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

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

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SPECIAL EDUCATION

School District Cannot Avoid Its Responsibility To Provide Special Education And Related Services To An Eligible Student Because The Child's Parents Have Funding Available From A Non-Educational Governmental Agency.

B.H. is a former foster child with severe disabilities. His adoptive parents ("Parents") reside within the geographical boundaries of the Manhattan Beach Unified School District ("District"). B.H. attended a District school through eighth grade, but he was not designated a special needs child. Parents enrolled B.H. in a charter school outside of the District's boundaries for ninth grade and later moved B.H. into a residential treatment center located within the boundaries of a different public school district.

When B.H. did not progress academically, Parents formally requested the District to assess B.H. for special education and related services. The District initially argued the other school district responsible to assess B.H. but ultimately agreed to conduct the assessment.

Around the same time, Parents told the District they thought a residential treatment center with a nonpublic high school in Sonoma County was an appropriate placement for their son's particular needs and requested the District consider that placement. Parents later informed the District that the residential treatment center interviewed and accepted B.H.

Subsequently, the District completed B.H.'s assessment and found him eligible for special education and related services under the category of emotional disturbance. The District convened an Individualized Education Plan (IEP) meeting and developed a formal IEP. The IEP noted that B.H. was unable to participate in a general curriculum educational environment and required a year-round program at a residential treatment center as the least restrictive environment to meet his needs at the time, and a "24–7 therapeutic environment in order to access curriculum." B.H.'s educational services were to be provided in a "Non Public Residential School" in a 24/7 residential treatment center, with the consistent provision of therapeutic services year-round. The IEP also provided for "[t]ransportation to and from residential treatment for therapeutic visits per recommendation of the treatment team."

Parents gave written consent to implementation of the IEP and believed the District placed B.H. at the residential treatment center they identified and the

District would finance the educational portion of B.H.'s placement. Parents secured financial assistance for the residential portion of B.H.'s placement through the Adoptive Assistance Program administered by the Los Angeles County Department of Children and Family Services ("DCFS").

Parents withdrew B.H. from the local residential treatment center, and B.H. returned home for five days before Parents drove him to the residential treatment center in Sonoma County. Parents informed the District that B.H. enrolled in the residential treatment center, but the District then insisted it was not responsible for B.H. because DCFS transferred him directly from one residential treatment center to another. The District also refused to reimburse Parents for expenses incurred transporting B.H. to the new residential treatment center.

The Sonoma County Office of Education administers the local Special Education Local Plan Area ("SELPA") that provides special education services to children residing within its boundaries. The local SELPA also denied responsibility for B.H. because it understood the District placed B.H. at the residential treatment center pursuant to the IEP the District developed. The County Office of Education stated it would only be responsible for B.H. when a noneducational government agency placed a student in a nonpublic school placement within the county.

The parents initiated a due process hearing to challenge the District's decision not to take responsibility for B.H. and reimburse them for the costs related to the placement.

At the due process hearing, Parents contended that the District placed B.H. at the residential treatment center pursuant to the IEP it developed, and the District was therefore responsible for meeting his special education needs. The administrative law judge disagreed. The judge reasoned that because the Parents identified the potential placement before the District completed its assessment and worked with DCFS to obtain funding, the District did not make the placement pursuant to the IEP. The judge concluded that DCFS was a "public agency, other than an educational agency" under Education Code section 56155, that DCFS had placed B.H. in the residential treatment center in Sonoma County, and that therefore, under Education Code section 56156.4, subdivision (a), the District was not responsible for the costs of B.H.'s education.

B.H. appealed the judge's decision to the trial court, which affirmed. The trial court reasoned that if Parents failed to satisfy the requirements for receipt of financial assistance from DCFS, then B.H., "would not have been approved to be at" the residential treatment center in Sonoma County. The trial court also found that B.H.'s return to Parents' home with "an intention that he remain" was a prerequisite to the District's IEP being effective. B.H. appealed.

The Court of Appeal stated federal law requires the District provide B.H. a Free Appropriate Public Education ("FAPE") that emphasized special education and related services designed to meet his unique needs. Where, as here, a FAPE required the intensive level of services provided by a residential treatment center, placement in such a facility is an appropriate—and sometimes necessary—part of the student's IEP. The statutory scheme of the Individuals With Disabilities Education Act ("IDEA") and California's complementary scheme does not provide an exception for a school district's obligation to provide residential placement services simply because those services may be facilitated by or available through another agency under a different statutory scheme. Public school districts are free to work with noneducational public agencies, such as DCFS, to satisfy students' educational needs through the IEP process. However, doing so will not relieve the school district of its independent obligation to comply with the IDEA.

The Court of Appeal held the administrative

law judge ("ALJ") and trial court were incorrect in ruling the financial aid provided by DCFS constituted "placement by a noneducational public agency," thus excusing the District under Education Code sections 56155 and 56156.4, subdivision (a) from the usual rule that a school district is responsible to educate children whose parents reside within the district's geographical boundaries. DCFS was not a "public agency, other than an educational agency" under Education Code section 56155, so its conduct in providing financial assistance to Parents did not qualify as a placement. The fact that DCFS offered the Parents financial assistance did not obligate it to monitor or assess B.H. Rather, the agency is limited to evaluating and modifying the amount of financial aid if warranted due to a change in circumstances.

The Court of Appeal found that, contrary to its later assertions, the record reflects the District was aware of and acknowledged its educational responsibility for B.H. when the District informed the Parents that it would serve B.H. if the assessment team agreed to offer him special education and related services. Once the District completed the IEP, federal law required it to immediately implement the IEP. The IEP was not contingent on B.H.'s return to Parents' home with an intention to remain. Moreover, the trial court's conclusion was at odds with the rule that the determination of which educational agency is responsible for a child's education is a function of the parent's residence and does not depend on where a child may be living.

