LCW Liebert Cassidy Whitmore

Education Matters

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

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LCW NEWS

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EQUAL PAY ACT

Ninth Circuit Court of Appeals to Reconsider "Factor Other than Sex" Exception to EPA After Judge Dies Before Opinion Published.

Aileen Rizo worked as a math consultant with the Fresno County Office of Education. She sued the County Office of Education under the Equal Pay Act after discovering the County Office of Education paid her male colleagues more for the same work.

Under the Equal Pay Act, the employee must first prove that he or she received different wages for equal work. The burden then shifts to the employer to show the disparity falls under one of following exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex.

When Rizo began working for the County Superintendent of Schools, the Superintendent used Standard Operation Procedure 1440 (SOP 1440) to determine her starting salary. SOP 1440 was a salary schedule that consisted of levels, and "steps" within each level. New employees' salaries were set at a step within Level 1. To determine the appropriate step, the County considered Rizo's prior salary and added five percent. That calculation resulted in a salary lower than the lowest step within Level 1, so the County started Rizo at the minimum Level 1, Step 1 salary, and added a $600 stipend for her master's degree.

The County Office of Education conceded that Rizo received lower pay for equal work. But, the County Office of Education argued that its consideration of Rizo's prior salary was permitted as a "factor other than sex." The trial court rejected the County Office of Education's argument and held that a "factor other than sex" could not be prior salary. The County Office of Education appealed.

In its 2017 opinion, the Court of Appeals analyzed its previous opinion in *Kouba v. Allstate Insurance Co.* in which the Court held that a prior salary can be a "factor other than sex" if the employer: (1) showed it to be part of an overall business policy; and (2) used prior salary reasonably in light of its stated business purposes.

The County Office of Education offered four business reasons to support its use of Rizo's prior salary to set her current salary: (1) it was an objective factor; (2) adding five percent to starting salary induced employees to leave

their jobs and come to the County Office of Education; (3) using prior salary prevented favoritism; and (4) using prior salary prevented waste of taxpayer dollars. The trial court did not evaluate those reasons under the *Kouba* factors, so the Court of Appeal sent the case back to the trial court to evaluate the County Office of Education's reasons. Then, the Court of Appeals granted a petition for rehearing before all of the judges of the court to clarify the law, including the continued effect of *Kouba.*

In the rehearing, the Court of Appeals considered which factors an employer could consider to justify a salary difference between employees under the "factors other than sex" exception to the Equal Pay Act. Prior to this decision, the law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. The Court of Appeals concluded that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Therefore, prior salary is not a permissible "factor other than sex" within the meaning of the Equal Pay Act. The Court of Appeal stated that the language, legislative history, and purpose of the Equal Pay Act made it clear that Congress would not create an exception for basing new hires' salaries on those very disparities found in an employee's salary history—disparities, the Court noted, that Congress declared are not only related to sex, but caused by sex. This decision overruled *Kouba.* Accordingly, the County Office of Education failed to set forth an affirmative defense for why it paid Rizo less than her male colleagues for the same work.

However, before the Court of Appeals issued its opinion, a judge who participated in the case and authored the opinion died. Without that judge's vote, the opinion would have been approved by only five of the ten members of the panel who were still living when the decision was filed, which did not create a majority to overrule the Court of Appeal's previous opinion in *Kouba*. Although the five living judges agreed in the ultimate judgment, they did so for different reasons.

The County Office of Education appealed to the U.S. Supreme Court and asked whether a federal court may count the vote of a judge who died before the decision was issued.

The U.S. Supreme Court stated that because the judge was no longer a judge at the time when the decision by the entire Ninth Circuit was filed, the Court of Appeals erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. Therefore, the Supreme Court vacated the opinion written by the deceased judge and sent the case back to the Court of Appeals for further proceedings.

Yovino v. Rizo (2019) __ U.S. __ [2019 WL 886486].

CIVIL PROCEDURE

Internal Investigations By Schools Into Claims of Discrimination Qualify as "Official Proceedings Authorized By Law" that Receive Protections of the Anti-SLAPP Statute.

Dr. Jason Laker is a professor at California State University, San Jose. A student told Dr. Laker the then-Chair of his Department sexually and racially harassed her. The student brought a formal Title IX complaint against the Chair, and after investigation, the University sustained the charges against the Chair. The University disciplined the Chair, and later, the University announced it was looking into how the matter was handled.

University administrators received an e-mail a few months later from the student who stated she experienced ongoing stress and anxiety relating to the issue. The student noted the investigative report stated that at least two professors were

aware of the behavior before her complaint. The Associate Vice President responded to the student and agreed it was concerning that other faculty members appeared to have received information regarding troubling behavior and did not notify administrators. Laker was one of these faculty members.

Separately, the University received and investigated three complaints against Laker.

After exhausting administrative remedies, Laker filed a lawsuit against University and the Associate Vice President for defamation and retaliation arising from the internal investigations. Laker alleged he was falsely accused of knowing about the sexual harassment and failing to report it. Laker also alleged the Associate Vice President and other University officials called him a "liar" when he said other students had complained of sexual harassment by the Chair. Laker also argued the University and others retaliated against him because he opposed the Chair's harassment and assisted the student with her complaint.

The University responded to Laker's complaint with an anti-SLAPP motion, a special motion to strike the lawsuit. The University argued the trial court should strike Laker's complaint because the defamation and retaliation causes of action arose from protected activity, and Laker had no probability of prevailing on either claim.

The trial court denied the University's motion, finding the University did not met its initial burden of showing that the causes of action arose from protected activity. The University appealed.

