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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INDEX

STUDENTS
Sexual Abuse .1
Vaccinations/SB 277 2

EMPLOYEES
New Legislation 2
Wage and Hour 3
Interactive Process. 6
Harassment/Adverse Action 8
National Origin Discrimination. .9
Arbitration Agreements 10

Business and Facilities 11

LCW Best Practices Timeline . . 12
Consortium Call of the Month. 13

LCW NEWS

Firm Activities 14
Firm Publications 15

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STUDENTS

SEXUAL ABUSE

All Causes of Action by Former Student Alleging Abuse Were Time Barred.

"Jane Doe" was a student at Bishop Foley High School between September 2004 and June 2008. She was under 18 the whole time she was a student. Richard Fisher was an art teacher and girls' cross-country coach. Doe alleged that during the spring of 2008 she began to spend study hour in Fisher's classroom with her friends. He gained her trust by acting as a mentor. He eventually told her he was sexually attracted to her and they started exchanging explicit emails. He allegedly told Doe that he had a previous sexual relationship with another student.

Fisher and Doe began a physical relationship that took place on school grounds and then off campus. When she refused to have intercourse with him, he ended the relationship. Doe also alleged that Fisher told her other Bishop Foley administrators knew of their relationship and instructed him not to contact her again and gave him a "slap on the wrist." Doe alleged that Bishop Foley officials also knew about Fisher's prior relationship with a student.

On November 7, 2015, Doe claims she learned that a parent had reported Fisher's previous relationship with a student to the school via Nancy Hager and Hager disregarded the complaint. Doe then alleged that Bishop Foley failed to report the complaint to state authorities or the Archdiocese, and did not investigate or take any other remedial action against Fisher. Doe argued the school could have prevented Fisher's abuse of her had it not failed to act on the prior allegations. Doe herself never reported the abuse in 2008. Doe sued Bishop Foley for negligence, negligent supervision, intentional infliction of emotional distress, fraudulent concealment and conspiracy to commit fraud. The school and individual defendants moved for summary judgment based on the statute of limitations, but Doe argued that she had two years from the time she discovered the existence of a claim due to the fraudulent concealment. Ultimately the trial court granted the school's motion and Doe appealed.

Doe agreed that her claims would generally be barred by the statute of limitations if not for the fraudulent concealment that she alleged arose from the school officials' failure to disclose the previous 2006 relationship. She argued this tolled the statute of limitations until 2015, when she discovered that the school had been informed of the 2006 relationship. Doe argued that the school owed her a fiduciary duty to disclose their knowledge of the previous relationship. The court disagreed with this logic, holding that Doe knew or should have known all the elements of her abuse claim within the limitations period.

Under the fraudulent concealment law, the concealment must be of a fact that would allow a plaintiff to know she had a claim. But here, Doe already knew that Fisher was a teacher when he allegedly assaulted her on school property, that he had a prior

relationship with a student, and that Bishop Foley officials knew about the relationship with Doe but gave Fisher only a slap on the wrist. Based on those facts, Doe knew or should have known that she had a cause of action against the defendants. Therefore, the trial court did not err in ruling that Doe did not have a claim for fraudulent concealment.

Doe next argued that the school should not be able to rely on the statute of limitations because of the doctrine of equitable estoppel, which holds that a plaintiff must show that defendant's acts induced the plaintiff to believe the limitations period would not be enforced, that the plaintiff relied on this belief, and that she was prejudiced as a result of that reliance. For example, had a defendant threatened to murder a plaintiff if she disclosed abuse, that action might compel a court to rely on this doctrine. In this case, the court did not find that the school or individual school officials took any actions which would lead Doe to believe the limitations period would not be enforced. In sum, the court agreed with the trial court and the summary judgment was upheld.

Jane Doe v. Bishop Foley Catholic High School, 2018 WL 2024589.

VACCINATIONS/SB 277

Court Rules Elimination of Personal Beliefs Exemption Does Not Violate Constitution.

Effective as of January 1, 2016, Senate Bill 277 eliminated the personal beliefs exemption from the requirement that all school-aged children receive certain vaccinations before enrolling in school. A group of parents who disagree with the law filed a lawsuit, seeking to invalidate it. The parents alleged the law violated four provisions of the state constitution: free exercise of religion, the right to attend school, equal protection, and due process. They also claimed it violated a statute which required consent for medical experiments. The trial court dismissed their claims and they appealed.

The court described the parents' complaint as consisting of such arguments as, "vaccines kill and maim children" and Senate Bill 277 is a "totalitarian mandate." The court discussed the historical importance of vaccines and the notion of herd immunity, which holds that if the vaccine rate in a population dips below a certain threshold there is a loss of protection for the community. The court also noted that while the parents believed the court could not take judicial notice of facts relating to vaccine safety and efficacy, the court disagreed and stated it will take judicial notice of scientific fact and the parents have cited no authority to support their claims against vaccines.

The court found that Senate Bill 277 did not impinge on the free exercise of religion, as the state has a compelling interest in preventing the spread of communicable diseases. Also, the right to attend school has not been violated, since there is no suspect classification in the law. With respect to equal protection, again, there is no suspect classification in the law. The law aims to protect all people and does not favor any class over another. The due process claim failed as well, with the court noting that the legislative goal of total immunization has been in the laws since 1995. Moreover, the plaintiffs provided no evidence as to how the law was constitutionally vague. Finally, as to the assertion that mandating vaccines is the same as mandating participation in a medical experiment, the court held that vaccines are not, as the parents asserted, all a medical experiment. The applicable scientific and legal history has shown immunization is reasonably related to maintaining the health of the population. The trial court's decision was upheld.

Brown v. Smith (2018) 24 Cal.App.5th 1135.

EMPLOYEES

NEW LEGISLATION

New Legislation Provides that Certain Communications about Workplace Sexual Harassment Complaints are Privileged.

On July 9, 2018, the Governor signed AB 2770 into law. This new law provides that an employer's communications about a sexual harassment complaint having been made against a current or former employee are privileged under certain circumstances.

