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EDUCATION MATTERS

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

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LCW NEWS

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EMPLOYEE DISCIPLINE

Where District Charged Teacher With Immorality Or Unprofessional Conduct, Applicable Standard Is Whether The Person Is "Fit To Teach" And Triggers Analysis Of Morrison Factors.

Jurupa Unified School District employed Patricia Crawford as a guidance counselor at Rubidoux High School. In February 2017, School students protested in support of A Day Without Immigrants a nationwide boycott that sought to illustrate the economic impact of immigrants in the United States and to protest President Donald Trump's immigration policies. A quarter of the School's students boycotted attending school in support of the protest.

During the protest, Crawford sent an email to a colleague expressing disapproval of the protesting students. Later that day, another teacher made a public Facebook post blaming immigrants for overcrowding in the public school system and stating the day was better without the protesting students. Crawford commented on the post, "Cafeteria was much cleaner after lunch, lunch, itself, went quicker, less traffic on the roads, and no discipline issues today. More, please." Several other teachers made similar comments about how the protesting students' absence had positive effects, such as smaller classes, fewer "troublemakers," increasing a class's "cumulative GPA," and making instruction easier. Multiple students commented on the post to express their disappointment and disagreement with the teachers. Crawford responded to some of the students and ultimately told them to "Get over yourselves."

The Facebook post "went viral" on social media and gained national attention. The District put all the teachers involved in the Facebook post on administrative leave on the same day.

In the following days, the District received over 250 e-mail complaints about the Facebook post and comment thread, including 50 complaints that specifically referenced Crawford's comments. The School was vandalized with graffiti, and about 350 students staged a "walk-out" and demonstration to protest the post and the comments. At its next meeting, the District's Board took public comment about the Facebook post, during which eleven people specifically referred to Crawford. Additionally, numerous local and national media outlets contacted the District for comment about the incident.

In May 2017, the District informed Crawford it intended to dismiss her for "immoral conduct" and "evident unfitness for service" pursuant to Education Code section 44932, subdivision (a)(1) and (6).

Crawford appealed the District's decision to the Commission on Professional Competence. The Commission conducted a hearing and found Crawford's comments negatively impacted students, the school, the district and the community. The Commission concluded Crawford's conduct qualified as immoral conduct, rendered her "evidently unfit to serve," and justified her dismissal.

Crawford challenged the Commission's decision by requesting a trial court review the Commission's decision, a special petition known as a writ of mandate. The trial court denied the petition and found that the weight of the evidence supported the Commission's finding that Crawford engaged in immoral conduct and was evidently unfit to serve. Crawford appealed.

On appeal, the Court of Appeal first found substantial evidence supported the trial court's finding that the weight of the evidence supported the Commission's finding that Crawford's conduct was "immoral." The Court did not agree with Crawford's argument that her conduct did not fit into any of the three fixed categories of conduct that constitute "immoral conduct." A teacher's conduct is immoral when it negatively affects the school community in a way that demonstrates the teacher is unfit to teach.

The Court of Appeal pointed to *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, a case in which the California Supreme Court outlined seven factors courts should consider to determine whether unprofessional conduct demonstrated unfitness to teach: (1) the likelihood that the conduct may have adversely affected students or fellow teachers and the degree of such adversity anticipated, (2) the proximity or remoteness in time of the conduct, (3) the type of teaching certificate held by the party involved, (4) the extenuating or aggravating circumstances, if any, surrounding the conduct, (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct, (6) the likelihood of the recurrence of the questioned conduct, and (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. The Court of Appeal noted that the trial court applied the *Morrison* factors and the weight of the evidence supported the Commission's decision.

However, Crawford argued the trial court erred by assessing the *Morrison* because it failed to find whether she engaged in immoral conduct or was evidently unfit *before* turning to the *Morrison* analysis. However, the Court of Appeal held the trial court found the weight of the evidence supported the Commission's finding before its *Morrison* analysis.

Crawford also argued that applying the *Morrison* factors to assess her fitness to teach, and thus whether her conduct was immoral conduct conflated the issues. In her view, the Court of Appeal must make a *prima facie* finding of immoral conduct before addressing the *Morrison* factors. She further argued that immoral conduct should be defined as conduct that would be deemed "immoral" in an everyday sense, such as criminal activity and using profanity or racial epithets. The Court of Appeal disagreed.

Next, Crawford claimed that using the *Morrison* factors to determine whether her conduct was immoral would allow schools to dismiss educators for any statement they make or in response to the public's response to the employee's speech. The Court of Appeal stated that *Morrison* actually ensured that a permanent employee can be dismissed for immoral conduct only if the school showed the employee was unfit to teach. Additionally, the Court of Appeal found that considering the public's opinion of and response to an employee's conduct may be appropriate when assessing whether the employee is unfit to teach. Specifically, a teacher may be discharged when her conduct gained sufficient notoriety so as to impair her on-campus relationships. Here, the District dismissed Crawford because of the adverse effect of her comments on her professional reputation, her ability to counsel students effectively, and her relationship with the School generally.

Crawford next argued that the *Morrison* factors did not apply because *Morrison* was a case about a teacher's credential, whereas this case was about Crawford's dismissal. The Court of Appeal found this distinction immaterial.

The Court of Appeal reviewed each of the seven *Morrison* factors and found there was substantial evidence to support the trial court's ultimate finding that Crawford was unfit to teach and, in turn, the trial court's finding that Crawford engaged in immoral conduct under Education Code section 44932, subdivision (a)(1).

Finally, Crawford argued that, even if her conduct was immoral, her dismissal was an excessive penalty. The Court of Appeal concluded the Commission did not abuse its discretion in upholding the District's dismissal of Crawford. Because of the Commission's expertise, its decision as to the appropriate penalty for Crawford's immoral conduct is entitled to great deference, and the Court of Appeal declined to overturn its decision.

The Court of Appeal therefore affirmed the trial court's ruling denying Crawford's petition for writ of mandate.

Crawford v. Comm'n on Prof'l Competence of the Jurupa Unified Sch. Dist. (2020) __ Cal.App.5th __ [2020 WL 4593167].

LABOR RELATIONS

Advanced Degree Not Required To Qualify As Professional Employee Under HEERA; PERB Lacks Discretion To Require Proof Of Majority Support If The Number Of Employees To Be Added Was Less Than 10 Percent Of Bargaining Unit.

The University of California had various bargaining units for its employees. The System-wide Technical Unit included nonsupervisory employees who provide technical support services for academic and scientific research throughout the University system. In 2009, the University began an initiative to review and revise job classifications for its unrepresented employees. The initiative classified jobs into one of three categories: "Operational and Technical," "Professional," and "Supervisory & Management." The professional category, which included the systems administrator classifications, was described as including "positions which require a theoretical and conceptual knowledge of the specialization. Problems are typically solved through analysis and strategic thinking. At more senior levels, incumbents may independently manage or administer professional or independent programs, policies and resources."

By 2016, twelve University locations implemented the reclassification, which resulted in 325 employees being reclassified as systems administrators.

The University Professional and Technical Employees, CWA Local 9119 filed a unit modification petition to add employees in the systems administrator classifications to the Unit. The Petition alleged UPTE represented approximately 3,900 employees in the Unit, and there were approximately 290 systems administrators. Accordingly, the Petition indicated the size of the Unit would only increase by 7.4 percent, which is below the threshold requiring proof of majority support. PERB did not require UPTE to provide proof of majority support in connection with the petition.

The University filed a response to the Petition and argued the systems administrator classifications were professional classifications and did not share a community of interest with the Unit. Specifically, the University argued the Unit consisted of "technical employees" who were nonprofessionals, whereas the systems administrator classifications were within the University's "professional" category. The University further argued PERB must require UPTE to demonstrate proof of majority support by the unrepresented systems administrators subject to the unit modification petition.

