LCW Liebert Cassidy Whitmore

Education Matters

News and developments in education law, employment law, and labor relations for School and Community College District Administration.

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LCW NEWS

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RETIREMENT

Statute Of Limitations in Action Against District and Retirees Begins When School Retirement System Knew or Should Have Known of Inaccurate Reporting Practices.

Over a seven-year period, the Yuba City Unified School District erroneously added retirement incentives to 54 educators' final compensation when they retired between the 2002-2003 and 2011-2012 school years. In 2012, CalSTRS audited the District and found the errors. In its audit report to the District, CalSTRS told the District to make corrections and stated CalSTRS would collect the overpayments from the retirees pursuant to Education Code Sections 24616 and 24617. Additionally, because the overpayments were based on erroneous information from the District, CalSTRS would also seek payment from the District if it was unable to completely collect from the retirees (Education Code Section 24616.5.)

The District and 47 of the retirees requested an appeal of the final audit and moved to dismiss arguing CalSTRS action was barred by the statute of limitations set forth in Education Code Section 22008. The District and retirees argued that when CalSTRS sent a letter to one of the retirees, Lavaune Bell, on October 15, 2005, it knew of all the accounting problems at issue in the audit. Therefore, they contended, CalSTRS waited too long before bringing the action against them to recoup the money.

The administrative law judge (ALJ) denied the District's and retirees' appeal and motion to dismiss. The ALJ found that the three-year statute of limitations should begin to run on the date the incorrect payment was discovered, but the 2005 letter to Bell did not establish that CalSTRS was aware of all the District's errors so that the limitations period should have started to run in 2005. The District then appealed to the superior court.

On June 17, 2016, the superior court concluded that the 2005 letter to Bell constituted actual notice to CalSTRS of all the payment errors. Therefore, the statute of limitations had expired and CalSTRS could not collect any of the overpayments. On September 6, 2016, CalSTRS appealed to the Court of Appeal.

The Court of Appeal ultimately found the 2005 letter did not demonstrate that CalSTRS had actual notice regarding all errors the lawsuit addressed. Rather, the 2005 letter raised a question of whether CalSTRS should have

investigated the District's reporting practices generally when it discovered the single error noted in the 2005 letter to Bell. The Court examined legislative intent and determined that *inquiry* notice, or notice that existing information would prompt an ordinarily prudent person to investigate the issue further, was sufficient to start the limitation period contained in Education Code section 22008 subdivision (c). The ALJ and superior court did not address whether CalSTRS had inquiry notice in 2005, so the Court of Appeal reversed the decision of the superior court and sent the case back to the superior court to conduct further proceedings to determine if CalSTRS had "inquiry notice" of the errors in 2005.

Yuba City Unified School District v. California State Teachers' Retirement System (2017) ___ Cal.App. ___ [2017 WL 6421385].

Statute of Limitations for School Retirement System's Claims Against District and Retirees is Triggered with Each Periodic Payment of Retirement Benefits Made by the System.

The Salinas Unified High School District and its teachers' union entered into a collective bargaining agreement in 1999 that purported to create a separate class of employees for teachers who elected to work an extra (sixth) period. In 2005, after three teachers retired, a District employee sent a memorandum to the Monterey County Office of Education (MCOE), which arguably alerted MCOE to the potential overpayment of retirement benefits to teachers in the District who had worked a sixth period. In December 2008, an outside auditing firm advised CalSTRS that the plaintiffs, a group of eleven retired teachers, were overpaid for several years due to the District's improper inclusion of certain earnings in the calculation of their monthly benefits. In July 2010, CalSTRS directed the District to correct its calculations and repay CalSTRS. The retirees and the District appealed the 2008 audit findings and requested an administrative hearing. In April 2012, before any such hearing, CalSTRS began reducing the retirees' monthly payments.

The retirees and District argued that CalSTRS was barred from this action due to the statute of limitations. In February 2013, an administrative law judge (ALJ) rejected the challenges and confirmed that the retirees had been overpaid in the past and that their monthly benefits should be reduced.

The Appeals Committee of CalSTRS (Committee) reviewed the ALJ's order and also decided in CalSTRS's favor. The retirees petitioned the superior court, and it ordered CalSTRS to resume paying the teachers at the original monthly amounts because CalSTRS's claims against the retirees were time-barred.

CalSTRS appealed. The Court of Appeal considered whether the three-year statute of limitations from Education Code Section 22008 applied to prevent CalSTRS from bringing an action to require the District and retirees to repay the overpayment. Under section 22008 subdivision (c), "[i]f an incorrect payment is due to lack of information or inaccurate information regarding the eligibility of a member, former member, beneficiary, or annuity beneficiary to receive benefits under the Defined Benefit Program or Defined Benefit Supplement Program, the period of limitations shall commence with the discovery of the incorrect payment."

The Court concluded that "discovery" means the date CalSTRS either actually discovered or should have discovered with reasonable diligence the incorrect payment to the teachers. The Court determined that August 18, 2005, the date of the District's memorandum to the MCOE, was the date that triggered the beginning of the statute of limitations because the memorandum gave CalSTRS (through MCOE) notice of the overpayment issue. Additionally, the Court determined that CalSTRS commenced the action against the teachers on July 6, 2012, when it filed the statement of issues to initiate the administrative proceeding.

Ultimately, the Court of Appeal ruled that only the payments due more than three years

prior to CalSTRS's commencement of the action in 2012 were barred by the statute of limitations, so a portion of its action concerning overpayments was not time-barred. The Court of Appeal reversed the trial court's judgment that CalSTRS's claims regarding incorrect monthly pension benefits to the retirees were completely time-barred. The Court directed the trial court to consider and decide defense arguments previously raised by the retirees but not yet considered by the trial court due to the original ruling that nullified the need for additional defense arguments.

Baxter v. California State Teachers' Retirement System (2017) 18 Cal.App.5th 340.

LITIGATION

Plaintiffs May Argue That a Public Agency Cannot Raise Plaintiffs' Non-Compliance with the Government Claims Act as a Defense Where the Plaintiffs had Allegedly Been Misled Into Believing They Had Followed the Law.

Douglas Morales and Jennalyn Santos were driving in Los Angeles when a Los Angeles School Police Department (LASPD) vehicle allegedly ran a red light and struck them, causing severe physical injuries that required hospitalization.

