LCW Liebert Cassidy Whitmore

Education Matters

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

April 2018

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LCW NEWS

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EMPLOYEE ASSIGNMENT

School Board Not Required to Provide Pre-Approval for March 15 Notice to Administrator of Possible Release and Reassignment.

Karen Hayes served as a middle school principal in the Temecula Valley Unified School District beginning in 2002. In late 2014, a female teacher complained about a male teacher. Hayes investigated the complaint with the assistance of District's human resource directors. After the investigation, Hayes found some of the complaints to be substantiated.

In early 2015, the male teacher submitted a Public Records Act request to the District for documents related to the complaint and investigation, including Hayes's emails. While gathering the responsive records, the human resources director found that Hayes's email communications showed she had not been objective and impartial in the investigation. Specifically, the director believed the emails were unprofessional, and Hayes showed favor toward the female teacher and bias against the male teacher.

As a result, the District superintendent provided Hayes with notice of possible release and reassignment to a teaching position for the next year because he had lost confidence in her abilities to serve as principal. On March 11, 2015, the superintendent and the human resource directors met with Hayes and gave her a reassignment notice pursuant to section 44951 of the Education Code. Education Code section 44951 governs the timing and nature of a preliminary notice (known as a March 15 notice) required before a school district can reassign a school principal for "no-cause." This statute requires a school district to provide notice by March 15 that a school administrator "may be released from his or her position for the following school year." Without this notice, a no-cause transfer from administrator to a teaching position is invalid, and the principal may continue in his or her position under the same terms and conditions for the next school year. On March 11, the superintendent also placed Hayes on paid administrative leave to allow the District to conduct an investigation into allegations of misconduct against her.

The day after the meeting with the superintendent, Hayes sent an email to the human resources director asking for clarification of her employment choices, including whether the District was terminating her. The human resources director sent a letter explaining Hayes may be released and reassigned to the classroom or another certificated position at the end of the school year without cause or, pending the results of the investigation,

may be immediately released and reassigned for cause. However, neither of these actions would terminate Hayes's status as a permanent certificated employee of the District. The letter explained that, if necessary, the District would brief its Board on the results of the investigation, and Hayes had the right to have the matter considered in open, public session instead of a closed session pursuant to Government Code section 54957.

In response, Hayes's attorney sent an email to the District to state Hayes was informed she was terminated, to request an open hearing, and to request a copy of all documents used to consider Hayes's termination. The District's again tried to clarify that it was not terminating Hayes, but instead the District was recommending her for a no-cause release from her administrative position and reassignment to a teaching position or other certificated position.

After reviewing a summary of the investigation into Hayes's conduct, the superintendent recommended the release and reassignment of Hayes *without cause* at the end of the school year, and the Board adopted the superintendent's recommendation in closed session. Hayes remained on paid administrative leave for the rest of the school year.

Two weeks after the vote, Hayes's counsel asked the District why Hayes was still on administrative leave and noted the District did not include Hayes in the investigation. In response, the District explained that its investigation only consisted of reviewing Hayes's emails, the District did not offer this information to the Board, and the District's decision to reassign Hayes was not based on cause.

Hayes then filed a lawsuit asking the trial court to set aside the Board's decision to release her as middle school principal and requesting reinstatement to the principal position. Specifically, Hayes argued: (1) the March 11 notice for a no-cause reassignment was improper because it was not authorized by the Board before March 15; (2) she was denied her due process rights because she was not provided a written statement of charges and an opportunity to respond regarding her alleged misconduct; and (3) her placement on paid administrative leave violated her due process rights, statutes, and District regulations.

In response, the District argued: (1) the Supervisor's March 11 notice was timely because the statutes do not require Board authorization before the March 15 statutory deadline; (2) Hayes was not entitled to a hearing or other related due process protections because the reassignment was not "for cause"; and (3) there is no requirement that the Board approve a decision to place a principal on paid administrative leave pending an investigation.

While the lawsuit was pending, the District continued its investigation of Hayes's conduct for another year, but Hayes refused to be interviewed. Finally, in May 2016, the District closed its investigation and found Hayes in violation of several District policies, which confirmed the District's decision to reassign Hayes to a teaching position under Education Code section 44951.

Meanwhile, the trial court evaluated the evidence submitted by Hayes and the District, conducted a hearing, and denied Hayes's requests. The court found that the District reassigned Hayes under a "no cause" procedure, and therefore she was not entitled to a hearing or related due process protections. The court also rejected Hayes's remaining arguments, including that the March 11 reassignment notice was untimely because it was not approved by the Board before March 15. Hayes appealed.

On appeal, Hayes argued the trial court erred in denying her requests because (1) the District's notice of the no-cause reassignment was untimely because the Board did not approve the notice until two days after the March 15 statutory deadline; (2) her removal was "for cause" and therefore she was entitled to a hearing and due

process before the removal and reassignment; and (3) her placement on paid administrative leave violated statutes and internal District policies.

The Court of Appeal determined the notice was timely because Hayes received written notice before March 15 that she may be released from her position the following year, and the statutes do not require school board preapproval for a section 44951 March 15 notice to be valid.

