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 2018

INDEX

LCW NEWS

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

DISABILITY LAW

Community College Did Not Deny Students Meaningful Access When It Discontinued On-Campus Shuttle Service.

Three students, all with various disabilities that restrict their mobility, attended West Los Angeles College operated by the Los Angeles Community College District. When the students initially enrolled in the College, the College provided an on-campus shuttle service to transport students with mobility issues between buildings and the parking lots due to the hilly terrain on campus. However, the College ended the shuttle service.

The three students and their attorneys had multiple meetings with College officials to demand the College reinstate the shuttle service, but the College refused. Instead, College officials suggested which lots the students might park in to have the shortest path to certain buildings, suggested that each of the students utilize the city bus or the paratransit service to get to campus, and suggested the students may need to use a motorized wheelchair or scooter (which the students admitted could be subsidized by the California Department of Rehabilitation) to get around campus. Each student refused to use public transportation or a motorized scooter.

The students filed a lawsuit against the College alleging that the College discriminated against them when it discontinued the shuttle service in violation of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and similar state laws.

In their action, the students argued that the College could not rely on the city bus and paratransit services or a student's motorized scooter to meet its legal obligation to provide meaningful access to its program and services to students with disabilities. The trial court rejected this argument stating the College can rely upon other well-established publicly funded services, such as the city bus or paratransit service, to assist in providing meaningful access to its participants with disabilities. Furthermore, the trial court held that the students were free to choose not to use motorized scooters, but "neither the District nor any other public entity is legally compelled to fill the void" with a shuttle service as a result of that choice.

The trial court ultimately held that at all relevant times, the students had meaningful access to the College's campus and programs because the College could rely on the city's public transportation system to transport the students from off-campus locations, and the students' ability to use motorized scooters

addressed any accessibility issues on the campus walkways. Because the students did not show that they were denied meaningful access to the College's campus, the court found in favor of the College on all claims.

Guerra v. West Los Angeles College (2018) __ F.3d __ [2018 WL 4026452].

NOTE:

This opinion is from a trial court, so it is not binding on any other courts . The case does provide some insight as to how one trial court interpreted challenges to disability access in an educational environment. However, on September 18, 2018, the students filed an appeal with the U.S. Court of Appeals for the Ninth Circuit. LCW will continue to monitor case developments and bring you updates.

TITLE IX

Colleges and Universities Must Allow Students Accused of Sexual Misconduct or Their Representatives to Directly Question Their Accuser in a Live Hearing.

John Doe and Jane Roe were students at the University of Michigan. Halfway through Roe's freshman and Doe's junior year, the two crossed paths at a fraternity party where they drank, danced, and eventually had sex. Two days later, Roe filed a sexual misconduct complaint with the University claiming that Doe had sex with her while she was too drunk to consent, which violated University policy. The University immediately began an investigation, and the investigator collected evidence and interviewed Roe, Doe, and twenty-three other witnesses.

After three months of thorough fact-finding, the investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the University rule in Doe's favor and close the case. Roe appealed to the University's Appeals Board, and a three-member panel reviewed the investigator's report. Although the Board found that the investigation was fair and thorough, it thought the investigator was wrong to conclude that the evidence was balanced. According to the Board, Roe's description of events was "more credible" than Doe's, and Roe's witnesses were more persuasive. As a result, the University set aside the investigator's recommendation and proceeded to the sanction phase of the appeal. Facing the possibility of expulsion, Doe agreed to withdraw from the University.

Doe filed a lawsuit in federal court claiming that the University's disciplinary proceedings violated the Due Process Clause and Title IX. The University sought to have the trial court dismiss the lawsuit, and the trial court agreed. Doe appealed.

On appeal, Doe first argued that the University violated his due process rights during his disciplinary proceedings. He claimed that because the University's decision ultimately turned on a credibility determination, the University was required to give him a hearing with an opportunity to cross-examine Roe and other adverse witnesses.

The appellate court agreed that if a college or university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process. Here, Doe never received an opportunity to cross-examine Roe or her witnesses—not before the investigator, and not before the Board. The Court of Appeal found there was a significant risk that the University erroneously deprived Doe of his protected interests.

The Court of Appeal further held that Doe responded to the investigator to identify inconsistencies in Roe's statements to the investigator during the investigation, and Doe had the opportunity to interview Roe about their interactions during a civil lawsuit he brought

against her in state court. Further, Doe allegedly admitted some sexual misconduct to the police. But, none of these facts allowed the University to completely deny any form of live questioning in front of the Board.

However, the Court of Appeal held that an accused student does not always have the right to *personally* confront the complainant and other witnesses. Colleges and universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment, so the college or university may allow the "accused student's agent to conduct cross-examination on his behalf." Colleges and universities may also facilitate live questioning in front of the fact-finder without the alleged victim appearing in person by using video conferencing technology.

Accordingly, the Court found Doe raised a plausible claim about the University violating his due process rights, so the trial court needed to consider the arguments instead of dismissing his claims.

Doe also sued the University under Title IX, which prohibits universities receiving or disbursing federal funds from discriminating against students on the basis of sex. Specifically, Doe claimed the University reached an erroneous outcome in his case because of his sex.

