



CLIENT UPDATE

Monthly news and developments in employment law and labor relations for California Public Agencies.

MAY 2018

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

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WAGE AND HOUR

Reversing Ninth Circuit, U.S. Supreme Court Rules that FLSA Overtime Exemptions Should be Interpreted Fairly, Not Narrowly.

The U.S. Supreme Court recently rejected the Ninth Circuit’s interpretation that the overtime exemptions from the Fair Labor Standards Act (“FLSA”) should be “construed narrowly.” The case was Encino Motorcars, LLC v. Navarro.

Navarro and other employees worked as “service advisors” at Encino Motorcars, a car dealership which sold and serviced Mercedes-Benz cars. The company’s service advisors were expected to greet car owners at the dealership service area, note customer concerns about the condition of their cars, evaluate repair and maintenance needs, suggest services to car owners, write up estimates, and communicate with customers while repair work was in progress.

Navarro and other employees sued, claiming that Encino Motorcars improperly denied them overtime wages in violation of the FLSA. Under the FLSA, employers must pay overtime wages for hours worked above 40 hours in a seven-day work period, unless an FLSA overtime exemption applies. Encino Motors asserted that service advisors are exempt under FLSA provisions for “salesm[e]n...primarily engaged in ...servicing automobiles.

The trial court found in favor of Encino Motors but the Ninth Circuit reversed on appeal and found in favor of Navarro and other employees. The U.S. Supreme Court then reversed the Ninth Circuit and remanded the case for further findings. When the Ninth Circuit again found in favor of Navarro, Encino Motors sought further review in the Supreme Court. The Court again reversed the Ninth Circuit.

First, the U.S. Supreme Court found that the service advisors are “salesmen” within the meaning of the FLSA because they sell goods or services. Specifically, they sell vehicle maintenance and repair services to dealership customers. They are also “primarily engaged in ...servicing automobiles” because they provide a service to dealership customers. It was not necessary for service advisors to spend the majority of their time physically repairing vehicles to qualify for this exemption given that they are “integrally involved in the servicing process.” Thus, the Court found that the service advisors were exempt from the FLSA overtime requirements.

Next, the U.S. Supreme Court went further and rejected the principle, long applied by the Ninth Circuit, that FLSA overtime exemptions should be construed narrowly. This approach, according to the Supreme Court, relies on the flawed premise that the remedial purposes of the FLSA -- awarding back pay to misclassified employees -- should be pursued at all costs. Rather, the FLSA's overtime exemptions are a key portion of the statute and should be given a "fair reading" rather than a narrow interpretation.

Encino Motorcars, LLC v. Navarro, 138 S.Ct. 1134 (2018).

NOTE:

Although the reasoning in this case is encouraging for employers, it is still the employer's burden to prove that one of the exemptions to FLSA overtime that is listed in 29 USC section 213 applies. This U.S. Supreme Court opinion may make it easier for an employer to meet that burden. This opinion does not discuss the FLSA regular rate of pay that is used to calculate FLSA overtime, nor does it offer any guidance on how to interpret the types of pay that are included in the FLSA regular rate of pay under 29 USC section 207(e).

Ninth Circuit Now Says the Federal Equal Pay Act Also Prohibits Using Prior Salary to Justify Gender Pay Disparities.

The U.S. Court of Appeals for the Ninth Circuit announced in *Rizo v. Yovino* that under the Federal Equal Pay Act (EPA), employers cannot defend pay disparities between male and female employees by asserting that the disparity is caused by differentials in the employee's prior salary. This decision brings Ninth Circuit federal EPA standards in line with California's Equal Pay Act, and reverses earlier Ninth Circuit's decisions to the contrary.

This case involved Eileen Rizo, a woman who applied to, and was hired as a math consultant in County of Fresno Public Schools in 2009. The County set a new employee's starting pay by

using its Standard Operation Procedure 1440. SOP 1440 was a salary schedule that consisted of levels, and "steps" within each level. SOP 1440 required that new employee salaries be set at one of 12 steps within Level 1 of the salary schedule. The new employee was placed on a step that added 5% to the employee's most recent prior salary. The County hired Rizo at Step 1 of the salary schedule because even with the 5% add-on, her salary would have fallen below Step 1.

In 2012, Rizo learned that her male colleagues, all of whom were also math consultants, were paid more. For example, three of Rizo's male colleagues were hired at steps 7 or 9 within Level 1. Rizo sued the County, claiming violations of the Federal EPA. It was undisputed that all four jobs required substantially equal skills, and responsibilities.

