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.

February 2018

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LCW NEWS

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

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STUDENTS

DISABILITY DISCRIMINATION

Four Year Statute of Limitations Applied to Student's Claim Under the ADA.

John Toma was a medical student at the University of Hawaii's medical school starting in 2005. He began to suffer from anxiety, depression, and insomnia. Starting in 2007, he underwent psychiatric care. He was placed on academic probation in January 2009 and told that he needed to take and pass the licensing exam by May 2009. In July of 2009, he requested a committee hearing to seek an extension of time to take the exam to accommodate his anxiety. The committee directed him to take the exam by the end of July. He took it and failed, claiming the failure was caused by a depressive episode.

In October 2009, Toma was asked to come before the committee again to evaluate his progress. In response, he emailed the Director of Student Affairs, Dr. Antonelli, about his depression. She did not refer him to the office for students with disabilities, but did accommodate him twice by postponing their meeting.

The committee decided to let Toma re-take the exam by April 28, 2010. Toma then suffered another depressive episode. His psychiatrist wrote the university, asking that he be granted a four to six month leave of absence. The leave was approved. In August 2010, Toma was diagnosed with hypothyroidism and began treatment. His depression and anxiety began to resolve as the treatment continued.

In December 2010, the new Director of Student Affairs, Dr. Smerz, asked Toma to come before the committee again. Toma asked for more time to continue his hypothyroidism treatment but Smerz refused. Smerz recommended that Toma withdraw from school or face expulsion due to his failure to progress academically. The committee met on January 12, 2011 and voted to expel Toma. He appealed several times but the decision was upheld. In December 2011, Toma filed complaints. The university investigated, but upheld the dismissal. Toma appealed the final decision in July of 2012 and four years later sued under the ADA, alleging a "hostile educational environment."

The university alleged that Toma's claims violated the statute of limitations. The court explained that with respect to federal laws like the ADA without an express statute of limitations, courts used to borrow the statute of limitations from analogous state laws. However, in 1990, Congress passed a catch-all four year statute of limitations. This applies as well to any claims that were made possible by amendments to laws occurring after 1990. Here, Toma's claim was made possible by the 2008 ADA Amendments Act. This is because the ADAA revised the definition of disability to include episodic incidents like Toma's bouts of depression. Therefore, any claims related to acts that took place before September 11, 2012 were time barred.

Toma alleged that he was subjected to a hostile educational environment. The court explained that the Ninth Circuit does not recognize such a claim and therefore this court declined to do so. Although in the employment context the hostile environment type of claims are recognized, the same is not true for students. Toma also alleged that he was subject to a systemic practice of discrimination that started within the limitations period. But the court noted that Toma did not allege any systemic policy, only a series of related yet discrete acts against him. Only one of those acts fell within the statute of limitations period. The university's motion to dismiss was granted for all claims apart from the one stemming from an incident after September 11, 2012.

Toma v. University of Hawaii, 2018 WL 443439.

EMPLOYEES

EEO-1 REPORT

Required Report Due March 31, 2018.

Federal law requires all private employers, including private schools and colleges, who have 100 or more employees to file the federal EEO-1 report each year. The EEOC announced that it has completed its mailing of the survey Notification Letters.

For more information see: https://www.eeoc.gov/eeoc/newsroom/release/1-24-18.cfm.

EEOC CHARGE DATA

Released Data Shows Most Common Charge is Retaliation.

The EEOC released data about the charges it received in 2017. The most common claim, both across the nation and in California, was for retaliation. Retaliation claims comprised 48.8% of nation-wide claims and 50.7% of California claims. California had the third most claims of all states, after Texas and Florida, which is not surprising given the relatively large population size of these three states.

For more data on EEOC charges and settlements see: http://bit.ly/2F2Z7392.

DISABILITY DISCRIMINATION

Obesity May Be a Disability or a Perceived Disability under California's Fair Employment and Housing Act.

Ketryn Cornell was an obese woman who was fired from the Berkeley Tennis Club ("Club") after having worked there for over 15 years. Cornell sued the Club, claiming that: her obesity was a disability; her termination was disability discrimination; and a Club manager harassed her due to her disabled status, among other claims.

