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

RACE DISCRIMINATION

Former Students Failed To Demonstrate College Discriminated Against Them.

During fall 2012, Janice Minto, Debra Bacchus, and Dytra Sewell (the Plaintiffs) were students enrolled in the Respiratory Care Program (RCP) at Molloy College located in Long Island, New York when Hurricane Sandy hit. Due to the disruption to transportation and power systems Hurricane Sandy caused, Molloy College issued a notice to its students stating that "wide latitude in demonstrating competence" would be given to students affected by the storm for that semester. The Plaintiffs, who were each African American women over the age of 50, experienced personal difficulties contemporaneous to the hurricane.

Molloy College maintains a policy that requires students to attain a "C+" grade or higher on their RCP courses and a policy to expel students who fail more than two courses (the Policies). During fall 2012, each of the Plaintiffs, who had each previously failed and repeated two RCP courses, received a grade of "C" or lower in one or more of their RCP courses. The Plaintiffs attempted to appeal their grades from the fall 2012, but their professor was unavailable over the winter break and they missed the appeal deadline. When the Plaintiffs attempted to register for classes for the spring 2013 semester, Molloy College informed them they were ineligible to continue in RCP because of their grades and because they already repeated the maximum number of courses.

The Plaintiffs sued Molloy College for race and gender discrimination under Title VI of the Civil Rights Act of 1964 and 42 U.S.C. section 1981, among other causes of action. Title VI prohibits discrimination based on race, color, or national origin by entities receiving federal funds. To state a claim for violation of Title VI, the Plaintiffs had to show that (1) Molloy College discriminated against them based on race, color, or national origin and (2) the discrimination was a "substantial" or "motivating factor" for Molloy College's actions.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to… the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Section 1981 applies to public and private actors, including independent academic institutions, and covers activities such as enrollment in universities. To state a section 1981 claim, the Plaintiffs had to show (1) they are members of a racial minority; (2) an intent to discriminate based on race by Molloy College; and (3) the discrimination concerned one or more activities included in section 1981.

The Plaintiffs alleged that Molloy College treated them differently than non-African American male students when it enforced the Policies and expelled them for their grades and prior failed courses. The Plaintiffs asserted that Molloy College routinely permitted non-African American male students to retake courses as many times as necessary to pass the course and complete the program and provided non-African American male students wide latitude for any difficulties experienced as a result of Hurricane Sandy. The Plaintiffs also argued that the professor purposefully made himself unavailable to them over the winter break so they could not appeal their grades by the deadline.

Molloy College filed a motion to dismiss the Plaintiffs' discrimination claims, arguing that the Plaintiffs failed to plead sufficient facts to permit an inference of discriminatory intent. The Court agreed and granted Molloy College's motion to dismiss the discrimination claims. The Court found that the Plaintiffs failed to show that their expulsion from the college was racially motivated or fueled by a discriminatory intent. Similarly, the Court found that the Plaintiffs failed to provide any facts that the College gave preferential treatment to non-African American male students. Instead, the Plaintiffs relied on conclusory statements that discriminatory and preferential treatment was occurring without providing any supportive factual content.

Minto v. Molloy College (E.D.N.Y., Sept. 26, 2019, No. 16-CV-276) 2019 WL 4696287.

TITLE IX INVESTIGATIONS

Court Dismisses Student's Claim Challenging His Expulsion For Sexual Misconduct.

Vanderbilt University student, Jane Roe, reported sexual misconduct involving fellow student, John Doe. Roe's complaint resulted in the university's Office of Student Accountability, Community Standards, & Academic Integrity issuing charges against Doe for sexual assault-intercourse, sexual assault-contact, and dating violence in violation of the university's sexual assault and intimate partner violence policy.

After completing an investigation, which included multiple interviews of Roe and Doe, the internal investigator issued an investigative report and findings. The findings of fact stated that based on a preponderance of evidence, Doe committed sexual assault-intercourse, sexual assault-contact, and dating violence. The university notified Doe that it intended to expel him. Doe appealed the expulsion, but his appeal was unsuccessful.

Doe filed a lawsuit against the university for, among other things, violations of Title IX of the Educational Amendments Act of 1972 (Title IX). Title IX prohibits exclusion, denial of benefits, and discrimination based on sex by any education program receiving federal financial assistance. Vanderbilt University is a private university that receives federal funding.

Title IX prohibits a university from imposing discipline where sex is the motivating factor in the decision to discipline. The U.S. Court of Appeals for the Second and Sixth Circuits recognize at least four theories of liability that a student can assert under Title IX to challenge a university's disciplinary proceeding: (1) erroneous outcome; (2) selective enforcement; (3) deliberate indifference; and (4) archaic assumptions. Doe asserted claims alleging erroneous outcome, selective enforcement, and deliberate indifference theories.

First, to plead a claim of erroneous outcome, Doe had to allege "(1) facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding, and (2) particularized … causal connection between the flawed outcome and gender bias." Doe attempted to do so by making conclusory statements that the university was biased against accused males; the university created an environment within which accused males did not receive due process; among the cases of sexual misconduct at the university, all or virtually all accused students were male and all complainants were female; and the university was motivated to convict accused male students for various reasons including protecting the university's public image, protecting Title IX funding, and making the disciplinary process expedient for university officials.

