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Education Matters

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

December 2018

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LCW NEWS

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TITLE IX

U.S. Department of Education Publishes Draft Title IX Regulations. Public Comment Period Remains Open Through January 28, 2019.

On September 7, 2017, United States Secretary of Education Betsy DeVos announced the United States Department of Education would launch a public comment period to inform the development of new federal Title IX regulations pertaining to campus sexual assault policies. This is significant because a federal regulation, as opposed to a Dear Colleague Letter, are legally enforceable against educational institutions. In the announcement, Secretary DeVos requested recommendations from "important perspectives" regarding Title IX enforcement issues including alternative models to traditional adjudication, the appropriate standard of proof for campus-based proceedings, investigation methods, and the role of campus officials.

By law, Federal agencies must consult the public during rulemaking. Anyone, including individuals or institutions, may submit a comment aimed at developing and improving federal regulations, and the Department of Education will review and consider all submissions.

The Department of Education published its proposed Title IX regulations on November 29, 2018, beginning a 60-day public comment period. The public comment period is an opportunity for the public to be heard and make a record of ideas or positions on the topic. Institutions should consider utilizing the public comment period. See the published proposed regulations and file a comment on the Federal Register's website here.

The proposed regulations include provisions that limit a public education employer's responsibility to investigate potential Title IX violations to cases in which there are formal complaints and the alleged incidents happened on campus or within an educational program or activity. The proposed regulations define sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The proposed regulations guarantee a person accused of sexual misconduct the right to cross-examine the accuser and allow public education employers more leeway to use mediation and other informal resolution procedures that were previously discouraged in federal guidance.

LCW will continue to monitor the notice-and-comment process and provide information as it becomes available.

Read more about the recent changes to Title IX enforcement here.

STUDENT MISCONDUCT

Where a College or University's Disciplinary Determination Turns on Witness Credibility, the Adjudicator Must Have an Opportunity to Assess Personally the Credibility of Critical Witnesses.

In April 2014, a group of students from the University of Southern California attended a paint party where they splattered each other with jugs of paint. Jane Roe drank before and during the party, and at the end of the party, Jane walked back to her apartment with John Doe. John initiated sexual activity with Jane on an air mattress in the living room of Jane's apartment.

Jane later stated she was blacked out when John began having sex with her, which she described as "really painful." After the encounter, Jane went to her bedroom to hide, and John left the apartment.

In a subsequent phone call with a high school friend, Jane cried and disclosed she could not remember if she had verbally consented to any sexual activity with John, and that she threw up before any sexual activity started. Jane later disclosed there was blood on the sheets and mattress, and she was still in some discomfort from the sexual activity.

Jane later described that she was covered in blood from the encounter, but she also told her friend she had red paint on her leftover from the paint party. Jane found a condom with fluids and put it in a bag and put all the clothes she had been wearing into another bag.

The next morning, Jane's friend Sarah went to Jane's apartment to collect belongings she left the night before and left the apartment after about five or ten minutes. Sarah did not remember seeing blood or red paint on the floor or mattress, but thought the apartment "looked really empty" and "seemed cleaner."

Later that morning, Jane sought treatment at a rape treatment center but declined to speak with law enforcement about the incident or make a report.

When Jane completed the examination, her boyfriend picked her up, and they went to Jane's apartment. The boyfriend went inside the apartment while Jane waited in the hallway. The boyfriend described the apartment as "disheveled" and noticed vomit, blood, a used condom. Jane asked the boyfriend to deflate the air mattress and throw away the sheets.

The Investigation

On April 30, 2014, Jane submitted a complaint to the USC Office of Student Judicial Affairs and Community Standards stating John sexually assaulted her in the early morning of April 13, 2014. Dr. Kegan Allee, USC's Title IX investigator, interviewed Jane by Skype about the incident. Jane had a support person who was not affiliated with the USC community with her during the interview. Jane admitted that she did not remember much from the incident and relied on a conversation with her friend Emily to remember what happened.

Dr. Allee was the initial Title IX investigator before USC transferred the investigation to Marilou Mirkovich, an outside attorney. Mirkovich interviewed Emily, Sarah, and Jane's boyfriend. Mirkovich transferred the investigation back to Dr. Allee after these interviews, and Dr. Allee did not reinterview these three witnesses. Dr. Allee conducted telephone interviews of additional witnesses saw or spoke to Jane on the night of the alleged assault.

On May 30, 2014, John's attorney requested all documents and relevant information gathered as part of the investigation. USC provided John with summaries of the witness interviews, the law enforcement reports, text messages, call logs, and other information the investigators gathered. John's attorney asked USC to follow up with Jane to obtain the clothing she wore on the night of the alleged assault.

Dr. Allee notified Jane of John's request, and Dr. Allee's notes from the call confirmed she told Jane the request came from John rather than USC. John never received Jane's medical report from the rape treatment center and the other evidence and information he requested.

The Administrative Review

On August 20, 2014, Dr. Allee concluded her investigation and issued her summary administrative review. Dr. Allee concluded John knew or should have known, regardless of his own intoxication, Jane was too drunk to consent to sexual activity. Therefore, even if Jane did appear to consent to vaginal sex, she was too incapacitated to understand who, what, where, when, and why and thus could not properly consent. Furthermore, Jane did not consent to additional sexual activity.

Despite conflicting evidence about whether the red substance on Jane and the air mattress was blood or red paint, Dr. Allee decided the substance was blood and evidence of the sexual assault. Specifically, Dr. Allee considered Jane credible when she reported she was covered in blood after the sexual encounter and considered the boyfriend's statement credible regarding the blood in the apartment. Dr. Allee found Sarah's conflicting statement—that there was no blood in Jane's apartment in the morning after the sexual encounter—was not "sufficiently reliable" even though she had not personally interviewed Sarah.

Dr. Allee imposed the sanction of expulsion and prohibited John from having any contact with Jane.

John's Appeal

In September 2014, John appealed Dr. Allee's decision to the Student Behavior Appeals Panel. The Appeals Panel denied John's appeal and recommended immediate expulsion. The USC vice provost approved the Appeals Panel decision, which became final, and provided notice to John.