The Court of Appeal noted that the University was under increased scrutiny from the federal government and the general public regarding its handling of sexual misconduct complaints from women. Doe argued that the increased pressure coupled with circumstantial evidence of bias in Doe's specific proceeding (such as the fact that the Board credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (Doe and his witnesses)), gave rise to the plausibility of Doe's Title IX bias claim. While the Court noted that there might be alternative explanations for the University's conduct, the trial court could not deprive Doe the opportunity to prove the allegations in court. According, the Court reversed the trial court's dismissal of Doe's Title IX claim. Ultimately, the Court instructed the trial court to consider the case.

Doe v. Baum (2018) __ F.3d __ [2018 WL 4265634].

NOTE:

This case is from the U.S. Court of Appeals for the Sixth Circuit that governs in Kentucky, Michigan, Ohio, and Tennessee. This case is not binding in California, but it does provide some insight into how one circuit court interpreted Title IX and due process requirements in sexual misconduct hearings at colleges and universities. This opinion is consistent with the decision issued in August by the California Court of Appeal in John Doe v. Claremont McKenna College*. Read more on the rapidly evolving interpretations of state and federal law regarding allegations of sexual misconduct and student discipline here: https://www.lcwlegal.com/news/allegations-of-sexual-misconduct-student-discipline-on-campus-and-due-process-keeping-up-with-rapidly-evolving-interpretations-of-state-and-federal-laws*

LABOR RELATIONS

California Supreme Court Deals Blow to Voter-Backed Pension Reform.

The City of San Diego's Proposition B, a 2012 voter-approved ballot measure designed to save the City's weakening pension system, was dealt a potentially fatal blow by a California Supreme Court decision. The decision finds that it was actually the City that caused the changes to employee pension benefits, and that the City did so without first negotiating with labor unions. The fate of those pension reforms is uncertain until the Court of Appeal to issues its remedy.

Proposition B Was a Citizen's Initiative

In reaching its decision, the Supreme Court relied heavily on the following facts. Under the

City of San Diego's "Strong Mayor" form of government, the mayor acts as the City's chief executive officer whose responsibilities include recommending measures and ordinances to the City Council, and conducting labor negotiations with the City's labor unions. In 2010, San Diego's former Mayor, Jerry Sanders, was outspoken on the need for pension reform due to mounting unfunded liabilities that strained the City's budget. Reforming the City's pension plan required an amendment to the City's Charter, which could be achieved by placing a ballot initiative before voters either by the City Council's own motion or a citizens' initiative. Mayor Sanders decided to champion a citizens' initiative to eliminate traditional defined benefit pensions for all newly-hired City employees, except for peace officers, and replace them with defined contribution plans.

Between November 2010 and March 2011, Mayor Sanders actively pursued the citizens' initiative by issuing press releases with the City seal that publicized his intent to put forward a citizens' ballot initiative, and by declaring his intent during his State of the City address. Mayor Sanders also promoted the initiative and solicited signatures in interviews, in media statements, at speaking appearances, and in a "message from the mayor" circulated to the San Diego Regional Chamber of Commerce. When 15% of voters approved the ballot measure, Mayor Sanders wrote an argument in favor of the initiative that appeared on the ballot.

Meanwhile, beginning in July 2011, the San Diego Municipal Employees Association and other employee organizations sought to negotiate the terms of any ballot measure on pension reform. The unions argued the Mayor was acting in his official capacity to promote the initiative and, in doing so, made a policy determination related to mandatory subjects of bargaining. City officials believed that a voters' initiative that had a rightful place on the ballot and could not be subject to mandatory bargaining within the meaning of the Meyers-Milias Brown Act ("MMBA").

The Unfair Practice Charge

Prior to the election, employee labor organizations filed unfair practice charges with the Public Employment Relations Board ("PERB") over the City's failure to meet and confer on the pension changes sought by the initiative. The unions also filed a petition for injunction in superior court which was denied. In June 2012, Proposition B won approval by the City's voters.

In December 2015, after an administrative hearing, PERB held the City violated the MMBA by placing the initiative on the ballot before exhausting the meet and confer process. PERB found the Mayor was acting as the City's agent and was not privileged as a private citizen to pursue changes in the terms and conditions of employment for the City's represented employees.

The Court of Appeal Reversed PERB's Decision

The City challenged PERB's decision by filing a petition for a writ of extraordinary relief in the Court of Appeal. The Court of Appeal annulled PERB's decision and found that the City's decision to place the citizens' initiative measure on the ballot was purely ministerial because the City was required under its own Charter to do so upon the verified signatures of at least 15% of the City's voters. Thus, the City was not the actor and had no obligation to meet and confer. The California Supreme Court granted review.

The California Supreme Court Held that the Obligation to Meet and Confer is Broad

The California Supreme Court took guidance from its decision in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, which addressed whether the meet-and-confer provisions of Government Code Section 3505 applied when a city council exercised its own constitutional power to propose charter amendments to its voters. In *Seal Beach*, the Court found that a public agency must comply

with Section 3505, even when it decides to take a proposal directly to the voters that could alter mandatory subjects of bargaining.

The Court observed that Mayor Sanders was the City's designated bargaining agent and had the authority to make policy decisions affecting City employees and negotiate with the City's unions. The Court held that the Mayor used that authority to draft, promote, advocate, and receive City resources and employees to assist him. The Court found that the intent of Section 3505 would be defeated if public officials could "purposefully evade the meet-and-confer requirements of the MMBA by officially sponsoring a citizens' initiative."

