required to provide Ms. Barker and her representative with some information regarding the interview--at least informing them of the subject matter such that they would be on notice of the circumstances. Ms. Barker alleges that Special Investigator Israel and Supervisor Lennox, who conducted the interview, declined to provide Ms. Barker with information about the interview. Specifically, Ms. Barker requested information on the specific topics, the list of questions, and the nature of the charges of impropriety that the interview would encompass. According to the case law, while Ms. Barker was not entitled to specific details, she was entitled to know the general subject matter of the interview. Because this lack of information prevented her from consulting with and receiving competent aid from her representative, her rights under CPERA were interfered with by the Department. However, as discussed in section 3 below, Ms. Barker likely is not entitled to the remedies she seeks.

2) Whether the Department interfered with Ms. Barker's right to engage in concerted activity by having and applying a blanket policy prohibiting Ms. Barker

from speaking to anyone but her representative about the subject matter of the interview.

Ms. Barker alleges that the Department's confidentiality policy, which Israel and Lennox reminded her of during the interview, interferes with her right to engage in concerted activity as guaranteed by section 15 of the CPERA. Because the Department applied a blanket confidentiality agreement, the generalized justifications for which cannot outweigh employee's rights, the Department likely violated Section 19. However, the Department can argue that the specific circumstances of this case provided the Department with a legitimate justification for the confidentiality requirement that greatly outweighed Ms. Barker's rights.

In a case called *Banner Health System*, the National Labor Relations Board ("the NLRB") analyzed whether a blanket confidentiality agreement violated employees' rights under Section 7 of the NRLA (comparable to Section 15 of CPERA) and constituted a violation by the employer of Section 8(a)(1) of the NLRA (comparable to Section 19 of the CPERA). In *Banner*, the employer applied a blanket policy of confidentiality to all investigatory interviews of employees in order to protect the integrity of the investigation. In analyzing the policy in the *Banner* decision, the NLRB stated that a central part of the protections provided by Section 7 is "the employee's right to communicate to co-workers about their wages, hours, and other terms and conditions of employment." Thus, in order to justify a prohibition on employee discussion of ongoing investigations, the employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. The Board found that no legitimate and substantial justification exists where an employer routinely prohibits employees from discussing matters under investigation. As a result, the Board concluded that the **generalized** concern with protecting the integrity of investigations was insufficient to outweigh employees' Section 7 rights.

Instead, the Board suggested that an employer must assess situations individually to determine whether the business's interests in a confidentiality requirement under those particular circumstances outweigh the employees' rights. This assessment should consider whether in the given investigation any witnesses needed

protection, evidence was in danger of being destroyed, or there was a need to prevent a cover-up. Because in *Banner* the employer imposed a blanket confidentiality requirement without assessing the specific need for such a limitation on the employees' rights under the circumstances, the Board found that the employer had violated Section 8(a)(1).

The confidentiality agreement at issue in *Banner* is similar to the confidentiality requirement used by the Department, which was communicated to Ms. Barker and which she complains violates her rights under the CPERA. The Department requires that "[i]n all investigations of employee misconduct, the employee under investigation shall not discuss the potential disciplinary matter with any other employee other than their representative." In both the policy used by the Department and the policy used by the employer in *Banner*, the confidentiality requirement applied to all investigatory interviews, preventing employees from discussing the matter with co-workers, and potentially subjecting employees to disciplinary action for failure to abide by the confidentiality requirement. Because the Department uses this blanket policy, routinely applied to all investigations, there can be no legitimate business justification. Thus, on the surface, the Department's blanket confidentiality requirement is a violation of employees' rights under the CPERA and constitutes an interference with those rights by the Department, as prohibited by the CPERA.

However, the Department can argue that, as applied to this case, the confidentiality requirement was justified by a legitimate business interest that outweighed Mr. Barker's Section 15 CPERA rights. In this case, there is a witness who fears retaliation and needs protection. Ms. Dayton, a co-worker of Ms. Barker, reluctantly approached her superiors regarding Ms. Barker's misconduct. She initially hesitated turning Ms. Barker in, having been threatened by Ms. Barker when she confronted her. However, when Ms. Dayton could no longer survive under the workload piling up as a result of Ms. Barker's misconduct, Ms. Dayton revealed to her superiors that Ms. Barker was frequently absent from work and consistently late turning in her work, or failing to complete it altogether. Ms. Dayton is an important witness who legitimately fears reprisals by Ms. Barker if Ms. Barker finds out that Ms. Dayton turned

her in. Thus, the Department had an interest in maintaining confidentiality of the investigation.