California law currently provides that employer communications to prospective employers regarding a former or current employee's job performance or qualifications is subject to a qualified privilege; employers may not be subject to libel or slander claims based on these communications if they are made without malice

and based on credible evidence. AB 2770 expands this protection by extending this qualified privilege to employers' communications to prospective employers about sexual harassment complaints and investigations.

Pursuant to AB 2770, the following communications by a current or former employer to a prospective employer are subject to the privilege: (1) a complaint of sexual harassment against the applicant, based on credible evidence and made without malice, by an employee to an employer; (2) communications between an employer and interested persons, made without malice, regarding a complaint of sexual harassment against the applicant; and (3) an employer's answer, given without malice, to an inquiry from a prospective employer about whether the employer would rehire a current or former employee, and whether the decision not to rehire is based on the employer's determination that the former employee engaged in sexual harassment.

AB 2770 clarifies that a communication about a sexual harassment complaint to a prospective employer is not privileged if such communication violates a court order, or a requirement of confidentiality imposed by law.

Note:

This new law does not prevent former or current employees from bringing defamation lawsuits against employers for disclosing sexual harassment complaints, but it provides for a defense in the event that a claim is filed. If a school or college enters into a confidentiality agreement with an employee regarding a sexual harassment complaint, the privilege set forth in AB 2770 is not a defense to violation of the confidentiality agreement. Schools and colleges may also be liable for negligent misrepresentation if they provide a reference for a current or former employee who the school or college concluded engaged in sexual harassment without disclosing the conduct the employee engaged in to the prospective employer. Schools and colleges should consult with legal counsel prior to providing references for employees who the school or college has determined engaged in sexual harassment.

WAGE AND HOUR

California Supreme Court Rules Employers May Not Use De Minimus Rule to Avoid Paying for Time Worked.

Douglas Troester worked for Starbucks and one of his duties was to close down the store at the end of the work day. The software required him to clock out before initiating close down procedures on a separate computer in the back office. This led to about 4-10 minutes of work each day that was not captured on his time record. Troester brought a lawsuit on behalf of himself and a class of other non-managers. Starbucks removed the action to federal court and the district court found for Starbucks, holding that the "de minimus" rule meant that Troester did not have unpaid wages due to him based on these few extra minutes a day. Troester appealed. The Ninth Circuit asked the California Supreme Court to rule on the issue of whether the de minimus rule, which is incorporated into federal wage and hour law, applies to wage claims brought under California state law.

The court explained that the de minimus rule comes from the Latin meaning "the law does not concern itself with trifles." Under this rule, if an employee works an extra couple of minutes here or there, and it is hard to capture such work, it can be disregarded for payroll purposes. Federal courts look to the difficulty of capturing the time, the aggregate amount of time, and the regularity of additional work to determine if the de minimus rule should apply.

In California, wage and hour claims are governed by the Labor Code and the series of 18 Wage orders adopted by the IWC. Wage Orders 5 applies to Starbucks and other establishments that provide food and beverage. State law must comply with federal law, but can choose to be more protective than that law. California law is very protective of employees and emphasizes that employees must be paid for all hours worked. The court found no convincing evidence that the IWC or the Legislature have intended to adopt the federal standard of a de minimus exception. The court did acknowledge that the de minimus standard appears in the DLSE Enforcement Manual as well as some opinion letters. But those are not binding on the court.

Starbucks also argued that generally the de minimus rule is a principle of California law that is independently applicable to wage and hour cases. The court acknowledged that California courts have opined that the de minimus doctrine may be incorporated by implication into statutory enactments. However, while the court did not hold that a de minimus principle may never apply in a wage and hour claim (for example, where the activity rarely occurred or took less than a minute of time), it did rule that such a principle did not apply in this case.

In this case, Troester and others in his position spent approximately 4-10 minutes on closing tasks after clocking out on a regular basis. The only reason they had to clock out before performing these tasks was the company's own software system. This is not an insignificant amount of time and in fact can add up to a substantial amount of money. Troester himself was owed over $100, which the court noted can be a week's worth of groceries for someone. The court also pointed out that ten minutes is not a small amount of time. In fact, there is an entire law regarding ten-minute rest breaks that non-exempt employees are entitled to take. Finally, if the time is hard to track on the current payroll system, why should only the employee bear that burden? With the advanced technology available today, Starbucks should be able to figure out how to capture the time of the closing tasks and pay employees appropriately.

The court also pointed out that this principle is different from the one that permits rounding of time on timekeeping systems because those systems round both up and down and must be fair and neutral on their face. Here, in contrast, the Starbucks system required an employee to keep working after punching out of the system, with no way to capture that time. The court ruled that the de minimus rule was not applicable in this case.

Douglas Troester v. Starbucks Corp., (2018) –P.3d--, 2018 WL 3582702

Note:

This decision is a major statement from the state supreme court. Many employers have relied on the de minimus rule based on DLSE advice. Now, employers must be sure to capture all work time that is done on any sort of regular basis. Again, the court did note that there still may be situations where the de minimus rule may apply, but in situations like this, where an employee is regularly working for several minutes off the clock, the de minimus rule does not protect an employer from having to compensate for that time.

CA Court of Appeal Holds that a PAGA Claim Does Not Require the Same Showing of Injury as an Individual Claim.

Coastal Pacific Food Distributors, Inc. ("Coastal Pacific") hired Terri Raines as a billing clerk in 1998 and terminated her employment in 2014. Raines then filed suit against Coastal Pacific, alleging, in part, that the company violated Section 266 of the California Labor Code by failing to provide Raines and other employees with an accurate wage statement, since the statements did not provide the hourly overtime rate.