Although Hayes argued that her removal was "for cause" despite the District's insistence that it was a "no cause" reassignment, the Court found her argument unavailing and agreed with the trial court in ruling against Hayes. Specifically, the Court of Appeal stated that because a principal's position is at-will, a school district does not need to establish that the principal engaged in the type of misconduct specified in the "for cause" termination statutes to trigger a school district's right to reassign a principal to a teaching position. Furthermore, Hayes did not have a right to a hearing because she was not suspended, dismissed, or removed and reassigned for cause.

Hayes also challenged the District's decision to place her on paid administrative leave, but failed to identify any evidence that supporting her argument that the superintendent did not have the power to place her on administrative leave.

Hayes v. Temecula Valley Unified School District (Feb. 28, 2018, No. D072998) __ Cal.App.5th __ [2018 WL 1442165].

NOTE:

The Court of Appeal decided this case under Education Code section 44951 regarding the assignment of K-12 administrators. The law relating to release of community college administrators is somewhat different.

EQUAL PAY ACT

Employer Cannot Use Salary History to Justify Pay Disparity as a "Factor Other Than Sex Under the U.S. Equal Pay Act.

Aileen Rizo worked as a math consultant with the Fresno County Superintendent of Schools. Rizo sued the County Office of Education under the EPA, and other laws, after discovering the County Office of Education paid her male colleagues more for the same work.

Under the EPA, the employee must first prove that he or she is receiving 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.

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

In its 2017 opinion, the Court of Appeal 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) shows it to be part of an overall business policy; and (2) uses prior salary reasonably in light of its stated business purposes.

The Superintendent of Schools 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 induces employees to leave their jobs and come to the Superintendent of Schools; (3) using prior salary prevents favoritism; and (4) using prior salary prevents waste of taxpayer dollars. The trial court had not evaluated those reasons under the *Kouba* factors, so the Court of Appeal sent the case back to the trial court to evaluate the county's reasons. Then, the Court of Appeal 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 Appeal considered which factors an employer could consider to justify a salary difference between employees under the "factors other than sex" exception to the EPA. 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 Appeal 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 EPA. The Court of Appeal stated that the language, legislative history, and purpose of the EPA make 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 overrules *Kouba*.

Accordingly, the County failed to set forth an affirmative defense for why it paid Rizo less than her male colleagues for the same work.

Rizo v. Yovino (9th Cir., Apr. 9, 2018, No. 16-15372) __ F.3d __ [2018 WL 1702982].

NOTE:

This case was decided under the federal Equal Pay Act. Under California law, Labor Code section 432.3, it illegal for an employer to rely on an applicant's past salary history when deciding whether to hire the applicant. Specifically, the bill says that past compensation cannot be a factor in the hiring decision. Thus, even if past salary is not the determinative factor, the mere fact that it was considered makes the hiring decision illegal. Section 432.3 contains two important exceptions: 1) where the salary is a public record; 2) where the employee voluntarily provides salary history.

BUSINESS & FACILITIES

Lowest Responsible Bidder May Recover Its Bid Preperation Costs Under A Promissory Estoppel Theory if the Public Works Contract is Wrongfully Awarded to A Competing Contractor.

In February 2015, the California Department of Corrections and Rehabilitation ("CDCR") published an invitation for bids for a heating, ventilation, and air conditioning system project at Ironwood prison (the "Project"). Five companies submitted bids to construct the Project.

In May 2015, CDCR awarded the contract for the Project to Hensel Phelps Construction Co. ("HP") because HP was the lowest bidder with a bid amount of $88 million. CDCR released a list of bidders that showed West Coast Air Conditioning Co. ("West Coast") was the next lowest bidder with a bid of $98 million.

Shortly thereafter, West Coast filed a lawsuit against CDCR and HP seeking to void CDCR's contract award to HP. West Coast argued

HP's bid had mathematical and typographical mistakes and failed to properly list the license numbers of 17 subcontractors. According to West Coast, these defects gave HP an unfair advantage over its competitors. West Coast sought, among other things, reimbursement of its bid preparation costs and interest in the stipulated amount of $250,000.

The trial court agreed with West Coast's arguments and set aside CDCR's contract award to HP. The court found the errors in HP's bid were material to the bid price and, as a result, HP's bid was nonresponsive as a matter of law. Although the court ordered HP to stop performing any additional work on the Project, the court declined to order CDCR to award West Coast the contract for the Project.

Subsequently, a trial court held a hearing to determine whether West Coast was entitled to recover its $250,000 bid preparation costs under a "promissory estoppel" theory. After West Coast proved it was the lowest responsible bidder, the trial court awarded West Coast the stipulated sum of $250,000. CDCR appealed.

On appeal, CDCR argued West Coast was not entitled to recover its bid preparation costs because West Coast had obtained "effective" relief when the court ordered HP to cease further work on the Project. The Court of Appeal rejected CDCR's argument. In doing so, the Court relied on the California Supreme Court's decision in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305. In *Kajima*, the California Supreme Court held monetary damages are generally not available in the "disappointed bidder" context unless it is possible to both set aside the misawarded contract *and* to award the contract instead to the lowest responsible bidder. However, in this case, the trial court did not order CDCR to award the contract for the Project to West Coast. "We conclude the issuance of a permanent injunction in favor of West Coast, the lowest responsible bidder, without *either* an award of the public works contract to it *or* an award of damages equal to its bid preparation costs, would result in an adequate remedy to West Coast. Indeed, West Coast prepared its bid and incurred $250,000 in costs in reliance on CDCR's representation that if a contract was awarded, which turned out to be the case, it would be to the lowest responsible bidder, which turned out *not* to be the case."