The Supreme Court remanded the case back to the Court of Appeal to devise a judicial remedy for the unlawfully imposed changes to the City's pension system. PERB has requested the courts invalidate the results of the voters' initiative election and/or issue a "make-whole" remedy of lost compensation for City employees affected by the changes to the City's pension system. LCW will report on the that judicial remedy when it is published.

Boling v. Public Employment Relations Board, et al (2018) 5 Cal.5th 898.

NOTE:

An in depth discussion of the California Supreme Court's decision is available here https://www.lcwlegal.com/news/voter-backed-pension-reform-is-dealt-a-blow-by-california-supreme-court. The California Supreme Court's decision is available here: http://sos.metnews.com/sos.cgi?0818//S242034.

PERB Changes its Prior Rule About Employee Use of Email for Protected Communications During Non-Work Time.

The Public Employment Relations Board ("PERB") broadened the rights of public employees to use employer email during non-work time, and reversed its prior rule on this issue. Although the case was decided under the Educational Employment Relations Act (EERA), this new PERB rule applies to other public sector entities that are governed by the MMBA and other California public sector labor relations statutes.

Eric Moberg applied for and received a job at the Napa Valley Community College District ("District") for a part time adjunct instructor position in 2014. Moberg's application stated that he was formerly employed by the San Mateo County Office of Education (SMCOE) and that he left SMCOE to move out of the area. Moberg actually left SMCOE as part of a settlement agreement that resolved several unfair practice charges that Moberg brought against that agency. Moberg's application did not disclose that he was terminated for cause from the Monterey Peninsula Unified School District (MPUSD).

In 2015, Moberg sent an email responding to an exchange between the faculty association president and a part time faculty member. The faculty association president reminded faculty about an upcoming association meeting. An adjunct faculty member suggested that adjuncts should be paid the same salary as full-time instructors. Moberg replied stating, "How about we take some money from the bloated Pentagon budget that funds death and destruction instead of education and enlightenment." Another faculty member responded directly to Moberg, expressing that she was disturbed by his email. Moberg thanked the faculty member for "joining our discussion," and noted "I stand by my suggested solution to low pay for educators, which is a working condition that I find both unsatisfactory and remediable." Moberg's department chair asked Moberg to exclude politics from the discussion and referred Moberg to the District email policy. The faculty association president then sent an email message disavowing the email exchange and noting that the association's practice was to use District email only for meeting reminders, and to conduct "any official online business of the Association" using non-District email.

Moberg filed a grievance claiming that the directive to refrain from using District email to discuss pay issues violated the collective bargaining agreement between the District and the Association.

The District withdrew Moberg's offer of employment for the Spring 2016 semester because the District had discovered that Moberg's employment application misrepresented his employment history and omitted material facts. The District's letter to Moberg noted that had it been aware of facts underlying his termination from MPUSD, the District would never have hired him.

PERB's General Counsel Dismissed the Charge

Moberg then filed an unfair practice charge with PERB alleging the District violated the EERA by withdrawing its offer of employment in retaliation for his prior protected activity. PERB initially dismissed the charge. PERB found that Moberg's email exchange and grievance were not activity protected by the EERA. PERB also found that Moberg's charge did not show that: the District representative who withdrew the offer of employment knew that Moberg had earlier filed PERB charges against SMCOE; or the District withdrew its offer of Spring employment *because* Moberg engaged in any protected activity. PERB's general counsel dismissed the charge and Moberg appealed.

PERB's Decision on Appeal

PERB re-examined the general counsel's dismissal of Moberg's charge and found that he did engage in protected activity in 2015 by filing a CBA grievance and participating in an email regarding adjunct instructor salary.

First, PERB noted that an employee engages in protected activity by asserting a violation of a labor agreement even if the employee does so outside of the contractual grievance process. Grievance processing is protected whether an individual or a union representative processes the grievance. PERB therefore found that Moberg's grievance regarding the direction not to discuss salary on employer email was a protected activity.

Second, PERB found that Moberg's email regarding faculty salary was protected activity. PERB noted that "the relationship between federal government spending on defense and education and the employment and/or wages of Moberg and other District faculty is not so attenuated that the emails lost their protection under EERA." This was so even though Moberg's proposed method of increasing adjunct salaries (decreasing federal government defense spending) was outside of the District's control. PERB also found it significant that Moberg's email was in response to a colleague's email regarding adjunct pay.

Public Employee Use of Employer Email for Protected Activity on Non-Work Time

PERB also addressed whether public employees have the right to use the employer's email to disseminate statements that are protected by the EERA.

PERB had previously held that an employer can restrict employee use of its email system so long as the restrictions do not discriminate against use of the email for union matters or other protected activity. PERB had followed the rule used by the National Labor Relations Board ("NLRB") – the agency that administers federal labor laws covering private sector employers. But the NLRB had itself changed course. The NLRB reversed its 2007 decision and announced a new rule in *Purple Communications, Inc.* (2014) 361 NLRB No. 126. In *Purple Communications*, the NLRB adopted a new rule that presumes that employees can use employer email to engage in protected activity on non-work time, unless the employer rebuts the presumption.