Shortly after the accident, Morales and Santos's attorney filed a claim for damages with the City of Los Angeles, but the City denied the claim and stated LASPD was not a part of the City. The attorney then filed a claim with LASPD on a form downloaded from the LASPD website and attached a copy of the original claim submitted to the City. When they filed the lawsuit against LASPD, Morales and Santos indicated they had complied with the Government Claims Act, a state law that has very specific timing requirements for filing a claim against a public agency. Morales and Santos later filed an amended complaint to correct the name of the employee driving the LASPD vehicle and add the Los Angeles Unified School District, who insured the LASPD vehicle, as a defendant in the case.

LAUSD filed a motion asking the court to dismiss the case because Morales and Santos failed to comply with the Government Claims Act. Morales and Santos opposed LAUSD's motion, arguing that LAUSD should be prevented from arguing they did not comply with the Act as a defense, because LAUSD and its employees misled them to believe that LASPD was a separate public entity and directed them to file a claim with LASPD instead of LAUSD. Morales and Santos argued that LASPD directed their attorney to submit the claim to LASPD on a form available on LASPD's website, and neither the form nor website made it clear that LASPD was actually a part of LAUSD. LAUSD claimed Morales and Santos could not make that argument because they originally stated they complied with the Government Claims Act instead of claiming they were excused from compliance. Additionally, LAUSD argued the statement of its employee who directed Morales and Santos to submit the form could not be submitted as evidence, and that Morales and Santos's reliance on his statement was not reasonable.

The trial court rejected LAUSD's contention that Morales and Santos were barred from raising their argument, but found Morales and Santos did not comply with the Government Claims Act and there was no evidence that LAUSD misled them. Morales and Santos appealed.

The Court of Appeal found that Morales and Santos could raise the argument that LAUSD is prevented from claiming they did not comply with the Government Claims Act. The Court of Appeal found that Morales and Santos presented evidence that raises a question of fact whether LAUSD misled them or concealed the fact that it was the correct public agency to receive a claim under the Government Claims Act. Ultimately, the Court of Appeals reversed the trial court's dismissal of the case and awarded Morales and Santos their cost on appeal.

Santos v. Los Angeles Unified School District (2017) 17 Cal. App.5th 1065.

Employee's Grievance Does Not Satisfy the Requirement of the Government Claims Act and the Futility Doctrine Does Not Provide an Exception to the Requirements.

Cassidy Olson ("Olson") was an employee of Manhattan Beach Unified School District (MBUSD) who served as a history teacher and head baseball coach for Mira Costa High School. In September 2012, parents of some players filed a complaint with MBUSD alleging Olson engaged in abuse behavior, bullying, and hazing of players. MBUSD conducted an investigation which determined the claims of abuse were unfounded based on interviews of almost 70 players. The investigative report recommended that Olson be retained as the baseball coach and counseled on his coaching expectations. MBUSD Superintendent Michael Matthews allegedly rewrote the report in December 2012 and omitted the investigators' recommendation and some favorable comments. Shortly after, MBUSD prohibited Olson from attending baseball games or practices or having contact with players after 3:00 pm until March 25, 2013.

In late January 2013, local media outlets reported that Olson was accused of mistreating baseball players. MBUSD did not refute the story or offer any contrary information. On February 25, 2013, Olson requested that MBUSD make the original report available under the Public Records Act, as he intended to use it to refute the media reports. MBUSD allegedly denied the report existed.

On March 4, 2013, the attorney for the complaining parents filed a complaint with the commission on teacher credentialing (CTC), asserting that MBUSD had not disciplined Olson properly and that he should be dismissed. The CTC initiated an investigation into Olson's conduct, and requested that MBUSD forward documents related to Olson for its review. Matthews sent the CTC Olson's file and included the rewritten report. On October 12, 2013, Olson discovered that MBUSD had sent the rewritten report to CTC. On December 3, 2013, the CTC recommended Olson's teaching certificate be suspended for 30 days. On January 2, 2014, Olson requested reconsideration, and on January 31, the CTC reaffirmed its decision.

Olson sued asserting that MBUSD's revision of the investigators' report and its production of the revised report to CTC constituted defamation and deceit, and MBUSD and Matthews engaged in deceit by "suppressing" the original report. Olson also claimed that his filing of a grievance against MBUSD constituted substantial compliance with the requirements of the Government Claims Act, a state law that has very specific timing requirements for filing a claim against a public agency. Olson did file a grievance with MBUSD in accordance with the collective bargaining agreement and arbitration on the grievance was pending. Alternatively, Olson contended that he should be excused from filing a claim with MBUSD, as it would have been futile to do so.

MBUSD argued that Olson only filed a grievance, which does not satisfy the requirements of the Government Claims Act nor was he excused from complying with the Act. Olson argued his grievance disclosed sufficient information to MBUSD about his claim, and it was clear that MBUSD had predetermined the outcome of the grievance. The trial court ruled in MBUSD's favor and found Olson's grievance did not comply with the Government Claims Act and the futility doctrine was inapplicable. Olson appealed.

On appeal, Olson again argued that he was excused from complying with the Government Claims Act because (1) his filing of a grievance substantially complied with the claim filing requirements; (2) he put MBUSD on notice that he attempted to file a valid claim and that litigation would result if it was not resolved; (3) it would have been futile, as it was clear that MBUSD would deny his claim. The Court of Appeal affirmed the trial court's ruling that Olson failed to comply with the requirements of the Government Claims Act and that his

noncompliance was not excused. In agreeing with the trial court, the Appeal Court found that Olson did not identify a case that applied the futility exception to the claim filing requirement, the claim filing requirement was not an administrative remedy, and application of the futility doctrine conflicted with the purposes of the claim filing requirement. Furthermore, the Court found that even if the futility doctrine did apply, Olson did not allege facts demonstrating futility.

Olson v. Manhattan Beach Unified School District (2017) 17 Cal.App.5th 1052.

PERSONNEL COMMISSIONS

Personnel Commission has a Mandatory Duty to Investigate Charges Made Against a Merit-System Employee, but it is Not Required to Conduct a Pre-Hearing Investigation, and the Investigation can be Conducted During the Course of the Hearing.