West Coast Air Conditioning Company, Inc. v. California Department of Corrections and Rehabilitation (2018) __Cal. App.5th __.

Recreational Trail Immunity Extends to Claims Arising From the Design of the Trail, Including the Lack of Guardrails or Warning Signs.

Jonathan Arvizu sued the City of Pasadena after he fell over a 10-foot high retaining wall located beside a recreational trail in the City's Arroyo Seco Natural Park. Arvizu had entered the Park in the dark, pre-dawn hours, while it was closed, to go "ghost hunting" with a group of friends. While taking a shortcut to reach the trail, he lost his footing, careened across the trail, fell over the wall, and landed on the dirt and rocks below.

The City argued it was immune from liability under the "trail immunity" statute. This statute provides, in relevant part: "A public entity . . . is not liable for an injury caused by a condition of" a trail used for hiking or recreational purposes. (Gov. Code, § 831.4, subd. (b).) The trial court agreed with the City and dismissed Arvizu's lawsuit.

Arvizu appealed. He argued, among other things, that the trail immunity statute did not apply because he was not injured by the trail itself, but by the lack of guardrails or warnings along the retaining wall.

The Court of Appeal rejected Arvizu's arguments and upheld the trial court's decision. "We presume that there are many miles of public trails on slopes in this state that could be made safer with handrails, and that handrails would perhaps enhance the safety of all trails, wherever located,

that bear pedestrian traffic. But to require installation of handrails along every public trail where it might be reasonably prudent to do so would greatly undermine the immunity's objective of encouraging access to recreational areas, because the burden and expense of doing so might cause the government agencies to close them to public use."

The Court of Appeal's opinion emphasized the goal of the trail immunity statute to preserve the public's access to trails and open space. "The Legislature provided for trail immunity to encourage government entities to keep trails and parkland open to the public. . . . Now, with California's population approaching 40 million, and especially in Los Angeles County, where more than a quarter of the State's residents reside, the need to preserve access to public open space is even more pressing due to the relative scarcity of public parkland."

Arvizu v. City of Pasadena (2018) __Cal.App.5th __

For Purposes of School Impact Fees, Assessible Space Includes Interior Common Areas.

1901 First Street Owner, LLC ("First Street") is the developer of a residential apartment complex. To obtain building permits, First Street was required to pay a school impact fee to the Tustin Unified School District (the "District") pursuant to Education Code Section 17620. First Street submitted its square footage totals to the City of Santa Ana. First Street based its square footage totals on the "net rentable" method, which includes the square footage of the individual apartment units, but excludes everything else in the building. The City accepted First Street's calculation and informed the District.

The District objected to the use of the net rentable method. According to the District, that method did not include all of the square footage within the interior common areas, as required by Government Code Section 65995 ("Section 65995"). For purposes of school impact fees, Section 65995 calculates the applicable fee as follows: "In the case of residential construction . . . one dollar and ninety-three cents ($1.93) per square foot of assessable space. 'Assessable space,' for this purpose, means all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area. The amount of the square footage within the perimeter of a residential structure shall be calculated by the building department of the city or county issuing the building permit, in accordance with the standard practice of that city or county in calculating structural perimeters." (Gov. Code, § 65995, subd. (b)(1).) The City rejected the District's position and confirmed the net rentable method was its "standard practice."

The District filed an administrative appeal. Rather than challenge the appeal, the City decided to abandon its net rentable method. The City re-calculated the square footage of the development to include interior common areas, which resulted in an increase of approximately 70,000 square feet, increasing the school impact fee First Street owed by nearly $240,000.

First Street objected to the change and filed its own administrative appeal. In the meantime, First Street paid the increased fees under protest. The administrative hearing officer found in favor of First Street, concluding that the City's standard practice of calculating net rentable space should have applied. The hearing officer ordered the District to refund the portion of the fees First Street had paid under protest. The District refused to refund the fees.

First Street sued the District seeking a refund of the excess fees. The trial court denied First Street's request. In doing so, the trial court interpreted Section 65995 as precluding the net rentable method the City had initially used. First Street appealed.

The Court of Appeal affirmed the trial court's decision. The Court of Appeal concluded that "assessable space" as defined in Section 65995, plainly includes interior common areas, such as interior hallways, storage rooms, mechanical rooms, fitness centers, and lounges. In doing so, the Court of Appeal rejected First Street's argument that the City's standard practice of using the net rentable method must apply. "First Street's position is that the standard practice must govern even if that practice does not comply with section 65995's definition of assessable space.... The flaw in First Street's reasoning is apparent from the plain language of the statute. The 'standard practice' referred to in section 65995, subdivision (b)(1), is specifically the standard practice of calculating the square footage within the *perimeter* of a residential *structure*. A standard practice of calculating something else does not qualify."

1901 First Street Owner, LLC v. Tustin Unified School District (2018) __Cal.App.5th __.

LITIGATION

Government Claims Act Allows Agencies to Develop Local Claims Presentation Procedures for Child Sexual Abuse.