UPTE filed a reply and argued the University's classifications were irrelevant, the Higher Education Employee Employer Relations Act provided a statutory definition of "professional" that excluded systems administrators, and the systems administrators shared a community of interest with Unit members. UPTE further argued PERB should not deviate from its prior decisions holding that it may not require proof of support for unit modification petitions that seek to increase the size of a bargaining unit by less than 10 percent.

The supervising regional attorney for PERB issued an order to show cause as to why the Petition should not be granted. PERB first concluded UPTE was not required to provide proof of support because it sought to add less than 10 percent of its bargaining unit. Second, PERB concluded systems administrators did not "possess advanced knowledge usually acquired by a specialized or advanced degree, as opposed to a general academic education" and "therefore cannot be defined as professional." Finally, PERB found a community of interest analysis was not required but, in any event, several factors demonstrated such a community.

The University filed a response to the order to show cause. The University argued that once the reclassification was complete at all of its campuses, the total number of employees performing the work of systems administrators would exceed 10% of the total number of employees in the Unit. The University also argued even if systems administrators did not meet the statutory definition of "professional," they should be recognized as professionals with a distinct community of interest from employees in the Unit. The University argued an "administrative professionals' unit" would be more appropriate than the Unit. The University further argued PERB should hold a hearing to assess whether systems administrators share more of a community of interest with administrative professionals than with employees in the Unit.

UPTE filed a reply to the University's response to the order to show cause. PERB's supervising regional attorney issued an administrative determination, which affirmed its prior conclusions and granted the unit modification petition. The University appealed, and UPTE filed a response opposing the appeal.

PERB affirmed the administrative determination. PERB concluded the administrative determination reasonably relied on UPTE's estimate as to number of affected employees, and it did not need an evidentiary hearing. PERB concluded systems administrators shared a community of interest with Unit employees. PERB also concluded employees in the systems administrator classification did not meet the statutory definition for "professional employees" because they were not required to have an advanced degree to perform their job.

In order to seek judicial review of PERB's decision, the University refused to bargain over the terms and conditions of employment for systems administrators. The UPTE filed an unfair practice charge. PERB concluded the University violated HEERA and ordered the University to cease and desist from refusing to bargain and take certain actions to effectuate HEERA. The University subsequently filed a petition in the Court of Appeal asking it to overturn PERB's decisions.

The University argued systems administrators should not be included in a unit of technical employees for three reasons: (1) they fell within the definition for "professional" employees under HEERA and should be separate from "nonprofessional" employees; (2) even if they did not meet the "professional" definition under HEERA, they were administrative professionals who should not be included in the same unit as technical employees; and (3) they did not share a community of interest with other Unit classifications.

The Court of Appeal reviewed the definition of "professional employee" found in HEERA. At issue is whether the systems administrator classification meets the fourth requirement in this definition, i.e., requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital…" The University argued the "professional" definition did not require a specific degree, and PERB erred by not investigating the knowledge and experience possessed by employees in the systems administrator classification.

The Court of Appeal agreed with the University that an advanced degree was required to be classified as a "professional employee." However, the University did not identify any advanced knowledge nor identify any tasks performed by systems administrators that are based on such advanced knowledge. Rather, the record demonstrated systems administrators applied a similar type of knowledge as utilized by other job classifications in the Unit. In the absence of conflicting evidence, PERB was not obligated to conduct a hearing.

Furthermore, PERB's finding that a community of interest existed was supported by substantial evidence. The job descriptions reflected a similarity in skills and duties between systems administrators and employees in the Unit. Neither systems administrators nor other Unit classifications required a bachelor's degree, and systems administrators had identical educational requirements to other classifications in the Unit. The record also indicated at least some systems administrators shared common supervision with Unit employees. As a whole, the Court of Appeal could not conclude PERB abused its discretion when it determined systems administrators could appropriately be included in the Unit. Nor was UPTE required to create a new unit rather than add employees to an existing unit.

The Court of Appeal also concluded PERB properly counted the number of systems administrators at the time UPTE filed the Petition, and PERB's holding that it lacked discretion to require proof of majority support from UPTE was not clearly erroneous because it was supported by legislative history and did not violate HEERA.

Ultimately, the Court of Appeal denied the University's request to overturn PERB's decision.

Regents of Univ. of California v. Pub. Employment Relations Bd. (2020) 51 Cal.App.5th 159.

GOVERNANCE

State Law Requires Public Universities To Supplement Environment Impact Reports When Making Discretionary Decisions To Increase Enrollment.

The Regents for the University of California adopted a development plan in 2005 to guide the University of California Berkeley campus through 2020 and certified a program Environmental Impact Report for the development plan, as required by the California Environmental Quality Act. The development plan and the EIR projected that, by the year 2020, the University's student enrollment would increase by 1,650 students the University would add 2,500 beds for students.

Save Berkeley, California nonprofit formed to improve Berkeley's quality of life and protect its environment, alleged that, beginning in 2007, the University made a series of discretionary decisions to increase enrollment well beyond the projection analyzed in the EIR. Save Berkeley alleged the University approved increases, without formal decisions, public notice, or further environmental review, in every two-semester period since 2007. By April 2018, the University's actual student enrollment had grown by a total of approximately 8,300 students—a five-fold increase over the 2005 projection.

In 2018, Save Berkeley filed a petition in a trial court to challenge the University's decisions to increase enrollment without further CEQA review. Save Berkeley argued the enrollment increases caused significant environmental impacts that were not analyzed in the EIR, including increased use of off-campus housing by University students, displacement of tenants and a consequent increase in homelessness, more traffic, and increased burdens on the City of Berkeley's public safety services. Save Berkeley argued CEQA required the University to prepare an EIR to analyze these impacts and to identify and adopt mitigation measures to reduce them. Save Berkeley also alleged it learned of the University's decisions in October 2017, and it could

not have discovered the decisions earlier through the exercise of reasonable diligence. Save Berkeley asked the trial court for a declaration that the University's policy of increasing student enrollment without environmental review violated CEQA and for an order to compel the University to prepare and certify an EIR.

The University argued Save Berkeley did not state a cause of action for violation of CEQA because the enrollment increases are not a CEQA "project" or a project change requiring subsequent environmental review. The University also argued Save Berkeley's claims were barred by the applicable statute of limitations or moot.

The trial court agreed with the University and concluded Save Berkeley's petition was barred by the statute of limitations to the extent it challenged the adequacy of the EIR. Additionally, the trial court held that informal, discretionary decisions to increase student enrollment beyond that anticipated in the development plan did not constitute project changes necessitating CEQA review. Accordingly, the trial court dismissed the dismissed the case, and Save Berkeley appealed.

On appeal, Save Berkeley argued: (1) it stated a cause of action for violation of CEQA when it alleged the University substantially increased enrollment without analyzing the environmental impacts of those decisions and (2) the trial court's construction of CEQA requirements was inconsistent with the plain language of the statute, its legislative history, and long standing CEQA principles.

The Court of Appeal first examined the CEQA requirements. CEQA required a public agency that proposed to undertake an activity potentially within CEQA's scope to follow a three-step process. First, the agency must decide if the activity is a "project" i.e., an activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Second, if it is a project, the agency must decide whether the project is exempt from CEQA review. Third, if no exemption applied and the project may have a significant environmental effect, the agency must prepare an EIR before approving the project.

The purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment, to list ways in which the significant effects of such a project might be minimized, and to indicate alternatives to such a project.

Here, the Parties did not dispute the 2005 EIR cannot be challenged because the statute of limitations expired. Instead, Save Berkeley alleged the University changed the original project and that the changes had significant environmental effects that were not examined in the EIR. Therefore, the question before the Court of Appeal was whether the alleged changes to the 2005 project—the decisions to increase enrollment beginning in 2007—required some form of environmental review under CEQA.

The Court of Appeal accepted as true that enrollment increases caused significant environmental impacts that were not analyzed in the EIR, and the University failed to analyze these impacts in a CEQA document and failed to adopt mitigation measures to reduce or avoid them. Based on this, Save Berkeley adequately pled that the University made substantial changes to the original project that trigger the need for a subsequent or supplemental EIR.

