LCW Liebert Cassidy Whitmore

Private Education Matters

News and developments in education law, employment law and labor relations for California Independent and Private Schools and Colleges.

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LCW NEWS

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

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

FREE SPEECH

Students Can Be Disciplined for Racist Instagram Account Despite All Posts Being Made Off Campus During Non-School Hours.

In November 2016, a student referred to as "C.E." at Albany High School (AHS), a public school in northern California, created an Instagram account with the handle @yungcavage. He invited several AHS students to follow the private account. By March 2017, around 9 students had access to the account, some who were C.E.'s friends and others who were acquaintances. In those 5 months, C.E. made around 30-40 posts, which all included derogatory, racist comments and many of which targeted AHS students or employees. Sometimes the student's or employee's picture was included.

Some examples of these offensive posts include: A picture of a school coach and student (both African-American) with nooses around their necks that said "twinning is winning;" multiple comparisons of African-American women and students to gorillas; and a screenshot of an iPhone spelling correction page showing the word "nigger" being changed to "nibbler" and captioned "Making my texts more black friendly."

Ten different AHS students were depicted in the account and some of the images were taken on school property. While C.E. made all the posts, other students liked or commented on the posts. The parties did not dispute that C.E. posted all images and comments to his account off school property and not during school hours. The supposedly private account became public knowledge in March 2017 when one person who followed the account showed two AHS students, both of whom were African-American. News spread quickly and students were enraged and distraught. Angry and upset students gathered in the hallway and the commotion was the first time the school principal learned of the account and its effects.

C.E. deleted the account the evening after it became public knowledge. By June 2017, the school had suspended each of the account's followers. C.E. and the followers sued the school, claiming the discipline violated their First Amendment rights. The followers had all liked or commented on the posts, except for one who had access to the account but never interacted with it beyond viewing it. He was suspended as well.

The court explained that public school students do have free speech rights, but that a long line of cases has laid out the tests for determining how to balance those rights against the safety and well-being of the student population as a whole. Different types of speech are analyzed differently, and while the notion of speech being "off-campus" was a component of the earlier cases, in today's advanced technological world, the court noted that these black and white notions of on or off campus are no longer as relevant.

The first test the court used relates to the nexus between the speech and the school. Then the court analyzed whether it was reasonably foreseeable that the speech would affect school. The court agreed that the Instagram activity falls under the First Amendment. Liking posts and commenting on them are forms of expression covered by the First Amendment because they convey the user's agreement or enjoyment or approval. There was only one account follower who did not like or comment on any post. The court found that his reading of the

material is covered activity of the First Amendment, and was troubled by the school's decision to discipline him.

After finding the speech involved was protected activity, the court went on to explain why the Instagram activity was school speech. The account was created by and followed by AHS students, and those targeted in the posts were also AHS students and employees. Some posts were directly related to school events and some images were taken on campus. This shows a nexus to school life and made it reasonably foreseeable that the speech might reach school. Even though the account was set up as private, the court noted that everyone knows that nothing can guarantee the privacy of content posted online.

Under current case law, speech may only be the cause for discipline if it risks a substantial disruption of the school environment or violates the rights of others to be secure. The court emphasized that, in general, schools are also responsible for preventing harassment and bullying. As to the right to discipline C.E., the court found no question that the school was within its rights to expel him. Students were so upset by the posts that the school had to call in mental health counselors. The court also found the school had the right to discipline those students who liked or commented on the posts that specifically targeted AHS students. Students have the right to be free of being targeted due to their race or ethnicity and to enjoy a safe and secure environment. The commenters who approved of C.E.'s posts disrupted those rights.

For the followers who did not approve of or comment on any posts targeting AHS students, the court drew a distinction, noting that endorsement of generally offensive or noxious speech is different from encouraging speech that targeted specific students. These followers did not create a risk of substantial disruption from their conduct. AHS was not granted summary judgment as to those four students, as well as the student who did not engage in any activity on the posts.

Some of the students argued that even if their discipline was constitutional, recording the discipline in their permanent records was not. But these students pointed to no events or facts that would justify updating their records with new information showing that their suspensions or expulsion were mistaken. The court denied the request to remove disciplinary records.

Even though this case involved public school students, the court also addressed Education Code 48950 and 48907, which provide free speech protection to high school private school students. The court noted that these statutes are really just endorsements of the line of case law the court used in reaching its conclusion in this matter.

Shen v. Albany Unified School Dist., et al., 2017 WL 5890089.