On appeal, the University argued Laker's defamation claim arose from the statements made by the Associate Vice President and others during the investigation into the complaint against the Chair, and his retaliation claim arose from the University's investigation of the three complaints against Laker. Laker argued the anti-SLAPP statute did not protect any of these activities, because the University acted illegally by conducting "sham" investigations, the e-mail that formed the basis of Laker's defamation claim fell outside the scope of the investigation into the Chair, and the University's decision to pursue three investigations into his conduct did not arise from protected activity.

Courts must evaluate anti-SLAPP motions using a two-step process: (1) determine whether the nature of the conduct that underlies the allegations is protected conduct defined by the anti-SLAPP statute, and (2) assess the merits of the claim.

Protected conduct includes a written or oral statements made during or in connection with official proceedings authorized by law or made in a place open to the public about an issue of public interest.

Before the Court turned to the application of the above definition, it considered Laker's argument that the University's investigation were "illegal," because it violated internal university regulations and policies into the standards and timing for investigations, as well as federal and state laws including Title IX. The Court of Appeal found that while the merits and conduct of the investigations may ultimately prove significant to the success of Laker's suit against the University, the deficiencies that Laker articulated did not arise to the level of illegality that would preclude application of the anti-SLAPP statute.

The Court of Appeal then considered whether the University's conduct fell within one of the categories set out the anti-SLAPP statute and whether the causes of action arose from that protected conduct. The Court of Appeal concluded Laker's defamation claim involved protected conduct in the form of statements, including the Associate Vice President's email response to the student, made during and in connection with the ongoing internal investigation. Specifically, this conduct was protected as an "official proceeding authorized by law." Furthermore, these statements formed the crux of Laker's defamation claim. The

Court of Appeal concluded Laker could not demonstrate a probability of success on the merits of his defamation claim.

Laker alleged the University unlawfully retaliated against him for opposing the Chair's harassment and for his assistance with the student's complaint. Laker alleged the University retaliated against him by making defamatory statements with the intent of "scapegoating" him for failing to report the Chair and by pursuing three meritless complaints against him. Laker also alleged the University decided to "red flag" him, preventing his access to the University President, which restricted his opportunities for promotion.

The Court of Appeal concluded the University could not show that Laker's retaliation claim based on the allegations that the University pursued three meritless investigations of him and decided to red flag him arose from any protected conduct. For this issue, the University could not defeat the retaliation claim using the anti-SLAPP statute. However, the University could show that its conduct underlying the defamation allegations in Laker's complaint arose from protected activity, so it met its burden as required by the anti-SLAPP statute to strike this part of Laker's claims.

Finally, because the University successfully struck one of the claims, it was a prevailing party under the anti-SLAPP statute and eligible for attorney's fees and costs, which the trial court would determine. Ultimately, the Court of Appeal ordered the trail court to enter a new order partially granting the University's motion and striking language from Laker's complaint.

Laker v. Board of Trustees of California State University (2019) 32 Cal.App.5th 745.

STUDENT SPEECH

Student Discipline For Off-Campus Speech Not Conveyed to Third Party Does Not Violate Constitutional Right to Free Speech if the Speech Bears a Sufficient Nexus to the School.

CLM was a high school sophomore at public high school in Oregon who created in his personal journal a hit list of 22 students that "must die." His mother discovered the hit list and graphic depictions of violence and told a therapist who informed the police.

When the police searched the family's home, Officers found and confiscated several weapons, including a rifle and ammunition belonging to CLM, but the officers did not find anything "to indicate any planning had gone into following through with the hit list."

CLM admitted he created the hit list and that "sometimes he thinks killing people might relieve some of the stress he feels," but he denied he would ever carry out the violence. The police declined to bring charges against CLM, but they informed the District of CLM's hit list, of the fact the police had seized guns from his house, and that CLM's journal contained additional entries that graphically depicted school violence.

Consistent with Oregon law, the District notified the parents of students found on a hit list but did not identify CLM as its author. The District suspended CLM pending an expulsion hearing. The school's principal recommended that CLM be expelled for one year because news of his hit list "significantly disrupted the learning environment at school," which would only be increased by CLM's return. At the expulsion hearing, the hearing officer adopted the principal's recommendation for expulsion, largely based on "the significant disruption" CLM's list caused in the school environment.

CLM and his parents filed a lawsuit alleging the District violated the Free Speech Clause of the First Amendment and the Equal Protection

and Due Process Clauses of the Fourteenth Amendment. The family also argued the District violated their substantive due process rights when expelling CLM because that action denied the parents the right to choose CLM's educational venue.

The District filed a motion asking the court to rule on all claims without a hearing, and the family did the same. The trial court concluded the District could regulate CLM's off-campus speech for three primary reasons: (1) the hit list had a sufficient connection to the school; (2) school officials could have reasonably foreseen that the effects of the hit list would spill over into the school environment; and (3) the facts in CLM's case mirrored those in *Wynar v. Douglas County School District* (9th Cir. 2013) 728 F.3d 1062. The trial court further held that the one-year expulsion did not violate CLM's First Amendment rights, reasoning that a student-authored hit list would cause a substantial disruption in any school community.

The trial court also granted the District's motion on the family's substantive due process claim. The trial court reasoned that the claim failed because it was derivative of CLM's First Amendment claim, and because a school has the authority to discipline students on reasonable grounds. The trial court determined that although the family had a liberty interest in selecting an educational venue, they did not have the right to control school discipline of that venue. The family appealed.

On appeal, CLM claimed that the District lacked authority under the First Amendment to discipline CLM for his hit list. The family also alleged that the District's expulsion of CLM violated their substantive due process right "to be free from state interference with their choice of [CLM's] educational forum."

The Ninth Circuit Court of Appeals stated that although public school students enjoy greater freedom to speak when off campus than when they are on campus, their off-campus speech is not necessarily beyond the reach of a district's regulatory authority. The Court of Appeals' review of the District's treatment of CLM turned on two inquiries: (1) whether the District could permissibly regulate CLM's off-campus speech at all; and if so, (2) whether the District's decision to expel CLM violated the First Amendment standard for school regulation of speech set out in *Tinker v. Des Moines Indep. Cnty. Sch. Dist.* (1969) 393 U.S. 503.