The court found that Doe failed to plead any facts that demonstrated gender bias, let alone the particularized causal connection between the outcome of the disciplinary proceeding and gender bias required for an erroneous outcome claim. The court went on

to explain that Doe failed to support his conclusory allegations with statistics, patterns, policies, practices, or anecdotal evidence showing gender bias in the reporting, investigation, or punishment of sexual misconduct; statements suggesting gender bias made by university participants in the disciplinary process; or past or present lawsuits, investigations, or other government pressure on the university to convict male students to protect Title IX funds. The court held that his erroneous outcome claim failed.

Second, to prevail on his selective enforcement theory, Doe was required to show that the university's decision to initiate disciplinary proceedings against him or the severity of the penalty imposed on him was motivated by gender bias. To do this, Doe needed to show that the university treated a similarly situated female student more favorably than him because of his gender. However, the court determined that Doe failed to make this showing.

Last, to prevail on his deliberate indifference theory, Doe had to show he endured sexual harassment that was "so severe, pervasive, and objectively offensive that it effectively [barred his] access to an educational opportunity or benefit." However, Doe failed to plead that anyone involved sexually harassed him before or during the disciplinary proceedings. Accordingly, his deliberate indifference claim failed as well.

Ultimately, the court dismissed Doe's case in its entirety.

Doe v. Vanderbilt University (M.D. Tenn., Sept. 30, 2019, No. 3:18-CV-00569) 2019 WL 4748310.

Note:

While this case is not binding on California private schools, it provides a helpful explanation of how a student can challenge a school's valid implementation of its disciplinary process and imposition of discipline on the student. The issues in cases such as this one are important for private schools, universities, and colleges to consider when administering serious discipline such as expulsions.

EMPLOYEES

WAGE & HOUR

Regular Rate Of Compensation For Purposes Of Meal, Rest, And Recovery Periods Was Not Equivalent To Regular Rate Of Pay For Overtime Purposes.

Jessica Ferra, an hourly employee of Loews Hollywood Hotel, LLC, brought a claim on behalf of herself and other hourly employees alleging, among other things, that Loews improperly calculated meal and rest premiums required by Labor Code section 226.7 for lost meal and rest periods. Loews paid Ferra meal and rest premiums at her base hourly wage rate. Ferra argued that Loews should have paid her these meal and rest premiums at her "regular rate of pay," which would include an additional amount based on incentive compensation such as nondiscretionary bonuses.

Labor Code section 226.7 requires employers who fail to provide an employee a meal, rest, or recovery period to pay a premium to the employee as compensation for the lost break period and for being deprived of the right to be free of the employer's control during the break period. The premium is one additional hour of pay at the employee's "regular rate of compensation" for each workday that the meal, rest, or recovery period was not provided.

In contrast, Labor Code section 510 contains the requirements under which an employer must provide overtime compensation to non-exempt employees and the calculation for such overtime compensation. Labor Code section 510 requires that employers calculate overtime compensation for employees at their "regular rate of pay." "Regular rate of pay" includes adjustments to the base hourly wage rate based on thing such as includable specialty pays (e.g., bilingual pay and shift differentials) or nondiscretionary bonuses.

Ferra argued that "regular rate of compensation" and "regular rate of pay" were synonymous. The court disagreed. As a matter of first impression, the court held that "regular rate of compensation" in Labor Code section 226.7 and "regular rate of pay" in Labor Code section 510 have different meanings. The court further held that "regular rate of compensation" means an employee's base hourly wage rate.

Therefore, the court found that Loews was correct when it paid meal and rest premiums to employees based on their base hourly wage rate.

Ferra v. Loews Hollywood Hotel, LLC (2019) 40 Cal.App.5th 1239, review filed (Nov. 18, 2019).

NOTE:

This case provides a basis upon which California employers can pay employees the meal and rest premiums required by Labor Code section 226.7 for lost meal and rest periods at the employees' base hourly wage rate rather than their often-higher regular rate of pay.

DISABILITY DISCRIMINATION

Employee Who Was Terminated Because Of A Mistaken Belief He Was Unable To Work Need Not Prove Employer Had A Discriminatory Intent.

John Glynn worked for Allergan as a pharmaceutical sales representative. His job required him to drive to doctors' offices to promote pharmaceuticals. In January 2016, Glynn requested, and Allergan approved, a medical leave of absence for his serious eye condition. Glynn's doctor indicated that Glynn was unable to work because he could not safely drive. While on medical leave, Glynn repeatedly requested reassignment to a vacant position that did not require driving, but he was never reassigned.

