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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STUDENTS

DISABILITY DISCRIMINATION

Court Rejects Former Student's Claim that USC Failed to Reasonably Accommodate.

Troy Beemer was a student enrolled in the accredited two-year Certified Registered Nurse Anesthetist (CNRA) Program (Program) at the University of Southern California (USC). USC's Program requires participants to complete clinical and non-clinical coursework over six consecutive semesters. Clinical courses are taken in a specified sequence, with subsequent courses building upon the skills learned in previous courses. Students spend four to five full days each week performing clinical rotations at a number of hospitals in the Los Angeles area. Each hospital specializes in one or more of the different types of clinical cases students must complete to sit for the certification examination necessary to become a CNRA.

During Beemer's second semester in the Program, he underwent nose, sinus, and eye surgery and requested, and was given, a few days off from the Program. Thereafter, Beemer received low marks for failing to meet course objectives, received feedback that he had gaps in his critical thinking ability, and was informed his patient care plans were poorly prepared and ignored patient safety issues. To assist Beemer improve, USC gave him additional time to prepare patient care plans. Near the end of Beemer's second semester, he suffered neck and back injuries in a car accident. Beemer's final grade for his clinical work in the second semester was a B-, which caused USC to place Beemer on academic probation and require Beemer to sign a Probation Contract.

During Beemer's third semester, he began requesting time off for physical therapy and doctor appointments related to his car accident and missing courses and clinical training without notifying his instructors in advance. USC counseled Beemer to try to schedule his medical appointments around his course and clinical schedule and to notify his instructors in advance of any absences as much as possible, but granted him all the time off he requested including a full week off at one point. Shortly thereafter, Beemer informed the Program director that he was unable to continue clinical training because of his ongoing care related to the car accident. The Program director and Beemer worked out a plan that allowed Beemer to withdraw from and postpone his clinical training until the following semester, while continuing his non-clinical coursework.

Before the next semester, Beemer requested to postpone clinical training for another semester and only continue his non-clinical coursework. The Program director granted Beemer's request upon receipt of a doctor's note. Additionally, the Program director, in consultation with the faculty, created a list of tasks (Contract of Study) for Beemer to complete in order to get him up to speed for clinical training the following semester.

Beemer performed poorly in his non-clinical coursework during that semester. He repeatedly failed to attend class, failed to participate in a group project worth forty percent of his course grade, failed to respond to his course instructor and Program director, turned in a paper that did not meet the assignment criteria, and did not complete the Contract of Study. At the end of the semester, the Program director asked Beemer to submit a plan on how he intended to complete the Contract of Study. Instead, Beemer submitted a list of demands that included being removed from probation, grade changes, exemptions from a group project, exemptions from attending some of the simulation workshops, exemptions from having to write certain clinical write-ups, taking two clinical courses at a time, permission to only perform clinical work at certain hospitals and with certain doctors, and early graduation.

The Program director believed some of these were requests for accommodations based on disability and she directed Beemer to contact USC's Office of Disability Services and Programs (DSP). The Program director told Beemer that if DSP approved the accommodations, the Program would follow DSP's instructions. DSP approved certain accommodations for Beemer, including time and half on exams and enlarged print on handouts and exam paperwork. Thereafter, Beemer requested and obtained a medical leave from the Program. He did not attempt to return.

Beemer filed a claim against USC alleging that the University failed to reasonably accommodate his disabilities under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Unruh Civil Rights Act (Unruh). Beemer argued that USC denied his requests for other, additional accommodations and that this denial caused his poor performance, which ultimately resulted in his constructive dismissal from the Program.

The Court disagreed. The Court analyzed Beemer's disability discrimination claim under the ADA, Section 504, and Unruh, stating Beemer had to show (1) he was qualified as disabled under these statutes; (2) he was otherwise qualified to remain a student in the Program; (3) he was dismissed because of his disability; and (4) USC receives federal financial assistance (for the Section 504 claim), is a public entity (for the ADA claim), and/or is a business establishment (for the Unruh claim).

First, the Court was unable to discern from the evidence Beemer presented whether his disability involved his eyesight or injuries related to the car accident. Second, USC repeatedly accommodated Beemer by permitting him to attend all appointments, take time off, postpone clinical training, miss simulation workshops, take more time for examinations, and take more time to prepare patient care plans. The additional accommodations that USC denied Beemer would have required a substantial modification to the standards of the Program by exempting him from completing the required variety of clinical work. Also, Beemer's request to take two clinical courses at a time was unreasonable because subsequent courses build upon previous ones and, importantly, there were not enough hours in the day to take two clinical courses at a time. Despite the provided accommodations, Beemer performed poorly, failed to comply with the terms of the Probation Contract, and failed to comply with the terms of the Contract of Study.

Third, the Court found that Beemer was not constructively dismissed from the Program. USC granted Beemer a medical leave from the Program and Beemer failed to enroll in courses or return to the program. Consequently, the Court affirmed the district court's grant of summary judgment to USC.