The Court of Appeal reversed the trial court judgment and ALJ's Findings and Decision.

B.H. v. Manhattan Beach Unified Sch. Dist. (2019) 35 Cal.App.5th 563.

FIRST AMENDMENT

Public Employee's Speech On A Matter Of Public Concern Is Protected If The Speech Is Not Made Pursuant To His Official Job Duties, Even If The Testimony Itself Addresses Matters Of Employment.

After a contentious budget approval process in which a city's chief of police did not voice support for a city manager's submitted budget, the city manager became angry with the chief, admonished him to focus solely on the police department, and warned him that a particular city official could ruin his career.

The chief became suspicious about the city's accounting and budgeting practices and worried that the city manager's performance and decisions harmed the city. The chief discussed his concerns with various city administrators. The chief attempted to meet with the city manager who refused to meet with him.

Months later, the chief authorized a police officer to perform a maneuver to stop a fleeing car during a police pursuit. Although the maneuver was successful, the city manager arranged for an outside agency to conduct an investigation. The investigative report found the chief committed ten policy violations, and without allowing the chief to respond to the report, the city manager suspended the chief for two weeks without pay.

The chief appealed his discipline to the city's Personnel Review Committee, which absolved him of wrongdoing. The Committee found the report was "an erroneous mischaracterization of the events," omitted pertinent and material facts, and appeared biased to arrive at a predetermined result. The Committee recommended the city manager retract the discipline.

While this investigation was ongoing, the city manager initiated two additional investigations led by the same agency into complaints about the chief. The city manager placed the chief on paid administrative leave pending the results of

the investigations. While the chief was on leave, the city manager sent him letters prohibiting him from speaking about the investigations to anyone other than his wife and attorney. At the same time, the city manager released defamatory information about the chief to the media while the investigations were ongoing in an effort to build public pressure for the investigations.

The city manager later resigned. His replacement used a "no-cause" clause in the chief's contract to terminate the chief who had not returned from administrative leave. The replacement city manager made his decision after reviewing the investigative reports and speaking with various people, whose views were highly polarized.

The chief was unable to find other employment. Subsequently, he filed a lawsuit against the former city manager alleging the former city manager retaliated against him in violation of the chief's First Amendment speech rights.

Before trial, the city manager filed a motion asking the court to dismiss the case because he was immune from judgment as a government official. The trial court denied the motion. A jury found in favor of the chief and awarded him more than $4 million in damages. The city manager sought a new trial on the grounds the trial court's jury instructions were erroneous, or in the alternative, he asked the court to overrule the jury's decision. The trial court denied the motion for a new trial and the city manager appealed.

The chief's First Amendment retaliation claim turned on five questions: (1) whether the chief spoke on a matter of public concern; (2) whether the chief spoke as a private citizen or public employee; (3) whether the chief's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the city had an adequate justification for treating the chief differently from other members of the general public; and (5) whether the city would have taken the adverse employment action even absent the protected speech.

Here, the chief argued the city manager retaliated against him for discussing the city's budgeting and accounting practices with other city officials. He argued this speech involved a matter of public concern— the mismanagement of city finances. The chief further argued that his discussions with city officials about the suspected mismanagement were not part of his job duties, so he engaged in this speech as a private citizen rather than as a public employee. The chief alleged a number of adverse employment actions— e.g., commencement of three investigations, the two-week suspension, the administrative leave, the order prohibiting him from speaking to the press, and the defamatory inflammatory information the city manager provided to the press. The chief argued his protected speech was a substantial or motivating factor in the city manager's decisions to take each of these actions. In addition, although the chief did not argue the ultimate decision to terminate him was itself retaliatory, he sought damages arising from the termination on the ground that the city manager's retaliatory actions directly caused the termination.

In response, the city manager argued the chief did not speak on a matter of public concern, he did not speak as a private citizen, the speech was not a substantial or motivating factor in the adverse employment actions, and the city had adequate justification for treating the chief differently from other members of the public. The city manager also challenged the chief's recovery of damages arising from the termination. The city manager also argued he was immune from judgment as a government official.

Although the city manager admitted that the potential mismanagement of city funds was a matter of public concern, he argued that the trial court had insufficient information to conclude the chief's speech involved matters of public concern, rather the chief was motivated by a personal grievance against him rather than exposing government wrongdoing.

The Court of Appeal found that the chief provided the trial court enough information

about his discussions with city employees, including a general timeline, the roles of those with whom he spoke, and a description of his motivations for his discussions to show his speech substantially involved matters of public concern. Accordingly, the trial court properly concluded the speech substantially involved matters of public concern, and the city manager was not entitled to immunity because he could not have reasonably concluded the speech was about a personnel dispute and grievance.

The Court of Appeal also agreed that the chief spoke as a private citizen because the chief spoke to city officials outside of his chain of command, his concerns related to ferreting out "corruption or systemic abuse" in city finances and management were not part of his official duties as chief of police, and there was strong evidence that the chief's supervisor (the city manager) did not want the chief discussing or looking into the overall city budget or the city manager's accounting practices. The city manager was not entitled to immunity on this decision because no evidence suggested a reasonable official in the city manager's position would have believed analyzing the timing of invoice payments in other departments or city-wide audit practices as the chief did was within the chief's job duties.