On July 20, 2016, while on medical leave, Glynn became eligible for long-term, as opposed to short-term, disability benefits. That day, a temporary employee in Allergan's benefits department sent Glynn a letter informing him that his employment was terminated due to his "inability to return to work by a certain date with or without some reasonable accommodation." The temporary employee who sent Glynn the letter mistakenly believed that Allergan policy required termination once an employee on short-term disability becomes eligible for long-term disability benefits. In reality, Allergan's policy only required termination once the employee had applied and been approved for long-term disability benefits.

The day after Glynn received the termination letter, he emailed a letter to the Human Resources Department stating that: he never applied for long-term disability benefits; he could work in any position that did not require driving; and he disputed the termination decision. After Allergan did not reinstate Glynn, he sued the company alleging various disability discrimination and other claims.

In the lawsuit, Allergan moved for summary judgment, and the district court dismissed a number of Glynn's claims, including his disability discrimination claim. However, the Court of Appeal concluded that the trial court erred in dismissing Glynn's disability discrimination claim.

California has adopted a three-stage burden-shifting test for Fair Employment and Housing Act (FEHA) discrimination claims. However, this three-stage test does not apply if the employee presents direct evidence of discrimination. In disability discrimination cases, the threshold issue is whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition.

Here, the court concluded there was direct evidence of discrimination. An employee alleging disability discrimination can establish the employer's discriminatory intent by proving: (1) the employer knew that employee had a physical condition that limited a major life activity, or perceived him to have such a condition; and (2) the employee's actual or perceived physical condition was a substantial motivating reason for the employer's decision to terminate or to take another adverse employment action. Allergan terminated Glynn because a temporary employee perceived, albeit mistakenly, that he was totally disabled and unable to work.

The court further reasoned that even if the employer's mistake was reasonable and made in good faith, a lack of discriminatory intent does not preclude liability for a disability discrimination claim. This is because California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California law protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition. In short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions should be borne by the employer, not the employee, even if the employer's mistake was reasonable and made in good

faith. Accordingly, the court found that the trial court should not have dismissed Glynn's disability discrimination claim.

Glynn v. Superior Court of Los Angeles County (2019) 42 Cal. App.5th 47.

NOTE:

This case highlights that even good faith mistakes can be the basis of a discrimination claim. Employers should make sure that employees responsible for making or approving termination decisions are well versed in the school, college, or university's reasonable accommodation policies to limit the risk of mistakes.

AGE & SEXUAL ORIENTATION DISCRIMINATION

University Prevails In Married Volleyball Coaches' Discrimination Suit.

Bonnie Kenny and Cindy Gregory are a married lesbian couple who are both in their fifties. Kenny and Gregory began working as coaches for the women's volleyball team at the University of Delaware in 2002. They were both already experienced coaches working at major universities when the university hired them. In their first ten years of coaching women's volleyball at the university, Kenny and Gregory led the team to numerous championships. However, in 2013 the team began posting record losses each year.

In 2016, the university hired a new athletic director, who observed what she described as Kenny yelling at players in an aggressive tone, Gregory behaving similarly "intense," and the players cowering and looking "distraught, defeated, uncomfortable, and devalued" at volleyball practices and games. Thereafter, the athletic director received an anonymous complaint from a student and a complaint from a volleyball player's parents, essentially alleging that Kenny and Gregory bullied players. In light of the allegations, the university offered Kenny and Gregory the option to resign in lieu of an investigation, but they both declined.

The allegations led the athletic director to examine the volleyball players' responses to a university survey from the previous semester. In the surveys, the majority of volleyball players reported that they were subjected to coaching techniques that involved verbal and mental abuse.

The university then terminated Kenny and Gregory in the middle of the volleyball season. The team had six wins and eleven losses at the time. The university replaced Kenny, who was 55 years old, with a 38 year old and replaced Gregory, who was 56 years old, with two assistant coaches who were 39 and 28 years old. Kenny and Gregory sued the university, claiming age discrimination in violation of the Age Discrimination in Employment Act (ADEA), sexual orientation discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, and state law violations.

Courts use the burden-shifting framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, in employment discrimination cases when there is no direct evidence of discrimination. Under the framework, a plaintiff must first establish a prima facie case by showing that: (1) he/she is a member of a protected class; (2) he/she was qualified for the position he/she sought to attain or retain; (3) he/she suffered an adverse employment action; and (4) the action occurred under circumstances that could give rise to an inference of intentional discrimination. If the plaintiff can make this showing, then the burden shifts to the defendant employer to offer a legitimate, non-discriminatory reason for its action. After the employer articulates this reason, the burden shifts back to the plaintiff to show that the stated reason is pretextual.

The court found that Kenny and Gregory established a prima facie case of age discrimination because (1) they were both over 40 years old; (2) their decades of successful coaching experience showed they were qualified; (3) their termination was an adverse employment action; and (4) they were replaced by significantly younger employees. However, the court found that the university produced sufficient evidence to show that it had legitimate, non-discriminatory reason for terminating the coaches. Specifically, that the coaches were terminated because of the way they interacted with players during the games and practices, the parent complaint, and the players' surveys reporting verbal and mental abuse.

