2260 N Street, Merced 627 W. 21<sup>st</sup> Street, Merced 1159 G Street, Los Banos

Monday, November 18, 2024

NOTE: Merced Superior Court will no longer be consolidating Courtroom 8 and Courtroom 10.

Tentative Rulings are provided for the following Courtrooms and assigned Judicial Officers with scheduled civil matters:

Courtroom 8 - Hon, Mark V. Bacciarini

Courtroom 9 - Hon. Mason Brawley

Courtroom 12 - Hon. Jennifer O. Trimble

Courtroom 10 will continue to post separate Probate Notes that are not included in these tentative rulings.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements. Electronic recording is available in certain courtrooms and will only be activated upon request.

The specific tentative rulings for specific civil calendars follow:

Civil Law and Motion Hon. Mark V. Bacciarini Courtroom 8 627 W. 21<sup>st</sup> Street, Merced Monday, November 18, 2024 8:15 a.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

#### Case No. Title / Description

22CV-00580 Elizabeth Banks v. Los Banos Unified School District

Order to Show Cause re: Dismissal

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance. The Plaintiff who is proceeding in pro per since her attorney was relieved was ordered to appear at the October 14, 2024, Case Management Conference and filed to do so, and so this Order to Show Cause re Dismissal was set. Absent an appearance by the Plaintiff and a showing of good cause why this matter should not be dismissed, the case will be DISMISSED WITHOUT PREJUDICE.

22CV-00719

Pacific Southwest Irrigation Corp. v. Jose Rodriguez

Trial Setting Conference

Continued on the Court's Own Motion to June 9, 2025, in Courtroom 8 at 10:00 A.M. for trial setting.

22CV-01458 Richard Morales v. General Motors LLC

**Trial Setting Conference** 

Continued on the Court's Own Motion to June 9, 2025, in Courtroom 8 at 10:00 A.M. for trial setting.

23CV-00837 Efrain Manzo v. General Motors LLC

**Trial Setting Conference** 

Continued on the Court's Own Motion to June 9, 2025, in Courtroom 8 at 10:00 A.M. for trial setting.

23CV-00846 Nicholas Baur v. City of Merced, et al.

Case Management Conference

Continued on the Court's Own Motion to June 9, 2025, in Courtroom 8 at 10:00 A.M. for trial setting.

Mandatory Settlement Conference Hon. Mark V. Bacciarini Courtroom 8 627 W. 21<sup>st</sup> Street, Merced

Monday, November 18, 2024 9:00 a.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

#### Case No. Title / Description

22CV-02972 Gilberto Trillo v. General Motors LLC

Mandatory Settlement Conference

Civil Case Management Conferences Hon. Mark V. Bacciarini Courtroom 8 627 W. 21st Street, Merced

> Monday, November 18, 2024 10:00 a.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

#### Case No. Title / Description

Appearance required on all matters. Remote appearances are permitted. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to arrange for a remote appearance.

Ex Parte Matters
Hon. Brian L. McCabe
Courtroom 8
627 W. 21<sup>st</sup> Street, Merced
Monday, November 18, 2024
1:15 p.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear. Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

Case No. Title / Description

There are no Ex Parte Matters Scheduled

Ex Parte Matters
Hon. Mason Brawley
Courtroom 9
627 W. 21<sup>st</sup> Street, Merced

Monday, November 18, 2024 1:15 p.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

Case No. Title / Description

There are no Ex Parte Matters Scheduled

Ex Parte Matters
Hon. Jennifer O. Trimble
Courtroom 12
1159 G Street, Merced
Monday, November 18, 2024
1:15 p.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear.

Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

#### Case No. Title / Description

There are no Ex Parte matters scheduled for hearing.

Short Cause Court Trials Hon. Mark V. Bacciarini Courtroom 8 627 W. 21<sup>st</sup> Street, Merced

Monday, November 18, 2024 1:30 p.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear. Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

23CV-01010 Randall Littlefoot, et al. v. Artikas Kamangar

Default Prove Up

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance.