To determine whether the District had authority to regulate CLM's off-campus speech, the Court of Appeals had to determine whether CLM's speech bore a sufficient nexus to the school. In making this determination, it considered (1) the degree and likelihood of harm to the school caused by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school. There is always a sufficient nexus between the speech and the school when the district reasonably concluded that it faced a credible, identifiable threat of school violence.

Here, the District reasonably determined CLM presented a credible threat. The District knew CLM identified specific targets, accentuated his hit list with the phrases "I am God" and "All These People Must Die," lived in a gun-owning home close to the school, and had had thoughts of suicide. The District knew the diary contained other graphic depictions of school violence. This evidence was sufficient to render the District's determination reasonable and to give it authority to regulate CLM's speech.

Once it learned of the hit list, the District could reasonably foresee that news of the threat would reach and impact the school and disrupt the school environment. Although it was not foreseeable to CLM that his speech would reach the school, a lack of intent to share speech is of minimal weight when, as here, the speech contains a credible threat of violence directed at the school.

Finally, the content of the speech involved the school. CLM's hit list contained the names of 22 students, and thus, presented a particular threat to the school community. Ordinarily, schools may not discipline students for the contents of their private, off-campus diary entries, any more than they can punish students for their private thoughts, but schools have a right to address a credible threat of violence involving the school community.

In sum, the Court of Appeals concluded the District could regulate CLM's off-campus speech without violating his First Amendment rights.

Furthermore, taking disciplinary action was reasonable in this case. CLM did not challenge the length of his expulsion—he argued only that the District did not have the authority to expel him at all. Thus, the Court of Appeals did not have to determine whether a one-year expulsion was excessive. However, the Court of Appeals noted that at a certain point, discipline may lose its basis in reasonable, ongoing concerns of campus safety, disruption, or interference with the rights of other students, and instead become primarily a punitive, retrospective response to the student's speech. Such discipline would be in conflict with *Tinker.*

Finally, the Court of Appeals addressed the family's substantive due process claim. The Court of Appeals held the parents had a right to choose their children's educational forum, but due process rights do not give parents the right to interfere with a public school's operations, such as discipline. Accordingly, the family's fundamental right allowed them to enroll CLM in the District, and in doing so, they accepted the school's curriculum, school policies, and reasonable disciplinary measures.

Ultimately, the Court of Appeals affirmed the trial court's ruling in favor of the District.

McNeil v. Sherwood School District 88J (9th Cir. 2019) __ F.3d __ [2019 WL 1187223].

BROWN ACT

Individual Had Valid Brown Act Claim After He Was Denied Opportunity to Comment at a Special Meeting.

On December 15, 2015, the Los Angeles City Council's Planning and Land Use Management Committee held an open meeting. At the meeting, the committee listened to comment from members of the public, including Eric Preven, regarding a proposed real estate development project near Preven's residence. The committee voted unanimously to make a recommendation of approval for the project to the full city council.

On December 16, 2015, the full city council held a special meeting to decide, among other things, whether to approve the recommendation of the Planning and Land Use Management Committee. A special meeting is a meeting called by a legislative body to handle an urgent matter. In contrast, a regular meeting is a meeting that occurs on a regular basis. Preven also attended the December 16th special meeting and requested the opportunity to address the full city council. However, the city council rejected his request because he had the opportunity to comment on the real estate development project at the committee meeting the previous day.

Preven then claimed that the City violated the Brown Act, which guarantees the public's right to attend and participate in meetings of local legislative bodies, by preventing him from speaking at the December 16, 2015 meeting. He also claimed that the City had engaged in similar improper conduct at special city council meetings in May and June 2016. Additionally, Preven asserted a second claim against the City based on the California Public Records Act ("CPRA").

The Court of Appeal found that the Brown Act does not permit limiting comment at special city council meetings on the basis that an individual has already commented on the issue at a prior, distinct committee meeting. First, the court noted that the so-called "committee exception" of the

Brown Act did not apply to special meetings. Under the committee exception, a legislative body does not need to provide an opportunity for public comment if a committee of legislative body members has previously considered the item at a meeting where interested members of the public had the opportunity to comment. Using methods of statutory interpretation, the court concluded that the committee exception applied only to regular meetings, not special meetings. Second, the court noted that the provision of the Brown Act giving the public the right to address a special meeting "before or during the legislative body's consideration" of the item did not restrict comment based on a prior, distinct meeting. The court relied on the legislative history of the Brown Act to conclude that the "before or during" language concerns only the timing of comments within a particular meeting. Accordingly, Preven alleged a valid claim under the Brown Act.

However, the court dismissed Preven's CPRA claim. Preven conceded that he was not suing to enforce the CPRA claim and that he did not make a request for records pursuant to the statute. Accordingly, the court concluded he failed to state a claim under the CPRA.

Preven v. City of Los Angeles (2019) __ Cal.App.5th __ [2019 WL 1012134].

NOTE:

LCW attorneys can help ensure that agencies are following the public comment requirements of the Brown Act.

RETIREMENT

County Department of Education Required to Pay $3.3 Million in Additional Pension Fund Contributions.

The California Court of Appeal found that a county's Department of Education was required to pay $3.3 million in additional contributions in order to properly fund the retirement benefits promised to 22 retired employees.

Nearly 40 years ago, Orange County employed all education-related employees including teachers and principals. These employees were all members of the County Retirement System. In 1977, the County's Board of Supervisors transferred the "duties and functions of an educational nature" to the Orange County Department of Education ("OCDE"). The transfer agreement gave employees the option of becoming a member of the California Public Employee's Retirement System (CalPERS), or remaining with the County Retirement System. A small number of employees decided to stay with the County Retirement System.