In response, the University argued that, based on California Public Resources Code section 21080.09, it was exempt from analyzing the changed increases in enrollment unless or until it approved a physical development project. The University argued that absent a development plan or a "physical development project," the statute exempted it from analyzing enrollment decisions in any kind of EIR.

The Court of Appeal disagreed with the University. The Court of Appeal held that the statute does not exclude enrollment increases from the broad definition of a "project," and the University must construe its project broadly to capture the whole of the action and its environmental impacts. Furthermore, the Legislature recognized that both enrollment levels and physical development are related features of campus growth that must be mitigated under CEQA. The statute did not say that enrollment changes need only be analyzed in an EIR for a development plan or physical development.

Ultimately, the Court found the University undercut the fundamental premise of CEQA because it did not provide advance notice of its decisions, CEQA analysis, or mitigation of the environmental issues related to its decisions to expand student enrollment. While the Court of Appeal found Public Resources Code section 21080.09 was not ambiguous, it also found the statute's legislative history did not support the University's interpretation.

The Court of Appeal also rejected the University's argument that the Court's decision would require the University to provide annual CEQA review of enrollment levels and would create enrollment cap. The Court explained the University's options to avoid annual CEQA review and denied that requiring the University to comply with CEQA created an enrollment cap.

The Court of Appeal reversed the trial court's decision and remanded the case for further consideration.

Save Berkeley's Neighborhoods v. Regents of Univ. of California (2020) 51 Cal. App. 5th 226.

RETIREMENT

CalSTRS Was Not On Inquiry Notice Of A Reporting Error That Led To An Overpayment Of Benefits To A Retiree Until It Began An Audit Of His Benefits.

Ernest Moreno served as president of East Los Angeles College in the Los Angeles Community College District. In 2006, he entered into a contract with the District to be the interim president of Los Angeles Mission College for the 2006-2007 school year. The contract entitled Moreno to a one-time $25,000 payment for the additional work and allowed Moreno to elect when to receive the payment. The District renewed the contract with Moreno for the 2007-2008 school year, and he chose to take both one-time payments, totaling $50,000, during the 2007-2008 school year.

In September 2008, Moreno met with a benefits counselor employed by the District but trained by CalSTRS, to discuss retirement. When Moreno learned the amount of his projected final, one-year compensation reported to CalSTRS, he told the counselor it should be $50,000 higher. The counselor told Moreno to contact the District to correct any reporting error. Moreno again met with the counselor in February 2009, at which time the counselor confirmed Moreno's one-year compensation increased by $50,000. Moreno also met with a CalSTRS benefits counselor in 2010 and 2011, and they reviewed a benefit counseling preparation sheet showing Moreno's one-year compensation as the higher amount. Moreno retired in August 2011.

In 2012, CalSTRS's Compensation Review Unit received a report from its Information Technology Services Unit containing the names of retired members with high salaries, high increases in salary, or high special compensation. Moreno's name was on this report.

In December 2014, the Compensation Review Unit selected Moreno for audit. Based on the Compensation Review Unit's review, CalSTRS determined the District incorrectly reported the additional $50,000 Moreno by crediting this amount to Moreno's defined benefits account instead of his defined benefits supplement account.

CalSTRS notified Moreno of the discrepancy and necessary adjustments in February 2015. Moreno appealed CalSTRS's decision, and an administrative law judge denied the appeal.

Moreno filed a petition in a trial court asking the court to bar CalSTRS from correcting the overpayment. Moreno argued CalSTRS's correction of Moreno's retirement benefit and collection of overpayment were barred by the statute of limitations in Education Code section 22008, subdivision (c) and equitably estopped. Moreno did not challenge the accuracy of CalSTRS's determinations. The trial court denied Moreno's petition, finding that CalSTRS did not have notice of the reporting error until the Compensation Review Unit's audit in December 2014. Moreno appealed.

On appeal, Moreno argued CalSTRS was barred from adjusting his retirement benefits and collecting the overpayment because the statute of limitations found in Education Code section 22008, subdivision (c). He argued CalSTRS was on inquiry notice of the reporting error when Moreno met with the benefits counselor in 2008 or, in the alternative, when Moreno's name appeared on the list generated by the CalSTRS Information Technology Services Unit in 2012.

Education Code section 22008 established a three-year limitations period in connection with "payments into or out of the retirement fund for adjustments of errors or omissions with respect to the Defined Benefit Program or the Defined Benefit Supplement Program…"

However, the Court of Appeal agreed with the trial court's rejection of this argument. While the counselor may have been on notice that the District adjusted its reporting of Moreno's salary, this did not place CalSTRS on inquiry notice that the amount reported by the District in 2009 was incorrect. The Court of Appeal found the same true of the 2010 and 2011 meetings with a different CalSTRS employee. Moreno did not identify any discussion during those meetings that would put CalSTRS on inquiry notice that there was anything questionable about the District's reporting of his compensation.

Moreno also argued CalSTRS was on inquiry notice when Moreno's name appeared on the list generated by the CalSTRS Information Technology Services Unit in 2012. But there is no evidence Moreno appeared on the list for any reason other than being a high-salary earner. CalSTRS completed the audit and notified Moreno about the overpayments in 2015, within the three-year limitations period.

Finally, Moreno argued CalSTRS was solely responsible for the alleged overpayments. But the record did not support his assertion. According to the record, the District revised its compensation report based on urging by Moreno and reported the incorrect increased compensation to CalSTRS.

Therefore, the Court of Appeal concluded the evidence supported the trial court's determination that CalSTRS was not on inquiry notice of the overpayments to Moreno before December 2014.

Moreno further argued CalSTRS must be equitably estopped from adjusting his retirement benefits and collecting the overpayments. However, the Court of Appeal held that Moreno's attempt to invoke equitable estoppel failed because CalSTRS was not aware that it incorrectly calculated Moreno's retirement benefits until at least December 2014 when CalSTRS audited Moreno's retirement benefits. Equitable estoppel did not apply unless CalSTRS was on notice before December 2014, which it was not. Therefore, CalSTRS was not equitably estopped from adjusting Moreno's retirement benefits and collecting the overpayment.

Moreno v. California State Teachers' Ret. Sys. (2020) 52 Cal. App.5th 547.

TITLE IX

Student Stated Viable Gender Bias Claim Against University By Alleging University Faced Contemporaneous Pressure From Department Of Education And The University Had A Pattern Of Gender-Based Decision Making.

David Schwake was a graduate student pursuing a Ph.D. in microbiology at Arizona State University in the summer and fall of 2014. For over three years, he worked in a campus lab as a student researcher alongside other Ph.D. students, including a student who made a sexual misconduct complaint against him. Schwake and the Complainant had dozens of romantic encounters between February 2013 and July 2014.

In August 2014, the University sent Schwake a letter that notified him of the complaint against him and three pending disciplinary charges for Student Code violations, including unwanted or repeated significant behavior and sexual misconduct. A University employee coordinating the University's response suggested Schwake prepare evidence and witnesses while the University investigated. Schwake provided a written account of the allegations and included text messages that he argued confirmed the sexual activity between him and the Complainant was consensual. Schwake stated several students and staff members could corroborate his account.

In early September 2014, the University sent Schwake a second letter stating it found him responsible for the disciplinary charges and immediately suspending him until Fall 2017 unless he requested a hearing to appeal the decision.

Shortly thereafter, an associate professor loudly discussed details of Schwake's disciplinary case with a group in his office with the door open and told the group the University "convicted Schwake of sexual assault and suspended him." The associate professor also discussed the case in his course throughout the semester and disclosed confidential, graphic details about the alleged sexual misconduct.

In early October 2014, Schwake's lawyer formally requested an appeal hearing on the University's decision. In mid-October, the University removed Schwake from the lab after the Complainant obtained a state court harassment injunction against him.