23CV-01037 Ronald Hall, et al. v. Fabian Flipp

Default Prove Up

Petition for Writ of Administrative Mandate

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance. Appear to argue the merits of the Petition for Writ of Administrative Mandate.

The sole issue before this Court is whether the Office of Administrative Hearings' June 4, 2024 finding that "the District failed to prove [Real Party-In Interest Denise Warkentin's] condition renders her unfit to instruct or associate with students" as required by Education Code § 87732 subdivision (e)" is a prejudicial abuse of discretion warranting reversal and/or remand pursuant to the Petition for Writ of Administrative Mandamus. The Merced Community College District elected to terminate Real Party in Interest's employment pursuant to Education Code § 87732(e) ["Physical or mental condition that makes him or her unfit to instruct or associate with students"], not, for example, pursuant to Education Code § 87732 (c) ["unsatisfactory performance"] or Education Code § 87732(f) ["Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her"]. The possibility that Real Party in Interest's employment could or could not be terminated on grounds other than those provided in Education Code § 87732(e) is irrelevant to these proceedings.

There appears to be no dispute that Real Party-in-Interest is mentally unable to be physically present on any Merced Community College Campus. This issue was addressed by the Office of Administrative Hearings' June 4, 2024, finding 35 which stated: "35. Respondent met with District representatives via Zoom on March 2, 2023. As an accommodation, the District proposed that respondent teach in-person classes at its Los Banos campus. The Los Banos campus is over 40 miles closer to respondent's Monterey home than the Merced campus. Respondent declined the accommodation. She argued that she cannot drive anywhere in the vicinity of Merced College without getting physically ill, and that she wants to be "left alone" by the District for a year to heal."

The District's position is summarized in Finding 37 as follows: According to Dr. Vitelli, respondent's absence from campus impaired her ability to fulfill all her responsibilities as a faculty member. Based on that failure, which is attributable to a permanent mental impairment associated with being present on campus, he determined that the District had no other reasonable option than to dismiss respondent. Respondent was subsequently hired and presently works as an adjunct English Professor at Hartnell College in Salinas, California."

Acknowledging that *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235 provided factors to be considered in determining whether a teacher's conduct indicates that she is unfit to teach, the Office of Administrative Hearings' June 4, 2024 finding contains the following analysis in Finding 41: "Significantly, all the Morrison factors pertain to conduct. The factors are typically applied after a finding that an educator has committed an act of misconduct, for the purposes of determining whether the act of misconduct indicates that the educator is unfit to teach. Here, there is no allegation that respondent engaged in any act of wrongdoing. Rather, it is alleged that respondent suffers from a mental condition. The District proved she does. The District also presented evidence that respondent's absences from campus may have inconvenienced or frustrated her students and colleagues. However, the District did not prove respondent is unfit to instruct or associate with students. On the contrary, the District proved respondent is presently instructing and associating with students as an adjunct English professor at Hartnell College. Consequently, the Statement of Charges should be dismissed."

There is no dispute that the Case Law interpreting Education Code § 87732(e) has most frequently involved situations where employee behavior was asserted to render an employee "unfit" because such behavior was potentially harmful to students under Education Code § 87732(e) or the analogous provision provided in Education Code § 13202 and Education Code § 13303(e). (See e.g. *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235 217,220 [whether one week homosexual relationship with husband of another teacher rendered employee unfit]; *Board of Education v. Jack M.* 19 Cal.3d 691, 696 [whether arrest—but not charge or conviction—under Penal Code § 457(a) [misdemeanor solicitation lewd or immoral conduct rendered employee unfit]; *Board of Trustees* (1971) 16 Cal.App.3d 820, 821-823 [whether teacher discovered by law enforcement in parked car with student in state of undress who assaulted officer and fled the scene resulting in a high speed chase was unfit]; *West Valley-Mission Community College District v. Concepcion* (1993) 16 Cal.App.4<sup>th</sup> 1766, 1770 [whether arrest, charge, and ultimate acquittal for selling cocaine rendered employee unfit].)

