LCW Liebert Cassidy Whitmore

Briefing Room

News and developments in employment law and labor relations for California Law Enforcement Management.

JUNE 2019

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FIRM VICTORY

LCW Obtains Workplace Violence Restraining Order For Special District.

California employers may seek a temporary restraining order (TRO) and a permanent injunction against anyone in order to protect current employees from unlawful violence or a credible threat of violence in the workplace. As part of the LCW employment relations consortium, a Special District contacted LCW to report that one employee assaulted another employee, without provocation, at the workplace. The employees seldom spoke to each other, and the employee who was attacked does not know why the other employee assaulted him. No other employees were present in the room during the attack, but members of the public and children were present. The Special District reported it terminated the attacker-employee, but thereafter, other employees saw him the parking lot and they were concerned. The employee who was attacked feared he would be attacked again if he encountered the former-employee.

LCW attorney **Alison R. Kalinski** advised the Special District that the best way to protect the employee who was assaulted would be to obtain a Workplace Violence Restraining Order. After obtaining the TRO, Kalinski met with the employee who was attacked and other witnesses to prepare for the hearing. Kalinski guided the employee's testimony in court about the attack and his fears that it could re-occur. In response, the court issued a permanent restraining order that keeps the attacker away from the employee and the worksite for three years.

NOTE:

Employers have a duty to provide a safe workplace. If you are aware or suspect any threats of violence to any employees, LCW can advise and determine whether a Workplace Violence Restraining Order is appropriate.

PUBLIC SAFETY

Sheriff's Sergeant Not Entitled To An Administrative Appeal For Release From Probationary Promotion.

On November 1, 2015, the Los Angeles County Sheriff's Department (Department) promoted Thomas Conger from sergeant to lieutenant, subject to a six-month probation period. A few months later, the Department informed Conger that he was under investigation for events occurring before his promotion. Shortly thereafter, the Department relieved Conger of duty, placed him on administrative leave, and extended his probationary period indefinitely due to his "relieved of duty" status.

On May 20, 2016, the Department notified Conger that it was releasing him from his probationary position of lieutenant based on investigatory findings that Conger had failed to report a use of force while he was still a sergeant. The Department provided Conger with a "Report on Probationer" (Report), which indicated that on May 21, 2015, Conger and two deputy sheriffs moved a resisting inmate from one cell into an adjacent cell. The Report said that Conger violated Department policy by failing: to report the use of force; to document the incident; and to direct his subordinates who used or witnessed the use of force to write the required memorandum. The Report concluded that Conger did not meet the standards for the position of lieutenant, and recommended Conger's release from probation and demotion back to sergeant.

Subsequently, Conger filed a written appeal with the County's human resources office and a request for a hearing pursuant to the Public Safety Officers' Procedural Bill of Rights Act, at Government Code section 3304 subdivision (b), with the County's Civil Service Commission. Section 3304, subdivision (b) provides that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal." Section 3303 defines "punitive action" as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

After both the human resources office and the Civil Service Commission denied Conger's requests, Conger petitioned the trial court for an order directing the County to provide him with an administrative appeal. Conger argued that releasing him from his probation based on alleged pre-promotion misconduct constituted a "denial of promotion on grounds other than merit" under section 3304, subdivision (b), and entitled him to an administrative appeal. The trial court denied the petition, ruling that the Department could properly consider Conger's pre-probationary conduct in rescinding his promotion, and that the decision to rescind was merit-based due to Conger's failure to report a use of force. Conger appealed.

The Court of Appeal affirmed. First, the court determined whether Conger's release from his probationary promotion was a "denial of promotion" or a "demotion." The court noted that this was an important distinction because under section 3304, subdivision (b), an employer can deny a promotion without triggering the appeal right, so long as the denial is based on merit. The court concluded that the Department's decision was indeed a denial of a promotion. The court noted that Conger had not completed his probationary period at the time the Department returned him to his previous rank because the Department had extended the probationary period indefinitely. Therefore, Conger did not yet have a vested property interest in the lieutenant position. Because Conger lacked permanent status as a lieutenant, his release from his probationary promotion constituted a denial of promotion rather than a demotion.

Next, the Court of Appeal considered whether the Department denied Conger's promotion on merit-based grounds. The court noted that because lieutenants are high-level supervisors in the Department, complying with Department procedures and ensuring that subordinates do so as well is substantially related to successful performance in that position. The court reasoned that Conger did not demonstrate competence as a supervisor when he failed to report a use of force or instruct his subordinates to do so. Further, the court noted that nothing in section 3304, subdivision (b) suggests that the term "merit" should be limited to the merit of an officer's performance during the probationary period. Thus, the court concluded that the Department's grounds for denying Conger's promotion were merit-based.