NOTE:

This is one of the few cases to directly address the Education Code sections 48950 and 48907 relating to private school speech. From the reasoning in this case, schools can see that courts will generally apply the same standards used in the public school setting when determining if a student's free speech rights have been violated by disciplinary action. Schools should be careful when disciplining high school students in particular for activity that occurs online during non-school hours. Tying such discipline to school policies such as a policy against harassment or discrimination or anti-bullying can support the school's decision to discipline for so-called "off campus" speech. While this case involved a public school, the Education Code specifically provides free speech protections to private school high school students.

EMPLOYEES

LABOR RELATIONS

NLRB Overturns Prior Standard for Assessing Legality of Employee Handbook Policies.

In a case involving The Boeing Company's handbook policies regarding cameras and hand-held devices on company property, the Board overruled its prior standard for assessing handbook policies under the National Labor Relations Act ("NLRA") and created a new test. The prior standard, under the *Lutheran Heritage* case from 2004, held that employers violated the NLRA by maintaining workplace policies or rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be "reasonably construed" by an employee to prohibit the exercise of NLRA-protected rights.

In this case, the Board majority ruled that the prior standard had many faults, including being contrary to Supreme Court precedent because it did not allow for any consideration of the legitimate business reasons that may underlie many policies and rules. Furthermore, the majority felt the prior rule imposed too many restrictions on the Board by requiring a one size fits all approach.

The new test is as follows: When evaluating a facially neutral policy or rule that, under a reasonable interpretation, might interfere with NLRA rights, the Board will evaluate two factors: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rules. As a result of this balancing consideration, the Board will create three categories of employment rules or policies.

Category 1 will include rules that are lawful to maintain because either the rule does not prohibit or interfere with NLRA-protected rights, or the potential adverse impact on those rights is outweighed by the business justifications. An example the Board gave of such a rule is one that requires employees to maintain basic standards of civility in the workplace. Category 2 will include rules that warrant individualized scrutiny of the balance between the rights and the justifications. Category 3 will include rules that are unlawful to maintain because they would limit or prohibit protected conduct and the business justifications do not outweigh the limitation of those rights. An example of a Category 3 rule would be one that prohibits employees from talking about their wages with each other.

The Board clarified that the Categories are not part of the test itself, but merely the results of the application of the test. In the case at issue here, the Board analyzed Boeing's rules about prohibiting cameras on company property. Though the Board acknowledged such a rule might interfere with NLRA-protected rights, such interference is dwarfed by the legitimate business justifications for the rule, such as ensuring Boeing complies with federally required security procedures, preventing disclosure of proprietary information, and preventing terrorist attacks since Boeing manufactures sensitive defense equipment.

The Board also explained that even if a certain rule is legal to maintain, some applications of such a rule may still be impermissible if such applications are analyzed and found to be too much of an infringement on protected activity. For example, while an employer may maintain a policy requiring civility in the workplace, if that employer uses the policy to punish employees engaging in a work-related dispute that is protected by the NLRA, then the Board may find the discipline violated the NLRA.

The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, Cases 19-CA-090932, 19-CA-090948 and 19-CA-095926 (December 14, 2017).

NOTE:

This new test allows for flexibility on the part of the Board to determine if a particular handbook rule or policy violates the NLRA. Schools should make sure that there are legitimate business reasons underlying all policies they maintain, particularly ones which may, in some cases, be understood as infringing upon certain employee rights. As this new test is applied in future cases, we will get a better sense of the types of rules that fall into the three different categories.

MARIJUANA USE

Navigating the Hazy World of Recreational Marijuana Use Following Proposition 64's Passage.

In 2016, California voters passed Proposition 64 ("Prop 64"), making the recreational use and sale of marijuana generally permissible under California law. Specifically, Prop 64 legalizes the use of marijuana for non-medical reasons by adults age 21 and over. While Prop 64 made the use of recreational marijuana legal under state law as of November 9, 2016, it only directed the State of California to begin issuing business licenses for the sale of recreational marijuana beginning January 1, 2018. Federal law still prohibits possession of marijuana, whether for recreational or medicinal purposes.

Several major California cities, including Los Angeles, San Francisco, San Diego, Oakland, and San Jose have already approved regulations permitting sales within their jurisdictions. Other cities, including Riverside, Fresno, Bakersfield, Pasadena, and Anaheim have elected to prohibit recreational sales, either permanently or temporarily.

