ROGERS JOSEPH O'DONNELL

PARMA 2011

KEY QUESTIONS EMPLOYMENT LAW UPDATE

SPEAKERS:

Michelle Schafer – County of Shasta

Dennis C. Huie, Esq. – Rogers Joseph O'Donnell

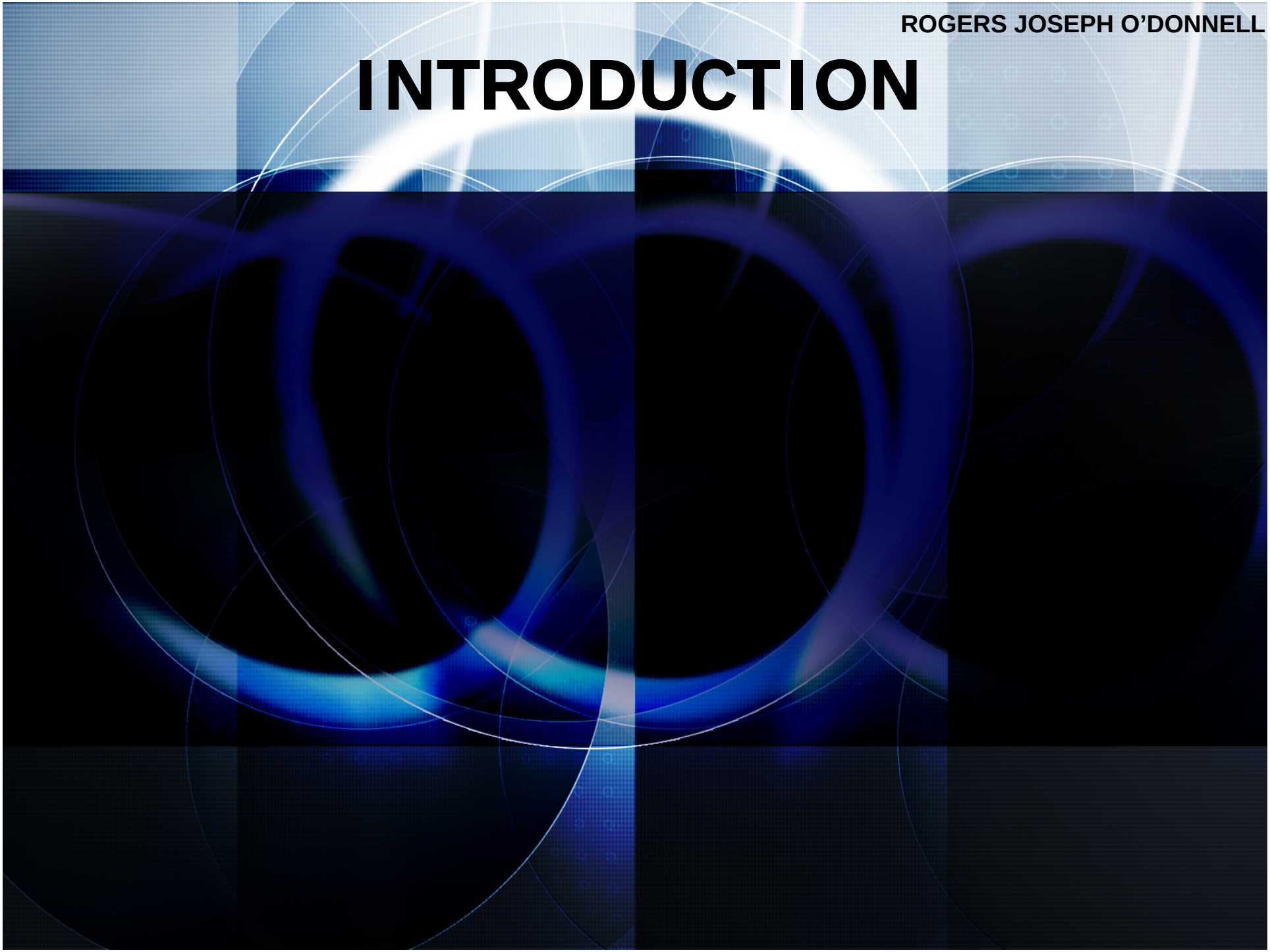
Ed Zappia, Esq. – Zappia Legal

MODERATOR

Steve Wilmes - ASCIP

ROGERS JOSEPH O'DONNELL

INTRODUCTION



LITIGATION TRENDS

LITIGATION TRENDS FOR 2010-11

DISCRIMINATION

QUESTION

TRUE OR FALSE?

In a discriminatory termination case, a manager's derogatory comments about the plaintiff's protected status (race, sex, age, etc) cannot be used to establish discrimination in connection with the termination where the manager was not the decision-maker for the termination.

DISCRIMINATION

ANSWER

Reid v. Google, Inc.

50 Cal. 4th 512 (2010)

False

CIVIL RIGHTS

QUESTION

TRUE OR FALSE?

In 2001, the City issued pagers to SWAT Team members. The City noticed that one officer repeatedly exceeded his text message limit. In order to determine whether the existing text message was too low or whether the officer was using the pager for personal use, the City requested a transcript of all the text messages the officer sent over a two month period for review. In doing so, the City did not violate the officer's Fourth Amendment right to privacy.

CIVIL RIGHTS

ANSWER

True. The City was investigating workplace misconduct, the measures adopted reasonably related to the objectives of that investigation, and were not excessively intrusive.

***City of Ontario, California v. Quon,* 130 S.Ct. 2619 (2010).**

ATTORNEY-CLIENT PRIVILEGE

QUESTION

The employer's handbook provided that employees were prohibited from sending and receiving personal e-mails and warned that the company may inspect all files or messages at any time. An employee, however, used her company e-mail account and to send an e-mail from her work computer to her attorney seeking advice as to possible legal action against her employer for hostile work environment harassment.