Raines brought claims both on an individual basis, seeking to recover statutory penalties under Section 266(e), and on a representative basis under the Private Attorneys General Act of 2004 ("PAGA"), seeking to recover civil penalties. PAGA enables an aggrieved employee to bring suit on behalf of him or herself and other current or former employees for violations of the Labor Code. The California Legislature enacted the law "to address the shortage of government resources to enforce labor laws." If a plaintiff recovers penalties for a PAGA claim, 75 percent is distributed to a State agency for enforcement and education and the remaining 25 percent is distributed to the aggrieved employees.

The trial court granted Coastal Pacific's motion for summary adjudication on both of these claims. It found that Raines could not prove she had suffered an actual injury due to Coastal Pacific's failure to provide the hourly overtime rate on her wage statements. Since such a showing is required for an individual claim brought under Section 266(e), the trial court determined that this barred Raines from prevailing on both her individual and representative claims. Raines appealed this decision to the California Court of Appeal.

The appellate court affirmed the trial court's grant of summary adjudication in favor of Coastal Pacific on Raines' individual claim for statutory penalties. The court agreed with the trial court's finding that a showing of injury is required for an individual claim, and Raines could not make such a showing.

Plaintiffs can demonstrate an actual injury when they must seek additional documentation and make additional mathematical calculations in order to determine whether they were correctly paid and what they may be owed. However, since Raines' wage statements included the number of hours of overtime she worked and the total amount she was paid for overtime, the court found that the hourly overtime rate could be "'promptly and easily' determined by simple arithmetic." Because a reasonable person could readily ascertain the hourly rate for overtime "from the four corners of the wage statement," the court found that the deficiency in Raines' wage statements caused her no actual harm. Therefore, she could not prevail on her individual claim for statutory damages under Section 266(e).

However, the appellate court reached a different result for Raines' PAGA claim, reversing the trial court's grant of summary adjudication for Coastal Pacific for that claim. The court held that, although an actual injury must be shown for an individual claim brought under Section 266(e), a showing of injury is not required for a PAGA claim.

The court reasoned that the statutory damages available through an individual claim and the civil penalties available through a PAGA claim have different purposes. Since damages are meant to be compensatory, making a party whole, there must be an injury to compensate. Civil penalties, on the other hand, "are intended to punish the wrongdoer and to deter future misconduct." Accordingly, the court ruled that an act may be subject to civil penalties even if it does not result in injury.

The court determined that even if Raines did not suffer an actual injury, Coastal Pacific still violated the law by failing to show the overtime hourly rate on its wage statements. Consequently, civil penalties were warranted. Therefore, the court found that the trial court had incorrectly held that an employee must suffer an injury in order to bring a PAGA claim, and it reversed this holding.

Raines v. Coastal Pac. Food Distributors, Inc. (2018) 23 Cal. App.5th 667.

Note:

The court's holding indicates that private schools could be liable for wage and hour violations brought through a PAGA claim, even if the current or former employee cannot show an actual injury caused by the alleged violation. Therefore, private schools should ensure they are complying with these laws, such as providing the hourly overtime rate that was the subject of this case. It is also important to remember that even though class actions may now be barred by arbitration agreements, PAGA claims cannot.

Employer In Compliance with Labor Code if Wage Statement Issued Before Semimonthly Deadline.

Wells Fargo Bank was sued by former employees who received certain types of bonus compensation. Bonus periods were either monthly, quarterly, or annually. For employees who worked overtime during those bonus periods, the wage statements contained a line called "OverTimePay-Override" which listed incremental amounts of overtime paid to the employee, but did not list hourly rates or hours worked. Wells Fargo also gave employees their final paycheck on their last day of employment, but mailed the accompanying wage statement the next day. The employees sued claiming that Wells Fargo violated Labor Code 226 by failing to identify the hourly rates and hours worked that corresponded to the OverTimePay-Override and by mailing wage statements to terminated employees after their final day of employment.

The court explained that non-discretionary bonuses are considered part of the "regular rate of pay" that must be used when calculating overtime. The employer must allocate the bonus over the period in which it was earned. Therefore, a bonus earned at the end of one month, might be paid in the following pay period. So, there were technically no hours worked in the pay period that correspond to the bonus amount, which would have been calculated based on the hours worked during the month the bonus was for.

Therefore, there may not be any applicable hourly rates to show on the current wage statement because they did not correspond to that pay period. The OverTimePay-Override was merely an adjustment to the overtime pay due to an employee based on bonuses earned by the employee for work performed during the prior pay periods. The court agreed that there was no problem with the wage statements as drafted because there were no applicable hourly rates in effect during the pay period which Wells Fargo was required to include in the wage statement.

The next argument was that Wells Fargo violated the law because it created a wage statement after a terminated employee was fired and sent it to the employee the next day in the mail instead of giving it to the employee on his or her final day of work when the employee received the final paycheck. Labor Code section 226 requires an employer to give the wage statement to the employee "semimonthly or at the time of each payment of wages."

The Labor Code requires terminated employees to be paid when they are terminated. Wells Fargo complied with this requirement, by paying terminated employees by check on their final day of employment. The plaintiffs argued this meant the wage statement had to be issued at the same time. But the court pointed out that the statute also allows an employer to provide the wage statement semimonthly and nothing in the law suggests the employer cannot provide the wage

statement prior to the semimonthly date. Therefore, if the employer furnishes the wage statement by or before the semimonthly deadline, then the employer is in compliance with the law.

Here, Wells Fargo mailed the wage statement the next day, so it was in compliance. The plaintiffs pointed out that the DLSE Enforcement Manual states that the employer must issue the wage statement at the time of payment "or at least semimonthly, whichever occurs first." But the court disagreed with this interpretation and stated the phrase "whichever occurs first" is not found in the statute itself. The court agreed with the trial court that Wells Fargo was in compliance with the Labor Code.

Canales v. Wells Fargo Bank, N.A., (2018) 234 Cal.Rptr.3d 36.

Note:

While the issue of the regular rate of pay is not a common issue that private schools deal with, it is important to be aware of it and know that an employee's overtime rate is not simply always just one-and-a-half times the hourly rate. More common for schools is the issue of furnishing the final check to terminated employees. Depending on circumstances, schools sometimes have to issue a final check by hand and a wage statement cannot be produced. This case means that mailing the wage statement separately is acceptable, so long as it is done before the semimonthly deadline.