The County agreed that using SOP 1440 resulted in male -female pay differentials but asserted the affirmative defense that the pay differential was based on "any other factor other than sex," namely Rizo's prior salary. The County noted that it used SOP 1440 consistently with four legitimate business reasons: (1) SOP 1440 uses objective factors rather than subjective opinions to determine salaries; (2) adding 5% to starting salary induces employees to leave their jobs and work for the County; (3) using prior salary prevents favoritism and ensures consistency; and (4) using prior salary prevents waste of taxpayer dollars.

Under the Federal Equal Pay Act:

No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1). The exceptions to the Act include:

... where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1).

Rizo initially prevailed on a motion for summary judgment at the trial court level. On the County's appeal, the Ninth Circuit initially disagreed with the district court determination that prior salary alone can never be a factor other than sex, and remanded the case back to the district court for further consideration of this issue. However, in its most recent April 2018 decision, the full court of the Ninth Circuit reversed itself and found that under the Federal EPA:

“any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing ‘endemic’ sex-based wage disparities, would create an exception for basing new hires’ salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County’s argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed.”

The decision makes clear that employers will not be able to defend Federal EPA wage disparity claims merely by asserting that a gendered wage differential is caused by disparities in employee's prior salaries.

The Ninth Circuit's 2018 holding also overturns its earlier precedents on this issue, and brings the Ninth Circuit's application of the Federal EPA more in line with California law. Under the California Equal Pay Act, employers must not pay an employee at a wage rate less than the rate paid to employees of the opposite sex, or of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort

and responsibility and performed under similar working conditions. (Cal. Labor Code § 1197.5 (a).) The California law explicitly states, “[p]rior salary shall not, by itself, justify any disparity in compensation.” Cal. Labor Code § 1197.5 (a)(3).

Rizo v. Yovino, No. 16-15372 (9th Cir. April 9, 2018), slip op. overturning *Rizo v. Yovino* (9th Cir. 2017) 854 F.3d 1161, 1165, reh'g en banc granted (9th Cir. 2017) 869 F.3d 1004.

NOTE:

LCW's wage and hour attorneys are available to assist agencies in bringing their hiring and pay policies into compliance with state and federal equal pay standards, and agencies are encouraged to reach out for advice in this area. Additional discussion of the decision is available here: <https://www.calpublicagencylaboremploymentblog.com/wage-and-hour-2/not-so-fast-the-ninth-circuit-reverses-itself-and-rules-employers-cannot-consider-applicants-prior-salary-in-setting-rate-of-pay/>

RETIREMENT

California Supreme Court to Review Appellate Court Decision Impacting CERL and CalPERS Employers.

In January 2018, LCW reported on a California Court of Appeal decision, *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* That decision addressed whether the County Employees Retirement Law of 1937 (CERL) could change the definition of “compensation earnable” under the Public Employee Pension Reform Act of 2013 (PEPRA) for employees hired before PEPRA's January 1, 2013, effective date.

The *Alameda* opinion was contrary to prior, well settled precedents and principles governing public employee “vested rights” in pension benefits.

The California Supreme Court has granted review of the decision. The Supreme Court will address the issue: Did statutory amendments to the County Employees' Retirement Law (Gov. Code, § 31450 et seq.) made by the Public Employees' Pension Reform Act of 2013 (Gov. Code, § 7522 et seq.) reduce the scope of the pre-existing definition of pensionable compensation and thereby impair employees' vested rights protected by the contracts clauses of the state and federal Constitutions?

The Supreme Court's decision could bring much needed clarity to the current inconsistency in California law.

NOTE:

LCW's earlier discussion of the Alameda opinion is available here. https://www.calpublicagencylaboremploymentblog.com/pension/california-court-of-appeal-issues-a-contrary-decision-addressing-vested-rights-of-public-employees-in-the-aftermath-of-pepra-where-will-the-supreme-court-land/?utm_source=Liebert+Cassidy+Whitmore+-+California+Public+Agency+Labor+%26+Employment+Blog&utm_medium=email&utm_campaign=4ea538b383-RSS_EMAIL_CAMPAIGN&utm_term=0_427914a8ad-4ea538b383-73232701

We will continue to provide updates on these issues as new developments arise.

Circular Letter Notifies Employers that CalPERS Will Begin Assessing Fees for Failure to Enroll and Report on Employment of Retired Members Starting in July 2018.