The Office of Administrative Hearings' June 4, 2024, finding addresses the standards set forth in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 as follows: "40. In Morrison v. State Board of Education (1969) 1 Cal.3d 214, 235 (Morrison), the California Supreme Court listed the following factors as relevant when determining whether a teacher's conduct indicates that she is unfit to teach: [1] the likelihood that the conduct may have adversely affected students or fellow teachers, [2] the degree of such adversity anticipated, [3] the proximity or remoteness in time of the conduct, [4] the type of teaching certificate held by the party involved, [5] the extenuating or aggravating circumstances, if any, surrounding the conduct, [6] the praiseworthiness or blameworthiness of the motives resulting in the conduct, [7] the likelihood of the recurrence of the questioned conduct, and [8] the extent to which disciplinary action may inflict an adverse or chilling effect upon the constitutional rights of the teacher involved or other teachers. (Id at pp. 229-230.)

In *Belvi v. Brisco* (1989) 221 Cal.App.3d 896, 991-992, the Court held: "The Morrison factors must be analyzed in all cases of teacher discharge for evident unfitness. "Morrison is followed by California courts for good reason. In the absence of a consideration of all the evidence and a reflection of the factual base on which to apply the Morrison standards, the trial court's finding becomes little more than an abstract moral judgment.... Without the Morrison standards, 'evident unfitness to teach' would be vulnerable to such a broad application virtually every teacher in the state could be subject to discipline and discharge. [Citation.]" (San Dieguito Union High School Dist. v. Commission on Professional Competence, supra, 135 Cal.App.3d at pp. 284–285....)"

While case law which this Court is obligated to follow requires that potential unfitness be evaluated using the above *Morrison* standards, the Hearing Officer, as quoted above, the School District (See Memorandum in Support of Petition at Page 16:19-18:9), and Real Party in Interest (See Respondent and Real Party in Interest's Opposition to District's Petition at Page 13:15-14:21) all assert that the *Morrison* factors are irrelevant because this case does not involve alleged employee misconduct, but unfitness in the sense that the Real Party in Interest, because of mental disability, lacks the mental capacity to be physically present on any campus operated by Merced Community College District.

In San Dieguito Union High School District v. Commission on Professional Competence (1982) 135 Cal.App.3d 278, 281-284, the Commission of Professional Competence determined that a high number of excused absences did not render the teacher unfit notwithstanding a persistent failing to provide adequate lesson plans for substitute teachers. The Trial Court set aside the finding and ordered the Commission to discharge the teacher. (Id.) The Court of Appeal reversed and remanded with the following instruction: "Finally, the trial court's conclusions of unfitness must be based upon an objective standard such as that articulated in Morrison. The Morrison standard gives substance to the tenured teacher's right to be discharged only for cause. If the Morrison standards are not applied, the teacher is left essentially at the mercy of the Board (or the trial court) to be discharged whenever cause exists in the subjective estimation of either

body. Such a procedure would make a shambles out of the tenure and job security now enjoyed by teaching employees." (*Id.* at 289.)

On remand, the Trial Court provided an analysis of the *Morrison* Factors and again found that the excessive absences and persistent failure to provide lesson plans rendered the teacher unfit, and that decision was appealed in *San Dieguito Union High School District v. Commission on Professional Competence* (1986) 174 Cal.App.3d 1176, 1182-1184.) The Court affirmed the findings under *Morrison* as supported by the evidence as follows:

Application of the Morrison Criteria

In weighing the evidence to determine whether Harris' conduct was sufficient to warrant dismissal, the trial court followed San Dieguito's instructions and applied the criteria of *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 82 Cal.Rptr. 175, 461 P.2d 375. Morrison recommended seven criteria should be considered in determining unfitness to teach: (1) likelihood of recurrence of the questioned conduct; (2) extenuating or aggravating circumstances; (3) effect of notoriety and publicity; (4) impairment of teacher-student relationships; \*\*354 (5) disruption of the education process; (6) motive; (7) proximity or remoteness in time of conduct. (Id., at p. 229, 82 Cal.Rptr. 175, 461 P.2d 375; see also San Dieguito at pp. 278, 284, 185 Cal.Rptr. 203.)

