LCW Liebert Cassidy Whitmore

Education Matters

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

September 2019

INDEX

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.

Los Angeles | Tel: 310.981.2000
San Francisco | Tel: 415.512.3000
Fresno | Tel: 559.256.7800
San Diego | Tel: 619.481.5900
Sacramento | Tel: 916.584.7000

SPECIAL EDUCATION

Students Must Exhaust Administrative Remedies Under The Individuals With Disabilities Education Act Before Seeking Damages Under The Americans With Disabilities Act And The Rehabilitation Act.

Paul G. is an adult student with autism. At the beginning of his senior year of high school, the public school district changed Paul's Individualized Education Plan (IEP) to place him in a residential facility. However, because Paul was 18 years old, no residential facility in California would accept him. Paul enrolled in a residential facility in Kansas, but became homesick and returned to California.

Paul sought a due process hearing with the Office of Administrative Hearings (OAH). He alleged the District denied him a Free Appropriate Public Education (FAPE) guaranteed under the Individuals with Disabilities Education Act (IDEA). He sought a residential placement in California, monetary damages, and an order directing the California Department of Education (CDE) and the District to develop in-state residential placements for adult students like Paul.

OAH dismissed the claims against the state because it could not order the state to create facilities for students over 18, and the District, not the CDE, was responsible for education decisions affecting Paul. Paul settled his complaint with the District. OAH dismissed the due process case and never decided whether the District denied Paul FAPE.

Paul then filed a lawsuit alleging the CDE violated the Rehabilitation Act and the Americans with Disabilities Act when it failed to provide him with an in-state residential facility. The CDE moved to dismiss the lawsuit because Paul could not pursue claims against the CDE for failure to provide a FAPE when his IEP did not require an in-state facility. The trial court ruled that although Paul did not allege a violation of the IDEA, the IDEA was key because it required a student to exhaust administrative remedies before filing a lawsuit about special education services. The trial court dismissed the lawsuit, and Paul appealed.

On appeal, Paul argued he did not claim an IDEA violation. However, the Court held that because Paul argued an in-state residential institution was necessary for him to receive the education guaranteed by the IDEA, he

must exhaust the administrative remedies for an IEP under the IDEA.

Paul argued he did not have to exhaust the administrative remedies because (1) the process would be futile, (2) his claim arose from a policy or practice "of general applicability that is contrary to law," and (3) he would not gain adequate relief with an administrative remedy.

The Court disagreed with Paul because his complaint sought relief related to only one part of the District's special education program—in-state residential facilities for adult students, so it did not concern a general policy or practice about IDEA. Additionally, Paul did not exhaust his administrative remedies against the District because his prior action against the District and OAH never determined whether the District denied him FAPE.

Accordingly, the Court held Paul must exhaust his administrative remedies under the IDEA before filing a lawsuit under the Rehabilitation Act or ADA.

Paul G. by & through Steve G. v. Monterey Peninsula Unified Sch. Dist. (2019) 933 F.3d 1096.

ATHLETICS

Student-Athletes Are Not Employees Of The National Collegiate Athletic Association And The School's Athletic Conference Within The Meaning Of The Fair Labor Standards Act.

Lamar Dawson played football for the University of Southern California, a member of the National Collegiate Athletic Association (NCAA) and PAC-12 Conference. The NCAA is an "unincorporated not-for-profit educational organization" comprised of more than 1,100 colleges and universities throughout the United States. The PAC-12 is an unincorporated association that operates a multi-sport collegiate athletic conference and is a formal conference member of the NCAA. NCAA member schools agree to administer their athletics programs in accordance with the constitution, bylaws, and other legislation of the NCAA.

Dawson brought a class action lawsuit alleging the NCAA and PAC-12 were his employers under federal and state labor laws. Specifically, Dawson alleged the NCAA and the PAC-12 acted as an employer of the class members by "prescribing the terms and conditions under which student-athletes perform services." Dawson claimed the NCAA and PAC-12 failed to pay wages, including overtime pay, to Dawson and class members in violation of federal and state labor laws. The NCAA and the PAC-12 filed a motion to dismiss Dawson's complaint because it was frivolous. The trial court granted the motion and concluded the NCAA or PAC-12 did not employee the student-athletes under either federal or state law. Dawson appealed.

The Fair Labor Standards Act (FLSA) provided that "employers" must pay their "employees" a minimum wage and overtime pay for hours worked in excess of the statutory workweek. The FLSA definition of employee is "exceedingly broad," but "does have its limits." The Court of Appeals found a number of circumstances relevant in evaluating whether an employment relationship existed, including: (1) expectation of compensation, (2) the power to hire and fire, and (3) evidence that an arrangement was "conceived or carried out" to evade the law.

Here, the Court of Appeals held that although Dawson received a scholarship to play football, the NCAA or PAC-12 did not provide the scholarship, so this could not create an "expectation of compensation," and Dawson could not consider this compensation.

Similarly, Dawson could not demonstrate the NCAA or the PAC-12 had the power to hire or fire him. Dawson argued the NCAA and PAC-12 controlled the lives of student-athletes because the organizations established rules for the athletes athletic and academic schedules, living arrangements, athletic eligibility, permissible compensation, and behavior, among other rules. However, Dawson did not allege, nor did the evidence show, the NCAA/PAC-12 actually hired, fired, or supervised the student-athletes.