CalPERS Circular Letter 200-010-18, dated March 30, 2018, reminds employers that effective January 1 this year, the California Legislature added two new penalties designed to enforce the limitations on employment of retired CalPERS annuitants. This Circular Letter notifies employers that CalPERS will begin to assess these penalties starting in July 2018.

Government Code section 21220 states that a person who has retired for service or disability under CalPERS, cannot be employed in any capacity unless: 1) the person has been reinstated from retirement; or 2) the employment without reinstatement is authorized by complex CalPERS rules.

Government Code section 21200 includes two penalties for failure to report the employment of retirees who are not reinstated. The first penalty is \$200 per month to any employer who fails to enroll, solely for CalPERS' administrative recordkeeping purposes, a retired member who is employed without reinstatement, in any capacity within 30 days of employment. The second penalty is \$200 per month to any employer who fails to report the pay rate and number of hours worked of any retired member who is employed without reinstatement within 30 days following the last day of the pay period in which the retired member worked.

Government Code section 21220 prohibits employers from passing on these costs to an employee

PUBLIC SAFETY

Modification of Timely Written Reprimand Did Not Violate POBRA's One-Year Limitations Period.

The California Court of Appeal reiterated that if a public agency employer provides timely notice of proposed discipline under the Police Officer Bill of Rights Act ("POBRA"), and then imposes a modified form of that discipline more than one year after becoming aware of the conduct at issue, the discipline is still timely under the POBRA.

In *Squire v. County of Los Angeles*, the Los Angeles County Sheriff's Department ("Department") issued Officer Matthew Squire a written reprimand dated May 22, 2014. It was

undisputed that the reprimand was the result of conduct that occurred between September 2008 and continued through May 31, 2013. It was also undisputed that May 31, 2013 was the start of the Department's one year time limit, under the POBRA at Government Code section 3304(d), to investigate Squire's misconduct and provide notice of the Department's proposed discipline.

The May 2014 written reprimand stated that Squire violated the Department's policy prohibiting inappropriate conduct based on gender. Specifically, Squire knew of, but failed to report an inappropriate relationship between a supervisor and a subordinate officer.

Squire filed a grievance on June 4, 2014 under the MOU, seeking to revoke the written reprimand. The Department denied the grievance but modified the written reprimand to cite violation of the Department's policy governing the duties of supervisors and managers. The Department then presented Squire with a written reprimand dated September 29, 2014 and signed October 3, 2014. The September 2014 reprimand referred to the same events as the May 2014 reprimand.

The Court of Appeal rejected Squire's claims that the September 2014 written reprimand was invalid because it was a new reprimand issued outside of the one-year POBRA deadline. The Court of Appeal noted that, by its terms, POBRA requires that an employer provide notice of proposed discipline within one year, which the Department did. POBRA did not require that the Department issue final discipline within the one year time frame. Moreover, the September 2014 written reprimand was a modification of a timely May 2014 reprimand, not a new reprimand based upon different conduct. The court rejected Squire's arguments to the contrary.

As the court aptly noted, "if a peace officer is not required to initiate a grievance procedure within the one-year limitations period, the public employer cannot be required to issue its response to the grievance within the same year." Thus, the Court of Appeal upheld the written reprimand

and found that it complied with the POBRA.

Squire v. County of Los Angeles, 2018 WL 1726152 18 Cal. Daily Op. Serv. 3297 (March 21, 2018).

NOTE:

This case is a good reminder to timely investigate and pursue potential misconduct. Timely follow up is not only good personnel practice, but it complies with the POBRA.

Sergeant's Factual Inquiry into Complaint of Officer Misconduct Triggered POBRA One-Year Limitations Period Because Sergeant Had Discretion to Issue Discipline.

The California Court of Appeal confirmed that a County of Kern Sheriff's Department ("Department") Sergeant was "a person authorized to initiate an investigation" under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code 3300), or POBRA. But in an unpublished section of the opinion, the Court rejected the Deputy Sheriff's claim that the Department failed to timely investigate allegations that led to his discipline. The case was *Ochoa v. County of Kern*.

Ochoa worked as a Deputy Sheriff with the Department. On March 22, 2013, a young woman, referred to as P.S., accused Ochoa of harassing her. She reported the harassment to another Deputy, named Chiadez, who documented the woman's complaint. On March 25, 2013, a Sergeant named Bittle inquired further into P.S.'s allegations. The investigation revealed evidence that, among other things, Ochoa made unwanted sexual advances toward the woman over a period of four years, including when she was a minor. The Department subsequently began a criminal investigation of Ochoa's conduct for assault and molesting a minor. On August 11, 2014 the Department provided Ochoa with Notice of proposed termination. The Department then conducted a *Skelly* conference and determined that termination was appropriate.