The California Government Claims Act limits the circumstances under which an individual can hold a public entity legally liable for an injury. Government Code section 905 of the Act requires that a claimant present the public entity with a written claim for money or damages within six months of the incident giving rise to the injury, as a prerequisite to filing a lawsuit. A claimant's failure to timely present the claim may bar a lawsuit. Section 905 is intended to provide a public agency with the opportunity to remedy the injury, investigate while evidence is available, and attempt to settle meritorious disputes where appropriate.

However, section 905 (m) makes an exception to the claim presentation requirements for actions to recover damages for child sexual abuse. Another section of the Act, section 935, permits an agency to establish its own claim presentation requirements for claims that are exempted from the Act under section 905(m), and which are not subject to other statutes or regulations explicitly relating to claims for money or damages.

A recent appellate court opinion found, for the first time, that Section 935 indeed allows government agencies to establish their own claims presentation procedures for all claims that are exempted under section 905 (m), as long as the agency's procedures allow at least six months for the claim to be presented. In *Big Oak Flat-Groveland USD v. Superior Court*, a school board had enacted Board Policy and Administrative Regulation 3320 which provided that all claims for money or damages, including personal injury claims and claims exempted by Government Code section 905, must be presented to the school district within six months after the incident(s) at issue. The Board Policy further provided that compliance with the presentation requirements was a prerequisite to initiating a court action on the claims unless a statute or regulation expressly exempted them from the presentation requirements in the Board procedures or the Government Code.

When a former student of the District sued for damages due to sex abuse, the District argued that her lawsuit was barred for failure to timely present her claims to the District. The Court of Appeal court agreed with the District. More specifically, the court found that the plain and unambiguous language of section 935 of the Government Code "permits the local public entity to impose its own claim presentation requirement on claims that section 905 exempts from the Act's claim presentation requirements, as long as the local claim presentation period is no shorter than the period prescribed by the Act (six months, in this case)." The Court of Appeal found that the District's policy and regulation met that requirement. The appellate court further

clarified that "a local public entity may impose its own claim presentation requirement on any of the types of claims listed in section 905, including claims described in section 905(m)."

NOTE:

This case makes clear that public agencies can implement their own claims presentation requirements if the Government Claims Act exempts a claim from the Act's presentation requirements. Agencies are encouraged to contact legal counsel for assistance in implementing such claim presentation requirements as doing can establish an important protection against lawsuits.

Big Oak Flat-Groveland USD v. Superior Court (Doe) (2018) 21 Cal.App.5th 403.

Employee's Failure to First Exhaust Internal Agency Process Bars Lawsuit.

The California Court of Appeal has held that if an employer provides an internal process for complaining about an adverse employment action, but the employee does not use that process, the employee may be barred from later bringing a lawsuit on those claims.

After being laid off by her employer, Santa Barbara County, Shawn Terris exercised her right to request placement in another position. The County denied her request because Terris was not qualified. Terris later brought a wrongful termination lawsuit claiming that Santa Barbara's decision not to employ her was unlawful discrimination and retaliation. The trial court granted summary judgment for Santa Barbara County and denied Terris' claims because Terris had failed to file a discrimination complaint with the County's Equal Opportunity Office (EEO) prior to bringing a lawsuit.

Terris appealed and the Court of Appeal sided with the County. Specifically, the Court of Appeal held that California Labor Code section 244 – which says that an individual is not required to exhaust administrative remedies in order to bring a civil action against his or her employer – applies only to administrative remedies available with the State Labor Commissioner. Therefore, Labor Code 244 does not relieve a public employee from his/her obligation to exhaust administrative remedies available through his/her employer before filing a civil lawsuit.

Labor Code section 244(a), states that an individual is "not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires the exhaustion of an administrative remedy…" The court explained that the legislative history indicated that the "administrative remedies" described by the section 244, are specific to remedies provided by the Labor Commissioner, not the remedies available through a public employer's internal procedure. Thus, the Court of Appeal affirmed summary judgment for Santa Barbara County.

NOTE:

This case emphasizes the importance of internal public agency grievance and complaint procedures, which may assist your agency in preventing unnecessary civil litigation. LCW offers many resources to assist agencies in developing these procedures. A more in depth discussion of the decision is available here: https://www.lcwlegal.com/news/agency-policy-bars-lawsuit-employee-must-first-exhaust-internal-agency-process

Shawn Terris v. County of Santa Barbara (2018) 20 Cal.App.5th 551.

WAGE & HOUR

California Supreme Court Rules that State Law Requires a Different Regular Rate of Pay Calculation for Private Employees than the FLSA Does for Public Employees.

Hector Alvarado sued his private employer, Dart Container Corporation, under the California Labor Code for back overtime compensation.

Alvarado claimed that his employer had incorrectly calculated his "regular rate of pay."

Under both the California Labor Code and the U.S. Fair Labor Standards Act (FLSA), the regular rate of pay is the rate an employer must use to pay overtime premiums to employees who work overtime hours. The U.S. Department of Labor regulations at 29 C.F.R. section 778.110(b) state that to calculate the per-hour value of a lump sum bonus under the FLSA, an employer must divide the weekly bonus amount by the total hours actually worked by the employee in the week. Alvarado's employer followed the FLSA method when an employee was paid the $15 per day bonus. Alvarado challenged this method as illegal under State law.