On December 3, 2014, Schwake and his lawyer met with the Associate Dean of Students. Schwake's lawyer and the Dean reached a settlement that allowed Schwake to graduate by changing Schwake's punishment from suspension to certain campus restrictions. The Dean explained that, as a result, Schwake was not entitled to a hearing. When Schwake protested, the Dean stated the decision was final, and the University had no appeal process available. When Schwake asked the Dean whether he could file a complaint against the complainant, the Dean denied telling Schwake on multiple prior occasions that he could not do so until after the disciplinary hearing because it would be seen as retaliatory. The Dean then told Schwake that filing his own complaint could lead to further investigations and additional disciplinary sanctions, including degree revocation.

The following day, Schwake received a letter with the University's final decision, outlining the following restrictions: a three-year restriction on accessing certain campus buildings, including the lab; a three-year ban on holding any paid or volunteer position at the University, including a post-doctoral position for Spring 2015; and a prohibition on any contact with the Complainant with no end duration.

Schwake sued in April 2015, seeking $20 million in damages as well as declaratory and injunctive relief. He asserted claims against University officials for alleged constitutional due process violations. He also asserted a Title IX claim against the University. The trial court granted the University's motion to dismiss the lawsuit and dismissed Schwake's claims with prejudice. Schwake appealed.

To state a Title IX claim, a plaintiff must plead that: (1) the defendant educational institutional received federal funding; (2) the plaintiff was excluded from participation in, denied the benefits of, or subjected to discrimination under any education program or activity, and (3) the latter occurred on the basis of sex. Here, Schwake alleged the University received federal funding. Thus, the Court

of Appeals focused on the second and third elements. Schwake argued the University discriminated against him on the basis of sex during the course of the sexual misconduct disciplinary case against him.

While the Court of Appeals noted that other circuit courts fashioned doctrinal tests for sex discrimination claims in this context (the Second Circuit's "erroneous outcome" and "selective enforcement" tests or the Sixth Circuit's "deliberate indifference" test), it had not expressly adopted any of the tests. Instead, the Court of Appeals focused whether the alleged facts, if true, raised a plausible inference that the University discriminated against Schwake on the basis of sex.

To survive a motion to dismiss, Schwake "need only provide enough facts to state a claim to relief that is plausible on its face." Sex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed. Here, the Court of Appeal found the trial court ignored many of the allegations in Schwake's complaint that were relevant to the sufficiency of the Title IX claim.

First, Schwake argued that the University faced significant pressure that affected how it handled sexual misconduct complaints around the time of the complaint made against him. He pointed to a "Dear Colleague" letter that the Department of Education sent in 2011 regarding the handling of sexual misconduct complaints. Schwake also pointed to his allegation that in April 2014 the Department initiated an investigation of the University for possible Title IX violations in the University's handling of sexual misconduct complaints. The Court of Appeal held it was reasonable to infer that such a federal investigation placed tangible pressure on the University. Schwake also alleged the University had a pattern of gender-based decision-making against male respondents in sexual misconduct disciplinary proceedings that make the inference in his case plausible. Although Schwake did not include significant details about this alleged pattern, this fact did not render Schwake's allegation conclusory or insufficient. Instead, the Court of Appeals was satisfied that Schwake's allegations of contemporaneous pressure and gender-based decision-making establish background indicia of sex discrimination relevant to his Title IX claim.

Although Schwake alleged background indicia of sex discrimination, he "must combine those allegations with facts particular to his case to survive a motion to dismiss."

The Court of Appeals held Schwake met this burden. First, Schwake drew the trial court's attention to the allegations concerning the associate professor's statements following the University's initial decision against Schwake. The associate professor made these comments despite the fact that Schwake had the right to appeal the University's decision, thereby ensuring that one version of the sexual misconduct disciplinary case would be the publicly known version. This alleged conduct reflects an atmosphere of bias against Schwake during the course of the University's disciplinary case. The statements are relevant here because the associate professor knew privileged and confidential information about the case shortly after the University made a preliminary decision, despite not being a decision-maker. Second, Schwake drew the trial court's attention to the Dean's treatment of him after Schwake's lawyer and the Dean fashioned a new punishment for Schwake that did not involve suspension. Despite Schwake's repeated protests, the Dean refused to permit Schwake to appeal the punishment and the University's underlying finding of responsibility on the sexual misconduct Student Code violations. In modifying the punishment, the inference may be drawn that the University sought to show that it took sexual misconduct complaints seriously by punishing Schwake while simultaneously insulating the finding of responsibility from scrutiny in light of the University's policy limiting the availability of an appeal hearing. The Dean's refusal to permit Schwake to file a harassment complaint against the Complainant is also probative of gender bias. The Dean's refusal to permit Schwake to pursue a complaint against the Complainant is consistent with the allegations that the University treated male respondents in sexual misconduct disciplinary proceedings differently because of the pending Department investigation into the University's handling of sexual misconduct complaints.

Finally, Schwake's allegations of the University's one-sided investigation support an inference of gender bias. According to Schwake, the University (1) refused to provide him with any written information about the complainant's allegations against him and only orally summarized them; (2) failed to consider his version of the alleged assault or to follow up with the witnesses and evidence he offered in his defense; (3) promised him that it would only consider "one accusation at a time" but then suspended him based on additional violations of the Student Code to which he was not given an opportunity to respond; and (4) ultimately found him responsible for the charges without any access to evidence or considering his exculpatory evidence.

Considering the combination of Schwake's allegations of background indicia of sex discrimination along with the allegations concerning his particular disciplinary case, the Court of Appeal concluded that sex discrimination is a plausible explanation for the University's handling of the sexual misconduct disciplinary case against Schwake, and his Title IX claim may proceed beyond the motion to dismiss stage.

Schwake v. Arizona Bd. of Regents (9th Cir. 2020) 967 F.3d 940.

LITIGATION

Student Entitled To Attorney Fees Because Action Held University Accountable For Its Failure To Comply With Its Own Policies And Procedures For Disciplinary Proceedings And Conferred A Benefit On All Students Attending The University.

The University of California Santa Barbara admitted John Doe as a freshman for the 2016-2017 academic year. Before the academic year began, Doe was in a verbal argument with his girlfriend, Jane Roe, in their home city of San Diego. Weeks later, Jane posted on social media a video recording of the argument in which it appeared that Doe hit her.

A student at the University saw the post and notified the University's Office of Student Affairs, which then forwarded the information to the campus police department. A detective from the campus police department drove to San Diego to arrest and transport Doe, age 17, to a juvenile detention facility in San Diego. The same day, the University issued an interim suspension order and had it delivered to Doe. The order barred him from entering the University's campus on the ground that he posed a threat to the safety of the campus community. He was also notified the University's Title IX office would investigate the allegation of relationship violence. The interim suspension was imposed pursuant to the University's policies governing student conduct and the University's Policy on Sexual Violence and Sexual Harassment. These policies stated the University will restrict a student only to the minimum extent necessary when there is reasonable cause to believe that the student's participation in University activities or presence at specified areas of the campus will lead to physical abuse, threats of violence, or conduct that threatens the health or safety of any person on University property.

The juvenile court found Doe was not a threat to anyone, and the district attorney eventually dismissed all charges against Doe. The University held a hearing regarding the interim suspension, but declined to remove the order. Doe remained barred from campus, campus housing, attending classes (including online classes), and participating in University activities.

In October 2016, Doe filed a lawsuit against the University for termination of the interim suspension and reinstatement as a student at the University. The Parties litigated the matter in trial court and the Court of Appeal until March 2017 when the trial court granted a preliminary injunction against the University. University policies state it must complete a Title IX investigation within 60 business days and the entire Title IX process, including all administrative appeals, within 120 business days from the date the University received the report of a potential Title IX violation. The trial court found the University's investigation extended far beyond the time period which, under its policies, the entire Title IX process, including administrative appeals, should have concluded. Even after more than 200 days, the University had only interviewed Doe. The trial court found this delay "unreasonable and arbitrary," and the interim suspension "particularly egregious." Furthermore, the University failed to show it considered less restrictive interim measures.

