LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

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INDEX

LCW NEWS

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

40 years
1980 - 2020

DISABILITY DISCRIMINATION

Student Not Required To Exhaust Administrative Remedies Under The Individuals With Disabilities Education Act When Arguing School District Discriminated Against Her By Failing To Provide Accommodations And Creating A Hostile Learning Environment.

L.M., a student with a disability, attended school in the Eugene School District 4J, which developed L.M.'s 504 Plan, a written document describing the regular or special education and related aids and services L.M. needed. The 504 Plan identified limited accommodations for L.M., including extra time on tests and assignments, reduced assignments and projects, preferred seating, and a quiet and separate testing environment. However, when L.M. began high school, teacher Michael Stasack declined to implement L.M.'s 504 Plan accommodations and repeatedly suggested she did not belong in the French Language Program due to her disability.

In May 2014, L.M.'s parents filed a complaint against Stasack. The District ultimately found Stasack violated the District's anti-discrimination and harassment policies. As a remedy for the violations, the District offered L.M. two options: she could attend college-level French classes through the University of Oregon or complete an "Independent Study" program through the District. Instead, L.M. completed a yearlong study abroad program the following school year. She returned to the high school in fall 2015.

In fall 2015, L.M. was diagnosed with another disability, so the District amended her 504 Plan to include an emergency protocol that required school officials call 911 if she were seriously injured.

As to L.M.'s language study, after the District discouraged her from taking college courses, L.M. accepted the District's offer of an independent study program for the 2015–16 school year. The independent study program instructor was a non-language teacher who was not certified to administer the International Baccalaureate exams and was not accredited to teach Advanced Placement courses. Ultimately, L.M. lacked sufficient opportunity to practice French, and she was unprepared for the AP exam in spring 2016.

In the same school year, L.M.'s math teacher repeatedly declined to implement the 504 Plan accommodations. Towards the end of that school year, the District reassigned Stasack to a different school after it investigated another student's complaint against him. L.M.'s peers organized a walkout in support of Stasack and to protest Stasack's reassignment. These students also protested the accommodations students with disabilities sought, believing that Stasack was "fired because of the 504 kids." L.M. felt isolated from her peers and betrayed by her teachers and school administrators who failed to intervene in the protest. Throughout the following year, L.M.'s classmates harassed and bullied her for her perceived role in Stasack's transfer. School officials never addressed the hostile learning environment L.M. experienced.

In June 2016, L.M. fractured her ankle during a physical education class. Despite the 504 Plan's emergency protocol requiring school officials to call 911, school officials declined to call for an ambulance.

During her 2016–17 senior year, the District made it difficult for L.M. to apply for college in light of her disability. The District failed to submit documentation for L.M. to receive testing accommodations with the College Board, declined to record properly academic credit for independent study and physical education classes from her junior year, and refused to help L.M. obtain the necessary evaluations and approvals for IB and College Board testing accommodations.

L.M., after turning eighteen, filed a lawsuit against the District in May 2018. L.M. argued the District failed to provide her reasonable accommodations and discriminated against her by failing to provide the reasonable accommodations and creating a hostile learning environment in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The District filed a motion in the trial court to dismiss the lawsuit. The trial court appointed a magistrate judge to assist the trial court judge in hearing the District's motion. The magistrate judge concluded L.M.'s claims, although raised under the ADA and Section 504, could not proceed because she failed to exhaust her administrative remedies as required by the Individuals with Disabilities Education Act. Although L.M. never sought services under the IDEA, the magistrate judge concluded L.M.'s claims involved the provision of a free appropriate public education (FAPE), and therefore the IDEA required exhaustion. The trial court adopted the magistrate judge's recommendation and dismissed L.M.'s lawsuit. L.M. appealed.

On appeal, the Court of Appeals determined it must determine the basis of the complaint in order to determine whether the law required L.M. to exhaust her administrative remedies. It considered two questions: First, could L.M. have brought essentially the same claim if she alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? Second, could an adult at the school—say, an employee or visitor—have presented essentially the same complaint? If the answer to both questions was yes, the complaint did not likely allege the denial of a FAPE; if the answer is no, then it likely did.

Here, L.M. first complained the District discriminated against her by failing to provide her with specific accommodations, none of which constituted FAPE under the IDEA. L.M.'s complaint alleged the District failed to: (1) provide an alternative, quiet location to take exams, (2) provide extra time to complete exams, and (3) comply with an emergency health protocol. These accommodations were not "special education," because they did not provide "specially designed instruction." Additionally, L.M. did not seek or receive special education or an IEP, so these accommodations were not "related services," which are services a child needs "to benefit from" special education. Thus, because L.M. sought relief for the District's failure to provide specific accommodations that were neither "special education" nor a "related service"—the constituent parts of the IDEA's FAPE requirement—she did not seek relief for the denial of FAPE. L.M. also complained the District discriminated against her by creating a hostile learning environment, which is not the same as seeking relief for the denial of FAPE under the IDEA.

The Court of Appeals found L.M. could have brought essentially the same claims against public facility that was not a school, and an adult at L.M.'s school could assert the same rights as L.M.. Although the underlying events in L.M.'s lawsuit occurred in an educational setting, L.M. was not required to exhaust her administrative remedies merely because the underlying events had "some articulable connection to the education of a child with a disability." The Court would only require exhaustion if L.M. sought relief for the denial of a FAPE, which she did not. Accordingly, the Court of Appeals reversed the trial court's dismissal of L.M.'s lawsuit for failure to exhaust administrative remedies under the IDEA. The Court remanded the case to the trial court to reconsider the case and determine any applicable statutes of limitations under Oregon law.

L.M. v. Eugene Sch. Dist. (2020) 976 F.3d 902.