PERB adopted the NLRB rule and disapproved of its own earlier decision in *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 15. PERB found,

> Recognizing that e-mail is a fundamental forum for employee communication in the present day, serving the same function as faculty lunch rooms and employee lounges did when EERA was written, we conclude the better rule which reflects this change in the contemporary workplace, presumes that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

PERB noted that it would be a "rare case" that circumstances require a total ban on non-work time email use, and that in the more typical case, employers may "apply uniform and consistently enforced controls over their email systems" that are no more restrictive than needed to protect the agency's interests.

Because the evidence showed that Moberg was authorized to access the District's email system, and it was not alleged that he sent emails during his work time, PERB presumed that Moberg had a right to use the email system for protected EERA communications. Thus, PERB found that Moberg's use of the District email system and the content of Moberg's emails were protected activity. Ultimately, however, PERB found that the general counsel properly dismissed Moberg's retaliation claims because his charge failed to assert sufficient facts to show the District possessed a retaliatory motive when it decided not to employ him for the Spring semester.

Significance for Public Agencies

PERB decided this matter under the EERA which provides employees the right to "form, join, and participate" and discuss "matters of legitimate concern to the employees as employees." These employee rights are also provided under the MMBA and other public sector labor statutes enforced by PERB, making the decision applicable to counties, cities and special districts subject to the MMBA and other public sector statutes administered by PERB.

Public agencies should review their email use policies to ensure they comply with the new standard announced in *Napa Valley CCD*. Under PERB's new rule, employee use of an agency's email system, during non-work time, will be protected if it relates to subjects such as wages, hours of work and other employee terms and conditions of employment. As the decision noted, an agency's restrictions on employee use of its email system during non-work time should be no more restrictive than needed.

However, PERB did not find that agencies must allow employees to use employer email systems for all non-work matters, and has not required public employers to allow email use for protected activity during working time. Agencies may be able to prohibit the use of email for non-work purposes *during working hours*, and may be able to prohibit excessive use of its email system even during non-work hours.

Moberg v. Napa Valley Community College District, PERB Dec. No. 2563 (2018).

NOTE:

> *LCW's San Francisco office partner* Laura Schulkind *represented the District in this matter. Agencies can receive advice and guidance regarding their employee email use policies by contacting LCW.*

Union Could Pursue Charge of Unilateral Change Due to County's Implementation of New Policy.

SEIU's unfair practice charge asserted that the County of Monterey violated its duty to bargain when it adopted a revised attendance policy without first notifying and negotiating with the union. SEIU contended that it never received the original version of the policy, and took issue with several sections of the revised policy. One section suggested that as "a courtesy" employees should "arrive and prepare for work 10 minutes

early." There was previously, according to SEIU, "no established past practice" and no policy requiring employees to begin working before the actual start time of their shift. Another section provided that "excessive absenteeism" or regular absences could result in consequences, such as suspension of shift trading privileges or voluntary overtime assignments, or a reduction in the employee's departmental seniority. The policy also provided that if an employee failed to provide a return-to-work doctor note, the absence would be regarded as "unauthorized". An unauthorized absence of three days (within a 60 day period) would be regarded as job abandonment and result in termination.

The County asserted that the management rights clause in the relevant MOUs authorized the County to "issue and enforce rules and regulations," and that the MOU effectively waived SEIU's right to negotiate over the attendance policy. SEIU claimed the policies were not covered by the MOUs or exceeded the County's authority to act unilaterally.

The MMBA requires agencies and unions to meet and confer in good faith regarding wages, hours and other terms and conditions of employment. An agency violates that duty when it does not provide the union with reasonable advance notice and a meaningful opportunity to bargain before the agency decides whether it will create or change a policy that affects a negotiable subject. In a unilateral change case, a union's unfair practice charge must show: (1) the employer took actions to change a policy; (2) the policy concerns a matter within the scope of representation; (3) the agency took action without giving the union notice or an opportunity to bargain the change; (4) the agency's actions had an impact on the terms and conditions of bargaining unit members. An agency may violate the duty to bargain if it adopts a new policy, without bargaining with the union, unless the union has clearly and unmistakably waived its right to bargain.

PERB found the revised attendance policy was negotiable. The early log-in portion impacted hours of work by affecting the time employees start their work day, and the amount of duty free time and work. The absenteeism portion of the policy was also negotiable because it affected wages and hours which are subjects within the scope of representation.

PERB also noted that at the pleading stage, if a charge alleges an unilateral change, PERB must issue a Complaint if the MOU does not clearly and unambiguously authorize the agency to unilaterally adopt or change the policies at issue. The MOU language presented to PERB did not meet this requirement.

PERB also found that the MOU management rights clause language did not *explicitly* address the County's attendance policies and could be interpreted *not* to waive SEIU's right to negotiate. The MOU language generally reserved the County's right to "direct its employees; take disciplinary action;…issue and enforce rules and regulations; maintain the efficiency of governmental operations…[and] exercise complete control and discretion over its work and fulfill all of its legal responsibilities."

PERB also noted that during initial investigation, a charge will be dismissed based upon the affirmative defense of the responding party only if the facts underlying that defense are undisputed. Because the County's waiver argument relied upon disputed interpretations of the MOU, PERB found that a Complaint should issue to provide the County and SEIU with the opportunity to present bargaining history or other evidence in support of their competing theories.