The University reinstated Doe as an enrolled student for the spring quarter of 2017, but the Parties continued to litigate the matter.

The University completed its Title IX investigation in November 2017 and found Doe responsible for dating violence. After a series of administrative appeals, the University overturned this decision in June 2018 and declined to pursue the administrative proceedings any further.

Doe filed a motion for an award of attorney's fees under the private attorney general doctrine codified in California Code of Civil Procedure section 1021.5. Doe's counsel sought $265,508, representing fees incurred from the inception of the case (August 2016) through the trial court's March 2017 order issuing a preliminary injunction against Doe's interim suspension. Doe's counsel requested the fees be increased by a multiplier of 1.6.

Following a hearing, the trial court denied the motion and concluded Doe failed to satisfy two of the four criteria required for an award of fees. Specifically, the trial court concluded that Doe failed to demonstrate that his action conferred a significant benefit on the general public or a large class of persons, and it was questionable whether the necessity and financial burden of private enforcement were such as to make the award appropriate.

On appeal, Doe argued the trial court applied the wrong standard in denying his motion for attorney's fees and was misled by the University's counsel as to the impact and significance of his litigation.

To obtain attorney's fees under Code of Civil Procedure section 1021.5, the moving party must establish that: (1) it is a successful party in an action; (2) the action resulted in the enforcement of an important right affecting the public interest; (3) the action has conferred a significant benefit on the general public or a large class of persons; and (4) the necessity and financial burden of private enforcement are such as to make the award appropriate.

Here, the Parties did not dispute Doe was the successful party. Nor did the parties dispute that Doe's litigation enforced an important right. However, the trial court concluded Doe failed to satisfy the significant benefit

element because the relief sought and obtained "was inherently personal in nature, involving the termination of his interim suspension and reinstatement as an active, full-time student pending the conclusion of the investigation." In response, Doe argued his action effectuated important constitutional and statutory due process rights, and conferred a benefit on all students attending the University. The Court of Appeal agreed with Doe.

The University's written policies required prompt and timely investigation of complaints for sexual harassment and sexual violence. The trial court found the University failed to follow these policies and procedures when it issued the interim suspension and violated Doe's constitutional right to due process. Doe's action enforced a student's right to have the University comply with its own policies governing the time limits for resolving Title IX complaints and investigations. It confirmed the availability of injunctive relief to prohibit an interim suspension where the University unreasonably delayed completion of a Title IX investigation, failed to consider less restrictive measures, and concealed critical evidence utilized in issuing the interim suspension order, all in violation of University policies.

The Court of Appeal held all students benefit when the trial court required the University to follow its own policies and procedures. The trial court had additional evidence showing Doe's case specifically influenced another student to file her own complaint against the University with the U.S. Department of Education alleging the University violated its policies when it placed her on an interim suspension prolonged by a lengthy, delayed Title IX investigation.

The final element required for an award of fees under Code of Civil Procedure section 1021.5 is that the "necessity and financial burden of private enforcement ... are such as to make the award appropriate ...." The trial court concluded it was unnecessary to decide whether Doe established this element because he failed to show that the litigation satisfied the significant benefit element. Nevertheless, the trial court noted it was "questionable whether [he] has met [the necessity and financial burden] requirement."

In determining the financial burden on litigants, courts focus not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. Doe neither expected to receive nor received any monetary award for his litigation contesting the interim suspension, yet he incurred significant financial costs.

Ultimately, the parties did not dispute that Doe had no ability to pay for legal representation. Without representation, the interim suspension in this case would have resulted in a de facto expulsion, in violation of the University's policies. Considering these circumstances, the Court of Appeal found necessity and financial burden of private enforcement made an award of attorney's fees appropriate.

Finally, the University argued that the award of fees must be significantly reduced. The Court of Appeal determined the appropriate amount of fees is a distinct question from whether a fee award is justified, so it sent the case back to the trial court to determine the appropriate amount of fees and the amount of the multiplier, if any.

Doe v. Regents of Univ. of California (2020) 51 Cal. App. 5th 531.

FIRM VICTORIES

Service In County's Work Release Program Is Not Employment Under The FEHA.

LCW Partner **Jesse Maddox** and Associate Attorney **Sue Ann Renfro** recently obtained a victory for Fresno County in a published Fair Employment and Housing Act (FEHA) case.

Ronald Talley is physically disabled and has to wear a foot brace to walk. He pleaded nolo contendere, or no contest, to a criminal offense. Instead of serving his 18-day sentence in Fresno County Jail, Talley was eligible to participate in the Adult Offender Work Program (AOWP) administered by Fresno County's Probation Department. Talley was injured while performing work in the AOWP and received workers' compensation benefits. Talley then sued Fresno County alleging, among other things, that the County violated the FEHA by failing to both accommodate his physical disability and to engage in the interactive process with him.

Because the FEHA generally protects employees only, Talley's claims rested on the theory that AOWP participants are County employees for the purposes of the FEHA. However, the County argued that because Talley was not paid for his time in the AOWP, he was not an employee under the FEHA. The County also argued that Talley's non-FEHA claim was barred by workers' compensation exclusivity. The trial court agreed and entered judgment in favor of the County on all of Talley's claims. Talley appealed.

On appeal, the California Court of Appeal affirmed the trial court's decision to enter judgment in favor of the County on all of Talley's claims. The Court of Appeal found that being paid is an essential condition to establish employee status under the FEHA. Because Talley did not receive direct or indirect pay, he was not an employee for purposes of the FEHA.

Talley v. County of Fresno (2020) __ Cal.App.5th __ [2020 WL 3888093].

NOTE:

This published decision clarified who is considered an employee under FEHA so that employers can better understand when workers who do not fit within the traditional category of a paid employee are covered by FEHA. Because the County prevailed at the appellate level, it was awarded its costs on appeal.

County Wins Bonus Pay Grievance.

LCW Partner **Adrianna Guzman** and Associate Attorney **Emanuela Tala** obtained a victory for a county in a grievance proceeding.

The grievants were clerks in the county's Health Services Department. Beginning sometime after 2014, the grievants worked with, and trained employees in the Health Information Associate classification (HIA). While the county paid HIA employees a higher pay rate, the HIAs did substantially the same work as the grievants, with the exception of coding medical procedures.

Pursuant to the Memorandum of Understanding (MOU), the grievants submitted written requests to the county for an Additional Responsibility Bonus. Under the MOU, permanent, full-time employees are entitled to additional compensation for performing additional responsibilities beyond those typically assigned to the employee's class if the additional duties are those performed by a higher class, or in connection with a special assignment. After the county denied their requests, the grievants filed grievances.

The arbitrator noted that there was no dispute that with the exception of medical coding, the grievants did the same tasks as the HIAs, at least for part of the day. However, the grievants' duties were fully consistent with their classification as they were not performing the level-defining duties of the HIAs. While the arbitrator noted it might seem unfair that HIAs were paid more than the grievants for the same work, the county did not violate the MOU.

NOTE:

To prevent similar problems or fair pay complaints, pay all job classifications equal pay for equal work. LCW attorneys conduct fair pay audits to assist agencies with these issues.

County Nurse's Differential Pay Grievance Was Untimely.

LCW Partner **Adrianna Guzman** and Associate Attorney **Ronnie Arenas** won a grievance arbitration for a county. The grievance challenged the county's decision to deny various pay differentials.

The grievant, a registered nurse, requested that the county award her acting, weekend, and nightshift differential pays for shifts worked between April 2012 and May 2014. While the Memorandum of Understanding (MOU) provided that nurses were entitled to an additional $2.25 per hour for working Friday, Saturday, or Sunday nights, the grievant's unit was only paid differentials for Saturday and Sunday nights.

The county audited the grievant's timecards and offered to resolve any errors it made between 2012 and 2014. However, the grievant rejected the offer and requested a 14-year audit of her timecards between 2000 and 2014.