Given the ability of a private citizen, age 21 and older, to now legally use recreational marijuana throughout the state, Prop 64 raises many issues for employers that currently implement drug free work place policies and drug testing programs.

Proposition 64 does not change the status quo regarding the enforcement of drug free workplace policies and testing programs. In fact, the language in Prop 64 specifically provides that Prop 64's amendments shall not:

"[B]e construed or interpreted to amend, repeal, affect, restrict, or preempt: . . . The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law."

This critical language was included in Prop 64 in order to ensure that employers are able to maintain or create their own policies regarding their employees' marijuana use.

Therefore, even after Prop 64's passage, all employers may still prohibit employees from possessing, using, or being under the influence of drugs, including marijuana, in the workplace, while on the employer's premises; while operating employer-owned equipment; while driving employer-owned vehicles; when attending functions or

events as a representative of the employer; or while in uniform.

Furthermore, "safety sensitive" employees can still be subject to random drug testing, and those testing requirements and potential consequences of positive testing remain unchanged. All other classes of employees continue to be subject to testing based on the "reasonable suspicion" standard, post-accident, or return to duty situations as addressed in many employer policies. The reasonable suspicion standard likewise applies to searches of an employee's work area. What constitutes reasonable suspicion will depend in part on how that phrase is defined by an employer's drug testing policy.

Schools should consider reviewing current handbook policies to determine whether they need to be updated in order to explicitly state the employer's expectations regarding the possession and use of marijuana in the workplace. Schools may also want to indicate in such policies that California law does not legalize recreational marijuana for individuals under the age of 21, public consumption of marijuana or driving while under the influence of marijuana.

Despite changes to state law, federal law remains unchanged. Marijuana is still considered a "Schedule I" drug under the federal Controlled Substances Act. This means that under federal law, including the Americans with Disabilities Act ("ADA"), employers are not required to accommodate "illegal" drug use, including marijuana usage.

While the status of an employer's obligation to accommodate marijuana usage for medical reasons under state law also appears to remain unchanged following Prop 64's passage, the controlling California case on this issue, *Ross v. Raging Wire Telecommunications, Inc.*, may be vulnerable now that California has legalized recreational marijuana.

In the *Ross* case, the California Supreme Court held that employers are not required to accommodate an employee's use of marijuana, even if the marijuana was recommended by a health care professional. The Court noted that, although the Compassionate Use Act of 1996 prohibits people who use marijuana under the care of a physician from being charged criminally, the Act does not grant marijuana the same status as a legal prescription drug. Similarly, the Court reasoned that, since the California Fair Employment and Housing Act ("FEHA") does not require employers to accommodate illegal drug use, the employer could lawfully terminate the employee for using medical marijuana. The Court further stated that marijuana cannot be "completely legalize[d] for medical purposes" because it is illegal under federal law.

Though *Ross* is still good law even though Prop 64 passed, based on the Court's reasoning, it is possible that a court examining identical facts could come to a different conclusion based on California's legalization of marijuana. On the other hand, because marijuana is still designated a Schedule I drug under the federal Controlled Substances Act, a court could point to the federal law and maintain that the applicability of the California Compassionate Use Act and the FEHA are limited. Employers will ultimately have to do a cost benefit analysis if the issue of accommodating an employee's use of marijuana arises. Absent further guidance from the state or the courts, schools should not have to make such accommodations.

The legalization of recreational marijuana under California law may pose potential enforcement challenges when implementing workplace drug policies and conducting drug tests on employees. For example, an employee may test positive for marijuana (i.e., the presence of "THC" in their system) based on off-duty consumption. That employee may argue that despite the test, he or she has complied with the letter of the employer's policy because the policy only bans use, possession or being under the influence of marijuana while on the employer's property or while on duty. In fact, many factors impact whether someone tests positive for marijuana, including the person's individual metabolism, frequency of use, amount of use, and type of test (urine, blood, hair) used. Many tests are unable to determine when a person consumed marijuana.

Employees generally have some expectation of privacy with respect to their off-duty conduct unless such conduct has a nexus to their employment. Whether a court will find a nexus to employment may depend on the particular position at issue. For example, employees who come into regular contact with children are often held to a higher standard.

Schools should review their drug free workplace policies to ensure that they clearly state that an employee may be disciplined for off-duty use under certain circumstances. Such a policy should indicate that off-duty drug use may be subject to discipline if such conduct can be reasonably said to affect an employee's job duties or impact school life. When disciplining an employee for such off-duty conduct, however, we recommend that employers discuss such discipline with legal counsel.