During the trial, the chief identified a number of potentially adverse employment actions, including some that involved the city manager's own speech— his statements to the press. The city manager argued his communication with the press was an exercise of his own free speech rights, so the trial court should have ruled in his favor on this question. However, the Court of Appeal found that the city manager's communication with the press was part of a concerted effort to deter the chief from, and punishing him for, engaging in constitutionally protected speech. Accordingly, the communication with the press (and the other adverse actions the city manager took against the chief) could appropriately form the basis of the chief's lawsuit, and the city manager was not entitled to immunity in this question.

Next, the city manager was required to use a balancing test to prove he had adequate justification for treating the chief differently from other members of the public. However, the city manager waited to raise the defense that he did have adequate justification to treat the chief differently until after the trial concluded. The Court of Appeal concluded it could not properly consider the defense because the city manager should have raised it before or during the trial.

Last, the chief argued the city manager's actions were the proximate cause of his termination even though the city manager did not terminate him. The city manager argued his replacement made an independent decision to terminate the chief. Additionally, he argued the jury instructions misstated the law of proximate cause by failing to require a direct relation between the city manager's actions and the chief's termination.

The Court of Appeal ruled the evidence showed the replacement city manager's decision to terminate the chief was "not unrelated to" the city manager's conduct. The city manager's wrongful actions, which amounted to a campaign of public humiliation through, among other things, false and misleading representations, "almost certainly played a direct and substantial role in creating or exacerbating these conditions." A reasonable jury could have found that the city manager's actions were a causal factor in the decision to terminate the chief. Furthermore, even if the jury instructions contained an error, the error was harmless because it would not have changed the jury's verdict.

The Court of Appeal affirmed the trial court ruling denying a new trial.

Greisen v. Hanken (2019) __ F.3d __ [2019 WL 2312566].

SEXUAL HARASSMENT

Appeal of Arbitration Award Not Proper Venue To Litigate Whether Faculty Member Is Guilty Of Criminal Sexual Harassment.

John Barrett is an assistant professor at Bloomsburg University of Pennsylvania. At the end of a semester, Barrett initiated a friendship with a student that developed into a romantic relationship including sexual intercourse. Barrett and the student ended the romantic relationship after nine months. The student later confronted Barrett about rumors she heard concerning Barrett's relationship with another student.

The student filed a complaint with the University the following year alleging that Barrett had a pattern of targeting female students and had engaged in sexual activity with her without her consent.

The University placed Barrett on administrative leave and initiated an investigation. After the investigation, the University held a pre-disciplinary conference with Barrett to allow him to respond to the allegations. The University terminated Barrett's employment citing Barrett's lack of professional judgment in engaging in sexual relationships with two students and engaging in sexual conduct with one student without her consent.

The faculty union filed a grievance on Barrett's behalf claiming the University terminated Barrett without just cause in violation of the collective bargaining agreement between the University and the faculty association.

After conducting hearings on the matter, the arbitrator issued an award sustaining the grievance. Specifically, the arbitrator found that Barrett's conduct did not violate any of the University's policies against sexual harassment and discrimination because he did not develop sexual relationships with current students in his class. Further, the University's policy did not prohibit either relationship, because the policy does not prohibit romantic, consensual relationships. The arbitration award ordered the University to reinstate Barrett with no loss of benefits and back pay. The University filed a lawsuit seeking review of the arbitration decision.

The University argued the public policy exception applied to invalidate the arbitration award because: (1) Barrett's conduct implicated the well-defined, dominant public policy against sexual harassment; and (2) the arbitration award posed an unacceptable risk that it will undermine the implicated public policy. Specifically, the University focused solely on the allegedly non-consensual acts Barrett performed during the course of the relationship.

Pursuant to the public policy exception, Pennsylvania courts may not enforce arbitration awards that contravene public policy. In order to determine whether the public policy exception is applicable, Pennsylvania courts must: (1) identify the nature of the conduct leading up to the discipline; (2) determine if the identified conduct implicates a well-defined, dominant public policy which is "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests;" and (3) determine if the arbitration award presented an unacceptable risk that the award will "undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty, given the particular circumstances at hand and the factual findings of the arbitrator." Pennsylvania courts have applied the public policy exception to invalidate arbitration awards that undermine the state's public policy against sexual harassment and discrimination.

However, while the University pointed to two cases to demonstrate instances where the Court applied the public policy exception to vacate arbitration awards on the basis that unwelcome sexual comments in the context of a professional relationship implicated the state's well-defined, dominant public policy against sexual harassment and sexual discrimination, that

conduct was distinguishable from the conduct in the case at hand. In this case, the University sought to vacate an arbitration award based on sexual conduct that occurred within the overall context of a consensual sexual relationship and asked the Court to find that the conduct was criminal.

The Court pointed to the arbitrator's finding that even if Barrett engaged in sexual conduct with the student, Barrett performed the acts in the context of a consensual sexual relationship and not as an act of sexual harassment. There is no record that criminal prosecutors ever charged, prosecuted, or convicted Barrett of indecent sexual assault stemming from the alleged acts. The Court held that an appeal from an arbitration award was not the proper venue to litigate whether Barrett was guilty of a crime.

Because the arbitrator expressly found that Barrett and the student engaged in a consensual sexual relationship and that Barrett's conduct did not violate any of the University's policies against sexual harassment and discrimination, Barrett's conduct did not implicate public policy against sexual harassment. As a result, the arbitration award did not pose an unacceptable risk of undermining the public policy and did not prevent the University from upholding its obligation to protect the public.

However, the Court did remind Barrett that his behavior exploited students and necessitated better judgment and more restraint.

Pa. State Sys. of Higher Educ., Bloomsburg Univ. of Pa. v. Ass'n of Pa. State Coll. and Univ. Faculties (2019) __ Pa. __ [2019 WL 2401524].