Prior to April 2008, Rodger Hartnett was a claims coordinator with the San Diego County Office of Education (SDCOE). The SDCOE terminated his employment, and Harnett sued the SDCOE and individual SDCOE employees for wrongful termination in violation of public policy, civil conspiracy to commit wrongful termination, and intentional infliction of emotional distress. Hartnett alleged he was wrongfully terminated as a result of the SDCOE's failure to accommodate his "visual processing impairment" disability and in retaliation for his investigation of allegedly illegal practices involving the SDCOE's panel attorneys.

Hartnett filed a claim with the SDCOE's personnel commission. He argued he was a permanent classified public employee denied due process and requested to be reinstated to his position with back pay pending completion of the Commission's review. The Commission conducted a hearing and affirmed his dismissal. In a second claim filed after the Commission's June 2008 decision, Hartnett challenged the Commission's jurisdiction, the fairness and legality of its proceedings, and the sufficiency of its findings.

The trial court ruled the Commission did not follow the requirements of Education Code Section 45306 because it failed to conduct an investigation prior to the hearing, thus Hartnett was entitled to reinstatement and back pay. The SDCOE appealed the ruling, reinstated Hartnett, put him on administrative leave with pay, gave him instructions not to report back to work, and tendered back wages. The SDCOE contended that Hartnett had not asked for reinstatement and back pay in his second claim, so the court was not allowed to order those benefits nor was Hartnett entitled to them.

In response, the trial court reopened the proceedings to take evidence on the amount of back pay owed Hartnett over the SDCOE's objections. Following a hearing, the court awarded Hartnett $234,703.55 in back pay, interest and health care premium reimbursement. The SDCOE appealed.

Under Education Code Section 45306, the power to dismiss merit system employees is vested in a school district's governing board, which is required to have reasonable cause to do so. The governing board's power is subject to the right of appeal to the personnel commission who reviews the board's action. Within certain time periods, written charges must be filed with the commission and a copy provided to the employee, who may appeal to the commission. Upon investigation and after a hearing at the employee's request, the commission makes its decision, which is not subject to review by the governing board. If the commission sustains the employee, it orders reinstatement and may order back pay.

The commission's obligations following an employee's appeal are referenced in Education Code Section 45306, which provides in part: "The commission shall investigate the matter on appeal and may require further evidence from

either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense." Additionally, the commission may "conduct hearings, subpoena witnesses, require the production of records or information pertinent to investigation, and may administer oaths." (Education Code, § 45311.)

The Court of Appeal investigated the legislature's intent when it drafted the law and found the commission is required to conduct an investigation. While a commission has discretion to forego a hearing if the employee does not request one, it must conduct a hearing upon the employee's request. If an employee foregoes a hearing and the commission elects not to conduct one, the commission must still investigate the matter to substantiate the charges. However, Education Code Section 45306 is silent on whether the commission's investigation of the charges may be conducted at the hearing and how it must be conducted. The merit system scheme gives the commission broad discretion in conducting hearings and investigations.

In this case, the commission conducted a hearing over the course of four days, took evidence, issued subpoenas, weighed the evidence presented by both sides, and issued a 21-page statement of findings and decision. Its findings state that both sides were given the opportunity to present oral and documentary evidence, cross-examine witnesses, and make oral and written arguments. Hartnett was either present or chose not to be present and represented via counsel. Section 45306 does not mandate that an investigation and hearing be independently conducted, so the commission satisfied its duty to investigate. Accordingly, the Court of Appeal reversed the trial court's judgment, which was based solely on the ground that the commission "did not proceed in the manner required by law because it failed to conduct an investigation prior to the hearing as required by Education Code section 45306." Furthermore, the Court ruled that a commission's investigation conducted outside of a public hearing does not violate the Ralph M. Brown open meetings act.

Hartnett v. San Diego County Office of Education (2017) ___ Cal.App. ___ [2017 WL 6379442].

STUDENT DISCIPLINE

School Officials Include School Resource Officers and Backup Officers. Removing Student From Class to Detain and Search Him for a Weapon Based on Tip is Reasonable Under Fourth Amendment.

An Assistant Principal of a comprehensive high school received a text from a student alerting him that a student at the credit recovery school brought a gun to class. The Assistant Principal called the police and immediately went to the credit recovery school to alert the school's Principal. Shortly after he arrived, the School Resource Officer (SRO) met him. The SRO called for a backup officer. The Assistant Principal contacted the student tipster for more information and learned that the student tipster had received a message via the social media application SnapChat with a video showing K.J., sitting in a classroom, displaying a gun and a magazine clip. The tipster also confirmed the K.J.'s gender, race, hair style, and that he was a former student at the comprehensive high school.

Once the backup officer arrived to the school, he, along with the SRO and Assistant Principal went into K.J.'s classroom and escorted him into the hallway. The SRO removed the K.J.'s backpack and handcuffed him. The search uncovered a bullet magazine in K.J.'s jeans and a gun in the shorts under his jeans.

The local District Attorney petitioned to have K.J., a minor, declared a ward of the juvenile court. K.J. argued the School illegally searched him and found the gun, so it should not be evidence in the case against him. The juvenile court adjudicated K.J. a ward of the court, finding that he possessed a weapon on school grounds. K.J. appealed.

On appeal, K.J. contended that the detention and search violated his Fourth Amendment right to

be free from unreasonable search and seizure because the SRO who handcuffed and searched him did not have reasonable suspicion that criminal activity was afoot or that he was armed and dangerous.

The Fourth Amendment protects students on a public school campus against unreasonable searches and seizures. Public school officials "must therefore respect the constitutional rights of students in their charge against unreasonable searches and seizures." In practice, a public school student's legitimate expectation of privacy is balanced against the school's obligation to maintain discipline and to provide a safe environment for all students and staff. Accordingly, a school official may detain a student for questioning on campus, without reasonable suspicion, so long as the detention is not arbitrary, capricious, or for the purpose of harassment. This standard is lower than the "reasonable suspicion" standard that police officers must have to detain and search a person.

Here, K.J. argued that because a backup officer from the local police department was involved in his detention and search, the "arbitrary and capricious" standard does not apply because the officer was not a school official. The Court of Appeal ruled that for purposes of Fourth Amendment analysis, "school officials," include police officers such as SROs, as well as the backup officers who are called to assist them. Additionally, K.J.'s detention was lawful because substantial evidence showed it was not arbitrary, capricious, or for the purpose of harassment.