The OCDE was required to make yearly contributions to the County Retirement System. These yearly contributions included two components: (1) the normal contribution rate to fund the employees' expected benefits for that year; and (2) Unfunded Actuarial Accrued Liability ("Unfunded Liability"), which funds unexpected benefits and costs.

In 2013, the OCDE stopped contributing to the County Retirement System after its last employee enrolled in the system retired because it believed it was no longer required to contribute. The County Retirement System did not immediately object.

In 2015, the County Retirement System informed the OCDE that it owed money for the Unfunded Liability attributed to 22 retired members still receiving benefits. The County Retirement System enacted a policy in order to collect these funds. Under this new policy, the County Retirement System directed the OCDE to pay $3.3 million in additional contributions. The OCDE filed a lawsuit to enjoin the County Retirement System from enforcing its new policy.

The OCDE argued that the 2015 policy was unlawful because it retroactively increased its liability, and because the Retirement Law does not permit the County Retirement System to collect additional funds from an "inactive employer." The Court of Appeal disagreed.

First, the Court of Appeal rejected the OCDE's argument that the policy was retroactive. The court reasoned that the Unfunded Liability OCDE owed arose from a variety of actuarial predictions and future estimates about often-fluctuating factors such as investment returns, pay increases, marital status at retirement, retiree and beneficiary life expectancies, salary increases, contribution rates, and inflation. Had the County Retirement experienced better investment returns over the years, the Unfunded Liability may have been avoided entirely. But when the County Retirement System determined there would be a funding shortfall with respect to the 22 retired OCDE employees, it was required to ensure that those employees received their benefits without reduction. Thus, the court concluded that the County Retirement System's assessment for addition funds to pay the 22 retired employees their promised benefit was not retroactive.

Second, the Court of Appeal found that the Retirement Law does not prohibit the County Retirement System from collecting additional funds from OCDE. The OCDE had argued that the Retirement Law allowed the County Retirement System to seek addition contributions from "ongoing employers," but since the OCDE did not have any active employees on its payroll contributing to the County Retirement System, it was not an "ongoing employer." The Court found the OCDE was still an "ongoing employer" because that provision applies broadly to allow a retirement system to collect additional compensation from both active and inactive employers who have retired employees currently receiving benefits from the retirement system.

Thus, the Court of Appeal concluded that the County Retirement System was acting within its authority when it directed the OCDE to pay additional contributions.

Mijares v. County of Orange Employees' Retirement System (2019) 32 Cal.App.5th 316.

NOTE:

This case demonstrates that the liability involved in misapplication of public retirement laws can be extremely high. LCW attorneys are experts in all public retirement issues and can help agencies ensure that they are making the necessary pension contributions.

LABOR RELATIONS

County's Standard Administrative Leave Gag Order Interfered with Peace Officer and Union Rights.

The County of Santa Clara initiated an investigation against Lance Scimeca, a peace officer and the president of the Santa Clara County Correctional Peace Officers' Association (CPOA), for alleged violations of the County's workplace communications policies. The County placed Scimeca on paid administrative leave and directed him to stay off Sheriff's Office property. The County also ordered him not to discuss the matter "with any witnesses, potential witnesses, the complainant, or any other employee of the Sheriff's Office other than [his] official representative."

CPOA objected that the County's gag order prevented Scimeca from meeting with union members in the workplace and from attending meet and confer sessions. The County responded by informing Scimeca that he could continue his union activities, such as: discussing union matters with CPOA members; representing CPOA members in disciplinary proceedings; and participating in negotiations with the County. But, the County did not change its directive that Scimeca not discuss the allegations under investigation with any witnesses, potential witnesses, the complainant, or other employees.

The Public Employment Relations Board (PERB) concluded that prohibiting Scimeca from

communicating with his coworkers about the allegations against him violated both: his MMBA right to communicate with others about working conditions; and the CPOA's MMBA right to represent the officer. PERB noted that the right to communicate with others about working conditions is one of the fundamental MMBA rights, and that "working conditions" include the circumstances underlying alleged employee misconduct.

Specifically, PERB noted that by preventing Scimeca from communicating with witnesses or potential witnesses, Scimeca was not able to make inquiries that could have helped him prepare for his investigatory interview. This in turn prevented Scimeca from giving effective assistance to his CPOA representative during the investigation. Additionally, by prohibiting Scimeca from communicating with his coworkers, the County denied him the opportunity to assert his innocence to other union members, which could have eroded members' confidence in union leadership and compromised the effectiveness of CPOA. This interfered with the union and Scimeca's protected rights.

Once the employer is shown to have interfered with its employees' MMBA rights, the burden shifts to the employer to provide a legitimate justification for its conduct. The County argued that it had a legitimate business necessity for the gag order so as to: (1) ensure the investigation was free from improper collusion or coercion by the subject employee; and (2) treat all employees under investigation the same. The County also said that the gag order was justified because correctional deputies work in dangerous conditions with real threats of violence.

PERB found that the County did not meet its burden of explaining why confidentiality was necessary in this case. First, PERB found that the County's stated concerns were only general and did not specifically apply to Scimeca's case. Second, PERB said the County did not offer any facts to explain why safety would have been compromised if Scimeca had been able to communicate during the investigation, or whether Scimeca's alleged misconduct related to abuse of his authority or to intimidation of employees or inmates. PERB concluded that the County had no particular reason for directing Scimeca not to communicate with his coworkers regarding the investigation. Both PERB and the NLRB have held that generalized or blanket gag orders during investigations are not sufficient to outweigh employee representational rights.

