LCW Liebert Cassidy Whitmore

Education Matters

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

October 2018

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LCW NEWS

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Education Matters*** should not be acted on without professional advice.

Please note: There will not be a November issue of the ***Education Matters*** newsletter.

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STUDENT DISCIPLINE

Court Upholds University's Finding that Student Cheated on Exam When Based on Reasonable Inference of Evidence and When the Discipline Process Provided a Fair Hearing for the Student.

In May 2015, the professors and laboratory manager for a biology class the University of Southern California submitted a report to the Office of Student Judicial Affairs and Community Standards. The report stated the professors believed John Doe, a student in the biology class, and a second student ("Student B") shared answers on the final exam through written notes on their examination booklets.

Administrative Review

The University advised Doe that it was charging him with violating the University's Student Conduct Code regarding academic dishonesty. The University provided him with information about the student conduct review process and asked him to schedule a meeting with the review officer.

Doe requested a copy of the report, which the University provided. The University did not provide Doe copies of the examination booklets with handwritten answers, the multiple choice answer sheet, or chart showing the faculty's comparison of answers, but the University advised Doe he could review, but not copy, these documents.

Doe met with the review officer and described what happened from his perspective. He insisted he had not cheated, accused Student B of copying Doe's answers, and stated he had not studied for the exam with Student B. The review officer also spoke to Student B who denied cheating but stated he had studied with Student B on at least one occasion. Based on the evidence, the review officer determined Doe engaged in the alleged academic violations. The University notified Doe that it was considering suspending him as a sanction because this was his second academy integrity violation.

LCW Welcomes New Partners!

Liebert Cassidy Whitmore is pleased to announce Linda Adler, Jennifer Rosner, and Max Sank have been named partners.
For more information, turn to page 14

The University advised Doe that he could have an attorney represent him in further proceedings. Later, Doe, along with his mother, reviewed his own exam booklet. Doe, along with his father, also reviewed Student B's exam booklet. Doe provided the University with the results of a polygraph exam in attempts to prove he did not share answers with Student B. Doe also submitted a character reference from a professor.

The review officer provided Doe with his written decision from the administrative review and advised him of his right to appeal to the Student Behavior Appeals Panel. The decision concluded that Doe engaged in academic dishonesty and identified specific pieces of evidence that contributed to the finding. The report also imposed a sanction of an "F" grade in the class, a two-semester suspension, and required Doe to attend and successfully complete an ethics workshop.

Appeal to the Student Behavior Appeals Panel

Doe appealed the review officer's decision to the Student Behavior Appeals Panel at the University. In the appeal, Doe argued the review officer's decision lacked evidentiary support, violated the procedural protections for students set forth in the University's Student Conduct Code, and imposed excessive sanctions. The panel rejected Doe's appeal. The Vice President for Student Affairs then reviewed the review officer's decision and the Panel's decision and approved the findings and sanctions imposed.

Petition to the Trial Court

Doe filed a petition with a trial court requesting the court review the University's decision to deny his appeal and prevent the University from enforcing sanctions against him. The trial court agreed to suspend the sanctions against Doe pending further review.

Following briefing and oral argument, the trial court issued a decision granting Doe's petition and found the University's decision to impose sanctions was not supported by substantial evidence. The trial court ordered the University to vacate its administrative decision and the sanctions imposed on Doe. However, the trial court also concluded the University had provided Doe a fair administrative hearing, because it provided Doe with clear notice of the allegations against him and he was informed of the University's written policies and procedures related to the administrative review process. Additionally, the University made all evidence it considered available to Doe, and Doe reviewed this evidence. Doe also had multiple face-to-face meetings with a representative of the University where he had the opportunity to object to the charges against him and explain his version of the facts. Finally, the trial court noted that the University fully complied with its policies and procedures and conducted a fair hearing. The University appealed.

Transcript Issue

Because the trial court prevented the University from suspending Doe, Doe completed his coursework and graduated in May 2017. However, the University refused to issue him a transcript pending resolution of its appeal. Doe filed a petition with the Court of Appeal to request the Court enforce the trial court's ruling. Doe argued withholding his degree and his transcript, which he needed to apply to medical school and to seek employment, violated the trial court's order that prevented the University from imposing sanctions against him. The University opposed Doe's petition, contending that it was not required to give Doe an "A" in the biology class while its appeal was pending. The Court of Appeal granted Doe's petition and directed the University to "(1) reinstate John Doe as a student in good standing, (2) issue a transcript showing the grade to which he would otherwise be entitled absent the allegation of cheating, (3) allow Doe to register for classes, if he would otherwise be entitled absent the cheating allegation, and (4) issue Doe a diploma, if he would otherwise be entitled to it absent the cheating allegation."

On the University's original appeal, the Court of Appeal considered whether the University "proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion."

University's Appeal

The Court of Appeal looked closely at the evidence the University relied on when making its decision regarding the academic dishonesty violations against Doe. The Court of Appeal noted the following facts: Doe and Student B sat next to each other during the final examination, had the same version of the examination although adjacent students were supposed to have different versions, answered 46 of the 50 examination questions identically, and wrote large letter answers in the margins of the examination booklets that would be visible to the students sitting next to them. Although Doe and Student B insisted they generally wrote answers in the margins of multiple-choice examinations to facilitate checking their answers, the laboratory manager who reported the violation stated in the summary of the incident that neither of the students had written anything next to the multiple-choice questions on a different biology exam. In addition, Student B, who performed better on the final than his "C" academic average, while denying he had cheated, contradicted Doe's claim that the two of them had not studied together for the examination. Although the Court of Appeal acknowledged that these facts could have been the product of independent work, it held the University's conclusion that the facts were the result of cheating was a reasonable interference, grounded in evidence.

Doe argued the Court of Appeal should affirm the trial court's order reversing the University's decision because the University's decision-making process violated the University's own procedural rules and was fundamentally unfair. Specifically, Doe argued the University failed to timely provide him with his and Student B's examination booklets with lettering in the margins, the key evidence used against him, and chilled his right to gather from information relevant to the cheating charge from witnesses.