Trial Court Writ Proceeding

In January 2015, John filed a petition with the trial court and requested it review USC's decision to expel him. John argued he was denied fair process and USC's findings were not supported by substantial evidence.

In its opposition, USC argued it provided John a fair hearing, and substantial evidence supported Dr. Allee's findings. USC asserted it requested, but was not able to obtain, the condom, Jane's clothes from the night of the incident, and Jane's private medical records from the rape treatment center.

In February 2016, the trial court issued a ruling denying John's petition. The trial court found there was substantial evidence to support USC's decision. The trial court deferred to USC's finding that Jane's testimony was credible that she lacked the capacity to consent and did not consent to the sexual activity and noted her testimony was corroborated by her boyfriend and high school friend. John appealed.

Appeal to Court of Appeal

The Court of Appeal considered whether USC proceeded without, or in excess of, jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion.

John argued he was denied a fair hearing because Dr. Allee did not reinterview critical witnesses who had been interviewed by Mirkovich to enable Dr. Allee to assess their credibility

The Court of Appeal held the same considerations underlying the holdings in *Doe v. Claremont McKenna College* (2018) 25 Cal. App.5th 1055 apply here: where a student faces a potentially severe sanction from a student disciplinary decision and the university's determination depends on witness credibility, the adjudicator must have the ability to observe the demeanor of those witnesses in deciding which witnesses are more credible.

Here, the boyfriend and Sarah gave conflicting accounts as to the condition of Jane's apartment and whether there was blood in the apartment on the morning of the incident.

Given the conflicting witness statements and lack of corroborating evidence, a fair hearing required Dr. Allee to assess personally the credibility of critical witnesses in person or by videoconference or other technological means, which would have provided Dr. Allee an opportunity to observe the witnesses' demeanor during the interview.

In addition, an accused student must have the opportunity indirectly to question the complainant. USC's procedures do not provide an accused student the right to submit a list of questions to ask the complainant, nor was John given that opportunity here.

John argued USC failed to obtain Jane's clothes from the night of the party or her medical records from the rape treatment center to help resolve the conflict over whether substances on Jane's body and in her apartment were red paint or blood. The Court of Appeal agreed USC violated its own procedures by failing to request that Jane provide her clothes or consent to release her medical records. Specifically, Dr. Allee did not request Jane provide her clothes as part of the investigation. Rather, she only informed Jane that John had requested Jane's clothes and the condom found in the apartment. By emphasizing the request was from John, it was easier for Jane to ignore the request, hampering John's ability to defend himself. In addition, Dr. Allee never asked Jane if she would consent to release of this her medical report and other evidence from the rape treatment center.

Ultimately, the Court of Appeal reversed the trial court's decision and ordered the trial court grant John's petition to review USC's decision.

Doe v. University of Southern California (2018) __ Cal.App.5th __ [2018 WL 6499696].

NOTE:

Read more on the rapidly evolving interpretations of state and federal law regarding allegations of sexual misconduct and student discipline here

REDISTRICTING LAW

City's Redistricting Plan Did Not Violate the Equal Protection Clause Because it was Not Motivated Predominantly by Race. Legislative Privilege Protected City Officials from Being Deposed and Questioned Regarding Legislative Acts, Motivations, or Deliberations Pertaining to City's Redistricting Plan.

The Los Angeles City Council created the Los Angeles City Council Redistricting Commission to advise the City Council on the drawing of new Council District boundaries after the federal census. In January 2012, the Commission divided into three ad hoc committees that became responsible for drawing the initial map of the Council Districts within its assigned region of the city.

At one of the committee's first meetings, Commissioner Chris Ellison prepared his proposed boundaries for Counsel District 10. In presenting his proposed boundaries, Ellison stated he sought to increase the percentage of registered African American voters in the Counsel District from 43.2 percent to over 50 percent. He reiterated this intention in an email and later when speaking at a conference of African American ministers.

The committee ultimately presented Ellison's boundary proposals to the Commission for approval. The Commission considered public feedback on the changes, debated adjustments,

approved adjustments, and solicited more public feedback. After more adjustments, the Commission forwarded the plan to the City Council.

Based on feedback in additional public hearings, the City Council made adjustments to the Commission's proposed boundaries and passed the final redistricting ordinance.

In July 2012, a group of voters in Los Angeles filed a lawsuit alleging the City violated the U.S. and California Constitutions and the City Charter in drawing Council District 10. In February 2013, another group of voters filed a similar lawsuit and brought the same claims against the City regarding Council District 10 and challenged the boundaries for two other Council Districts. The trial court consolidated these cases.

In the course of litigation, the City filed a motion requesting a protective order prohibiting the voters from questioning City officials regarding any legislative acts, motivations, or deliberations pertaining to the redistricting ordinance. The trial court granted the City's request and issued a protective order.

In February 2015, the trial court ruled in favor of the City as to the voters' federal constitutional claim without a full trial and declined to rule on the remaining claims, which it dismissed. The voters appealed both the ruling and the issuance of the protective order.

On appeal, the voters argued race was the overriding motivation behind Council District 10's boundaries. They contended the Council President used his powerful and prominent position to ensure that Council District 10 would become a majority African American Council District. The Council President claimed credit for acting to preserve African American seats on the City Council after the redistricting process concluded. He explicitly stated that it had been his "priority" to "make sure we have a black vote or two on that Council."

The Court of Appeals court found the evidence showed race was a motivation in drawing Council District 10, and for Commissioner Ellison and Council President Wesson, it may have even been the only motivation. However, the Court of Appeals noted the relevant inquiry is whether "race was the predominant factor motivating the *legislature's* decision" as to the final boundaries. Ellison and the Council President were only two people in a process that incorporated multiple layers of decisions and alterations from the entire Commission and the City Council. Absent additional evidence, Commissioner Ellison's and Council President Wesson's own subjective motivations were insufficient to make the voters' case that race predominated over the City Council's deliberations.