In addition, PERB was not persuaded by the County's argument that it could not provide the basis for its directive to Scimeca because Scimeca refused to waive his privacy rights in his peace officer personnel records. PERB noted that the County could have filed the necessary "Pitchess" motion to attempt to reveal Scimeca's records, but it did not do so.

PERB concluded that the County's gag order interfered with not only Scimeca's rights to discuss the terms and conditions of his employment with co-workers, but also with the right of the CPOA to represent its members in their employment relations with the County.

County of Santa Clara, PERB Decision No. 2613-M (2018).

NOTE:

NLRB and PERB precedents do not allow blanket gag orders. Instead, the employer must first analyze whether in any given investigation: witnesses need protection; evidence is in danger of being destroyed; testimony is in danger of being fabricated; or there is a need to prevent a cover up. Agencies are encouraged to review and update their notices of investigation and administrative leave. LCW's Workbooks, which are available through subscription to the Liebert Library, provide updated notices to help ensure that public agencies are complying with the requirements of this frequently changing area of law. Go to https://liebertlibrary.com/ for more information.

Although this case involved an interpretation of the Meyers, Milias, Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act.

County Violated MMBA by Refusing Employee's Request for Representation and Disciplining Him for Making the Request.

Joel Madarang was a Custody Recreation Supervisor at the County of San Joaquin's jail. As a Custody Recreation Supervisor, Madarang supervised inmate recreation programs. In 2014, Madarang began conducting bingo games for the female general population inmates on Thursday afternoons. Later, Madarang's supervisor, Kristen Hamilton, emailed him directing him to change the start time of the bingo games from 1:00 p.m. to 10:30 a.m. in order to make room for a new mental health program designed to decrease the recidivism rate.

In the following months, Madarang held numerous bingo games in the morning. However, on three occasions, he held bingo games in the afternoon. Madarang understood that Hamilton had directed him to move the time of the bingo game so as not to interfere with the new mental health program, but he also believed he had discretion to make changes to the recreation schedule. As a result, Madarang did not seek Hamilton's authorization before holding the bingo games in the afternoon.

Hamilton learned that the bingo games Madarang held in the afternoon were affecting the attendance of the mental health program. Hamilton sent Madarang an email asking why he was holding bingo games in the afternoon when she had directed him to hold them in the morning. After Madarang explained verbally, Hamilton sent a follow-up email expressing her frustrations and directing Madarang to write a memo explaining why he failed to follow her directions and to bring it to her office.

Madarang told Hamilton that he wanted to speak to a union representative first. Hamilton responded that Madarang did not need a union representative for this and that he should just write the memo so she could get his side of the story and correct his behavior. Madarang continued to request a union representative prior to writing the memo.

Hamilton consulted with the jail's custodial captain, who told her that if Madarang wanted to speak with a representative, he should be allowed to bring one when he delivered Hamilton the requested memo. Instead of relaying that information to Madarang, however, Hamilton requested an internal affairs investigation regarding Madarang's refusal. The County placed Madarang on paid administrative leave and investigated the allegations against him. Madarang received a 10-day suspension for insubordination.

PERB found that the County violated the MMBA by refusing to grant Madarang's request for a union representative, and then by disciplining him because of his request. PERB noted that "[a]n employer faced with a valid request for representation has three options. It may: (1) grant the request; (2) discontinue the interview/request for information and investigate through other means; or (3) offer the employee the option of continuing the interview without representation or having no interview at all." PERB noted that Hamilton's order that Madarang draft the memo and bring it to her was well outside an employer's permissible responses to an employee's request for a representative.

PERB also found that by initiating an investigation into Madarang's alleged insubordination after he repeatedly requested representation, the County punished him for making such requests. There was no evidence that Hamilton had considered discipline or sought to involve internal affairs before Madarang requested a representative. PERB noted that there would not have been an internal affairs investigation or discipline absent Madarang's request for representation. Thus, PERB concluded that the County violated both Madarang and the union's rights under the MMBA.

County of San Joaquin (Sheriff's Dep't), PERB Decision No. 2619-M (2018).

NOTE:

Agencies must allow an employee the right to representation if: the employer seeks to elicit information that the employee reasonably believes could potentially affect the employment relationship; and the employee asks for a representative. LCW attorneys can help agencies to through the intricacies of disciplinary investigations and the disciplinary process.

Although this case involved an interpretation of the Meyers, Milias, Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act.

County Violated MMBA by Changing Performance Targets without Consulting the Union.

The County of Kern's Department of Mental Health ("Department") operates as a mental health clinic. Medi-Cal reimburses the Department for some of the services it provides. These reimbursable services are known as "direct services."

Within the Department, six divisions provide direct services to clients. The Adult Care Division generally expected employees to spend 50 percent of their available time performing direct services, while other divisions generally expected employees to spend 75 percent of their available time doing so. Division supervisors had discretion to implement a formula for calculating whether employees met these targets. These formulas varied among divisions and supervisors.

In September 2014, the County created a new, Department-wide 75 percent direct services target and a corresponding Department-wide formula. These policies increased the direct services target from 50 percent to 75 percent for the Adult Care Division employees, and standardized the method for evaluating whether employees met their targets.

The County did not provide advance notice of the changes to the union representing Department employees. At a labor-management meeting, the union asked to meet and confer with the County over the new policies. The union also asked for a copy of the formula the Department was using. A County representative emailed the union a copy of formula previously used by one of the Department's divisions, but not the new, Department-wide formula.

After the union learned the County had implemented the 75 percent direct services target and the associated Department-wide formula, it demanded that the County stop imposing these changes and that it meet and confer. The County Director of Mental Health advised the union that the County would continue to use the new policies. At no point did the County and the union meet and confer over the changes.