Beemer v. University of Southern California (C.D. Cal., July 24, 2017, No. 215CV01458CASSSX) 2017 WL 3161204, *reconsideration denied* (C.D. Cal., Sept. 18, 2017, No. CV1501458CASSSX) 2017 WL 4179858, *and aff'd* (9th Cir. 2019) 755 Fed.Appx. 714 (*unpublished*).

Note:

This case occurred at the university level, but private (non-religious) schools also have an obligation under Title III of the Americans with Disabilities Act (ADA) to engage in the interactive process with disabled students to identify reasonable accommodations that provide students equitable opportunity to participate in the school's educational programs. The school, through its designated representative, should work with the student and teachers to identify any barriers to accessing the academic program or activity at issue and to recommend reasonable accommodations that mitigate the impacts of those barriers, but do not fundamentally alter the essential functions of the school's educational programs.

EMPLOYEES

DISABILITY DISCRIMINATION

Employee's Disability Discrimination Claim Survives Summary Judgment Where Alleged Adverse Actions Were Aggregated.

Joann Waite is a 55-year-old woman who worked at Gonzaga for 10 years as a department head. She frequently brought her bulldog Maddie to work as an "informal mascot" and the dog posed no problems. Waite fell at work, injuring herself. She provided a doctor's note that she needed accommodations in the form of an ergonomic workstation. During the months when the workstation was being built, she was accommodated with 6-hour workdays.

A month later, Waite was instructed not to bring Maddie to sporting events any more, as there were trademark and licensing concerns and NCAA regulations about live mascots. Waite then provided a doctor's note indicating Maddie was a service dog and so Gonzaga allowed Waite to continue to bring Maddie to work, but did not require proof of vaccination or licensing at that time. In May 2016, two years after Waite received the ergonomic workstation, a human resources employee asked Waite if she still needed the workstation and, if so, to provide updated medical documentation. Gonzaga claimed this was due to costs. The email also asked about formalizing Maddie as a service animal by requesting vaccination and registration information. Waite provided emails from her doctor about the workstation instead of using the required form, but otherwise did not respond for six months.

Shortly after that correspondence, another employer sent out an email asking for feedback about Waite's department and about her specifically. The email made clear it was looking for negative responses. A week later, Waite emailed her supervisor, referencing "the rash of" women over 40 who had left Gonzaga. A month later, another employee filed a complaint about Waite, alleging that she was improperly using Gonzaga resources to support her private pet supply business. Gonzaga placed Waite on administrative leave during the investigation. While on leave, her ergonomic workstation was taken away. Waite filed a counter-complaint alleging sex and age discrimination. Gonzaga kept Waite on leave while her counter-complaint was investigated. Waite filed an EEOC complaint the next month.

Waite returned to work after both of the investigations ended. She returned to the new non-ergonomic workstation and had a new direct supervisor. Gonzaga was still concerned about Waite's continued use of Maddie as an unofficial mascot. Two months later, Waite finally provided the required form regarding the doctor's note about the ergonomic workstation. The workstation was returned to her within two weeks. She then suffered another slip and fall, this time in the parking lot. Waite was accommodated during her recovery with shortened workdays at home. As she transitioned back to the office, her psychologist determined it was not advisable for her to return to work, so she quit. She sued for disability discrimination, retaliation, failure to accommodate, sex and age discrimination, and negligent infliction of emotional distress.

The parties disputed whether Waite established a prima facie case of disability discrimination. She identified several alleged adverse actions, including the delayed installation and ultimate removal of her ergonomic workstation, the requirement for Maddie's vaccinations and license, the email requesting feedback about her, putting her on administrative leave, and delaying her return to work. Gonzaga argued none of those qualified as adverse actions under the law. The court noted that not every employment decision is an adverse action. To constitute an adverse action, it must materially affect the compensation, terms, conditions, or privileges of employment.

The court may look at the actions in the aggregate, however, and by doing so, the court found that Waite did make at least a prima facie case. Gonzaga provided a legitimate, non-discriminatory reason for the actions involving the ergonomic workstation. But Waite provided evidence that there were several other workstations in storage at the time and there was no real cost saving to confiscating her workstation. The court agreed and held that she had shown enough to survive summary judgment on the discrimination claim.

With respect to retaliation, the court noted that placement on administrative leave could be retaliatory conduct. Here, Gonzaga argued the administrative leave was to protect the integrity of the investigation. Gonzaga admitted, however, that the policy was not uniformly implemented, which left open the possibility that it was imposed as retaliation. Therefore, summary judgment was denied as to retaliation.

The failure to accommodate claim revolved around the ergonomic workstation and the refusal to allow Maddie at sporting events. But the court noted the delay in setting up the workstation was not a failure to accommodate, as the university allowed her shortened workdays during this time to accommodate her. Furthermore, at the time Maddie was barred, the university did not know she was a service animal and had outside factors to consider, such as NCAA regulations. Gonzaga was also within its rights to ask for an updated doctor's note, as it had been two years since Waite submitted documentation that she needed this special workstation. Therefore, the failure to accommodate claim failed. Similarly, the age and sex discrimination claims failed because Waite provided no evidence that men or younger women in similar circumstances were treated differently from her.