Finally, the court evaluated whether Conger was entitled to an administrative appeal because the Report could lead to future adverse consequences. Conger argued that he was entitled to an administrative appeal because the Department placed the Report in his personnel file and could rely on it in future personnel decisions that could lead to punitive action. The court said that the mere fact that a personnel action may lead to a denial of promotion on merit grounds does not transform it into a punitive action for purposes of section 3304. Moreover, Conger did not provide any evidence that the Report would lead to punitive action or affect his career because the only action the Report recommended was release from promotion.

For these reasons, the court found that the Department was not required to provide Conger with an administrative appeal for his release from his probationary promotion.

Conger v. County of Los Angeles, 2019 WL 2482400 (2019).

NOTE:

Public safety officers are entitled to a number of additional protections under the Peace Officers' Procedural Bill of Rights Act ("POBRA"), which includes administrative appeals of certain types of personnel actions. LCW attorneys are experts at advising agencies about their obligations under the POBRA .

DISCRIMINATION

U.S. Supreme Court Concludes That County Forfeited Its Late Objection That An EEOC Complaint Failed To Reference A Protected Status In A Title VII Action.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment based on race, color, religion, sex, or national origin. Title VII requires an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a state's fair employment agency before commencing a Title VII action in court. Once the EEOC receives a complaint, it notifies the employer and investigates the allegations. The EEOC may then resolve the complaint through informal conciliation, or may sue the employer. If the EEOC chooses not to sue, it issues a right-to-sue notice, which allows the employee to initiate a lawsuit. An employee must have this right-to-sue notice before initiating a lawsuit.

Lois Davis filed an EEOC complaint against her employer, Fort Bend County. She alleged sexual harassment and retaliation for reporting harassment. While the EEOC complaint was still pending, the County fired Davis because she went to church on a Sunday instead of coming to work as requested. Davis attempted to amend her EEOC complaint by handwriting "religion" on an EEOC intake form; however, she never amended the formal charge document. Upon receiving her right-to-sue notice, Davis sued the County in federal court for religious discrimination and retaliation for reporting sexual harassment.

After years of litigation, the County alleged for the first time that the court did not have jurisdiction to decide Davis' religious discrimination claim because that protected status was not included in her formal EEOC charge. The trial court agreed and dismissed the suit. On appeal, the Fifth Circuit reversed and held that an EEOC complaint was not a jurisdictional requirement for a Title VII suit, and therefore, the County forfeited its defense because it waited years to raise the objection. The U.S. Supreme Court then agreed to hear the case.

The U.S. Supreme Court had to decide whether an EEOC complaint is a jurisdictional or procedural requirement for bringing a Title VII action. When a jurisdictional requirement is not met, a court has no authority whatsoever to decide a certain type of case. A procedural requirement, by contrast, is a claim-processing rule that is a precondition to relief that may be waived if there is no timely objection. The Court noted that a key distinction between the two is that jurisdictional requirements may be raised at any stage of the proceedings, but procedural requirements are only mandatory if the opposing party timely objects.

The Supreme Court concluded that Title VII's complaint-filing requirements are not jurisdictional because those laws "do not speak to a court's authority." Instead, those complaint-filing requirements speak to "a party's procedural obligations." Therefore, the Court found that while filing a complaint with the EEOC or other State agency is still mandatory, the County forfeited its right to object to Davis' failure to mention religious discrimination in her EEOC complaint because the County did not raise the objection until many years into the litigation.

Fort Bend County v. Davis, 587 U.S. ____, 135 S.Ct. 2804 (2019).

NOTE:

This case demonstrates the importance of considering the adequacy of an employee's administrative EEOC or California Department of Fair Employment and Housing discrimination complaint early in the litigation process. LCW trial attorneys regularly help public agencies defend against themselves against all types of discrimination lawsuits.

School District Gets Employee's Harassment And Retaliation Claims Dismissed.

Aurora Le Mere began working as a teacher for Los Angeles Unified School District ("LAUSD") in 2002. While working at LAUSD, Le Mere filed numerous claims and complaints. Le Mere filed two workers' compensation claims and at least two administrative complaints alleging that LAUSD violated provisions of the Education Code. In 2007, Le Mere filed a civil action against LAUSD and two individuals for discrimination, retaliation, and civil rights violations. In 2015, Le Mere filed a second civil action against LAUSD and six individuals alleging that she had endured a pattern of continued harassment, intimidation, discrimination, hostility, and retaliation following her various complaints.