The court also found that the coaches were unable to show that the university's reasons for terminating them were pretext for discrimination. The court

found that there was no sign of discriminatory motive and the university was consistent in explaining its reasons for terminating the coaches. The court stated that a reasonable factfinder would conclude that the athletic director fired the coaches because she believed their behavior was unprofessional.

Next, the court considered the coaches' claim of sexual orientation discrimination. However, the court explained that it was unnecessary to determine whether they established a prima facie case for sexual orientation discrimination under the *McDonnell Douglas Corp.* framework. Because the coaches were unable to establish pretext for their age discrimination claim, they would similarly be unable to establish pretext for their claim of sexual orientation discrimination. The court granted summary judgment in favor of the university.

Kenny v. University of Delaware (D. Del., Nov. 8, 2019, No. 1:17-CV-01156-RGA) 2019 WL 5865595.

RACE & GENDER DISCRIMINATION

Court Dismisses Majority Of Former Professor's Discrimination Claims Against University And Denies His Request To Order Removal Of Student Newspaper's Article About Him.

A United States District Court recently evaluated former professor Laith Saud's claims of discrimination against DePaul University and his request for a preliminary injunction concerning an article published by the university's student newspaper, which Saud asserted prevented him from finding employment. The facts the court relied upon are as follows:

Saud, a visiting assistant professor in the university's Religious Studies Department, had a romantic relationship with one of the students in his class. After the relationship soured, Saud received a letter from the student's attorney, accusing Saud of sexual misconduct. The university's Title IX coordinator conducted an investigation into the accusations. The student declined to participate in the investigation. The investigation found that Saud did not violate any university policies. At the time, the university did not have a policy prohibiting romantic relationships between faculty and students.

Thereafter, the university informed Saud and the other visiting assistant professor, a white male, in the Religious Studies Department that their positions were being shifted for budget reasons and proposed that the men instead teach as adjunct professors in the fall.

Meanwhile, the student filed a lawsuit alleging, among other things, common law battery and violations of Illinois law against Saud and negligent hiring and supervision against the university. The university agreed to indemnify and defend Saud, selected and began paying for Saud's attorneys, and entered into a Joint Defense Agreement with Saud's attorneys.

The university then withdrew its offer to have Saud teach in the upcoming academic year and reopened the investigation into the student's allegations of misconduct. The student also declined to participate in the second investigation. Nevertheless, the Title IX coordinator concluded that Saud sexually harassed the student and made credibility determinations in favor of the student despite not speaking with her. The university informed Saud that the investigation was closed and would not be reopened and he could not appeal the decision. The university also informed Saud that he was not eligible for future employment at the university and was barred from university events.

Shortly thereafter, the university's student newspaper published an article about the student's lawsuit against Saud titled, "Power Player: Former DePaul student sues ex-professor for sexual coercion," which was "pinned" on the newspaper's Twitter page above all other tweets and articles for several months.

In the student's lawsuit against Saud, he countersued for defamation. The university and the student settled the student's lawsuit, but despite pressure from the university, Saud refused to settle with the student as well. The university notified Saud it was not going to defend or indemnify him any longer and terminated the Joint Defense Agreement. Thereafter, in a bench trial, a judge denied all of the student's claims and granted Saud's defamation claim.

Despite receiving a result in his favor in the student's lawsuit, Saud contended that he was unable to find work. Saud asserted that the article in the university's student newspaper is the first result when searching his name on Google and at least one prospective employer told him that the article was the reason he was not considered for employment.

Saud filed an action against the university asserting, among other things, a 42 U.S.C. section 1983 claim, a Title IX discrimination claim, and a 42 U.S.C. section 1981 claim and requesting a preliminary injunction to order the university to remove the article from the university website and Twitter account.

First, the court analyzed Saud's 42 U.S.C. section 1983 claim, which required Saud to show that his constitutional rights were violated by a person acting under color of state law. However, the court determined that Saud failed to show that the university acted under color of state law. Saud failed to show that the state directed or controlled the university's actions or that the state delegated a public function to the university as required to prove his § 1983 claim. It was not enough that the university received grants and funding from the state or had reporting obligations to the state. Therefore, the court dismissed Saud's section 1983 claim.

Second, the court analyzed Saud's Title IX claim that the university discriminated against him based on gender by denying him access to educational benefits and programs. The court found that Saud's Title IX claim was preempted by Title VII, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion, because his claim was related to his employment as a professor. Specifically, the sexual harassment policy applied to Saud because of his position as a professor; the investigation was conducted because of Saud's position as a professor; and the damages Saud alleged including the university withdrawing his adjunct professor position and denying him future employment were employment related. The court gave Saud the opportunity to amend his complaint to state a Title VII or other proper gender discrimination claim.

Third, the court evaluated whether Saud adequately plead a claim of racial discrimination under 42 U.S.C. section 1981, which prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts, including employment contracts with private employers. The court noted that Saud met the low bar for pleading a section 1981 claim by pleading that he was an Arab American and that when the positions he and a white male professor held were eliminated, the white male professor was offered an adjunct position while Saud was not. Accordingly, the court permitted Saud's section 1981 claim to proceed.