The voters also contended that the trial court erred in prohibiting the depositions of officials involved in the redistricting process. According to the voters, the legislative privilege does not apply at all to state and local officials, but the Court of Appeals disagreed. The Court of Appeal held, "Like their federal counterparts, state and local officials undoubtedly share an interest in minimizing the "distraction" of "divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation." Therefore, the legislative privilege applied equally to federal, state, and local officials.

The voters next argued the legislative privileged was a qualified right that should be overcome in this case. Although the voters called for a categorical exception whenever a constitutional claim directly implicated the government's intent, that exception would render the privilege "of little value." The Court of Appeal found the factual record fell short of justifying the "substantial intrusion" into the legislative process and concluded the trial court properly denied discovery on the ground of legislative privilege.

Ultimately, the Court of Appeals agreed with the trial court's ruling in favor of the City and prohibited the discovery.

Lee v. City of Los Angeles (2018) 908 F.3d 1175.

STUDENT SAFETY

Universities Owe Students a Duty of Care of a "Reasonably Prudent Person Under Like Circumstances" to Protect Them From Foreseeable Violence During Curricular Activities.

In March 2018, we reported a California Supreme Court opinion that held colleges and universities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities.

In that case, the California Supreme Court reversed the Court of Appeal's decision with regard to the duty University of California, Los Angeles (UCLA) owed a student who was assaulted in class by another student, but the Supreme Court sent the case back to the Court of Appeal to decide the remaining issues, including a determination of whether UCLA reasonably could have done more to prevent the assault.

Factual History

Damon Thompson was a transfer student at UCLA. After enrolling, Thompson began to experience problems with other students in both classroom and residence hall settings. On multiple occasions, Thompson complained to professors, a dean, and a teaching assistant about the alleged harassing behavior of other students and professors during class and in his residence hall.

UCLA urged Thompson to seek help at the university's Counseling and Psychological Services (CAPS), but Thompson's complaints of hearing voices and threats from other students only increased. At a psychiatric session, he admitted to thinking about harming others, although he had not identified victim or plan.

During class in October 2009, Thompson, without warning or provocation, stabbed fellow student Katherine Rosen in the chest and neck with a kitchen knife. Rosen survived the life-threatening injuries. Thompson admitted to campus police that he stabbed someone because the other students had been teasing him. He pleaded not guilty by reason of insanity to a charge of attempted murder and was diagnosed with paranoid schizophrenia.

Procedural History

Rosen sued Thompson, the Regents of the University of California, and several UCLA employees for negligence. Rosen alleged UCLA had a special relationship with her as an enrolled student, which entailed a duty "to take reasonable protective measures to ensure her safety against violent attacks and otherwise protect her from reasonable foreseeable criminal conduct, to warn her as to such reasonable foreseeable criminal conduct on its campus and in its buildings, and/or to control the reasonably foreseeable wrongful acts of third parties/other students." She alleged UCLA breached this duty because, although aware of Thompson's "dangerous propensities," it failed to warn or protect her or to control Thompson's foreseeably violent conduct.

UCLA argued the case should not proceed because: (1) colleges have no duty to protect their adult students from criminal acts; (2) if a duty does exist, UCLA did not breach it in this case; and (3) UCLA and one employee were immune from liability under certain Government Code provisions. Rosen argued UCLA owed her a duty of care because colleges have a special relationship with students in the classroom, based on their supervisory duties and the students' status as "business invitees"—in this case, a person invited into the classroom to receive an education. Rosen also claimed UCLA assumed a duty of care by undertaking to provide campus-wide security.

The trial court ruled against UCLA and concluded a duty could exist under each of the

grounds Rosen identified, there was a question about whether UCLA breached that duty, and the immunity statutes did not apply. UCLA appealed the ruling.

The Court of Appeal held that UCLA owed no duty to protect Rosen based on her status as a student or business invitee or based on the failure of its campus-wide security program. Rosen sought review in the California Supreme Court, which granted review of the decision.

Ultimately, the Supreme Court concluded the college-student relationship fits within the paradigm of a special relationship but only in the context of college-sponsored activities over which the college has some measure of control. The duty extends to activities that are tied to the university's curriculum but not to student behavior over which the university has no significant degree of control. Whether a university was, or should have been, on notice that a particular student posed a foreseeable risk of violence is a case-specific question to be examined in light of all the surrounding circumstances. Such case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case, but they do not determine that a duty exists.

Ultimately, the Supreme Court reversed the Court of Appeal's decision with regard to the duty UCLA owed Rosen, but it sent the case back to the Court of Appeal to decide the remaining issues, including a determination of whether UCLA reasonably could have done more to prevent the assault.

Remand to the Court of Appeal

Although the Supreme Court opinion held that colleges and universities owe a duty to protect their students from foreseeable acts of violence, the Supreme Court left open "the appropriate standard of care for judging the reasonableness of the university's actions" and invited the parties to litigate that issue on remand.

The Court of Appeal adopted the standard of care that ordinarily applied in negligence cases, "that of a reasonably prudent person under like circumstances." The Court of Appeal held this standard was better aligned with the Supreme Court's opinion in the appeal opinion and in other cases regarding the standard of care that governed a secondary school. UCLA did not provide any explanation why the ordinary standard of care that governs the duty secondary schools owe to their students should not also govern the analogous duty universities owe to their students in the curricular setting. The Court of Appeal concluded that if the Legislature disagreed that imposing the ordinary standard of care on universities and their employees led to undesirable consequences, it could pass a statute limiting the circumstances under which liability may attach.

Next, UCLA argued that even if they had a duty to respond to foreseeable threats of violence, no rational jury could conclude Thompson presented a foreseeable risk of harm or the university could have reasonably done more to prevent the attack. The Court of Appeal held that foreseeability of harm and breach of the standard of care are ordinarily questions of fact for the jury's determination, so the Court must allow the matter to proceed to a jury.

Finally, UCLA and the named employees argued even if they owed Rosen a duty of care and there were triable issues of fact regarding the breach of that duty, they were entitled to a ruling in their favor without a trial based on immunity grounds.