COVID-19

U.S. Department Of Education Issues Additional Guidance Regarding Civil Rights Responsibilities During The COVID-19 Pandemic.

The U.S. Department of Education released two Question and Answer guidance documents on September 28, 2020. The guidance provides assistance regarding the implementation of the Individuals with Disabilities Education Act in the current COVID-19 environment and school reopening strategies.

The guidance recognized that state educational agencies and local educational agencies may deliver instruction to students through distance instruction, in-person attendance, or a combination of both, but regardless of the delivery method, agencies remain responsible for ensuring it provides a free appropriate public education to all children with disabilities. If state and local decisions require schools to limit or not provide

in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligations under the IDEA.

One guidance document provided answers to seven questions in the area of IEPs, initial evaluations, initial and annual IEP Team meetings, and reevaluations. The answers suggested IEP Teams should consider how a school will implement a student's IEP with traditional in-person instruction and how it could provide services through distance instruction if circumstances require a change to distance learning or a hybrid model. The guidance did not provide any flexibility to the timeline requirements for initial evaluations, initial eligibility determinations, or reevaluations. The Department also encouraged LEAs to investigate all appropriate assessment instruments and tools to determine if it can administer some remotely during the pandemic.

The Department also issued a second guidance document that contained thirteen questions and answers regarding reopening schools during the COVID-19 pandemic.

The guidance stated a school reopening plan or any school policy that prioritized, otherwise gave preference to, or limited programs, supports or services to students based on their race, color, or national origin violated federal anti-discrimination laws. However, schools may prioritize in-person instruction for students with disabilities in order to provide services necessary to ensure those students receive a Free Appropriate Public Education.

Regarding face covering mandates, the guidance stated local education agencies should make reasonable modifications to policies, practices, or procedures—including any addressing the use of face coverings—when those modifications can be made consistent with the health, safety, and well-being of all students and staff, and are necessary to avoid discrimination on the basis of disability.

State or district policies that reduce or limit services specifically for students with disabilities in a particular jurisdiction, without regard to any reasonable modifications or services that may be necessary to meet the individualized needs of those students, violate Section 504. Ultimately, local education agencies are still responsible for complying with provisions of Section 504 and Title II of the Americans with Disabilities Act, including requirements regarding conducting evaluations and reevaluations. Local education agencies must also continue to comply with Title IX regulations, which changed effective August 14.

Read the guidance documents here and here.

U.S. Department Of Education Issues Revised Guidance Regarding CARES Act Funding To Private School Students.

The U.S. Department of Education released updated guidance entitled" Providing Equitable Services to Students and Teachers in Non-Public Schools Under CARES Act Program" after three court cases—including brought by the State of California— successfully challenged the Department's initial guidance issued on April 30, 2020. The CARES Act authorized the Education Stabilization Fund, which was a new appropriation of $30.75 billion that created funding streams for programs that addressed the impact of COVID-19 on educational services. Under these programs, the Department awarded governors, State educational agencies, and institutions of higher education to help states prevent, prepare for, and respond to the effects of COVID-19. Two programs required local educational agencies that received funds to provide equitable services to students and teachers in private schools.

Specifically, the original guidance advised LEAs to set aside money for "equitable services" for *all* local private school students. This was a departure from how federal law typically handled those services, which were provided normally only to disadvantaged and at-risk students in private schools. Under the original guidance, if private school students represented 8% of total enrollment within the LEA's boundaries, the LEA must set aside 8% of the total funds the LEA received under a CARES Act program for equitable services for these students at private schools.

However, in August and September, three federal trial courts issued decisions that concluded an LEA must determine the proportional share available to provide equitable services to non-public school students and teachers in accordance with Section 1117(a)(4)(A) of the Elementary and Secondary Education Act—meaning, the equitable services calculation is based now on the number of low-income children who attend private schools. Accordingly, the Department released revised guidance on October 9, 2020, that aligned with the courts' decisions.

An institution of higher education or education-related entity that receives funds through the CARES Act is not required to provide equitable services to students and teachers in nonpublic schools.

Read the revised guidance here.

NOTE:

The multistate lawsuit against the Secretary of Education, in which the State of California joined, argued the federal rule threatened tens of millions of dollars in California intended to help K-12 public schools confront the effects

of the COVID-19 pandemic. Specifically, the State successfully argued the federal rule violated requirements established by Congress, the Administrative Procedure Act, and the U.S. Constitution. Now that the Department has revised the rule, LEAs are no longer required to divert CARES Act funding intended for low-income students to private school students regardless of economic status.

CLERY ACT

U.S. Department Of Education Rescinds And Replaces 2016 Handbook For Campus Safety And Security Reporting.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act contained specific campus safety- and security-related requirements for institutions of higher education. In an announcement made October 9, 2020, the U.S. Department of Education stated the 2016 Handbook for Campus Safety and Security Reporting and previous versions of the Handbook created additional requirements and expanded the scope of the statute and regulations. In an effort to eliminate guidance that extended beyond the statutory and regulatory requirements and reduce regulatory confusion, the Department rescinded the 2016 Handbook. However, this action does not change any statutory or regulatory requirements related to Clery Act reporting.

The Department will create a new appendix in the Federal Student Aid Handbook. Among the significant changes is guidance regarding Clery geography, Clery crimes, and Campus Security Authorities.

This rescission will inform the Department's views moving forward, but the rescission will not retroactively apply to previous Department determinations regarding Clery Act violations, fines, enforcement actions, or any other related actions by the Department. Additionally, none of the changes in the new appendix affect the July 10, 2020, temporary extension (to December 31, 2020) that the Department provided regarding Clery reporting due to COVID-19.