NOTE:

LCW will be tracking further guidance arising from Prop 64 and its implementing regulations over the coming year and will provide updates as needed.

SALARY BASIS TEST

New Database Available With Information Needed for Calculating Salary Basis Test Figures for Teachers Under Revised Labor Code 515.8.

The California Association of Private School Organizations (CAPSO) has put together a helpful database of the salaries for each school district and County Office of Education in the state. This information is necessary for schools to calculate the minimum salary for an exempt teacher under the revised Labor Code 515.8. The website also explains to users how to compare the database information to determine the relevant numbers for their school.

The database, with instructions, can be found at: http://bit.ly/2nz8vUJ

DEFAMATION/INVASION OF PRIVACY

Defamation Case Cannot Proceed Where Statement Regarding Teacher's Use of Prescription Drugs While Supervising Children Was Mere Opinion.

Teacher Jerretta Certain worked at Barfield Elementary School, where one of her after school duties was monitoring the carpool pick-up process. One day the principal, Judy Goodwin, received a phone call from the grandparent of a current student, who told Goodwin that she had just picked up her grandchild and Ms. Certain appeared to be under the influence of something. Goodwin brought Certain, along with the school nurse and a school resources officer, to a classroom to question her.

Certain suffers from several medical conditions, including nerve pain and fibromyalgia, and arthritis. She claimed on that day she was having severe muscle spasms in her back. She took several prescription medicines during the day including anti-anxiety pills, nerve pain pills, and muscle relaxers. In the classroom, Goodwin asked to look in Certain's purse, where she found seven different prescription bottles of pills.

The nurse, the officer, and Goodwin all testified that they felt Certain was in an "altered state." She could not keep her eyes open, had a flat affect, and could barely walk down the hall by herself. When they found the pill bottles, Goodwin said something along the lines of, "It looks like we may be dealing with an addiction to prescription drugs." She then allegedly asked the nurse if she would want her daughter under Certain's care knowing this about her. The nurse said no.

Ms. Certain was not disciplined because she went on immediate medical leave. She sued for defamation, invasion of privacy, and intentional infliction of emotional distress. The trial court granted summary judgment for Goodwin and Certain appealed. The defamation claim was for slander, relating to the statement Goodwin made about an addiction to pills. Certain conceded that as a public school teacher, she was a public figure and would be held to the higher standard of requiring her to prove actual malice on the part of Goodwin.

Goodwin claimed that she said it might be possible that there was an addiction to pills, whereas Certain alleged the statement was that it looked like they were dealing with an addiction. Either way, the court found that Goodwin's comment did not rise to the level needed to show defamation. Judging within the context in which the statement was made, with Certain barely able to walk straight and not keeping her eyes open when she was supposed to be monitoring children, along with finding seven different prescription bottles in the purse, there was no indication that Goodwin was motivated to make false statements about Certain. The court also found that Goodwin's statement was one of mere opinion, and therefore not actionable. Furthermore, there is no evidence of actual malice.

As for the privacy claim, Certain acknowledged that she agreed to get her purse and give it to Goodwin to examine. Certain's purse was in her classroom, thereby accessible to students, and Goodwin was concerned about what might be inside given Certain's behavior. The information as to what medications Certain was taking was highly relevant to the inquiry over her mental state. Under the totality of the circumstances, the court could not find that this search violated Certain's privacy in a highly offensive way. As for the intentional infliction of emotional distress claim, the behavior would have to be so outrageous as to be intolerable in a civil society. The court found that a quick and cursory look into Certain's purse and questions about her prescription drug use were not outside the bounds of decent behavior given the context of this incident. Goodwin had received a concerned call from a grandparent who had just witnessed Certain's behavior. Goodwin, along with the nurse and officer, all testified as to Certain's impaired condition. The safety of children was at stake. Taking action to determine what was going on was not unreasonable. Summary judgment was affirmed on all counts.

Certain v. Goodwin, 2017 WL 5515863.

NOTE:

In this case, the court ultimately found that given the circumstances and Ms. Certain's consent, the search of her purse was permissible. However, it is definitely risky to search an employee's personal belongings. If a school ever has reason to believe the employee has contraband in his or her personal possessions, it would be a good idea to consult counsel before conducting a search.

ECCLESIASTICAL ABSTENTION

Ecclesiastical Abstention Does Not Apply to Employee's Claim Where Termination Based on Budgetary Constraints.