New Minimum Wage Increases Across California.

The following cities and counties will increase their minimum wage on July 1 to:

Emeryville: $15.69/hour for businesses with 56 or more employees; $15/hour for businesses with 55 or fewer employees.

City of Los Angeles: $13.25/hour for employers with 26 or more employees; $12/hour for employers with 25 or fewer employees.

County of Los Angeles (unincorporated areas only): $13.25/hour for employers with 26 or more employees; $12/hour for employers with 25 or fewer employees.
Malibu: $13.25/hour for employers with 26 or more employees; $12/hour for employers with 25 or fewer employees.

Milpitas: $13.50/hour.

Pasadena: $13.25/hour for employers with 26 or more employees; $12/hour for employers with 25 or fewer employees.

San Francisco: $15/hour.

San Leandro: $13/hour.

Santa Monica: $13.25/hour for employers with 26 or more employees; $12/hour for employers with 25 or fewer employees.

Schools in these areas should make sure they are paying all hourly employees at least the local minimum wage. The salary basis test for administrative, professional, and executive employees is still based on a rate that is twice the state minimum wage, so local wage rates are not part of that analysis.

INTERACTIVE PROCESS

Ninth Circuit Holds That Failing To Engage In The Interactive Process Does Not Shift The Burden To An Employer At Trial To Prove The Unavailability Of A Reasonable Accommodation.

Danny Snapp worked for the Burlington Northern Santa Fe Railway Company ("Railway Company") from 1971 through 1999, working his way up the ranks to eventually become a Division Trainmaster. In 1994, after experiencing tiredness and low energy, he went to a doctor who diagnosed him with sleep apnea. Snapp had two separate surgeries, each unsuccessfully attempting to correct his condition.

In 1999, after the Railway Company received a report from Snapp's physician, Snapp took a "fitness for duty" evaluation to decide whether he could work in a safe manner. The evaluation determined that Snapp was totally disabled, causing him to go on short-term disability leave. The next year, CIGNA, the third-party administrator of the Railway Company's disability plan, approved Snapp's claim for long-term disability benefits. As a result, Snapp began a period of long-term disability leave, receiving payments from CIGNA. However, Snapp was informed that should CIGNA later find him ineligible, he should contact the Railway Company to plan a "return to work."

In 2005, CIGNA requested a sleep study to verify Snapp's continuing disability, but Snapp refused to complete the study after he was asked to pay for it himself. Consequently, CIGNA terminated Snapp's disability benefits, citing an absence of evidence of continuing disability.

Snapp appealed CIGNA's denial of benefits and contacted the Railway Company demanding his disability payments be reinstated. However, throughout the course of letters and phone calls, he never requested an accommodation or applied to return to work. In 2008, the Railway Company informed Snapp that, in accordance with the long-term disability plan, he had sixty days to secure a position within the Railway Company or he would be dismissed.

Snapp responded with a letter expressing his hopes that the Railway Company would assist in his appeal of CIGNA's denial of benefits. Still, the Railway Company reiterated that he needed to deal with CIGNA directly, since that was the party solely responsible for plan administration. The Railway Company communicated that it stood by its sixty-day window, sent Snapp a website for accessing current position openings, and identified a human resources representative in Snapp's region.

Snapp neither visited the website nor contacted the human resources representative. The only action he took toward finding an open position was inquiring to displace a senior yardmaster, to which the United Transportation Union informed him he lacked the requisite seniority. The Railway Company confirmed with the Union that Snapp did not have the necessary seniority for the position he desired. At that point, since the sixty-day window had expired, the Railway Company terminated Snapp's employment.

Snapp sued the Railway Company alleging failure to provide a reasonable accommodation for his disability in violation of the Americans with Disabilities Act (ADA). A jury found for the Railway Company at trial, and Snapp appealed.

As stated by the Ninth Circuit: "The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business."

If an employee notifies his or her employer of the need for an accommodation, the employer then has a duty to engage in an "interactive process." The goal of this interactive process is to enable both parties to understand the employee's abilities and limitations, the employer's needs for various positions, and a possible "middle ground" to accommodate the employee. Snapp argued that the Railway Company was liable because it had failed to engage in this interactive process, which prevented it from providing a reasonable accommodation.

The interactive process is considered essential to accomplishing the ADA's goals, because it is the primary way to determine a reasonable accommodation that will prove satisfactory to both an employee and an employer. Acknowledging the importance of the interactive process, the Ninth Circuit has previously held that if an employer fails to engage in it, the burden of proof shifts to the employer to demonstrate the unavailability of a reasonable accommodation. However, notably, those previous holdings only applied to the summary judgment phase of litigation, not to trial.

Snapp relied on these previous holdings to argue that, during his trial, the burden of proof should have shifted to the Railway Company to prove the absence of a reasonable accommodation, since it had not engaged in the interactive process. However, the Ninth Circuit rejected this argument, holding that shifting the burden of proof to an employer should be limited to summary judgment proceedings, and should not carry over to trial.

Here, the court reasoned that burden-shifting is complicated. While motions for summary judgment are decided by a judge who is equipped to handle such complex issues, trials are typically decided by a jury. Charging jurors with the task of untangling an intricate burden-shifting framework would not be appropriate. In support of this reasoning, the court noted that several other circuits have consistently held that failure to engage in the interactive process does not require a shifted burden at trial.

Ultimately, the Ninth Circuit affirmed the jury's decision that the Railway Company did not violate the ADA. The court explained that the record supported that Snapp neither requested an accommodation nor took advantage of resources that could have triggered the interactive process or a possible accommodation.