Ultimately, the Court of Appeal granted UCLA's request to dismiss the lawsuit against the UCLA psychologist who treated Thompson, but denied the petition in all other respects.

The Regents of the University of California v. Superior Court of Los Angeles County (2018) __Cal.App.5th __ [2018 WL 6314402].

LABOR RELATIONS

When it is Undisputed that the Public Employment Relations Board Followed its Procedures Prior to Issuing a Decision, Substantial Evidence Necessarily Supports a Trial Court's Finding that the Decision was Issued Pursuant to the Board's Established Procedures. The PERB's General Counsel's Post-Decision Actions Cannot be Raised as a Defense to an Enforcement Action.

The California School Employees Association (CSEA) is the exclusive representative of most classified employees employed by Bellflower Unified School District.

During the 2009 to 2010 school year, the District decided to close one of its elementary schools at the end of the school year. The proposed closure had the potential to eliminate some classified positions. On multiple occasions, CSEA demanded a meeting to negotiate the effects of the proposal, but no meeting occurred. In November 2010, CSEA filed an unfair practice charge with the Public Employment Relations Board alleging that the District failed to negotiate the closure and the closure caused layoffs and reductions in hours in violation of the Education Employment Relations Act (EERA).

In January 2012, PERB issued a complaint alleging the District committed an unfair practice and violated the EERA by failing to meet and bargain in good faith with CSEA over the effects of the proposed layoffs, and the District implemented layoffs and reductions in hours for its employees.The matter proceeded to a hearing before an administrative law judge who issued a proposed decision finding the District violated the EERA.

PERB ultimately issued a decision adopting the administrative law judge's findings of fact and conclusions of law. PERB ordered the District to cease and desist from: (1) failing to bargain in good faith with CSEA and (2) denying classified bargaining unit members the right to be represented by CSEA. It required the District to: (1) meet and negotiate in good faith, (2) provide affected bargaining unit members with limited back pay, (3) post a specific "Notice to Employees," and (4) provide PERB proof of compliance.

The District petitioned the Court of Appeal for review of the decision, but the Court of Appeal denied the petition.

The District reported to PERB that it had posted a modified notice in its personnel office and contended that posting the Notice to Employees required by the decision would be misleading to all classified employees.

PERB made multiple attempts to obtain the District's compliance, but ultimately sought enforcement of the order in trial court.

In a separate issue in 2012, CSEA received information indicating the District failed to pay certain employees for the July 4th holiday. Subsequently, CSEA filed an unfair practice charge with PERB alleging the District violated the EERA by changing its holiday pay policy without giving CSEA notice or an opportunity to bargain.

PERB issued a complaint that alleged the District committed an unfair practice by changing its holiday policy without affording CSEA an opportunity to negotiate the decision. An administrative law judge issued a proposed decision and order finding the District violated the EERA, and PERB adopted the decision. PERB required the District to cease and desist from: (1) failing to negotiate in good faith by enacting unilateral policy changes and failing to timely respond to requests for information, (2) interfering with the right of unit employees to be represented by CSEA, and (3) denying CSEA its right to represent unit employees. The order required the District to: (1) rescind the policy change regarding holiday leave and abide by the terms of the parties' collective bargaining agreement; (2) make whole the

affected employees for financial losses suffered; (3) either provide a complete response to CSEA's request for information or verify, in writing, to CSEA that the responses already provided were complete; (4) post a specific Notice to Employees in the form appended to the decision; and (5) provide PERB with proof of compliance,

The District refused to post the requisite Notice to Employees and proposed posting a modified notice. PERB's Office of General Counsel stated it did not have the authority to make any modifications to PERB's orders and filed a petition in trial court asking the trial court to enforce its two orders.

The trial court concluded the District failed to identify any specific procedures PERB failed to follow during the hearings and found the District waived any objections to the procedural regularity of the orders by failing to litigate the issue earlier. It held PERB's Office of General Counsel did not abuse the discretion afforded by state law when it sought to effectuate the District's compliance with PERB's decisions and orders. The trial court was not persuaded that the District's reasons for refusing to comply with the orders were appropriately argued before the court, citing EERA's directive that the court "shall not review the merits of the order" and noted the District's failure to cite authorities that would permit the court to assess whether the passage of time or other events made the orders moot. Finally, the court found sufficient evidence that PERB authorized the filing of the enforcement action in the Office of General Counsel's representations that it had sought and obtained such authorization. The trial court directed the District to comply with PERB's orders, and the District appealed.

The Court of Appeal sided with PERB. EERA permits PERB to seek enforcement of any final decision or order in trial court, and the court must order an agency to comply with PERB's order if, after a hearing, the court determines the "the order was issued pursuant to procedures established by the board and that the person or entity refused to comply with the order."

Here, the District did not raise any issues of procedural irregularity in its appearances before PERB, in its post-hearing briefs, or in the petitions seeking review of the orders, and offered no excuse for its failure to do so. The Court of Appeal found it waived any objections to procedural deficiencies.

The District contended PERB's General Counsel abused his discretion in refusing to negotiate over the wording of the notices or to allow the District to post modified notices.

However, the record disclosed no abuse of discretion by the General Counsel. As the General Counsel correctly advised the District, nothing in the regulation authorized him to modify a PERB order. The District had an opportunity, prior to the issuance of the decision and order, to propose a modified notice, but it did not.

Ultimately, the Court of Appeal affirmed the trial court's order granting PERB's petition for enforcement of the orders against the District.

Public Employment Relations Board v. Bellflower Unified School District (2018) __Cal.App.5th __ [2018 WL 6322422].

Employee's Allegedly Dishonest Comments Are Protected by the MMBA Unless the Employer Can Prove the Employee Knew the Comments Were False.

Under the Meyers Milias Brown Act ("MMBA"), employee statements related to the terms and conditions of employment are legally protected. They lose the protection of the MMBA only if they are flagrant, defamatory, insubordinate, or made with malice such that they cause a "substantial disruption of or material interference with" an agency's operations.