ATTORNEY-CLIENT PRIVILEGE

QUESTION (cont.)

Did that qualify as "confidential communication between client and lawyer" under the attorney-client privilege?

ATTORNEY-CLIENT PRIVILEGE

ANSWER

No. Since the employee was aware of the company policy mandating that "its computers were to be used for company business" and that "the company would monitor its computers in compliance with this company policy," her communications were not made in confidence as required by the attorney-client privilege.

Holmes v. Petrovich Development **___ Cal.App.4th ___ (2011).**

HARASSMENT

QUESTION

TRUE OR FALSE?

Propositions for romance between co-workers always constitute unlawful sexual harassment

HARASSMENT

ANSWER

***EEOC v. Prospect Airport Servs*.**
621 F.3d 991 (9th Cir. 2010)

False.

WAGE & HOUR

QUESTION

TRUE OR FALSE?

Sandy is a public works employee for City. Sandy must drive her City car home as a condition of her employment. Because the City requires Sandy to commute to work with a City car, her commute time is compensable under the FLSA.

WAGE & HOUR

ANSWER

***Rutti v. Lojack Corp*.**
596 F.3d 1046 (9th Cir. 2010)

False

WAGE & HOUR

QUESTION

TRUE OR FALSE?

Joe is a City maintenance worker who MUST wear a City uniform on duty. He often changes into uniform at work but is not required to. His time spent changing into uniform is compensable under the FLSA.

WAGE & HOUR

ANSWER

Bamonte v. City of Mesa
598 F.3d 1217 (9th Cir. 2010)

False

DISABILITY DISCRIMINATION

QUESTION

TRUE OR FALSE?

An employee who needs to use a cane after a stroke but is otherwise able to walk does not have a "disability" under the California Fair Employment and Housing Act.

DISABILITY DISCRIMINATION

ANSWER

Sandell v. Taylor-Listing, Inc.
188 Cal.App. 4th 297 (2010)

False

VICARIOUS LIABILITY

QUESTION

TRUE OR FALSE?