Cornell was obese since childhood. Beginning in 1997, Cornell worked at the Club as a lifeguard and pool manager and received positive performance reviews, raises, and bonuses. In 2012, a new manager instituted a requirement that Club employees wear shirts bearing the Club's logo. When Cornell said she would need a specially-ordered T-shirt size, the manager mocked her, asked her about weight-loss surgery, and ultimately ordered her a shirt that was five sizes too small. Cornell ultimately bought her own shirt, having been humiliated by the manager's conduct. The manager subsequently denied Cornell's requests to work extra shifts, refused to consider her for promotions, and paid her less than a newly hired employee even though the two performed the same duties.

In 2013, the Club terminated Cornell for allegedly secretly recording a Club board meeting held to discuss personnel issues. Managers suspected that Cornell had planted a recording device when she helped set up the meeting room. However, the Club did not fully investigate the matter prior to terminating Cornell.

Upon being terminated, Cornell sued the Club under the Fair Employment and Housing Act (FEHA), alleging disability discrimination and other claims. The trial court granted the Club's motion for summary judgment and dismissed Cornell's FEHA claims, holding that Cornell had failed to produce evidence that her obesity qualified as a disability. Cornell appealed. The Court of Appeal reinstated Cornell's claims of disability discrimination and harassment.

A key issue before the Court of Appeal was whether Cornell could establish that her obesity was a disability within the meaning of FEHA. Under the FEHA, a physical disability is defined as any

physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that (1) affects one or more of several body systems, and (2) limits a major life activity. Affected body systems may include the neurological, organ, respiratory, musculoskeletal, skin, or digestive systems, among others. A condition limits a major life activity (such as physical, mental or social activities, or working) if the condition makes achievement of the activity difficult.

First, in reinstating Cornell's discrimination claim, the Court of Appeal followed the California Supreme Court's decision in *Cassista v. Community Foods, Inc.*, a case which recognized that obesity can result from a physiological condition affecting a bodily system, and may limit a major life activity. The Court of Appeal agreed that under *Cassista*, an employee claiming a disability due to obesity must be able to produce evidence showing the obesity has some physiological, systemic basis. Cornell presented evidence from a physician who opined that her obesity "is more likely than not caused by a genetic condition affecting metabolism." The Club needed to, but did not provide evidence disproving that Cornell's obesity has a physiological cause. Thus, the Club could not win summary judgment on Cornell's disability claims.

The Court of Appeal also concluded that the Club's failure to conduct a follow-up investigation of the recorder incident, and the manager's comments to Cornell precluded summary judgment on Cornell's discrimination claims. The fact that Cornell's managers did not fully question her about the recorder incident or perform a follow up investigation, raised a question for the jury on the issue whether Club management actually believed that Cornell planted the recorder. A jury could conclude that the recorder incident was a mere pretext for the Club's true discriminatory motive.

Second, the Court of Appeal reinstated Cornell's harassment claim because Cornell's evidence raised a question for a jury to decide: whether the alleged harassment was sufficiently severe or pervasive to constitute harassment. Claims of harassment are actionable under FEHA if an employee shows a "concerted pattern of harassment of a repeated, routine, or generalized nature" that would create a hostile work environment from the perspective of a reasonable person. Isolated, non-severe offensive statements do not generally support harassment claims. The Court of Appeal found that the manager's comments about Cornell's weight, and eating habits, by themselves, were not extreme and were too isolated to be severe or pervasive. However, the manager had also reduced Cornell's hours, passed her over for internal job openings, and paid her lower wages than an employee performing the same duties. This combination of evidence precluded summary judgment in the Club's favor on Cornell's harassment claim.

Finally, the Court of Appeal noted that obesity may constitute a perceived disability that triggers employer obligations under the FEHA. FEHA defines physical disabilities to include: 1) "[b]eing regarded or treated by the employer . . . as having, or having had" a condition "that has no present disabling effect but may become [an actual] physical disability," and also 2) "any physical condition that makes achievement of a major life activity difficult." It is not necessary for an obese employee to actually be disabled, or for an employer to perceive that a plaintiff's obesity has a physiological cause, in order for FEHA to apply.

Ketryn Cornell v. Berkeley Tennis Club (2017) 18 Cal. App.5th 908.