Janet Cropper was employed by the Roman Catholic Diocese as a lay administrator at Saint Augustine School. Her employment contract was renewed for the following year, but just before the new school year started, she was terminated due to the school's declining enrollment and dwindling operating budget. She sued for breach of contract. The trial court ruled the ecclesiastical abstention doctrine did not bar the claim, but that the school prevailed on the substance since Cropper could not show a breach of contract. Cropper appealed the court's decisions and the Court of Appeals reversed the trial court on the matter of breach of contract but did not address the ecclesiastical abstention doctrine.

The school argued the ecclesiastical abstention doctrine applied and should bar Cropper from her damages claim based on breach of contract. The court clarified by noting that the doctrine actually operates as an affirmative defense, not a bar to bringing a claim. The doctrine prohibits secular courts from adjudicating predominantly religious issues so as not to entangle themselves with matters of faith and thus violate the First Amendment. The court must determine if Cropper's claim could be decided without "wading into doctrinal waters."

Here the court ruled that her termination and resulting breach of contract claim were not in any way entangled with church matters. Cropper's dismissal was directly caused by the falling enrollment numbers and resultant budgetary constraints. Her designation as "lay" administrator, or her level of involvement with the religious life of the church played no role in the decision to terminate her employment. Therefore, the ecclesiastical abstention defense was not applicable in this case. Neutral principles of law could be used to decide the matter.

St. Augustine School; Diocese of Covington v. Cropper, --S.W.3d--, 2017 WL 5896868.

TRANSGENDER EMPLOYEES

New Poster Required by DFEH Regarding Transgender Employee Rights.

Starting January 1, 2018, all employers are required to post a new poster pertaining to transgender employee issues. The poster provides information regarding definitions of key terms, use of facilities such as locker rooms and restrooms, and the right of employees to dress according to their own gender identity and expression. The poster must be displayed in a prominent area along with other required workplace posters.

More information can be found at: http://bit.ly/2GC3VgX.

PAID ADMINISTRATIVE LEAVE

To Be or Not to Be an Adverse Employment Action – What is Paid Administrative Leave?

This principle used to be clear – paid administrative leave was outside the scope of an adverse employment action. This was based on court holdings that an employee suffers no substantial or material change in terms and conditions of employment while on paid administrative leave. For years, courts held that an employee who is put on paid administrative leave cannot prove he or she suffered an adverse employment action to give rise to a viable discrimination or retaliation claim. However, this is no longer clear.

First, in 2013, the Ninth Circuit put into question the principle that paid administrative leave does not constitute a type of adverse employment action. In *Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060, the Ninth Circuit held that paid administrative leave could constitute an adverse employment action when considering the totality of the circumstances. Second, on November 15, 2017, the Fourth District Court of Appeal issued a decision in *Whitehall v. County of San Bernardino* holding that the imposition of an administrative leave may constitute an adverse employment action. ((2017) 2017 WL 5485398)

The decisions in *Whitehall* and *Dahlia* have forced California employers to rethink when paid administrative leave may qualify as an adverse employment action and to consider the risk involved with placing an employee on paid administrative leave.

The purpose of paid administrative leave is to temporarily remove an employee from the workplace to address a particular situation. For example, if an employee engages in or threatens violence in the workplace, an employer can and should remove the employee from the workplace pending an investigation into the alleged misconduct. Paid administrative leave has also been used by employers when, on balance, they feel it is better that the subject of an investigation is not in the workplace while the investigation is pending.

The California Supreme Court has coined "adverse employment action" as a "term of art." It is generally used as a shorthand description of the kind of adverse treatment imposed upon an employee to support a cause of action under a discrimination or retaliation statute.

Employees in California may bring claims of discrimination and retaliation pursuant to the Fair Employment and Housing Act ("FEHA"). Under the FEHA, an adverse employment action must be reasonably likely to impair an employee's job performance or prospects for advances. It

does not include minor or trivial actions that do no more than anger or upset an employee. This brings up the question, is paid administrative leave a substantial and adverse change in employment?

There is a split in federal circuit authority on whether paid administrative leave constitutes adverse action. However, the split is heavily weighted to one side favoring paid administrative leave is not an adverse employment action. The Ninth Circuit, which is the circuit whose decisions govern employers in California, is the outlier on this issue. The court, however, has explained that it is not a certainty that paid administrative leave always constitutes an adverse employment action. Rather, the paid administrative leave may constitute an adverse employment action in certain circumstances. Even though an employee receives full pay and benefits during paid administrative leave, when looking at the totality of the circumstances, a court may find the secondary effects that come as a natural result of being away from the workplace deter an employee from engaging in protected activity and constitute adverse employment action.