NOTE:

This case is from the Commonwealth Court of Pennsylvania. This case is not binding in California, but it does provide some insight into how one state appellate court interpreted sexual harassment policies in reviewing an arbitration award regarding employee discipline.

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 did 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.

DISCRIMINATION

U.S. Supreme Court Concludes That County Forfeited Its Late Objection That An EEOC Complaint Failed To Reference A Protected Status The Employee Pursued 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 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. ____ (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 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 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 thriving litigation practice. LCW attorneys are very successful in using all available tools to convince courts to dismiss claims against public entities.

The Ninth Circuit Provides Some Favorable Authority for Educators in Title IX Litigation.

In March of 2014, three basketball players at the University of Oregon were alleged to have forced a female student to engage in nonconsensual sex at an off-campus apartment. The local District Attorney ultimately decided not to prosecute them, but the University proceeded with a formal disciplinary process. These students had the option to choose between two types of disciplinary hearings: a panel hearing or an administrative conference. They opted for the simpler, more streamlined administrative conference.

At the end of the process, the university determined that the students had violated the Student Conduct Code by engaging in specified sexual acts without explicit consent. The university suspended them for at least four years and until the female student was no longer enrolled at the university (but no longer than ten years). It declined to renew their athletic scholarships.

The accused students sued, seeking to have their discipline set aside. They alleged that the university violated Title IX under theories of "selective enforcement, erroneous outcome, and deliberate indifference." Title IX of the Education Amendments of 1972 prohibits institutions of higher education from discriminating "on the basis of sex." Under Title IX, a victim of sexual assault can argue their institution should be liable for damages if the victim can prove the institution was "deliberately indifferent" to an environment on campus that presented a sufficient danger of assault. Here, however, the accused students invoked Title IX to contend that the institution's disciplinary system itself discriminated "on the basis of sex." The federal trial court dismissed their lawsuit, ruling that they had not pleaded their claims with enough supporting facts. The students appealed.

The U.S. Court of Appeal for the Ninth Circuit affirmed the trial court's dismissal of the lawsuit. The Court of Appeal agreed with the trial court that the students did not provide enough factual detail to support their claims, even at this preliminary stage. The Court held that a student asserting a Title IX claim for institutional bias in the disciplinary system has to state in the complaint, at the very beginning of the case, sufficient facts to support the claim. For example, the Court of Appeal reasoned: "The essence of the [students'] selective enforcement theory is that the decision to discipline the student athletes was 'grounded' in gender bias. But the students failed to allege how this is so. The complaint recites such facts as the content of the University president's speech and the campus protests, but does not make any plausible link connecting these events and the University's disciplinary actions to the fact that the student athletes are male." The Court also observed: "The student athletes also allege that, because the University disciplines male students for sexual misconduct but never female students, it is biased against men. . . . Significantly, the complaint does not claim that any female University students have been accused of comparable misconduct, and thus fails to allege that similarly situated students—those accused of sexual misconduct—are disciplined unequally."

The students also claimed that the disciplinary

system at the university violated their constitutional rights to due process. The Court of Appeal rejected this claim based on the facts pleaded in the student's complaint. The university's disciplinary procedures allowed the plaintiffs to choose between a "panel hearing" and a simpler, streamlined "administrative conference." The students had selected the administrative conference. "The administrative conference procedure included notice of the character of the accusations against each student athlete, a summary description of the types of processes available, and the range of possible penalties; access to the case file; the opportunity to review and respond to the investigative report including witness interviews; representation by an advisor, including counsel; and a neutral administrator as a hearing officer." The Court of Appeal concluded that the students received "the hallmarks of procedural due process," which consist of "notice and a meaningful opportunity to be heard."

The Court also found the fact that the students had legal representation and negotiated a suspension for several terms, essentially negated any denial of due process claim. "Because the student athletes were represented by counsel and negotiated the scope of sanctions, they can hardly be heard to complain about the administrative hearing's procedural safeguards."

Austin v. University of Oregon (2019) ___ F.3d ___ [2019 WL 2347380].

NOTE:

The Austin case is helpful to educational institutions in the areas of both Title IX lawsuits and federal due process. California state authorities have recently required more stringent procedural due process/fair process requirements for student discipline, and Institutions should consider these recent changes in structuring a disciplinary process.

CONSTITUTIONAL RIGHTS

Ninth Circuit Withdraws Its 2018 Opinion And Upholds Probationary Release Of Officer For On-Duty Calls And Texts To Paramour-Officer.

Janelle Perez, a probationary police officer, began a romantic relationship with Shad Begley, another officer employed at the same municipal police department. Both officers separated from their respective spouses once they began working together.

The department then received a written citizen's complaint from the male officer's wife, alleging that the two officers were having an extramarital relationship, on-duty sexual contact, and numerous on-duty communications via text and telephone.

The department's internal investigation found no evidence of on-duty sexual relations, but did find that the officers called or texted each other several times while on duty. The investigation ultimately sustained charges that both officers: (i) violated the department's telephone policies; (ii) violated the department's "unsatisfactory work performance" standard; and (iii) engaged in "conduct unbecoming" for their personal, on-duty contact.

On August 16, 2012, the department sent a letter to Begley's wife informing her that its investigation into her citizen complaint was completed. The letter also listed the sustained charges against the officers.

Based on the department's custom of terminating probationary officers who violate policies, the Internal Affairs Captain overseeing the investigation recommended that Perez be terminated. The Chief disagreed, and decided a written reprimand based on the two sustained charges against both officers was sufficient. Both officers appealed the written reprimands. While the appeals were pending, the officers continued their personal relationship. Before the date of Perez's administrative hearing, the Chief

received negative comments about Perez's job performance from several sources.