Read the Department's announcement here and new Appendix to the FSA Handbook here.

STATE CHANCELLOR OPINIONS

State Chancellor's Office Opinion Finds Districts Are Required To Provide Real-Time Captioning Of Online Classes.

The California Community Colleges Chancellor's Office issued Legal Opinion 2020-11 on October 19, 2020, regarding whether community college districts must provide real-time captioning in live synchronous online classes.

The Chancellor's Office found Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and state law, require a district to provide auxiliary aids or services to deaf and hearing impaired students to ensure they are able to participate in their educational program. This requirement may be satisfied by the provision of real-time captioning in live, synchronous online classes, depending on the individual needs of the student in the class, but districts must give "primary consideration" to the choice of aid or service requested by deaf or hearing impaired students, and weight such requests against the burdens they would impose upon the college program.

Read the Opinion here.

State Chancellor's Office Opinion Finds Online Class Cameras-On Requirement May Violate Student Privacy Rights.

The California Community Colleges Chancellor's Office issued Legal Opinion 2020-12 on October 19, 2020, regarding whether it was permissible for community college faculty to require students to keep their cameras on during live synchronous online instruction, which may enhance the interactive nature of an online class, provide the instructor with visual feedback, and facilitate attendance monitoring.

The Chancellor's Office found the practice was not expressly prohibited, but it could potentially violate student privacy rights under the California Constitution and other federal and state privacy and civil rights laws.

The Opinion recommends Districts adopt policies limiting or prohibiting faculty from establishing cameras-on requirements. However, if student participation is essential to the online class, Districts should consider the extent to which cameras are necessary during the class, consider alternatives such as audio participation, encourage the use of electronic backgrounds, or encourage the chat feature for attendance and discussion.

Read the Opinion here.

TITLE IX

New York State Voluntarily Dismisses Lawsuit Regarding Title IX Regulations.

The State of New York agreed on November 3, 2020, to dismiss its lawsuit against the U.S. Department of Education regarding the new federal Title IX regulations. The lawsuit, filed in June 2020 by New York State officials and the Board of Education for the City School District of the City of New York, challenged the new federal regulations that govern how educational entities must adjudicate sexual harassment allegations under Title IX of the Education Amendments of 1972.

Although the parties voluntarily dismissed the lawsuit, they agreed the State or educational entities in the state could still argue the regulations were invalid if New York schools are sued for sexual assault or harassment-related claims.

In October, a federal trial judge in Washington, D.C., also dismissed a different lawsuit filed by the American Civil Liberties Union on behalf of advocacy organizations for survivors of sexual assault.

Therefore, two lawsuits remain that challenge the legality of the new Title IX regulations. One lawsuit filed by the National Women's Law Center and other legal advocacy groups completed a trial on November 12, 2020, in a federal trial court in Massachusetts. The parties in another lawsuit involving sixteen states and the District of Columbia, including California, continue to litigate the matter, and the court set some deadlines in March 2021.

NOTE:

An educational entity's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. Even if an educational entity does not accept federal or state funding, the new regulations may raise issues of best practice. Educational entities should therefore review their policies and procedures in light of the new Title IX regulations and carefully consider what practices they wish to adopt.

If your school, college, or university needs assistance, please contact one of our five offices statewide. Learn more about LCW's Title IX compliance training programs and other resources by visiting this page.

BUSINESS AND FACILITIES

When A Company Modifies A Contract, It Must Provide Notice To All Parties And Allow The Parties To Consent To The New Term.

In 2014, Rachel Stover purchased Experian's credit score subscription service. The terms of the service required Stover to arbitrate all claims arising out of the subscription service and contained a change-of-terms provision stating that, each time Stover accessed Experian's website, she consented to "the then current terms" (i.e. new or different terms added or revised after 2014). Stover cancelled her Experian subscription one month after purchase and later claimed that Experian fraudulently marketed this credit score as information that lenders review when determining consumers' creditworthiness.

Stover accessed the Experian website again in 2018, one day before she filed her complaint. At that time, the arbitration provision had changed to exclude certain disputes from arbitration. Stover argued that her dispute was not subject to arbitration pursuant to the 2018 terms. Experian disagreed and argued that a mere visit to the website after the parties terminated their business relationship was insufficient to activate a change in the original terms because Stover had no opportunity to review the new terms and conditions before visiting the website. Experian moved in the trial court to compel arbitration of Stover's claims. The trial court granted Experian's motion but held that the 2018 terms applied because of the plain language of the 2014 terms. Stover appealed.

The Ninth Circuit Court of Appeal affirmed the trial court ruling, but held that Experian's 2014 terms applied because Stover did not receive notice of the 2018 version of the terms and conditions. The Court of Appeal held that ruling otherwise would undermine the contract principle requiring mutual assent. The Court of Appeal reasoned that in order to bind parties to new terms pursuant to a change-of-terms provision, the parties must have express notice and an opportunity to review those changes. Thus, the 2018 changed terms did not apply because Stover did not have notice of them and Experian could compel arbitration of her claims under the 2014 arbitration provision.

Stover v. Experian Holdings, Inc. (2020) 978 F.3d 1082.

NOTE:

If a company modifies contract terms and conditions, even with an express change-of-terms clause, it must provide notice to all parties in a manner that allows the parties to expressly consent to the new or changed terms. LCW can help companies navigate the terms of any contract and evaluate appropriate and effective notification strategies.

Neighbors Use Of Private Recreational Trails Is Insufficient To Establish Public Dedication Of Land.

Prior to 1972, a private landowner could dedicate an interest in land to the public impliedly when "the public has used the land for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." In 1972, the legislature enacted Civil Code Section 1009, subdivision (b), which effectively abolished implied dedications prospectively.