Finally, the negligent infliction of emotional distress claim failed because employers do not owe employees a stress-free workplace. The acts that Waite described are normal workplace disputes and do not give rise to a claim of emotional distress.

Waite v. Gonzaga University (E.D. Wash., Feb. 11, 2019, No. 2:17-CV-00416-SAB) 2019 WL 544947.

Note:

An important takeaway from this case is that implementing employment policies inconsistently opens the door to employee claims that the school applied a policy to them for discriminatory or retaliatory reasons. As a result, implementing employment policies in a fair and consistent manner can protect the school from these legal challenges.

NO-POACH AGREEMENTS

Attorney General Becerra Announces Multistate Settlements Targeting "No-Poach" Policies that Harm Workers.

On March 12, 2019, California Attorney General Javier Becerra issued a press release announcing that the State of California, along with the states of Massachusetts, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, and Pennsylvania entered into settlement agreements with four major fast food companies, Arby's, Dunkin', Five Guys, and Little Caesars to prevent inclusion of "no-poach" provisions in any of their franchise agreements in the United States.

According to the press release, the "no-poach" provisions are routinely included in the franchise agreements between fast food companies and their franchisees. The provisions require franchise operators to agree contractually not to hire or solicit the employees of another franchise operator, thereby restricting a franchisee's ability to recruit or hire employees from one franchise to another. Consequently, "employees, many of whom are low-wage workers, may be unable to seek better pay and benefits by going to work for a competing franchise." The provisions diminish an employee's ability to seek new work and earn higher wages. The settlements are part of Attorney General Becerra's "efforts to protect the rights of workers throughout the State of California."

Read more at: *https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-multistate-settlements-targeting-%E2%80%9Cno-poach%E2%80%9D*

Note:

While these settlement agreements are only binding on the parties who entered into them, the principles they contain are relevant to California private schools who share unofficial agreements with other private schools not to hire away teachers without the knowledge of the teacher's current employing school. These settlements indicate that these unofficial agreements may be seen as harmful restrictions on a teacher's ability to seek new work and earn higher wages.

FMLA

New DOL Letter States Employees Cannot Take Personal Leave Before Tapping Into FMLA for Qualified Leave.

Should your private school or college permit employees to use their available paid leave accruals prior to designating leave as Family Medical Leave Act (FMLA)-qualifying, even if the school knows the leave is FMLA qualifying from the start? A new Department of Labor (DOL) Opinion Letter issued by the Acting DOL Wage & Hour Administrator explains that employers that delay designation of FMLA-

qualifying leave more than five days violate the FMLA. Consistent with the new DOL Opinion Letter, employers should commence FMLA once on notice of an FMLA qualifying event.

Generally, the FMLA provides employees with the right to take up to twelve weeks of unpaid, job-protected leave per year to treat their own serious health condition or for various family care reasons, or up to twenty-six weeks to care for a covered service member. An employee's accrued paid leave may run concurrently with an employee's otherwise unpaid FMLA leave.

Issued March 14, 2019, a new DOL Opinion Letter addresses an employer's obligation to designate leave as FMLA leave. Specifically, the Opinion Letter explains that once an FMLA-eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. That is, once an employer determines the employee's reason for leave is FMLA-qualifying, the leave is FMLA protected, must be designated as FMLA, and counts toward the employee's FMLA leave entitlement. As the DOL Opinion Letter explains, an employer "may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation." The Opinion Letter also rescinds any prior statements in previous opinion letters that are inconsistent with the new opinion.

For California employers, the new DOL Opinion Letter clarifies employer responsibilities – especially after the Ninth Circuit case, *Escriba v. Foster Poultry Farms* (2014) 743 F.3d 1236, in which the Court held that an employee may affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection. Importantly, the *Escriba* case did not hold that an employer may delay designation of FMLA leave when an employer is on notice of an FMLA-qualifying event. Rather, the case dealt with a scenario in which an employee did not request FMLA leave and did not give sufficient information that the purpose of the leave was FMLA-qualifying. Because the employer was not on notice that the leave was FMLA-qualifying, it did not have an obligation to designate the leave as FMLA.

The new DOL Opinion Letter provides clarification that once an employer determines that a leave qualifies as FMLA, the employer should designate an FMLA-qualifying leave as FMLA leave within five days. Even if an employee wishes to take accrued paid leave at the outset, if the employer is on notice that the leave is FMLA qualifying, the leave will necessarily count toward the employee's FMLA entitlement and will not expand that entitlement.

The California Family Rights Act (CFRA) follows the FMLA to the extent the laws are not inconsistent. On this issue, CFRA is not inconsistent with the FMLA so the principles discussed above should extend to CFRA leave designations as well.

LABOR RELATIONS

NLRB Board Holds That Employee's Private Facebook Posts Were Protected Activity.