SEIU v. County of Monterey, PERB Decision No. 2579 (July 20, 2018).

NOTE:

Whether a union has waived its right to negotiate a subject within the scope of representation is generally difficult to prove, and will depend on the unique language of each MOU and bargaining

history between the parties. PERB did not decide this issue in this decision and simply allowed the union's claims to proceed. LCW's labor attorneys can provide agencies with advice in this area.

RETIREMENT

Teachers Have Property Right to Daily Accrued Interest on Retirement Contributions.

The U.S. Court of Appeals for the Ninth Circuit found that teachers have a property right in the daily interest accrued on their retirement fund contributions. In this case, several teachers, including Mickey Fowler, participated in the State of Washington's Teachers' Retirement System, a public retirement fund that was managed by the State Department of Retirement Systems ("DRS").

As fund manager, DRS was responsible for tracking teachers' contributions and for crediting their accounts for accumulated interest. The interest was credited at a rate determined by the DRS director, and according to the account balance at the end of the prior quarter. Therefore, DRS did not credit accounts with the interest accrued during the quarter in which it accrued. Additionally, if an account had a zero balance in a given quarter, DRS did not credit that account with any interest, nor in the quarter preceding the zero balance.

Fowler and other teachers had transferred their account holdings from one plan to another in the middle of a quarter which created a zero balance. DRS did not credit their accounts for interest earned in the zero balance quarter or the prior quarter. DRS instead used the interest earned to pay benefits to other members. The teachers sued, seeking the return of interest that the DRS allegedly "skimmed" from their retirement accounts; they alleged that failure to credit their accounts violated the U.S. Constitution.

The Ninth Circuit agreed with the teachers that they possessed a private property interest in the daily interest that accrued on their retirement accounts. The court pointed to its earlier decision in *Schneider v. California Department of Corrections* which found that interest income earned on an interest-bearing account is a fundamental property right. The Ninth Circuit then clarified that the property right identified in *Schneider* "covers interest earned daily, even if payable less frequently." In turn the teachers' property right in daily accrued interest was protected by the U.S. Constitution. The Ninth Circuit let the teachers pursue their lawsuit because they had stated a claim that DRS committed an unlawful taking by depriving them of daily interest accrued on their retirement accounts.

Fowler v. Guerin (2018) 899 F.3d 1112.

LITIGATION

Government Claims Act Barred Lawsuit Because Employee Was Aware of the Facts Underlying Her Claims but Failed to Timely Present Her Claim or Disclose Actual Date of Her Claim.

Renee Estill was terminated from her employment with the Shasta County Sheriff's Office. She intended to sue the County, and presented a government claim on February 23, 2012. Under the California Government Claims Act, a litigant must first present a claim to the government agency within six months of when she knew or should have known of the incidents underlying the claims. Estill stated on the claim that she first became aware of the incidents that supported her claim on September 9, 2011. Estill claimed that on that date, an employee of the Sheriff's Office told her that a Sheriff's Captain had informed employees about the details of the internal affairs investigation leading to her termination.

Estill then sued the County claiming that the Captain's actions were an invasion of her

privacy, and harassment, among other things. However, during Estill's deposition, the County learned that she became aware of the incidents underlying her lawsuit in 2009. The County moved to dismiss her lawsuit on the basis that she did not timely present her claims.

The trial court allowed Estill's claims to proceed but the Court of Appeal dismissed her case, finding that she did not timely comply with the requirements of the Government Claims Act. The Court of Appeal rejected Estill's argument that she could not have presented her claim any sooner because she did not know the identity of the specific person who inappropriately shared information about the internal affairs investigation into her conduct. Ignorance of a defendant's identity does not delay accrual of the cause of action because Estill could have simply listed a "Doe" defendant, conducted discovery to learn the defendant's identity, and then amended her Complaint.

The Court of Appeal also rejected Estill's argument that the County was barred from asserting that her claim was untimely. The Court of Appeal found that "equitable estoppel" applied and that Estill could not prevent the County from bringing this defense. The court found it would be unfair to prevent the County from making this argument because: Estill knew of the events underlying her lawsuit as early as 2009, but chose not to disclose this information; Estill intended for the County to treat her claim presentation as timely in 2012 by concealing her earlier knowledge; the County relied on Estill's representation and treated her claim as timely; and the County did not know that Estill had actually become aware of the events underlying her claim in 2009. Thus, "equitable estoppel" required that the County should be able to defend itself from Estill's claims. The Court of Appeal dismissed the lawsuit.

Estill v. County of Shasta (2018) 25 Cal.App.5th 702, reh'g denied (Aug. 24, 2018).

WAGE AND HOUR

Ninth Circuit Finally Affirms U.S. Supreme Court's Broader Interpretation of FLSA Overtime Exemptions.

LCW previously reported on an opinion from the U.S. Supreme Court that held that the Fair Labor Standards Act (FLSA) overtime exemptions should be given "a fair reading." That U.S. Supreme Court's decision reversed the decision of the Ninth Circuit Court of Appeals that found that the overtime exemptions should be "construed narrowly." The case was *Encino Motorcars, LLC v. Navarro.*

The history of the case shows that after the original trial court hearing, the U.S. District Court ruled in favor of the employer and found that Navarro and other employees worked as "service advisors" at Encino Motorcars, were "salesmen" within the meaning of the FLSA and exempt from the FLSA overtime requirements.