NOTE:

The Cornell *decision makes clear that obesity may be a disability within the meaning of FEHA if it has a physiological cause, or if an employer perceives the condition to be disabling. In light of this decision, employers should be sure to investigate employee complaints of disability discrimination due to obesity, as well as employee requests for accommodation based upon obesity. Additionally, this case highlights the importance of conducting a fair and complete investigation into alleged employee misconduct especially as it is needed to provide a defense against claims of discrimination.*

Attorney's Fees Reduced by Half Where Employee Only Prevailed on Three of Her Claims and the Rest Were Dismissed.

Liberty Natural Products imports and distributes botanical products. Tracy Dunlap worked there as a shipping clerk starting in September 2006. In June, 2010, Dunlap began experiencing elbow pain. She filed a worker's compensation claim and was later diagnosed with problems in both elbows. For two years she worked full time, but with certain restrictions. Her worker's compensation claim closed.

One month after her claim closed, Liberty fired Dunlap. She requested reinstatement but was denied. She filed an action against Liberty, alleging discrimination under the ADA. The court granted summary judgment in Liberty's favor on all but three claims. The jury returned a verdict for Dunlap on her claim of disability discrimination, her claim of being "regarded as" having a disability, and failure to reinstate. Liberty appealed, challenging the jury verdict. Dunlap moved for $235,038 in attorney's fees. The court reduced the fees award by 50%. Dunlap appealed.

Liberty argued that the court committed error by conflating the elements of a disparate impact claim and a failure to accommodate claim. Dunlap countered that any error was harmless. While the court agreed that in an ideal world, the jury instructions would have separated out the elements of the two claims, it ultimately agreed with Dunlap that any error was harmless. The record was undisputed that Liberty was on notice of Dunlap's physical limitations and required restrictions. This awareness triggered Liberty's duty to engage in the interactive process. Therefore, the jury was not deprived of the opportunity to decide the foundational issue of whether there was a duty to accommodate.

Liberty appealed the court's denial of its motion for judgment as a matter of law. Liberty argued that Dunlap failed to meet her burden to show that a reasonable accommodation existed that would have enabled her to perform the essential functions of her job. The court noted that whether an accommodation is reasonable depends on the individual circumstances of each case and requires a fact-specific analysis. Once an employer is aware of the need for accommodations, the employer has a duty to engage in the interactive process to identify reasonable accommodations. The court found that Dunlap did produce evidence that onsite carts and other affordable assistive devices existed that would have allowed her to perform her duties. Liberty failed to discuss any of these options.

With respect to Dunlap's appeal of the reduction of attorney's fees, the court agreed with the trial court. All but three of Dunlap's claims were dismissed. She therefore only achieved limited success relative to the overall litigation. The 50% reduction was appropriate given the trial court's discretion.

Dunlap v. Liberty Natural Products (2017) 878 F.3d 794.

NOTE:

The court here emphasized that once an employer is on notice of the need for accommodations, it becomes the employer's duty to begin the interactive process to identify and discuss reasonable accommodations that might help the employee perform the essential functions of the job. It is important for schools and colleges, therefore, to have job descriptions that state the essential functions of each position, including physical requirements. Employers must remember there is no one-size-fits-all solution and each assessment must be individualized, based on the specific facts and circumstances.

FEHA/ATTORNEY'S FEES

Supervisor in Harassment Litigation Must Prove Subordinate's Allegations Were "Frivolous" in Order to Recover His Defense Costs.

A supervisor is not entitled to recover attorneys' fees for defending against an employee's harassment lawsuit unless the supervisor proves that the lawsuit meets the "frivolous" standard. Specifically, individual defendants in harassment cases, like employers, must show that the employee's harassment claims are "frivolous, unreasonable, or without foundation" if they are to recover their litigation costs from an unsuccessful employee-plaintiff.

Elisa Lopez sued her employer, the City of Beverly Hills, and her supervisor, Gregory Routt, for harassment based on race and national origin. The jury found in favor of the City and Routt. At the conclusion of the trial, Routt sought to utilize a provision of the law decided under the California Fair Employment and Housing Act (FEHA) that allows a prevailing defendant to recover attorneys' fees from an unsuccessful Plaintiff.