Desert Cab, Inc. (Desert Cab) and "sister" company, On Demand Sedan, Inc. (ODS), provide charter and walk-up limousine transportation for various hotels on the Las Vegas Strip and shuttle services for Sundance Helicopters, a helicopter tour company. Desert Cab and ODS share the same building, postal address, parking lot, maintenance team, and mechanics. ODS uses Desert Cab's road supervisors to perform various duties including investigating accidents, disciplining other drivers, mentoring, and assigning work, and Desert Cab handles workers compensation claims and related issues for both companies. In this decision, the NLRB Board considered Desert Cab and ODS as a single employer for these and other related reasons.

ODS hired Paul Lyons as a fleet chauffeur driver in 2005. From 2006 until September 2015, Lyons performed duties as a chauffeur and as a road supervisor for Desert Cab/ODS. Thereafter, Lyons performed the duties of a fleet chauffeur and occasionally worked on-call as a driver for the shuttle services to Sundance. Driving the Sundance shuttle was considered less desirable work by Lyons and the other chauffeur drivers because the rate of pay was lower than driving the limousines and sedans and Sundance passengers were well-known to tip significantly less than limousine or sedan passengers or not at all. Lyons and the other chauffeur drivers frequently complained about driving the Sundance shuttle and drivers scheduled for Sundance shuttle shifts often called in sick or did not show up for work.

As a result, Desert Cab/ODS stopped giving chauffeur drivers advanced notice of their schedules so they would not know whether they were assigned to the Sundance shuttle until they arrived for work.

The negative financial implications of Sundance shuttle work were somewhat alleviated by the drivers' ability to drop off their passengers at Sundance Helicopters and then "stage," i.e. wait for walk-up passengers, at one of the Las Vegas hotels that Desert Cab/ODS had obtained prior permission at which to stage. This allowed chauffeur drivers to pick up other passengers and earn tips while the Sundance passengers spent around three or more hours on their Sundance Helicopter tours. The chauffeur drivers would then return to Sundance Helicopters at a set pick up time.

In 2017, Desert Cab/ODS implemented a new "no stage" policy prohibiting chauffeur drivers from leaving Sundance Helicopters to "stage" at hotels while Sundance passengers were on their helicopter tours. Instead, drivers had to remain idle at Sundance Helicopters, waiting for three or more hours for the passengers to return. This policy caused chauffeur drivers assigned to the Sundance shuttle to earn significantly less money.

Lyons and his fellow drivers complained to Desert Cab/ODS management, including the general manager, frequently about the new policy. On one evening, Lyons sent two text messages to Desert Cab/ODS management complaining that seven to eight limousines were sitting idle in the Sundance parking lot on what could have been a lucrative Friday night of a fight weekend. The management employees did not respond to Lyons's text messages.

Several weeks later, Lyons made two private posts to his friends-only, personal Facebook page while sitting idly at Sundance for three hours. The first post contained a photo of him at Sundance that said, "Hanging out at the Morgue. We are sent here to sit around for three hours for no reason." The second post contained a photo of Lyons in front of Sundance stating, "When its [sic] truly a crappy day at work and there is nothing you can do about it." Lyons's Facebook friends included several Desert Cab/ODS employees, many of whom "liked" and commented on the posts. Lyons's Facebook friends also included one Desert Cab/ODS management employee who shared screenshots of the posting with other members of the Desert Cab/ODS management team the following day.

Two days later, Desert Cab/ODS terminated Lyons for his Facebook posts, citing "Gross misconduct violating standards of professionalism by posting Derogatory [sic] and demeaning comments specifically targeting ODS clientele and ODS on Social [sic] media (Facebook)" in violation of company policy permitting termination for "Gross misconduct or unprofessional conduct towards management and staff" (unprofessional conduct rule).

The NLRB Board held that Lyons's two Facebook posts constituted concerted activity because his posts were part of the employees' collective, on-going complaints about the "no stage" policy and were directed to his private friends-only Facebook page, which included Desert Cab/ODS employees. The Board further held that Lyons's concerted activity was for the purpose of mutual aid and protection because his posts were aimed at improving the terms and conditions of employment for all drivers. Specifically, Lyons's posts were aimed at conveying the message that the "no stage" policy diminished the drivers' working conditions by forcing them to remain idle for long periods and decreased the drivers' income. Accordingly, the Board found that Lyons's Facebook posts were protected activity under Section 7 of the National Labor Relations Act (NLRA). Because Desert Cab/ODS terminated Lyons for his protected activity, the Board concluded that it had violated Section 8a(1) of the NLRA, by interfering, restraining, and coercing Lyons in the exercise of the rights guaranteed in Section 7 of the NLRA. The Board also determined that Desert Cab/ODS applied its unprofessional conduct rule unlawfully against Lyons because its intent was to prohibit Lyons and his fellow coworkers from discussing their terms and conditions of employment via private Facebook postings and otherwise engaging in protected activities.

Desert Cab, Inc. d/b/a ODS Chauffeured Transp. & Paul Lyons (Feb. 8, 2019) 367 NLRB No. 87.

Note:

The NLRA grants private sector workers the right to organize and be represented by labor unions and gives significant protections to employees whether or not they work in a unionized environment.