NOTE:

Because this case was decided by the Ninth Circuit, it is controlling California precedent. The outcome of this case is positive for private schools and colleges if they are sued for not providing a reasonable accommodation and the suit goes to trial. Still, it did not reverse previous Ninth Circuit rulings that the burden of proof does in fact shift to an employer at the summary judgment phase. Therefore, because private schools and colleges faced with a similar suit would likely want to dispose of the lawsuit through a motion for summary judgment, they should ensure they engage in the interactive process with any employee that has communicated a disability. The interactive process is considered to be at the heart of the ADA's goals, and the best way to find an accommodation that will be reasonable to both an employee and an employer or provide a defense if an accommodation cannot be provided.

Snapp v. United Transportation Union (9th Cir. 2018) 889 F.3d 1088.

HARASSMENT/ADVERSE ACTION

Student Harassment Does Not Create Hostile Environment Unless Employer Failed Reasonably to Respond to the Conduct.

Patricia Campbell was a high school music teacher employed by the Hawaii Department of Education on Maui. During her 9-year employment with the Department, Campbell alleged her students verbally harassed her. Campbell routinely reported the students' misconduct to Department administrators, who investigated the complaints and imposed a variety of discipline on the students who misbehaved.

Contemporaneously, parents, students, and teachers complained that Campbell physically and verbally abused students, discriminated against students, and failed to maintain a safe classroom. The Department investigated, allowed Campbell to continue working through the investigation, and although it found that Campbell violated Department policy, took no action against her.

On another occasion, the Vice Principal of her school held a counseling meeting with Campbell after she reportedly stormed into the Vice Principal's office, yelled, and refused to leave. The Vice Principal wrote Campbell a memo documenting the meeting and instructed Campbell not to "address adults or students on campus in a yelling or ragging manner." Campbell took offense to the Vice Principal's use of the words "ragged" and "ragging" in the memo, which she believed to be a reference to her menstrual cycle, and filed a complaint with the Department. After another investigation, the Department determined the Vice Principal's use of the words was not derogatory.

Before the start of the 2007-2008 school year, Campbell requested a transfer to teach elsewhere on Maui. However, the Department denied Campbell's request. The positions Campbell specifically requested were not open during the school's annual transfer period window in the spring, nor did Campbell qualify for an emergency transfer outside the normal transfer period window.

Unable to transfer, Campbell requested and the Department granted a 12-month leave of absence without pay due to work-related stress. Campbell requested and the Department granted a second year of unpaid leave.

When Campbell prepared to return for the 2009-2010 school year, she learned that because there were not enough students to support a full teaching load of music classes, the Department assigned her to teach three remedial math classes and two music classes. Campbell objected and never reported to work after her leave expired. She subsequently resigned.

In February 2013, Campbell filed a lawsuit against the Department and various administrators. Campbell alleged that she had been subjected to several acts of discriminatory treatment and a hostile work environment because of her race and her sex, and that she had been retaliated against for complaining of harassment at the school. The trial court dismissed Campbell's claims, but she appealed her claims of disparate treatment, hostile work environment, and retaliation under Title VII of the Civil Rights Act of 1964 and sex discrimination under Title IX of the Education Amendments of 1972.

The Court of Appeals first considered Campbell's Title VII claim alleging that the Department discriminated against Campbell based on her sex and race by subjecting her to adverse employment actions. Campbell alleged that this violation occurred when the Department: (1) lost one of her employment evaluations; (2) investigated allegations against her raised by parents, students, and teachers; (3) denied her transfer request to another school; (4) did not provide

her leave with pay (either during the Department's investigation into the allegations against her or during her requested and approved voluntary leave); (5) assigned her to teach remedial math classes upon her anticipated return in 2009; and (6) failed to respond adequately to her complaints of offensive student conduct. Despite these claims, the court found that facts contradicted her claims and Campbell did not provide evidence that any of these actions materially affected the "compensation, terms, conditions, or privileges" of her employment. Moreover, even if the various alleged actions could be adverse employment actions, Campbell did not provide evidence that the Department treated any similarly-situated employees of a different race or sex more favorably than it treated Campbell. Accordingly, Campbell did not establish a case for disparate treatment.

Campbell also argued that the Department violated Title VII by creating a hostile work environment that adversely affected the terms or conditions of her employment. Campbell primarily argued that her work environment was hostile because of the derogatory comments she received from students. The Department could be liable for the students' harassing conduct only to the extent that it failed reasonably to respond to the conduct or to the extent that it ratified or acquiesced in it. However, the Department did respond her to complaints of the students' conduct, and that response was reasonably calculated to end the harassment.

In addition to the students' behavior, Campbell argued that the Vice Principal created a hostile work environment when he chided Campbell for "ragging" at students and staff or made potentially offensive comments about female students' clothing over the school's loudspeaker. The court disagreed that the language created a sexually-hostile work environment. The court held that the few isolated and relatively mild comments that Campbell alleges the Vice Principal made in reference to her or to female students were not sufficient to show a severe and pervasive environment that altered the terms or conditions of Campbell's employment.

Campbell also argued that the Department violated Title VII's anti-retaliation provisions by taking action against her because she voiced complaints of harassment at the school. The court examined the Department's investigation into Campbell's alleged misconduct and Campbell's assignment to teach remedial math in the 2009-2010 school year. However, the Department provided clear evidence of a neutral, non-retaliatory reason for its actions in both of these issues. Therefore, Campbell could not prevail on this claim.

Finally, Campbell claimed that the Department violated Title IX by both directly and intentionally discriminating against her and by acting with deliberate indifference to the sexual harassment she endured from students and the Vice Principal. However, the Department immediately conducted an investigation into her allegations against the students and the Vice Principal. The Department disciplined students when it found they engaged in misconduct. The investigation into the Vice Principal ultimately determined that he had not engaged in misconduct. Therefore, the Department did not act with deliberate indifference to Campbell's complaints.

Ultimately, the Court of Appeals agreed with the trial court on all the issues Campbell appealed.

Campbell v. State of Hawaii Department of Education (9th Cir.) __ F.3d __ [2018 WL 2770989].

Note:

It should be noted that the fact that the school district promptly investigated and took corrective action where needed in response to Campbell's multiple complaints provided a strong defense for the school.