Additionally, the Department was concerned about evidence being destroyed, fabrication of testimony, and a potential cover-up. The evidence against Ms. Barker shows that she was running her own transcript company, Barker Court Reporting Services, using Department resources and work time. Allan Lennox found documentary evidence of Ms. Barker's misconduct around her desk, as well as digital copies on Ms. Barker's computer. The evidence also shows that Ms. Barker was working with another Department employee, Renato Humphrey, who was also a poor performing court reporter with hard evidence of his similar misconduct. The Department had a legitimate concern that if Ms. Barker conferred with Mr. Humphrey about the investigation, Mr. Humphrey may destroy the documentary and digital evidence of their outside business. Additionally, the two may have colluded to come up with some alternative story.

The circumstances of this case provide the Department with a legitimate business justification for the confidentiality requirement. The concern for protecting the witness, the evidence, and preventing a cover-up or fabrication of testimony is high. Thus, considering the guidance from the NLRB in *Banner*, the Department likely has interests that outweigh Ms. Barker's rights under Section 15 of the CPERA. However, the Department may have nevertheless violated Section 19 of the CPERA by failing to consider these specific circumstances and instead applying its blanket confidentiality requirement. But again, Ms. Barker is unlikely to receive the requested remedies as a result of this interference with her rights.

3) Whether Ms. Barker is entitled to reinstatement, back pay, restoration of benefits, or any other remedies, in the event that the Department interfered with her rights.

Ms. Barker argues that she is entitled to reinstatement of her job and back pay as a result of the above interference with her rights under CPERA and the Department’s violations of Section 19 of CPERA.

The CPERA does not include a provision regarding Ms. Barker's requested remedies. However, Section 10(c) of the NLRA states that "[n]o board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment of him of any back pay if such individual was suspended or discharged **for cause**" [emphasis added]. Despite the CPERA having no comparable provision, the Columbia Court of Appeal's guidance in *Roginson* suggests that any federal decision applying Section 10(c) of the NLRA remains persuasive as to application of the CPERA.

In the *Pacific Telephone* case, a federal court interpreted Section 10(c) of the NLRA, concluding that the plain language prevents the Board from reinstating or awarding back pay to an employee who "was clearly discharged for cause and not for attempting to assert their *Weingarten* rights by requesting union assistance at an investigatory interview." In *Pacific Telephone,* the employee had confessed to the wrongdoing, making it completely clear that he was discharged for cause. Thus, it was beyond the NLRB's authority to provide the employee with reinstatement or back pay. It is possible that restoration of benefits would fall into this category as well, as an employee's benefits could only be restored if he were reinstated. Thus, any employee fired for cause will likely not be entitled to restoration of benefits.

The Department has substantial evidence of Ms. Barker's misconduct giving rise to her termination. The Department has the testimony of Ms. Dayton, numerous documents showing Ms. Barker's work during company time for her own business and the use of company resources for said business, as well as the electronic versions of Ms. Barker's non-work-related files. Additionally, Ms. Barker's misconduct is evident in numerous email messages. While Ms. Barker did not provide a confession of this conduct, the evidence the Department does have seems more than enough to prove Ms. Barker's termination was for cause and not as a result of her assertion of her rights under the CPERA. Thus, the Department will have strong argument that the federal court's interpretation of the NLRA remedies section should apply, preventing the Board from providing Ms. Barker with reinstatement or back pay, and arguably restoration of benefits.

However, the Board will exercise its power under Section 19.5 of the CPERA in directing an offending party to cease and desist an unfair practice and ordering affirmative action that will effectuate the policies of the CPERA. In a case called *Columbia State Employee's Association v. Columbia Department of Mental Health*, the Board sought to remedy the employer's violations of CPERA--namely changing the scheduling system without providing the union notification or opportunity to negotiate the changes. The Board ordered the employer to post copies of an official Notice of the cease and desist and affirmative orders from the Board. In particular, the employer was ordered to cease and desist from failing to meet and confer with the employees' union as to the scheduling system change, cease and desist from continuing to implement the changed system until meeting and conferring with the union, and desisting from denying the employees' rights to meet and confer on such issues. Additionally, the employer was ordered to rescind implementation of the new scheduling system.