Here, the trial court's written statement of decision examined and explained why each of the Morrison criteria was applicable.

The court explained it believed the likelihood of Harris' conduct adversely affected students or fellow teachers was reflected in the testimony of teachers who had to assist substitute teachers in Harris' classes. When administrators or other teachers were required to devote their time to locate lesson plans valuable time which could otherwise have been devoted to educational purposes was being wasted.

The court stated these "repeated failures to supply adequate and timely lesson plans have been persistent for the last four (4) year period [under] ... review ... despite numerous communications to Harris of the problems associated therewith." The court concluded the failure to provide lesson plans where the teacher is absent a considerable period of time has a \*1183 continuing adverse effect on students, teachers and parents particularly where the behavior continued over a period of time.

The court was also concerned that the subjects Harris taught were "academic basics which require diligent, continuing and progressive instructions in contrast to that held by one of Harris' two witnesses who testified [s]he was out frequently but who [was] a P.E. teacher. The stress placed on academic basics for High School students is uncontroverted and within the common knowledge of any teacher or parent whose child seeks a higher education."

Although the court improperly considered the number of Harris' absences as per se unfitness, a consideration precluded by San Dieguito, since those absences had been stipulated to as being legitimate within the District's policy, (id., at p. 289, 185 Cal.Rptr. 203) the court properly focused on the "detrimental effect on [Harris'] students which was being compounded by her failure to provide adequate and timely lesson plans." The court decided "Harris' response to these problems was one of indifference and a feeling that she had no responsibility to assure location of the lesson plan by substitute teachers when she was absent."

Harris had been on notice since 1976 of the need to provide lesson plans in an appropriate and accessible location. In light of Harris' continuing conduct the court concluded it was likely Harris would repeat her unsatisfactory performance since she appeared to be indifferent to the seriousness of the problem.

The court also weighed the extent to which the disciplinary proceedings on Harris could create a chilling effect upon the constitutional rights of other teachers. In resolving this issue the court was satisfied the District was addressing a teaching issue not an unrelated social or political problem. The court decided that within this narrow context involving the need to properly educate students there could be no harmful effect on the constitutional rights of other teachers.

In summary, the trial court considered and correctly applied the Morrison criteria. The court's determination that Harris' violations were persistent, i.e., stubborn and continuing (Governing Board of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal.App.3d 77, 82, 104 Cal.Rptr. 64, 104 Cal.Rptr. 527) is supported by the evidence.

(San Dieguito Union High School District v. Commission on Professional Competence (1986) 174 Cal.App.3d 1176, 1182-1184.)

In the instant case, the Court if faced with three issues of first impression:

- (1) whether a evidence that a person is employed in some capacity as a teacher precludes a finding that they are unfit within the meaning of Education Code § 87732 subdivision (e),
- (2) whether a person with a disability that prevents them from being personally present at a given location, but does not prevent them from being personally present at other locations renders them unift, within the meaning of Education Code § 87732 subdivision (e) to teach at the location they are unable to be present at, and
- (3) the extent to which whether the evaluation of unfitness pursuant to Education Code § 87732 subdivision (e) must address the feasibility of teaching and associating with students remotely as opposed to in person.

In the instant case, the Office of Administrative Hearings' June 4, 2024 analysis began and ended with the conclusion that since Real Party-In-Interest was employed as an adjunct professor, Real Party-In-Interest could not be found unfit to serve as a full professor. Adjunct and Full Professors often have different duties, and the June 4, 2024 analysis did not analyze the specific duties currently being performed by Real Party-In-Interest or address the extent such performance established fitness to teach and associate with students in the capacity as a full professor at Merced Community College.