Perez's administrative appeal of her reprimand concluded in September 2012. Based on the evidence, the Chief sustained her reprimand for violating the department's telephone policy. However, based on the recent negative comments about Perez's job performance and the sustained policy violation, the Chief released Perez from probation on September 4, 2012. The Chief confirmed that the officers' affair played no role in his decision to release Perez.

Perez then sued the city, the police department, and individual members of the department. She claimed, among other things, that her release violated her constitutional right to privacy and intimate association because it was impermissibly based in part on management's disapproval of her private, off-duty sexual conduct. The district court granted summary judgment in favor of the city defendants on all claims, and Perez appealed.

In its first decision in this case in 2018, the Ninth Circuit reversed the city defendants' summary judgment victory as to Perez's privacy and intimate association claims. In that 2018 decision, the Ninth Circuit opined that Perez had presented sufficient evidence that "[a] reasonable factfinder could conclude that [the Captain overseeing the investigation] was motivated in part to recommend terminating Perez on the basis of her extramarital affair, and that he was sufficiently involved in Perez's termination that his motivation affected the decision-making process."

Following the death of Judge Stephen Reinhart, who was on the panel that issued the 2018 opinion, the Ninth Circuit withdrew the 2018 opinion and issued a new one. The second opinion gave the summary judgment victory back to the individual defendants based on qualified immunity.

The Ninth Circuit noted that under the doctrine of qualified immunity, courts may not award damages against a government official in his or her personal capacity "unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct." To determine whether there is a violation of clearly established law, courts assess whether any prior cases establish a right that is "sufficiently definite."

The Ninth Circuit first examined *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), which explicitly rejected a rule that a police department can never consider its employees' sexual relations. Rather, *Thorne* held that a police department could not inquire about or consider a job applicant's past sexual history that was irrelevant to on-the-job considerations.

Similarly, in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), the Ninth Circuit held that a police department could fire a probationary police officer over criminal sexual conduct that occurred before he was hired because it "compromised [the officer's] performance as an aspiring police officer" and "threatened to undermine the department's community reputation and internal morale."

The Ninth Circuit held that *Thorne* and *Fleisher* did "not clearly establish that a police department is constitutionally prohibited from considering an officer's off-duty sexual relationship in making a decision to terminate her, where there is specific evidence that the officer engaged in other on-the-job conduct in connection with that relationship that violated department policy."

The Ninth Circuit held the individual defendants did not violate any clearly established law in terminating Perez because there was evidence from the investigation that Perez's on-duty personal telephone use was a clear violation of department policy that reflected negatively on the department. Therefore, the individual defendants had qualified immunity on the privacy and intimate association claims.

Perez also claimed that the individual defendants violated her constitutional right to due process under the Fourteenth Amendment by failing to: give her adequate opportunity to refute the charges made against her; and allow her to clear her name before she was released from probation. Specifically, Perez argued the department managers violated her right to due process by disclosing the charges sustained against her in the August 16, 2012 letter to the officer's wife.

The Ninth Circuit disagreed. To trigger a procedural opportunity to refute the charges, the employee must show: (i) the accuracy of the charge is contested; (ii) there is some public disclosure of the charge; and (iii) the charge is made in connection with termination of employment. The Ninth Circuit stated that the letter to the officer's wife regarding her citizen's complaint was not made "in connection with termination of employment" because there was an insufficient temporal nexus between that letter and Perez's release 19 days later. Therefore, the Ninth Circuit found the individual defendants had qualified immunity as to Perez's due process claim because they did not violate any clearly established law in terminating her.

Perez's complaint also claimed that her release was due to gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. But she conceded on appeal that the only "gender-related" discrimination she was alleging was based on her relationship with the other officer. The relationship, however, triggered only her rights to privacy and intimate association. In view of Perez's concession, the Ninth Circuit affirmed the grant of summary judgment to the individuals, the city and the department on those claims.

Perez v. City of Roseville, et al, 2019 WL 2182488 (unpublished).

NOTE:

LCW previously reported on the Ninth Circuit's 2018 opinion in this case in the March 2018 Client Update. The 2018 opinion has been withdrawn and cannot be relied upon. The new opinion shows why public safety managers must carefully analyze whether an employee's off-duty conduct impacts the workplace before issuing discipline based on off-duty conduct. This case outlines the circumstances when a public safety employer may lawfully consider its employee's off-duty sexual relations.

RETIREMENT

Interim Finance Manager Retained Through Regional Government Services Was An Employee Entitled To CalPERS Membership And Contributions.

Tracy Fuller served as an Interim Finance Manager for the Cambria Community Services District ("CCSD") from March to November of 2014 following the former Finance Manager's retirement. Fuller previously worked with other CalPERS member agencies, and retired within the CalPERS system. Throughout Fuller's retention, CCSD actively sought to (and eventually did) hire a permanent Finance Manager replacement.

CCSD retained Fuller through Regional Government Services ("RGS"), a joint powers authority that does not contract with CalPERS. RGS has worked with over 200 local agencies since approximately 2002. RGS hires retirees as employees of RGS, and classifies itself as an independent contractor, which is not subject to CalPERS pension laws.

CalPERS audited CCSD in late 2014, and issued a report finding Fuller was not an independent contractor and should have been enrolled in CalPERS as an eligible employee. CCSD appealed CalPERS' determination. Throughout the audit and appeal, CCSD, RGS and even Fuller agreed and characterized her service as a third-

party contractor and RGS employee.