In a matter of first impression, the California Supreme Court departed from the FLSA regular rate calculation standard, opining that under State law, a per-hour value of a lump sum bonus, such as that paid to Mr. Alvarado, must be calculated by dividing the lump sum bonus by only the number of non-overtime hours he actually worked in the week. This method results in a higher per-hour value.

The California Supreme Court's decision is limited to flat-sum bonuses or pays (e.g., any flat dollar amount that can be converted into a weekly equivalent).

Although *Alvarado* set a new standard for calculating the regular rate under the California Labor Code, most public sector agencies are exempt from the requirements of the California law and need only comply with the overtime requirements of the FLSA. However, this decision is a reminder of the importance of clearly articulating the basis for negotiated forms of compensation in labor agreements. Failure to specify whether a payment is purely hourly, paid on a certain number of hours, or has no bearing on hours may have unintended FLSA regular rate consequences. For example, if you do not intend on paying an agreed upon additional hourly pay for overtime hours, state that clearly in the MOU.

NOTE:

Our attorneys are experts in public sector wage and hour law and are available to help with your questions. A more in depth discussion of the California Supreme Court's decision is available here: https://www.lcwlegal.com/news/california-supreme-court-rules-that-state-law-requires-a-different-regular-rate-of-pay-calculation-than-the-fair-labor-standards-act

Alvarado v. Dart Container Corporation (2018) 4 Cal.5th 542.

DISCRIMINATION

Termination of Employee Because of her Transgender and Transitioning Status is Discrimination on the Basis of Sex, and Violates Title VII.

A federal appellate court with jurisdiction over the area including the State of Michigan has found that transgender status is a protected status under Title VII. The court found that an employer discriminated on the basis of sex when it terminated a transgender woman because she wished to identify as female and wear a uniform designated for women.

Aimee Stephens ("Stephens") is a transgender woman who was born biologically male and assigned the male gender at birth. She began working at R.G. & G.R. Harris Funeral Homes ("employer" or "Funeral Home") as an apprentice in 2007. At that time, she presented as a male, and identified herself using her legal name, William Stephens. In 2013, Stephens provided her employer with a letter stating that she had "a gender identity disorder" her "entire life," and told Funeral Home owner, Thomas Rost ("Rost") that Stephens had "decided to become the person that [her] mind already is." More specifically, Stephens stated that she "intend[ed] to have sex reassignment surgery," and noted that she would live and work as a woman. The letter said that, after returning from a prescheduled vacation, she would identify as "Aimee" Stephens and would be dressed "in appropriate business attire."

Two weeks later, before Stephens departed for her vacation, Rost terminated Stephens, stating "this is not going to work out." The only reason the Funeral Home provided for the termination was that its customers would not be accepting of Stephens' transition. Rost later admitted that he fired Stephens because Stephens "was no longer going to represent himself as a man. He wanted to dress as a woman." Rost did not have any work performance concerns. Rost also stated that he believed that an individual's sex is "immutable," and that Rost would not permit Funeral Home employees to "deny their sex," while representing the funeral home, just as Rost would "not allow a male funeral director to wear a uniform for females while at work."

Stephens filed a discrimination complaint with the EEOC asserting that the Funeral Home terminated her because she was transitioning from the male to the female gender and her employer believed the public would not be accepting of her transition. The EEOC investigated and found there was reasonable cause to believe that the Funeral Home terminated Stephens due to her female sex and gender identity. The EEOC then brought a lawsuit against the Funeral Home after informal settlement efforts failed. The federal trial court found that transgender status is not a protected characteristic under Title VII, and ruled that the EEOC could not sue for discrimination based solely on transgender and/or transitioning status. Stephens appealed.

On appeal, the Sixth Circuit became the first federal appellate court to explicitly hold that an employee's transgender and transitioning status are protected under Title VII, and that taking adverse action against an employee because of that protected status is unlawful discrimination on the basis of sex. The court reasoned, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. …discrimination 'because of sex' inherently includes discrimination against employees because of a change in their sex."

The court also found that discrimination based on transgender status also constitutes unlawful sex stereotyping because "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."

In so holding, the court rejected the Funeral Home's arguments that its decision to terminate Stephens was rooted in Rost's religious beliefs and was therefore a protected exercise of religion under the federal Religious Freedom and Restoration Act. The Sixth Circuit also rejected the Funeral Home's argument that Stephens' transition to the female gender and use of a uniform designated for women would be a "distraction" for Funeral Home customers. The court relied on the Ninth Circuit's decision in *Fernandez v. Wynn Oil Co.*, which found that customer preferences or bias are not a legally valid justification for taking adverse employment actions against employees on the basis of the sex, even if evidence indicates that the employer's business would indeed be hurt as a result of the discriminatory preferences of customers.

California employers should take note that the state's Fair Employment and Housing Act ("FEHA") includes "transgender" and "transitioning" statuses as protected categories, and prohibits discrimination and harassment based on sex, gender identity and gender expression. Under the FEHA, "transgender" refers to an individual "whose gender identity differs from the sex they were assigned at birth," while "transitioning" refers to a process some transgender individuals go through to begin living as the gender with which they identify including, for example, changes in name, pronoun usage, or undergoing hormone therapy, surgery or other medical procedures. As of January 1, 2018, California employers with 50 or more employees must post information about the rights of transgender employees in the workplace, and must provide training on the prevention of sexual harassment and abusive conduct, including the prevention of harassment based on gender identity and expression.