Finally, the court reviewed Saud's request for a preliminary injunction. To obtain a preliminary injunction, Saud had to show (1) absent the injunction, he would suffer irreparable harm; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits.

Here, the court stated that Saud's delay of more than a year after the article was published before seeking a preliminary injunction suggested that he would not suffer irreparable harm if the court did not order the university to take down the article immediately. The court also concluded that Saud did not present evidence that he could not be compensated for the harms he allegedly suffered through monetary damages and an injunction after a final judgment. Finally, the court concluded that Saud failed to show he had a reasonable likelihood of success on the merits. The only claim that survived the university's motion to dismiss was the section 1981 claim and Saud presented limited evidence to support the claim. Consequently, the court denied Saud's request for a preliminary injunction.

Saud v. DePaul University (N.D. Ill., Oct. 29, 2019, No. 19-CV-3945) 2019 WL 5577239.

LABOR RELATIONS

NLRB Clarifies Boeing Test For Analyzing Workplace Rules And Holds Employer's Confidentiality And Media Contact Rules Are Permissible.

In a recent decision, the National Labor Relations Board (Board) clarified its holding in *The Boeing Co.* (Dec. 14, 2017) 365 NLRB No. 154, in which the Board established a framework for determining whether workplace rules violate employee rights under Section 7 of the National Labor Relations Act (NLRA). The NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

The Board explained that it is the initial burden of the General Counsel of the National Labor Relations Board to prove first in all cases that a "facially neutral rule would in context be interpreted by a reasonable employee … to potentially interfere with the exercise of [NLRA] rights." A reasonable employee is one who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of the job" and "does not view every employer policy through the prism of the NLRA."

Only if the General Counsel meets this burden, is the Board then required to evaluate the rule 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 rule. If the adverse impact of the rule on NLRA rights outweighs the employer's legitimate justifications, then the employer's maintenance of the rule violates the NLRA.

To provide "certainty and predictability" for employers, the Board stated its intention to classify employment rules into three categories over time. Category 1 includes rules that are lawful to maintain because either the rule does not prohibit or interfere with NLRA-protected rights, or the justifications for the rule outweigh the potential adverse impact on protected rights. Category 2 includes rules that warrant individualized scrutiny as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether the adverse impact is outweighed by the employer's legitimate justifications. Category 3 includes rules that are unlawful to maintain because they limit or prohibit NLRA rights and the justifications associated with the rule do not outweigh the adverse impact.

The Board also noted that in some cases, "it will not be possible to draw broad conclusions about the legality of particular rules because the context and competing rights and interests are specific to that rule and employer." These rules fall within Category 2.

After clarifying *The Boeing Co.* framework, the Board analyzed two workplace rules maintained by LA Specialty Produce Company. At issue was a portion of the company's confidentiality rule, which read, "Every employee is responsible for protecting any and all information that is used, acquired, or added to regarding matters that are confidential and proprietary of [the company] including, but not limited to client/ vendor lists." Also at issue was the entirety of the company's media contact rule, which read, "Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our president… is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

The Board concluded that neither rule, as interpreted by an objectively reasonable employee, prohibited or interfered with the exercise of NLRA rights. The confidentiality rule only applied to the company's client/ vendor lists, which represented the company's own nonpublic, proprietary records. Further, the Board explained that it now generally categorizes rules that prohibit the disclosure of confidential and propriety customer and vendor lists as Category 1 rules, which are lawful to maintain.

Next, the Board found that the media contact rule was not unlawful on its face because it did not prohibit employees from discussing terms and conditions of employment with the media. Instead, the media contact rule only prohibits employees from speaking on behalf of the company when approached by the news media for interview or comment. The Board noted that employees have no NLRA right to speak on their employer's behalf. The Board then designated rules that prohibit employees from speaking to the media on behalf of their employer as Category 1 rules.

La Specialty Produce Co. & Teamsters Local 70, Int'l Bhd. of Teamsters (Oct. 10, 2019) 368 NLRB No. 93.

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. This new case represents a departure from the past few years of NLRB cases that were highly protective of employees and challenging for employers. This is an evolving area of the law and we recommend seeking legal counsel with specific questions regarding workplace rules and policies.

ADMINISTRATION & GOVERNANCE

MULTI-LINE PHONE SYSTEMS

Kari's Law Act Of 2017.

In December 2013, Kari Hunt Dunn was brutally attacked by her estranged husband in a hotel room in Marshall, Texas. While Ms. Dunn was being attacked, her nine-year old daughter, who was also in the hotel room at the time, tried to dial 911 four times. However, her calls did not go through because she was unaware that the telephone in the hotel room required guests to dial a "9" first to reach an outside line. Ultimately, Ms. Dunn's estranged husband fatally stabbed her, as her daughter remained unable to reach emergency responders. Following Ms. Dunn's death, her father, Hank Hunt, worked to change the law to prohibit multi-line telephone systems, commonly used in offices, schools, campuses, and hotels, from requiring users to dial a prefix such as "9" to make a 911 call.