Finally, there was no evidence the NCAA rules were "conceived or carried out" to evade the law.

Dawson then argued the labor of student-athletes generated substantial revenue for the NCAA and PAC-12, and that this fact should alter the Court's analysis. However, the Court of Appeals held the revenue generated by college sports did not unilaterally convert the relationship between student-athletes and the NCAA and PAC-12 into an employment relationship, and the Court's previous analysis controlled the determination.

The Court of Appeals also agreed with the trial court's decision to dismiss Dawson's lawsuit based on California law, because state law and state court decisions specifically excluded student-athletes from employment benefits and did not consider student-athletes an "employee" of their school. (See *Townsend v. State of California* (1987) 191 Cal.App.3d 1530 and *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837.) Dawson did not offer any authority that supported his argument that even though California law did not consider student-athletes employees of their schools, the student-athletes can nevertheless be the employees of the NCAA and the PAC-12.

Consequently, the Court held student-athletes are not employees of the NCAA/PAC-12 under either federal or state law.

Dawson v. Nat'l Collegiate Athletic Ass'n (2019) 932 F.3d 905.

STUDENT DISCIPLINE

Evidence Of Disparate Impact Is Sufficient To Support Equal Protection Claim Based On Unequal Treatment Affecting The Fundamental Right To An Appropriate Education.

Kern High School District submitted disciplinary data to the California Department of Education for the 2009-2010 school year. The data showed the District had the highest number of expulsions of any district in the state of California, and the discipline disproportionately affected African-American and Latino students. The District later reported lower totals of expulsions in following school years or did not submit data at all. Upset about the data, a group of parents, students, taxpayers, and community organizations sued local-level agencies and individuals including the District, the members of the District's governing board, and the County Office of Education, and state-level agencies and individuals including the State Superintendent of Public Instruction, the California Department of Education (CDE), and the State of California.

The Plaintiffs argued the District adopted a discriminatory disciplinary program, and the state-level defendants knew of the bias but ignored the information or actively sought to hide the District's conduct. The Plaintiffs alleged the District's discipline policies and practices resulted in the disproportionate suspension, expulsion, and involuntary transfer of African-American and Latino students out of a general education setting and into inferior alternative schools.

In response to motions filed by the Defendants, the trial court dismissed the lawsuit against the state-level defendants, and the Plaintiffs settled the claims against the local-level defendants. However, the Plaintiffs appealed the trial court's decision to dismiss the claims against the state-level defendants.

On appeal, the Plaintiffs argued the trial court wrongly dismissed various claims including the equal protection claims under both the Federal and California Constitutions, a claim under the common schools clause of the California Constitution, a claim brought under Government Code section 11135 et seq., an Equal Educational Opportunities Act claim, a taxpayer claim, and a claim seeking a writ of mandate under the California Code of Civil Procedure.

To state a valid claim for violation of the federal Equal Protection Clause, the Plaintiffs must show the state-level defendants acted with an intent to discriminate based upon the students' race. Here, the allegation made against the state-level defendants was they became aware of a discriminatory discipline system and failed to respond. The Plaintiffs did not allege the state-level defendants had a discriminatory motive behind their actions. The Court found the allegations did not show a discriminatory intent. Accordingly, the Court concluded the Plaintiffs failed to state a claim under the federal Equal Protection Clause. Under California's equal protection clause, a plaintiff has a valid claim when a policy causes de facto segregation of schools and affects the District's educational quality, and the defendant does not take corrective action. Here, the state-level defendants argued they had no duty to act. However, the Court found that California constitutional principles required the State to act even when the State's conduct did not produce the discriminatory effect. The Court found that evidence of a disparate impact of the discipline policies was sufficient to support a California equal protection claim. Accordingly, the Court concluded the Plaintiffs stated a valid equal protection claim against the state-level defendants under California's equal protection guarantees.

The Plaintiffs next argued the Defendants had a duty under the common schools clause of the California Constitution to provide students with an education that will teach them the skills they need to succeed as productive members of modern society. Plaintiffs argued Defendants breached this duty through the expulsion and involuntary assignment of African-American and Latino students to inferior alternative schools. However, because the common schools clause does not guarantee a right to a particular quality or level of education, the Court found that the trial court correctly dismissed the claim.

Plaintiffs also argued the state-level defendants had statutory duties to investigate allegations of discrimination and take corrective action. Defendants argued the Plaintiffs' claim was moot because amendments to the Government Code, cited by the Plaintiff, specifically removed educational discrimination claims, such as those raised by the Plaintiffs, from the requirements of Government Code section 11135. The Court agreed and found the state-level defendants did not have a duty to investigate discrimination under the Government Code.

The Court also ruled that the Plaintiffs could only file their claim based on the Equal Educational Opportunities Act in federal court. Next, the Plaintiffs argued it was proper to bring a taxpayer suit against the state-level defendants alleging governmental waste. Specifically, Plaintiffs argued the state-level defendants had a duty to act to monitor and correct potentially discriminatory activities and to curtail funding for school districts where

they found such discrimination. The Court ultimately agreed a cause of action existed, but concluded state law required the Plaintiffs to seek an administrative remedy under the Uniform Complaint Procedure, which it did not do before filing a lawsuit.