POBRA establishes a one-year statute of limitations. Before disciplinary action may be taken against an officer, POBRA requires that an investigation and notice of intended disciplinary action must occur within one year after “ a person authorized to initiate an investigation” discovers the allegation of misconduct. This requirement is intended to balance the public’s interest in maintaining the integrity and efficiency of the police force, and the officer’s interest in being treated fairly.

Ochoa asserted that Bittle was authorized to initiate an investigation, and did initiate the investigation on March 25, 2013. Ochoa further claimed that because the Department did not provide him with a Notice of proposed discipline until August 11, 2014, more than a year after the initiation of the investigation, his termination was procedurally invalid. He filed a writ requesting that the Department be ordered to rescind his termination. The Department asserted that its internal affairs investigation was not initiated on March 25 by Deputy Bittle, because Department policies did not authorize Bittle to initiate internal affairs investigations. Rather, the Department asserted, the internal affairs investigation was initiated on May 6, 2013 by an officer who was formally authorized to conduct the investigation.

Department policies provided that only Department Undersheriffs or Chief Deputies are authorized to initiate an administrative investigation. However, as a Sergeant, Bittle was obligated to inquire into allegations, such as those asserted by P.S., to determine whether the allegations are criminal or civil in nature. Sergeants are also authorized to issue discipline, such as documented oral counseling and written reprimands if the alleged misconduct does not warrant an internal affairs investigation and is not serious or criminal misconduct. Bittle acknowledged that he “started an investigation... to determine what the nature of the complaint was,” and ultimately took statements from P.S. regarding Ochoa’s harassing conduct.

The Court of Appeal found that considering Bittle’s authority to inquire into a subordinate officer’s wrongdoing, he was authorized to initiate an investigation for purposes of the POBRA. The Court of Appeal found that Bittle’s inquiries into P.S.’s complaints were an “investigation” within the meaning of POBRA because they “could lead to punitive action” within the meaning of POBRA. Indeed, Bittle’s inquiry ultimately did lead to punitive action.

Thus, the Court of Appeal found that Bittle’s inquiry into allegations of Ochoa’s misconduct did constitute an investigation within the meaning of the POBRA, and triggered the POBRA one-year limitations period.

Ochoa v. County of Kern, 2018 WL 1755494 (Cal.App. 5 Dist. 2018).

NOTE:

This case is an important reminder that even if a law enforcement agency’s internal policies do not delegate authority to initiate a full internal affairs investigation to a particular rank of officer, any authority delegated to that officer to make factual inquiries into misconduct may trigger the one-year POBRA limitations period.

Internal Reports Containing Summaries of Police Officer Personnel Matters, Including Information from Citizen Complaints Older than Five Years Old, May Be Discoverable.

This case arose when Robert Riske, a police officer for the City of Los Angeles Police Department (“Department”), sued the agency. He claimed the Department repeatedly hired less qualified officers for positions instead of him, and that the Department unlawfully did so in retaliation for Riske’s reports of misconduct by other officers. After Riske made his report, some colleagues viewed him as a “snitch”, refused to work with him, and ignored him in the field. Riske applied for promotion from police officer to 14 different detective positions. Each time, the Department awarded the position to an applicant who Riske viewed as less experienced or less qualified.

Riske sought, and was granted discovery of documents submitted by successful candidates subject to a court protective order. This information included training and evaluation (“TEAMS”) reports summarizing candidates’ history of discipline, commendations, personnel complaints, performance evaluations and other personnel matters that had occurred during the officers’ employment. The Department used the reports to evaluate and select candidates. Some of this information was also contained in the officers’ confidential personnel files.

However, relying on California Evidence Code section 1045, the trial court ordered the City to disclose the TEAMS reports, with redaction of all information that occurred more than five years before Riske filed his lawsuit. Section 1045 (a) provides that in litigation involving peace officers the following information shall be disclosed: “records of complaints, or investigations of complaints, ... concerning an event or transaction in which the peace officer or custodial officer ... participated, ... provided that information is relevant to the subject matter involved in the pending litigation.” Section 1045 (b)(1) excludes from disclosure: “information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation.” Riske appealed and asserted that the trial court improperly allowed redaction of the TEAMS reports.