NOTE:

Discrimination on the basis of transgender or transitioning is illegal in California. Employers should ensure that they treat transgender and transitioning individuals as members of a protected class and that agency policy, handbooks, training sessions, hiring protocols and other personnel procedures reflect these evolving standards. More information about the rights of transgender employees under the FEHA is available here: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH_E04P-ENG-2017Nov.pdf

Stephens v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. 2018) 884 F.3d 560.

BENEFITS CORNER

IRS Releases Sample ACA Penalty Notice Following Earlier Release of Proposed Penalty Forms.

The IRS has released a sample version of Notice CP 220J. This Notice will inform applicable large employers (ALEs) that they are being charged an Employer Shared Responsibility Payment (Penalty) pursuant to the Affordable Care Act's Employer Mandate.

The IRS may assess a Penalty where, in any month, the ALE:

- failed to offer minimum essential coverage (MEC) to at least 70% (95% after 2015) of its full-time employees and their dependents, or
- offered MEC to at least 70% (95% after 2015) of its full-time employees, but the coverage offered did not provide minimum value or was not affordable.

The trigger for the Penalty occurs when a full-time employee purchases coverage through Covered California and receives a premium tax credit. The sample Notice is specifically for the 2015 tax year.

However, it is important to note that before an ALE receives the Notice, it will first receive Letter 226J from the IRS. This Letter is the initial notification from the IRS that it intends to assess a Penalty. There will be two forms included with the Letter (Forms 14764 and 14765). An employer must complete Form 14764 to inform the IRS as to whether it agrees or disagrees with the Penalty. If the ALE agrees with the proposed amount, it should sign and return the form in the envelope provided. If the ALE disagrees with the proposed penalty liability, it must provide a full explanation of the disagreement and indicate changes, if needed, on Form 14765.

If your agency receives a Notice CP 220J, it should pay the Penalty assessment amount to avoid being charged interest. Employers disagreeing with the assessment may file a claim for refund on Form 843. Alternatively, for an employer wanting to take its case to court immediately, the Notice requests that the employer include a written request for the IRS to issue a Notice of Claim Disallowance.

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

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

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

LCW WEBINAR: GRIEVANCES AND DISCIPLINE: MAXIMIZING YOUR AGENCY'S POSITION THROUGH CONTRACT LANGUAGE

Thursday, April 26, 2018 | 10 AM - 11 AM

Presented by:

Laura Kalty

Many labor contracts contain unclear, outdated, or unintentional language related to grievance and disciplinary procedures. As a result, agencies spend unnecessary resources, and may be open to significant risk in managing contract disputes and employee discipline. This webinar will identify common problems in labor contracts regarding grievance and disciplinary procedures, and recommend best practices to maximize your agency's position when responding to grievances and employee discipline.

Who Should Attend?

Human Resources, Labor Relations professionals, Managers & Directors

Workshop Fee: *Consortium Members: $70, Non-Members: $100*

LCW WEBINAR: MANDATED REPORTING

Tuesday, May 1, 2018 | 10 AM - 12 PM

Presented by:

Lee T. Patajo

Employees whose duties require contact with and/or supervision of children are considered "mandated reporters." This workshop provides mandated reporters with the training that is suggested and encouraged by the California Penal Code to help them understand their obligations. It is essential that mandated reporters understand their legal duties not only to help ensure the safety and welfare of children, but because the duty to report is imposed on individual employees, not their agencies. Moreover, a lack of training does not relieve mandated reporters of this important duty.

This workshop, designed for any employee who is a mandated reporter, or who supervises mandated reporters, explains this complex area of the law, including: what constitutes child abuse and neglect; the specific reporting obligations of mandated reporters; how to file a report; protections for reporters; the consequences for failing to file a report; and appropriate employer reporting policies. This practical workshop includes an interactive discussion of typical scenarios that could trigger a duty to report suspected abuse or neglect.

Who Should Attend?

Department of Parks and Recreation Administrators and Employees, Athletic Coaches, Support Staff, Day Camp Administrators and Employees, Youth Program Administrators and Employees

Workshop Fee: *Consortium Members: $100, Non-Members: $125*

Register Today: www.lcwlegal.com/events-and-training

New to the Firm

Kelsey joins our San Francisco office after most recently working with public agencies in southern California. In addition to providing advice and counsel to clients, Kelsey is a litigator with experience researching, drafting pleadings, conducting discovery and preparing witnesses. Kelsey can be reached 415-512-3026 or kcropper@lcwlegal.com.

LCW LIEBERT CASSIDY WHITMORE

WEBINARS ON DEMAND

Throughout the year, we host a number of webinars on a variety of important legal topics. If you missed any of our live presentations, you can catch-up by viewing recordings of those trainings.

WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

CALIFORNIA PUBLIC AGENCY LABOR & EMPLOYMENT BLOG

USEFUL INFORMATION FOR NAVIGATING LEGAL CHALLENGES

Every week, LCW attorneys author blog posts on a variety of important labor and employment law topics. These posts are designed to provide useful information and takeaways for California's public employers on how to navigate the constantly-changing legal landscape.

Topics

Our posts provide valuable information and key takeaways in a wide-range of public-sector labor and employment law matters, including:

- Discrimination
- Education
- Employment Law
- Labor Relations and Collective Bargaining
- Legislation
- Public Safety
- Retirement Health & Disability
- Wage and Hour
- Workplace Policies

DON'T MISS ANY IMPORTANT UPDATES - SUBSCRIBE TODAY!