CONFIDENTIALITY CLAUSES/ARBITRATION

NLRB Administrative Law Judge Rules Confidentiality Clauses in Arbitration Agreements Violate NLRA.

In May 2016, Pfizer informed its existing employees that as a condition of continued employment with the company, employees would thereby be agreeing to a "Mutual Arbitration and Class Waiver Agreement" (Agreement) which waived their rights to sue the company in court and waived their right to file a class or collective action against the company in any forum. The Agreement also contained a confidentiality clause that required the parties to "maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award." The confidentiality clause only permitted the parties to disclose such information when seeking an injunction to aid arbitration or maintain the status quo pending arbitration, a judicial action reviewing the award pursuant to the Federal Arbitration Act (FAA), as otherwise required by law, or with the prior written consent of the parties. The confidentiality clause also contained a limiting sentence, which stated, "Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment."

The Administrative Law Judge (ALJ) found that employees would reasonably consider the confidentiality clause in the Agreement as an employment policy and work rule, which the employee could be subject to discipline for violating. Accordingly, the ALJ applied the NLRB Board's decision in Boeing, which held that a facially neutral policy or rule that, under a reasonable interpretation, might interfere with NLRA rights should be evaluated utilizing two factors: (1) the nature and extent of the potential impact on NLRA rights, and (2) the employer's legitimate justifications associated with the rules.

After balancing, the employment policy or rule will be classified within one of three categories. Category 1 includes 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. Category 2 includes rules that warrant individualized scrutiny of the balance between the rights and the justifications. Category 3 includes 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.

The ALJ concluded that the confidentiality clause without the limiting sentence interfered with activity protected by the NLRA. The ALJ further concluded that the limiting sentence did not redeem the confidentiality clause. The ALJ reasoned that the confidentiality clause explicitly directed employees to preserve the confidentiality of the arbitration proceeding and award. While the limiting sentence permitted discussions about wages, hours, and other terms and conditions of employment, it did not make an explicit exception for disclosure of any part of the arbitration proceeding, award, or outcome. Consequently, the ALJ determined that an employee would not reasonably understand that the limiting sentence allowed them to discuss any part of the arbitration proceeding or award. The ALJ also noted that the limiting sentence did not make an exception that would allow employees to publicize their dissatisfaction with working conditions and seek public support to change those conditions, which is a right protected by the NLRA. Accordingly, the ALJ determined that the nature and extent of the potential impact on NLRA rights was significant.

In evaluating part two of the *Boeing* test, the ALJ considered Pfizer's justification for the rule, which was the desire to prevent employees from talking publicly about what happens during arbitrations. The ALJ concluded that while Pfizer's justification was understandable, it did not outweigh the impact of the rule on the employees' NLRA rights. The ALJ determined Pfizer's rule was a Category 3 violation under *Boeing* because it prohibited employees from discussing a condition of employment and its adverse impact on NLRA rights was not outweighed by Pfizer's claimed justifications.

Pfizer, Inc. & Rebecca Lynn Olvey Martin, an Individual & Jeffrey J. Rebenstorf, an Individual (Mar. 21, 2019) 2019 WL 1314927.

For more information on the *Boeing* case: *https://www.lcwlegal.com/news/nlrb-overturns-prior-standard-for-assessing-legality-of-employee-handbook-policies*

TITLE VII

Religious Organization Exemption in Title VII Extends to Retaliation and Hostile Work Environment Claims.

The Salvation Army is an evangelical ministry whose mission is to preach the gospel of Jesus Christ and "meet human needs in His name without discrimination." In the United States, the Salvation Army operates as a 501(c)(3) nonprofit organization. Ann Garcia attended religious services at the Salvation Army starting in 1999 and in 2002 was hired as an assistant to the pastor. In July 2010, when new pastors came aboard, Garcia was reassigned to the position of social services coordinator. In late 2011, she left the church and stopped attending religious services, but kept her job. Her relationship with her supervisor, Dionisio Torres began to deteriorate.

In July 2013, a client filed a complaint against Garcia. She wanted to see the complaint, but Torres would not allow her to see it. She filed a grievance against Torres and claimed she was discriminated against and isolated ever since she left the church. After a long period of medical leave, Garcia failed to report back to work after being cleared by her doctor and the Salvation Army fired her. She claimed the Salvation Army was refusing to accommodate her. She brought claims alleging a hostile work environment after she left the church and retaliation after she complained about religious-based mistreatment, as well as failure to accommodate under the ADA. The district judge granted summary judgment to the Salvation Army and Garcia appealed.

Garcia argued that Title VII's religious organization exemption did not extend to hostile work environment claims and was waived by the Salvation Army because they did not raise it as an affirmative defense. The exemption applies to religious organizations with respect to employment decision made on a religious basis. In applying the exemption, the court must determine whether an institution's purpose and character are primarily religious. Here, there was no argument they are. Garcia argued the exemption should not apply because the Salvation Army generates sales revenue as part of its activities. However, the court noted that the exemption still applies if all other factors are met and the organization is a nonprofit. Garcia then argued the exemption does not apply to claims of hostile work environment, only pure hiring and firing decisions.