It is likely that remedies similar to those ordered by the Board in *Columbia State Employee's Association* would be ordered in response to Ms. Barker's claims. In particular, the Board will likely order the Department affirmatively act to provide employees with information when they are subjected to an investigatory interview, and cease and desist from not providing such information. Additionally, the Board may order the Department to cease and desist from applying its blanket confidentiality policy and affirmatively act to only require confidentiality of such matters when the Department's interests outweigh the employees' rights to engage in concerted activity. Generally, the Board will have the authority under Section 19.5 of the CPERA to order such cease and desist or affirmative action requirements as it sees fit to effectuate the purposes of the CPERA.

We hope this assessment proves helpful in the settlement conference before the Board. Please do not hesitate to reach out with any further questions or concerns.

PT-B: SELECTED ANSWER 2

STATE OF COLUMBIA
DEPARTMENT OF ADMINISTRATIVE HEARINGS

MEMORANDUM

TO: George Field, HR Manager
FROM: Applicant
DATE: July 30, 2015
RE: Barker v. Department of Administrative Hearings

Mr. Field:

Per your request to Pearl Morton, our chief counsel, I have prepared a brief memo regarding the merits of Kristina Barker's unfair practice charge (UPC) and what remedies she might have against the Department of Administrative Hearings ("Department"). You inquired as to the merits of Ms. Barker's claims and what remedies the Board might award. In short, I believe that she will likely prevail on her first claim, but that the Board cannot award reinstatement or back pay under the circumstances. I further believe that although Ms. Barker's rights were not violated by the confidentiality policy in this case, blanket application of the confidentiality policy likely violated the California Public Employment Relations Act, and the Board may require the Department to stop enforcing or change the policy.

My assessments are more fully described below. I provide a brief synopsis of relevant law for your convenience, and then evaluate Ms. Barker's claims, and the possible remedies, in turn.

I. GOVERNING LAW: CPERA AND THE NLRA

It might be useful to begin with a brief overview of the CPERA, although you may be familiar with the law. Ms. Barker's UPC of July 29, 2015 alleges that the Department has violated Sections 15, 15.5, and 19 of the Columbia Public Employment Relations Act (CPERA), which provides certain rights to employees and employee organizations regarding union representation.

Section 15 of CPERA provides that employees 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." Closely related to this provision is Section 15.5, which provides that recognized employee organizations and their representatives have the right to "represent their members in their employment relations with the state." It also provides that the scope of representation is "limited to wages, hours, and other terms and conditions of employment."

Ms. Barker has invoked these sections as the basis for her UPC, along with Section 19 of CPERA, which provides that it is "unlawful" for the state to violate Sections 15 or 15.5. Its various subsections contain more specific descriptions of prohibited employer actions. Section 19(a), which will prove to be important here, says that the state may not "impose or threaten to impose reprisals, . . . discriminate or threaten to discriminate," or "otherwise . . . interfere with, restrain, or coerce employees because of their exercise of rights" guaranteed by CPERA. Further, Section 19(b) makes it illegal for the state to "deny to employee organizations rights guaranteed to them by this chapter," and Section 19(c) makes it illegal for the state to "refuse to meet and confer in good faith with a recognized employee organization."

In *Roginson v. Columbia Public Relations Board* (Colum. Ct. App. 1978), the Columbia Court of Appeals held that CPERA is modeled on the National Labor Relations Act (NLRA), and therefore, federal court decisions that interpret NLRA are "unusually strong

persuasive precedent in interpreting CPERA." *Roginson*. This means that even if a Columbia court has not decided an issue under CPERA, courts will look to see if any federal courts have interpreted a similar provision in the NLRA, and may apply the same interpretation.

With this in mind, I will analyze the merits and the remedies available under Ms. Barker's two UPC claims.

II. BARKER'S CLAIM THAT THE DEPARTMENT VIOLATED HER RIGHTS BY REFUSING TO INFORM HER ABOUT THE SPECIFICS OF THE INTERVIEW

In her first claim for unfair practices, Ms. Barker alleges that when the Department (specifically, Justine Israel and Allan Lennox) refused to provide information about "the specific topics, the list of questions, and the nature of any charge(s) of impropriety the interview would encompass," the Department interfered with her and her union's right to representation as protected under CPERA.

A. Ms. Barker May Prevail On The Merits Of This Claim

The main issue on the merits of this claim is whether Ms. Israel and Mr. Lennox's refusal to share specific information about the charges constituted "interfer[ing] with, restrain[ing], or coerc[ing]" Ms. Baker in the exercise of her right to have her union representative present, and with the Union's right to represent Ms. Barker in the interview.