Plaintiffs sought an requiring the state-level defendants perform specific duties including the duty to provide equal access to the public school system, to initiate an investigation into allegations of discrimination under Government Code section 11136, and to monitor legal compliance by local education agencies under federal law. To succeed on this kind of claim, a plaintiff must show: (1) the defendant had a clear duty to act; (2) the plaintiff had a beneficial interest in the performance of that duty; (3) the defendant was able to perform the duty; (4) the defendant failed to perform that duty; and (5) no other adequate remedy existed.

The Court found that the Plaintiffs' allegations sufficiently alleged an abuse of discretion in the nonperformance of required duties, namely the duty under federal law to monitor school systems for compliance with federal equal protection requirements. In addition, Plaintiffs adequately alleged a greater interest than the public-at-large in the performance of these duties, both as parents and students attending the schools in question. Ultimately, the Court agreed the state-level defendants had a mandatory duty to monitor for compliance with federal law and abused their discretion by failing to implement any process to ensure they received the disciplinary data necessary to meet their duty. Furthermore, there was no other adequate remedy because the Uniform Complaint Procedure would not provide appropriate relief. Consequently, the Court concluded Plaintiffs stated a claim for relief. Ultimately, the Court affirmed the judgment of the trial court in part and reversed in part.

Collins v. Thurmond (2019) 39 Cal.App.5th 323.

LEGISLATIVE UPDATE

Legislature Drops Bill Requiring Community Colleges To Allow Homeless Students To Sleep Overnight In Campus Parking Lots.

The California Legislature moved Assembly Bill 302 (AB 302) to its inactive file on September 3, 2019, after the Senate Appropriations Committee weakened the proposal.

As introduced, AB 302 would require a community college campus that has parking facilities on campus to grant overnight access to those facilities, on or before April 1, 2020, to any homeless student who is enrolled in coursework, has paid any enrollment fees that have not been waived, and is in good standing with the community college for the purpose of sleeping in the student's vehicle overnight. Senate amendments delayed the start of the program to July 2021 and added exemptions for community colleges with parking facilities within 250 feet of an elementary school and colleges that provide at least one type of homeless student housing assistance.

Senator Jerry Hill (D-San Mateo) requested the Legislature move the bill to its inactive file, which allows the Legislature to reconsider the bill in the next legislative cycle. The Legislature began interim recess on September 13, 2019, and will reconvene on January 6, 2020.

FIRM VICTORY

California Supreme Court Allows Law Enforcement Agency To Disclose "Brady Alerts" To Prosecutors.

LCW Partner **Geoffrey Sheldon**, Senior Counsel **David Urban**, and Associate Attorney **Alex Wong** led the Los Angeles County's Sheriff's Department (LASD) to victory in a closely watched case before the California Supreme Court. The State's Supreme Court overturned a lower appellate court's decision and held that the LASD could give prosecutors the name(s) of potential deputy witness(es) in a particular case, who are on its "Brady list", without a Pitchess motion and court order.

The case arose from a conflict in the law between criminal defense rights and California peace officers' privacy rights. In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court (USSC) concluded that under the due process clause of U.S. Constitution's 14th Amendment, the prosecution in a criminal case must disclose to the defense all evidence the prosecutor has that would tend to show the criminal defendant was not guilty, including evidence that that would impeach prosecution witnesses such as peace officers.

Sometimes, this "exculpatory" evidence is found in the personnel file of a peace officer witness. For example, if the personnel file shows that the officer had been dishonest or committed other significant misconduct (e.g., racial profiling), the defense could use that information to impeach the officer's credibility or motivations at the criminal trial. Conversely, California Penal Code sections 832.7 and 832.8 and Evidence Code section 1043, et seq., sometimes called "the Pitchess statutes, generally make peace officer personnel records confidential. The Pitchess statutes say that in order to access peace officer personnel information, the party seeking the information must first file a motion with the court. If the motion is granted, which can only occur if the moving party establishes "good cause," the court privately reviews the officer's personnel records and provides the asking party any information the court deems relevant. This is commonly known as the "Pitchess" procedure, and the motion the party files is commonly called a "Pitchess motion."

To address this conflict between a criminal defendant's constitutional rights and a peace officer's privacy rights, the LASD compiled a so-called "Brady list," consisting of names and employee identification numbers of deputies whose personnel files contained sustained allegations of misconduct that could be used to impeach the deputies at trial. This Brady list typically includes officers who had been found to be dishonest or guilty of other acts of moral turpitude.

The LASD planned to disclose its Brady list to the district attorney's office and other prosecutorial agencies. The prosecution would then know to file a Pitchess motion to obtain the relevant information from the deputy's personnel file, or to alert the defense so it could file its own Pitchess motion. Under the proposed policy, no information from the deputies' personnel files would be disclosed without a formal Pitchess motion and accompanying court order.