If paid administrative leave can be an adverse employment action, then employees placed on paid administrative leave who file a discrimination or retaliation lawsuit against an employer have added leverage in proving their case or negotiating a settlement. This creates tricky situations for employers who must now assess the risk in placing an employee on paid administrative leave.

Below is a checklist of the factors schools should consider when making a decision to place an employee on paid administrative leave and conducting a risk assessment into such decision. Courts will determine whether paid administrative leave constitutes an adverse employment action by looking at the totality of the circumstances. These factors balance the various factors a court may consider.

- Will the employee continue to receive full pay and benefits?

To reduce the possibility that administrative leave could be determined to constitute an adverse employment action, the employee must continue to receive full pay and benefits. The employee must continue to accrue vacation, sick leave, and personal time off just as he/she would be entitled to accrue if he/she was not on leave.

- Has the employee engaged in protected activity (such as complaining to other employees or on social media about working conditions at the school)?

If the employee has engaged in protected activity, then placing an employee on paid administrative leave immediately following such protected activity may appear retaliatory.

- Is the leave likely to deter employees from engaging in protected activity?

If employee activity is reasonably likely to be chilled due to the fear of being placed on paid administrative leave, then it may constitute an adverse employment action.

- Are any of the secondary effects of the leave likely to deter employees from engaging in protected activity?
- What has the employer done in similar situations in the past?
- Will the paid administrative leave hinder an employee's opportunity for promotion or advancement?
- Will the employee encounter stigma in the workplace for being placed on paid administrative leave?
- Are there any alternatives to placing this employee on paid administrative leave?

If your school is faced with this situation, we recommend your school consider consulting legal counsel before deciding to put an employee on paid administrative leave.

PAID SICK LEAVE

Santa Monica City Ordinance Accrual Increase.

As of January 1, 2018, the minimum cap for sick leave accrual for Santa Monica employers is 72 hours, not 40. Now it is higher than California state law. For employers with 25 or fewer employees, the accrual cap is increased from 32 hours to 40 hours. Private schools in the city of Santa Monica should make sure their sick leave policies reflect these changes.

TORTS/RESPONDEAT SUPERIOR

Employer Not Responsible Where Employee's Errand Was Not a Job Duty and Not at Employer's Request.

Vincent Ong worked for Genentech, a biotechnology company in South San Francisco as a lead technician on the night shift. He commuted to work in his own vehicle and was not compensated for his travel time. One of Ong's duties was to assist in interviewing and hiring for certain open positions. On Wednesday December 12, 2012, Ong received an email that Genentech had rejected two candidates and he and his supervisor Marc Tumaneng would have to look for more candidates.

Later that evening, Tumaneng had selected four new candidates to interview, and he inputted that information in WAND, the computer program Genentech used for hiring purposes. WAND generated four emails to Ong including information on the new candidates. Late that night Ong was driving his car when he collided with another vehicle. The accident resulted in the death of a passenger in the other vehicle. Ong told an officer he was headed to Genentech to pick up resumes for upcoming interviews. He also had mentioned to a friend earlier that night that he was going to drive into work for an important reason. The daughter of the woman who died in the crash sued Ong and Genentech, the latter on the theory of respondeat superior. The issue was whether Ong was acting within the course and scope of his employment when he was driving that night. If so, Genentech could be held vicariously liable. Genentech prevailed on summary judgment and plaintiffs appealed.

The court explained that the concept of the "scope of employment" has been interpreted broadly under California law with respect to finding vicarious liability through respondeat superior. An employee who is merely commuting to and from work is not within the scope of employment. However, there is a concept known as the "special errand rule" which holds that an employee is within the scope of employment while performing an errand either at the request of the employer or as part of the employee's regular duties.

Genentech argued that Ong was not performing a special errand because no one asked him to drive to work that night to collect the resumes of the new candidates and the task was also not part of his regular duties. The plaintiffs, however, asserted three different theories as to why Ong was on a special errand. First, they claimed he was able to order himself on a special errand as part of his hiring duties. Second, the emails he received about new candidates were a request to him to complete the hiring. And, third, going to work on one of his nights off was within his regular duties.