The Public Employment Relations Board (PERB) adopted the decision of the Administrative Law Judge ("ALJ") and found that the County violated the MMBA by unilaterally implementing the 75 percent direct service target and Department-wide formula, without giving the union the opportunity to bargain. PERB rejected the County's argument that the Department-wide formula was sufficiently similar to its prior practices that the County had no duty to bargain. PERB reasoned that the new formula represented a significant departure for employees working in the Adult Care division who were previously only expected to meet a 50 percent direct services target. The County also standardized the formula for evaluating whether employees were meeting their targets, which transferred the exercise of discretion from the divisional level to the Department level. Because these changes were not consistent with the County's past practices, the County was required to bargain with the union.

PERB also found that the County did not bargain with the union over the change of policy. The County did not respond to the union's repeated requests to meet and confer over the changes.

Further, the County did not provide the union with a copy of the Department-wide formula prior to its implementation. Thus, the County denied the union notice and an opportunity to bargain in violation of the MMBA.

County of Kern, PERB Decision No. 2615-M (2018).

NOTE:

Agencies must ensure that they are not changing policies unilaterally. LCW attorneys can advise public agencies as to the extent of their management rights and their duty to bargain the terms and conditions of employment.

Although this case involved an interpretation of the Meyers, Milias, Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act.

County Violated MMBA by Stopping Union from Distributing Surveys and Removing Grievances from Union's Bulletin Board.

The Public Employment Relations Board ("PERB") determined that a county violated numerous provisions of the Meyer Milias Brown Act ("MMBA") when it: directed a union representing its employees to stop distributing surveys; removed grievances from the union's designated bulletin boards; made unilateral changes to its release policies; and retaliated against a union steward for her protected activity.

This case arose from four different incidents that occurred at the County of Orange. First, three County employees who were also union site representatives spent approximately 30 minutes distributing union surveys to employees at their workstations in the County's social services building. A social services manager directed the three employees to leave, and the County's human resources manager directed the union to immediately stop distributing surveys "to employees in work areas during work time."

Second, the County removed two Workload Grievances the union had posted on its designated bulletin boards. The grievances "generally alleged that managers 'blatant[ly] disregard' employee safety, use 'intimidation' to discourage employees from raising workplace issues with [the union], and 'intimidate and threaten' discipline for failing to satisfy unclear productivity standards."

Third, the County made several changes to its release time policy and practices without consulting with the union. Specifically, the County placed limits on the number of representatives eligible for release time for each given meeting, required site representatives to identify the employee they were meeting with, required 48 hours' notice of the need for release time, and discontinued the past practice of allowing site representatives release time to file grievances in person at County offices.

Fourth, the County reprimanded a union steward and intake worker after two public benefit applicants filed complaints against the steward. This employee-steward had also recently participated in MMBA protected activity. Specifically, this employee testified that around the same time management removed the grievances from the union's bulletin boards, the social services manager instructed her to remove the grievances from her cubicle. She also took substantial release time for union activities.

With regard to the County's order that the union stop distributing surveys, PERB found that the County disparately enforced restrictions on non-business activities in work areas during working time in violation of the MMBA. While an employer may restrict non-business activities during work time, it cannot single out union activities or enforce general restrictions more strictly against unions. Here, the County allowed employee-run social committees to fundraise for office parties, birthday celebrations, and other social events. In fact, the social services manager permitted these employee-run social committees to sell items cubicle to cubicle and allowed staff to purchase items during their work time. Yet, the

social services manager ordered the union site representatives to leave after overhearing them ask employees about their working conditions and grievances, and the human resources manager directed the union to stop distributing surveys during work times.

While the County argued that the social committees' activities were not comparable to the union's survey distribution, PERB disagreed. PERB found that the union's activities were no more disruptive than the social committees' activities; the County's belief that the social committees improved employee morale did not justify disparate treatment to the union. PERB concluded that "[b]y allowing some minimally intrusive non-business activities in employees' work area during work hours, the County cannot simultaneously prohibit employees from engaging in a similar level of communication merely because it involves employee organizations."

PERB found that the County interfered with protected rights by removing the Workload Grievances the union posted on its designated bulletin boards. The County claimed that the grievances were derogatory and therefore unprotected. Employee speech may lose protection under the MMBA if it is so flagrant, insulting, or insubordinate that it causes a substantial disruption in the workplace. Speech may also lose protection if the statement is demonstrably false, and the employee knew or should have known the statement was false, or acted in reckless disregard to the truth. However, PERB concluded that while the grievances "were uncomplimentary to management, they were within the realm of rhetoric typically employed in labor disputes and which management is 'likely to encounter at least occasionally in the routine course of business.'" The County also did not offer evidence that the grievants knew the claims in the grievances were false or that they acted with reckless disregard for their truthfulness. PERB concluded that the language of the grievances was protected under the MMBA, and the County interfered with the union's rights when it removed them.

PERB determined that the County's changes to its release time policies and practices constituted a unilateral change. These changes resulted in denials of paid release time that employees and their representatives had previously been granted. As a result, the County forced representatives and employees to meet on their own personal time. PERB further noted that these changes have more than a de minimis impact on employees' wages and terms and conditions of employment. By not bargaining with the union over these changes, the County altered its release time policies in violation of the MMBA.

PERB found that the County failed to demonstrate that the reprimand it issued to the union steward was in good faith. When an employer's actions are motivated by both lawful and unlawful reasons, PERB considers whether the adverse action would have occurred "but for" the protected activity. When the evidence shows the employer relied on an accusation that it did not believe in good faith to be true, PERB has found the justification for discipline is a pretext for retaliation. While there were two complaints against the employee-steward, PERB focused in on only one of the complaints. PERB said that the County failed to resolve contradictory statements one of the complainants had made, and the County could not explain why it nonetheless determined that the complainant was credible. Because the County could not show that all of the events used to justify the reprimand actually occurred, PERB concluded that the County failed to prove that its stated reasons for reprimanding the employee-steward were the actual reasons it took that adverse action against her.