The Court of Appeal found that Doe exercised his right to review the examination papers, and the procedure the University required for this review complied with its rules and satisfied the requirements for a fair hearing.

Doe's second complaint of procedural unfairness—that the University severely compromised his ability to gather evidence to defend against the charge of cheating—is based on the review officer's admonition when sending Doe a copy of the faculty report not to engage in inappropriate contact with the reporting individuals or other witnesses. Although Doe contends this warning deterred him from interviewing Student B, the examination proctors, and other students sitting near him during the examination, cautioning Doe to refrain from improper tactics when speaking to potential witnesses did not preclude him from reaching out to any of those individuals or to have one of his parents, who assisted him during this process, or a lawyer do so. The decision to refrain from appropriate contact with potential witnesses was Doe's alone. Furthermore, Doe did not raise this argument during his appeal to the Panel, so he forfeited the argument on appeal.

Ultimately, the Court of Appeal reversed the trial court's decision in Doe's favor.

Doe v. University of Southern California, et al. (2018) __Cal. App.5th __ [2018 WL 4878834].

A Student Discipline Hearing Must Allow Students Access to Critical Evidence, the Opportunity to Adequately Cross-Examine Witnesses, and the Opportunity to Present Evidence in Defense.

Background Facts

John Doe and Jane Roe were undergraduate students at the University of California at Santa Barbara. In June 2015, Jane attended a party

at John's apartment. Jane was intoxicated and decided to lie down under the covers on a mattress against the living room wall. John, also intoxicated, lay down fully-clothed on top of the covers with his back to Jane. Two eyewitnesses sat talking on the couch less than three feet away. Jane alleged that while she was asleep on the mattress, John sexually assaulted her.
Two days after the alleged assault, the Santa Barbara County Sexual Assault Response Team (SART) medically examined Jane. She reported the sexual assault to campus police, but declined to divulge the identity of the suspect or location of the sexual battery. Campus police informed the University's Title IX office of Jane's complaint. The office attempted to contact Jane for further information, but she did not respond. The office closed the file. One month later, Jane informed campus police that she wished to proceed with her complaint, and the Title IX office initiated an investigation. In September 2015, the University notified John that it placed him on interim suspension pending an investigation into the incident, and he was not allowed on campus or permitted to live in University housing.

John contested the interim suspension and denied that he assaulted or had sexual contact with Jane. He attended an informal hearing with the assistant dean of students where he submitted evidence to support his defense. The vice chancellor upheld John's interim suspension with modifications.

Discipline Hearing

Nearly a year after the alleged assault, the Title IX office concluded its investigation and issued a report that substantiated Jane's claims. The University notified John it scheduled a hearing before the Sexual/Interpersonal Violence Conduct Committee to determine if he had violated the Student Conduct Code prohibiting sexual assault and sexual harassment. The University notified John that he had 12 days to submit any information he wanted the Committee to review, along with the name and contact information of any witnesses.

The University advised John that if he wished to review the hearing packet comprised of the investigation notes and report, the University's internal correspondence and notifications to the parties in advance of the hearing, he could make an appointment with the director of judicial affairs in her office prior to the hearing, or he could review it at the hearing. John timely submitted his list of exhibits, evidence, and witnesses for the hearing. Jane submitted no witness information or evidence at that time. The day before the scheduled hearing, the Committee Chair rescheduled the hearing for a month later. John objected because the rescheduling created a hardship and prejudiced his defense; his key witness would be studying abroad at the time of the rescheduled hearing and would be unable to attend in person. The University overruled his objection, explaining the Committee had "the right to postpone the hearing for a reasonable period of time to allow consultation with University General Counsel."

Prior to the rescheduled hearing, Jane submitted her list of witnesses and two documents - the cover page of her medical examination and a second document from the medical examination that listed her current medications. John submitted a list of witnesses, detailed declarations from his eyewitnesses, photographs of the living room, and the report of a polygraph examiner.

A two-member Committee conducted a hearing to determine if John had sexually assaulted Jane in violation of the Student Conduct Code.

Outcome of Discipline Hearing

Despite the University's policy to audio record the proceeding and keep a summary of the minutes of the hearing, nothing in the administrative record indicated the University made an audio recording of the proceeding, and there was no transcript of the hearing. Jane testified about the alleged assault, John testified and denied all of Jane's accusations, one eyewitness testified by Skype and provided

a declaration, another eyewitness provided a declaration, and the polygraph examiner testified by telephone. Additionally, a campus police detective testified about his recollection of the medical examination report, but the University did not produce the complete report at the hearing or disclose it to John or his attorney. John attempted to ask Jane about the possible side effects of a prescription drug Jane took, and its side effects when combined with alcohol, but Jane refused to answer the question. John tried to explain his line of questioning and stated that the prescription drug has many side-effects that "become severe when alcohol is consumed ... such as hallucinations and sleep paralysis and night terrors." John's mother attempted to testify about the side effects of the prescription drug based on information she learned from the manufacturer. The Committee Chair stated he could not accept this information in this format. Ultimately, the University's General Counsel interrupted John's questioning of his mother and denied John the opportunity to introduce any evidence about the prescription medication.

The Committee found by a preponderance of the evidence that John violated the Student Conduct Code. The Committee concluded that the results of the medical examination corroborated Jane's report of vaginal and anal penetration with fingers or a penis. Relying in part on the SART report, the Committee rejected John's theory that Jane's use of alcohol while taking the prescription drug caused Jane to hallucinate the incident. The Committee also rejected testimony offered by John about the effects of his neurological disorder and the polygraph test.

The Committee recommended the University suspend John for two years (eight quarters), starting fall 2016. The Vice Chancellor of Student Affairs agreed with the Committee's recommended sanction. John sought review of the Vice Chancellor's decision. The Vice Chancellor affirmed the sanction, but adjusted the suspension to include the time John had already served on interim suspension. Therefore, his eight-quarter suspension was effective Fall 2015 through Summer 2017.