The CalPERS Board of Administration adopted the Administrative Law Judge's ("ALJ") proposed decision and determined that Fuller was a common-law employee of CCSD. Thus, CCSD was required to pay pension contributions on Fuller's behalf as a CalPERS member. The Board noted that the California Supreme Court has held that the retirement law's provisions regarding employment incorporate the common law test. Under this test, an employer-employee relationship exists if the employer has the right to control the manner and means of accomplishing the desired result (as opposed to simply the result, which instead establishes an independent contractor relationship). Courts will also consider a number of other secondary factors in this analysis.

The Board and the ALJ primarily relied on the following factors to determine that Fuller was a common law employee who must be enrolled in CalPERS: 1) CCSD ultimately had the right to control the manner and means in which Fuller accomplished her assignments; 2) RGS could not reassign Fuller without CCSD's consent; 3) Fuller ultimately reported to CCSD's General Manager; 4) CCSD's General Manager and Administrative Services Officer ("ASO") determined and issued her particular assignments, not RGS; 5) CCSD's General Manager and ASO evaluated her work; 6) Fuller's work, although different in kind from her predecessor, simply reflected the particular financial work CCSD needed at the time, and was not sufficiently distinguishable from any other past Finance Manager's duties; 7) CCSD provided Fuller with an office, phone, limited access to its computer systems, and an email address; 8) CCSD paid for Fuller's local housing; 9) CCSD described Fuller as a staff member in its board minutes; 10) RGS did not provide any specialized services and the ALJ held "operating as an Interim Finance Manager for a public agency is not a distinct occupation or business, and is work usually done under the principal's direction"; 11) RGS and CCSD's independent contractor agreement provided for an option to extend the agreement on a month-to-month basis, past the specified four-month term; and 12) although CCSD paid Fuller indirectly through RGS, Fuller was still paid by the hour, not the job. Accordingly, the Board and ALJ concluded that the weight of the factors supported a finding that Fuller was a CCSD employee. Further, because the Board determined CCSD should have known Fuller was improperly classified, it imposed additional liability on CCSD.

Fuller v. Cambria Community Services District, PERS Case No. 2016-1277.

NOTE:

Following the Board's adoption of the ALJ's proposed decision, CalPERS staff recommended the Board designate the decision as "precedential" so that it would be binding on other agencies. The CalPERS Board, however, sought out public comment before considering at its June 2019 Board meeting whether to make the Fuller decision precedential. As of May 24, 2019, the item was pulled from the Board's June agenda, and CalPERS does not appear to have any public plans to designate this decision as precedential. Even though this case is not precedential, the Fuller *decision demonstrates the great level of risk involved in classifying a retiree as an independent contractor. LCW is publishing a blog post on this decision with additional information regarding the implications of the* Fuller *decision. LCW can assist employers to analyze whether a retiree qualifies for the independent contractor exception to CalPERS membership.*

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 compensable. 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, 2019 WL 2171135 (2019).

NOTE:

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

DID YOU KNOW....?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

The Fair Labor Standards Act does not permit

an employee to volunteer for a public agency if the volunteer services involve the same type of services that the employee is paid to perform for that agency. For example, a city's beach lifeguard cannot volunteer to lifeguard for swim lessons at the city's recreational center. *See* 29 C.F.R. section 553.102.

Employers are prohibited from considering misdemeanor marijuana-related convictions that are more than two years old when making an employment decision regarding a job applicant. *See* California Labor Code sections 432.7 and 432.8.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

Question: A human resources analyst contacted LCW with a question regarding an applicant selected for a seasonal position. The agency accidentally extended a conditional job offer to an applicant who did not show up for the interview, and the no-show applicant promptly accepted the offer. The agency had already requested a fingerprint and drug screen for the no-show applicant, so the human resources analyst sought LCW's guidance for how to proceed.

Answer: The attorney advised the human resources analyst to cancel the fingerprint and drug screen immediately. The attorney noted that the agency should cancel these tests so that the no-show applicant could not argue that the agency improperly relied on any incriminating results to rescind the conditional offer.

BENEFITS CORNER

Has Your Agency Received An IRS Letter 226J Penalty Notice?

The IRS has steadily increased its enforcement practices since approximately late 2017, starting with evaluation of the 2015 tax year. In March 2018, the Treasury Inspector General for Tax Administration issued a report referencing that of the 318,296 applicable large employers ("ALEs") filing ACA information returns for the 2015 tax year, the IRS identified 49,259 ALEs as potentially owing an ACA penalty. The IRS has continued its ACA enforcement practices for subsequent tax years, currently focusing on the 2016 tax year.

The IRS may have sent your agency a Letter 226J penalty notice, proposing an Employer Shared Responsibility Payment ("ESRP"). This ESRP is essentially an IRS assessed penalty for full-time employees of an ALE who for one or more months of the reporting year received a premium tax credit through a government exchange.

These ESRP assessments can range from hundreds to millions of dollars depending on the size of your agency, reporting requirements and information. We recommend employers receiving any type of IRS penalty notice respond quickly and carefully. These proposed ESRP amounts are not final penalties, but provide employers an opportunity to respond and appeal.

Employers should assess whether the potential ESRP relates to penalty (a) (i.e. the failure to offer coverage to "substantially all" full-time employees and their dependents penalty) or

penalty (b) (i.e. the "unaffordable" coverage penalty). Once you assess the nature of the potential penalty, gather and analyze all relevant information relating to the penalty calculation. Often times, the IRS does not have the full or complete information and you will want to carefully explain your agency's position in an appeal letter and provide the supporting documentation.

A copy of Letter 226J may be reviewed here: https://www.irs.gov/pub/notices/ltr226j.pdf.

Can Your Agency Offer Deferred Compensation Under A Section 125 Cafeteria Plan?