NATIONAL ORIGIN DISCRIMINATION

DFEH Issues New Regulations on National Origin, Immigration-Related Practices, and Language and Height/Weight Restrictions.

It's time to check your policies. New DFEH regulations (California Code of Regulations, title 2, sections 11027.1 and 11028) went into effect on July 1, 2018 that provide definitions on "national origin" and "undocumented applicant or employee," in addition to outlining specific employment practices regarding language restrictions and height/weight restrictions.

The new "national origin" definition includes the individual's or ancestor's actual or perceived (1) physical, cultural, or linguistic characteristics associated with a national origin group; (2) marriage to or association with persons of a national origin group; (3) tribal affiliation; (4) membership in or association with an organization identified with or seeking to promote the interests of a national origin group; (5) attendance or participation in schools, churches, temples, mosques, or

other religious institutions generally used by persons of a national origin group; and (6) name that is associated with a national origin group.

What is a "national origin group?" The new definition provides that it includes, but is not limited to, "ethnic groups, geographic places of origin and countries that are not presently in existence." The regulations also define an "undocumented applicant or employee" as someone who "lacks legal authorization under federal law to be present and/or work in the United States."

The DFEH has established new protections for "undocumented applicants or employees," making it unlawful to discriminate against them because of their immigration status, "unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law." The regulation provides an example of unlawful discrimination by stating that it is unlawful for an employer to discriminate against an applicant or employee because he or she "holds or presents a driver's license issued under section 12801.9 of the Vehicle Code" (which establishes that undocumented immigrants may be eligible for a California driver's license).

The new regulations also prohibit employers from inquiring into an applicant's or employee's immigration status unless it is necessary to comply with federal law. The DFEH does not identify or explain under what circumstances, however, federal law requires an employer to make such an inquiry. Like California law, federal law prohibits pre-offer inquiries into an applicant's immigration status.

The new regulations include an explanation of what "language restrictions" may be implemented by employers. It has been unlawful for an employer to adopt or enforce an "English-only" rule, except in limited circumstances. The new regulation creates further protection. Employers will not meet the threshold of business necessity if the "language restriction merely promotes business convenience or is due to customer or co-worker preference." Employers also may not discriminate based upon an applicant's or employee's accent, "unless the employer proves that the individual's accent interferes materially with the applicant's or employee's ability to perform the job in question."

It is unlawful for the employer to establish English-only rules for employees applicable to breaks, lunch, or unpaid employer-sponsored events.

According to the DFEH, height and weight requirements may create a disparate impact on the basis of national origin. Therefore, if the applicant or employee is able to show a disparate impact, the employer must demonstrate the requirements are job-related and justified by business necessity. Note, however, that height and weight restrictions may still be unlawful if the business requirements "can be achieved effectively through less discriminatory means."

Employers should review their Equal Employment Opportunity policies, as well as recruitment and retention procedures, to avoid potential noncompliance with or violation of the new regulations. Importantly, if the employer uses a third party to conduct recruitment, the employer should ensure that the third party also complies with the new regulations. Individuals responsible for recruitment and hiring should be trained in the application of these new regulations.

ARBITRATION AGREEMENTS

Integration Clause Contained Within An Agreement Does Not Preclude Proof Of Later-Signed Arbitration Clause; Parties Are Not Bound By Terms Of Arbitration Agreement That They Did Not Sign.

After suffering a traumatic brain injury and other major injuries, John Williams signed a residency agreement to live in Atria Los Posas, a residential care facility for elder or dependent adults. The agreement contained an integration clause, which read: "This Residency Agreement and all of the Attachments and documents referenced in this Residency Agreement constitute the entire agreement between you and us regarding your stay in our Community and supersedes all prior agreements regarding your residency." The agreement did not contain an arbitration clause.

Immediately after signing the agreement, Williams signed a separate arbitration agreement. The arbitration agreement stated: "It is understood that any and all legal claims or civil actions arising out of or relating to care or services provided to you at Atria… or relating to the validity or enforceability of the Residency Agreement for Atria, will be determined by submission to arbitration as provided by: (1) the Federal Arbitration Act (FAA), 9 U.S.C., Sections 1-16, or (2) CA law, in the event a court determines that the FAA does not apply."

Williams's wife, Vicktoriya Marina-Williams, did not sign any of the documents.

Sadly, shortly after his admission to Atria, Williams walked away from the facility. Several hours later, paramedics found him lying in a ditch five miles away. He suffered kidney failure, respiratory arrest, heat stroke, and a second traumatic brain injury.

Williams and Marina-Williams sued Atria and Williams's primary care physician. In one cause of action, they alleged that both Atria and the physician were negligent. In another, Marina-Williams sued both Atria and the physician for loss of consortium, or deprivation of the benefits of a family relationship due to William's injuries caused by Atria.

Atria asked the court to force the parties to arbitration based upon the arbitration agreement. Williams and Marina-Williams opposed the request. They argued (1) the court could not consider the arbitration agreement because it was not included in the residency agreement; (2) the Federal Arbitration Act applied instead of California state law, (3) the arbitration agreement was unconscionable; and (4) Marina-Williams was not a party to nor bound by the arbitration agreement. The trial court denied Atria's request and reasoned that the integration clause in the prior residency agreement barred the subsequent arbitration agreement.

The Court of Appeal reviewed the timing of residency agreement and arbitration agreement and determined the parties did not intend the residency agreement to be the final and complete expression of their agreement. The residency agreement superseded any "prior" agreements, but it did not invalidate agreements signed later, such as the arbitration agreement. Additionally, the arbitration agreement expressly provided that it applied to claims regarding "the validity or enforceability of the residency agreement." Therefore, the trial court erred in concluding that the integration clause in the residency agreement precluded the later signed arbitration agreement.

Atria also argued the parties should be forced to arbitrate Marina-Williams's claim for loss of consortium because the claim arose out of Atria's care of Williams. The Court held that because Marina-Williams did not sign the arbitration agreement and was not acting as a representative of her husband, but is pursuing her own claim based on the alleged misconduct of others, she was not bound by the arbitration agreement.