LAUSD demurred to Le Mere's 2015 civil action. In other words, LAUSD requested the trial court to determine, even assuming that the incidents Le Mere claimed were true, that she still had no case under the law. The trial court sustained LAUSD's demurrer and dismissed many of Le Mere's claims, including all of the claims against individual defendants. Subsequently, Le Mere filed a First Amended Complaint ("FAC") asserting the same causes of action against LAUSD and the individual defendants. LAUSD demurred again, and for the same reasons as before, the trial court dismissed her complaint. Le Mere then filed a Second Amended Complaint ("SAC") alleging that LAUSD: (1) harassed her in violation of Education Code sections 44110 through 44114; (2) violated Labor Code section 1102.5; and (3) violated Labor Code section 226.7. The first claim for harassment was newly added. In February 2016, prior to filing her SAC, Le Mere filed a claim under the Government Claims Act, which is a prerequisite for bringing certain claims against a public entity. LAUSD demurred once again, and the trial court dismissed Le Mere's lawsuit. Le Mere appealed.

On appeal, Le Mere argued that the trial court improperly dismissed the retaliation claim under the California Fair Employment and Housing Act ("FEHA") that she asserted in her FAC. The Court of Appeal disagreed. The court noted that the elements of a claim for retaliation under the FEHA are: (1) the employee's involvement in a protected activity; (2) retaliatory animus on the part of the employer; (3) an adverse employment action; (4) a causal link between the retaliatory animus and the adverse action; (5) damages; and (6) causation. However, the court noted, Le Mere's FAC did not name the individual defendants engaged in any retaliatory conduct or even allege the named defendants were LAUSD employees. Further, the FAC did not allege that the individual defendants knew about Le Mere's 2007 lawsuit, which Le Mere had identified as her protected activity. Moreover, the court noted that almost two years elapsed between the 2007 lawsuit and the first alleged instances of retaliation in 2009. This was not sufficient to establish causation. Thus, the trial court properly dismissed the retaliation claim.

Le Mere also argued that the trial court erred in dismissing the harassment claim under the Education Code that she asserted in her SAC. Again, the Court of Appeal affirmed the trial court's ruling. Le Mere filed her SAC 14 months after the original complaint and offered no explanation for asserting the new cause of action. Further, the new cause of action was not properly pled because it did not allege that a complaint had been lodged with local law enforcement, which is a prerequisite for a harassment claim under Education Code sections 44110 through 44114. Accordingly, the trial court properly dismissed this claim in Le Mere's SAC.

Finally, Le Mere argued that the trial court improperly dismissed her Labor Code section 1102.5 claim in her SAC. The Court of Appeal disagreed once again. In order to bring a Labor Code section 1102.5 claim against a public entity, the person must comply with the Government Claims Act. Under that Act, a person must first file a claim for money or damages with the public entity. Further, the claim must usually be presented to the public entity within six months after the alleged bad act occurred. Failure to meet these requirements bars a person from suing the entity. Here, Le Mere eventually filed a claim in February 2016, but that was one year after Le Mere filed the initial complaint and several months after she filed the FAC. Thus, the Court of Appeal concluded that the trial court properly dismissed the claim.

Le Mere v. Los Angeles County Unified School District, 2019 WL 2098780 (2019).

NOTE:

LCW has a deep bench of trial attorneys. LCW attorneys are very successful in using all available tools to convince courts to dismiss claims against public entities.

RETIREMENT

Bonus Payments For Consultant's Additional Work Were Not Pensionable.

Dr. Robert Paxton is a medical consultant-psychiatrist for the Department of Social Services ("DSS") who reviews claims of disabled Californians seeking federal Social Security Benefits. Dr. Paxton, and other consultants who do this work, are expected to be at work for certain hours and must work 40 hours per week, but otherwise have flexibility in their schedules.

In 1993, after laboring with periodic backlogs of cases, the DSS received an exemption from the Department of Personnel Administration ("DPA") to temporarily pay medical consultants overtime to deal with the pending cases. The DPA granted the exemption even though the consultants were salaried employees.

The DSS requested another exemption in 1996, but the DPA denied the request. Thereafter, the DSS and the union agreed to a voluntary bonus program for processing additional workload. Under the bonus program, medical consultants would be paid for each case closed above a certain threshold per week. The DSS stopped the bonus program in November 2011.

Dr. Paxton participated in the bonus program from 2005 until it ended. As a result, Dr. Paxton earned over 1.2 million dollars in bonuses, despite testifying that he did not work more than 40 hours per week. At times, Dr. Paxton's monthly bonuses were more than three times his monthly salary.