K.J. also tried to argue that his detention was intrusive because he was escorted out of class by two police officers who immediately placed him in handcuffs and searched him. Given the information the school officials knew, the court ruled that the methods used during the detention were reasonably necessary and not intrusive.

Finally, K.J. argued that the search was not "justified at its inception" because there were no "reasonable grounds" for suspecting that he was carrying a gun. In particular, K.J. reasoned that the information leading to the search came from an anonymous source and was therefore unreliable because there were no means of testing the informant's knowledge or credibility. A search is justified at its inception if under "ordinary circumstances" the information constituted "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."

In this case, the anonymous tip came from a student at the comprehensive high school, who sent a text message to the Assistant Principal. The student tipster provided additional details about K.J., which allowed school staff to identify only two students who fit the description. When provided names of the two students, the student tipster confirmed the K.J.'s name. Yet, K.J. insisted that the search was not based on reasonable suspicion because neither the Assistant Principal nor the SRO watched the social media video before he was searched. The Assistant Principal's and SRO's failure to watch the video prior to contacting the K.J. did not diminish the reliability of the information provided by the student tipster. Furthermore, the danger alleged in the tip was so great it justified a search even without a showing of reliability.

Ultimately, the Court of Appeal affirmed the juvenile court's ruling because it found that reasonable grounds existed for suspecting that a search of K.J. would turn up evidence that he was carrying a gun, and the search was consistent with the Fourth Amendment.

In re K.J., (2017) ___ Cal.App. ___ [2017 WL272694].

BUSINESS & FACILITIES

New Bid Limit of $90,200 for School and Community College District Contracts.

As of January 1, 2018, the bid threshold over which community college district and school governing boards must competitively bid and award certain contracts was raised to $90,200. This threshold level applies to the following types of contracts:

- Purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district;
- Services, other than construction services; and
- Repairs, including maintenance as defined in Public Contract Code (PCC) section 20656, which are not public projects as defined in PCC section 22002 subdivision (c).

PCC sections 20111 subdivision (a) and 20651 subdivision (a) require school and community college district governing boards, respectively, to competitively bid and award any contracts involving an expenditure of more than $50,000, adjusted for inflation, to the lowest responsible bidder. The State Superintendent of Public Instruction and the Board of Governors of the California Community Colleges are required to annually adjust the $50,000 amount specified in the PCC. Both entities have increased the bid limit 2.20% to $90,200 for 2018.

Contracts for construction of public projects, as defined in PCC section 22002(c), still have a bid threshold of $15,000. Public projects include contracts for reconstruction, erection, alteration, renovation, improvement, demolition, and repair. This $15,000 threshold is not adjusted for inflation.

The notice adjusting the bid limits is posted on the California Department of Education's website. The California Community Colleges Chancellor's Office also posted its notice adjusting the bid limits.

Enviormental Impact Report That Describes Alternate Projects Under Consideration Does Not Satisfy CEQA.

In 1984, the Department of Parks and Recreation ("Department") acquired 777 acres of land in the Lake Tahoe Basin. The land was divided into two contiguous units: 608 acres designated as the Washoe Meadows State Park to preserve and protect wet meadows and habitat (the "State Park") and the remaining acreage for the continued operation of an existing golf course (the "Recreation Area"). The division was necessary because golf courses are not allowed in state parks.

In 2003, studies identified the portion of the Upper Truckee River that runs through the State Park and Recreation Area as one of the worst contributors to sediment running into Lake Tahoe. The layout of the golf course had altered the course and flow of the river, which in turn contributed to a deterioration of the habitat and water quality.

The Department began exploring restoration and reconfiguration options. In August 2010, the Department prepared and circulated a draft environmental impact report ("Draft EIR") for the "Upper Truckee River Restoration and Golf Course Reconfiguration Project." The stated purpose of the proposed project was to reduce the river's discharge of nutrients and sediments that diminish Lake Tahoe's clarity, while providing access to public recreation opportunities. The Draft EIR described the following five alternatives for the project: Alternative #1: no project; Alternative #2: river restoration with reconfiguration of the 18-hole golf course; Alternative #3: river restoration with a 9-hole golf course; Alternative #4: river stabilization with continuation of the existing 18-hole golf course; and Alternative #5: restoration of the ecosystem and the decommissioning of the golf course. The Draft EIR did not identify a preferred alternative.

In September 2011, the Department released the final environmental impact report ("Final EIR") for the project, in which it identified "a refined version of Alternative 2" as the proposed preferred alternative. In January 2012, the Department certified the adequacy of the Final EIR and approved the project.

A citizens group filed a lawsuit challenging the approval of the project under the California Environmental Quality Act ("CEQA"). The group argued the Draft EIR violated CEQA because it did not identify a proposed project, but described five very different alternatives. The trial court agreed with the citizens group and directed the Department to set aside its approval of the project.

The Department appealed the trial court's decision. On appeal, the Court affirmed the trial court's decision. The Court stated that an EIR is the "heart" of CEQA and confirmed that an accurate, stable, and finite project description is the threshold requirement of an informative and legally sufficient EIR. The Court found that the Draft EIR in this case functioned more as a scoping plan, which should be formulated *before* completion of a draft EIR. The Court explained: "To ensure informed public participation in the CEQA process, agencies are required to circulate a draft EIR for public comment. The draft EIR in this case did not identify a proposed project, but described five very different alternative projects then under consideration. Consequently, the public was not provided with an accurate, stable and finite project description on which to comment."

Washoe Meadows Community v. Department of Parks and Recreation (Nov. 15, 2017) __Cal.App.5th __ (2017 WL 5476487)

RETALIATION

Paid Administrative Leave May Constitute Adverse Employment Action.

The California Court of Appeal allowed an employee's whistleblower retaliation claim to proceed on the theory that being placed on paid administrative leave constituted an adverse employment action.