The court rejected these arguments. There was no evidence showing that anyone at Genentech instructed Ong to go in on his night off to collect the resumes to review. Just because Ong himself had supervisory responsibilities did not mean he could order himself on a special errand. Such a theory would undermine the heart of the special errand rule, which emphasizes that the employee was ordered on the errand by a superior. Ong made a unilateral decision to take time on his night off to drive in to work. This was not a special errand.

The court also rejected the notion that the automated emails from WAND constituted orders to go into work that night. It was not even clear that Ong read the emails before he drove in to work. Nothing in the emails ordered Ong to come to Genentech that night. Finally, the court found that driving into work that night was not part of Ong's regular duties of hiring. Just because Ong sometimes worked overtime or communicated with others outside of normal work hours does not mean that his duties required him to come to work on his night off to look at resumes. The court affirmed summary judgment for Genentech.

Morales-Simental v. Genentech, Inc., 2017 WL 4700383.

BUSINESS AND FACILITIES

SUB-CONTRACTORS

Subcontractor Compensation and Salaries Liabilities: Summary and Comment on AB 1701.

All private works construction contracts entered on or after January 1, 2018, require that the general contractor assume liability for debt owed to a laborer of a subcontractor at any tier. This liability includes unpaid wages, fringe or other benefit payments or contributions, including interest. It does not include liability for penalties or liquidated damages. Assembly Bill 1701 adds Section 218.7 to the California Labor Code. This new statute requires the direct contractor to cure a sub-contractors failure to pay an employee wages and benefits owed in connection with the contract. The statute does not allow a private right of action, but allows the Labor Commissioner, a labor union, or a joint labor-management cooperation committee to bring an action under this law. Lawsuits may be filed within one year following project completion, but may cover claims from the start of the project.

Schools who plan to enter into construction contracts next year should insist on the following contract provisions:

- Require the direct contractor to comply with this statute;
- Require the direct contractor to continue work on the project despite dispute or claims that could arise as a result of this law; and
- Require the direct contractor to include a provision in its subcontracts stating that subcontractors agree to continue work on the project despite disputes or claims arising as a result of this law.

Any disputes between the School's contractor and its subcontractors can create work stoppage issues for the School. A well-planned construction contract will protect the School from contractor/subcontractor disputes relating to this new law.

LIQUIDATED DAMAGES CLAUSES

Stipulated Judgment Must Bear Reasonable Relationship to The Amount Of Anticipated Damages.

Vitatech International, Inc. ("Vitatech") and National Marketing, Inc. ("NMI") entered into a contract for Vitatech to manufacture certain products for NMI. In 2011, Vitatech sued NMI and its related entities (collectively, the "NMI Defendants"). Vitatech alleged the NMI Defendants breached the contract by failing to pay $166,000 for products Vitatech had manufactured for them. Vitatech's lawsuit sought $166,000 in compensatory damages, plus interest, attorneys' fees, and costs.

The NMI Defendants denied liability and asserted a variety of defenses, including that the underlying contract was unenforceable and that Vitatech improperly manufactured and labeled the products. On the eve of trial, the parties agreed to settle the lawsuit. Under the terms of the settlement, the NMI Defendants agreed to pay Vitatech $75,000. The NMI Defendants also stipulated to an entry of judgment against them in the full amount alleged in Vitatech's lawsuit, if they failed to pay the $75,000 by a certain date.

Subsequently, the NMI Defendants failed to make the settlement payment by the due date and Vitatech asked the trial court to enter judgment in its favor based on the parties' stipulation. Vitatech sought a judgment of over $303,000 comprised of $166,000 in damages, $105,000 in interest, and $32,000 in attorneys' fees and costs. The trial court entered judgment in favor of Vitatech in the amount requested of over $303,000.

The NMI Defendants filed a motion to vacate the judgment on the ground that it was an unlawful liquidated damages penalty in violation of Civil Code section 1671, subdivision (b). This statute provides, in relevant part: "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." The NMI Defendants argued the judgment was an illegal liquidated damages penalty because it bore no reasonable relationship to the damages likely to be caused by breach of the settlement. The trial court rejected the NMI Defendants' arguments and denied their motion to vacate. The NMI Defendants appealed.

On appeal, the NMI Defendants argued the stipulated judgment was void because there was no reasonable relationship between the damages that could have been anticipated based on their failure to pay the $75,000 settlement and the stipulated judgment of more than $303,000. The Court of Appeal agreed. The Court explained that although the parties' stipulation for entry of judgment did not use the phrase "liquidated damages," its legal effect was the same as a liquidated damages provision because it predetermined the amount of damages Vitatech was entitled to receive if the NMI Defendants failed to timely pay the settlement amount. The Court held the amount of the stipulated judgment, therefore, was unenforceable unless the amount bore a reasonable relationship to the amount of damages the parties could have anticipated Vitatech to suffer if the NMI Defendants failed to pay the settlement amount.