Martha Company (Martha) owned 110 acres of undeveloped land in the Tiburon peninsula, near the communities of Tiburon and Belvedere, for more than 100 years. The Reed family owns and controls the Martha Company and utilized the property for cattle grazing until 1959. Four roads dead-end at the property and the property has views of Angel Island, San Francisco, and the Golden Gate Bridge.

In 2017, Tiburon/Belvedere Residents United to Support the Trails (TRUST) filed a complaint to quiet title, in favor of the public, of recreational easements over four trails on the property. TRUST argued that, before 1972, the public's use of trails on Martha's property established a recreational easement under the doctrine of implied dedication. At trial, TRUST witnesses, mostly comprised of locals living in the neighborhoods immediately surrounding the property, testified that, during the five-year period preceding 1972, the trails were frequently used for various forms of recreation, including hiking, running, dog walking, biking, horseback riding, and picnicking. The majority of TRUST's witnesses recall gates or old fences of some kind at points where the property intersected with the trails. Although, some witnesses also testified that there were no barriers blocking access to the trails.

On the other hand, Martha's witnesses, including members of the Reed family, painted a different picture. They testified, that, during the relevant period, fences, gates, and "no trespassing" signs were in place at various trail access points. Trespassers frequently cut wires in the fencing and removed signs, necessitating continual repairs.

The trial court concluded TRUST failed to show that the public's use of the trails was sufficient "to make a conclusive and undisputable presumption of knowledge and acquiescence." The court reasoned, "it is a high standard to take away a party's land in favor of a public dedication." The trial court entered judgment for Martha and TRUST Appealed.

On appeal, TRUST argued that the trial court applied the wrong legal standard by discounting the testimony of neighbors and of its witnesses during the relevant period. The Court of Appeal disagreed and found that, for the most part, TRUST's witnesses were a small group of neighbors and not the public at large. The appellate court found that the landowner might have simply tolerated this use as a neighborly accommodation. Even assuming that a significantly large and diverse group of the public used the trails, Martha made adequate bona fide attempts to prevent public use by installing fences and "no trespassing" signs. The Appellate Court found that substantial evidence supported the trial court's findings of insufficient public use, and Martha's attempts to deter trespassers demonstrated lack of acquiescence to a public dedication.

Tiburon/Belvedere Residents United to Support the Trails v. Martha Company (2020) __Cal.App.5th__ [2020 WL 6266312].

FIRM VICTORY

Office Of Administrative Hearings Upholds Faculty Member's Termination For Creating Hostile Educational Environment.

LCW Attorneys **Eileen O'Hare-Anderson** and **Jenny Denny** successfully represented a community college district in a tenured faculty member's disciplinary appeal.

Throughout the faculty member's more than 15 years at the District, the District received numerous student complaints against him alleging harassing and discriminatory classroom conduct and generally inappropriate behavior aimed at students and colleagues. The District issued repeated written warnings from the faculty member's deans, and College President. Despite these warnings, an administrative investigation in 2018 confirmed the faculty member continued to violate directives and District policies. The District placed the faculty member on paid administrative leave in December 2018 pending the Board of Trustees' final decision ending the faculty member's employment in February 2019.

The faculty member appealed. The District and faculty member, representing himself, set the matter for a 10-day hearing in February 2020 before the Office of Administrative Hearings.

Prior to the hearing, the faculty member, who is a licensed attorney, sent an extreme number of special interrogatories, several motions to compel discovery, a motion for sanctions, a motion to dismiss, motions to strike, and even a motion for summary judgment, all of which are extremely rare in an OAH proceeding.

The District presented testimony from 20 witnesses who interacted with the faculty member. Most of the faculty member's witnesses were former students who had been enrolled in his classes and who were not offended by his conduct. In the end, the faculty member, through his testimony, clearly showed he was evidently unfit for service and persistently violated the District's policies and directives.

The Administrative Law Judge issued a 137-page ruling upholding the District's termination of the faculty member. Specifically, the ALJ found a preponderance of evidence established that the faculty member told a story about a former student in which he described her scant attire and breast size, repeatedly used the word "tard" (a truncation of the word "retard") to describe himself and students, referred to wives as "bitches," and made a crude reference to political candidates performing sex acts in order to advance her political ambitions. The ALJ found these comments cumulatively constituted hostile or offensive conduct in violation of District policy and procedure, inappropriate or offensive remarks, jokes or innuendoes based on a person's gender or other protected status. The comments also constituted inappropriate comments regarding an individual's body, physical appearance, attire, and were patronizing or ridiculing statements that conveyed derogatory attitudes based on a protected status. The gratuitous comments created a hostile academic environment that interfered with the learning or work activities of several students. Finally, the ALJ found that the First Amendment did not protect the faculty member's speech because the District had a greater interest in maintaining a hostile-free learning environment and the offending conduct did not relate to the substance of the faculty member's lectures.

The ALJ concluded that the District's decision to dismiss the faculty member was reasonable and supported by the District's evidence. The ALJ affirmed the decision to terminate.

DAMAGES

City May Deduct Post-Termination Earnings From Award In Wrongful Termination Case.

In 2017, the California Court of Appeal concluded that the City and County of San Francisco wrongly terminated Paulo Morgado from his job as a police officer. As a remedy, the court directed the City to vacate Morgado's termination and reinstate him pending an administrative appeal. The City did reinstate Morgado. But, the City then suspended him without pay retroactive to his 2011 termination. Morgado argued that the retroactive suspension was inconsistent with the court order. The court agreed and issued an order holding the City in contempt. The contempt order required the City to "unconditionally" vacate Morgado's termination and suspension, and compensate him with front pay and benefits he would have earned between his termination and court victory.