The employee in the case, Mary Ann Whitehall, was a social worker for the San Bernardino County Children and Family Services ("CFS"). CFS assigned Whitehall to investigate the living conditions of four children who were placed in protective custody following the death of their infant sibling under suspicious circumstances. Whitehall collected evidence - including law enforcement and medical reports, and photos - that suggested that the children had been neglected and physically abused. The deputy director of CFS instructed Whitehall to withhold certain photos and alter others. Whitehall then learned CFS had not provided a complete police report to the court that was handling the children's case. Whitehall provided the Deputy County counsel a copy of all photos she had obtained from the police. CFS then removed Whitehall from the case and instructed her not to discuss the case with the new investigator (contrary to normal practice). Around the same time, CFS fired the social worker, who investigated the death of the infant, for allegedly exaggerating the poor condition of the children's home, even though his description was corroborated by another social worker.

Concerned about possible liability for having submitted altered photos in the case, Whitehall then filed a motion to inform the juvenile court that CFS had perpetrated a fraud upon the court. At this point, CFS placed Whitehall on paid administrative leave pending investigation of whether she violated county rules and policies prohibiting disclosure of confidential information when she gave the photos to the Deputy County Counsel, and filed the motion in the juvenile

court. After two months on paid administrative leave, the County decided to fire Whitehall, but she resigned to avoid the termination. She then sued, claiming that the County violated Labor Code section 1102.5, which prohibits employers from retaliating against an employee who discloses improper government activity.

The appellate court found that the paid administrative leave constituted an adverse action under the circumstances of the case, and denied the County's motion to strike Whitehall's claims. The court did not find that paid administrative leave always constitutes an adverse employment action; instead, each case turns on its own facts. As the court noted,

> *"The impact of an employer's action in a particular case must be evaluated in context. ...an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claims."*

After Whitehall, when an employee is placed on paid administrative leave, courts will look at the effects of the paid administrative leave to determine whether being away from the workplace is "a substantial adverse change in the terms and conditions" of employment. Other factors courts may consider to determine whether paid administrative leave is an adverse action may include: loss of promotional opportunities, loss of specialty pay, loss of opportunities to gain work experience, whether the employer had a legitimate reason to place the employee on leave, and whether the employee participated in protected activity prior to when he or she was placed on paid administrative leave.

Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352.

NOTE:

The Whitehall *case requires employers to give greater consideration to the circumstances in which paid administrative leave could be considered an adverse action. Here, two months of paid administrative leave pending an investigation was held to be an adverse action because there was little to investigate about Whitehall's disclosure of accurate information to either the deputy county counsel who was handling the case, or to the juvenile court. A more in- depth discussion of the authorities governing paid administrative leave in California is available here: http://bit.ly/2CYGlJM.*

Employer Reasonably Relied on Workplace Investigation When It Decided to Terminate Manager.

The California Court of Appeal dismissed a lawsuit brought by a manager who claimed he was wrongfully terminated. In *Jameson v. PG&E*, PG&E moved for summary judgment on the basis that it terminated Jameson for good cause. It was PG&E's burden to show it acted reasonably and in good faith after making an appropriate investigation into Jameson's actions. The appellate court affirmed that employers may defend against wrongful termination claims by showing that the termination decision was made in good faith after an appropriate investigation, and for reasons that are not arbitrary or pretextual.

In reaching this conclusion, the appellate court reiterated well-settled legal principles relating to employer reliance on workplace investigations. The appellate court noted that on a motion for summary judgment, courts will not reexamine the underlying facts whether, for example, Jameson actually retaliated against an employee. Rather, the court will consider whether the employer had reasonable grounds for believing Jameson retaliated, after an appropriate investigation. Nor are employers required to use a specific investigation method, as long as the method used is fair. The court cited the California Supreme Court decision in

Cotran v. Rollins Hudig Hall Intern. Inc. which held that fairness in the investigation process "contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial."

In this case, the appellate court reiterated the factors that courts will consider when deciding whether the standard for investigative fairness is met.

"Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in misconduct."

The appellate court affirmed the trial court's determination that PG&E's investigation met all these criteria, such that PG&E's decision to terminate Jameson was made in good faith.

In this case, Paul Nelson, a PG&E employee responsible for supervising the testing of gas transmission pipes, reported a safety concern. Nelson was then assigned to another testing site. Nelson complained to PG&E management representatives that Jameson and others were retaliating against him for making a health and safety report.

In response to Nelson's complaint of retaliation, PG&E retained an outside investigator. The investigator interviewed ten people over a two-month period. The investigator also interviewed several individuals who, per Jameson, would support Jameson's claim that he removed Nelson from his construction sites because of Nelson's poor performance.

The investigator issued a report that found Jameson retaliated against Nelson in violation of PG&E's code of conduct. Specifically, the report found that Jameson began complaining about Nelson's performance only after Nelson reported unbarricaded pressurized gas lines, and that Jameson did so in retaliation for Nelson's report of that unsafe condition. The conclusion was based on information gained during the investigation. For example, the witnesses offered by Jameson contradicted both his claims that Nelson's performance was poor, and that Jameson had expressed concerns with Nelson's performance before Nelson made his report. The investigator also found that the evidence suggested that Jameson falsely claimed that Nelson had conflicts with PG&E contractors to get Nelson transferred out of the area of Jameson's construction sites. PG&E considered the investigation report and decided to immediately terminate Jameson.

The court thus rejected Jameson's claims that a disputed issue of material fact existed simply because the investigator did not interview every witness Jameson offered. The investigator provided valid reasons for not interviewing those witnesses, and there was no evidence the investigator failed to interview those witnesses for an improper reason. Thus, the trial court properly granted summary judgment for PG&E and the appellate court affirmed the trial court.

Jameson v. Pacific Gas and Electric Company (2017) 16 Cal. App.5th 901.

NOTE:

Jameson *and* Cotran *stand for the principle that courts will not second guess whether an employer's investigation could have been more thorough or effective, as long as the investigative process is inherently fair. If this criterion is met, an employer's investigative efforts may serve a basis for defending against an employee's wrongful termination claim. LCW has many attorneys who can conduct sound workplace investigations and/or advise your agency about how to respond to an investigation report.*

MILITARY LEAVE

Pilot is Awarded Signing Bonus He Would Have Earned Had He Not Taken Military Leave.

The Ninth Circuit federal appellate court confirmed that courts must consider an employee's career trajectory (escalator principle), and what position the employee would have attained if not for taking leave for military service, in determining entitlement to employment benefits.