The first question we must ask is whether CPERA Section 15.5 applied to the interview at all. Although Section 15.5 provides that the scope of representation is "limited to wages, hours, and other terms and conditions of employment," the Columbia Court of Appeals has interpreted that to include meetings "held with a significant purpose to investigate grounds for a disciplinary action." *Roginson v. Columbia Public Employment Relations Board* (Colum. Ct. App. 1978). In *Roginson*, the plaintiff was called into a

meeting to discuss problems with his work performance. He refused to participate in the meeting without a union representative present, and the court faced the question of whether Section 15.5 applied to such meetings. Relying on Section 15.5's similarity to Section 7 of the NLRA and reasoning that "CPERA is modeled on the NLRA and has imbibed the underlying federal policy," the court noted that Section 7 has been "consistently" interpreted to protect employees in similar situations. Thus, it concluded that if the meeting was held to develop facts for disciplinary action, the employee had a right to union representation "and may not be dismissed for attempted exercise of that right."

Ms. Barker clearly had a right to have a Union representative present in the interview. Your July 7 memorandum to Ms. Barker specifically puts her on notice that "information obtained during the interview may lead to disciplinary action being taken against [her]," and informs her that she has a right to a have a representative present. Therefore, the Department fully complied with requirements in allowing her to be represented during the interview.

However, although there do not appear to be Columbia cases on point, federal case law suggests that the Department may have violated CPERA by failing to give adequate information to Ms. Barker and her representative. In 1983, the Fifteenth Circuit interpreted the right to have a representative in an interview that might lead to dismissal to naturally extend to adequate information about the interview and the charges against the employee. In *Pacific Telephone & Telegraph Co. v. National Labor Relations Board* (15th Cir. 1983), the court determined that Section 8(a)(1) of the NLRA--protecting employees' right to union representatives--necessarily protected as well an employee's right to "the securing of information as to the subject matter of the interview." *Pac. Telephone.* There, the employer had called the employee and his representative into a meeting regarding his performance but gave "no information" as to the purpose of the interview, even after being asked. The court rejected the later termination of the employee, holding that "[i]f 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." *Pac. Telephone.* Section 19(a) of CPERA is very similar to Section 8(a)(1) of the NLRA, so according to the decision in *Roginson,* it is likely that a Columbia court would follow a federal court's interpretation in *Pacific Telephone* in considering a Section 19(a) CPERA action.

The success of Ms. Barker's first claim therefore turns on whether the information provided here was adequate under the court's standard in *Pacific Telephone*. There, the court elaborated that the information provided "need be nothing more than that which provides the representative and employee the opportunity to become familiar with the employee's circumstances." *Pac. Telephone.* It goes on to say that "[t]he employer does not have to reveal its case, the information obtained, or even the specifics of the misconduct to be discussed." *Id*. Rather, "[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." *Id.*

Here, Ms. Barker's claim that Ms. Israel and Mr. Lennox were required to provide information about "the specific topics, the list of questions, and the nature of any charge(s) of impropriety the interview would encompass," is clearly overbroad in some respects. Under the *Pacific Telephone* standard, "specifics" do not need to be discussed, so it is unlikely that a court would rule that not providing specific topics or a list of questions violated Ms. Barker's rights under CPERA. Indeed, the Department might successfully argue that *Pacific Telephone* is distinguishable because in that case, the employee was given "*no* information" as to "the *subject matter* of the interview." *Pac. Telephone* (emphasis added). Here, in contrast, your memo provided notice that the interview was in relation to a disciplinary investigation, and thus provided greater notice than the facts in *Pacific Telephone*.

However, the Department is likely liable for not disclosing "the nature of any charge(s)" to be discussed at the interview. *Pacific Telephone* requires that the notice be sufficient to allow the employee and representative to "become familiar with the . . .

circumstances" and "identif[y] to the employee and his representative the misconduct" for which discipline will be imposed. *Pac. Telephone.* Your memo informs her that the interview will bear on discipline, but does not provide any information as to the charges being investigated. In Ms. Barker's UPC statement of facts, she alleges that when she requested information in the meeting, "Ms. Israel stated only that the subject matter and potential disciplinary charges would become evident from the line of questioning in the interview." Ms. Barker is likely correct that a court would determine that this prevented her from adequately discussing the nature of the charges with her representative, and that it meant the representative was unable to assist and counsel her to prepare for the interview.