Mr. Hunt's efforts culminated in House of Representatives Bill 582, or the Kari's Law Act of 2017, which was enacted after being signed by President Trump on February 16, 2018.

Kari's Law requires all multi-line telephone systems to have a default configuration that allows users to dial 911 directly, without having to dial a prefix, code, post-fix, or any additional digits. Kari's Law also requires multi-line telephone systems to be configured to notify a designated central point of contact (e.g., a front desk or security office) when someone makes a 911 call. These requirements apply to any "multi-line telephone system that is manufactured, imported, offered for first sale or lease, first sold or leased, or installed after" February 16, 2020. Essentially, if a school leases or installs a new multi-line telephone system after February 16, 2020, it will need to comply with Kari's Law.

While Kari's Law does not require entities to replace or upgrade their existing multi-line telephone systems to permit direct dialing to 911, from a safety and best practices perspective, it may be wise to do so voluntarily.

Kari's Law is codified at 47 U.S.C. § 623.

ELECTRONIC SIGNATURES

Company Failed To Produce Sufficient Evidence To Prove Consumer's Electronic Signature Was Authentic.

Renovate America, Inc., a company that provides financing to homeowners for home improvement projects and connects homeowners with contractors for those projects, moved to compel to arbitration a complaint filed by homeowner Rosa Fabian related to the installation of solar panels on her home. In opposing the motion, Fabian argued that she did not sign the financial agreement, which contained the arbitration clause. Fabian asserted that Renovate did not present her with the agreement, she did not sign the agreement, and her purported electronic signature on the agreement was placed there without her consent, authorization, or knowledge.

The court explained that when an individual asserts that his or her purported electronic signature on a contract is not authentic, the burden falls on the person claiming the electronic signature is authentic to prove authenticity by a preponderance of the evidence. Proving authenticity may be accomplished by presenting evidence of the contents of the contract in question and the circumstances surrounding the contract's execution.

To attempt to prove the authenticity of Fabian's purported electronic signature, Renovate argued that DocuSign, a company used to sign documents electronically in compliance with federal law, authenticated Fabian's signature and also produced a signed declaration from the company's senior director of compliance operations stating that Fabian entered into the agreement.

The court found that the use of DocuSign alone was insufficient to prove that the electronic signature was authentic. The court explained that Renovate also needed to present evidence explaining the process it used to verify the initials and signature via DocuSign. Similarly, the court found that the declaration of Renovate's senior director of compliance operations was also insufficient because it only summarily asserted that Fabian had entered into the agreement.

The court explained that in order to meet its burden, Renovate needed to produce additional evidence such as, who sent the agreement to Fabian, how the

agreement was sent to Fabian, how Fabian's electronic signature was placed on the agreement, who received the signed agreement, how the signed agreement was returned to Renovate, and how Fabian's identification was verified as the person who actually signed the agreement. Because Renovate failed to provide this type of evidence, the court held that the company failed to prove that Fabian electronically signed the agreement.

Fabian v. Renovate America, Inc. (Cal. Ct. App. 2019) 255 Cal. Rptr.3d 695.

NOTE:

Electronic signatures are acceptable in California and may not be denied legal effect or enforceability solely because the signature is in electronic form. However, this case highlights the issues and challenges that may arise related to proving the authenticity of electronic signatures. The safest and most conservative course of action is to require that hard copies of contracts be signed in person. If a school decides to utilize electronic signatures, we recommend first seeking legal counsel to discuss implementing steps to boost the likelihood that contracts with electronic signatures will withstand challenge.

BUSINESS & FACILITIES

NONPROFIT SECURITY GRANTS

Governor Newsom Signs AB 1548 Authorizing Grant Funding To Protect Nonprofits At Risk Of Violent Attacks.

On October 11, 2019, Governor Newsom signed AB 1548. This bill established the California State Nonprofit Security Grant Program (CSNSGP), to provide grant funding to improve the physical security of nonprofit organizations, including schools, clinics, community centers, churches, synagogues, mosques, temples, and similar locations that are at high risk for violent attacks or hate crimes due to ideology, beliefs, or mission. AB 1548 adds section 8588.9 to the Government Code and is effective immediately as an urgency statute.

The 2019-2020 budget will appropriate $15 million in grant funding for CSNSGP, which nonprofits may use for items such as security guards, reinforced doors, lighting, and alarms. Additionally, AB 1548 increases the amount of funds an applicant may receive to $200,000. The California Office of Emergency Services (Cal OES) will administer CSNSGP. Cal OES currently distributes funding from the federal National Security Grant Program.

NOTE:

Schools and other nonprofits should carefully consider the restrictions that accompany acceptance of CSNSGP grant funding before accepting these grants. CSNSGP grant funds may subject schools and other nonprofits to state laws and regulations that would otherwise not apply. An example is Education Code section 220, which prohibits discrimination by an educational institution that receives, or benefits from, state financial assistance on the basis of "disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or" other protected characteristics. The California Constitution also restricts the provision of state funds to schools other than public schools, which may be problematic. Finally, when schools and other nonprofits accept CSNSGP grant funds they are required to sign assurances, which typically obligate compliance with specified laws.