County of Orange, PERB Decision No. 2611-M (2018).

NOTE:

Agencies should consult with LCW attorneys before taking any disciplinary action after an employee has participated in protected MMBA rights. In order to avoid a claim of retaliation for protected activity, the employer must not discipline unless it can show reliable evidence that it honestly believed that the employee had violated conduct rules, and that the employer was disciplining for that misconduct and not protected activity.

Although this case involved an interpretation of the Meyers, Milias, Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act.

FIRST AMENDMENT

Anti-SLAPP Statute Did Not Protect the City's Speech About Its Agent for NFL Stadium Negotiations.

The California Supreme Court concluded that a City's actions were not protected under California's anti-SLAPP statute after a developer sued the City for failing to renew his contract.

In 2012, the City of Carson and Rand Resources agreed that Rand would be the City's exclusive authorized agent in negotiations with the National Football League ("NFL") to build a football stadium in Carson, California. The agreement prohibited the City from allowing anyone else to negotiate with the NFL on its behalf.

In April 2013, Rand claimed that the City breached its contract by allowing another company to act as its representative in negotiations with the NFL.

In July 2014, Rand submitted a request to renew its contract for an additional year. Before the City voted on Rand's request, the owner of the other company allegedly met with the City's mayor and at least one councilperson to discuss not extending Rand's agreement. The City Council later voted to deny the requested extension. As a result, Rand filed suit against the City, its mayor, and the owner of the other company for breach of contract, and related claims.

The City responded by filing an anti-SLAPP motion to strike Rand's claims. An anti-SLAPP motion asks the court to dismiss a lawsuit and to award attorney's fees, if the lawsuit attacks the defendant's protected free speech in connection with a public issue.

Most of the claims in Rand's lawsuit against the City alleged that the City concealed conversations about breaching Rand's contract, and misleading Rand by: meeting with the other company in secret; exchanging confidential emails with the other company; and falsely telling Rand that it would extend his contract if he showed reasonable progress. The City argued that its actions were protected because the City's communications with the other company to negotiate with the NFL were made in connection with an issue under legislative-City Council review and in connection to an issue of public concern. The City argued this was "speech" protected under California's anti-SLAPP statute.

The California Supreme Court disagreed. The Court reasoned that the City's actions were not made in connection with an issue under legislative review because they were not considered by the City Council when it voted on whether to extend Rand's contract. For example, the City Attorney made the comment regarding extending Rand's contract in 2012, nearly two years before the renewal issue even came before the City Council. Further, the Court found that Rand's claims against the City were not an issue of public concern because they merely involved the identity of the City's exclusive agent. As a result, City was not entitled to anti-SLAPP protection.

Rand Resources, LLC v. City of Carson (2019) 6 Cal.5th 610.

NOTE:

LCW has been very successful on anti-SLAPP motions on behalf of public agency clients. The anti-SLAPP motion can be a powerful tool to defeat lawsuits and recover attorney's fees without the need for expensive discovery.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney as part of the consortium service to answer direct questions not requiring in-depth research, document review, written opinions, or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

Question: A human resources manager contacted LCW to ask if employers are allowed to look at an applicant's publicly available social media profile prior to hiring.

Answer: The attorney noted that there is a risk that an agency could face liability for discrimination if a hiring committee learns about an applicant's protected status by looking as his or her public social media profile. If an unsuccessful applicant learns that the hiring committee reviewed his or her social media page, the applicant may allege that he or she did not receive a job offer based on a protected classification. The attorney recommended placing a "wall" between the individual looking up an applicant's social media profile and the hiring committee so that an individual with no decision-making authority conducts the social media search and presents only information that may lawfully be considered to the committee.

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Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news**

"The Thin Blue Line" authored by Managing Partner **J. Scott Tiedemann** and Associate **Sarah R. Lustig** of our Los Angeles office, appeared in the January 25, 2019 issue of the *Daily Journal.* "California Law Enforcement Unions Seek to Block Release of Officer Disciplinary Records" quote by Managing Partner, **J. Scott Tiedemann** appeared in the January 17, 2019 issue of the *Los Angeles Times.*

"Changes to Sexual Harassment Laws Could Open California Employers to Increased Liability" quote by Partner, **Jesse Maddox** of our Fresno and Sacramento offices, appeared in the February 1, 2019 issue of the *San Gabriel Valley Tribune* and the *Orange County Register.*

LCW
Labor Relations Certification Program

Developing Positive Partnerships and Leadership Excellence for Labor Relations Professionals

The Liebert Cassidy Whitmore Labor Relations Certification Program© is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. These workshops combine educational training with experiential learning methods ensuring that knowledge and skill development are enhanced. Participants may take one or all of the Certification programs, in any order. Take all of the classes to earn your certificate!

Next Class:

The Public Employment Relations Board (PERB) Academy

Thursday, May 16, 2019 | Fresno, CA

This workshop will help you understand unfair labor practices, PERB hearing procedures, representation matters, agency shop provisions, employer-employee relations resolutions, mediation services, fact-finding, and requests for injunctive relief - all subjects covered under PERB's jurisdiction. Join us as we share insights on PERB!

Register Today!

LEARN MORE AT WWW.LCWLEGAL.COM/LRCP

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 Selena Dolmuz at 310.981.2000 or info@lcwlegal.com.