Routt argued that an individual defendant should not have to meet the same "frivolous" standard that employers have to meet. However, as the court reiterated, the FEHA requires a defendant – whether the employer or an individual defendant – to demonstrate that a harassment lawsuit has no legal or factual basis. This frivolous standard is a difficult test to meet and the trial court judge has the discretion to grant or deny a defendant's request for fees. The trial court in this case found, and the appellate court agreed, that Routt had not demonstrated that Lopez's lawsuit was unreasonable or frivolous.

The appellate court also confirmed that the FEHA allows a plaintiff to hold individual employees (such as coworkers or supervisors) personally liable for harassment, regardless of whether an employer knew or should have known of the harassing conduct. The court noted that this is consistent with the FEHA's goal of deterring harassment.

Lopez v. Routt (2017) 17 Cal.App.5th 1006.

NOTE:

As this case illustrates, even if an employee's allegations are weak or specious, it may not be possible to prove that the claims are also "frivolous." This case reinforces the advice that the best approach is to avoid litigation altogether by refraining from any comments or conduct that are based on an employee's race, sex, age, national origin, or any other protected status.

WRONGFUL TERMINATION

Employer's Use of Criticism, Demotion, and Performance Improvement Plan Did Not Amount to an Employee's Constructive Discharge.

An employee cannot prove a constructive discharge claim based solely on the employee's personal, subjective reactions and objections to the employer's use of standard disciplinary procedures, unless the employee presents evidence that the procedures were used as part of a pattern to mistreat the employee.

A "constructive discharge" occurs when an employer intentionally creates, or knowingly permits the existence of working conditions that are so intolerable that they would compel a reasonable person in the employee's position to resign. But an employee can only prevail on a constructive discharge claim by proving that working conditions were "unusually aggravated" or that they amount to a "continuous pattern of mistreatment." The California Court of Appeal explained that this is an objective standard that focuses on the nature of the working conditions and not on the employee's subjective reaction to the conditions.

In this case, T.J. Simers was a sports columnist for the Los Angeles Times who wrote a thrice weekly column. He received consistently positive performance reviews and positive feedback. However, following criticism about the tone and substance of several of his columns, Times' management decided to reduce the frequency of Simers' columns to two times per week. Subsequently, the paper became aware that Simers may have violated the Times' newsroom ethics guidelines by, among other things, making a pitch for outside work without the necessary approval from a Times editor. The Times suspended Simers' column pending further investigation. Simers was subsequently demoted without a reduction in pay pending the outcome of the investigation, and was provided with a final written warning. Simers ultimately left the Times, accepted a position at another newspaper, and sued the Times for constructive discharge.

The Court of Appeal reviewed the evidence Simers presented about his working conditions at the Times. Simers' evidence showed, among other things: the Times reduced the frequency of publication of his columns; he was accused of unethical conduct; he was referred to as a "public embarrassment" to the Times in reference to his alleged ethical breach; Times' managers criticized his writing as sloppy and not up to standards; his columns were suspended; he was demoted; the Times issued a final warning; and placed him on a performance improvement plan which could potentially lead to termination.

The Court of Appeal found that Simers' evidence was insufficient to show the required aggravated conditions or pattern of mistreatment for a constructive discharge claim. The problem, the Court of Appeal noted, was that some of Simers' allegations were based solely on his "subjective reaction to standard employer disciplinary actions – criticism, investigation, demotion, performance plan – that … are well within an employer's prerogative for running its business." Using these methods does not constitute constructive discharge "[u]nless those standard tools are employed in an unusually aggravated manner or involve a pattern of continuous mistreatment…" In reaching this conclusion, the Court of Appeal applied the standards set forth in *Scott v. Pacific Gas & Electric Co., and Turner v. Anheuser-Bush, Inc.*

T.J. Simers v. Los Angeles Times Communications, LLC (2018) 18 Cal.App.5th 1248.

NOTE:

This case provides encouragement for educational employers to address employee work performance by using counseling, performance improvement plans and disciplinary action.

INVESTIGATIONS

Employer Reasonably Relied on Workplace Investigation When It Decided to Terminate Manager.