On appeal, the Ninth Circuit twice found in favor of Navarro and other employees, and was twice reversed by the U. S. Supreme Court. After the second remand from the U.S. Supreme Court, the Ninth Circuit has now affirmed the federal trial court's decision finding that Navarro and other employees are exempt from FLSA overtime.

Navarro v. Encino Motorcars, LLC (2018) 897 F.3d 1008.

NOTE:

LCW's summary of the Encino Motorcars, Inc. decision is available here:https://www.lcwlegal.com/news/reversing-ninth-circuit-us-supreme-court-rules-that-flsa-overtime-exemptions-should-be-interpreted-fairly-not-narrowly-3.

§

LCW Webinar: Bona Fide Plan Assessment & the Cash-In-Lieu Conundrum: Strategies for Improvement

Tuesday, October 30, 2018 | 10 AM - 11 AM

Following the decision in *Flores vs. the City of San Gabriel*, one critical outcome is the need for agencies to analyze their benefit plans to ensure that those plans are bona fide plans. This analysis requires that you identify the plan and all elements of the plan and evaluate the ratio of cash paid relative to total plan benefits paid. The higher the ratio the greater likely hood that you have a non-bona fide plan which will impact the way in which you calculate the regular rate of pay for FLSA overtime. This session will review the definitions and steps you need to take to conduct the analysis and will explain the strategies for reducing the ratio and/or calculating overtime in compliance with the law.

Presented by:

Peter J. Brown

Who Should Attend?
Human Resources/Personnel Department Heads, Finance Managers, Payroll Administrators, and Agency Labor Negotiators.

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

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

Firm Publications

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

"Strategies to Manage Increasing Pension Costs authored by **Steven M. Berliner** of our Los Angeles office, appeared in the August 2018 issue of the League of California Cities - *Western Cities* Magazine.

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

LCW Liebert Cassidy Whitmore

2-DAY FLSA ACADEMY

Registration is Now Open!

Monday October 1st - Tuesday October 2nd, 2018
Piedmont Community Hall
711 Highland Ave
Piedmont, CA 94611

This seminar offers an in-depth training for public agencies on one of the most fundamental employment areas – items dealing with wages and hours. The FLSA became applicable to the public sector in 1986, and governs many significant matters that supervisors, human resources, finance, and labor relations professionals need to understand and ensure agency compliance. But the FLSA often confuses and complicates the lives of public agencies. We understand the struggle is real and this program is designed to help you strategize through those struggles and walk away feeling comfortable that you understand this complicated law and can be an effective leader in your organization to ensuring compliance. Public agency liability can be significant and costly so the best strategic plan is one of prevention.

This two-day workshop will cover all you need to know to understand the key areas covered by the FLSA including:

- FLSA Basics
- Work Periods & Hours Worked
- Exemption Analysis
- The Regular Rate of Pay & Compensatory Time Off
- Conducting a Compliance Review

Attendees will recieve a copy of our FLSA Guide. The seminar includes a continental breakfast and lunch.

Intended Audience: Professionals in Human Resources, Finance, Legal Counsel and Managers/Executives

Time: This is a 2-Day Event, 9:00 a.m. to 4:00 p.m both days.

Pricing: $500 pp for Consortium Members | $550 pp for Non-Consortium Member

For more information and to register, visit
http://www.lcwlegal.com/events-and-training /webinars-seminars/2-day-flsa-academy-1

LCW LIEBERT CASSIDY WHITMORE

REGULAR RATE OF PAY: MAKING IT SIMPLE

REGISTRATION IS NOW OPEN!

LCW is pleased to announce a comprehensive seminar for Public Sector personnel:

Thursday, November 15, 2018 in Buena Park
Buena Park Community Center
6688 Beach Blvd.
Buena Park, CA 90621

Is your agency agonizing and struggling to ensure that overtime is paid at one and one-half times the employee's regular rate of pay in compliance with the Fair Labor Standards Act? FLSA compliance is an onerous task, and agencies often make mistakes resulting in significant backpay awards, liquidated damages, and attorneys' fees. This workshop will assist agencies to identify the types of pays that must be included and what may be excluded from the regular rate. This workshop will also show you how to calculate the regular rate of pay for all types of employees, including public safety (both police officers and firefighters) as well as all other employees who work a 40 hour workweek. Using examples, this session will make regular rate calculations simple and more straightforward. Examples will include many different types of additional pay provided to public employees, including cash in lieu of health benefits as addressed by the recent decision in *Flores v. City of San Gabriel.* This workshop will provide basic tools for proper regular rate calculations, and enable your agency to fix common mistakes in a timely fashion.

Intended Audience:

This seminar is fitting for public agencies: general administration, finance, payroll, and human resources.

Time:

9:00 a.m. to 12:00 p.m

Pricing:

$250 per person for Consortium Members
$300 per person for Non-Consortium Members

Register TODAY!
https://www.lcwlegal.com/events-and-training/webinars-seminars

LCW
Labor Relations Certification Program

Developing Positive Partnerships and Leadership Excellence for Labor Relations Professionals

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

Upcoming Classes:

The Rules of Engagement: Issues, Impacts & Impasse

October 11, 2018 | Fullerton, CA

Understanding the scope of meet and confer matters, impacts/effects bargaining, the rights of union/association representatives, dealing with pickets, protests and concerted activity, issuing last, best & final offers, impasse procedures and managing the chaos that can come when engaged with labor relations challenges will be covered in this workshop.