A key question we often receive and advise agencies on is whether a Section 125 Cafeteria Plan allows employees to direct cash in lieu of benefits and excess plan allowances to a deferred compensation plan. These arrangements should be red flags for the agency since cafeteria plans under Internal Revenue Code section 125 may not offer any benefit which defers the receipt of compensation (subject to limited exceptions). On a related note, 457(b) plans are deferred compensation plans, and therefore are not qualified benefits under a cafeteria plan benefit. For the reasons just mentioned, we generally recommend that employers create election forms for 457(b) plans separate from election forms used for a cafeteria plan, along with additional safeguards to maximize separation between the plans.

Agencies who fail to comply with this requirement risk potential significant tax implications for both the employee and employer that jeopardize the tax-advantaged nature of the qualified benefits under the cafeteria plan.

IRS Announces 2020 Annual Contribution Limits For Health Savings Accounts (HSA).

The 2020 annual limit on HSA contributions will be $3,550 for self-only coverage and $7,100 for family coverage.

For 2020, a HDHP is a health plan with an annual deductible of not less than $1,400 for self-only coverage or $2,800 for family coverage, and the annual out-of-pocket expenses do not exceed $6,900 for self-only coverage or $13,800 for family coverage.

BUSINESS AND FACILITIES

Requests And Inquiries Regarding Development Do Not Constitute A Current Or Imminent Threat Under Planning And Zoning Law In Order To Justify Enactment Of Urgency Ordinance.

The City of Huntington Park is a small, densely populated working-class city in Los Angeles County. The City has approximately 59,000 residents and twenty (20) schools, of which six (6) are charter schools. Huntington Park has more than twice the number of schools than are needed to serve the City's school-age population. The high number of schools attracts students from outside the City, which contributes to traffic, parking, and noise problems in the neighborhoods where the schools are located.

In the fall of 2016, the Huntington Park City Council identified a need for more diverse land uses, such as retail, commercial businesses, and other revenue-generating operations. At the same time, the City reported "a proliferation of inquiries and requests for the establishment and operation of charter schools." The City requested that the City Council enact an urgency ordinance to impose a temporary moratorium on the establishment, construction, and development of new charter schools in the City.

In September 2016, the City Council enacted an urgency zoning ordinance, under the authority of Government Code section 65858, the Planning and Zoning Law to impose a 45-day moratorium on the "approval or issuance of licenses, permits or other entitlements for the establishment,

construction, and development of charter schools." The following month, the City Council extended the moratorium for an additional 10 months and 15 days.

The California Charter Schools Association ("CCSA") challenged the City's action in Superior Court seeking a court order directing the City to invalidate the ordinance on the grounds that it failed to comply with the requirements of the Planning and Zoning Law. The trial court refused, denying the order, and CCSA appealed.

On appeal, CCSA challenged the City's finding of current and immediate threat public health, safety, or welfare, which is required under Section 65858. CCSA argued that when the City Council enacted the ordinance no actual development applications for charter schools were pending.

CCSA relied on a previous case, *Building Industry Legal Defense Foundation v. Superior Court*, to argue that "current and immediate threat" means that the approval of an entitlement or use is imminent, and that inquiries and requests regarding potential future uses do not meet the definition. In *Building Industry*, a city adopted an urgency ordinance suspending the processing of development applications after a developer applied to build a residential subdivision. The court in *Building Industry* held that processing a development application did not constitute a current and immediate threat under Section 65858.

The Court of Appeal concluded that *Building Industry* was persuasive. The Court indicated that while issuing a building permit or approving a development application are acts that give the landowner the right to proceed with development, submission of an application to the City merely starts the process, and the City retains the power to subsequently deny the application.

The Court of Appeal stated that the City of Huntington Park retained discretion, when reviewing individual permit applications, to deny the permit or impose additional conditions, and that, therefore, the inquiries and requests by charter school operators could not possibly present an imminent threat to the City.

The Court of Appeal held that the City's urgency ordinance was not valid under Section 65858 because mere inquiries and requests do not constitute a current and imminent threat within the meaning of the statute.

California Charter Sch. Ass'n v. City of Huntington Park (2019) 35 Cal. App. 5th 362.

Substantial Compliance With Subletting And Subcontracting Fair Practices Act's Objectives Permits Awarding Agency To Substitute Unsafe Subcontractor Without Prime Contractor's Consent.

The City and County of San Francisco entered a contract with a prime contractor, Ghilotti Bros., Inc. for a major renovation of Haight Street.

The contract between the City and Ghilotti allows the City to substitute a subcontractor when the subcontractor fails to perform to the satisfaction of the City in accordance with Administrative Code section 6.21(A)(9) and the Subletting and Subcontracting Fair Practices Act, at no added cost to the City.

Consistent with its bid, Ghilotti entered a subcontract Synergy Project Management, Inc. (Synergy) to perform excavation and utilities work.

Work on the project began in April 2015. Over the next five months, Synergy engaged in many unsafe practices, including improperly shoring trenches, failing to properly store equipment, and engaging in highly dangerous conduct, such as dangling a Synergy foreman by his ankles into an open manhole with no safety equipment or traffic control. Synergy also caused a number of gas line breaks, at least four of which resulted from

Synergy's unsafe practices. After Synergy caused a fifth gas line break, the City issued a stop-work order.

In an October 9 letter, the City invoked the substitution provision of its contract with Ghilotti, directing the prime contractor "to remove [Synergy] immediately" and "immediately ... request approval of a replacement subcontractor to perform the Work." In an October 14 letter, the City notified Synergy that it had "directed Ghilotti to remove Synergy and to substitute a replacement contractor" based on Synergy's unsatisfactory work. The City stated that the letter constituted its notice to Synergy under the Subletting and Subcontracting Fair Practices Act that Synergy would be replaced. The Public Contract Code requires a prime contractor to obtain the consent of the awarding authority before replacing a subcontractor listed in the original bid, and it limits the awarding authority's ability to consent to such substitution to specifically enumerated circumstances. Further, if the original subcontractor objects to being replaced, Public Contract Code requires the awarding authority to hold a hearing "on the prime contractor's request for substitution." (Public Contract Code Section 4107 subd. (a).)