The California Court of Appeal dismissed a lawsuit brought by a manager who claimed he was wrongfully terminated. In *Jameson v. PG&E*, PG&E moved for summary judgment on the basis that it terminated Jameson for good cause. It was PG&E's burden to show it acted reasonably and in good faith after making an appropriate investigation into Jameson's actions. The appellate court affirmed that employers may defend against wrongful termination claims by showing that the termination decision was made in good faith after an appropriate investigation, and for reasons that are not arbitrary or pretextual.

In reaching this conclusion, the appellate court reiterated well-settled legal principles relating to employer reliance on workplace investigations. The appellate court noted that on a motion for summary judgment, courts will not reexamine the underlying facts whether, for example, Jameson actually retaliated against an employee. Rather, the court will consider whether the employer had reasonable grounds for believing Jameson retaliated, after an appropriate investigation. Nor are employers required to use a specific investigation method, as long as the method used is fair. The court cited the California Supreme Court decision in *Cotran v. Rollins Hudig Hall Intern. Inc.* which held that fairness in the investigation process "contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial."

In this case, the appellate court reiterated the factors that courts will consider when deciding whether the standard for investigative fairness is met.

"Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in misconduct."

The appellate court affirmed the trial court's determination that PG&E's investigation met all these criteria, such that PG&E's decision to terminate Jameson was made in good faith.

In this case, Paul Nelson, a PG&E employee responsible for supervising the testing of gas transmission pipes, reported a safety concern. Nelson was then assigned to another testing site. Nelson complained to PG&E management representatives that Jameson and others were retaliating against him for making a health and safety report.

In response to Nelson's complaint of retaliation, PG&E retained an outside investigator. The investigator interviewed ten people over a two-month period. The investigator also interviewed several individuals who, per Jameson, would support Jameson's claim that he removed Nelson from his construction sites because of Nelson's poor performance.

The investigator issued a report that found Jameson retaliated against Nelson in violation of PG&E's code of conduct. Specifically, the report found that Jameson began complaining about Nelson's performance only after Nelson reported unbarricaded pressurized gas lines, and that Jameson did so in retaliation for Nelson's report of that unsafe condition. The conclusion was based on information gained during the investigation. For example, the witnesses offered by Jameson contradicted both his claims that Nelson's performance was poor, and that Jameson had expressed concerns with Nelson's performance before Nelson made his report. The investigator also found that the evidence suggested that Jameson falsely claimed that Nelson had conflicts with PG&E contractors to get Nelson transferred out of the area of Jameson's construction sites. PG&E considered the investigation report and decided to terminate Jameson immediately.

The court thus rejected Jameson's claims that a disputed issue of material fact existed simply because the investigator did not interview every witness Jameson offered. The investigator provided valid reasons for not interviewing those witnesses, and there was no evidence the investigator failed to interview those witnesses for an improper reason. Thus, the trial court properly granted summary judgment for PG&E and the appellate court affirmed the trial court.

Jameson v. Pacific Gas and Electric Company, (2017) 16 Cal. App.5th 901.

NOTE:

Jameson *and* Cotran *stand for the principle that courts will not second-guess whether an employer's investigation could have been more thorough or effective, as long as the investigative process is inherently fair. If this criterion is met, an employer's investigative efforts may serve as a basis for defending against an employee's wrongful termination claim. It is essential to ensure that investigators are well trained in conducting investigations and writing the report, these cases really put the investigation on trial.*

PAGA

Employee Who Settled Individual Claims No Longer "Aggrieved Person" Under PAGA.

Justin Kim was a training manager at one of the many restaurants run by Reins International. He was classified as exempt from overtime. Kim disputed his classification and sued in a class action, claiming he did not perform any managerial tasks and should have received overtime for the 10-30 hours he worked beyond the standard 40-hour work week. As part of his claim he sought civil penalties under the Private Attorneys General Act (PAGA).

Kim had signed an arbitration agreement with Reins and so the company sought to compel arbitration for most of his wage and hour claims, and to stay the PAGA cause of action until arbitration was complete, since under California law, PAGA claims cannot be the subject of mandatory arbitration. During that time, he accepted a settlement offer from Reins. The court then lifted the stay on the PAGA cause of action. Reins then moved for summary adjudication of Kim's PAGA claim, arguing he was no longer an "aggrieved employee" under PAGA since his claims had been satisfactorily settled.