The Court of Appeal found that section 1045(b) (1) only limited disclosure of actual citizen complaints that occurred more than five years prior to the events at issue in Riske’s lawsuit (the Department’s alleged failure to promote him over other candidates). The Court of Appeal reasoned that the plain language of the Evidence Code, and court precedents supported this interpretation. While section 1045(a) broadly permits disclosure of records of complaints, the section 1045(b)(1) prohibition on disclosure of information “consisting of complaints” has been interpreted by the courts to prohibit only

the disclosure of “citizen complaints” against an officer. Because the TEAMS reports are not citizen complaints, and they do not quote directly from citizen complaints, they were not subject to the disclosure bar set forth in Evidence Code section 1045(b)(1) and should not have been redacted.

Thus, the Court of Appeal found that the trial court erred by ordering disclosure of the TEAMS reports subject to redaction and directed the City to produce unredacted reports.

Riske v. Superior Court (City of Los Angeles), 2018 WL 1789937 (Cal.App. 2 Dist. 2018).

NOTE:

Whether information contained in police officer personnel files is subject to disclosure or discovery depends on the facts of each case. Here, the Court’s decision to disclose the TEAMS reports without redaction turned on the fact that they were not citizen complaints and they did not directly quote information from citizen complaints.

LABOR RELATIONS

The PERB Decides that County’s Surveillance of, and Denial of Access to Unrecognized Employee Organizations Were Unfair Labor Practices.

The Public Employment Relations Board (PERB) approved an Administrative Law Judge’s decision that the County of San Bernardino violated the Meyers-Milias-Brown Act (MMBA) and the County’s Employee Relations Ordinance (ERO) by: 1) prohibiting non-employee representatives of SEIU from accessing non-work areas of County facilities; and 2) photographing County employees meeting with SEIU organizers. The County claimed that SEIU had no right of access because it was not a recognized employee organization, and that the photographing did not interfere with employee rights.

The County's ERO stated that recognized employee organizations had access to County work locations, but was silent about access for unrecognized employee organizations. By May 2014, the County had reached a tentative agreement for a successor MOU with the San Bernardino Public Employees Association (SBPEA), the incumbent recognized employee organization. That same month, the County's Human Resources Director issued a memo regarding Campaign/ Solicitation Activities. That memo stated that SEIU and other organizations were visiting County facilities to urge a no vote on the tentative agreement. The memo also stated the County's position about access to County facilities, and said that organizers were not permitted to access offices, worksites, break and lunch rooms, and employee parking lots.

On at least two occasions, SEIU representatives entered an outdoor and an indoor break area of different County facilities to talk with County employees about joining SEIU. On one of those occasions, a District Manager photographed the SEIU representatives talking to County employees; the District Manager did so because she had understood the County's directive to mean that organizing activity could not occur in County break areas. On the second occasion, the SEIU organizers were escorted from the County facility.

The PERB concluded, without determining all of the contours of unrecognized employee organization access, that the County violated the MMBA by denying SEIU from accessing the break room areas during non-work time in order to solicit membership. PERB noted that while California's various labor relations statutes do not treat the issue of employee organization access uniformly, there was no basis in case law or the purpose of the MMBA to support the County's contention that unrecognized employee organizations had no right of access.

Specifically, the PERB noted that the MMBA at Government Code 3507(a)(6) does not distinguish between the access of recognized

or unrecognized employee organizations. The PERB agreed with the County that the MMBA does give recognized and unrecognized employee organizations very different statuses because only the recognized representative can negotiate for and represent the organizations members before the employer. But, the PERB decided that employees do not have a meaningful right to select their representative unless the non-incumbent employee organizations have reasonable access to work sites. The PERB adopted the ALJ's conclusion that the County's blanket prohibition on organizational activities in non-work areas of County facilities was unreasonable, and improperly denied SEIU its right of access.

The PERB also agreed with SEIU that the County had interfered with County employees' exercise of MMBA rights by photographing SEIU organizers meeting with County employees in one County break area. The PERB noted that the MMBA prohibits employers from interfering with employees' MMBA rights. Once the employer is shown to have interfered with its employees' MMBA rights, the burden shifts to the employer to provide a legitimate justification for its conduct. If the harm to the employees' MMBA rights is slight, an unfair practice will be found unless the employer's justification outweighs the severity of the harm. If the employer's conduct is inherently destructive of employees' MMBA rights, however, the conduct will be excused only if the interference was caused by factors outside the employer's control and no alternative course of action was available.

The PERB found that harm to the employees' MMBA rights occurred if employees saw the County manager taking the photograph. The fact that the manager deleted the photograph after the SEIU organizers objected was evidence that the employees were intimidated enough to ask for the photograph to be deleted. Moreover, the PERB found that the manager did not repudiate her conduct by simply deleting the photograph, because she did not say anything to indicate that she would not photograph again.