Next, Morgado argued that the City was only partially complying with the court's order. Instead of paying him in full, the City offset the payment owed to Morgado based on his post-termination earnings as a mortgage broker. Morgado argued that the City used his tax returns for the years he was employed as a broker and suspended as a police officer to deduct $181,402. Morgado obtained a second order of contempt against the City directing it to repay the amount deducted. That ruling made its way to the California Court of Appeal.

On appeal, the sole issue was whether the "front pay"- or the future wages Morgado lost for the time between his termination and his court victory-- was subject to an $181,402 deduction for the side income he earned during that time. In public and private employment cases, the governing remedial principle is that the remedy should return the employee to the financial position he would have been in had the employer's unlawful conduct not occurred. Employees, however, are generally not entitled to recover in excess of make-whole damages.

The court first considered whether an employer can offset front pay. Morgado argued that front pay is immune to offset. The Court of Appeal disagreed. The court noted that there was no basis "in logic or fairness" to exclude front pay from the principle of "make-whole relief." The court reasoned that the purpose is to make a wrongfully terminated employee whole. Thus, front pay must be subject to deduction to avoid overcompensation.

The court then evaluated whether the City could take a deduction for income generated by "moonlighting" or side employment. The court noted that if an employee would have earned such income regardless of his employment status, the income cannot be deducted from the wrongful termination compensation. Here, the court reasoned that if Morgado had not been terminated and suspended, he would not have been able to take up secondary employment as a mortgage broker and he would not have earned the disputed income. Thus, the City was justified in deducting the compensation from his front pay award.

Finally, the court analyzed whether the City calculated the $181,402 deduction properly. The court noted that the $181,402 was based on the total pre-tax income Morgado made as a broker. The court concluded that taking away $181,402 from Morgado, when he earned only a portion of that figure after taxes, would deprive him of money that he was properly owed. The court remanded the issue for the parties to determine the proper post-tax amount of the deduction.

Morgado v. City & Cty. of San Francisco (2020) 53 Cal. App. 5th 1216.

NOTE:

This case demonstrates the complexities of offsetting damages awards in employment cases. Agencies should ensure they are considering mitigating income when paying employees both back pay and front pay.

QUALIFIED IMMUNITY

Qualified Immunity Does Not Apply To First Amendment Retaliation Claim Against County.

Natia Sampson is the paternal aunt of a minor named H.S. In 2014, after learning that H.S.'s parents had been incarcerated, Sampson volunteered to become H.S.'s legal guardian. The Los Angeles County juvenile dependency court ordered H.S. to be placed in Sampson's care pending Sampson's guardianship application. The Los Angeles County Department of Children and Family Services (DCFS) assigned social worker Ahmed Obakhume to H.S.'s case.

While Obakhume was assigned to H.S.'s case, he commented on Sampson's appearance and marital status, urged her to end her marriage, touched her inappropriately, and attempted to coerce her into riding in his vehicle. After several months of unwanted advances, Sampson complained about Obakhume's conduct to his supervisor, Nicole Davis. In responding to Sampson's complaint, Davis said that Obakhume was "one of her best" social workers and the only one willing to work with H.S.'s biological parents. Obakhume's conduct continued.

Sampson also experienced two other issues dealing with DCFS officials. One issue was that DCFS required Sampson to supervise visits between H.S. and the biological parents, even though Sampson expressed her unwillingness to do so. The other issue was that when Sampson had difficulties obtaining a special type of funding for caregivers, DCFS officials continued to incorrectly tell her there were unsatisfied requirements. Despite Sampson's numerous complaints and DCFS's assurances they would remedy these issues, they never did.

In August 2015, the juvenile court granted legal guardianship of H.S. to Sampson. Thereafter, H.S.'s biological father absconded with H.S. in October 2015 during a visit that Obakhume had said could be unsupervised. Obakhume visited Sampson's house to discuss the incident and told her that the social workers "stick together" and "cover for each other."

A month later, with Davis' permission, Obakhume filed unsupported allegations that Sampson was neglecting and abusing H.S. DCFS then sought an order from the juvenile court to remove H.S. from Sampson's care. After significant litigation and a brief period in which H.S. was removed from Sampson's custody, the California Court of Appeal returned H.S. to Sampson's care realizing that DCFS's allegations of abuse and neglect were unfounded.

Sampson subsequently sued DCFS and four individual DCFS employees, including Obakhume and Davis, under 42 U.S.C. Section 1983. Sampson alleged sexual harassment in violation of the Equal Protection Clause of the Fourteenth Amendment, retaliation in violation of the First Amendment, and other constitutional claims. The district court granted qualified immunity to DCFS on Sampson's First and Fourteenth Amendment claims and dismissed all other causes of action. Sampson appealed the district court's dismissal based on qualified immunity for her Fourteenth Amendment equal protection and First Amendment retaliation claims.

In order to state a claim under Section 1983, Sampson had to plausibly allege that she was deprived "of a federally protected right" and that the "alleged deprivation was committed by a person acting under color of state law." In Section 1983 actions, qualified immunity protects government officials from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To determine whether qualified immunity exists, a court will consider whether: 1) the person suing has plausibly alleged a violation of a constitutional right; and 2) the constitutional right was clearly established at the time.

The Ninth Circuit vacated the district court's grant of qualified immunity to DCFS on Sampson's First Amendment retaliation claim. The court reasoned that at the time of DCFS's misconduct, it was clearly established that the First Amendment prohibits public officials from threatening to remove a child from an individual's custody to chill protected speech. In other words, DCFS should have known that it was unconstitutional to retaliate against Sampson for speaking out about the sexual harassment she allegedly suffered. The court then remanded the claim to the district court to determine whether Sampson could meet the first prong of the test, namely whether she plausibly alleged a retaliation claim under the First Amendment.