The case involved claims brought under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The USERRA is a federal statute designed to ensure that employees are not adversely affected in their employment when they take leave to serve in the military.

Dale Huhmann worked for Federal Express (FedEx) as a pilot. A pilot's pay grade is determined by the type of aircraft the pilot flies, and the pilot's role in flying the aircraft. Before he departed for military service, Huhmann was selected to train as a first officer on an MD-11 aircraft; an assignment that would qualify him for a higher pay grade.

Training for the MD-11 pilot position was to begin on February 19, 2003. However, on February 7, 2003, Huhmann was called to active Air Force duty: he was deployed on August 31, 2003. At the time Huhmann began his military service, he was still piloting a Boeing 727. He did not return to FedEx active status until December 1, 2006, more than three years after he would have begun training on the MD-11.

While Huhmann was serving in the U.S. Air Force, FedEx issued a letter to the labor union representing Huhmann and other pilots. FedEx offered a signing bonus to FedEx employees upon ratification of the parties' proposed collective bargaining agreement. The bonus would be paid to pilots employed on the day the CBA was signed, including pilots on military leave. A pilot's signing bonus would be determined in part by the class of aircraft on which they were a crew member. The signing bonus for a crew member on a 727 aircraft was $7,400, while the bonus for crew on an MD-11 aircraft was $17,700.

Upon Huhmann's return from military duty, FedEx paid him a $7,400 signing bonus, not the $17,700 bonus. Huhmann restarted his training to become a pilot on the MD-11. Some pilots are unable to successfully complete the training program. However, Huhmann completed the required ground school sessions, flight simulator trainings and "check ride" in which an instructor observed his flight performance. He was approved to fly the MD-11 on February 22, 2007.

Huhmann sued FedEx, claiming that FedEx violated the USERRA when it denied him the $17,700 bonus he would have earned had he not served in the military, and completed the MD-11 training prior to deployment.

The key question the court decided was whether Huhmann was denied any "benefit of employment" due to his military service, in violation of the USERRA. An employee making such a claim is responsible for proving that their military service status was a "substantial or motivating factor in the adverse employment action"; here, the adverse action was Fed Ex's decision to pay a lesser bonus amount. An employer can defend a USERRA claim by showing that it would have made the particular decision at issue regardless of whether the employee served in the military.

The trial court applied a two-step analysis to determine whether Huhmann was entitled to be paid the $17,700 bonus that upon his return from service: the "escalator principle" and the "reasonable certainty" test.

First, under the escalator principle, the court reasoned that under USERRA, a member of the military should not be removed from the normal progress of his or her "career trajectory" but must be returned to the same position of employment in which he or she would have been employed if

their employment had not been interrupted by military service. (38 U.S.C. § 4313(a)(2)(A).) This principle presumes that employees will advance upward in their career trajectories as predictably as if they were standing on an upward moving staircase.

Second, the trial court applied the "reasonably certain test" which asks two questions: 1) Whether, looking forward, it is reasonably certain that employees who complete training regularly advance in their career, and 2) Whether in hindsight, an employee did in fact advance, or would have probably advanced, if training or employment was not interrupted by military service.

The federal trial court found that, applying these standards, Huhmann was entitled to the $17,700 bonus applicable to MD-11 pilots. Under the first, forward-looking aspect of the reasonable certainty test, the court found that while qualifying to pilot an MD-11 aircraft is challenging and some trainee pilots fail, trainees are provided multiple opportunities to pass exams. Under the second prong, Huhmann did in fact pass his training exams upon returning from military service and began working as an MD-11 pilot after reemployment with FedEx. The trial court therefore found for Huhmann – FedEx should have paid him the higher bonus.

On FedEx's appeal, the Ninth Circuit confirmed that the trial court appropriately applied this two-step analysis to find that Huhmann was entitled to the higher bonus amount. This is so, because the escalator principle and reasonable certainty test are incorporated into federal regulations. Additionally, Section 4311 of the USERRA explicitly states that "A person who… has an obligation to perform service in a uniformed service shall not be denied employment, reemployment,…or any benefit of employment by an employer on the basis of that membership…performance of service…or obligation." 38 U.S.C. § 4311 (a). The USERRA defines a bonus as a benefit of employment. It states, a "benefit of employment" includes "any advantage, profit, privilege, gain, stats, account or interest…that accrues by reason of an employment contract or agreement…and includes…bonuses." (38 U.S.C. § 4303(2).)

Thus, the plain language of the USERRA prohibited FedEx from denying Huhmann the bonus, an employment benefit, to which he would have been entitled had he not left employment to serve in the military.

Huhmann v. Federal Express (2017) 874 F.3d 1102.

NOTE:

Agencies should be aware that the California Military and Veterans Code (MVC) also governs public employees who take leave to serve in the military. The MVC and USERRA govern issues such as: an employee's entitlement to health insurance, vacation and sick leave benefits while on military leave; whether or not an employee is entitled to reemployment upon returning from military service; and what obligation, if any, an employer has to pay an employee's salary while the employee is on leave to complete military service. As this case illustrates, a failure to complete a qualifying test because of military service is an insufficient reason to deny an employment benefit.

DISCRIMINATION

Employer Has Obligation to Act When It Knows or Should Have Known That a Drunken Trespasser was Harassing Employees.

A hotel housekeeper asserted viable claims under the Fair Employment and Housing Act ("FEHA") when she claimed that her employer failed to take reasonable steps to prevent a trespasser from sexually harassing and assaulting her.

Under the FEHA, an employer may be liable for sexual harassment committed by a non-employee. Liability may exist if the employer, or the employer's agents or supervisors, know or should have known of the non-employee's harassing conduct, and fail to take immediate and appropriate corrective action. To determine

liability, a court will consider the extent of the employer's control over the non-employee, and any other legal responsibility over the non-employee. The FEHA also creates liability for failure to prevent sexual harassment if an employee proves a claim of harassment, and also proves that the employer failed to take all reasonable steps necessary to prevent harassment from occurring.