Because the PERB found that the photograph did cause slight harm to employees' MMBA rights, the burden shifted to the County to provide a legitimate justification for the interference. The County argued that the manager was justified in taking the photograph because she reasonably believed that the organizers were violating the County's policy. But PERB disagreed, finding that the act of documenting a violation of an unlawful access policy cannot constitute a legitimate justification.

PERB decided in favor of SEIU and ordered the County to rescind its access policy.

SEIU v. County of San Bernardino, (2018) PERB Decision No. 2556-M

NOTE:

Employers should review their local employee relations rules and/or MOU's to ensure they are providing unrecognized employee organizations access to employees during non-work times in non-work areas.

BENEFITS CORNER

IRS Takes First Step To Assess Employer Mandate Penalties.

We have started to see our public agency clients receive IRS Letter 226J, providing employers a preliminary calculation of the Employer Shared Responsibility Payment ("ESRP") they owe for the 2015 tax year. The letter explains whether the IRS is assessing the penalty for failure to offer minimum essential coverage to "substantially all" full-time employees or the "unaffordable" coverage penalty. Employers who receive this letter have an opportunity to agree or disagree with the proposed ESRP. If you receive Letter 226J, you should carefully compare the data noted on Letter 226J with the Forms 1094-C and 1095-C you filed for tax

year 2015. It is possible that the IRS may have assessed the ESRP in error. If you disagree with the preliminary ESRP, you will need to file a statement with supporting documentation and follow the detailed instructions on Letter 226J.

Benefit Decisions Should Not Discriminate Against Employees With Disabilities Or Employees Who Associate With Persons With Disabilities.

A New York federal district court upheld a jury's determination that an employer illegally discriminated against a former employee (Barry Reiter) when it terminated him shortly after he requested time off to care for his disabled daughter. This case is not binding authority for California public agencies, nor does it raise novel principles of law. We highlight this case here, however, because it serves as an important warning for implementing best practices.

Mr. Reiter worked for his employer for approximately two years. Mr. Reiter had health issues and requested that he and his family be added to his employer's health plan. The employer initially refused, and even allegedly made disparaging remarks about the employee's health conditions and their impact on the health plan. Mr. Reiter demanded the employer not to discriminate against him based on his health conditions, and three months later, he and his family were enrolled. Mr. Reiter subsequently requested FMLA leave to care for a suicidal daughter with chronic depression and acute anxiety disorder, but he was terminated a day later, allegedly for performance reasons. Mr. Reiter sued his employer under the association provision of the Americans with Disabilities Act ("ADA"), which protects employees from termination and other adverse employment actions based on their association/relationship with another disabled individual. The jury ruled in Mr. Reiter's favor, and the employer requested the district court to review that verdict.

The district court considered a variety of factors and held there was sufficient evidence to show that the employer knew about Mr. Reiter's daughter's disability, and that it factored into the termination decision. The district court relied on the closeness of time between the employer's learning of the daughter's condition and the termination decision. The district court also determined that the alleged performance reasons for Mr. Reiter's termination was "pretextual" (or otherwise untrue or suspect), especially considering the employer's past remarks about Mr. Reiter's medical issues. The court upheld the jury award to Mr. Reiter for \$6,000 for lost wages and COBRA premiums paid, as well as \$50,000 in punitive damages.

Employers should take steps to ensure employment and benefit decisions are not being made in a manner that discriminates (or reasonably can be construed to discriminate) against an employee with a disability or an employee who cares for a family member with a disability. Similar to the referenced case, an employer's past interactions with the employee should be considered when assessing the scope of potential liability.

This article is based on *Reiter v. Maxi-Aids, Inc.*, 2018 WL 557864 (E.D.N.Y. 2018).

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may call or email a 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

our answer. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting identifying details.

ISSUE:

A Human Resources Manager wanted to know what obligations a public agency employer has to transgender employees. The agency had recently hired an employee who would be working in the Parks and Recreation Department. The employee openly identified herself as a transgender woman and asked to be identified by a particular name. The agency wanted to understand its obligations under the Fair Employment and Housing Act (FEHA), and ensure that it could refer the employee by her chosen name.

RESPONSE:

The LCW attorney informed the Manager that under the FEHA, if an employee requests to be identified by a preferred name, gender and/or pronoun (she, he, they) the employer must so identify the employee unless an exception applies. The attorney also noted that under the FEHA it is unlawful for an employer to impose on an employee any standard of dress, grooming or appearance, that is inconsistent with the employee's gender identity unless the employer can show that the standard is justified by a legitimate business necessity.