Regarding Sampson's Fourteenth Amendment equal protection claim, the Ninth Circuit affirmed the district court's grant of qualified immunity. The court noted that unlike Sampson's retaliation claim, the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established

at the time. However, the court nonetheless determined that moving forward, public officials, including social workers, violate the Equal Protection Clause of the Fourteenth Amendment when they sexually harass individuals while providing them social services.

Sampson v. Cty. of Los Angeles (2020) 974 F.3d 1012.

NOTE:

While this case dealt with the Equal Protection Clause as it relates to social workers, prior case law clearly establishes the right under the Equal Protection Clause to be free from sexual harassment by public officials in the workplace.

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.

- Following the California Supreme Court's interpretation of IWC Wage Order 7 in the *Frlekin v. Apple* case we reported on in the April 2020 *Education Matters*, the Ninth Circuit granted summary judgment in favor of the employees. The Ninth Circuit found that the employees were entitled to compensation for the time spent waiting for and undergoing exit searches. (*Frlekin v. Apple, Inc.* (2020) __ F.3d __ [2020 WL 5225699].

- On September 17, 2020, Governor Gavin Newsom signed into law Senate Bill (SB) 1383, which significantly expands the California Family Rights Act (CFRA). Effective January 1, 2021, California's family and medical leave law (Government Code section 12945.2) will: apply to all employers with five or more employees; allow leave to care for a serious health condition of additional categories of family members; and eliminate some restrictions on the use of CFRA leave.

- On Friday, September 4, 2020, Governor Newsom signed Assembly Bill (AB) 2257 into law, which reorganizes the Labor Code sections established by AB 5 and amends certain exceptions to the "ABC" test for determining independent contractor status. This law takes effect immediately.

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: Should an educational entity subject to Title IX of the Education Amendments of 1972 wait to revise its policies and procedures to comply with the new federal Title IX regulations issued in May 2020 considering President-Elect Biden may change the federal regulations?

Answer: LCW anticipates President-Elect Biden will change the new federal Title IX regulations once his administration begins. The current regulations run contrary to much of the work President-Elect Biden led while Vice President—namely his work leading the White House Task Force to Protect Students from Sexual Assault.

However, it is unclear at this time how or when the Biden Administration will change the Title IX regulations. It is also unclear whether the Biden Administration will seek to amend all of the new regulations or, more likely, focus on some of the more problematic pieces of the new regulations. The U.S. Department of Education could issue new regulations, issue informal guidance as we saw with the 2011 Dear Colleague Letter or 2014 Question and Answer document, or even push new federal legislation. The new administration cannot simply withdraw the current regulations; rather they have to amend the current regulations. Amending new regulations or creating and passing new legislation takes time. For example, the U.S. Department of Education lead by Betsy DeVos announced in September 2017 that it would issue new federal Title IX regulations. After preparatory discussions lasting more than a year, the Department issued proposed regulations in November 2018 and began the public comment period, which culminated in issuing the final regulations more than eighteen months later in May 2020.

Until the new administration makes any changes, LCW strongly recommend educational entities follow the current federal Title IX regulations. It would be risky for an educational entity to refuse to adopt policies and procedures to implement the current Title IX regulations even though we suspect they will change. When Title IX obligations change whether through regulatory amendments, guidance, or the like, LCW will work quickly to alert our clients and explain how the changes affect policies and procedures.

BENEFITS CORNER

Recent Developments Should Trigger Employer's Review of COBRA Notice Procedures.

Employers should review their COBRA notices, election forms, and procedures due to recent regulatory and litigation developments. COBRA is a federal law that provides for the continuation of group health plan benefits to "covered employees" (i.e., employees who elect group health plan coverage) and "qualified beneficiaries" (i.e., the spouses and dependents of covered employees) under certain circumstances when the health coverage would otherwise be lost. Typically, this can happen due to a "qualifying event", such as a reduction in hours or termination of employment, which then allows employees to elect to continue coverage under their employer's group health plan for a specified number of months at their own expense. The current economic climate has also unfortunately required many employers to implement many cost-saving and workforce reduction measures, thus further highlighting the need to revisit COBRA compliance.

A plan administrator must provide qualified employees (and covered dependents) with mainly two types of COBRA notices: general and election notices. General notices are provided to employees who are newly covered under their employer's health plan, which explains their COBRA rights due to a qualifying event. An election notice is provided to an employee experiencing a qualifying event, which explains important and required information, such as continued coverage rights, the length and cost of continued coverage and an election form. The U.S. Department of Labor (DOL) has actively guided employers, plan administrators and employees regarding COBRA compliance, including issuing regulations identifying the necessary information in these notices and publishing model notices.

On May 4, 2020, the DOL issued a new rule, which pauses certain COBRA deadlines due to COVID-19 during a period designated as the "Outbreak Period" (from March 1, 2020 until 60 days after the end of the Coronavirus National Emergency or such other date announced in future guidance). Notably, the clock stops on the following key COBRA deadlines (among others) and then restarts after the Outbreak Period ends: the subsequent 60-day period for a qualified beneficiary to elect COBRA continuation coverage; the 45-day deadline for making an initial COBRA premium payment following the initial election; and the 30-day deadline for making subsequent monthly COBRA premium payments, which follows the first day of the coverage period for which payment is being made. For further discussion on the DOL's new rule, see our June 2020 Education Matters. Also note, the DOL recently revised its model COBRA notices, but they have not been updated to account for the extended deadlines noted above.