The right of control, *by itself*, compels a finding that a person was an employee rather than an independent contractor.

VICARIOUS LIABILITY

ANSWER

False. Although the "right of control" is an important factor, it is not the only factor that must be considered. Other secondary factors must also be considered, "such as whether the worker is engaged in a district occupation or business, the skill required to participate in the occupation or business, etc."

***Bowman v. Wyatt*, 186 Cal.App.4th 286 (2010).**

DISABILITY DISCRIMINATION

QUESTION

TRUE OR FALSE?

An employer can sometimes require an employee submit to a fitness for duty evaluation even though the employee's job performance has not yet been impacted?

DISABILITY DISCRIMINATION

ANSWER

Brownfield v. City of Yakima
612 F.3d 1140 (9th Cir. 2010)

TRUE: only if there is significant evidence that could cause
a reasonable person to inquire as to whether an employee
is still capable of performing essential job functions

DISABILITY DISCRIMINATION

QUESTION

Joe, a disabled employee, is laid-off for economic reasons. Under a union contract, he is given preferential rehire rights for 12 months. The union contract requires that Joe register with the union and to participate in the rehire process. Joe is not rehired.

To establish disability discrimination for failure to rehire, Joe must:

(1) Show he is substantially limited in a major life activity.
(2) Tell his employer what his disability is.
(3) Show he participated in the Union rehire process.
(4) All of the above.

DISABILITY DISCRIMINATION

ANSWER

Stiefel v. Bechtel Corp.
624 F.3d 1240 (9th Cir. 2010)

(3)

RETALIATION

QUESTION

Miriam and her fiancé, Eric were employed by the same company. In 2003, Miriam filed a charge alleging sex discrimination against her employer with the Equal Employment Opportunity Commission (EEOC). Three weeks later, her employer fired Eric. Thereafter, Eric filed a charge with the EECO claiming that his employer fired him in order to retaliate against Miriam for filing her charge with the EEOC.

Did the employer's firing of Eric constitute unlawful retaliation?

RETALIATION

ANSWER

Yes. Title VII's anti-retaliation provision is very broad and prohibits any employer action that may dissuade an employee from engaging in protected activity.

***Thompson v. North American Stainless, LP* (2010) 561 U.S. _____ .**

RETALIATION

QUESTION

May Eric bring a cause of action under Title VII, even though he did not engage in any protected activities?

RETALIATION

ANSWER

Yes. The Supreme Court determined that Eric was within the zone of interests protected by Title VII. The Court explained that Eric "was an employee . . . and the purpose of Title VII is to protect employees from their employers' unlawful actions."

***Thompson v. North American Stainless, LP* (2010) 561 U.S. _____ .**

RETALIATION

QUESTION

Which of the following employees does not have a valid retaliation claim under Title VII?

(1) Employee terminated for complaining about sexual harassment
(2) Employee demoted for supporting co-worker's sex harassment claim
(3) Employee terminated because his fiance filed a sex discrimination claim (even if employee did not assist fiance with claim)
(4) None of the above

RETALIATION

ANSWER

Thompson v. North American Stainless, LP
__ U.S. __ (2011)

(4)

COLLECTIVE BARGAINING

QUESTION

TRUE OR FALSE?

A parties' dispute over the formation of a Collective Bargaining agreement is a matter that can only be resolved by the court.

COLLECTIVE BARGAINING

ANSWER

True. A parties' dispute over a CBA's ratification date is a matter for judicial resolution. Questions regarding the effective date of a CBA cannot be deemed as "arising under" the CBA.

***Granite Rock Co. v. International Brotherhood of Teamsters,* 130 S.Ct. 2847 (2010).**

GINA

QUESTION

TRUE OR FALSE?

Under GINA, there are NO EXCEPTIONS to the rule prohibiting an employer from acquiring genetic information relating to a manifested disease

GINA

ANSWER

29 C.F.R. 1635.8

False

DISABILITY DISCRIMINATION

QUESTION

TRUE OR FALSE?