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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

May 10	“Introduction to the FLSA” and “Public Sector Employment Law Update” Coachella Valley ERC Indio Christopher S. Frederick
May 10	“12 Steps to Avoiding Liability” and “Moving Into the Future” East Inland Empire ERC Fontana T. Oliver Yee & Alysha Stein-Manes
May 10	“Advanced Investigations of Workplace Complaints” North State ERC Chico Gage C. Dungy
May 10	“Inclusive Leadership” San Diego ERC La Mesa Kristi Recchia
May 10	“The Disability Interactive Process” San Diego Fire Districts Bonita Frances Rogers
May 10	“A Guide to Implementing Public Employee Discipline” and “Managing the Marginal Employee” San Mateo County ERC Burlingame Erin Kunze
May 16	“Navigating the Crossroads of Discipline and Disability Accommodation” and “Leaves, Leaves and More Leaves” Gold Country ERC Elk Grove Jack Hughes
May 16	“Navigating the Crossroads of Discipline and Disability Accommodation” and “Managing the Marginal Employee” Ventura/Santa Barbara ERC Camarillo Kevin J. Chicas & Mark Meyerhoff
May 17	“Principles for Public Safety Employment” and “Issues and Challenges Regarding Drugs and Alcohol in the Workplace” Imperial Valley ERC Brawley Mark Meyerhoff
May 17	“Preventing Workplace Harassment, Discrimination and Retaliation” Orange County Consortium Tustin Christopher S. Frederick
May 17	“Public Sector Employment Law Update” and “Maximizing Performance Through Evaluation, Documentation and Discipline” West Inland Empire ERC San Dimas Geoffrey S. Sheldon
May 24	“Workplace Bullying: A Growing Concern” Monterey Bay ERC Webinar Joy J. Chen
May 24	“Disaster Service Workers If You Call Them, Will They Come?” and “Difficult Conversations” NorCal ERC Oakland Jack Hughes
May 24	“Moving Into The Future” South Bay ERC Redondo Beach Alysha Stein-Manes
June 5	“Maximizing Performance Through Evaluation, Documentation and Discipline” San Mateo County ERC Brisbane Joy J. Chen
June 7	“Inclusive Leadership” Los Angeles County Human Resources Los Angeles Kristi Recchia

June 21	“Leaves, Leaves and More Leaves” and “Issues and Challenges Regarding Drugs and Alcohol in the Workplace” Monterey Bay ERC Santa Cruz Kimberly A. Horiuchi
June 21	“Labor Code 101 for Public Agencies” and “Employees and Driving” Orange County Consortium Buena Park Mark Meyerhoff & Paul D. Knothe
Customized Training	
May 10	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Coalinga Michael Youril
May 10,16,24	“Preventing Workplace Harassment, Discrimination and Retaliation” Sonoma Valley Fire and Rescue Authority Kristin D. Lindgren
May 14	“A Guide to Implementing Public Employee Discipline” ERMA Chowchilla Kimberly A. Horiuchi
May 15	“Leave Management” City of Gardena Kristi Recchia
May 16	“Leaves, Leaves and More Leaves” City of Fountain Valley Jennifer Rosner
May 16	“A Guide to Implementing Public Employee Discipline” ERMA Novato Suzanne Solomon
May 17	“Risk Management for Front Line Supervisors” ERMA Perris Danny Y. Yoo
May 17	“Preventing Workplace Harassment, Discrimination and Retaliation” Housing Authority of the City of Alameda Joy J. Chen
May 21	“Preventing Workplace Harassment, Discrimination and Retaliation” Contra Costa Mosquito and Vector Control District Concord Joy J. Chen
May 22	“Successful Supervisory Skills” City of Gardena Kristi Recchia
May 22	“Guide to Implementing Public Employee Discipline” ERMA Hesperia Christopher S. Frederick
May 22	“Key Legal Principles for Public Safety Managers - POST Management Course” Peace Officer Standards and Training - POST San Diego Frances Rogers
May 23	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Banning Danny Y. Yoo
May 24	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Manhattan Beach Laura Kalty
May 24	“Risk Management Skills for the Front Line Supervisor” ERMA Shafter Kimberly A. Horiuchi
May 30	“Maximizing Supervisory Skills for the First Line Supervisor” City of Richmond Jack Hughes
May 31	“MOU’s, Leaves and Accommodations” City of Santa Monica Laura Kalty