PAGA was enacted in 2003 to allow private citizens to sue for Labor Code violations, acting as private Attorneys General for the state. Of any penalties recovered, 75% go to the Labor and Workforce Development Agency and the other 25% go to the aggrieved employees.

In order to bring a PAGA claim, an employee must have suffered harm. While the term "aggrieved employee" was not defined in the first draft of the bill, a later amendment added a definition. An aggrieved employee was any person employed by the alleged violator against whom one of the alleged violations was committed.

The court agreed with Reins that by accepting a settlement for his individual claims, Kim acknowledged that he no longer maintained any viable Labor Code-based claims against the company. He was therefore no longer "aggrieved" and could not maintain a PAGA action. The trial court's motion to dismiss was properly granted. The court also pointed out that the dismissal only affected Kim's standing--another aggrieved employee could still maintain a PAGA action against Reins for the same alleged violations.

Kim v. Reins International California, Inc. (2017) 18 Cal. App.5th 1052.

INTERNS

DOL Rejects Current Intern Test and Adopts Standard Preferred By Courts.

The U.S. Department of Labor endorsed a new test for assessing whether interns qualify as employees under the Fair Labor Standards Act. This "primary beneficiary" standard is used by several appellate courts, including the Ninth Circuit, which governs California. This adoption effectively rescinds agency guidance from 2010.

The seven-part test looks to factors such as the expectation of compensation, the length of time of internship, and type of training received to look at the economic reality of the relationship to see who the primary beneficiary is. The test also analyzes whether the intern's work displaces or is complementary with current employee work and whether there is any expectation of a job at the end of the internship. If the employer is the primary beneficiary, the person is likely an employee and not an intern.

For more information see: https://www.dol.gov/whd/regs/compliance/whdfs71.htm.

NOTE:

The analysis of whether someone is an intern or employee, like the analysis of whether someone is an independent contractor or employee, is fact-specific and does not have a one-size-fits-all answer. Schools and colleges who want to retain interns should make sure the working relationship complies with this seven-part test to avoid potential liability if the intern is in fact deemed an employee.

BUSINESS AND FACILITIES

CREDIT CARD SURCHARGES

California Statute Prohibiting Businesses From Charging Credit Card Surcharges Deemed Unconstitutional.

Five California businesses and their owners brought this law suit to challenge the California law that prohibited businesses from charging a credit card surcharge to customers who choose to pay by credit card instead of cash. These businesses end up paying thousands of dollars a year in credit card fees, which are usually between 2-3% of a transaction. The business owners want to charge a surcharge to those paying by credit card. One of the businesses already charges less for cash customers, but instead of calling it a cash discount (which is permissible under the law), the owner would prefer to call it a credit card surcharge.

The court explained the legislative history of this law, noting that after a federal surcharge ban under the Truth in Lending Act expired in 1984, several states, including California, enacted their own credit card surcharge bans. While credit card companies used to prohibit surcharges as well, those prohibitions have generally been discontinued as a result of class action lawsuits.

The statute does not define the term "surcharge." It also does not prohibit retailers from charging more to credit card users. It does, however, prohibit the retailer from calling that extra charge a surcharge and using the lower price as the base price. Instead, a retailer has to give a discount to cash customers. Therefore, the law prohibits retailers from posting a single sticker price and then charging an extra fee to credit card users and also prohibits labeling a credit card price as a surcharge. The retailers at issue in this case want to be able to post a single price and then add on a fee for those customers who use a credit card.

Like the Supreme Court case on this issue, *Expressions Hair Design v. Schneiderman*, (2017) 137 S.Ct. 1144, which we reported on in our June 2017 issue, this issue was analyzed under a First Amendment framework. The business owners claim their free speech rights are hampered by this law because they cannot use the language they want to convey their pricing scheme. The state disagreed, arguing only conduct was being restricted--the practice of imposing a surcharge. But the court referred to the *Expressions* case and held that the law did impact the retailers' speech rights. The conduct of charging more to those using credit cards was not banned under the law; only the practice of naming it a credit card surcharge was banned. Therefore, it was speech and not conduct that was being regulated.