In this case, the County terminated employee and Union Chief negotiator, Wendy Thomas, because she allegedly made false statements in the course of pending litigation. The County later investigated the statements and found them

to be false. The Union then filed an unfair labor practice charge claiming that the statements were protected by the MMBA and that the County unlawfully terminated Thomas in retaliation for her protected activity.

The PERB Board reversed the Administrative Law Judge ("ALJ") decision dismissing the Union's charge. Instead, the Board found that the County had not proven that the employee knew that the statements at issue were false. Thus, PERB found the statements were indeed protected by the Act.

PERB relied on its prior decision in *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, which found that an employer must prove that an employee was knowingly dishonest (that the employee acted with "actual malice"):

> A party claiming employee speech is unprotected [because the speech is false] therefore must prove that (1) the employee's statement was false and (2) the employee made the statement 'with knowledge of its falsity, or with reckless disregard of whether it was true or false.' This standard focuses on the employee's subjective state of mind, not on whether a reasonable person would have investigated before making the statement. Even gross or extreme negligence as to the statement's truth is insufficient to prove the actual malice necessary to strip employee speech of statutory protection.

(internal citations omitted). The employer must prove the employee was dishonest under the "clear and convincing" standard, a higher standard of proof than the "preponderance of the evidence" standard.

PERB found the evidence did not show that Thomas was intentionally dishonest in making the statements at issue. Among other things, the PERB Board found that in describing her worksite as "remote" and "substandard," Thomas made statements of opinion which PERB did not find to be knowingly false.

Thomas had also stated that her County-issued vehicle had been removed from its usual parking spot even though Thomas had possession of the vehicle keys. The County claimed that Thomas omitted the material fact that the car was inoperable so the keys were not needed.

PERB rejected the ALJ's finding that Thomas' assertion was maliciously false. The evidence confirmed that the County moved Thomas' vehicle without notifying her or asking her for the keys. PERB also reasoned that because Thomas experienced other County actions that she may have viewed as retaliatory, Thomas' assertions more likely reflected her genuine belief that the County's actions were inappropriate.

PERB found that the evidence did not support the County's position that Thomas made these statements knowing that they were false. Therefore, Thomas' statements were indeed protected by the MMBA, and PERB found the County violated the MMBA's prohibitions on retaliation when it terminated her for making these statements.

SEIU v. County of Riverside, (2018) PERB Dec. No. 2591-M.

NOTE:

As this decision indicates, the MMBA is very protective of employee comments relating to terms and conditions of employment. Proving that an employee's comments lose the protection of the Act because they were intentional or reckless requires clear and convincing evidence that the employee knew the statements to be false. LCW attorneys are available to advise agencies in evaluating whether employee conduct is protected by the MMBA.

IMMUNIZATIONS

Legislature's Elimination of a Previously Existing "Personal Beliefs" Exemption from Mandatory Immunization Requirements for School Children Passes Another Constitutional Challenge.

Effective as of January 1, 2016, Senate Bill 277 ("SB 277") eliminated the personal beliefs exemption from the requirement that all school-aged children receive certain vaccinations before enrolling in school. A group of parents who disagreed with the law filed a lawsuit against the California Department of Education, the California Department of Public Health and various state officials, seeking to invalidate the law.

The parents alleged the law violated their rights under the state constitution to substantive due process, privacy, and a public education. The State petitioned the trial court to dismiss the case because the parents' claims were irrelevant or invalid, and the trial court agreed. The parents appealed.

In their complaint, the parents asserted SB 277 violated their substantive due process rights because it: (1) infringed on their rights to bodily autonomy and to refuse medical treatments; (2) conditioned the right to attend school on giving up the right to bodily autonomy and to refuse medical treatments; and (3) negated their parental right to make decisions in the upbringing of their children. While the parents argued the trial court erred in dismissing the lawsuit, their opening brief was "virtually devoid of any legal authority on this issue." The parents eventually argued against the cases and pointed to an Illinois case to support their argument, but the Court found these arguments without merit.

The parents' substantive due process claim failed because, "It is well established that laws mandating vaccination of school-aged children promote a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases." Furthermore, the Court was not aware of any case holding that mandatory vaccination statutes violated a person's right to bodily autonomy, and the Court disagreed with the parents that the seminal cases were now obsolete due to the increased prevalence of international travel.

Additionally, the parents argued that SB 277 was not narrowly circumscribed, because there were alternative means to accomplishing the State's goal of higher vaccination rates. The Court noted the pertinent analysis was whether the *elimination of the exemption* is narrowly circumscribed to address the goal of the law—here, "[a] means for the eventual achievement of total immunization" of appropriate school-aged children. Additionally, the parents' argument failed as compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases. Accordingly, the parents' substantive due process claim had no merit.

Next, the parents asserted SB 277 infringed on their constitutional right to privacy on two grounds: (1) required children to reveal personal medical information to attend a free public school; and (2) required parents and children to forego control over the integrity of the children's bodies.

The California Constitution provides that all individuals have a right to privacy. A person's medical history and information and the right to retain personal control over the integrity of one's body is protected under the right to privacy. However, the right to privacy must be balanced with the State's interest in protecting the health and safety of its citizens. The court held the removal of the personal beliefs exemption was necessary and narrowly drawn to serve the compelling objective of SB 277. Accordingly, SB 277 did not violate the parents' or children's right to privacy.

Next, the parents claimed the right to a public education cannot be burdened the way SB 277 allowed by "requiring families to incur substantial costs for the multitude of doctors'

visits, requiring students to relinquish rights to determine what goes into their bodies and their rights to bodily autonomy, and conditioning a fundamental right on giving up another." The parents cited four cases to support their argument, but the Court found three of the four cases were inapplicable to the legislative action in this case. In contract, the Court pointed to a 1904 California Supreme Court decision that found legislative vaccination requirements do not interfere with the right to attend school.

Lastly, the parents argued on appeal that SB 277 violated their right to free exercise of religion. The Court stated it agreed with the Court of Appeal's detailed opinion in *Brown v. Smith* (2018) 24 Cal.App.5tth 1135 that found SB 277 did not violate the right to free exercise of religion.