June 1,4	“Writing Investigations” Probation Training Center Pico Rivera Los Angeles County Probation
June 4	“Preventing Workplace Harassment, Discrimination and Retaliation” ERMA Cathedral City Christopher S. Frederick
June 5	“Costing Labor Contracts” City of Long Beach Kristi Recchia
June 5	“Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service” City of Atherton Erin Kunze
June 5,27,29	“Handling Grievances” Probation Training Center Pico Rivera Los Angeles County Probation
June 6	“Performance Management” City of Gardena Kristi Recchia
June 6	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Santa Maria Che I. Johnson
June 6	“The Brown Act and Ethics and Grievance Procedures” County of Imperial El Centro Stefanie K. Vaudreuil
June 7	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Fairfield Gage C. Dungy
June 11	“Performance Management and Performance Evaluation” Housing Authority Santa Clara County San Jose Kristi Recchia
June 13,14	“Preventing Workplace Harassment, Discrimination and Retaliation” Town of Truckee Jack Hughes
June 14	“Mandated Reporting” East Bay Regional Park District Oakland Erin Kunze
June 15	“Keenan SWAAC Training: Performance Management” Keenan Torrance Pilar Morin
June 15	“Freedom of Speech and Right to Privacy” Labor Relation Information System - LRIS Las Vegas Mark Meyerhoff
June 19,26	“Key Legal Principles for Public Safety Managers - POST Management Course” POST San Diego Frances Rogers
June 20	“Risk Management Skills for Front Line Supervisor” ERMA Rancho Cucamonga Christopher S. Frederick

Speaking Engagements

May 17	“Courageous Authenticity - Do You Care Enough to have critical Conversations?” Southern California Public Labor Relations Council (SCPLRC) Monthly Meeting Cerritos Kristi Recchia
May 19	“AB-1234: Ethics Training” California Contract Cities Association (CCCA) Annual Municipal Seminar Indian Wells J. Scott Tiedemann

- May 21 **“Promoting Equal Opportunity in Public Contracting”**
Association of Chief Business Officials (ACBO) 2018 Spring Conference | Santa Rosa |
Laura Schulkind & Doug Smith
- May 22 **“Making your Auxiliary Legally Compliant”**
ACBO 2018 Spring Conference | Santa Rosa | Erin Kunze
- May 23 **“Defining Board and Staff Roles and Relationships”**
California Special Districts Association (CSDA) Special District Legislative Days | Sacramento |
Gage C. Dungy
- May 25 **“Labor Relations Training”**
CSAC Labor Relations Class | Sacramento | Richard S. Whitmore & Richard Bolanos & Gage C. Dungy
- May 29 **“Employment Law and the Interactive Process”**
Judicial Branch Workers’ Compensation Program (JBWCP) | Santa Ana | Jennifer Rosner
- June 25 **“Strategies to Manage Increasing Pension Costs”**
CSDA General Manager Leadership Summit | Olympic Valley | Steven M. Berliner
- June 26 **“Powerful Leadership: Effective Tips for Stellar General Managers”**
CSDA General Manager Leadership Summit | Olympic Valley | Gage C. Dungy

Seminars/Webinars

- May 16 **“Cafeteria Plans: All About the Cash (in Lieu)”**
Liebert Cassidy Whitmore | Webinar | Heather DeBlanc & Stephanie J. Lowe
- May 21 **“Preparing for a Strike: How to Ensure Effective Coordination for Your Agency”**
Liebert Cassidy Whitmore | Webinar | Che I. Johnson
- May 30,31 **“FLSA Academy”**
Liebert Cassidy Whitmore Seminar | Buena Park | Peter J. Brown
- June 13,14 **“Internal Affairs Investigation Training”**
Liebert Cassidy Whitmore | Fullerton | Geoffrey S. Sheldon & J. Scott Tiedemann
- June 20 **“How to Avoid Claims of Disability Discrimination: The Road to Reasonable Accommodation”**
Liebert Cassidy Whitmore | South San Francisco | Jennifer Rosner
- June 26 **“Firefighter Discipline and Appeal Rights: How to Comply with the Bill of Rights”**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos
- June 27 **“Life After Retirement - Hiring Retired Annuitants and Avoiding Violations”**
Liebert Cassidy Whitmore | Webinar | Frances Rogers & Michael Youril
- June 28 **“The Negotiable Aspects of Organizational Restructuring and Day-to-Day Labor Relations”**
Liebert Cassidy Whitmore | Webinar | Jack Hughes

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