The failure to provide general information about the charges means that Ms. Barker is likely to succeed on the merits of her first UPC claim.

B. Ms. Barker Likely Cannot Be Awarded Reinstatement Or Back Pay

Ms. Barker's UPC claim requests a variety of remedies for the alleged violations, including "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." Assuming the court finds that the Department is liable on this claim, however, Ms. Barker is unlikely to recover reinstatement or back pay.

CPERA Section 19.5 governs the available remedies for unfair practice violations. It provides that what remedy is "necessary to effectuate" the purposes of the Act is "a matter within the exclusive jurisdiction of the Board." It further allows that "[t]he 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.

Pacific Telephone, however, also bears on the remedies that might be appropriate where an employee has not been provided adequate information about the employment charges. In that case, the court was faced with the question of whether the National Labor Relations Board's reinstatement of the employee and award of back pay was proper. The Fifteenth Circuit decisively rejected those remedies on the facts, relying on Section 10(c) of the NLRA, which says that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for the payment to him of any back pay if such individual was suspended or discharged for cause." Pac. Telephone. The court held that the Board erred in not considering the employee's admission in the interview that he installed unauthorized telephone equipment in his home during work hours. Because it "clearly appear[ed] that the company discharged [the employee] for cause . . . . [t]he order for reinstatement and back pay was beyond the authority of the Board and [was] not entitled to enforcement." *Pac. Telephone.*

Here, under the principle of *Roginson* that federal decisions interpreting the NLRA are highly persuasive in interpreting CPERA, the similarity on the facts between *Pacific Telephone* and Ms. Barker's UPC means that a court will likely refuse to grant reinstatement and back pay, because Ms. Barker was clearly discharged for cause. Here, Ms. Barker was discharged for the misuse of state resources when she repeatedly conducted her own business during work hours, at the expense of her work for the Department. This is very similar to the charges that the plaintiff in *Pacific Telephone* was discharged for cause for installing equipment at his home during work hours. Indeed, Ms. Barker's termination for cause is arguably stronger because she denied all the allegations in her interview, and the for-cause termination is based entirely on independent evidence; in *Pacific Telephone*, the plaintiff's dismissal was the result of statements he made in the procedurally improper interview, and the court still did not believe that bore on whether those remedies were appropriate.

Ms. Barker may argue that reinstatement and back pay is not barred by *Pacific Telephone* because CPERA has no section that is equivalent to NLRA Section 10(c),

but that argument will likely fail. In *Roginson*, the Columbia Court of Appeals held that "federal decisions interpreting the NLRA remain persuasive even where CPERA does not contain any provision comparable to the NLRA." *Roginson*. Thus, because the similar purposes and underlying policies of CPERA and the NLRA, a court would likely find that Pacific Telephone and the analogy to NLRA Section 10(c) are persuasive in limiting the remedies available to Ms. Barker.

Thus, it is unlikely that Ms. Barker will receive reinstatement or back pay, although the Board has wide discretion to issue the other remedies discussed above.

III. BARKER'S CLAIM THAT THE DEPARTMENT'S BLANKET POLICY OF CONFIDENTIALITY VIOLATED HER RIGHTS

Ms. Barker also alleges that the Department's blanket policy prohibiting employees from speaking to anyone but their representatives about disciplinary proceedings interferes with her right under CPERA to "engage in concerted activity." She also alleges that "[n]o evidence supported prohibiting Ms. Barker from communicating with other employees concerning the investigation.

A. Ms. Barker Will Not Prevail On The Merits Of This Claim, But The Blanket Confidentiality Policy Is Likely Impermissible

CPERA does not expressly mention an employee's right to engage in "concerted activity"; that language appears in Section 7 of the NLRA. However, under the principles of *Roginson* discussed above, it is likely that a court will find that language persuasive in interpreting the protections of CPERA.

There is a federal NLRB decision on-point here, which provides that blanket policies of confidentiality are not permissible under the NLRA, but that the facts may justify such policies in specific cases based on specific findings of fact. In that decision and order, the Board was faced with a complaint from an employee who had been subject to the

employer's policy prior to his firing that included, in relevant part, the acknowledgement that if the employee failed to keep "employee information such as salaries and disciplinary action" confidential, the employee "could be subject to corrective action, including termination." *Banner Health System and James A. Navarro* (NLRB 2012). The employer applied that confidentiality policy to all investigatory interviews of employees, and the Board noted that the purpose of the policy was "to protect the integrity of the investigation from the negative effects of employees sharing their recollections." *Banner Health*. The Board concluded that NLRB Section 7's protection for acting in concern included protections for communicating with employees about wages and hours and other terms and conditions of employment.