Atria also claimed that because the arbitration agreement provided for the application of the Federal Arbitration Act, the procedural rules of the Federal Arbitration Act applied to the exclusion of California Code of Civil Procedure. Although the Court found that the language of the arbitration agreement did not rule out the application of the Code of Civil Procedure, the trial court must decide whether the Code of Civil Procedure applied to deny arbitration of the claims.

Finally, rather than ruling on the Williamses' claims that the arbitration agreement was unconscionable, the Court ordered the trial court to consider the argument.

Ultimately, the Court affirmed the trial court's order denying the request to force arbitration of Marina-Williams's cause of action for loss of consortium, but for all other causes of action, the Court reversed and instructed the trial court to consider and rule on the objections to enforcement of the arbitration agreement.

Williams v. Atria Las Posas, __Cal.App.5th __ , 2018 WL 3134869.

NOTE:

This is another in a long line of cases that reinforces how important it is to ensure that arbitration clauses comply with the law in both how they are drafted and executed.

BUSINESS AND FACILITIES

INSURANCE COVERAGE/NEGLIGENT HIRING

California Supreme Court Holds that Insurance Policy Defense Obligation is Triggered In Claims of Negligent Hiring.

Ledesma & Meyer (L&M) contracted with the San Bernardino Unified School District to manage a construction project at a middle school. L&M hired Darold Hecht to work on the project. In 2010, Jane Doe, a 13-year-old student, alleged that Hecht abused her. Her claims included a cause of action against L&M for negligently hiring and retaining Hecht. L&M tendered the claim to its insurer, Liberty. Liberty defended L&M, but sought declaratory relief that it was not obligated to defend or indemnify L&M.

The insurance policy in question provided coverage for bodily injury caused by an "occurrence." Occurrence was defined as an accident. The district court granted summary judgment to Liberty on the cause of action for negligent hiring and retention. L&M appealed.

Here the court explained that the meaning of the word "accident" is settled in California law in terms of liability insurance. The term is more comprehensive than negligence and thus it includes negligence. The question for the court was whether Liberty had a duty to defend L&M against Doe's lawsuit.

It is undisputed that Hecht's sexual abuse was a willful act beyond the scope of insurance coverage. However, that does not preclude coverage for L&M because there is a difference between an intentional act of molestation by Hecht and negligent supervision by L&M. L&M's allegedly negligent hiring, supervision and retention were independent tortious acts, which form the basis of the claim against Liberty for coverage.

The district court ruled that L&M's alleged negligence was too seperate from Hecht's acts, such that L&M's acts did not cause Doe's injury. But the Supreme Court here disagreed with that reasoning, noting instead that case law precedent holds that negligent hiring, retention, or supervision may be a substantial factor in a sexual molestation perpetrated by an employee, depending on the facts of the situation. Also, an injury may be the result of more than one cause.

The court held that a finder of fact could conclude that the connection between L&M's alleged negligence and the injury caused by Hecht were close enough to justify the imposition of liability on L&M. Liberty's arguments for non-coverage, if accepted, would leave employers without coverage for claims of negligent hiring or supervision whenever the employee in question's bad acts are deliberate. Such a result is inconsistent with California law. Absent a specific exclusion, employers should be able to legitimately expect coverage for such claims under general liability insurance policies, as they do for other claims of negligence.

Liberty Surplus Insurance Corporation v. Ledesma & Meyer Construction Company, Inc., et al., (2018) 418 P.3d 400.

LCW BEST PRACTICES TIMELINE

Back to School: Is Your School Ready? Here is a Checklist to Consider.

With the new school year fast approaching, here is a list of some important laws and best practices that your School should be following:

- New AB 500 disclosure requirements recently went into effect. As of July 1, 2018, this new law requires all K-12 schools to provide to parents written copies of all existing personnel policies on employee interactions with students, at the beginning of each school year. AB 500 went into effect on January 1, 2018, and as of that date, all K-12 schools have been required to post the sections of any code of conduct personnel policies they maintain on employee interactions with students to parents on the school's website. It is important to review your personnel policies, including your employment handbook, to ensure the AB 500 disclosure includes all applicable policies. Remember that the law does not require a school to create policies if they do not already exist. Please seek legal guidance if you have questions or concerns about preparing the AB 500 disclosure.

- Ensure that your school's Employment Handbook is up to date. The best time to introduce revisions to an Employment Handbook is the beginning of a new school year. Keep in mind new laws that your school may need to comply with. If your school has fewer than fifty (50) employees, and at least twenty (20) employees, it is subject to the New Parent Leave Act (which went into effect January 1, 2018), and your school should have a policy in place addressing this leave. We recommend that Employment Handbooks be updated at least every two (2) years.

- Ensure that the school's Student/Parent Handbook is up to date. As with Employment Handbooks, the best time to distribute new policies and updates to the Student/Parent Handbook is at the beginning of the school year. We recommend that Student/Parent Handbooks be updated at least every two (2) years.

- Ensure that all student waivers are up to date. In planning for any new activities or trips for the upcoming school year, it is important to ensure that the school has a waiver that parents sign that covers the trip or activity. We recommend that schools have separate waivers in place for all overnight trips, for athletic programs, and for activities, such as hiking, that pose a heightened risk of injury.

- Ensure your vendor contracts are up to date. The School's vendor contracts should be reviewed every year. Examples of vendor agreements include food services/catering, security services, and janitorial services.

- Plan for staff trainings. The week before school begins is the best time to conduct the following required and recommended trainings:

  - AB 1825 Sexual Harassment training, which is required to be provided for supervisors and managers every two (2) years if school has more than fifty (50) employees.

  - Mandated Reporter Training.

    - Prior to commencing employment it is a prerequisite that all mandated reporters sign a statement to the effect that they have knowledge of the provisions of the Mandated Reporter Law, and will comply with those provisions. (California Penal Code § 11166.5.)