Appeal to Trial Court

John filed a petition in trial court to challenge the University's decision. John contended the University deprived him of due process during the hearing because, among other reasons, the Committee chose to selectively apply the rules of evidence and to withhold evidence favorable to John. He argued he had not been able to see the medical examination report, about which the detective testified, and the Committee did not allow him to present evidence about the side effects of the prescription drug that could have affected Jane.

The trial court denied John's petition and concluded the admission of a small portion of the medical examination report and the detective's testimony were not prejudicial because the medical examination report was not the sole supporting evidence for the Committee's conclusions. The court also concluded John had not demonstrated he was prejudiced by the timing of the Committee's disclosure, the day before the hearing, of Jane's use of the prescription drug or its exclusion of his mother's testimony. John appealed the trial court's decision.

John's Appeal to the Court of Appeal

On appeal, John argued the University deprived him of his due process right to a fair hearing because it withheld critical evidence, improperly excluded relevant evidence, and selectively applied the formal rules of evidence. He also argued the University abused its discretion by reaching findings that were not supported by substantial evidence in light of the whole record.

Limited Access to the SART Report

Specifically, John argued the University deprived him of a fair hearing when the Committee allowed the detective to testify about a single phrase from the medical examination report without requiring production of the entire report to the Committee and to him. The Court of Appeal held that without access to the complete

medical examination report, John did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The University must permit a student accused of misconduct to see the evidence against him. It was unfair to allow the detective to select and describe only a portion of the medical examination report without producing the complete report. John's lack of access to the entire report prevented effective cross-examination and hampered his ability to present a defense. Additionally, the medical examination report was critical evidence, but the Committee did not have the report. At a minimum, the University should have required the detective to provide a complete copy of the medical examination report. The Committee should not have considered the medical examination evidence without giving John timely and complete access to the report.

Other University Errors

John argued that the University's untimely disclosure of the prescription drug evidence deprived him of the opportunity to obtain an expert to testify about the side effects of the prescription drug and the opportunity to effectively cross-examine Jane. He also argued the University inconsistently applied its policies and procedures and selectively applied formal evidentiary rules, to his detriment. The University should have allowed John to introduce evidence of the side effects of the prescription drug through his mother's testimony or some other informal method.

Moreover, the University did not allow John's counsel to actively participate in the hearing. The Committee, however, permitted the University's general counsel to actively participate and to make formal evidentiary objections. However, University policies and procedures do not permit the general counsel to make formal evidentiary objections. A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections.

The Committee also selectively applied the formal rules of evidence to John's detriment. The Committee precluded John's mother from offering testimony about the side effects of the prescription drug because she was not an expert on the drug. But, the Committee allowed the detective to offer an expert medical opinion on causation of Jane's injuries, even though the detective was not a medical expert and had not authored the medical examination report. Finally, the Committee allowed Jane to decline to respond to John's questions about the side effects of the prescription drug on the ground that it was her "private medical information." This deprived John of his right to cross-examine Jane and impeded his ability to present relevant evidence in support of his defense. Furthermore, the Committee's refusal to hear John's evidence of the side effects of the prescription drug was prejudicial. The Committee's error in excluding John's evidence of the side effects of the prescription drug was compounded by admitting only a portion of the medical examination report.

The Court of Appeal reversed the trial court's decision and instructed the trial court to grant John's petition to review the University's decision.

Doe v. Regents of University of California (2018) __ Cal. App.5th __ [2018 WL 4871163].

FLSA

LCW Attorneys Win Dismissal of Two FLSA Collective Action Lawsuits.

Liebert Cassidy Whitmore attorneys succeeded in decertifying two Fair Labor Standards Act (FLSA) cases brought by approximately 2,500 City of Los Angeles police officers seeking overtime pay for a 13-year period. This victory means that the City will not incur the tremendous costs that would have been required to proceed to trial on these two collective action lawsuits.

An employer is liable for FLSA overtime worked if the employer has actual or constructive knowledge that FLSA overtime work is occurring. In this case, the police officers claimed that the City's Police Department knew or should have known that they were working uncompensated overtime. The Department argued that it had no knowledge that its officers were not following its overtime policy.

Both sides in these two cases agreed that the Department maintained a written, widely-disseminated FLSA-compliant policy that required officers to accurately report all overtime worked in six minute increments, whether or not the overtime was approved in advance by a supervisor. The policy further provided that failure to report overtime could result in discipline. The Department's evidence showed that it had paid 330,000 reports for overtime worked in amounts of less than one hour during the relevant time period, including 64,000 such reports from the police officers who opted into these lawsuits.

Nevertheless, the officers claimed that the Department maintained an unwritten policy of requiring them to perform extra work, while discouraging or rejecting their claims for small amounts of overtime pay for less than one hour of overtime worked. Following extensive discovery and exchange of information between the parties, the federal trial court granted the City's motion to decertify these FLSA collective actions and dismissed the officers' claims. The officers appealed the decertification to the Ninth Circuit. Under the FLSA, multiple employees cannot join together in a collective action unless they are "similarly situated." The FLSA does not define the "similarly situated" standard, and the Ninth Circuit decided that the standards other circuit courts used to assess whether employees were similarly situated were vague and not useful. The Ninth Circuit reasoned that a standard similar to that used for a motion for summary judgment should apply to decertify a collective action if the basis for the collective action is also the basis for the FLSA claim. In these two collective actions, the basis for the officers' FLSA claim was also the basis for their claim that they were similarly situated -- namely, that the Department had an unwritten policy that discouraged the reporting overtime work of less than one hour.