The county argued that because the original grievance only alleged errors between 2012 and 2014, the nurse could not add the time between 2000 and 2011. The county also argued that the grievance was untimely because the MOU required her to file a formal grievance within 10 business days of the MOU violation. Finally, the county argued that the doctrine of laches barred the grievance because the county was prejudiced by the grievant's delay. By the time the grievance was heard, the county could no longer ascertain when grievant's shifts had occurred because those records had been destroyed under the county's document retention policy. Ultimately, the arbitrator agreed with the county's arguments and concluded that the grievance was untimely.

NOTE:

In evaluating a grievance, always check whether the grievance is timely filed under the applicable grievance procedure. As this victory shows, LCW was able prove that the County was prejudiced by both the grievant's delay and her attempt to enlarge the scope of the grievance.

DUE PROCESS - PROBATION

Civil Service Rules Prevented The Extension Of A Sheriff Deputy's Probationary Period.

Christopher Trejo began work as a deputy sheriff with the Los Angeles County Sheriff's Department (Department) in February 2014. Pursuant to the County's Civil Service Rules (Rules), deputy sheriffs serve 12-month probationary periods before promotion into a permanent position, based on the employee's performance of the essential duties of the position. The Rules also provide that a probationary period shall not last more than 12 months from the date of appointment.

However, the County may stop the 12-month clock if the employee is absent from duty. The Rules allow the County to then recalculate the length of time remaining on probation "on the basis of actual service exclusive of the time away." The Rules define "actual service" as "time engaged in the performance of the duties of a position or positions including absences with pay."

In June 2014, the Department investigated whether Trejo violated the Department's use-of-force policies. Pending the investigation, Trejo was relieved of duty and reassigned to administrative duties in the records unit. In this assignment, Trejo did not perform all of the essential duties of a deputy sheriff.

In August 2014, the Department extended Trejo's probationary period because he was relieved of peace officer duties during the investigation. The Department informed Trejo that his probationary period would be recalculated upon his return to assigned duty as a deputy sheriff.

In January 2016, the Department released Trejo from probation. Although the Department's letter informed Trejo of certain appeal rights, it did not notify Trejo of any rights to a *Skelly* hearing or other due process procedures because it did not consider Trejo to be a permanent employee. Following a name-clearing hearing, the Department issued a decision confirming Trejo's termination.

Trejo filed a request for a hearing before the Civil Service Commission, asserting he was a permanent employee at the time of his termination. The Commission determined that Trejo's petition was untimely and made no ruling on whether he was entitled to pre-termination rights.

Trejo then filed a petition for writ of mandate in superior court against the County, claiming that the Department unlawfully extended his probationary period. The trial court granted the petition and ordered the County to set aside Trejo's dismissal on the grounds that he was a permanent employee entitled to pre-disciplinary rights.

The County appealed, claiming that the trial court: (i) relied on an erroneous interpretation of the Rules; and (ii) lacked jurisdiction because Trejo failed to exhaust his administrative remedies. The Court of Appeal disagreed on both counts.

First, the Court of Appeal examined the plain language of the Rules and held that the time Trejo spent on administrative duty in the records unit was "actual service," and therefore, Trejo became a permanent employee 12 months after his probationary period began. The court stated that Trejo's circumstances were different from those who are entirely relieved of duty and placed on paid administrative leave.

Second, the court concluded that Trejo did not fail to exhaust all administrative remedies available to him because the available grievance procedure excluded appeals of probation extensions, and claims regarding the interpretation of the Rules.

For these reasons, the court affirmed the trial court's order to set aside Trejo's dismissal. The court provided Trejo backpay from the date of his dismissal and all applicable pre-disciplinary rights as a permanent employee.

Trejo v. County of Los Angeles (2020) 50 Cal.App.5th 129.

NOTE:

Employers should closely review all applicable rules and procedures in determining whether an employee has achieved permanent status. Courts tend to narrowly interpret any rule that allows an employer to extend an employee's probationary period.

DISCRIMINATION

USSC Holds That Title VII Protects Gay And Transgender Employees.

In *Bostock v. Clayton County*, the U.S. Supreme Court (USSC) considered three similar cases regarding whether Title VII's non-discrimination protections apply to gay or transgender employees. In each case, the employee sued the employer under Title VII of the Civil Rights Act of 1964 alleging unlawful discrimination on the basis of sex.

In the first case, Gerald Bostock worked as a child welfare advocate for Clayton County, Georgia. After Bostock began participating in a gay recreational softball league, influential community members made disparaging comments about his sexual orientation. Not long after, the county fired Bostock for conduct "unbecoming" of a county employee.

In the second case, Donald Zarda worked as a skydiving instructor at Altitude Express in New York. A few days after Zarda mentioned he was gay, the company fired him.

In the third case, Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When Stephens first started working at the funeral home, she presented as male. Two years into her service with the company, Stephen's clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. After Stephens wrote a letter to her employer explaining that she planned to live and work full-time as a woman, the funeral home fired her, telling her "this is not going to work out."

Title VII provides that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." Accordingly, the USSC evaluated whether discrimination because of someone's sexual orientation or gender identity was discrimination on the basis of sex.

The USSC concluded that an employer who fires an individual merely for being gay or transgender violates Title VII. The USSC analyzed the Title VII statute and previous USSC decisions. The parties conceded that the term "sex" referred to the biological distinctions between male and female. However, the Court noted that the inquiry did not end there. The USSC also reasoned that the phrase "because of" incorporated a "but-for" causation standard into Title VII. This means that an employer cannot avoid liability just by citing some other non-discriminatory factor that contributed to its challenged employment action.

The USSC also noted that in so-called "disparate treatment" cases, the Court has held that the difference in treatment must be intentional. Finally, the Court recognized that the statute's repeated use of the term "individual" means that the focus is on "a particular being as distinguished from a class."

Using this analysis, the USSC announced the following rule: an employer violates Title VII when it intentionally fires an individual based in part on sex. Because discrimination of the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender violates Title VII.

Bostock v. Clayton Cty., Georgia (2020) 140 S. Ct. 1731.

NOTE:

Unlike Title VII of the Civil Rights Act of 1964, California's anti-discrimination statute -- the Fair Employment and Housing Act -- expressly prohibits sexual orientation discrimination and explicitly defines discrimination on the basis of sex to include gender identity and gender expression. (Cal. Government Code sections 12926(r) & (s).)

WAGE & HOUR

Hospital's Quarter Hour Time-Rounding Policy Was Lawful.

Joana David worked as a registered nurse at the Queen of the Valley Medical Center (QVMC) from 2005 to 2015. From September 2011 to May 2015, David worked two, 12-hour shifts per week. To record her time, David clocked in and out of work using an electronic timekeeping system that automatically rounded time entries up or down to the nearest quarter hour.

After David's employment ended, she sued QVMC alleging various California wage and hour violations. Among other claims, David alleged that QVMC did not pay her all wages owed because of the hospital's time-rounding policy.

QVMC argued that it paid David for all time worked and that its rounding policy was legal. Specifically, QVMC noted that because David's time entries were rounded to the nearest quarter hour, when she clocked in or out, her time was rounded up or down a maximum of seven minutes. Thus, David benefitted from the rounding policy on several occasions. QVMC's expert witness reviewed David's time entries and concluded that in a 128-day period, 47% of David's rounded time entries favored her or had no impact and 53% favored QVMC. Further, the expert found that during that same period, the hospital paid David for 2,995.75 hours of work, and that had punch time entries been used, QVMC would have paid David for 3,003.5 hours. While David argued that the hospital's failure to pay her for those 7.75 hours of work established that the rounding policy was unfair, the court found that QVMC had shown its policy was neutral. After the trial court decided in favor of QVMC, David appealed.

Under California wage and hour law, an employer may use a rounding policy if it is "fair and neutral on its face" and "is used in in such a manner that will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." Further, a court may decide in favor of an employer if the employer can show the rounding policy does not systematically underpay the employee, even if the employee loses some compensation over time.