The LASD notified the deputies of the proposed policy. The Association for Los Angeles County Deputy Sheriffs (ALADS), a union representing non-supervisory deputies, opposed the policy. ALADS filed a lawsuit seeking an injunction to, among other things, prohibit the LASD from creating its Brady list or disclosing it (or individual names off of it) to anyone outside of the LASD, absent full compliance with the Pitchess procedure. The case made its way up to the California Supreme Court.

In a unanimous decision in favor of the LASD, the Court first evaluated the extent to which California's SB 1421, effective January 1, 2019, affected its analysis. That new law, which went into effect while this case was pending, opened for public inspection many types of peace officers personnel records that could cause an officer to be on a Brady list, such as: particular categories of sustained findings of officer dishonesty, perjury, false statements, filing false reports, or evidence destruction, falsification, or concealment. The Court found that although some of this SB 1421 information could place an officer on a Brady list, other types of misconduct and information might also do so.

To resolve the case, the Court held that the "confidentiality" requirement of the Pitchess statutes should be interpreted to allow law enforcement agencies to comply with their constitutional obligations under Brady by providing limited Brady alerts to prosecutors. A Brady alert is limited to informing prosecutors that a potential peace officer witness in a particular case is on the Brady list. The Court reasoned:

In common usage, confidentiality is not limited to complete anonymity or secrecy...[D]eeming information "confidential" creates insiders (with whom information may be shared) and outsiders (with whom sharing information might be an impermissible disclosure). The text of the Pitchess statutes does not clearly indicate that prosecutors are outsiders, forbidden from receiving confidential Brady alerts.

The Court concluded that "the Department may provide prosecutors with the Brady alerts at issue here without violating confidentiality."

It is important to note that the Court did not hold that LASD could forward an entire Brady list to prosecutors. Rather, the Court held that Brady alerts were permissible on a case-by-case basis, that is only when there was a pending criminal case.

Association for Los Angeles Deputy Sheriffs v. Superior Court (Los Angeles County Sheriff's Department), No. S243855 (August 26, 2019) mandate

Ass'n for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles Cty. (2019) 8 Cal.5th 28.

NOTE:

This decision will allow law enforcement and criminal prosecutorial agencies to more efficiently work together without compromising an officer's privacy rights. LCW celebrates its attorneys and staff for serving the Sheriff's Department so well throughout this case.

LABOR RELATIONS

County Violated MMBA By Unilaterally Amending Rules Regarding Promotional Opportunities.

The County of Orange revised its Merit Selection Rules (MSR) for employee promotions and renamed them its Recruitment Rules and Policies (RRP). The Association of Orange County Deputy Sheriffs (Association) later learned of the revisions. The Association sent the County a letter identifying several changes it considered to be subject to bargaining, and requested the County to return to the status quo by reinstituting the former MSR. The County declined, and replied that none of the changes concerned mandatory subjects of bargaining. The Association then filed an Unfair Practice Charge (UPC) with PERB based on the following changes.

First, the RRP amended the MSR's "Qualification of Applicants" section to state that applicants must not only meet "minimum qualifications" to be considered for

a position, but depending on the needs of the County, applicants must also have "desirable qualifications." Second, the RRP amended the MSR's "Assessment Requirements" section to require "desirable or ideal qualifications" in some circumstances addition to minimum qualifications. Third, the RRP included new language limiting applicants for inter-jurisdictional transfers from other counties. Fourth, the RRP employed a new "absent rater formula" to recuse a panel member in case of a "close personal relationship" with a candidate.

The ALJ ruled that the County's actions did not violate the Meyers-Milias-Brown Act (MMBA) because these changes fell outside the scope of representation, and thus did not require advance notice to the Association or an opportunity to meet and confer. Applying the three-part test regarding the scope of representation, the ALJ referenced City of Alhambra (2010) PERB Decision No. 2139-M (Alhambra), which held that some changes to procedures for promotional opportunities are outside the scope of representation. The ALJ then concluded that based on Alhambra, the changes to threshold qualification levels in the RRP were outside the scope of representation.

As for the "absent rater formula" and inter-jurisdictional transfers, the ALJ found that these changes both had an effect on public services and were a fundamental managerial or policy decision, and therefore fell outside the scope of representation. The Association excepted to the ALJ's ruling, and the matter was heard before the PERB Board.

PERB reversed the ALJ's decision. PERB found that the County violated the MMBA by implementing changes to the MSR/RRP without affording the Association advance notice and an opportunity to bargain. PERB held that because the revisions at issue were substantive changes to the County's promotional procedures, they fell within the scope of representation.

PERB examined 35 years of precedent predating the Alhambra decision which supported that promotional opportunities usually fall within the scope of representation. PERB stated that promotional opportunities fall outside the scope of representation only under unusual circumstances, such as when an employer makes no substantive changes to a procedure, or revises a procedure to comply with changes in the law.

PERB found no such unusual circumstances in this case. PERB found that the County's implementation of "desired" qualifications excluded candidates who met the minimum qualifications, and therefore implicated the promotional opportunities of those who did not. The County's new rating formula also altered promotional opportunities. PERB decided that the County's desire for a uniform recruitment policy covering all departments did not create an unusual circumstance that released the County from its duty to bargain. PERB found that promotional criteria were within the scope of representation and disavowed Alhambra on this issue.