Therefore, the Court of Appeal affirmed the trial court's judgment against the parents.

Love v. State Department of Education (2018) __ Cal.App.5th __ [2018 WL 6382089].

BUSINESS & FACILITIES

California Court of Appeal Holds Prop 218 Did Not Repeal Voters' Right to Challenge Local Resolutions and Ordinances by Referendum.

The California Constitution contains express reservations of the voters' initiative and referendum powers. The initiative is the power of electors to propose statutes and amendments to the Constitution and to adopt or reject them. The referendum is the power to approve or reject statutes or parts of statutes, subject to certain exceptions including statutes providing for tax levies or appropriations for usual current expenses of the State. In 1996, California voters adopted Proposition 218, adding article XIII C to the California Constitution, through which they expressly reserved their right to challenge local taxes, assessments, fees, and charges by *initiative*. Prop 218 makes no express reference to the voters' referendum powers.

In 2016, the City of Dunsmuir passed a resolution to increase water rates over a six year period to fund replacement of aged water storage and delivery infrastructure. After adoption of the resolution, Leslie Wilde gathered signatures sufficient for a referendum to repeal the resolution. However, the City refused to place the referendum on the ballot because, it asserted, the resolution involved an administrative act not subject to referendum. Wilde challenged the City's decision by writ of mandate but the trial court agreed with the City and denied the writ petition.

Wilde subsequently appealed the trial court decision. On appeal, the Court addressed, among other things, whether: (i) Proposition 218 impliedly repealed voters' right to challenge local resolutions and ordinances by referendum; (ii) the resolution was exempt from referendum as an administrative act; and (iii) the resolution was exempt from referendum under the "essential government service" exception to referendum. The Court concluded Prop 218 did not prevent referendum on repeal of the resolution, and that the resolution was not otherwise exempt. The Court of Appeal reversed and remanded to the trial court with directions to issue a peremptory writ ordering the voter registrar to place the referendum on the ballot.

The Court of Appeal rejected the City's argument that the failure to reference referenda in Proposition 218, Cal. Const., art. XIII C, section 3 constituted a failure to preserve the referendum power as a tool for challenging local resolutions and ordinances. The Court reasoned that Proposition 218 was enacted in response to cases that had limited the reach of voters' *initiatives* to challenge local tax measures, and to prevent local governments from subjecting taxpayers to excessive tax, assessment, fee and charge increases that frustrate voter approval requirements for tax measures. Moreover, the text of Proposition 218 requires that it be liberally construed to limit local government revenue and enhance taxpayer consent. In addition, Proposition 218's focus on preserving initiative

rights for tax levies did not require any reference the referendum power because taxes have never been subject to referendum. Accordingly, the Court declined to construe Prop 218 to limit the voters' referendum powers in any way.

The Court of Appeal also concluded that the resolution was legislative, not administrative in nature, and thus subject to referendum. The new water rates adopted in the resolution were not an administrative adjustment of rates according to a previously established master plan. Instead, the new water rates were the product of a newly formulated set of policies that implemented new policy choices: to replace aging water storage and delivery infrastructure and to allocate infrastructure costs.

In addition, the Court of Appeal concluded that the resolution was not exempt from referendum as an impingement on essential government services. The City argued that the referendum would lead to uncertainty in the planning and fiscal administration of government budgets. The Court rejected the argument, finding that the resolution did not represent the ordinary working or budgeting for the City but merely policy choices regarding the City's water infrastructure and rates. Moreover, the referendum contained no prohibition on the City's future ability to study, plan, or implement a new water rate plan, it merely proposed repeal of the current referendum. The City did not argue, and the Court declined to consider, whether the resolution implicated an essential government service due to the importance of water supply to residents. The Court deemed the argument forfeited.

Wilde v. City of Dunsmuir (2018) 29 Cal.App.5th 158.

WAGE AND HOUR

No Travel Time Pay for Special District Employees Who Voluntarily Drove Company Vehicles During Commute.

Pacific Bell Telephone Company ("Pac Bell") employs technicians to install and repair residential video and internet services. Prior to 2009, Pac Bell required all technicians to pick up company vehicles loaded with equipment each day at a Pac Bell garage. Pac Bell paid technicians for time spent picking up the vehicle at the garage, loading it with equipment, and driving to the first work site. Pac Bell also paid technicians for time spent driving from the last customer worksite to the garage at the end of the work day, but did not pay them for time spent traveling to or from the garage and their homes at the start and end of their shifts.

In 2009, Pac Bell created a voluntary "Home Dispatch Program" ("HDP") that gave technicians the option to commute between their homes and work sites using a Pac Bell vehicle. Use of the company vehicle was not mandatory, and technicians had the option to use their own cars instead. Technicians participating in the HDP traveled to the garage once a week to load the Pac Bell vehicle with the necessary tools and equipment. Pac Bell paid technicians for the time spent driving the vehicle to the garage and loading it with equipment on a weekly basis. Technicians could drive the company vehicle home at the end of each work day, and drive from their home to their first work site the next day. Pac Bell did not pay technicians for time spent driving the company vehicle between their homes and work sites at the start or end of the work day.

Several technicians participating in the HDP sued, claiming they were entitled to pay for the time they spent driving a Pac Bell vehicle from their homes to and from their work site. Because Pacific Bell is a special district, California wage and hour laws governing travel time (not the Fair Labor Standards Act) governed the dispute. The

California Court of Appeal ultimately dismissed the technicians' claims.

First, the Court of Appeal found that because Pac Bell did not *require* employees to participate in the HDP or use a company vehicle, technicians were not under Pac Bell's "control" during their commute between their home and work sites, and were not entitled to be paid for the time.

Pac Bell did place restrictions on technicians' personal activities while they were in a company vehicle. Pac Bell required technicians to use its vehicles only for company business and they could not: carry unauthorized persons as passengers; run errands; pick up or drop off their children; or talk on a cell phone while driving. But the Court found that the restrictions did not establish "control" because the use of the company vehicle was completely voluntary and not required.