The court explained that the law does not require such a narrow approach. The exemption applies to the employment of people, and employment is much broader than hiring and firing only.

The court also explained that contrary to the district court's ruling, the exemption may be waived. But here the Salvation Army was permitted to raise the defense at the summary judgment stage because there was no harm to Garcia. She was well aware of the religious nature of the organization, and its status as a nonprofit is a matter of public record. Since Garcia was not harmed by the delay, the court ruled that Garcia's Title VII claims were foreclosed by the religious organization exemption.

The court also ruled the district court properly dismissed the ADA claim. Garcia took FMLA leave from October to December 2013. Her leave was repeatedly extended until May 5, 2014. She was cleared to return to work without restrictions on May 26. However, she said she would not return unless she could see a full copy of the complaint about her. She requested this as an "accommodation." The Salvation Army requested documentation from her doctor regarding that proposed accommodation. She did not provide any. Therefore, the Salvation Army told her that her continued absence was not excused. She did not report to work and the Salvation Army terminated her employment.

The court explained that Garcia was not entitled to further accommodation without any documentation from her doctor. She was cleared to return to work without restriction, and she could not couch her personal request to see the claim as a needed "accommodation" simply because it would make her feel better to see it. The court noted that obtaining a year-old copy of a complaint was not in any way related to the essential functions of Garcia's job. The Salvation Army was under no obligation to continue to accommodate Garcia when there was no documentation of an existing disability.

Garcia v. Salvation Army (2019) –F.3d--, 2019 WL 1233216.

Note:

This case holds that the religious exemption under Title VII applies not only to decisions related to hiring and firing, but also to more broad religious discrimination claims such as hostile work environment. The case also notes that accommodations that are unrelated to the essential functions of the job or requested in absence of any documented disability do not require an interactive process under the ADA.

BUSINESS AND FACILITIES

TORTS

Employer Not Liable for Work-Related Injury to Employee of Independent Contractor.

Laurence Johnson was an employee of ABM Facilities Services, Inc. (ABM), an independent contractor that provided control room staff to The Raytheon Company, Inc. (Raytheon). While monitoring the computers in the control room at Raytheon one night, Johnson started receiving low water level alarms concerning the water cooler towers. After unsuccessfully attempting to resolve the alarms, Johnson called his ABM supervisor who advised Johnson to handle the situation, as Johnson deemed appropriate.

Johnson decided to go to the water cooling towers and visually check the water level. When Johnson reached the water cooling tower, the Raytheon-owned platform ladder normally present at the tower wall was not there. Instead, leaning against the tower wall was what appeared to be a straight ladder, but was actually only the upper portion of an extension ladder. The upper portion had a caution label stating, "CAUTION" and "THIS LADDER SECTION IS NOT DESIGNED FOR SEPARATE USE." Johnson did not see these warnings and did not manipulate the ladder to confirm it was secure. However, Johnson did notice that the ground under the ladder and around the tower was wet.

Johnson climbed the ladder, looked over the wall, and noticed there was no problem with the water level. It was later determined that the water level sensors had malfunctioned due to exposure to the elements. As Johnson descended the ladder, it slid out. Johnson fell on top of the ladder and sustained serious injuries. Johnson received workers' compensation benefits through ABM for his injuries.

Johnson filed a suit against Raytheon based on negligence and premises liability, alleging that Raytheon was negligent in the "retention of their control of the subject premises, including the water cooling tower, the worksite, the procedures, and the unsafe equipment including the subject ladder." Johnson also filed suit against Systems XT, the independent contractor that Raytheon hired to remove and replace the water cooling towers. Systems XT's subcontractors, Brownco Construction Company, Inc. and Power Edge Solutions, Inc., were the entities that left the partial extension ladder at the cooling tower wall and installed the malfunctioning water level sensors that led Johnson to check the water levels, respectively. Johnson alleged that Systems XT was responsible for the work of its subcontractors and was thereby negligent "(1) in allowing the sensor wires to be hooked up in a manner in which they were exposed to the elements, such that a false alarm was generated; and (2) in failing to supervise the construction site and require Brownco to put its ladders away at the end of each day."

The court first addressed the California Supreme Court decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689, *as modified on denial of reh'g* (Sept. 16, 1993), which stands for the general principle that a hirer of an independent contractor is not liable for the negligence of the independent contractor when the injured plaintiff is an employee of the independent contractor and covered by workers' compensation. The court concluded that it was undisputed that Raytheon hired ABM as an independent contractor and Johnson was seeking to pursue Raytheon for injuries he suffered in the course of employment and for which he received workers' compensation.

Next, the court determined that Raytheon was not liable for Johnson's injuries because it had not affirmatively contributed to his accident. Raytheon had not represented that the upper portion of the extension ladder was a safe replacement for the platform ladder that was normally present at that location. Further, Raytheon had provided numerous other safe ladders for use by ABM employees, which were located nearby. Also, Johnson could reasonably have discovered the latent hazardous condition by inspecting the ladder and avoided the condition, once discovered, by using one of the other available ladders.