While the plain language of Education Code § 87732 subdivision (e) addresses fitness in general rather than fitness in a specific location, the application of the *Morrison* criteria in *San Dieguito Union High School District v. Commission on Professional Competence* (1986) 174 Cal.App.3d 1176, 1182-1184 quoted above effectively evaluated the impact of the conduct in question on the school district in question. Until findings have been made with regard to the specific impact of the alleged unfitness on Merced Community College, this Court does not have a sufficient administrative record to determine whether Real Party-In-Interest is unfit within the meaning of Education Code § 87732 subdivision (e).

This Court notes that when Education Code § 87732 subdivision (e) was last amended and when *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 was decided, the technology permitting remote teaching and remote association with students did not exist and that some of the cases evaluating unfitness might have been decided differently if a 100% remote assignment was a feasible option. Until findings have been made with regard to the specific impact of the alleged unfitness on Merced Community College and the extent to which 100% remote assignment might mitigate such impact, this Court does not have a sufficient administrative record to determine if Real Party-In-Interest is unfit within the meaning of Education Code § 87732 subdivision (e).

Accordingly, this Court's tentative ruling is to GRANT the Petition for Writ of Administrative Mandate and REMAND this matter to the Office of Administrative Hearings for specific findings (1) addressing the specific duties currently being performed by Real Party-In-Interest as an adjunct professor and address the extent Real Party-In-Interest's performance as an adjunct professor establishes fitness to teach and associate with

students in the capacity as a full professor at Merced Community College; (2) perform an analysis using the *Morrison* factors to evaluate the impact of the alleged unfitness on Merced Community College; and (3) perform an analysis using the *Morrison* factors to determine the extent to which a 100% remote schedule might mitigate any impact Real Party-In-Interest's alleged unfitness might have on Merced Community College. The Court refers the Office of Administrative Hearings to the decision in *San Dieguito Union High School District v. Commission on Professional Competence* (1986) 174 Cal.App.3d 1176, 1182-1184 for guidance in the application of the *Morrison* factors where the alleged unfitness results from physical absence from premises.

# SUPERIOR COURT OF CALIFORNIA COUNTY OF MERCED Limited Civil Hon. Mason Brawley Courtroom 9 627 W. 21st Street, Merced

Monday, November 18, 2024 1:30 p.m.

The following tentative rulings shall become the ruling of the court unless a party gives notice of intention to appear as follows:

- 1. You must call (209) 725-4111 to notify the court of your intent to appear.
- 2. You must give notice to all other parties before 4:00 p.m. of your intent to appear. Per California Rules of Court, rule 3.1308(a)(1), failure to do both items 1 and 2 will result in no oral argument. *Note*: Notifying Court Call (the court's telephonic appearance

provider) of your intent to appear does not satisfy the requirement of notifying the court.

IMPORTANT: Court Reporters will NOT be provided; parties wanting a hearing transcript must make their own arrangements.

Case No. Title / Description

24CV-01366 Marcel Nelson v. Breanna Puga

Order of Examination

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance.

24CV-03881 [Parties' names withheld pursuant to CCP § 1161.2(a)(1)]

**Unlawful Detainer Court Trial** 

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance.

24CV-04391 [Parties' names withheld pursuant to CCP § 1161.2(a)(1)]

Unlawful Detainer Court Trial

24CV-04574 [Parties' names withheld pursuant to CCP § 1161.2(a)(1)]

**Unlawful Detainer Court Trial** 

Appearance required. Parties who wish to appear remotely must contact the clerk of the court at (209) 725-4111 to seek permission and arrange for a remote appearance.

24CV-04628 [Parties' names withheld pursuant to CCP § 1161.2(a)(1)]

**Unlawful Detainer Court Trial**