CALPUBLICAGENCYLABOREMPLOYMENTBLOG.COM

Firm Activities

Consortium Training

Apr. 25 **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"**
Humboldt County ERC | Eureka | Gage C. Dungy

Apr. 25 **"Iron Fists or Kid Gloves: Retaliation in the Workplace"**
Los Angeles County Human Resources Consortium | Los Angeles | Geoffrey S. Sheldon

Apr. 25 **"Technology and Employee Privacy"** and **"Disaster Service Workers – If You Call Them, Will They Come?"**
Monterey Bay ERC | Seaside | Lisa S. Charbonneau

Apr. 25 **"Maximizing Supervisory Skills for the First Line Supervisor"**
NorCal ERC | Dublin | Kelly Tuffo

Apr. 26 **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Humboldt County ERC | Eureka | Gage C. Dungy

May 1 **"Technology and Employee Privacy"** and **"So You Want To Be A Supervisor"**
North San Diego County ERC | San Marcos | Elizabeth Tom Arce

May 2 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"** and **"Disaster Service Workers - If You Call Them, Will They Come?"**
Sonoma/Marin ERC | Rohnert Park | Morin I. Jacob

May 3 **"Moving Into The Future"**
Los Angeles County Human Resources Consortium | Los Angeles | T. Oliver Yee & Alysha Stein-Manes

May 3 **"Issues and Challenges Regarding Marijuana and Vaping in the Workplace"**
Ventura County Schools Self-Funding Authority ERC | Camarillo | Lee T. Patajo

May 9 **"Workplace Bullying: A Growing Concern"**
Gateway Public ERC | Long Beach | Alison R. Kalinski & Elizabeth Tom Arce

May 10 **"Introduction to the FLSA"** and **"Public Sector Employment Law Update"**
Coachella Valley ERC | Indio | Geoffrey S. Sheldon

May 10 **"Moving Into the Future"** and **"12 Steps to Avoiding Liability"**
East Inland Empire ERC | Fontana | T. Oliver Yee & Alysha Stein-Manes

May 10 **"Advanced Investigations of Workplace Complaints"**
North State ERC | Chico | Gage C. Dungy

May 10 **"Inclusive Leadership"**
San Diego ERC | La Mesa | Kristi Recchia

May 10 **"Managing the Marginal Employee"** and **"A Guide to Implementing Public Employee Discipline"**
San Mateo County ERC | Burlingame | Erin Kunze

May 16 **"Leaves, Leaves and More Leaves"** and **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Gold Country ERC | Elk Grove | Jack Hughes

May 16 **"Managing the Marginal Employee"** and **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Ventura/Santa Barbara ERC | Camarillo | Kevin J. Chicas

May 17 **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"** and **"Principles for Public Safety Employment"**
Imperial Valley ERC | Brawley | Mark Meyerhoff

May 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County Consortium | Tustin | Christopher S. Frederick

May 17 **"Public Sector Employment Law Update"** and **"Maximizing Performance Through Evaluation, Documentation and Discipline"**
West Inland Empire ERC | San Dimas | Geoffrey S. Sheldon

May 23 **"Difficult Conversations"** and **"Disaster Service Workers If You Call Them, Will They Come?"**
NorCal ERC | Oakland | Jack Hughes

May 24 **"Workplace Bullying: A Growing Concern"**
Monterey Bay ERC | Webinar | Joy J. Chen

May 24 **"Social Media (Technology and Employee Privacy)"**
SCCCD ERC | Anaheim | Stephanie J. Lowe

May 24 **"Moving Into The Future"**
South Bay ERC | Redondo Beach | Alysha Stein-Manes

Customized Training

Apr. 24 **"Social Media and School Staff"**
Ventura County Schools Self-Funding Authority ERC | Camarillo | Lee T. Patajo

Apr. 24 **"Labor Relations 101"**
City of Beverly Hills | Kristi Recchia

Apr. 25 **"Introduction to the FLSA and Prevention and Control of Absenteeism and Abuse of Leave"**
City of Riverside | Jennifer Rosner

Apr. 25 **"Retaliation in the Workplace"**
ERMA | San Ramon | Erin Kunze

Apr. 26 **"The Brown Act and Grievance Procedure"**
County of Imperial | El Centro | Stefanie K. Vaudreuil