PERB also found that the County violated the MMBA with regard to effects bargaining. PERB disagreed with the ALJ's conclusion that the Association failed to state a claim for effects bargaining because it did not demand effects bargaining after it learned of the unilateral implementation. PERB ruled that if a union learns of an agency's decision after its unilateral implementation, there can be no waiver its right to bargain effects for failure to make a demand because a union's obligation to demand effects bargaining never even arises in the face of an employer's unilateral implementation. PERB also found the effects identified by the Association, including job security and promotional opportunities were not speculative given the substance of the

unilaterally imposed changes.

County of Orange, PERB Decision No. 2663-M (2019).

NOTE:

Although this case involved an interpretation of the Meyers-Milias-Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act. This PERB decision disparages a nine-year old PERB precedent and overturns the ALJ's decision that was in the employer's favor. LCW will continue to monitor PERB decisions and report on whether this decision is part of any trend.

DISCRIMINATION

Employee Must Show An Adverse Employment Action Would Not Have Occurred But For A Disability.

Dr. Michael Murray sued the Mayo Clinic (Clinic) and various individuals alleging disability discrimination in violation of the federal Americans with Disabilities Act (ADA) after the Clinic terminated his employment. During trial, Dr. Murray requested that the district court instruct the jury that he would prevail if he established that his disability "was a motivating factor" in the Clinic's decision to terminate his employment. The district court denied Dr. Murray's request and instead instructed the jury that Dr. Murray needed to establish that he "was discharged because of his disability." This is known as the "but for" causation standard. The jury returned a verdict in favor of the defendants. Dr. Murray appealed.

On appeal, Dr. Murray argued that the district court was required to instruct the jury on the "motivating factor" standard rather than the "but for" standard based on the Ninth Circuit precedent stated in the case Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005.) However, a three-judge panel of Ninth Circuit disagreed.

The court noted that while the Ninth Circuit's decision in Head had been consistent with the plain meaning of the ADA and the interpretation of other courts, the U.S. Supreme Court (USSC) had subsequently issued decisions to change the applicable causation standard. For example, the USSC held that an employee must "prove that age was the 'but-for' cause of the employer's adverse action" in order to prevail on a claim under the federal *Age Discrimination in Employment Act in Gross v. FBL Financial Services Inc., 557 U.S. 167* (2009). The USSC declined to extend the "motivating factor" causation standard to Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338* (2013). Accordingly, the court noted that the USSC has retreated from the "motivating factor" causation standard.

The court noted that while a three-judge panel generally cannot overrule a prior Ninth Circuit decision, it may overrule prior authority when an intervening USSC case undermines the existing precedent. The court concluded that because the USSC's decisions in Gross and Nassar were clearly irreconcilable with the Ninth Circuit's decision in Head, Head was overruled. Thus, the court found that an employee bringing a discrimination claim under the ADA must show that the adverse employment action would not have occurred but for the disability.

Murray v. Mayo Clinic (2019) __ F.3d __ [2019 WL 3939627].

NOTE:

This case confirms that California courts should apply the "but for" causation standard when considering ADA discrimination cases. This

standard is more generous towards employers than the "motivating factor" causation standard.

Employee Could Not Establish Disability Discrimination Without A Causal Relationship Between His Impairment And Termination.

Jose Valtierra began working for Medtronic, Inc. in 2004 as a facility maintenance technician. Between his hiring until his termination in 2014, Valtierra was severely overweight. In late 2013, Valtierra received time off for joint pain associated with his weight. Valtierra returned to work in December 2013 without medical restrictions; however, he was still morbidly obese.

In May 2014, Valtierra's supervisor noticed Valtierra seemed to be having difficulty walking. Concerned about Valtierra's ability to perform his job, the supervisor checked the computer system the company used to track assignments. Although Valtierra had left for vacation a day prior, the computer system indicated that he had completed numerous assignments that should have taken a more significant amount of time to complete. When Valtierra's supervisor confronted him about these discrepancies, Valtierra admitted he had not performed all of the work, but intended to complete the assignments when he returned from vacation. Medtronic then terminated Valtierra for falsifying records.

Subsequently, Valtierra sued Medtronic alleging that he had a disability within the meaning of the Americans with Disabilities Act (ADA) and that his termination was unlawful discrimination. The trial court dismissed Valtierra's case, finding that obesity, no matter how great, could not constitute a disability under ADA regulations unless the obesity is caused by an underlying condition. The trial court concluded that Valtierra was not able to demonstrate that his obesity was caused by such a condition.

On appeal, the Ninth Circuit affirmed the trial court's decision to dismiss the case. However, the Ninth Circuit did not decide whether Valtierra's obesity was a disability under the ADA. Instead, the court found that even assuming that Valtierra was disabled, he could not establish ADA disability discrimination because he could not prove a causal relationship between his obesity and his termination. The court reasoned that because Valtierra admitted he marked assignments as completed when he had not done the work, and because he had been severely overweight throughout his employment, there was no basis to conclude that the company terminated him for any reason other than falsifying records.

Valtierra v. Medtronic Inc. (2019) 934 F.3d 1089.

NOTE:

Agencies should also be aware that obesity may be a disability within the meaning of the California Fair Employment and Housing Act ("FEHA") if there is a physiological cause or if the employer perceives of or regards the condition as a disability. Accordingly, public agencies should be sure to carefully evaluate all disability discrimination complaints and requests for accommodation involving obesity.