The volume of evidence presented was significant. The Ninth Circuit described the Department's evidence of FLSA compliance as "overwhelming." The Department's evidence included a statistical analysis of the 6.6 million overtime reports that the officers submitted during the 13 years at issue in the case. The officers' evidence included 232 declarations describing their individual experiences, but the officers failed to tie their individual experiences to the work force generally. Only a few of the declarations identified specific instances when officers were discouraged from claiming overtime. The officers did not present any evidence of any directives, conversations, or emails from Department leadership to supervisors to communicate any policy that contradicted the Department's well-known policy on reporting all overtime worked in six minute increments.

The Ninth Circuit found that the officers failed to prove that any unwritten policy discouraging overtime reporting existed at a Department-wide level. The Ninth Circuit decided that no reasonable trier of fact could conclude that the Department fostered or tolerated a tacit policy of non-compliance with the FLSA, given the Department's overwhelming evidence of compliance with its valid FLSA overtime policy, and dismissed the officers' two collective lawsuits.

Campbell v. City of Los Angeles (2018) 903 F.3d 1090.

NOTE:

LCW attorneys Brian P. Walter, Geoffrey S. Sheldon, David A. Urban, and Danny Y. Yoo successfully represented the City of Los Angeles in this case. LCW has a very deep bench of exceptional attorneys who know how to handle complex and multi-party litigation or grievances in a cost-effective way.

DISABILITY

Employer Must Pay Cost of Medical Testing It Required of an Applicant with Perceived Disability.

Russell Holt applied for a position with the BNSF Railway Company ("BNSF") and received a conditional job offer. As part of the application process, BNSF required Holt and other applicants to undergo a medical exam. Holt's exam revealed he had injured his back several years earlier. In response to BNSF's request for additional information, Holt submitted his medical records and a note from his medical provider which stated that Holt was able to function normally. BNSF's medical representative requested further information, including a current MRI of Holt's back.

When Holt learned that an MRI costs more than $2,500, he requested that BNSF waive the MRI requirement. BNSF informed Holt that he would not be hired without the MRI, and rescinded its job offer when Holt did not provide one. Holt filed an Equal Employment Opportunity Commission (EEOC) complaint alleging that BNSF violated Americans with Disabilities Act (ADA) restrictions on the use of medical exams.

The ADA generally prohibits employers from discriminating against a qualified individual on the basis of disability in regard to job application procedures or hiring and other terms, conditions, and privileges of employment.

The issues decided in this case were whether Holt had a disability as defined in the ADA, and whether BNSF discriminated against Holt because of his disability. The parties did not dispute that Holt was qualified.

First, the Ninth Circuit found that BNSF perceived Holt as an individual with a physical impairment – a back injury. The ADA's definition of "perceived impairment" encompasses "situations where an employer assumes an employee has an impairment or disability." In this case, BNSF requested that Holt complete an MRI examination because of his back condition, conditioned his employment offer on completion of the MRI, and treated him like an applicant whose MRI revealed a physical impairment. Therefore, Holt had a perceived disability as defined in the ADA.

Next, the court found that although the ADA is silent on the issue, the ADA nonetheless requires employers, and not employees, to pay the cost of post-offer, pre-employment medical testing of an applicant with a perceived impairment. The court noted that an employer would not violate the ADA if it required all applicants receiving a conditional offer to participate in follow up medical testing at their own expense. But requiring an applicant with a perceived disability to shoulder the cost of follow up testing imposes "an additional financial burden on a person with a disability because of that person's disability." In that scenario, the ADA requires the employer to bear the cost of the additional testing.

This approach is consistent with the ADA's requirement that employers pay for reasonable accommodations, unless doing so creates an undue hardship. BNSF discriminated against Holt because of his perceived lower back impairment when it required him, and not all other applicants, to undergo further medical testing at his own expense. This is the case whether the follow up testing is inexpensive or would be a significant cost to the applicant.

Finally, the court rejected BNSF's argument that the company was simply attempting to confirm the condition of Holt's back through the MRI. ADA regulation 12112 allows employers to require post-offer medical exams, and allows employers to condition an offer upon the results of the exam, but states that these medical exams can only be given if "all entering employees are subjected to such an examination regardless of disability." BNSF's treatment of Holt did not meet these requirements.

Thus, the Ninth Circuit affirmed the trial court order granting summary judgment in favor of Holt, and finding BNSF liable for disability discrimination.

EEOC v. BNSF Railway Company (2018) 902 F.3d 916.

Note:

Agencies should pay for post-offer, pre-employment medical testing that does not apply to all job applicants. Be sure to follow the reasonable accommodation process by considering all accommodations that may be available to an applicant with an actual or perceived disability. The employer should document the reason why the accommodation is or is not reasonable.

Employee Had to Prove to the Jury that a Reasonable Accommodation Was Available.

Danny Snapp worked for Burlington Northern Santa Fe Railway Co. ("BNSF") as a trainmaster. However, after being diagnosed with sleep apnea, and undergoing two failed surgeries to correct the condition, a fitness for duty evaluation determined Snapp was totally disabled. Snapp took a disability leave for approximately five years until his disability benefits were discontinued for lack of evidence of a continuing disability. Snapp did not request reinstatement or request a reasonable accommodation during this time but instead demanded that BNSF reinstate his disability benefits. BNSF informed Snapp that he had 60 days to secure a position consistent with BNSF's long term disability program. After he failed to do so, BNSF terminated Snapp's employment.

Snapp sued BNSF, claiming the company failed to accommodate his alleged disability in violation of the Americans with Disabilities Act ("ADA"). At trial, the jury decided in favor of BNSF, finding no disability discrimination occurred.

On appeal the Ninth Circuit affirmed the jury's determination and rejected Snapp's claim that BNSF was responsible for proving that no reasonable accommodation was available to Snapp. The Ninth Circuit confirmed that to prevail at trial, an employee alleging disability discrimination due to the employer's alleged failure to accommodate must prove: 1) that the employee is a qualified individual; 2) the employer received notice of the employee's disability; and 3) a reasonable accommodation was available that would not create an undue hardship for the employer. Thus, Snapp's claim that it was BNSF's burden to prove a reasonable accommodation was available in order to avoid liability failed. The Ninth Circuit affirmed the jury's decision in favor of BNSF.