As to Systems XT, the court concluded that Systems XT did not owe a duty of care to Johnson and that, generally, a contract between a property owner and a subcontractor did not give rise to a duty of care to the employee of another subcontractor doing work on the property.

Johnson v. Raytheon Company, Inc. (Cal. Ct. App., Mar. 8, 2019, No. B281411) 2019 WL 1375663.

CONSTRUCTION CONTRACTS

It's Construction Time! Contract Language Can Protect Your School.

Note:

The following is general advice only. Please consult us should you have specific questions on these issues.

As summer approaches many schools are underway planning on-campus construction projects to occur during the few summer months when students are on break. Schools benefit from engaging a competent and qualified construction team, including architects, construction managers, and general contractors. A solid relationship with the construction team based on respect, trust, and confidence increases the chance that the project will be completed on time and within budget.

Schools will need to enter into contracts with their construction team to outline each party's obligations. Construction teams regularly use the American Institute of Architects (AIA) form contracts. However, schools should review and revise key provisions of these AIA forms to ensure they are adequately protected.

Schools should utilize the following checklist and ensure that the contract language protects the school from potential risks that could result in breaches of contract, delay claims, construction injury damages, and liens on school property.

- Performance/Duties – Specifically identify the duties and obligations of the architect, construction manager, and contractor in each of their respective contracts and ensure these provisions are consistent across the various contracts. If a school clearly identifies each party's obligations, it can help avoid claims that certain services were not part of the contract and will only be performed if the school pays additional amounts.

- Cost and Payment Terms – Clearly identify how the school will make payment, including whether it will pay a fixed fee, cost of the work plus a fee with a guaranteed maximum price, or some other arrangement. A school should also identify retention amounts, invoice documentation requirements, and clarify that the school must pre-approve all additional services. Payment provisions should be reasonable and comply with California statutory requirements.

- Schedules/Timelines – Require the construction team to comply with the agreed-upon construction schedule, including requirements to timely submit, review, and respond to requests for information, or other submittals, to avoid delaying the project.

- Change Orders – Establish a uniform process to create, review, and approve of change orders and to promptly address these issues to avoid delaying the project.

- Ownership of Documents – Clarify that the school owns all documents created by any construction team member related to the project, including any design plans.

- Insurance Requirements – Include appropriate coverages and amounts.

- Indemnification Protections – Require the construction team to indemnify and defend the school from damages caused by their acts or omissions. If a school agrees to indemnify the construction team, the school should ensure it is only obligated to indemnify the construction team for claims caused by the school, not by any third party or subcontractor.

- Liquidated Damages; Savings Clauses; Early Completion Incentives – Consider whether the school should include a right to withhold amounts from a contractor on a per day basis for each day the project completion is late; whether to offer early completion incentives; and whether the school and contractor will share in any project savings.

- Termination Provisions – Establish that a school can terminate the agreement for any reason, or if a contractor is unable to timely cure a default on the project. A school can agree to pay all undisputed amounts owed through the date of termination, but the school should not agree to pay early termination penalties.

Schools and the construction teams share a common goal to make the project a success. Negotiating mutually acceptable provisions upfront will ensure that every member of the construction team is on the same page as the project progresses.

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.

MAY

- ◻ Complete hiring of new employees for next school year.
- ◻ Complete hiring for any summer programs.
- ◻ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g. janitorial services if applicable).
  - – Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:
    - School and classroom janitorial.
    - Schoolsite administrative.
    - Schoolsite grounds and landscape maintenance.
    - Pupil transportation.
    - Schoolsite food-related.
  - – A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
    - That there is a physical barrier at the worksite to limit contact with pupils.
    - That there is continual supervision and monitoring of all employees of that entity, which may include either:
      - ▪ surveillance of employees of the entity by School personnel; or
      - ▪ supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code section 33192). (See Education Code section 33193).

If conducting end of school year fundraising:

- ◻ Raffles:
  - – Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code section 320.5.
  - – In order to comply with Penal Code section 320.5. raffles must meet all of the following requirements
    - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
    - Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
    - At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.
- ◻ Auctions:
  - – The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
    - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
    - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.

- Ex: If a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

JUNE

- ◻ Conduct Exit Interviews:
  - Conduct at the end of the school year for employees who are leaving (whether voluntarily or not). These interviews can be used to help defend a lawsuit if a disgruntled employee decides to sue.

MID-JUNE THROUGH END OF JULY

- ◻ Update Employee and Student/Parent Handbooks
- ◻ The handbooks should be reviewed at the end of the school year to ensure that the policies are legally compliant, and consistent with the employee agreements, and the tuition agreements that were executed. The School should also add any policies that it would like to implement.
- ◻ Conduct review of the school's Bylaws (does not necessarily need to be done every year).
- ◻ Review of Insurance Benefit plans
  - Review the School's insurance plan plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.
    - Workers Compensation Insurance plans generally expire on July 1st
    - Other insurance policies generally expire between July 1st and December 1st.