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.

An agency can extend workers' compensation coverage for peace officers injured out-of-state. (Cal. Labor Code, § 3600.2.)

A single incident of harassing conduct may be sufficient to create a hostile work environment. (Cal. Gov. Code section 12923 subd. (b).)

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 director wanted to know if the agency was required to pay non-exempt employees holiday pay for working on Labor Day. The agency did not have a holiday pay policy or address holiday pay for non-exempt workers in the applicable CBA.

Answer: The attorney explained that the Fair Labor Standards Act has no requirement that employers pay employees a premium rate for working on a holiday. Because the agency did not have a holiday pay policy, nor address holiday pay in the applicable CBA, there was no obligation to pay non-exempt employees holiday pay for working on Labor Day.

BENEFITS CORNER

Considerations In Structuring And Managing Eligible Opt-Out Arrangements.

It is September, and for many employers the open enrollment period for group health insurance is just around the corner. Employees may face various decisions relating to health benefit elections. Employers that offer opt out arrangements or cash-in-lieu of health benefits to employees must consider various issues. The issues discussed in this article apply to applicable large employers (i.e. those with an average of at least 50 full-time employees or "full-time equivalents") (ALE) pursuant to the Affordable Care Act's (ACA) Employer Shared Responsibility requirements.

Cash-in-lieu of health benefits can make it more difficult for an ALE to meet the "affordability" test under the ACA. Opt-out arrangement payments count as employee contributions in the ACA's "affordability" calculation, essentially making the plans more expensive. The main way to avoid this issue is for the employer to maintain an "eligible opt-out arrangement" when an employee declines employer offered coverage and takes cash. This requires documentation of the following:

Proof that the employee and all members of the employee's tax family have or are expected to have minimum essential coverage (MEC) (other than coverage in the individual market, whether or not obtained through Covered California) for the relevant period (i.e., the plan year for which the opt-out payment is offered); That the employer cannot make opt-out payments (and the employer in fact must not) if the employer knows or has reason to know that the employee or a member of the employee's tax family does not or will not have MEC.

What is sufficient "proof" of alternative coverage?

Does the opting-out employee need to provide a copy of his/her benefits card for the alternative coverage? The IRS has provided guidance in this area. Employers only need to receive "reasonable evidence" of alternative coverage, which may consist of an employee

attestation that complies with the following:

Signed acknowledgment that the employee and all other members of the employee's tax family, if any, have or will have MEC (other than coverage in the individual market);
The employee must provide the attestation annually (i.e., every plan year);
The employee must provide the attestation no earlier than a reasonable time period before coverage starts (i.e., open enrollment). The arrangement can also require the evidence/attestation to be provided after the plan year starts.

If the foregoing conditions are met, the opt-out arrangement is an "eligible opt-out arrangement," meaning that the amount of the opt-out payment is excluded from the employee's required premium contribution for the affordability calculation.

What is MEC? Is it the same thing as group health coverage?

Under an eligible opt out arrangement an employee must provide proof that they have MEC, other than individual coverage and other than individual coverage through Covered California. Minimum essential coverage is NOT the same thing as group health coverage. It is broader. Many plans that do not qualify as group health coverage provide MEC, such as government-sponsored plans, including Medicare part A, most Medicaid, CHIP, most TRICARE, veterans' health care benefits, and others.

An opt out arrangement that requires the employee to provide proof of "group" health coverage only, will not qualify as an eligible opt out arrangement.

Can an Employer just modify its Opt Out Form to create an Eligible Opt Out Arrangement?

It depends. Employers must ensure they analyze currently applicable policies and procedures, Memoranda of Understanding ("MOU") or other collective bargaining agreements. Implementing an eligible opt out arrangement might require negotiation with union groups or revision to underlying policies and procedures.

Will having an Eligible Opt Out Arrangement make coverage affordable?

Not necessarily. Employers should make sure that their benefit arrangements are affordable under one of the affordability safe harbors by running the calculations. In addition to eligible opt out arrangements, a separate rule relating to the affordability calculation requires an employer to ignore any employer contribution toward health benefits that can be directed toward non-health benefits or cashed out. If the entire employer contribution may be cashed out, this should be a red flag warning that your offered coverage may not be affordable.

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New to the Firm

Anni Safarloo is an Associate in Liebert Cassidy Whitmore's Los Angeles office where she provides representation and counsel to clients in matters pertaining to labor and employment law, business and facilities, and general litigation. Anni has experience representing clients in all phases of litigation, especially related to construction delay, extra work and stop notice claims; commercial matters; and code enforcement. She has secured judgments in favor of clients in various code enforcement matters and handles post-judgment remedies. Anni also represents clients in real estate related litigation. She advises clients in various general counseling, pre-litigation and litigation matters. She can be reached at 310.981.2313 or asafrloo@lcwlegal.com.