The Court of Appeal noted that the California Supreme Court found in *Morillion v. Royal Packing Co.* that "[E]mployers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as 'hours worked.'" (2000) 22 Cal.4th 557, 581 (*Morillion*). Because Pac Bell did not require technicians to use company vehicles to travel between their homes and work sites, it was not required to compensate technicians for that time.

Second, the Court of Appeal found that Pac Bell was not obligated to pay technicians merely because technicians transported tools in their vehicles. The technicians claimed that by transporting tools and equipment necessary for their work, they were "suffered or permitted to work," and should be paid for their labor. However, the Court of Appeal found that technicians were merely "commuting with necessary tools in tow," but were not delivering heavy or specialized equipment to their work sites. The former does not require additional time, effort, or exertion beyond what is required for commuting. Thus, time spent driving with equipment was not compensable for this additional reason.

Hernandez v. Pacific Bell Telephone Company (2018) 29 Cal. App.5th 131.

NOTE:

The legal standards governing travel time and whether it is compensable, differ and depend upon the legal status of each public agency. The rules for Charter Cities and all Counties are governed by the FLSA. But the travel time rules for general law cities and special districts are governed by California wage and hour laws. In this case, Pacific Bell Telephone Company was a special district and California wage and hour law applied to the travel time dispute.

DISCRIMINATION

Injured Employee Gets a Jury Trial After His Employer Denies Previously Approved Transfer and Requests a Resignation.

The U.S. Court of Appeals for the Ninth Circuit found that an employee presented enough evidence to survive summary judgment and have his case heard by a jury.

Herman Nunies was a delivery driver for HIE Holdings, Inc. ("HIE"). His job duties included operating a vehicle, loading and unloading five-gallon water bottles, and carrying and lifting heavy items. Nunies allegedly requested, and was approved to be transferred to a part-time warehouse positon, but HIE denied his request and forced him to resign after he reported that he had incurred a shoulder injury. Nunies sued, claiming that HIE had discriminated against him in violation of the ADA, because of a perceived physical disability.

To prevail on his claim of disability discrimination, Nunies was required to present evidence that he was regarded as having a physical impairment (as defined in the ADA), that he was qualified for the part-time position, and that HIE denied him the transfer and forced him to resign because of the impairment.

An individual is protected by the ADA if the individual is "regarded as" having a physical impairment.

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited [by the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

The parties disputed whether HIE "regarded" Nunies as an individual with a disability due to his shoulder injury. The trial court granted summary judgment in favor of HIE and dismissed Nunies' claims.

On Nunies' appeal, the Ninth Circuit applied the employee-friendly summary judgment standard that requires a court to view the evidence in the light most favorable to Nunies and reversed summary judgement.

The Ninth Circuit was persuaded by Nunies' evidence that: on June 14th, a supervisor told Nunies that his transfer to a part-time position had been approved; three days later, Nunies informed his supervisor and manager that he injured his shoulder; and two days after learning of the injury, HIE informed Nunies that he could not transfer to a part-time position but must resign due to budget cuts. There was also evidence that on June 26th, HIE posted an opening for a part-time warehouse position. On June 27th, one day after posting the position, HIE's termination report listed Nunies as having "resigned." Thereafter, Nunies was diagnosed with a partial tear of his left shoulder. HIE presented evidence that Nunies requested transfer to a part-time position to have more time to focus on his side business.

Viewing this evidence favorably to Nunies, the court noted that a jury could reasonably conclude that HIE misrepresented that the part-time warehouse position was no longer available. A jury could also reasonably find that HIE forced Nunies to resign because of his shoulder injury given that Nunies' request to transfer to a part-time position was approved, and then rescinded shortly after Nunies reported his injury. Finally, the court noted that under the ADA, an employee need not prove that the employer subjectively believes the employee is substantially limited in a major life activity in order to be protected by the ADA. The trial court was wrong to require Nunies to do so. Thus, the Ninth Circuit reversed the trial court's decision granting summary judgment for HIE and allowed Nunies to try his claims to a jury.

Nunies v. HIE Holdings, Inc. (2018) 908 F.3d 428.

PUBLIC RECORDS

Agency Was Permitted to Recover Costs of Redacting Electronic Public Records.

The California Court of Appeal found that the California Public Records Act ("CPRA") permits a public agency employer to recover, from the requestor of public records, the actual costs to the agency of redacting information from electronic records in response to a request for electronically stored public records.

In this case, the National Lawyers Guild ("NLG") San Francisco Chapter requested from the City of Hayward ("City") electronic records related to a demonstration for which the City's Police Department provided security. The NLG initially requested 11 categories of records including electronic and paper records. The NLG made a second request for video recordings of police

body camera footage from 24 named officers and additional unnamed officers.

The City complied with the NLG's records requests. In response to the first request, the City produced more than six hours of body camera footage. City staff spent approximately 170 hours reviewing and redacting portions of the video that were exempt from disclosure under the CPRA. The task required the City to research and acquire a special software program to edit and redact the video recordings. The City sought reimbursement for $2,939.58 in costs incurred in copying and redacting the videos, including costs for: City staff time spent reviewing and editing/redacting exempt portions of the requested video recordings and costs incurred in copying the videos. In response to the NLG's second request for videos, the City offered to produce copies for $308.89 to reimburse the City for its production costs.

The NLG filed a legal action seeking reimbursement for its payment of $2,939.58, and access to the second set of its requested videos for no more than the City's direct production costs. The parties agreed that the video recordings that the NLG requested were subject to disclosure but disputed which party should bear the costs incurred in connection with the City's production of these records. The trial court granted the NLG's request and the City appealed.

First, the Court of Appeal recognized that a person's protected right of access to information regarding the conduct of a police force must sometimes yield to the personal privacy interests of others. The CPRA specifies that "if only part of a record is exempt, the agency is required to produce the remainder, if segregable" but the agency may not withhold the entire document. (Gov. Code 6253, subd. (a).)