For information about eligibility and application requirements, visit the Cal OES website, which is available here: https://www.caloes.ca.gov/

RECYCLING & ORGANIC WASTE

Businesses Must Provide Organic Waste Recycling Bins On Or Before July 1, 2020.

In an effort to accomplish California's climate change goal to reduce short-lived climate pollutants, Governor Brown signed into law Senate Bill (SB 1383) in 2016, which established targets to reduce the disposal of organic waste into landfills by 50% by 2020 and by 75% by 2025 from the levels measured in 2014. According to CalRecycle, the methane emissions from decomposing organic waste in California's landfills are a significant source of greenhouse gas emissions that contribute to climate change.

In order to achieve the targets established in SB 1383, Assembly Bill 287 (AB 287) was signed into law in October 2019. Under existing law, most businesses that generate four cubic yards or more of commercial solid waste or four cubic yards or more of organic waste per week must arrange for recycling services. The definition of a covered business is broad and

includes any "commercial or public entity, including, but not limited to, a firm, partnership, proprietorship, joint stock company, corporation, or association that is organized as a for-profit or nonprofit entity, or a multifamily residential dwelling."

AB 287 now requires a covered business that provides customers access to the business to provide, on or before July 1, 2020, an organic waste recycling bin or container to collect material purchased on the premises for immediate consumption that (1) is adjacent to each bin or container for trash other than recyclable organic waste, except in restrooms; (2) is visible and easily accessible; and (3) is clearly marked with educational signage indicating what is appropriate to place in the bin or container. CalRecycle will develop the educational signage on or before July 1, 2020.

Full-service restaurants are generally exempt from AB 287 as long as the restaurant provides its employees an organic waste recycling bin or container and implements a program to collect recyclable organic waste. A full-service restaurant is defined as an establishments with the primary business purpose of serving food, where food may be consumed on the premises, and employees of the establishment (1) escort or assign consumers to an eating area; (2) take consumers' orders after consumers are seated; (3) deliver food, beverages, or other ordered items directly to consumers at their eating area; and (4) deliver checks directly to consumers at their eating area.

AB 287 means that schools, universities, and colleges that sell food on their campuses for immediate consumption, must provide organic waste recycling bins or containers that meet the bill's requirements on or before July 1, 2020 unless those sales occur in an establishment that qualifies as a full-service restaurant.

AB 287 amends sections 42649.1, 42649.2, 42649.8, and 42649.81 of the Public Resources Code.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents 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.

NOVEMBER THROUGH JANUARY

□ Issue Performance Evaluations
- We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to renew the teacher for the following school year is made. Schools that do not conduct regular performance reviews have difficulty and often incur legal liability terminating problem employees - especially when there is a lack of notice regarding problems.
  - Consider using Performance Improvement Plans but remember it is important to do the necessary follow up and follow through on any support the School has agreed to provide in the Performance Improvement Plan.

□ Compensation Committee Review of Compensation before issuing employee contracts
- The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.

□ Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.

□ If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.

□ Review tuition rates and fees relative to economic and demographic data for the School's target market to determine whether to change the rates.

□ Review student financial aid policies.

□ Review and revise enrollment/tuition agreements.

□ File all tax forms in a timely manner:
- Forms 990, 990EZ
  - Form 990:
    - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.
  - Form 990-EZ
    - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990-EZ.
    - A School below college level affiliated with a church or operated by a religious order is

exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).
◦The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.
◦ The School should make its IRS form 990 available in the business office for inspection.

- Other required Tax Forms common to business who have employees include Forms 940, 941, 1099, W-2, 5500

□ Annual review of finances (if fiscal year ended January 1st)

- The School's financial results should be reviewed annually by person(s) independent of the School's financial processes (including initiating and recording transactions and physical custody of School assets). For schools not required to have an audit, this can be accomplished by a trustee with the requisite financial skills to conduct such a review.
- The School should have within its financial statements a letter from the School's independent accountants outlining the audit work performed and a summary of results.
- Schools should consider following the California Nonprofit Integrity Act when conducting audits, which include formation of an audit committee:
  – Although the Act expressly exempts educational institutions from the requirement of having an audit committee, inclusion of such a committee reflects a "best practice" that is consistent with the legal trend toward such compliance. The audit committee is responsible for recommending the retention and termination of an independent auditor and may negotiate the independent auditor's compensation. If an organization chooses to utilize an audit committee, the committee, which must be appointed by the Board, should not include any members of the staff, including the president or chief executive officer and the treasurer or chief financial officer. If the corporation has a finance committee, it must be separate from the audit committee. Members of the finance committee may serve on the audit committee; however, the chairperson of the audit committee may not be a member of the finance committee and members of the finance committee shall constitute less than one-half of the membership of the audit committee. It is recommended that these restrictions on makeup of the Audit Committee be expressly written into the Bylaws.