In 2012, Dr. Paxton submitted a request to CalPERS for the cost to purchase five years of additional service credit, which was allowed under the retirement law at the time. CalPERS excluded Dr. Paxton's bonuses in its calculation of the cost. While the exclusion of Dr. Paxton's bonuses resulted in a lower cost to purchase the additional service credit, calculating his pension this way would reduce the benefit Dr. Paxton would be eligible for upon retirement. Dr. Paxton challenged CalPERS determination that the bonuses were not pensionable.

The CalPERS Board determined that the bonus payments were not pensionable because they did not qualify as special compensation under the law. Dr. Paxton then requested that the courts review the decision. The trial court concluded the Board properly determined that the bonus payments were not pensionable compensation because they were intended to compensate Dr. Paxton for performing additional work outside of his regular duties. Dr. Paxton appealed.

The Court of Appeal affirmed the trial court's decision and determined that the bonus payments were not pensionable compensation. The court noted that the retirement law explicitly excludes "bonuses for duties performed after the member's work shift" from the calculation of special compensation but includes "bonuses (for duties performed on regular work shift)." Here, the court determined that Dr. Paxton's bonus payments were for duties performed after his work shift, and therefore, were not included as special compensation. The court noted that the bonus program was a replacement for an overtime program that was necessitated because the consultants refused to work more hours to address the backlog of claims. Therefore, the foundation of the bonus program was the understanding that it would compensate consultants for additional work that was not part of their duties.

Paxton v. Board of Administration, California Public Employees' Retirement System, 35 Cal.App.5th 553 (2019).

NOTE:

This case illustrates the complexities of calculating an employee's pensionable compensation. LCW attorneys are experts in helping agencies to comply with CalPERS requirements, including analyzing what types of pay count toward pensionable compensation.

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PLEASE NOTE:

To celebrate the upcoming summer break, we will combine the July and August 2019 issues of this newsletter.

Check your inbox in August for information on the latest legal developments.

NEW TO THE FIRM

Kevin B. Piercy joins our Fresno office where he provides advice and counsel to the firm's public entity clients in matters pertaining to employment and labor law. His main areas of specialty include the Fair Labor Standards Act, the California Labor Code, Title VII, and the Fair Employment and Housing Act.

He can be reached at 559.449.7809 or kpiercy@lcwlegal.com.

Isabella Reyes joins of San Francisco office where she assists counties, cities, and public education clients in a full array of employment matters, discrimination, harassment, and retaliation claims under Title VII, Title IX, the ADA, FEHA, and various federal and state statutes.

She can be reached at 415.512.3015 or ireyes@lcwlegal.com.

Brian J. Hoffman is a new litigator in Liebert Cassidy Whitmore's Sacramento office. He has experience in all phases of litigation, from the pre-litigation stage through mediation and trial. Prior to joining LCW, Brian worked as a full-service civil and business litigation attorney.

He can be reached at 916.584.7015 or bhoffman@lcwlegal.com

Videll Lee Heard represents Liebert Cassidy Whitmore clients in matters pertaining to labor and employment law. With over 25 years of trial and arbitration experience, Lee has extensive knowledge in all aspects of the litigation process.

Lee joins our Los Angeles and can be reached at 310.981.2018 or lheard@lcwlegal.com

Management Training Workshops

Firm Activities

Customized Training

July 18 **"Mandated Reporting"**
City of Rancho Cucamonga | Jenny-Anne S. Flores

July 22 **"Difficult Conversations"**
City of Tustin | Christopher S. Frederick

July 25 **"The Art of Writing the Performance Evaluation"**
City of Newport Beach | Kristi Recchia

Speaking Engagements

July 18 **"Fitness for Duty Exams"**
Southern California Public Labor Relations Council (SCPLRC) Monthly Meeting | Cerritos | Jennifer Rosner

August 12 **"Train the Trainer: Harassment Prevention"**
Fresno | Shelline Bennett
To Register: www.lcwlegal.com/train-the-trainer

Firm Publications

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

Partner Gage C. Dungy was quoted in an article by the *Sacramento Bee,* "Nepotism Investigations Spur Questions for California State Workers: Where is it Happening?"on April 15, 2019.

Partner Geoffrey Sheldon from our Los Angeles office was quoted on a radio segment by 89.3KPCC titled "CA Supreme Court Oral Arguments: Can Police Share Problem Officers' Names With DAs?"

Partner Geoffrey Sheldon of our Los Angeles office was quoted in a *Los Angeles Times* article, "Should Prosecutors Get the Names of Officers Who Commit Misconduct?" on the June 5, 2019 issue.

Partner Geoffrey Sheldon of our Los Angeles office spoke on a Podcast episode for the Daily Journal, "Episode 140: Brady v. Pitchess" on June 7, 2019.

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