Recently, there has been a notable rise in class action litigation against employers based on alleged non-compliance in the content and issuance of COBRA notices. These class actions generally allege that the companies' COBRA election notices: failed to include the minimum content that the DOL regulations specified; were not written in a readable manner; failed to explain COBRA coverage enrollment and related deadlines; deviated significantly from the DOL's model notices; and included additional unnecessary information intended to deter persons from obtaining COBRA continuation coverage. Defendants are raising a variety of applicable defenses to these class actions, but the significant costs of litigation alone often drive the parties towards settlement.

Given these significant recent developments, employers should take the time to review the administration of their plans and the issuance of required notices, and consult with their benefits counsel and third-party administrators. For example, employers can compare their COBRA election notices line-by-line to both the DOL Regulations and model notices. Employers should understand what differences exist and why.

Employers should also take the time to review their administrator service agreements to ensure adequate indemnification against COBRA compliance deficiencies.

It is unclear whether employers need to specifically revise COBRA notices to reflect the extended deadlines noted in the DOL's new rule, especially considering the DOL has not yet revised its own model notices. Nevertheless, to mitigate against the risk of non-compliance and costly litigation, employers should exercise due diligence to independently determine whether any revisions are necessary. Also, employers should familiarize themselves again with the applicable rules for terminating COBRA continuation coverage, such as when qualified beneficiaries obtain coverage under other group health plans or become entitled to

Medicare benefits. Note, the DOL's temporary rule extends the due date for making COBRA premium payments through the Outbreak Period, which effectively limits employers' ability to terminate such coverage for failure to timely pay premiums.

Calendar Year 2020 ACA Reporting And Penalties For Applicable Large Employers.

As we enter the last quarter of this unprecedented year, applicable large employers (ALEs) are starting to prepare for annual ACA reporting. Generally, an ALE is an employer that had, on average, 50 or more full-time employees (including full-time equivalents) during the preceding calendar year, according to ACA's specific calculation rules.

Recently on July 13, 2020, the IRS released drafts of the 2020 Form 1094-C and Form 1095-C. ALEs will provide a completed Form 1095-C to each full time employee and file the final versions of these forms in early 2021 to report ACA compliance during the 2020 calendar year. Please note the following deadlines:

- January 29, 2021 - Provide IRS Form 1095-C that you plan to file with IRS to each full-time employees (as that term is defined under the ACA) (Statement);
- February 26, 2021 - Last Day to Mail Form 1094-C and Forms 1095-C to the IRS;
- March 31, 2021 –Last Day to E-file Form 1094-C and Forms 1095-C to the IRS.

Note: ALEs filing 250 or more returns must file electronically.

Employers who fail to provide Statements to full-time employees or fail to file correct Forms are subject to the following penalties:

- Failure to provide Statement to Employee – $270 for each failure (maximum annual penalty of $3,275,500); and
- Failure to file correct Form - $270 for each failure (maximum annual penalty of $3,275,500).

ALEs should plan ahead to ensure these deadlines are met to avoid penalties. ALEs working with a vendor on the filings should double check the Forms to ensure that the vendor is completing them correctly, as the IRS will still penalize the ALE (not the vendor) for incorrect forms and failure to timely file.

2020 Penalty Amounts For The ACA's Employer Shared Responsibility Requirements.

The IRS also recently published the 2020 tax year annual ACA penalty amounts, which increase every year. These penalties are referred to as Employer Shared Responsibility Payments, and are described as follows:

4980H(a) Penalty: For failure to offer minimum essential coverage to at least 95 percent of full-time employees in any given calendar month:

- **$214.17 per month** ($2,570 annualized) multiplied by the total number of full-time employees less 30. In 2021, this penalty increases to $2,700 annualized.

4980H(b) Penalty: For failure to offer affordable minimum essential coverage that provides minimum value:

- **$321.67 per month** ($3,860 annualized) for each full-time employee who enrolls in coverage and receives a subsidy from Covered California. In 2021, this penalty increases to $4,060 annualized.

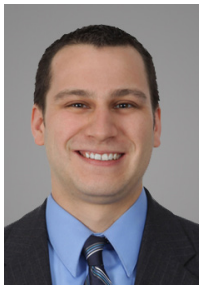
ALEs subject to potential penalties will receive an IRS Letter 226J to inform them of their potential liability for an employer shared-responsibility payment.

ALEs who are subject to the Employer Shared Responsibility Requirements should review their policies and health benefit arrangements to confirm they do not have exposure to ACA penalties. In our August 2020 *Education Matters*, we generally discuss the three main IRS safe harbors, which an employer may use to consider whether it offers affordable coverage. However, it's important to note that offering flexible benefit arrangements and cash in lieu may impact the general affordability calculations. If you have questions about your particular arrangement, please reach out to an LCW attorney.

LCW

Congratulations to Our New Partners!

Introducing LCW's newest partners, Grace Chan & Michael Youril!



Grace Chan represents private educational institutions in all aspects of education and employment law. Grace works extensively in handling various employment and student issues, such as drafting employment agreements, employee handbooks, enrollment agreements and student handbooks, defending claims of alleged harassment and discrimination, among others. She regularly advises boards on governance issues, including updating bylaws, articles and board policies, and advising on board functions and operations, fiduciary duties and obligations, and risk management practices.

Michael Youril has extensive experience in retirement law including CalPERS, the '37 Act, and local retirement systems. Michael represents public agencies in all aspects of the CalPERS audit and determination process and in disability retirement proceedings. Michael regularly represents agencies before the Office of Administrative Hearings and various retirement Boards. Michael also litigates employment law actions in state and federal courts through all stages of litigation. He regularly litigates cases involving discrimination, harassment, retaliation, and whistleblower retaliation, among others. Michael has also litigated several individual and collective action cases brought under the Fair Labor Standards Act. Michael was named a Northern California Super Lawyers Rising Star in 2017 and 2020.