Snapp v. BNSF Railway Company (2018) 889 F.3d 1088.

NOTE:

California's Fair Employment and Housing Act (FEHA) provides employees and applicants greater rights than the ADA does. The FEHA, unlike the ADA, makes it unlawful for the employer to fail to provide an interactive process. Under the ADA, there is no standalone cause of action for failure to provide an interactive process; there is only liability if a reasonable accommodation was possible and the employer did not provide it. California employers must provide an interactive process upon an appropriate request to avoid liability.

FIRST AMENDMENT

Last Chance Agreement Violated Public Employee's Free Speech Rights.

Thelma Barone began working as a Community Service Officer ("CSO") for the City of Springfield Police Department in 2003. She served as a victim advocate and as a Department liaison to the City's minority communities. She received and reported community member complaints to the Department leadership. Latino community members repeatedly complained to Barone about alleged racial profiling in the Department and

the number of complaints increased beginning in 2013. In 2014, the Department investigated Barone for two incidents of alleged misconduct – whether she: 1) improperly allowed students to take photos in restricted areas of the Department during a tour; and 2) appropriately relayed a report of a potential crime.

In 2015, Barone attended a Department-sponsored community outreach event entitled "Come Meet Thelma Barone from the Springfield Police Department." Barone was in uniform and being paid for her time. Her supervisor also attended. A citizen asked whether Barone was aware of increasing complaints of racial profiling – Barone responded that she "had heard such complaints."

A week after the event, the Department placed Barone on administrative leave for alleged dishonesty during the investigation of the photo and crime report incidents. Ultimately, Barone was placed on administrative leave for her conduct, suspended without pay and asked to sign a Last Chance Agreement (LCA). The LCA terms stated:

"…Employee will not speak or write anything of a disparaging or negative manner related to the Department/Organization/City of Springfield or its Employees. Employee is not prohibited from bringing forward complaints she reasonably believes involves discrimination or profiling by the Department."

When Barone refused to sign the LCA, the Department terminated her employment. Barone sued, claiming that she was terminated in retaliation for exercising her First Amendment right to free speech at the community meeting, and that the LCA was an unlawful prior restraint (or restriction) on her right to speak.

The Ninth Circuit agreed with the federal trial court that Barone's comments at the event were made in her capacity as a public employee, and therefore were not protected by the First Amendment. It was significant that Barone was at the event as a Department representative, had special access to the event because of her position, spoke about complaints she regularly received in the course of her duties, and attended in uniform and for pay. Because Barone commented in her role as a public employee, and not as a private individual, the Department could lawfully discipline Barone for the comments she made at the event.

However, the Ninth Circuit found that the terms of the very broad Last Chance Agreement violated Barone's rights to free speech as a private citizen speaking on matters of public concern. The LCA restricted Barone from speaking on topics unrelated to her job duties, and topics of concern to the general public, such as: City or Department misconduct, "the City's services, employees, or elected officials … cleanliness, water quality, or tax and revenue policies." The part of the LCA that excluded complaints of discrimination or profiling was insufficient to address this problem. The court noted an employer may unlawfully restrict First Amendment protected speech even if the employer does not intend to do so. The key question is whether an employee would understand a policy or restriction to prohibit protected speech, and not whether a public employer actually intended to restrict the speech.

Thus, the Ninth Circuit affirmed the trial court's finding that the Department did not retaliate against Barone for her comments at the community outreach event in violation of the First Amendment, but that the LCA was an unlawful restriction on speech.

Barone v. City of Springfield, Oregon (2018) 902 F.3d 1091.

NOTE:

Public employees have a First Amendment right to speak out on matters of public concern in their roles as private citizens. Any rule or agreement that limits a public employee from communicating must be carefully drafted to allow a public employee to speak out as a private citizen on matters of public concern.

AGE DISCRIMINATION

County's Restructuring of Retiree Medical Premiums Was Not Age Discrimination.

The Ninth Circuit Court of Appeals decided that Orange County did not violate the Fair Employment and Housing Act (FEHA) by restructuring its retiree medical premium program to address unfunded liability in a way that was less advantageous to retirees receiving medical benefits.

In 2006, Orange County restructured two aspects of its retiree medical benefits – its "Retiree Premium Subsidy," and its Grant Benefit. Prior to 2006, the County subsidized retiree medical benefit premiums by combining retired and active employees into a single pool. This approach effectively lowered the premium that retirees paid than what retirees would have paid had they been maintained in a separate pool. The County also provided retirees with a monthly grant to defray the cost of coverage. However, to address unfunded liability of its retiree medical benefits program, the County negotiated the separation of active employees and retirees into separate pools and reduced the Grant Benefit.

A class of retirees sued the County, claiming: 1) that the County's actions violated an implied contractual agreement to provide retirees with a lifetime Grant Benefit and deprived them of a vested employment benefit; and 2) that elimination of the premium subsidy, by virtue of separating active employees and retirees into separate premium pools, constituted age discrimination in violation of the FEHA.

On the first issue, the Ninth Circuit found that the retirees' lawsuit supported a claim of an implied County agreement to provide retirees with a lifetime Grant Benefit. State contract law principles applied, and "under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution." *Retired Emps. Ass'n of Orange Cty., Inc. v. Cty. of Orange* (REAOC III), 52 Cal. 4th 1171, 1194 (2011).

The retirees relied on the part of the MOU that stated that an eligible retiree "shall receive" a Grant Benefit. The retirees further alleged that they had an implied contractual right to continue receiving the Grant Benefit throughout retirement. The retirees cited: an agreement to allow the County to access surplus investment earnings in exchange for providing the Grant Benefit; the fact that active employees were required to contribute a portion of their wages to fund the Grant Benefit; and an MOU rebate provision allowing active employees to recoup their wage contributions upon separation before becoming eligible for the Grant Benefit. The court cited its decision in *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109 (9th Cir. 2013) which stated that once a retiree identifies "an express contract covering the substance of a benefit, it may rely on extrinsic evidence to prove the existence of an implied term requiring the continuation of that benefit in perpetuity." The court found the retirees met this standard and allowed their contract claim to proceed.