Nathan T. Jackson is an associate in Liebert Cassidy Whitmore's Sacramento office where he provides representation and counsel to clients in matters pertaining to labor and employment law. Nathan defends clients against individual and representative claims for discrimination, retaliation, harassment, wrongful termination, breach of contract, and violations of wage and hour laws, including class actions and claims brought under the Private Attorney General Act (PAGA). He also counsels clients regarding sensitive personnel matters. He can be reached at 916.584.7022 or njackson@lcwlegal.com

Richard Shreiba is an Associate in Liebert Cassidy Whitmore's Fresno office where he provides advice and representation to clients on labor, employment, and business & facilities matters. Richard litigates in both state and federal court and has experience from pre-litigation through trial. He can be reached at 559.256.7800 or rshreiba@lcwlegal.com.

Firm Publications

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

Peter Brown and **Lisa Charbonneau** wrote an article that appeared in the *Daily Journal* titled "DOL May Update Overtime Rate Regulations For The First Time In 50 Years" on September 13, 2019.

Sacramento Partner **Gage Dungy** authored the *Daily Journal Corporation* article, "A Recap of New Employer Requirements as Cleanup Bill Passes," discussing recent legislation passed in California amending SB 1343 harassment training requirements on September 23, 2019.

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Hyatt Regency
San Francisco
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lcwlegal.com/lcw-conference

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

If you have any questions, contact Selena Dolmuz at 310.981.2000 or info@lcwlegal.com.

Firm Activities

Consortium Training

Oct. 2 **"Leaves, Leaves and More Leaves"**
North State ERC | Webinar | Lisa S. Charbonneau

Oct. 3 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Central Valley ERC | Lindsay | Tony G. Carvalho & Jesse Maddox

Oct. 3 **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
Gateway Public ERC | South Gate | Kristi Recchia

Oct. 3 **"Managing the Marginal Employee"** & **"Prevention and Control of Absenteeism and Abuse of Leave"**
Imperial Valley ERC | El Centro | Frances Rogers

Oct. 3 **"Managing the Marginal Employee"** & **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
San Joaquin Valley ERC | Ripon | Michael Youril

Oct. 3 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
South Bay ERC | Redondo Beach | Ronnie Arenas

Oct. 10 **"Technology & Employee Privacy"**
Bay Area ERC | Webinar | Che I. Johnson

Oct. 10 **"Maximizing Supervisory Skills for the First Line Supervisor"**
East Inland Empire ERC | Fontana | Kristi Recchia

Oct. 10 **"Going Outside the Classified Service: Short-Term Employees, Substitutes and Professional Experts"**
Northern CA CCD ERC | Weed | Kristin D. Lindgren

Oct. 10 **"Technology & Employee Privacy"**
San Mateo County ERC | Webinar | Che I. Johnson

Oct. 10 **"The Future is Now - Embracing Generational Diversity and Succession Planning"** & **"Iron Fists or Kid Gloves: Retaliation in the Workplace"**
Ventura/Santa Barbara ERC | Camarillo | Christopher S. Frederick

Oct. 11 **"Human Resources Academy I for Community College Districts"**
Central CA CCD ERC | Merced & Webinar | Kristin D. Lindgren

Oct. 11 **"Human Resources Academy II for Community College Districts"**
Central CA CCD ERC | Merced & Webinar | Kristin D. Lindgren

Oct. 16 **"Labor Negotiations from Beginning to End"** & **"Leaves, Leaves and More Leaves"**
San Gabriel Valley ERC | Alhambra | T. Oliver Yee

Oct. 17 **"Case Study for Managing Illnesses or Injuries"** & **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Coachella Valley ERC | Palm Desert | Ronnie Arenas

Oct. 17 **"Preventing Workplace Harassment, Discrimination & Retaliation"**
Orange County Consortium | Buena Park | Laura Drottz Kalty

Oct. 18 **"Exercising Your Management Rights"**
SCCCD ERC | Anaheim | Melanie L. Chaney

Oct. 23 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"** & **"Leaves, Leaves and More Leaves"**
NorCal ERC | Danville | Kelly Tuffo

Oct. 24 **"Maximizing Supervisory Skills for the First Line Supervisor Part Two"**
LA County Human Resources Consortium | Los Angeles | Elizabeth T. Arce

Oct. 24 **"An Agency's Guide to Employee Retirement"** & **"Exercising Your Management Rights"**
Mendocino County ERC | Ukiah | Erin Kunze

Oct. 30 **"Difficult Conversations"** & **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Gold Country ERC | Roseville | Gage C. Dungy & Brian J. Hoffman

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.

Oct. 1 **"Title V Diversity"**
Contra Costa Community College District | Martinez | Laura Schulkind

Oct. 2 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Lynwood | Christopher S. Frederick

Oct. 2 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations"**
City of San Jose | Heather R. Coffman

Oct. 2 **"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"**
East Bay Regional Park District | Oakland | Erin Kunze

Oct. 3 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Monterey Park | Laura Drottz Kalty

Oct. 3 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Sunnyvale | Lisa S. Charbonneau

Oct. 3 **"Promoting Equity-Mindedness in the Hiring Process for All Campus Positions"**
College of the Canyons | Santa Clarita | Laura Schulkind

Oct. 3 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of Siskiyou | Yreka | Kristin D. Lindgren

Oct. 4 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Rancho Santiago Community College District | AM - Orange & PM - Santa Ana | Laura Schulkind