Nuts & Bolts of Negotiations

November 7, 2018 | Citrus Heights, CA

Navigate the nuts & bolts of public sector labor negotiations by exploring the legal framework of collective bargaining, preparation tips for the process, and setting up your strategy. The fundamentals are the building blocks to success and this workshop will provide the key elements in this process.

REGISTER NOW!

https://www.lcwlegal.com/events-and-training/labor-relations-certification-program

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Sept. 21 **"Human Resources Academy 1 for Community College Districts"**
SCCCD ERC | Anaheim | Lee T. Patajo

Sept. 26 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Central Valley ERC | Fresno | Sue Cercone & Shelline Bennett

Sept. 26 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Humboldt County ERC | Arcata | Erin Kunze

Sept. 26 **"A Guide to Implementing Public Employee Discipline"** and **"Moving Into the Future"**
Sonoma/Marin ERC | Rohnert Park | Lisa S. Charbonneau

Sept. 27 **"Public Sector Employment Law Update"**
Bay Area ERC | Webinar | Richard S. Whitmore

Sept. 27 **"Workers Compensation: Managing Employee Inhuries, Disability and Occupational Safety"**
Coachella ERC | Indio | Jeremy Heisler

Sept. 27 **"Nuts and Bolts: Navigating Common Legal Risks for the Front Line Supervisor"** and **"Difficult Conversations"**
Gold Country ERC | Roseville | Kristin D. Lindgren

Sept. 27 **"Iron Fists or Kid Gloves: Retaliation in the Workplace"**
Humboldt County ERC | Arcata | Erin Kunze

Sept. 27 **"Exercising Your Management Rights"** and **"Terminating the Employment Relationship"**
North State ERC | Red Bluff | Jack Hughes

Sept. 27 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
South Bay ERC | Manhattan Beach | Danny Y. Yoo

Oct. 3 **"Leaves, Leaves and More Leaves"** and **"Labor Negotiations from Beginning to End"**
Central Coast ERC | Santa Maria | Che I. Johnson

Oct. 3 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Monterey Bay ERC | Webinar | Heather R. Coffman

Oct. 4 **"Risk Management Skills for the Front Line Supervisor"**
Gateway Public ERC | Commerce | Danny Y. Yoo

Oct. 4 **"The Future is Now – Embracing Generational Diversity and Succession Planning"**
Gold Country ERC | Rancho Cordova | Jack Hughes

Oct. 4 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Mendocino County ERC | Ukiah | Kristin D. Lindgren

Oct. 10 **"Moving Into the Future"** and **"The Art of Writing the Performance Evaluation"**
NorCal ERC | San Ramon | Lisa S. Charbonneau

Oct. 10 **"Public Sector Employment Law Update"** and **"Risk Management Skills for the Front Line Supervisor"**
San Gabriel Valley ERC | Alhambra | Geoffrey S. Sheldon

Oct. 11 **"Preventing Workplace Harassment, Discrimination and Retaliation""**
LA County HR Consortium | Los Angeles | Jolina A. Abrena & Elizabeth Tom Arce

Oct. 16 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Bay Area ERC | Sunnyvale | Kelly Tuffo

Oct. 16 **"Leaves, Leaves and More Leaves"**
San Mateo County ERC | Webinar | Lisa S. Charbonneau

Oct. 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County Consortium | Buena Park | Jenny-Anne S. Flores

Oct. 17 **"A Guide to Implementing Public Employee Discipline"**
South Bay ERC | Palos Verdes Estates | Jennifer Rosner

Oct. 17 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Ventura/Santa Barbara ERC | Camarillo | Kristi Recchia

Oct. 18 **"A Guide to Implementing Public Employee Discipline"** and **"Supervisor's Guide to Public Sector Employment Law"**
San Joaquin Valley ERC | Lodi | Jack Hughes

Oct. 18 **"Maximizing Supervisory Skills for the First Line Supervisor"**
West Inland Empire ERC | Rancho Cucamonga | Kristi Recchia

Oct. 19 **"Legally Compliant Strategies for Diversity Enhancement"**
SCCCD ERC | Anaheim | Frances Rogers

Oct. 25 **"The Art of Writing the Performance Evaluation"**
Mendocino County ERC | Ukiah | Jack Hughes

Oct. 29 **"Legal Issues Regarding Hiring"**
San Diego Fire Districts | San Diego | Mark Meyerhoff