On the second issue, the court found that the County's changes to retiree health benefits did not violate the FEHA. The court interpreted the FEHA definition of "employee" broadly to include already retired employees, and found that "changes in retirees' health benefits are covered by the FEHA." But the court found that the County did not discriminate against retirees because of their age. The County simply treated "retirees as a group differently, with regard to medical benefits, than employees as a group taking into account that the cost of providing medical benefits to the retiree group is higher because the retirees are on average older." The Ninth Circuit found that the County's treatment of retirees was based on pension status (which correlated to age), and was not motivated by the age of the pensioner.

Thus, the Ninth Circuit allowed the retirees' contract claim to proceed but affirmed the trial court order dismissing the retirees' FEHA claim.

Harris v. County of Orange (2018) 902 F.3d 1061.

BACKGROUND CHECKS

California Supreme Court Confirms Validity of Two Background Check Laws.

The California Supreme Court confirmed that employers can, and must, comply with two California laws governing job applicant consumer reports (or background checks): the Investigative Consumer Reporting Agencies Act (ICRAA); and the Consumer Credit Reporting Act (CCRA). The case addressed similarities and differences between these two laws, and clarified that employers must comply with both laws when applicable.

The ICRAA defines a "consumer report" as a report on an individual's character, general reputation, personal characteristics, and similar information. Among other things, the ICRAA requires that an employer that procures such information from job applicants or existing employees must certify that: 1) the employer has provided the individual who is the subject of the report with a clear notice that discloses the requirements of the ICRAA; and 2) the subject of the report authorized the report in writing.

The CCRA defines "consumer report" as any communication by a consumer reporting agency bearing on credit worthiness, credit standing, or credit capacity that is "used or is expected to be used . . . for . . . employment purposes," but excludes reports that are based "solely on … character…reputation, personal characteristics… obtained through personal interviews with neighbors, friends or associates…"

The court found that both statutes apply to reports containing information about character and creditworthiness when the reports are based on public information and interviews, and are used for employment background check purposes.

In this case, Eileen Connor worked as a school bus driver with Laidlaw Education Services which was later acquired by First Student. When First Student conducted background checks on Connor and other employees, the employees sued, claiming that First Student did not provide them with the notice required by the ICRAA. In its defense, First Student argued that because of overlap between the two statutes, the ICRAA was unconstitutionally vague and should not be enforced. Rejecting this argument, the Court found that the requirements of both statutes are sufficiently clear, and each regulates information that the other does not. The Court concluded that both statutes applied to the report on Connor, and First Student must comply with both.

Connor v. First Student (2018) 5 Cal.5th 1026.

NOTE:

The Supreme Court's decision resolves conflicting decisions issued by California's appellate divisions and makes clear that if there is potential overlap between the ICRAA and CCRA, and the substance of a consumer report relates to creditworthiness and character, an employer may be required to comply with both statutes. LCW's earlier discussion of the Court of Appeals decision in Connor v. First Student *is available here: https://bit.ly/2qbqnGC.*

BENEFITS CORNER

ACA Reporting – IRS Releases 2018 Drafts: Forms 1094, 1095 and Instructions

Applicable Large Employers and Employers who offer self-insured health plans must comply with information reporting required by the Affordable Care Act. See our prior article: https://www.calpublicagencylaboremploymentblog.com/healthcare/irs-extends-affordable-care-act-reporting-deadlines/.

The new draft forms may be found here:

- Draft Form 1094B
- Draft Form 1095B
- Draft Form 1094C
- Draft Form 1095C
- Draft Form B Instructions
- Draft Form C Instructions

The Forms have not changed significantly from last year. Employers must provide statements to employees (or copies of the Forms) to each employee for whom the employer intends to file a Form 1095, to such employees by March 2, 2018. For calendar year 2018, Forms 1094 and 1095 must be filed by February 28, 2019, or April 1, 2019, if filing electronically.

Health FSAs and the $500 Carryover Option

Recently, the IRS issued an Information Letter confirming the carryover rules for Health Flexible Spending Arrangements, or Health FSAs. The Information Letter is available at: https://www.irs.gov/pub/irs-wd/18-0012.pdf.

As a reminder, a Health FSA is an employer-owned account that employees can contribute to on a pre-tax basis in order to pay for eligible healthcare expenses. It is an employee benefit that may be offered under a Section 125 cafeteria plan.

Employee contributions to a Health FSA are subject to an annual cap, which for 2018 is $2,650. Unused funds are forfeited to the employer at the end of each calendar year, except that an employer has the option to offer employees one of the following in its Section 125 plan documents:

- A grace period of 2.5 months (extending the deadline to use the FSA funds until March 15 of the following year); or
- A carryover of the unused FSA balance, up to $500, to be used in the following year.

The IRS's Information Letter pertains to the second of these options. The IRS issued the letter in response to a request that "the [carryover] rules be changed to allow savings to be accumulated in these accounts over several years." The IRS responds that "Health FSAs can provide for the carryover of unused amounts on a limited basis." The IRS notes that, "[a]t its option, an employer can include a provision in a health FSA that allows amounts unused at the end of the plan year to be carried over to the next year up to $500." In the letter, the IRS also distinguishes Health FSAs from Health Savings Accounts (HSAs) and Health Reimbursement Arrangements (HRAs), which do permit funds to be accumulated into later years to pay for certain medical expenses.

Employers looking to provide employees some relief from automatic forfeiture of their unused Health FSA contributions at the end of each year might consider updating their plan documents to allow a grace period of 2.5 months or a carryover of $500 into the following year.

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Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit **www.lcwlegal.com/news**.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of our ***Education Matters*** newsletter.