An employer is not required to provide a reasonable accommodation to a disabled employee where the employee is able to perform all essential job functions without a reasonable accommodation?

DISABILITY DISCRIMINATION

ANSWER

***Centeno v. UPS Supply Chain*,**
__ F.3d ___ (9th Cir. 2010)

False.

DISABILITY DISCRIMINATION

QUESTION

Which one of the following is TRUE about a "global" settlement involving a settlement of both civil and workers' compensation claims:
(1) You do not need to obtain approval of the compromise and release (C&R) by the WCAB before entering into the global settlement
(2) The civil release should be in the same document as the C&R
(3) The C&R automatically covers civil claims
(4) None of the above

DISABILITY DISCRIMINATION

ANSWER

***Steller v. Sears* (2010)**

(1)

RACE DISCRIMINATION

QUESTION

A professor at the Maricopa Community college sent several racially charged e-mails over a distribution list maintained by the District. The e-mails contained statements such as "[t]he only immigration reform imperative is preservation of White majority," and urged people to report "illegal aliens to the INS." All District employees with an e-mail address received the e-mails. Nonetheless, the District refused to discipline the professor for making the statements after several Hispanic employees complained.

RACE DISCRIMINATION

QUESTION

Did the District's decision not to discipline the professor create a hostile work environment in violation of Title VII? Choose the best answer.

A. No. The professor's racially-charged speech was pure speech. The statements related to a matter of public concern and were directed at the college community sparking academic debate, rather than particular individuals.

RACE DISCRIMINATION

QUESTION (cont.)

B. Yes. The professor's e-mails were sent over an e-mail distribution list maintained by the College and, thereby, violated Hispanic employees' equal protection right to be free from unlawful workplace harassment.

C. Yes. There is a categorical harassment exception to the First Amendment's free speech clause.

RACE DISCRIMINATION

ANSWER

A. The professor's racially charged speech was pure speech and not unlawful harassment. The First Amendment demands substantial deference to the District's decision not to take action. To maintain academic freedom, colleges must have the ability to allow people to voice their opinions, even if controversial. The court also affirmed that there is no categorical harassment exception to the First Amendment. *(Rodriguez v. Maricopa County Cmty. Coll.*, 605 F.3d 703 (9th Cir. 2010)).

MISCLASSIFICATION

QUESTION

TRUE OR FALSE?

Unless an employer produces evidence that a worker is an independent contractor, a low wage worker will always be deemed an employee and not an independent contractor given the strong presumption of employment

MISCLASSIFICATION

ANSWER

Lara v. WCAB,
182 Cal.App 4th 393 (2010)

False.

DISABILITY DISCRIMINATION

QUESTION

TRUE OR FALSE?

For reasonable accommodation purposes, providing contemporaneous written summaries of a "team meeting" for a hearing impaired employee is a legally adequate substitute to providing a sign language interpreter as a reasonable accommodation

DISABILITY DISCRIMINATION

ANSWER

***Centeno v. UPS Supply Chain*,**
__ F.3d ___ (9th Cir. 2010)

False.

DISABILITY DISCRIMINATION

QUESTION

An disabled salesperson terminated for a decline in sales can establish disability discrimination using:

(1) Evidence that decision maker made derogatory remarks about his disability
(2) Evidence that non-decision maker manager made derogatory remarks about his disability
(3) Evidence that she was not responsible for the decline in sales
(4) All of the above

DISABILITY DISCRIMINATION

ANSWER

Sandell v. Taylor-Listing, Inc.
188 Cal.App. 4th 297 (2010)

(4)

COLLECTIVE BARGAINING

QUESTION

Due to a budget crisis, the City decided to lay off 18 of its firefighters to reduce labor costs. The firefighters union tried to negotiate with the city to avert the layoffs. The firefighters union attempted to negotiate with the City to prevent the layoffs, but the City refused to meet and confer over its decision.