Customizing Training

Sept. 24,25 **"Ethics in Public Service"**
Merced County | Michael Youril

Sept. 25 **"POBR"**
City of Alameda Police Department | Morin I. Jacob

Sept. 25 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Gage C. Dungy

Sept. 26	**"Bias in the Workplace"** ERMA | Emeryville | Suzanne Solomon
Sept. 26,27	**"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"** Rancho Santiago Community College District | Santa Ana | Laura Schulkind
Sept. 28	**"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"** Chaffey College | Rancho Cucamonga | Pilar Morin
Oct.1	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of San Carlos | Heather R. Coffman
Oct. 3	**"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"** East Bay Regional Park District | Oakland | Kelly Tuffo
Oct. 3, 29	**"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment and Workplace Bullying: A Growing Concern"** El Camino College | Torrance | Pilar Morin
Oct. 3	**"HR for Non-HR Managers"** ERMA | Chowchilla | Michael Youril
Oct. 4	**"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"** Chaffey College | Rancho Cucamonga | Pilar Morin
Oct. 5	**"Ethics in Public Service"** Merced County | Che I. Johnson
Oct. 8, 16, 25	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Newport Beach | Christopher S. Frederick
Oct. 8	**"ADA"** County of Humboldt | Eureka | Heather R. Coffman
Oct. 9	**"Supervisory Skills for the First Line Supervisor"** City of Glendale | Laura Kalty
Oct. 11	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Campbell | Erin Kunze
Oct. 16	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Carlsbad | Stephanie J. Lowe
Oct. 16	**"Performance Management: Evaluation, Discipline and Documentation"** Fresno County | Bass Lake | Che I. Johnson

Oct. 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Pico Rivera | Danny Y. Yoo

Oct. 17 **"Mandated Reporting"**
City of Stockton | Kristin D. Lindgren

Oct. 18 **"Making the Most of Your Multi-Generational Workforce"**
ERMA | Perris | Christopher S. Frederick

Oct. 23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Laura Kalty

Oct. 25 **"Ethics in Public Service"**
City of La Mesa | Stephanie J. Lowe

Oct. 25 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Los Banos | Gage C. Dungy

Oct. 26 **"Embracing Diversity"**
Los Angeles Conservation Corps | Los Angeles | Jennifer Rosner

Oct. 30 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Frances Rogers

Speaking Engagements

Sept. 26 **"Town Hall- Legal Eagles"**
CSDA Annual Conference | Indian Wells | Peter J. Brown & Christopher Fallon

Sept. 26 **"Tackling Challenges in Accommodating Mental Disabilities in the Workplace"**
Public Agency Risk Managers Association (PARMA) Chapter Meeting | La Palma | Danny Y. Yoo

Sept. 27 **"Drugs & Alcohol in the Workplace"**
California Fire Chiefs Association (CFCA) Annual Conference | Sacramento | Morin I. Jacob

Sept. 28 **"Legal Update"**
Northern California HR Directors Conference | Truckee | Gage C. Dungy

Oct. 10 **"How to Write it Right: An Advanced Course on Discipline and Performance Documentation"**
Association of College Human Resource Officers (ACHRO) 2018 Fall Institute | Sacramento | Laura Schulkind & Dorene Novotny

Oct. 10 **"Bargaining Part-Time and Temporary Faculty Reemployment Rights"**
ACHRO 2018 Fall Institute | Sacramento | Eileen O'Hare-Anderson & Dr. Diane Fiero

Oct. 10 **"Collective Bargaining in 2018 & Beyond; The Twists & Turns on Things You Need to Know!"**
Public Employer Labor Relations Association of California (PELRAC) Annual Conference | Anaheim | Peter J. Brown

Oct. 11 **"Town Hall - Legal Eagles"**
ACHRO 2018 Fall Institute | Sacramento | Eileen O'Hare-Anderson & Pilar Morin & Laura Schulkind

Oct. 11 **"A Mock Deposition of a CHRO"**
ACHRO 2018 Fall Institute | Sacramento | Eileen O'Hare-Anderson

Oct. 12 **"Put Your Investigation in the Best Light - Common Areas of Attack in Investigations"**
Association of Workplace Investigators (AWI) Annual Conference 2018 | Burlingame | Morin I. Jacob & Megan Lewis

Oct. 19 **"The Significant Impact of Janus v. AFSCME and S.B. 866 on Public Sector Labor Relations"**
Municipal Managers Association of Southern California (MMASC) Annual Conference | Indian Wells | Kevin J. Chicas

Oct. 22 **"MeToo: a Movement and a Moment"**
Women Leaders in Law Enforcement (WLLE) 2018 Annual Training Symposium | Palm Springs | Morin I. Jacob

Oct. 25 **"Labor and Employment Legal Update"**
County Counsels' Association of California (CCAC) Employment Law Conference | San Diego | Mark Meyerhoff

Oct. 25 **"U.S. Supreme Court Decision in Janus v. AFSCME - Impact and Tips for Counties"**
CCAC Employment Law Conference | San Diego | Mark Meyerhoff

Oct. 25 **"Conducting Workplace Investigations"**
Small School District Association (SSDA) | Sacramento | Kristin D. Lindgren

Oct. 26 **"Advanced Workplace Investigations"**
CCAC Employment Law Conference | San Diego | Stefanie K. Vaudreuil

Seminars/Webinars

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

Oct. 1, 2 **"FLSA Academy"**
Liebert Cassidy Whitmore Seminar | Piedmont | Richard Bolanos & Lisa S. Charbonneau

Oct. 11 **"The Rules of Engagement: Issues, Impacts & Impasse"**
Liebert Cassidy Whitmore | Fullerton | Kristi Recchia & T. Oliver Yee

Oct. 30 **"Bona Fide Plan Assessment & the Cash-In-Lieu Conundrum"**
Liebert Cassidy Whitmore | Webinar | Peter J. Brown

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

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

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

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

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. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.