If you have any questions, contact Nick Rescigno at 310.981.2000 or info@lcwlegal.com.

LINDA ADLER JENNIFER ROSNER MAX SANK

OUR NEW PARTNERS

Liebert Cassidy Whitmore (LCW) is pleased to announce that Linda Adler, Jennifer Rosner, and Max Sank have been named Partner effective October 1, 2018.

"We are extremely proud to welcome this group to the partnership," said J. Scott Tiedemann, Managing Partner of LCW. "Linda, Jennifer and Max are experts in their respective areas of law and embody the qualities that our clients expect from LCW. We are very fortunate to call them our partners and look forwards to their contributions for years to come."

Linda Adler advises on business and risk management practices and policies in the areas of preventing harassment claims, student discipline and expulsion, faculty and staff discipline and termination, equal employment opportunity law compliance, and contracts. She also regularly conducts training classes for faculty, staff and administrators on sexual harassment, discrimination, retaliation, and disability accommodations. Adler received her JD from Santa Clara School of Law.

Jennifer Rosner is a prolific litigator with experience in lawsuits involving discrimination, harassment and retaliation, disciplinary and due process issues. Jennifer has considerable experience with law enforcement issues, incldiung the POBR, and in defending public safety agencies om officer discipline, section 1983 claims and *Pitchess* motion hearings. She has been successful in obtaining summary judgments on behalf of clients in both state and federal court and has extensive appellate and administrative appeal experience. Rosner also works closely with local agencies on every facet of the disability accommodation process. Rosner received her JD at Loyola Marymount University School of Law.

Max Sank's areas of expertise include the interactive process and reasonable accommodations for employees and students, workplace and student investigations, employment/enrollment agreements (including arbitration agreements), and student discipline. He is passionate about advising clients on employment law and student matter issues to help them avoid disputes when possible. Sank is also one of the firm's top litigators and has successfully defended schools in matters brought by employees and students, such as racial harassment, age discrimination, and breach of employment and enrollment agreements. Sank received his JD from the University of Southern California School of Law.

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LCW Liebert Cassidy Whitmore

REGISTRATION IS NOW OPEN!

January 23-25, 2019

Palm Desert, California

JW Marriott Desert Springs Resort & Spa

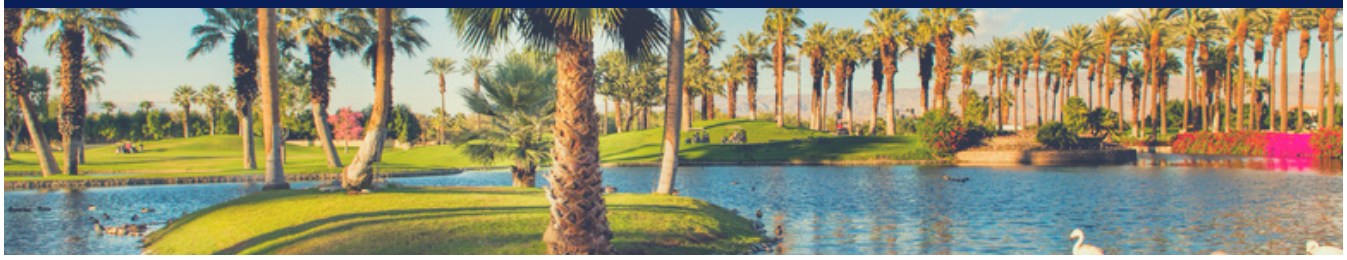
2019 PUBLIC SECTOR EMPLOYMENT LAW ANNUAL CONFERENCE

Join us for LCW's premier three-day conference for public agency management. Each day is packed with a variety of informative and engaging presentations that offer practical lessons for success in the workplace. There are over **20 sessions** to choose from, including:

- Public Safety Legal Update
- Concurrent Criminal and Administrative Investigations
- Peace Office Personnel Records: Navigating Employer Obligations Under *Pitchess*, *Brady*, and the Public Records Act and the POBRA
- Public Safety Labor Negotiations

Register before **11/30** for special early bird pricing at:

WWW.LCWLEGAL.COM/LCW-CONFERENCE



LCW LIEBERT CASSIDY WHITMORE

REGULAR RATE OF PAY: MAKING IT SIMPLE

REGISTRATION IS NOW OPEN!

LCW is pleased to announce a comprehensive seminar for Public Sector personnel:

Thursday, November 15, 2018 in Buena Park
Buena Park Community Center
6688 Beach Blvd.
Buena Park, CA 90621

Is your agency agonizing and struggling to ensure that overtime is paid at one and one-half times the employee's regular rate of pay in compliance with the Fair Labor Standards Act? FLSA compliance is an onerous task, and agencies often make mistakes resulting in significant backpay awards, liquidated damages, and attorneys' fees. This workshop will assist agencies to identify the types of pays that must be included and what may be excluded from the regular rate. This workshop will also show you how to calculate the regular rate of pay for all types of employees, including public safety (both police officers and firefighters) as well as all other employees who work a 40 hour workweek. Using examples, this session will make regular rate calculations simple and more straightforward. Examples will include many different types of additional pay provided to public employees, including cash in lieu of health benefits as addressed by the recent decision in *Flores v. City of San Gabriel.* This workshop will provide basic tools for proper regular rate calculations, and enable your agency to fix common mistakes in a timely fashion.

Intended Audience:

This seminar is fitting for public agencies: general administration, finance, payroll, and human resources.