Second, the Court of Appeal interpreted section 6253 and section 6253.9 of the CPRA. Section 6253 allows an agency to recover the direct costs of duplication (interpreted to cover, for example, photocopying costs and the expense of running the machine). Section 6253.9 requires government agencies that keep public records in an electronic format to make them available in electronic format and permits an agency to recover ancillary costs of producing public records. Specifically, section 6253.9 specifies: a requester "shall bear the cost of producing a copy of the record, including the *cost to construct* a record, and the *cost of programming and computer services necessary to produce* a copy of the record when…[t]he 'request would require data compilation, extraction, or programming to produce the record.'" (Gov. Code 6253.9, subd. (b), (b)(2) (emphasis provided).) The Court of Appeal found that the legislative history of the CPRA indicated that section 6253.9 was added to allow public agencies to recover, in addition to the direct costs of duplication, the costs of acquiring and utilizing computer programs "to extract exempt material from otherwise disclosable electronic public records."

For these reasons, the Court of Appeal found that the CPRA allowed the City to charge a requestor of records for the costs of creating a redacted version of an existing public record.

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward (2018) 27 Cal.App.5th 937.

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New to the Firm

Lars T. Reed is an Associate in our Sacramento office where he provides counsel and representation to clients on matters involving employment law and litigation. Lars has experience in all aspects of the litigation process from pre-litigation advice to enforcement and appeals. He is fluent in Norwegian, and also speaks Swedish and Danish. He can be reached at 916.584.7011 or lreed@lcwlegal.com.

Emanuela Tala joins our Los Angeles office where she provides representation and legal counsel to clients in matters related to employment law and litigation. She has defended employers in litigation claims for discrimination, harassment, retaliation, wage and hour, and other employment claims. Emanuela has successfully argued dispositive motions, including motions for summary judgment. She can be reached at 310.981.2732 or etala@lcwlegal.com.

Alexander (Alex) Volberding is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he provides assistance to clients in matters pertaining to labor and employment law and litigation. Alex has significant experience drafting and negotiating Project Labor Agreements (PLAs) on behalf of public sector clients throughout the state, as well as providing advice and counsel to clients regarding issues that arise under such agreements after adoption, including disputes about payments and threatened work stoppages. He can be reached 310.981.2021 or avolberding@lcwlegal.com.

Casey Williams is an employment litigator and nonprofit business attorney based in Liebert Cassidy Whitmore's San Francisco office. Her dynamic practice is focused on helping mission-driven organizations achieve their goals while staying compliant and working through complex disputes. She can be reached at 415.512.3018 or cwilliams@lcwlegal.com.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Jan. 4 **"Prevention and Control of Absenteeism and Abuse of Leave"**
Central CA CCD ERC | Webinar | Eileen O'Hare-Anderson

Jan. 9 **"Supervisor's Guide to Public Sector Employment Law"**
Gold Country ERC | Placerville & Webinar | Jack Hughes

Jan. 10 **"Maximizing Performance Through Evaluation, Documentation and Discipline"** and **"The Art of Writing the Performance Evaluation"**
East Inland Empire ERC | Fontana | Christopher S. Frederick

Jan. 10 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Gateway Public ERC | Santa Fe Springs | Kristi Recchia

Jan. 10 **"Public Sector Employment Law Update"**
North State ERC & San Diego ERC & San Mateo County ERC | Webinar | Richard S. Whitmore

Jan. 16 **"Management Guide to Public Sector Labor Relations"**
South Bay ERC | Manhattan Beach | Melanie L. Chaney

Jan. 16 **"Public Sector Employment Law Update"**
Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore

Jan. 17 **"Advanced FSLA"** and **"Public Sector Employment Law Update"**
Coachella Valley ERC | La Quinta | Elizabeth Tom Arce

Jan. 17 **"Labor Negotiations from Beginning to End"**
LA County HR Consortium | Los Angeles | Adrianna E. Guzman

Jan. 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"** and **"Moving Into the Future"**
West Inland Empire ERC | Diamond Bar | Kevin J. Chicas

Jan. 18 **"Public Meeting Law (the Brown Act) and the Public Records Act"**
SCCCD ERC | Anaheim | T. Oliver Yee

Customized Training

Jan. 18 **"Embracing Diversity"**
Los Angeles Conservation Corps | Jennifer Rosner

Jan. 23 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Ohlone College | Fremont | Laura Schulkind

Jan. 23 **"Students with Disabilities: How Academic Accommodations Work"**
Ohlone College | Fremont | Eileen O'Hare-Anderson

Jan. 31 **"An Employment Relations Primer for Community College District Administrators and Supervisors"**
College of the Desert | Palm Desert | T. Oliver Yee

Speaking Engagements

Jan. 9 **"The Leadership Role of Finance and FLSA Compliance"**
California Society of Municipal Finance Officers (CSMFO) Annual Conference | Palm Springs | Brian P. Walter & Lori Sassoon

Jan. 10 **"Strategies to Manage Increasing Pension Costs"**
CSMFO Annual Conference | Palm Springs | Steven M. Berliner & Monica Irons

Jan. 10 **"Legal Update"**
International Public Management Association for HR (IPMA) Sacramento-Mother Lode Chapter Meeting | Roseville | Gage C. Dungy

Jan. 16 **"What Public Procurement Officials Need to Know About California's New Independent Contractor Test"**
California Association of Public Procurement Officers (CAPPO) Conference | Sacramento | Kristin D. Lindgren

Jan. 28 **"Performance Management - Evaluation, Documentation and Discipline"** and **"The Art of Writing the Performance Evaluation"**
National Association of Housing and Redevelopment Officials (NAHRO) | Napa | Kristin D. Lindgren

Jan. 30 **"Legal Update"**
Inland Empire Public Management Association for Human Resources (IEPMA-HR) | Riverside | J. Scott Tiedemann

Jan. 30 **"AB 1661 Training"**
League of California Cities New Mayors and Council Members Academy | Irvine | J. Scott Tiedemann

Seminars/Webinars

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

Jan. 23 **"Costing Labor Contracts"**
LCW Conference 2019 | Palm Desert | Peter J. Brown & Kristi Recchia

Jan. 24-25 "**2019 LCW Conference"**
Liebert Cassidy Whitmore | Palm Desert

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