Under protest, Ghilotti terminated Synergy, and Synergy objected to being replaced. The City held a hearing under Public Contract Code section 4107 subdivision (a), and the hearing officer found that Synergy's work was "substantially unsatisfactory and not in substantial accordance with the plans and specifications" under Section 4107 subdivision (a)(7). The hearing officer upheld the City's "determination to remove Synergy as a subcontractor" on the project.

Synergy and Ghilotti each filed a challenge to the City's decision, arguing that Section 4107 did not authorize the City to remove a subcontractor except upon the prime contractor's request, and, because Ghilotti had not made a "request" for substitution, the hearing officer lacked jurisdiction.

The trial court held separate hearings on Ghilotti's and Synergy's motions in the fall of 2016. The trial court focused on whether the contract provision conferred jurisdiction on the hearing officer based on the provision's incorporation of Subletting and Subcontracting Fair Practices Act procedure.

The trial court concluded that the hearing officer had jurisdiction under the contract only if "Ghilotti remove[d] Synergy and request[ed] a replacement of the subcontractor." The trial court determined that the key issue in the case was whether Ghilotti had taken these actions. The court ultimately found that Ghilotti had not "requested the replacement of Synergy," and accordingly ruled in favor of Ghilotti and Synergy. The City appealed.

On appeal, the Court of Appeal considered the statutory framework of the Subletting and Subcontracting Fair Practices Act, the purpose of which is to limit bid shopping and bid peddling, and to protect the awarding authority's selection of subcontractors. Under the Act, a prime contractor cannot normally substitute a subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority may consent to the substitution of a subcontractor under specifically enumerated circumstances. One of those circumstances is when the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans. (Public Contract Code § 4107, subd. (a)(7).) The Court therefore concluded that the Act contemplates that the awarding authority will monitor the project during construction to ensure compliance with its contractual and statutory obligations.

The Court of Appeal then considered whether the hearing officer that removed Synergy had proper jurisdiction to do so. On appeal, Synergy argued that the City's substitution order constituted a backdoor removal by the awarding agency

that was not authorized by the statute, and that the hearing officer therefore had no jurisdiction to order Synergy's removal. The Court of Appeal found that the City, in removing Synergy, complied with the overarching purpose of the statute to protect the public without undermining the statute's more specific purposes. The Court concluded there was valid ground for substitution due to Synergy's unsafe practices and unsatisfactory work.

The Court held that even though Ghilotti opposed substituting Synergy, the hearing officer had jurisdiction to issue a decision under Section 4107 subdivision (a) because the procedures employed in the substitution substantially complied with the Act's underlying objectives. The Court of Appeal reversed the trial court and ordered that the hearing officer's decision will stand.

Synergy Project Mgmt., Inc. v. City & Cty. of San Francisco (2019) 33 Cal. App. 5th 21

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ON THE MOVE!

Our SAN DIEGO Office has relocated! As of June 1, our offices are located at: 401 West "A" Street, Suite 1675

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 sdolmuz@lcwlegal.com.

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 office and can be reached at 310.981.2018 or lheard@lcwlegal.com

LCW Named To "Best Law Firms for Female Attorneys" List By Law 360

On May 27, 2019, Law360 published their annual Best Law Firms for Female Attorneys list that surveyed more than 300 law firms across the United States. For the fourth consecutive year, Liebert Cassidy Whitmore ("LCW") has made the list of top law firms for female attorneys. This year, Liebert Cassidy Whitmore was ranked in the top three firms with 50-149 attorneys on staff.

As Law360 indicates, the firms included are "leading the pack in representing women at all levels." The list focused on identifying the best U.S. law firms for women, based on the female representation at the partner and non-partner levels as well as its total number of female attorneys.

"Liebert Cassidy Whitmore's ranking this year exemplifies our internal commitment to one of our core values – promoting a diverse and discrimination-free workplace," said Ms. Shelline Bennett, Managing Partner of the Firm's Sacramento and Fresno offices. "It is an honor to be part of a firm that ranks so highly in this report, and where attorneys are encouraged to strive for both the highest quality service and utmost in professional growth and satisfaction."

Fifty-five percent of LCW's attorney workforce is comprised female attorneys. In addition, fifty-one percent of the partners are female. These numbers nearly double the legal industry's overall average where, according to Law360, firms of comparable size are thirty-five percent female and only twenty-seven percent of partners are female.

Liebert Cassidy Whitmore is honored to included in Law360's list and to be recognized for its long-standing tradition of inclusiveness and diversity in its ranks and in its leadership.

- Firm Publications

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

"The Ninth Circuit Provides Favorable Authority for Colleges and Universities in Title IX Cases" authored by **David Urban** of our Los Angeles office, appeared in the June 12, 2019 issue of the *Daily Journal.*

Partner **Geoff Sheldon** of our Los Angeles office appeared on "Episode 140: Brady v. Pitchess" of the *Weekly Appealate Report Podcast* by the *Daily Journal* on June 5, 2019.

The articles can be viewed by visiting the link listed above.

Firm Activities

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training/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

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

Speaking Engagements

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

July 24 **"Admin 101: Nuts & Bolts of Human Resources in Community Colleges"**
Association of California Community College Administrators (ACCCA) Administration 101 | Irvine | Mary Dowell

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.

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