Time:

9:00 a.m. to 12:00 p.m

Pricing:

$250 per person for Consortium Members
$300 per person for Non-Consortium Members

Register TODAY!

https://www.lcwlegal.com/events-and-training/webinars-seminars

Management Training Workshops

Firm Activities

Consortium Training

Nov. 1 **"The Future Is Now - Embracing Generational Diversity and Succession Planning"** and **"Moving Into the Future"**
Monterey Bay ERC | Morgan Hill | Drew Liebert

Nov. 1 **"Maximizing Supervisory Skills for the First Line Supervisor"**
South Bay ERC | Redondo Beach | Kristi Recchia

Nov. 6 **"Accommodating Bad Behavior: The Limits on Disciplining Disabled Employees"**
Imperial Valley ERC | El Centro | Laura Drottz Kalty

Nov. 6 **"Privacy Issues in the Workplace"**
San Mateo County ERC | Webinar | T. Oliver Yee

Nov. 7 **"Managing the Marginal Employee"** and **"Maximizing Performance Through Evaluation, Documentation and Discipline"**
Bay Area ERC | Campbell | Suzanne Solomon

Nov. 7 **"Maximizing Performance Through Evaluation, Documentation and Discipline"** and **"A Guide to Implementing Public Employee Discipline"**
Central Valley ERC | Fresno | Michael Youril

Nov. 7 **"The Disability Interactive Process"** and **"The Meaning of At-Will, Probationary, Seasonal, Part-Time and Contract Employement"**
Coachella ERC | TBD | Danny Y. Yoo

Nov. 8 **"Workplace Bullying: A Growing Concern"** and **"Advanced Investigations of Workplace Complaints"**
East Inland Empire ERC | Fontana | Laura Drottz Kalty

Nov. 8 **"Moving Into the Future"**
Gateway Public ERC | Pico Rivera | Kevin J. Chicas

Nov. 8 **"Difficult Conversations"** and **"The Art of Writing the Performance Evaluation"**
San Diego ERC | La Mesa | Danny Y. Yoo

Nov. 9 **"Creating a Culture of Respect"**
Northern CA CCD ERC | Folsom | Kristin D. Lindgren

Nov. 14 **"Moving Into the Future"** and **"12 Steps to Avoiding Liability"**
Central Coast ERC | Arroyo Grande | Jesse Maddox

Nov. 14 **"Labor Negotiations from Beginning to End"**
Gold Country ERC | Placerville and Webinar | Gage C. Dungy

Nov. 14 **"An Agency's Guide to Employee Retirement"**
Humboldt County ERC | Eureka | Jack Hughes

Nov. 14 **"A Supervisor's Guide to Labor Relations"**
Orange County Consortium | Buena Park | Melanie L. Chaney

Nov. 15 **"Prevention and Control of Absenteeism and Abuse of Leave"**
Humboldt County ERC | Eureka | Jack Hughes

Nov. 15 **"Labor Code 101 for Public Agencies"**
North State ERC | Webinar | Heather R. Coffman

Nov. 15 **"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement"**
West Inland Empire ERC | Rancho Cucamonga | Danny Y. Yoo

Nov. 20 **"Employees and Driving"** and **"The Future is Now: Embracing Generational Diversity and Succession Planning"**
North San Diego ERC | Vista | Christopher S. Frederick

Nov. 29 **"Maximizing Supervisory Skills for the First Line Supervisor Part I"**
LA County HR Consortium | Los Angeles | Kristi Recchia

Nov. 29 **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"** and **"Human Resources Academy I"**
Napa/Solano/Yolo ERC | Napa | Richard Bolanos

Customized Training

Nov. 1 **"MOU's, Leaves and Accommodations"**
City of Santa Monica | Laura Drottz Kalty

Nov. 2 **"Ethics in Public Service"**
City of Yuba City | Gage C. Dungy

Nov. 5 **"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"**
Chaffey College | Rancho Cucamonga | Pilar Morin

Nov. 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Tracy | Kristin D. Lindgren

Nov. 13 **"Legal Update"**
County of Fresno | Fresno | Shelline Bennett

Nov. 13 **"Legal Aspects of Violence in the Workplace"**
City of Glendale | Mark Meyerhoff

Nov. 13 **"Unconscious Bias and Microaggressions"**
City of Stockton | Kristin D. Lindgren

Nov. 14 **"Bias in the Workplace"**
ERMA | Ceres | Kristin D. Lindgren

Nov. 16 **"Ethics in Public Service"**
City of San Carlos | Lisa S. Charbonneau

Nov. 26,28 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Santa Clara County Fire Department | Los Gatos | Morin I. Jacob

Nov. 29 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Laura Drottz Kalty

Speaking Engagements

Nov. 14 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
California District Attorneys Association (CDAA) Conference | Paso Robles | Michael Youril

Nov. 15 **"Forging Strong CCD/K-12 Partnerships: Sound AB288 Agreements"**
Community College League of California (CCLC) Annual Convention | Rancho Mirage | Eileen O'Hare-Anderson

Nov. 15 **"First Amendment, Academic Freedom and Harassment"**
CCLC Annual Convention | Rancho Mirage | Pilar Morin & Terri L. Hampton

Nov. 16 **"Legal Eagles"**
CCLC Annual Convention | Rancho Mirage | Pilar Morin & Kristin D. Lindgren & Laura Schulkind & Eileen O'Hare-Anderson

Nov. 16 **"Responding to #MeToo Accusations: The Critical Need for Policy Leadership"**
CCLC Annual Convention | Rancho Mirage | Laura Schulkind & Kristin D. Lindgren & Karen Furukawa-Schlereth

Nov. 30 **"The Executive Assistants Program"**
California School Boards Association (CSBA) Annual Education Conference | San Francisco | Laura Schulkind

Seminars/Webinars

Register Here: https://www.lcwlegal.com/events-and-training

Nov. 7 **"Nuts & Bolts of Negotiations"**
Liebert Cassidy Whitmore | Citrus Heights | Kristi Recchia & Jack Hughes

Nov. 12 **"Critical Considerations When Changing or Evaluating a New Payroll System"**
Liebert Cassidy Whitmore | Webinar | Brian P. Walter

Nov. 13 **"2019 Legislative Update for Public Agencies"**
Liebert Cassidy Whitmore | Webinar | Gage C. Dungy

Nov. 15 **"Regular Rate of Pay Seminar"**
Liebert Cassidy Whitmore Seminar | Buena Park | Peter J. Brown

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