JANUARY/FEBRUARY

□ Review and revise/update annual employment contracts.
□ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

FEBRUARY- EARLY MARCH

□ Issue enrollment/tuition agreements for the following school year.
□ Review field trip forms and agreements for any spring/summer field trips.
□ Tax documents must be filed if School conducts raffles:

- Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

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 for an independent school called LCW and explained that the school requires employees to download an app onto their personal cell phones and use the app to communicate with school families. The administrator asked whether the school needed to reimburse employees for the cost of the app and any portion of the data charges associated with the app.

RESPONSE: The LCW attorney explained that California Labor Code section 2802 requires an employer to reimburse its employees for all reasonable and necessary expenses the employees incur in performing their jobs. In *Cochran v. Schwan's Home Service*, a California court of appeal interpreted Labor Code section 2802 as requiring employers to reimburse its employees if they require them to use their personal cell phones for work-related calls. Regardless of whether the employees have cell phone plans with unlimited or limited minutes, the court held that the reimbursement owed is a reasonable percentage of the employees' cell phone bills.

Based on Labor Code section 2802 and the *Cochran* case, the school should reimburse employees for the cost of the app and some reasonable percentage of the employee's cell phone bill that accounts for the data charges associated with using the app because the employee is required to incur these expenses to carry out their job. As an aside, LCW does recommend that schools have policies requiring that employees communicate with students and their families only through communications that are set up through the school and may be monitored/accessed by the school if needed. If personal devices are used employees should be using a group format of communication that includes an administrator.

NEW TO THE FIRM

Ariana Hernandes is an Associate in our Fresno office where she provides advice and counsel in employment and education law matters.

She can be reached at 559.449.7816 or ahernandes@lcwlegal.com.

Shane Young is an Associate in our San Francisco office where he advises clients in labor and employment matters including employee hiring, firing, and discipline, personnel grievances, complaints by and against employees, internal policies, and labor relations.

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Jessica Tam is an Associate in our San Francisco office and provides counsel to the LCW clients on a range of labor, employment and education matters.

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Savana Manglona is an Associate in our Sacramento office and provides advice and counsel to clients pertaining to labor and employment law and litigation. She also supports the firm's legislative tracking efforts on labor and employment law legislation.

She can be reached at 916.584.7023 or smanglona@lcwlegal.com.

Daniella Bahrynian is an Associate in our Los Angeles office. She assists our education clients on a variety of matters including labor, employment, and education law. Prior to becoming a lawyer, Daniella taught third grade for three years through Teach for America.

She can be reached at 310.981.2061 or dbahrynian@lcwlegal.com.

FIRM PUBLICATIONS

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

Congratulations to San Francisco Partner **Linda Adler** for being quoted in a *Law360* article about AB 5 and the new Independent Contractor test and how businesses should take a close look in light of the new law.

Los Angeles Partner **Heather DeBlanc** was featured on the National Association of Independent School's (NAIS) Legal Tip of the Week with important "Tips for Planning Campus Construction Projects."

Sacramento Partner **Gage Dungy** and Associate **Savana Manglona** authored an article for *Bloomberg Law* on the new lactation accomodation requirements that take effect Jan. 1, 2020.

Sacramento Partner **Gage Dungy** and Associate **Savana Manglona** authored an article for Law.com's *The Recorder* on "What Employers Should Know About California's New Lactation Accommodation Requirements."

San Francisco Partner **Linda Adler** and Associate **Anni Safarloo** wrote an article for *Law360* that focused on two new Senate Bills and their impact on private schools and immunication exemptions.

Management Training Workshops

Firm Activities

Consortium Training

Jan. 14 **"Emerging Legal Issues for California Private Schools"**
ACSI Consortium | Webinar | Michael C. 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.

Jan. 8 **"Student Privacy Issues"**
The Buckley School | Sherman Oaks | Julie L. Strom

Speaking Engagements

Jan. 8 **"Legislative Update"**
American Camp Association | San Rafael | Casey Williams

Jan. 14 **"Addressing and Preventing Sexual Abuse, Harassment, and Assault"**
ACA | Buena Park | Julie L. Strom

Jan. 14 **"New Governor, New Laws: a Look at Key Legislative Changes Affecting Camps"**
ACA | Buena Park | Julie L. Strom

Jan. 23 **"The Times They Are A Changin': Laws, Politics, and Your School in 2020."**
Gallagher's Independent School Business Officers Seminar | Santa Rosa | Grace Chan

Jan. 25 **"A Behind the Scenes Look at Bylaws and Committee Charters"**
California Association of Independent Schools (CAIS) Trustee School Head Conference | San Francisco | Heather L. DeBlanc & Patricia Merz

Jan. 25 **"Annual Legal Update"**
CAIS Trustee School Head Conference | San Francisco | Michael C. Blacher & Donna M. Willamson

Jan. 25 **"Affinity Groups: How to Lawfully Promote Diversity, Equity & Inclusion with Impact"**
CAIS Trustee School Head Conference | San Francisco | Grace Y. Chan & Portia Collins & Christopher Jones

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 **Jaja Hsu** at jhsu@lcwlegal.com.

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