Did the City commit an unfair labor practice for refusing to meet and confer over its decision to lay off workers?

COLLECTIVE BARGAINING

ANSWER

No. Such decision fall "solely within the scope of management" and are thereby not subject to mandatory bargaining.

(*International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board* (City of Richmond) - filed January 24, 2011 - Cite as 2011 S.O.S. 427.)

COLLECTIVE BARGAINING

QUESTION

Although an employer may unilaterally decide to implement a layoff, must he or she bargain over the effects of the layoff? (e.g., timing of layoffs, the number and identity of the employees affected, effects on the remaining employees.)

COLLECTIVE BARGAINING

ANSWER

Yes.

(*International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board* (City of Richmond) - filed January 24, 2011 - Cite as 2011 S.O.S. 427.)

RETALIATION

QUESTION

TRUE OR FALSE?

A public employee jumped the chain of command to report directly to the chairman of his employer's governing board that his immediate supervisor had failed to disclose the fact that the agency was not in compliance with its legal obligations. Shortly after, the employee was terminated. The First Amendment "shields a public employee if he speaks as a citizen on a matter of *public concern*."

RETALIATION

QUESTION (cont.)

TRUE OR FALSE?

The statements did not involve a matter of public concern because the public at large is generally not interested in such matters and the employee spoke to the chairman in private.

RETALIATION

ANSWER

False. An agency's failure to comply with its legal obligations is a matter of public concern and the freedom to protest is not lost when an employee chooses to make the statements in private. Therefore, the statements involved a matter of public concern, for purposes of the First Amendment retaliation claim.

***Anthoine v. North Central Counties Consortium,* 605 F.3d 740 (2010).**

RETALIATION

QUESTION

When a public employee complains that the agency is not complying with its legal obligations, is he or she acting pursuant to his or her official duties? Choose the best answer.

A. Yes. If the statements are made during paid working hours while the employee is under the control of his or her supervisor.

RETALIATION

QUESTION

B. Yes. All public employees have a duty to report to their supervisor when an agency fails to comply with the law.

C. Yes. Only if the speech was a product of performing a task the employee was paid to perform.

RETALIATION

ANSWER

C. A fact issue as to whether an analyst's statements were made pursuant to his official duties precluded summary judgment on his First Amendment retaliation claim.

***Anthoine v. North Central Counties Consortium,* 605 F.3d 740 (2010).**

COLLECTIVE BARGAINING

QUESTION

The City's MOU contained a limitation period providing that "[n]o disciplinary action or reprimand may be implemented more than six months after the alleged inappropriate behavior has come to the attention of a management representative." In 2007, two employees complained that their supervisor sexual harassed them on several occasions. A private attorney investigator concluded that the allegations were true.

COLLECTIVE BARGAINING

QUESTION

The City notified the supervisor of its proposed decision to terminate him in April 2008, more than six months after the employees reported the harassment. The union filed a grievance and the matter was referred to arbitration. The arbitrator reinstated the supervisor, without even determining whether he actually harassed the employees, merely because the City failed to discipline the supervisor within the limitations period.

COLLECTIVE BARGAINING

QUESTION

Which of the following is true?

A. The arbitrator's decision was overturned. Reinstating a former employee who allegedly harassed two women on purely procedural grounds violates public policy against harassment.

B. The arbitrator's decision was upheld. The City and the union mutually bargained for the limitation period and there is no absolute public policy against reinstatement of persons who have engaged in sexual harassment.

COLLECTIVE BARGAINING

ANSWER

B. The arbitrator did not violate public policy against sexual harassment by ordering employee reinstated on ground that the city did not implement disciplinary action on the sexual harassment claims within the limitations period imposed by collective bargaining. The court observed that the parties mutually bargained for the limitations period.

COLLECTIVE BARGAINING

ANSWER (cont.)