In this case, the employee, M.F., was working as a hotel housekeeper at Pacific Pearl Hotel ("Hotel"). A man who was not an employee or guest of the hotel walked around various buildings within the hotel premises. A hotel manager saw the trespasser walking around drunk and with a beer in his hand. The manager later saw the trespasser around various areas on the hotel premises, including a hotel balcony, several floors of a hotel building and a hotel elevator. The manger did not ask the trespasser to leave or report the trespasser to authorities.

While on the premises, the trespasser approached two housekeepers and made sexual advances toward them. The second housekeeper reported the trespasser to housekeeping management. Housekeeping management alerted other housekeeping mangers to the trespasser's activities and location. Various Hotel managers and supervisors attempted to check hotel buildings to ensure the safety of the Hotel's housekeepers. However, they did not check the floor of the building in which M.F. was working and did not attempt to locate her to ensure her safety. After he had been on the Hotel premises for about an hour, the trespasser forced his way into the hotel room where M.F. was working and sexually assaulted her over a period of several hours. No one from the Hotel attempted to locate M.F. during this period of time. When M.F. phoned Hotel housekeeping after the trespasser had finally departed, M.F.'s call went unanswered. M.F. subsequently phoned law enforcement to come to her aid.

M.F. asserted that the facts she presented in her complaint were enough to state a FEHA claim against the Hotel. The Hotel asserted that it could not be liable because M.F. did not present enough facts to show that the Hotel knew or should have known that the trespasser would sexually harass M.F. before the time the trespasser appeared at the Hotel property. However, as the Court noted, the Hotel did become aware of the trespasser's harassing conduct once he was on the Hotel premises, and certainly after he harassed other housekeeping employees. At that point, the court found, the Hotel had a legal obligation to take remedial measures to prevent the trespasser's harassment of M.F.

The court further noted that once an employer is informed of sexual harassment, as the Hotel was in this case, the employer must take immediate corrective action that is reasonably calculated to end the current harassment as well as deter future harassment. This means an employer may have to take temporary initial steps to address the situation while it determines whether the harassment complaint is justified, and then adopt permanent remedial steps to prevent future harassment. The court therefore rejected the Hotel's argument that it was relieved of its legal obligations to protect M.F. from harassment merely because the trespasser's initial harassing conduct wasn't directed toward her. The Hotel knew of the trespasser's abusive, harassing conduct toward women, and it therefore had an obligation under FEHA to take steps to protect potential future victims, including M.F.

Because the appellate court found that the trial court had incorrectly dismissed M.F.'s FEHA claims, it reversed the trial court and allowed M.F.'s claims to proceed.

M.F. v. Pacific Pearl Hotel Management LLC (2017) 16 Cal. App.5th 693.

NOTE:

This case only addressed whether M.F.'s complaint asserted viable FEHA claims. Whether an employer knows or should have known of a non-employee's sexually harassing conduct, or takes adequate measures to prevent future harassment depends on the facts of each case. Public employers

need to protect employees from harassment that originates from members of the public or vendors who come onto the public employer's property.

Court May Award Additional Money to a Prevailing Title VII Litigant to Account for Tax Liability on Lump Sum Damages Award.

If an employee prevails in a Title VII employment discrimination claim and recovers damages in the form of a lump sum payment, the trial court judge has discretion to adjust the award upward to account for the income taxes that will be assessed against the employee – a practice that is also known as a "gross up".

In this case, the employee, Arthur Clemens, prevailed on his claims that his employer committed race discrimination and retaliation in violation of Title VII. The jury awarded Clemens lost wages and benefits and damages in a single lump sum payment. However, Title VII back-pay awards are taxable as income. Clemens therefore requested additional money to make up for the income tax liability that he would experience due to receiving the jury's award. The trial court denied Clemens' request, but the Ninth Circuit reversed the trial court on Clemens' appeal.

On appeal, the Ninth Circuit held that a judge hearing a Title VII case has authority to award a "gross up" in the interest of equity, to put a prevailing Title VII employee in the same position he would have been in if not for the employer's discriminatory action, and also to account for the tax liability that may result from a lump sum payment.

This decision does not mean that a prevailing Title VII employee is automatically entitled to an increase in a back pay award. The employee has the burden of demonstrating to the court that the employee will be assessed income tax that justifies any upward adjustment of the recovery amount. The decision whether to award a "gross up" is at the discretion of the trial court judge who may decide that a gross up is not warranted where, for example, the amount of the gross up is hard to determine or is negligible in amount.

Clemens v. Qwest, Corp. (2017) __Fed.Appx.__.

Supervisor in Harassment Litigation Must Prove Subordinate's Allegations Were "Frivolous" in Order to Recover His Defense Costs.

A supervisor is not entitled to recover attorneys' fees for defending against an employee's harassment lawsuit unless the supervisor proves that the lawsuit meets the "frivolous" standard. Specifically, individual defendants in harassment cases, like employers, must show that the employee's harassment claims are "frivolous, unreasonable, or without foundation" if they are to recover their litigation costs from an unsuccessful employee plaintiff.

Elisa Lopez, sued her employer, the City of Beverly Hills ("City"), and her supervisor, Gregory Routt, for harassment based on race and national origin. The jury found in favor of the City and Routt. At the conclusion of the trial, Routt sought to utilize a provision of the law decided under the California Fair Employment and Housing Act (FEHA) that allows a prevailing defendant to recover attorneys' fees from an unsuccessful Plaintiff.

Routt argued that an individual defendant should not have to meet the same "frivolous" standard that employers have to meet. However, as the court reiterated, the FEHA requires a defendant – whether the employer or an individual defendant – to demonstrate that a harassment lawsuit has no legal or factual basis. This frivolous standard is a difficult test to meet and the trial court judge has discretion to grant, or deny a defendant's request for fees. The trial court in this case found, and the appellate court agreed, that Routt had not demonstrated that Lopez' lawsuit was unreasonable or frivolous.

The appellate court also confirmed that the FEHA allows a plaintiff to hold individual employees (such as coworkers or supervisors) personally liable for harassment, regardless of whether an employer knew or should have known of the harassing conduct. The court noted that this is consistent with the FEHA's of deterring harassment.

Lopez v. Routt (2017) 17 Cal.App.5th 1006.

NOTE:

As this case illustrates, even if an employee's allegations are weak or specious, it may not be possible to prove that the claims are also "frivolous." This case reinforces the advice that the best approach is avoid litigation altogether by refraining from any comments or conduct that are based on any employee's race, sex, age, national origin, or any other protected status.