On appeal, the Court of Appeal affirmed the trial court's decision and found that QVMC's policy was neutral both on its face and in practice. The Court noted that the timekeeping software rounded all time, regardless of whether the rounding benefited QVMC or the employee. Further, the court reasoned that the policy did not systematically undercompensate David since the overall loss of 7.75 hours in the 128-day period was statistically meaningless. Thus, the court found that QVMC had satisfied its burden of establishing that the rounding policy was lawful.

David v. Queen of Valley Med. Ctr. (2020) 51 CalApp.5th 653.

NOTE:

This case examines time-rounding policies under California law. While the federal wage and hour law generally governs public agencies, this decision offers guidance similar to that under the federal law regarding time-rounding policies.

VICARIOUS LIABILITY

Volunteer Was Not Acting In The Course And Scope Of His Volunteer Work During Commute.

Ralph Steger was a volunteer for Kaiser who provided pet therapy to a Kaiser patient at an assisted living facility. In July 2015, after a therapy session, Steger drove his own car to his credit union to do some personal business. On his way home from the bank, Steger struck and killed Wyatt Savaikie, a pedestrian who was crossing the street. Following the accident, Savaikie's parents filed a lawsuit against Kaiser alleging that Kaiser was vicariously liable for Steger's negligence.

Kaiser filed a motion to dismiss the lawsuit because Steger was not acting within the scope of his volunteer work at the time of the accident. Kaiser argued that the so-called "coming and going" rule applied. Under that rule, an employer is not liable for an employee's negligent acts committed during the commute to or from work. Savaikie's parents argued that an exception to the rule applied. The trial court disagreed, finding that in order to hold Kaiser liable for Steger's accident, Steger must have stuck Savaikie in the course and scope of his volunteer work for Kaiser. The Savaikie's appealed.

First, the Court of Appeal considered whether the "required-vehicle" exception to the coming and going rule applied. Under the required-vehicle exception, if an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the workplace. A Kaiser employee testified that Kaiser did not require Steger to use his own car and that other methods of transportation, such as Uber or Lyft, were permissible. While there was testimony regarding whether Kaiser offered mileage reimbursement to volunteer pet therapists, the court noted that payment for travel expenses is not evidence of an implied requirement that an employee must use his own vehicle. Finally, the court rejected the Savaikie's arguments that Kaiser's requirements that Steger provide annual proof of vehicle insurance and transport the therapy dog inferred that Kaiser required Steger to use his own car. The court concluded that there was no evidence that Kaiser expressly or impliedly required Steger to use his own car.

Next, the court evaluated whether Steger's use of his personal car provided an incidental benefit to Kaiser. The Savaikies suggested that a variation on the vehicle use exception focuses on whether the employer receives an incidental benefit from the employee's use of the employee's own car. The court declined to find that there was a distinct exception for such a situation. Instead, the court proposed that the employer's incidental benefit is a factor to consider in deciding whether an implied vehicle use requirement exists. But, because there was no requirement that Steger use his own car as a condition of his volunteer work, there was no triable issue as to whether the incidental benefit pertained to the case.

Lastly, the court considered the Savaikie's argument that a "special mode of transportation" exception to the coming and going rule applied. The court reasoned that even if using a specially equipped vehicle is alone sufficient to create an exception to the coming and going rule, there is no evidence Steger had such a vehicle. Steger simply used a harness and clips to secure his therapy dog in the back of his vehicle; he did not make any modifications to the vehicle itself.

Savaikie v. Kaiser Found. Hosps. (2020) 52 Cal.App.5th 223.

NOTE:

Agencies that require an employee to use a personal car as a condition of employment may be liable for that employee's car accidents, even if the accidents do not occur at the workplace. LCW attorneys can review an agency's vehicle use policies to reduce risk while continuing to meet the agency's needs.

DID YOU KNOW....?

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

- The Americans with Disabilities Act (ADA) prohibits an employer from requiring employees to submit to COVID-19 antibody testing as part of an employer's decision to allow employees to return to the workplace. (US EEOC Guidance regarding "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," 6/17/2020.)
- The U.S. Department of Labor (DOL) issued a final rule updating its regulations regarding joint employer status under the Fair Labor Standards Act (FLSA). The DOL's rule clarifies the circumstances when an employee may have more than one employer that can be held jointly and severally liable for wage and hour obligations. (85 Fed. Register 2820; 29 CFR sections 791.1-791.3.)

- On June 18, 2020, the California Department of Public Health issued a public health order mandating the use of cloth face coverings in many "high-risk situations" including when any person is "[i]nside of, or in line to enter, any indoor public space" and when an employee is "[e]ngaged in work, whether at the workplace or performing work off-site."

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 contacted LCW to ask if a district has an obligation under the Americans with Disabilities Act (ADA) or Fair Employment and Housing Act (FEHA) to reasonably accommodate an employee who tested positive for methamphetamine. The human resources director explained that the district wanted to terminate the employee for violations of the district's drug and alcohol policy, but it wanted to ensure it was complying with the ADA and FEHA.

Answer: The attorney advised the human resources director that illegal drug use is not protected under the ADA or FEHA. Therefore, the attorney noted that the employee was not entitled to a reasonable accommodation.

BENEFITS CORNER

IRS Announces ACA Affordability Percentage For 2021.

Every year the IRS adjusts the shared-responsibility affordability percentages under the ACA, and recently issued the new 2021 percentage in **Rev. Proc. 2020-36**. For 2021, the premium cost of the lowest-level self-only coverage must be less than 9.83% of an employee's household income to be considered affordable. This is an increase from the 2019 affordability percentage of 9.78%. The ACA originally set the affordability threshold at 9.5% of an employee's household income.

For many employers, it is difficult to determine an employee's household income. Accordingly, the IRS provided three safe harbors for employers to determine if they have offered affordable coverage. An employer may choose any safe harbor, but must apply the safe harbor on a reasonable and consistent basis. Briefly, the three safe harbors are:

1. **Rate of Pay Safe Harbor**: Under this safe harbor, an employer's offer of coverage will be deemed affordable if the cost for the lowest-level self-only coverage is no more than the IRS issued affordability percentage (9.78% for 2020 or 9.83% for 2021) of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay during the calendar month (or the start of the plan year).
2. **Form W-2 Safe Harbor**: Under this safe harbor, an employer's offer of coverage will be deemed affordable if the employer's share of the cost for the lowest-level self-only coverage is no more than the IRS issued affordability percentage (9.78% for 2020 or 9.83% for 2021) of the employee's wages as reported in Box 1 of Form W-2.
3. **Federal Poverty Line Safe Harbor**: Under this safe harbor, an employer's offer of coverage under a calendar year plan is affordable if an employee pays no more for the lowest-level self-only coverage than the IRS issued affordability percentage (9.78% for 2020 or 9.83% for 2021) of the published annual individual U.S. mainland federal poverty level divided by 12.

If the safe harbor makes the employer's offer of coverage offer affordable, the employer will not face penalties, even if an individual's overall household income qualifies him/her for a premium tax credit from Covered California.

Employers should carefully monitor the adjustments to the affordability percentage since failure to offer affordable, minimum value coverage to full-time employees may result in employer shared responsibility penalties. The 2020 penalty for employers that do not offer affordable, minimum value coverage is $321.67 per month/$3,860 per year for each employee who enrolls in coverage through Covered California and qualifies for assistance premium tax credit. These penalty amounts have not yet been released for 2021 as of the publishing of this newsletter.

A Reminder About Section 125 Cafeteria Plan Relief Options.

In May of this year, the IRS issued Notice **2020-29** and Notice **2020-33**, which provided guidance and allows temporary changes to Section 125 Cafeteria Plans to address changes in expenses due to the impacts of the COVID-19 pandemic. Notice 2020-29 provides employers the option to amend their cafeteria plans to: (1) extend the health FSA and dependent care FSA's claims period for claims incurred during 2019 to the end of 2020; and (2) allow employees to make midyear election changes in 2020, including revoking, increasing, or decreasing a health FSA or dependent care FSA election. Notice 2020-33 increases the maximum health FSA carryover amounts remaining in a health FSA to the next year and permits employers to amend their cafeteria plans to adopt this increased amount.