Management Training Workshops

Firm Activities

Consortium Training

April 3 **"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement"**
Central Coast ERC | Pismo Beach | Richard Goldman & Michael Youril

April 3 **"Workplace Bullying: A Growing Concern"** & **"Human Resources Academy I"**
Gold Country ERC | Citrus Heights | Suzanne Solomon

April 3 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Humboldt County ERC | Arcata | Kristin D. Lindgren

April 3 **"An Employment Relations Primer for Community College District Administrators and Supervisors"**
Northern CA CCD ERC | Webinar | Eileen O'Hare-Anderson

April 4 **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
Humboldt County ERC | Arcata | Kristin D. Lindgren

April 4 **"The Art of Writing the Performance Evaluation"** & **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
Napa/Solano/Yolo ERC | Fairfield | Gage C. Dungy

April 4 **"Leaves, Leaves and More Leaves"** & **"Technology and Employee Privacy"**
West Inland Empire ERC | Diamond Bar | Mark Meyerhoff

April 10 **"Human Resources Academy I"** & **"Workplace Bullying: A Growing Concern"**
North State ERC | Red Bluff | Kristin D. Lindgren

April 10 **"Legal Issues Regarding Hiring and Promotion"** & **"Human Resources Academy II"**
San Gabriel Valley ERC | Alhambra | Christopher S. Frederick

April 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Gateway Public ERC | South Gate | Jenny-Anne S. Flores

April 11 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety"**
Imperial Valley ERC | Brawley | Jeremy Heisler, Goldman Magdalin & Krikes

April 11 **"Nuts & Bolts Navigating Common Legal Risks for the Front Line Supervisor"**
LA County HR Consortium | Los Angeles | Danny Y. Yoo

April 11 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Monterey Bay ERC & San Mateo County ERC | Webinar | Heather R. Coffman

April 11 **"Introduction to the FLSA"**
South Bay ERC | Inglewood | Jennifer Palagi

April 16 **"Navigating the Crossroads of Discipline and Disability Accommodation"** & **"Legal Issues Regarding Hiring and Promotion"**
North San Diego County ERC | Vista | Mark Meyerhoff

April 17 **"Public Sector Employment Law Update"** & **"Human Resources Academy II"**
Central Valley ERC | Los Banos | Shelline Bennett

April 17 **"Managing the Marginal Employee"** & **"Difficult Conversations"**
NorCal ERC | Alameda | Casey Williams

April 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County Consortium | Fountain Valley | Ronnie Arenas

April 19 **"Summit 3: 'Managing the Marginal Employee and Accommodating Bad Behavior'"**
Bay Area CCD ERC | Pleasant Hill | Kristin D. Lindgren

April 23 **"Case Study for Managing Illnesses or Injuries"** & **"The Disability Interactive Process"**
Bay Area ERC | Hayward | Morin I. Jacob

April 25 **"Difficult Conversations"** & **"Managing the Marginal Employee"**
Mendocino County ERC | Ukiah | Casey Williams

April 26 **"Human Resources Round Table"**
SCCCD ERC | Anaheim | Frances Rogers

Customized Training

April 3 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations"**
County of Merced | Merced | Shelline Bennett

April 3 **"The Art of Writing the Performance Evaluation"**
Housing Authority of the City of Alameda | Alameda | Casey Williams

April 12 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of San Luis Obispo | San Luis Obispo | Christopher S. Frederick

April 15 **"Going Outside the Classified Service: Short Term Employees, Substitutes and Professional Experts"**
College of the Desert | Palm Desert | Pilar Morin

April 16 **"Introduction to the Fair Labor Standards Act"**
Zone 7 Water Agency | Livermore | Lisa S. Charbonneau

April 17 **"Maximizing Supervisory Skills for the First Line Supervisor"**
City of Stockton | Kristin D. Lindgren

April 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County Mosquito and Vector Control District | Garden Grove | Christopher S. Frederick

April 17 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Port of Oakland | Oakland | Heather R. Coffman

April 23,24 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Conejo Recreation and Park District | Thousand Oaks | Danny Y. Yoo

April 24 **"Legal Issues Update"**
Orange County Probation | Santa Ana | Christopher S. Frederick

Speaking Engagements

April 2 **"Legally Defensible Investigations"**
Small School District Association (SSDA) Annual Conference | Sacramento | Kristin D. Lindgren

April 4 **"Common Legal Issues for Administrators"**
Association of California Community College Administrators (ACCCA) Mentorship Program | Los Altos | Eileen O'Hare-Anderson

April 4 **"Don't Let it Happen to #YouToo: A Study of the #MeToo and #TimesUp Movements' Impact on Public Safety Agencies"**
FDAC Annual Conference | Napa | Lisa S. Charbonneau

April 8 **"FLSA Update"**
National Public Employer Labor Relations Association (NPELRA) Annual Training Conference | Scottsdale | Lisa S. Charbonneau

April 11 **"Legal Update"**
SCPMA-HR | Long Beach | J. Scott Tiedemann

April 12 **"Post Janus Case Developments and Legislation"**
California Lawyers Association's (CLA) Labor and Employment Law Section Annual Public Sector Conference | Sacramento | Che I. Johnson & Scott Kronland & Sheena Farro

April 18 **"Avoiding the Legal Consequences of Hiring Retirees"**
California Association of School Business Officers (CASBO) Annual Conference | San Diego | Frances Rogers

April 24 **"Human Resources Boot Camp for Special Districts"**
California Special Districts Association (CSDA) | Simi Valley | Joung H. Yim

Seminars/Webinars

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

April 8 **"Mandated Ethics for Public Officials"**
Liebert Cassidy Whitmore | Webinar | Michael Youril

April 10 **"Your Managers Just Organized – What Do You Do? Labor Relations & Your EERR"**
Liebert Cassidy Whitmore | Webinar | Che I. Johnson

April 12 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | Los Angeles | Christopher S. Frederick

April 15 **"Cafeteria Plan Compliance – Mid-Year Election Changes and More"**
Liebert Cassidy Whitmore | Webinar | Heather DeBlanc & Stephanie J. Lowe

April 23 **"Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 1)"**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon

April 24 **"Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 2)"**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon

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