    - Employees of licensed daycare facilities are required to complete specialized mandated reporter training. New employees have up to 90 days to complete their training. The state provides this training for free online

  - Risk Management Training Such as Injury, Illness Prevention, CPR.

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: A preschool director called and asked about AB1207, which requires training for mandated reporters. She was confused about who exactly needed to be trained.

RESPONSE: The attorney explained that AB 1207 added a new category of mandated reporter who must complete training. Currently, only public and charter school employees were required to undergo training, whereas the training was only recommended for private schools. This new law requires that employees and administrators of licensed child care facilities undergo training. The state of California provides a free training online, and it contains information that is specific to the care of young children. The preschool director was confused because the preschool is part of a larger K-6 school. She wondered if all employees had to undergo this training. The attorney explained that while it is not completely clear from the text of the law, it seems only those employees and administrators who work in the child care facility portion of the school are required to undergo training. For example, a 5th grade math teacher who has no interaction with the pre-K children would likely not be required to be trained. The director thanked the attorney and said that she will require all employees who work in the pre-K division to undergo the free training online.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Sept. 13 **"How to Prepare a Campus Safety Plan"**
ACSI Consortium | Webinar | Judith S. Islas

Sept. 25 **"Student Safety Issues"**
CAIS | Webinar | Judith S. Islas

Customized Training

Aug. 2 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Pacific Ridge School | Carlsbad | Stephanie J. Lowe

Aug. 7 **"Employee Handbook"**
German International School of Silicon Valley | Mountain View | Stacy Velloff

Aug. 9 **"Field Trips/Off Campus Programs"**
Kirby School | Santa Cruz | Linda K. Adler

Aug. 17 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Westmark School | Encino | Michael Blacher

Aug. 17 **"Preventing Harassment, Discrimination and Retaliation in the Independent School Setting/Environment and Professional Conduct"**
Woodland School | Portola Village | Grace Chan

Aug. 20 **"Preventing Harassment, Discrimination and Retaliation in the Independent School Setting/Environment and Mandated Reporter"**
Presidio Hill School | San Francisco | Grace Chan

Aug. 20 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
The Jean and Jerry Friedman Shalhevet High School | Los Angeles | Michael Blacher

Aug. 21 **"Healthy Boundaries for Employees with Students"**
Marymount High School | Los Angeles | Michael Blacher

Aug. 21 **"Professional Boundaries"**
Sea Crest School | Half Moon Bay | Grace Chan

Aug. 22 **"Overview of At-Will Employment, Compliance with Wage and Hour Laws, Mandatory Reporting Requirements, and Appropriate Employee/Student Interactions and Boundaries"**
Redwood Day School | Oakland | Linda K. Adler

Aug. 22 **"Preventing Harassment, Discrimination and Retaliation in the School Setting/Environment"**
Vistamar School | El Segundo | Michael Blacher

Aug. 22 **"Preventing Harassment, Discrimination and Retaliation in the Independent School Setting/Environment and Mandated Reporting"**
YULA Girls High School | Los Angeles | Julie L. Strom

Aug. 24 **"Mandated Reporting"**
Polytechnic School | Pasadena | Lee T. Patajo

Aug. 28 **"Harassment and Mandated Reporting"**
The Center for Early Education | West Hollywood | Lee T. Patajo

Sept. 6 **"Mandated Reporting"**
German International School of Silicon Valley | Mountain View | Grace Chan

Sept. 20 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
German International School of Silicon Valley | Mountain View | Grace Chan

Seminars/Webinars

Aug. 7	**"Classification of Independent Contractors: Not as Easy as ABC"** Liebert Cassidy Whitmore | Vista | Stephanie J. Lowe
Aug. 9	**"Classification of Independent Contractors: Not as Easy as ABC"** Liebert Cassidy Whitmore | Citrus Heights | Kristin D. Lindgren
Aug. 14	**"Mandated Reporter Training for California Private Schools"** Liebert Cassidy Whitmore | Webinar | Julie L. Strom

Firm Publications

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

"Risk and Liability in the Era of Ride Sharing" authored by **Heather DeBlanc** and **Julie L. Strom** of our Los Angeles office, "What Schools Should Know About Checking References" authored by **Michael Blacher** of our Los Angeles office and **Linda K. Adler** of our San Francisco office , "Exchange Programs and Host Families" authored by **Michael Blacher** and **Julie L. Strom** of our Los Angeles office , and "Anxious Parents in a Litigious Age: Preemptive Steps to Manage Parental Relationships" authored by **Michael Blacher** of our Los Angeles office and **Grace Chan** of our San Francisco office all appeared in the July/August 2018 issue of the National Business Officers Association (NBOA)'s Net Assets Magazine.

The articles can be viewed by visiting the link listed above.

LCW Webinar OnDemand - Mandated Reporter Training for California Private Schools

Employees whose duties require contact with and/or supervision of children are considered "mandated reporters". This workshop provides mandated reporters with the training that is suggested and encouraged by the California Penal Code to help them understand their obligations. It is essential that mandated reporters understand their legal duties not only to help ensure the safety and welfare of children, but because the duty to report is imposed on individual employees, not on the school. Moreover, a lack of training does not relieve mandated reporters of this important duty.

Presented by:

Julie L. Strom

This webinar, designed for any employee who is a mandated reporter, or who supervises mandated reporters, explains this complex area of the law, including: what constitutes child abuse and neglect; the specific reporting obligations of mandated reporters; how to file a report; protections for reporters; the consequences for failing to file a report; and appropriate employer reporting policies. This practical workshop includes interactive discussion of typical scenarios that could trigger a duty to report suspected abuse or neglect.

Who Should Attend? Any Mandated Reporters, including Teachers and Teaching Assistants, Staff, Administrators, Counselors, Athletic Coaches, and Child Care Center Staff.

Recording Fee: Consortium Members: $100; Non-Consortium Members: $125

Become Trained Today: www.lcwlegal.com/events-and-training

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