Note: Answer A is wrong because there "is no absolute public policy against reinstatement of persons who have engaged in sexual harassment, much less a public policy against reinstatement of persons who *may* have engaged in sexual harassment and who were ordered reinstated because the accusations were time-barred."

***City of Richmond v. SEIU, Local 1021,* 189 Cal.App.4th 663 (2010).**

CIVIL RIGHTS

QUESTION

Delia, a firefighter, was diagnosed with an illness after working to control a toxic spill. The doctor issued an off-duty work order, but did not place any activity restrictions on Delia. The City became suspicious that Delia was off-work on false pretenses. The City, thereby, hired a private investigation firm to conduct surveillance on Delia and observed that Delia purchased building supplies, which included several rolls of insulation. During an administrative investigation interview, a private attorney investigator asked Delia to enter his home to verify that he had not installed the insulation.

CIVIL RIGHTS

QUESTION (cont.)

During an administrative investigation interview, a private attorney investigator asked Delia to enter his home to verify that he had not installed the insulation. Delia refused. The Fire Chief issued a written order to produce the insulation for inspection.

Are the City officials entitled to qualified immunity for violating an employee's Fourth Amendment right to privacy by ordering him to produce items from his home?

CIVIL RIGHTS

ANSWER

Yes. The "doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Although City officials violated Delia's Fourth Amendment right, that right was not clearly established at the time the Fire Chief issued the written order. In determining whether a right has been clearly established, the key inquiry "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'"

CIVIL RIGHTS

ANSWER (cont.)

There is "no analogous case law" prior to this decision, concerning an unreasonable search pursuant to an administrative internal affairs investigation. Thereby, Delia failed to establish that "as of the date of the [Fire Chief's] order . . . defendants would have known that their actions were unlawful."

***Delia v. City of Rialto,* 621 F.3d 1069 (2010).**

CIVIL RIGHTS

QUESTION

Would the City officials be entitled to qualified immunity, if they made the same mistake again in 2011?

CIVIL RIGHTS

ANSWER

No.

***Delia v. City of Rialto,* 621 F.3d 1069 (2010).**

CIVIL RIGHTS

QUESTION

Is the private attorney investigator hired by the City to aid in the internal affairs investigation also entitled to qualified immunity for his conduct in connection with the Fourth Amendment violation? Choose the best answer.

A. No. Private parties are not government employees and as such are not afforded the same government immunity.

B. Yes. Although the attorney was a private party, he was acting as an agent of the government and is thereby entitled to government immunity.

CIVIL RIGHTS

ANSWER

A. Private attorney/investigator was not entitled to government immunity because he was a private party.

***Delia v. City of Rialto*, 621 F.3d 1069 (2010).**

ATTORNEY-CLIENT PRIVILEGE

QUESTION

TRUE OR FALSE?

Rolando filed a race discrimination claim against the City. Rolando was represented by attorney Gregory. Initially, a City employee spoke to Gregory collaborating Rolando's claims. After meeting with City officials, the City employee decided not to get involved. Thereafter, the allegations of conspiracy to cover up wrongdoing were added to the complaint and Gregory referred the case to another attorney. When the City moved for summary judgment, Rolando provided his own affidavit and some of Gregory's handwritten notes in opposition to the motion.

ATTORNEY-CLIENT PRIVILEGE

QUESTION (cont.)

By producing the notes, Rolando waived the attorney-client and work product privileges between himself and Gregory entirely.

ATTORNEY-CLIENT PRIVILEGE

ANSWER

False. Disclosure constitutes a waiver of the attorney-client privilege "only as to communications about the matter actually disclosed." Because Rolando only disclosed Gregory's notes involving the statements made by the city employee, Rolando waived privileges only as they pertained to the conspiracy claim against the City and not the underlying discrimination claim. Similarly, the work product privilege was only waived with respect to those matters covered in the disclosed documents.

Hernandez v. Tanninen, 604 F.3d 1095 (9th Cir. 2010).

THE END