FAMILY AND MEDICAL ACT LEAVE

Sixth Circuit Grants Summary Judgment for City on Claims of Interference with Family and Medical Leave Act Rights.

The Sixth Circuit Court of U.S. Court of Appeals, dismissed a City Manager's claim that the City of Belding, Michigan ("City") terminated her in violation of her right to take leave under the Federal Family and Medical Leave Act ("FMLA"). The court granted the City's motion for summary judgment because the manager's evidence was inadequate to show that she was terminated because she took FMLA leave, and the City provided evidence of its legitimate, non-discriminatory reason for the termination, which the City Manager did not disprove.

Under the FMLA, eligible employees of a covered entity may take job protected leave to attend to the employee's own serious health condition. The FMLA makes it unlawful for employers to interfere with an employee's attempt to exercise their rights under the FMLA.

In this case, City Manager Margaret Mullendore, was an at-will employee hired under an employment contract that allowed the members of the City Council to vote to terminate her employment, at any time, subject to certain conditions. Although the City had renewed Mullendore's contract several times, her work performance also drew criticism from several citizens. Some members of the City Council were also displeased with her leadership.

In late 2014, one Council Member announced his intention to terminate Mullendore's employment. Thereafter, in January 2015, Mullendore provided Council Members with a memorandum stating that she would be undergoing a medical procedure and that she intended to work from home for a period of time.

While Mullendore was on leave, the City Council passed a motion to terminate her employment. Mullendore sued, claiming that the Council terminated her because she took FMLA leave. The City asserted that its decision to terminate Mullendore occurred before she announced her surgery, and that the City Council made the decision to terminate her because it was dissatisfied with her work performance, and found her to be a politically divisive manager.

An employee may only prevail on a claim of an employer's interference with FMLA rights if the employee proves five elements: the employee is eligible for FMLA leave; the employer is covered by the FMLA; the employee is entitled to take FMLA leave; the employee gave notice of her intent to take FMLA leave; and the employer denied the employee FMLA leave to which the employee was entitled. Even if the employee proves all five elements, an employer may defend such a claim by providing a legitimate reason for its conduct, unrelated to the employee's request for leave. If the employer presents a legitimate reason for its decision, an employee must prove that the employer's reason is pretextual.

The court determined that, even if Mullendore's memorandum reasonably notified City Council of her desire to take FMLA leave, Mullendore

failed to present evidence that raised an issue for the jury on the question whether she was terminated because she requested FMLA leave. Mullendore's evidence merely demonstrated that she was terminated while she was on leave, not that she was terminated because she requested FMLA leave. She failed to present any evidence that showed the City's reasons for terminating her (performance concerns and political divisiveness) was a pretext for an unlawful motive to deprive her of her rights under the FMLA.

Thus, the Sixth Circuit affirmed the trial court's decision to grant summary judgment in favor of the City and dismiss Mullendore's FMLA interference claims.

Mullendore v. City of Belding (6th Cir. 2017) 872 F.3d 322.

NOTE:

This case demonstrates how important it is for an employer to promptly take action about an employee's poor performance. Had the City Councilmember delayed discussion of the performance issues in this case until after the City Manager's leave, the court might have found that the City's reasons for termination were pretextual.

CONFLICTS OF INTEREST

Right to Enforce Government Code Section 1090 Conflict of Interest Claims Extends to Taxpayers, and Not Just the Actual Parties to the Contract.

Taxpayers of a municipality have a legal right to assert claims under Government Code section 1090, which prohibits conflicts of interest in public contracting. In this case, the court of appeal confirmed that taxpayers of a municipality have a legal right, or legal "standing," to bring lawsuits to enforce Government Code section 1090, thereby reconciling somewhat divergent legal decisions on this issue.

Government Code section 1090 prohibits public officials, such as city employees, from having a personal financial interest in contracts they enter into in their official capacity on behalf of the city. Government Code section 1092 provides that a contract that violates section 1090, may be avoided by "any party."

The City of San Diego adopted an ordinance and resolution that would authorize the issuance of bonds to refinance existing bonds. A non-profit group, San Diegans for Open Government ("SDOG") sued the City, claiming that members of the City financing team who prepared the 2015 bonds held a financial interest in the sale of the bonds, in violation of Section 1090.

The trial court had found that SDOG did not have "standing" to sue the City for an alleged violation of section 1090's prohibition on conflicts of interest. The appellate court reversed the trial court, citing precedents and policy concerns which, in the court's view, required a broad reading of section 1090. The appellate court noted, for example, that the policies reflected in 1090 dictate that enforcement of section 1090 was not intended to be limited to the parties to the contract being challenged. The court also noted that many court decisions have assumed that taxpayers do not have standing to challenge contracts made in violation of section 1090 because of section 1092's reference to "any party", and without actually interpreting the law. Thus, the appellate court found, SDOG was a "party" because it had a sufficient interest in the contract to support standing to sue the City for alleged violation of Section 1090.

San Diegans for Open Government v. Public Facilities Financing Authority for the City of San Diego (2017) 242 Cal.App.4th 416.

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Jenny Denny, Associate - Los Angeles

Jenny is a former Presidential Management Fellow who worked on civil rights issues and domestic policy for Vice President Joe Biden. As a former teacher, she brings her education background to the benefit of our clients, including as author of the *Education Matters* newsletter. Jenny can be contacted at 310.981.2048 or **jdenny@lcwlegal.com.**

Victoria McDermott, Associate - Los Angeles

Victoria is an experienced litigator and has represented clients in matters ranging from employment discrimination, wage and hour disputes, wrongful termination and sexual harassment allegations. She joins our Los Angeles office and can be contacted at 310.981.2058 or **vmcdermott@lcwlegal.com.**

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Melanie Rollins, Associate - Los Angeles

Melanie brings her litigation experience to the aid of our clients as an associate in our Los Angeles office. Melanie served as a judicial extern to the Honorable Franz E. Miller of the Orange County Superior Court before turning her focus to representing clients in civil litigation including matters pertaining to wage and hour, discrimination, harassment, retaliation and wrongful termination disputes. Melanie can be contacted at 310.981.2020 or **mrollins@lcwlegal.com.**

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