Employers can, but are not required to, amend their Section 125 plan documents to provide these options for employees. An employer must adopt an amendment for the 2020 plan year on or before December 31, 2021, and may be effective retroactively to January 1, 2020. The employer should also inform all employees eligible to participate of the changes to the plan and review any other requirements that Notices 20-29 and 2020-33 provide.

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Northern California Super Lawyers and Rising Stars

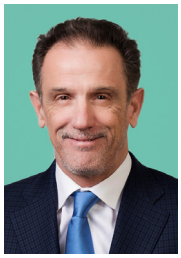
Congrats to all Super Lawyers and Rising Stars!

Southern California Super Lawyers and Rising Stars

Super Lawyers

Northern California

Shelline Bennett



Richard Bolanos

Southern California

Scott Tiedemann

Geoffrey Sheldon

Peter Brown

Rising Stars

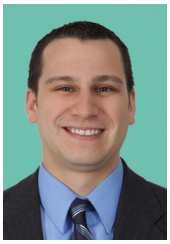
Tony Carvalho

Abigail Clark

Erin Kunze

Matthew Nakano

N. Richard Shreiba



Michael Youril

Megan Atkinson

Firm Publications

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

Partners **Heather DeBlanc**, **T. Oliver Yee** and Associate **Kelly Tuffo** authored the *Bender's California Labor & Employment Bulletin* article, "Financial Assistance for Employee Housing: Legal Considerations for California Public Agencies."

Los Angeles Partner **Steven M. Berliner** was quoted in *Daily Journal, Orange County Register, Sacramento Bee, EdSource* and *Courthouse News Service* regarding the California Supreme Court ruling on July 30, 2020 against a union of Alameda County sheriff's deputies over the legality of a 2013 law that limited retirement benefits.

Fresno Partner **Che I. Johnson** and San Diego Associate **Kevin J. Chicas** authored the *Daily Journal* article, "Post-Janus Power Shift of California's Private and Public Sector Unions," discussing how as private sector management rights grow, public sector employers are seeing a growing imbalance.

Los Angeles Partner **Geoffrey S. Sheldon** and Los Angeles Associate **James E. Oldendorph** authored the *Daily Journal* article, "Reform in Law Enforcement: an L&E Prespective," discussing how law enforcement agencies need to approach the calls for significant police reform in the wake of the deaths of George Floyd, Breonna Taylor and Rayshard Brooks.

Los Angeles Partner **T. Oliver Yee** and Los Angeles Associate **Alysha Stein-Manes** authored the *American City & County* articles, "Anticipating Legal Issues in a Post-COVID-19 Work Environment," addressing the legal risks and considerations that many public agencies will face in a remote work environment and "Adapting to the 'New Normal': Lessons Learned and Best Practices for a Post-COVID 19 Workplace," discussing how employers can best address remote working situations in the era of COVID-19.

Los Angeles Partner **Geoffrey S. Sheldon** was quoted in the *Orange County Register* article, "In Wake of Floyd Killing, Police in Orange County Talk Reform," discussing reforms needed in the hiring and discipline processes of public safety agencies.

Managing Partner **J.Scott Tiedemann** and Los Angeles Partner **Geoffrey S. Sheldon** were quoted in the *Daily Journal* article, "Public Employee Rights Might Block Some Police Discipline Efforts."

Managing Partner **J.Scott Tiedemann** and Los Angeles Partner **Geoffrey S. Sheldon** authored the *California Police Chief Magazine* article, "Returning to "Normal": Legal Issues Law Enforcement Agencies Face in Returning to Work Post-COVID-19."

Los Angeles Partner **Elizabeth T. Arce** and Los Angeles Associate **Jennifer Palagi** authored an article for the *Daily Journal* titled "FFCRA Forces Public Agencies to Comply with FLSA 'Regular Rate of Pay' Calculations."

Los Angeles Partner **T. Oliver Yee** and Los Angeles Associate **Alysha Stein-Manes** authored an article for the *Daily Journal* titled "How COVID-19 Could Permanently Transform Public Agency Operations: Lessons Learned."

New to the Firm

Allen Acosta is an Associate in Liebert Cassidy Whitmore's Los Angeles office, where he represents clients in all facets of labor and employment law, including discrimination, harassment, retaliation, and federal civil rights' claims.

He can be reached at 310.981.2000 or aacosta@lcwlegal.com.

Anthony Risucci is an Associate in Liebert Cassidy Whitmore's San Francisco office where he provides representation and counsel to clients in all matters pertaining to labor, employment, and education law, with a particular focus on public safety.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Sept. 3 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Sonoma/Marin ERC | Webinar | Heather R. Coffman

Sept. 9 **"Maximizing Performance Through Evaluation, Documentation And Corrective Action"**
San Gabriel Valley ERC | Webinar | Monica M. Espejo

Sept. 9 **"Managing COVID-19 Issues: Now and What's Next"**
Ventura/Santa Barbara ERC | Webinar | Peter J. Brown & Alexander Volberding

Sept. 10 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
Mendocino County ERC | Webinar | Kristi Recchia

Sept. 10 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
Monterey Bay ERC | Webinar | Che I. Johnson

Sept. 15 **"Moving into the Future"**
San Mateo County ERC | Webinar | Erin Kunze

Sept. 16 **"Moving Into The Future"**
Central Coast ERC | Webinar | T. Oliver Yee

Sept. 16 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
Humboldt County ERC | Webinar | Kristi Recchia

Sept. 17 **"The Future is Now: Embracing Generational Diversity and Succession Planning"**
Orange County Consortium | Webinar | Danny Y. Yoo

Sept. 18 **"Managing COVID-19 at Work and School"**
Central CA CCD ERC | Webinar | Meredith Karasch

Sept. 18 **"Reductions in Staffing"**
Southern CA CCD, (SCCCD) ERC | Webinar | Kristin D. Lindgren

Sept. 23 **"Leaves, Leaves and More Leaves"**
South Bay ERC | Webinar | Danny Y. Yoo

Sept. 24 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
Napa/Solano/Yolo ERC | Webinar | Kristi Recchia

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.

Sept. 2 **"Unconscious Bias"**
City of Gilroy | Webinar | Suzanne Solomon

Sept. 9 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Frances Rogers

Sept. 22 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Stefanie K. Vaudreuil

Sept. 23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of San Luis Obispo | Webinar | Christopher S. Frederick

Sept. 24 **"Employee Rights: MOUs, Leaves and Accommodations"**
City of Santa Monica | Laura Drottz Kalty

Sept. 24 **"Conducting Disciplinary Investigations: Who, What, When and How?"**
City of Stockton | Webinar | Kristin D. Lindgren

Sept. 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Gage C. Dungy

Sept. 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Tracy | Webinar | Erin Kunze

Speaking Engagements

Sept. 10 **"Understanding Our Unconscious Bias"**
Chief Student Services Officers (CSSO) Annual Student Services Conference | Webinar | Eileen O'Hare-Anderson & Lataria Hall

Sept. 10 **"The CSSO as a Witness! Best Practices for Preparing CSSOs for Litigation and Disciplinary Appeals"**
CSSO Annual Student Services Conference | Webinar | Pilar Morin & Alysha Stein-Manes

Sept. 23 **"Employment Law: Disciplining Police Officers"**
International Municipal Lawyers Association (IMLA) Virtual Annual Conference | Webinar | J. Scott Tiedemann & James E. Brown

Seminars/Webinars

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

Sep. 23 **"Labor Relations for Public Safety Executives in Times of Crisis"**
Liebert Cassidy Whitmore | Webinar | Adrianna E. Guzman & Laura Drottz Kalty

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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.