Apr. 26	**"Maximizing Supervisory Skills for the First Line Supervisor"** City of Richmond | Jack Hughes
Apr. 27	**"Management Professional Development"** Barstow Community College District | Barstow | Eileen O'Hare-Anderson
Apr. 27	**"Bullying at Work: Legal Obligations and Interdisciplinary Prevention"** College of the Desert | Palm Desert | Lee T. Patajo
Apr. 27	**"Preventing Workplace Harassment, Discrimination and Retaliation"** County of San Luis Obispo | San Luis Obispo | Christopher S. Frederick
Apr. 27	**"Harassment Prevention: Train the Trainer"** Liebert Cassidy Whitmore | Fresno | Shelline Bennett
Apr. 28	**"Preventing Workplace Harassment, Discrimination and Retaliation in the Workplace"** City of Newport Beach | Christopher S. Frederick
May 2	**"The Art of Writing the Performance Evaluation"** Imperial Irrigation District | El Centro | Stefanie K. Vaudreuil
May 2	**"Preventing Workplace Harassment, Discrimination and Retaliation"** REMIF | Fortuna | Joy J. Chen
May 3	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Fairfield | Gage C. Dungy
May 3	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Irvine | Christopher S. Frederick
May 3	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of San Bernardino | Joung H. Yim
May 8	**"Mandated Reporting"** East Bay Regional Park District | Oakland | Erin Kunze
May 8	**"Preventing Workplace Harassment, Discrimination and Retaliation"** ERMA | Rancho Santa Margarita | James E. Oldendorph
May 9	**"Mandated Reporting"** City of Stockton | Kristin D. Lindgren
May 9	**"Preventing Workplace Harassment, Discrimination and Retaliation"** REMIF | Healdsburg | Morin I. Jacob
May 10	**"Ethics Decision Making"** College of the Desert | Palm Desert | Laura Schulkind
May 14	**"A Guide to Implementing Public Employee Discipline"** ERMA | Chowchilla | Kimberly A. Horiuchi

May 16 **"Leaves, Leaves and More Leaves"**
City of Fountain Valley | Jennifer Rosner

May 16 **"A Guide to Implementing Public Employee Discipline"**
ERMA | Novato | Suzanne Solomon

May 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Housing Authority of the City of Alameda | Alameda | Joy J. Chen

May 18 **"Sick and Disabled Employees and The Disability Interactive Process"**
West Valley-Mission Community College District | Saratoga | Laura Schulkind

May 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Contra Costa Mosquito and Vector Control District | Concord | Joy J. Chen

May 24 **"Management Professional Development"**
Barstow Community College District | Barstow | Eileen O'Hare-Anderson

May 24 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Manhattan Beach | Laura Kalty

May 24 **"Risk Management Skills for the Front Line Supervisor"**
ERMA | Shafter | Kimberly A. Horiuchi

May 31 **"MOU's, Leaves and Accommodations"**
City of Santa Monica | Laura Kalty

Speaking Engagements

Apr. 25 **"An Ounce of Prevention is Worth its Weight in Gold: Workplace Bullying"**
Western Region IPMA-HR Annual Training Conference | Sacramento | Kristin D. Lindgren

Apr. 25 **"The New Frontier of Meet and Confer Strategies for Success at the Table"**
Western Region IPMA-HR Annual Training Conference | Sacramento | Jack Hughes

Apr. 26 **"Labor Relations and the Pending Pension Challenges"**
California Society of Municipal Finance Officers (CSMFO) Luncheon | Paramount | Steven M. Berliner

Apr. 27 **"A Nugget of Knowledge about Workplace Investigations"**
Western Region IPMA-HR Annual Training Conference | Sacramento | Kristin D. Lindgren

May 3 **"Reaching New Heights with updated BPs & Aps"**
Community College League of California (CCLC) Annual Trustees Conference | Valencia | Eileen O'Hare-Anderson & Jane Wright

May 5 **"Me Too and Title IX: Expanding the Conversation"**
CCLC Annual Trustees Conference | Valencia | Eileen O'Hare-Anderson & Jeff Kellogg & Diane Fiero

May 8 **"Employment Law"**
Finance and Professional Relations for Water Managers California State University - San Marcos | San Marcos | Frances Rogers

May 9 **"Free Speech and the Rapidly Changing Discipline Issues in the Digital Era"**
Channel Islands Public Management Association for Human Resources (CIPMA-HR) | Oxnard | Jennifer Rosner

May 17 **"Courageous Authenticity - Do You Care Enough to have critical Conversations?"**
Southern California Public Labor Relations Council (SCPLRC) Monthly Meeting | Kristi Recchia

May 23 **"Special District Legislative Days"**
California Special Districts Association (CSDA) Special District Legislative Days | Sacramento | Gage C. Dungy

May 25 **"Labor Relations Training"**
California State Association of Counties (CSAC) Labor Relations Class | Sacramento | Richard S. Whitmore & Richard Bolanos & Gage C. Dungy

May 29 **"Employment Law and the Interactive Process"**
Judicial Branch Workers' Compensation Program (JBWCP) | Jennifer Rosner

Seminars/Webinars

Register Today: ***www.lcwlegal.com/events-and-training***

Apr. 26 **"Collective Bargaining – The Grievance & Disciplinary Appeals"**
Liebert Cassidy Whitmore | Webinar | Laura Kalty

Apr. 27 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

May 1 **"Mandated Reporter"**
Liebert Cassidy Whitmore | Webinar | Lee T. Patajo

May 9 **"Reducing the Chances of an Off-the-Clock Wage Claim"**
Liebert Cassidy Whitmore | Webinar | Gage C. Dungy

May 21 **"Preparing for a Strike: How to Ensure Effective Coordination for Your Agency"**
Liebert Cassidy Whitmore | Webinar | Che I. Johnson

May 23 **"Cafeteria Plans: ACA, Flores and PEMHCA Webinar"**
Liebert Cassidy Whitmore | Webinar | Heather DeBlanc & Stephanie J. Lowe

May 30,31 **"FLSA Academy**
Liebert Cassidy Whitmore Seminar | Buena Park | Peter J. Brown

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