Oct. 7 **"Title V Diversity"**
Contra Costa Community College District | Pittsburg | Laura Schulkind

Oct. 7 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Port of San Diego | San Diego | Stefanie K. Vaudreuil & Frances Rogers

Oct. 8 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
City of Glendale | Jennifer Palagi

Oct. 8,9 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
El Dorado County | Placerville | Kristin D. Lindgren

Oct. 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mesa Water District | Costa Mesa | Christopher S. Frederick

Oct. 9,22 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Laura Drottz Kalty

Oct. 9,10 **"Performance Management and Evaluation Process"**
Mendocino County | Ukiah | Jack Hughes

Oct. 9,10 **"Maximizing Performance Through Documentation, Evaluation and Corrective Action and The Art of Writing the Performance Evaluation"**
Mendocino County | Ukiah | Jack Hughes

Oct. 10,17,23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Port of San Diego | San Diego | Stacey H. Sullivan

Oct. 14 **"ADA and Ethics in Public Service"**
Humboldt County | Eureka | Jack Hughes

Oct. 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Port of San Diego | San Diego | Kevin J. Chicas

Oct. 15 **"Skelly Procedures"**
Los Angeles Homeless Services Authority | Los Angeles | T. Oliver Yee

Oct. 15 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
West Valley Water District | Rialto | Jenny Denny

Oct. 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Lodi | Gage C. Dungy

Oct. 22 **"Courageous Authenticity and Conflict Resolution"**
CalOptima | Orange | Kristi Recchia

Oct. 22 **"Preventing Workplace Harassment, Discrimination and Retaliation"** & **"Leaves, Leaves and More Leaves"**
Riverside County District Attorney's Office | Riverside | J. Scott Tiedemann

Oct. 23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Rialto | James E. Oldendorph

Oct. 23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mariposa County | Mariposa | Che I. Johnson

Oct. 24 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Carlsbad | Stephanie J. Lowe

Oct. 24 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Los Banos | Che I. Johnson

Oct. 24 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Rialto | Alison R. Kalinski

Oct. 28 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Menlo Park | Heather R. Coffman

Oct. 28 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Pasadena City College | Pasadena | Jenny Denny

Oct. 29 **"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"**
East Bay Regional Park District | Oakley | Erin Kunze

Oct. 30 **"Managing the Marginal Employee and Creating a Positive Workplace Culture with Communication, Conflict Resolution & Civility"**
City of Colton | Kristi Recchia

Oct. 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Mountain View | Lisa S. Charbonneau

Oct. 30 **"Title V Diversity"**
Contra Costa Community College District | Pleasant Hill | Laura Schulkind

Oct. 30 **"Unconscious Bias"**
County of San Luis Obispo | San Luis Obispo | James E. Oldendorph

Oct. 30 **"Principles for Public Safety Employment and 12 Steps to Avoiding Liability"**
Los Angeles County | Los Angeles | J. Scott Tiedemann

Speaking Engagements

Oct. 22 **"CHRO Emerging Leaders: Leadership Issues for Strategic Employment"**
Association of College Human Resource Officers (ACHRO) CHRO Emerging Leaders | Garden Grove | Laura Schulkind & Eileen O'Hare-Anderson & Frances Rogers

Oct. 23 **"CCD Employment & Labor Relations Game Show"**
ACHRO| Garden Grove | Pilar Morin & Dr. Alberto Roman

Oct. 24 **"Town Hall - Legal Eagles"**
ACHRO | Garden Grove | Eileen O'Hare-Anderson & Pilar Morin & Laura Schulkind

Oct. 25 **"Updating Your EEO Plans"**
ACHRO | Garden Grove | Jenny Denny & Laura Schulkind

Oct. 28 **"Essential Issues To Consider When Leasing Your District Buildings and Facilities"**
ACBO 2019 Fall Conference | San Diego | Christopher Fallon & Tim Flood

Oct. 28 **"Strategies for Addressing Business-Related Board Policies (BPs) & Administrative Procedures (APs)"**
ACBO 2019 Fall Conference | San Diego | Eileen O'Hare-Anderson & Jane Wright

Seminars/Webinar
For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

Oct. 8 **"10 Problems You May Have With CalPERS, and How to Fix Them"**
Liebert Cassidy Whitmore | Webinar | Michael Youril

Oct. 8,9 **"2-Day FLSA Academy"**
Liebert Cassidy Whitmore | Citrus Heights | Richard Bolanos & Lisa S. Charbonneau

Oct. 9 **"Costing Labor Contracts"**
Liebert Cassidy Whitmore | Poway | Peter J. Brown & Kristi Recchia

Oct. 17 **"Bargaining Over Benefits"**
Liebert Cassidy Whitmore | Suisun City | Steven M. Berliner & Kristi Recchia

Oct. 17 **"AB 5 Webinar"**
Liebert Cassidy Whitmore | Webinar | T. Oliver Yee
Sheldon

Oct. 30 **"Nuts & Bolts of Negotiations"**
Liebert Cassidy Whitmore | East Garrison | Richard Bolanos

LCW Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor | Los Angeles, CA 90045
CalPublicAgencyLaborEmploymentBlog.com | @lcwlegal

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