Here, the Department's confidentiality policy appears similar to the policy at issue in *Banner Health*. Here, too, the policy forbids sharing information with other employees in relation to a disciplinary hearing, and cautions employees that violation of confidentiality is an independent basis for disciplinary action. In addition, the Department's policy is also justified by a desire to prevent, among other things, interference with the investigation.

However, the Department can persuasively argue that unlike the employer in *Banner Health*, it had a "legitimate business justification that outweighs [Ms. Barker's] rights." *Banner Health*. Although the Board determined that no legitimate justification existed where the employer had a blanket policy that was routinely applied, it noted that "in order to minimize the impact on [NLRA] Section 7 rights, it was [the employer'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 Health.*

Here, many of those factors weigh in favor of confidentiality in this case. Indeed, Allan Lennox specifically made a determination in his July 6 memo to you (prior to your July 7 memo informing Ms. Barker of the interview and the confidentiality policy) that he had "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." Here, the allegations against Ms. Barker were partially based on statements from Terrie Dayton, who had been threatened by Barker and feared reprisal. In addition, there was an identifiable risk that Ms. Barker might warn Renato Humphrey, an employee allegedly doing work for her, that the Department was investigating their work for Barker Court Reporting. This might encourage either or both of them to lie in investigations or to collaborate on creating a false story. Finally, because much of the physical evidence of Barker's (and possibly Humphrey's) activities were on their computers, there was a risk that a breach in confidentiality would result in the destruction of relevant emails--particularly those in Humphrey's computer, which Mr. Lennox was unable to quickly access, and could not search for another three to four weeks.

Ms. Barker may argue that the Columbia Public Employment Relations Board need not accord any weight to an NLRB decision because *Roginson* only applies to federal court decisions, and the *Banner Health* did not issue by a court. This is an unlikely argument for two reasons. First, Ms. Barker is likely to rely on the overall principle of *Banner Health* and merely object to the exception's application in this case, so the argument would be of little practical value to her. Second, the argument is not logically persuasive: even though *Roginson* explicitly applies only to courts, it is well-settled that federal courts will "uphold the [NLRB]'s construction of the [NLRA] if it is reasonable or permissible." The Board's interpretation in *Banner Health* was both.

Thus, although blanket application of the confidentiality policy likely violates the CPERA, the Department has a very strong claim that it was justified in this specific instance under the rule of *Banner Health*, and will therefore likely prevail on the merits of this claim.

B. The Board Will Likely Require The Department To Stop Enforcing The Policy

As discussed above in Part II.B, the Board has wide discretion in fashioning a remedy for unfair practices. Here, assuming that the Board determines that blanket application

of the Department's confidentiality policy is a violation of CPERA, it is likely the board will issue an order that the department cease and desist applying the policy without particular findings of necessity, and undertake affirmative action to repeal the policy.

This relief follows the example of *Columbia State Employees' Association v. Columbia Department of Mental Health* (Unfair Practice Case No. S-CE-417, 1989). There, the Board determined in an earlier proceeding that the employer had adopted a policy in violation of CPERA (there, by failing to provide unions an opportunity to negotiate a new hours structure). Observing that it possessed the power to order affirmative action and issue a cease and desist, the Board ordered the employer to post a notice and cease and desist from continuing to implement the offending policy, and to take affirmative action "designed to effectuate the purposes of CPERA" by "rescind[ing] implementation" of the new policy.

Here, if Ms. Barker prevails on her claim, similar remedies seem to fit the facts here. The Board can order the Department to cease and desist from applying its confidentiality policy broadly, and require affirmative action to rescind the policy as applied. It can also require the Department to post notices informing employees that the confidentiality policy is no longer a blanket policy that applies regardless of circumstances.

IV. CONCLUSION

For the reasons above, I believe that Ms. Barker is likely to prevail on her first claim (for failure to inform), but that the Board cannot permissibly reinstate her or award back pay, because she was clearly dismissed for cause. I also believe that the Department is likely to prevail on Ms. Barker's second claim that the confidentiality policy was impermissibly applied to her case, but that she is likely correct that the blanket nature of the policy violated CPERA. The Board may order the Department to cease and desist or affirmatively repeal the policy.

Please let me know if I can clarify any of my points, or provide you with any other assistance.

All best,

Applicant