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 at an independent school asked what duty, if any, California law places on a school to defend and/or indemnify an employee named in a lawsuit with the school. The administrator also asked whether a finding that the employee was grossly negligent would have any effect on the school's duty.

RESPONSE: The attorney answered that California Labor Code section 2802 requires employers to indemnify employees for losses that occur in the course and scope of their employment. Labor Code section 2802 states, in relevant part:

(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.
….
(c) For purposes of this section, the term "necessary expenditures or losses" shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.

Therefore, an employer's duty to indemnify is limited to liability incurred in direct consequences of the employee's duties. The test is generally whether the employee's conduct was, in a general way, foreseeable from the employee's duties. For example, an employer generally has no duty to defend or indemnify an employee found liable for sexual harassment because such conduct is not part of the employee's duties. Yet, there is likely a duty to indemnify if the employee is found not liable.

If an employee was grossly negligent while carrying out his or her official duties within the course and scope of employment, the school will generally still need to indemnify the employee. However, if an employee is grossly negligent in a way that was not clearly part of the course and scope of his or her employment, there may not be a duty to indemnify. Thus, whether indemnification is required in the case of gross negligence is a highly fact-dependent determination.

In any event, insurance is also a significant factor as insurance coverage will sometimes either not provide a defense or provide notice that certain liability is not covered.

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New to the Firm

Megan Atkinson joins our Los Angeles office where she represents public entities in labor and employment law matters. She regularly defends against claims of discrimination, harassment, retaliation, and wage and hour violations. She litigates in both state and federal court and has experience from pre-litigation through trial. In 2018, she served as second chair in a nine-week jury trial. Megan was selected as a 2019 Southern California Rising Star by Super Lawyers. She can be reached at 310.981.2058 or matkinson@lcwlegal.com.

Antwoin Wall joins our Los Angeles office where he assists and represents clients in matters pertaining to labor and employment law and litigation. His career background has a strong foundation in the public sector. Antwoin assists counties, cities, and public agencies in a full array of employment matters, including claims of discrimination, harassment, retaliation, wrongful termination, breach of contract, and wage and hour litigation. He can be reached at 310.981.2084 or awall@lcwlegal.com.

Sung (Sean) Kim joins our Los Angeles office where where he provides representation and counsel to clients in litigation matters. As an experienced litigator, Sean has extensive experience in all aspects of the litigation process, including trials. He can be reached at 310.981.2062 or skim@lcwlegal.com.

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, contact **Sara Gardner** at sgardner@lcwlegal.com.

Management Training Workshops

Firm Activities

Consortium Training

May 16 **"Employee Investigations"**

ACSI Consortium | Webinar | Stephanie J. Lowe

May 21 **"Emerging Legal Issues"**

CAIS | Webinar | Michael Blacher

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/training.

May 24 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**

Waldorf School of Orange County | Costa Mesa | Jenny Denny

Webinars

May 23 **"Five Things California Private Schools Need to Know About: Dual Enrollment"**

Webinar | Ryan L. Church

May 29 **"Five Things California Private Schools Need to Know About: Vaccinations in Light of Measles Outbreak"**

Webinar | Julie L. Strom

Firm Publications

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

Partner **Elizabeth Tom Arce** our Los Angeles office, was featured in the March 27, 2019 *Los Angeles County Bar Association's Daily eBriefs* "Member Benefit Spotlight" in honor of Women's History Month.

LCW WEBINAR

FIVE THINGS CALIFORNIA PRIVATE SCHOOLS NEED TO KNOW ABOUT: DUAL ENROLLMENT

Thursday, May 23, 2019 | 8:30 AM - 9:00 AM
Dual enrollment in public (including charter) and private schools can raise significant legal and fiscal issues. This webinar will highlight what schools need to know about the requirements and risks of dual enrollment. It will cover how dual enrollment must be reported to the Department of Education, how state education funding may come into play, and the legal and financial implications that may result.

Who Should Attend?
Heads of School, Business Officers, Registrars, and other Administrators

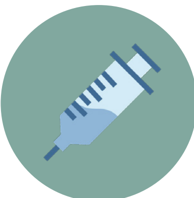
Workshop Fee:
Consortium Members: $50, Non-Members: $70

PRESENTED BY RYAN L. CHURCH

REGISTER TODAY:
WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

LCW WEBINAR

FIVE THINGS CALIFORNIA PRIVATE SCHOOLS NEED TO KNOW ABOUT: VACCINATIONS IN LIGHT OF MEASLES OUTBREAK



Wednesday, May 29, 2019 | 8:30 AM - 9:00 AM
From cruise ships to school and college campuses, the threat of measles is grabbing our attention. This quick 30-minute webinar provides California Independent Schools with guidance on vaccination requirements and what schools can, and should, do to keep their campuses safe and epidemic-free.

Who Should Attend?
Heads of School, Business Officers, Registrars, and other Administrators

Workshop Fee:
Consortium Members: $50, Non-Members: $70

PRESENTED BY JULIE L. STROM

REGISTER TODAY:
WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

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