To view our tribute to Grace and Michael, and their comments, please visit our website.

Firm Publications

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

Los Angeles Partner **Steven M. Berliner** was quoted in *Pensions & Investments* 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.

Los Angeles Partner **Pilar Morin** was quoted in the *Daily Journal* article, "Schools Must Rely More Heavily on Legal Counsel to Navigate New Title IX Rules," discussing the Department of Education's new Title IX regulations that went into effect on August 14, 2020.

Los Angeles' Partner **Pilar Morin**, Senior Counsel **David Urban** and **Associate** Anni Safarloo authored the *Daily Journal* article, "Review New Title IX Regulations, Effective This Month," discussing the new Title IX regulations that went into effect August 14, 2020.

Los Angeles Partner **Pilar Morin** and Sacramento Associate **Kristin Lindgren** authored the ACHRO/EEO article, "Investigations in the Time of COVID-19," discussing the obligations CCDs have to conduct legally compliant investigations during the COVID-19 pandemic.

New to the Firm

English Bryant is an Associate in Liebert Cassidy Whitmore's San Diego office, where she assists clients in all matters pertaining to labor and employment. Prior to joining LCW, English served as a legal advisor the San Diego County Sheriff's Department, handling high-level personnel issues, civil service hearings, and Pitchess motions, and overseeing Internal Affairs investigations and medical standards issues.

She can be reached at 619.481.5900 or ebryant@lcwlegal.com.

Megan Nevin is an Associate in Liebert Cassidy Whitmore's Sacramento office, where she represents public sector employers in all aspects of labor and employment law. Megan is an experienced litigator with a proven track record of success in motion practice and trials.

She can be reached at 916.584.7013 or mnevin@lcwlegal.com.

Michael Gerst is an experienced litigator in Liebert Cassidy Whitmore's Los Angeles office. His has successfully argued several state and federal appellate matters, including before the United States Courts of Appeals for the Ninth, Fifth, Sixth and Third Circuits.

He can be reached at 310.981.2750 or mgerst@lcwlegal.com.

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Management Training Workshops

Firm Activities

Consortium Training

Nov. 19 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
North San Diego County ERC | Webinar | Laura Drottz Kalty

Nov. 19 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
San Mateo County ERC | Webinar | Christopher S. Frederick

Nov. 20 **"Terminating the Employment Relationship"**
SCCCD ERC | Webinar | Melanie L. Chaney

Dec. 2 **"Ethics For All"**
Humboldt County ERC | Webinar | Michael Youril

Dec. 3 **"Moving into the Future"**
Gateway Public ERC | Webinar | T. Oliver Yee

Dec. 3 **"New Developments in FLSA Litigation: What Fire Command Staff Need to Know"**
San Diego Fire Districts | Webinar | Lisa S. Charbonneau

Dec. 4 **"Regulations and Obligations: The Changing Landscape of Title IX"**
SCCCD ERC | Webinar | Jenny Denny

Dec. 9 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 2"**
San Gabriel Valley ERC | Webinar | Jeremiah A. Heisler

Dec. 10 **"The Meaning of At-Will, Probationary, Seasonal, Part-Time and Contract Employment"**
Bay Area ERC | Webinar | Heather R. Coffman

Dec. 10 **"Disaster Service Workers - If You Call Them, Will They Come?"**
East Inland Empire ERC | Webinar | Brian J. Hoffman

Dec. 10 **"Managing COVID-19 Issues: Now and What's Next"**
San Diego ERC | Webinar | Peter J. Brown & Alexander Volberding

Dec. 11 **"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"**
Central CA CCD ERC | Webinar | Jenny Denny

Dec. 16 **"MOU Auditing and The Book of Long Term Debt"**
Central Valley ERC | Webinar | Kristi Recchia

Dec. 16 **"Speaking Freely or Shouting "Fire""**
Northern CA CCD ERC | Webinar | Kristin D. Lindgren

Dec. 17 **"Exercising Your Management Rights"**
South Bay ERC | Webinar | Melanie L. Chaney

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.

Nov. 23 **"Performance Management: Evaluation, Documentation and Discipline for Community College District"**
Napa Valley College | Webinar | Kristin D. Lindgren

Dec. 1 **"Maximizing Supervisory Skills for the First Line Supervisor"**
City of Stockton | Webinar | Brian J. Hoffman

Dec. 3 **"Understanding Our Unconscious Bias"**
City of Burbank | Webinar | Shelline Bennett

Dec. 8 **"Respectful Workplace: Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Carlsbad | Stephanie J. Lowe

Dec. 8 **"Ethics in Public Service"**
City of National City | Webinar | Stacey H. Sullivan

Dec. 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Shelline Bennett

Dec. 9 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Brian J. Hoffman

Speaking Engagements

Nov. 19 **"Layoffs: They Are Coming, Are You Ready?"**
(CCLC) Annual Convention | Webinar | Eileen O'Hare-Anderson & Melanie Chaney

Nov. 20	**"Town Hall - Legal Eagles"** (CCLC) Annual Convention | Webinar | Eileen O'Hare-Anderson & Laura Schulkind & Pilar Morin & Kristin D.Lindgren
Nov. 30	**"Negotiating in Lean Times - What School Boards Need to Know"** (CCSA) Legal Symposium for Experienced Board Members | Webinar | Laura Schulkind & Kristin D. Lindgren
Dec. 4	**"How the 2020 Census and California Voting Rights Act May Impact Future Board Elections"** (CCSA) Virtual Annual Conference | Webinar | Alysha Stein-Manes & William Tunick

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore.
The information in ***Education Matters*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.