The Court concluded that nothing in the record established a reasonable relationship between the NMI Defendants' failure to pay the $75,000 settlement amount and the $303,000 judgment. The Court stated: "[T]he parties made no effort to anticipate the damages that might flow from [the NMI Defendants'] failure to pay the settlement amount. Instead, the parties simply selected the amount Vitatech had sought as damages in the underlying lawsuit. The record, however, lacks any evidence suggesting Vitatech was likely to recover all of the damages it sought if it proceeded to trial. Moreover, we cannot conceive of any meaningful relationship between [the NMI Defendants'] failure to pay the amount Vitatech agreed to accept in settlement of its disputed claims and a judgment that is more than four times that amount."

Vitatech International, Inc. v. Sporn (2017) ___ Cal.App. __.

NOTE:

Many schools have enrollments agreements which contain liquidated damages provisions stating that in case the student leaves the school for any reason, the full year's tuition will be retained by the school as liquidated damages. If a parent ever sought to fight that provision by showing the damages clause was in fact a penalty, the school would need to be able to demonstrate why the tuition for the year is a reasonable estimation of damages for the parent's breach. Given that schools budget in advance for the year based on enrollment numbers, the school would likely rely on that to show that the tuition amount is the reasonable estimation of the school's loss in the event a child is removed.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

DECEMBER/FEBRUARY

- Review and revise/update annual employment contracts.
- Analyze teacher and administrator recruiting needs for the next school year.
- Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.
- Ensure computer-use policies are updated, especially if they will be used for enrollment and hiring of staff.

FEBRUARY - MARCH

- Prepare/Issue Enrollment/Tuition agreements for the following school year.
- Review field trip forms and agreements for any Spring/ Summer field trips.
- Tax documents must be filed if School conducts raffles:
  - Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The school must also complete Form W-2G and provide it to the recipient at the event. The school should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the school retains the rest of the copies. The school must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

FEBRUARY - APRIL

- Post job announcements and conduct recruiting.
- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal background and credit checks should be done, along with multiple reference checks.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: An administrator from a religious day school called and asked about the new AB 500. They wanted to know which policies the school had to publicize and how to publicize them. They were confused because they do not have anything called a Code of Conduct in their Employee Handbook. They also wondered if they were exempt as a religious school.

RESPONSE: The attorney explained that AB 500, which adds section 44050 to the Education Code, requires all private schools that maintain "a section on employee interactions with pupils in its employee code of conduct" to provide that information to parents and to post it on the publicly-accessible portion of their website. The law does not require schools that do not maintain relevant policies to create them. However, even if the school does not have something called a Code of Conduct, it might still have employee policies that would likely be covered by AB 500. Policies such as rules against friending students on social media, or requiring meetings with students to be in rooms with either the door open or a window, or rules about not being permitted to provide private tutoring to current students would likely qualify under this umbrella. The legislative history indicates the legislature was concerned about improper interactions with students by employees. Therefore, schools should look through any relevant employee handbooks or other policies and determine which, if any, policies might be covered. Some schools do maintain explicit policies entitled something like "Appropriate Interactions with Students." Others may have many policies spread throughout the handbook. School can collate these policies into one document that is then handed out to parents each school year with enrollment materials and posted as a link on the website. The attorney clarified that the only exception in the law is for homeschooling, and so even religious schools need to comply with this new law.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Feb. 6 **"Leaves, Leaves and More Leaves"**
CAIS Consortium | Webinar | Stacy Velloff

Feb. 22 **"12 Steps to Avoiding Liability"**
Builders of Jewish Education | Los Angeles | Max Sank

Customized Training

Feb. 2 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Hollywood School House | Los Angeles | Elizabeth Tom Arce

Feb. 15 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Menlo School | City of Atherton | Grace Chan

Feb. 16 **"Understanding Professional Boundaries and Mandated Reporter"**
Foothill Country Day School | City of Claremont | Julie L. Strom

Speaking Engagements

Feb. 8 **"Facilities Rentals: Risk Management and the Bottom Line"**
National Association of Business Officers (NBOA) | Webinar | Heather DeBlanc and Darrow Milgrim

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

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

If you have any questions, call Sherron Pearson at 310.981.2753.

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

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