The court here found that the state Attorney General was not able to point to any actual harm that the restriction in fact alleviates. Particularly harmful to the state's argument was the fact that California has exempted itself from the law's coverage, meaning that public entities like cities, counties, or other public agencies were permitted to impose credit card surcharges. Ultimately the court found that the law violates the First Amendment as to these plaintiffs, who hoped to express their higher prices as a credit card surcharge instead of offering a discount for paying cash. The court did not reach the issue of overall vagueness of the statute generally.

Italian Colors Restaurant v. Becerra, (2018) –F.3d--, 2018 WL 266332.

NOTE:

This case, following the Expressions *case, makes clear that statutes prohibiting credit card surcharges as being expressly stated as part of pricing violate the First Amendment. Here the court analyzed the law only with respect to owners who wished to state their baseline prices, and then the higher prices as resulting from a credit card surcharge. Most major credit card companies have also stopped contractually prohibiting surcharges, but any schools or colleges accepting credit card payments should confirm that surcharges are not prohibited under their agreements with credit card companies.*

LCW BEST PRACTICES TIMELINE

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

DECEMBER - FEBRUARY

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

FEBRUARY - MARCH

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

FEBRUARY - APRIL

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

CONSORTIUM CALL OF THE MONTH

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

ISSUE: An administrator called and asked if there were any legal requirements regarding a school's attendance policy. This school did not have a formal policy in the student handbook and wanted to know if they needed to add one. They also wanted to know what records they had to keep regarding attendance.

RESPONSE: The attorney explained that there are Education Code sections regarding compulsory education. Private schools fill out an affidavit each year. Part of this affidavit is stating that the school is a full time school which keeps attendance records. The Education Code cited requires that schools track attendance regarding absences that are more than half a day. If the school answers that question affirmatively, then its students are exempt from the compulsory education laws in the Education Code relating to truancy. Therefore, the school must have an attendance practice wherein any absence that is more than half a day is noted. Beyond that, it is a best practice for the school to maintain an attendance policy. This can help ensure that students are meeting the academic requirements and being taught the full range of topics required under the law. Also, it can be helpful to have a written policy to refer to if the school needs to discipline a student for attendance purposes.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Mar. 14 **"Navigating the Conflicts Between Parents Without Getting Caught in the Middle"**
Bay Area Independent Schools | Atherton | Linda K. Adler

Mar. 14 **"Navigating the Conflicts Between Parents Without Getting Caught in the Middle"**
Bay Area Independent Schools | Webinar | Linda K. Adler

Speaking Engagements

Mar. 6 **"Ask an Attorney"**
National Business Officers Association 2018 Annual Meeting | Nashville | Michael Blacher

Mar. 6 **"Risk Management: What's on Your Mind?"**
NBOA 2018 Annual Meeting | Nashville | Heather DeBlanc & Michael Blacher & Darrow Milgrim & Keith Huyssoon & Shelley Levine

Mar. 7 **"Student Discipline: Top Tips for Independent Schools"**
NBOA 2018 Annual Meeting | Nashville | Donna Williamson

Mar. 7 **"Top 5 Tips for Vendor Contracts"**
NBOA 2018 Annual Meeting | Nashville | Heather DeBlanc

Mar. 7 **"How California Wage and Hour Law Sets National Trends"**
NBOA 2018 Annual Meeting | Nashville | Brian P. Walter

Mar. 8 **"East Meets West: Local and National Legal Trends to Follow or Avoid"**
National Association of Independent Schools (NAIS) 2018 Annual Conference | Atlanta | Michael Blacher & Susan Schorr

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

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

Save Some Money And Be In Compliance

Become A Certified AB 1825, AB 2053, and AB 1661 Trainer For Your Agency

Government Code Section 12950.1 (AB 1825), requires employers with 50 or more employees to provide harassment prevention training to all supervisory employees every two years and to new supervisors within 6 months of their assumption of a supervisory position.

Liebert Cassidy Whitmore, leaders in client education, is offering "Train the Trainer" sessions to provide you with the necessary tools to conduct mandatory of AB1825 (harassment/retaliation), AB2053 (bullying), and AB1661 (elected officials) training for your agency.

Train the Trainer Seminars

San Francisco

April 11, 2018

Los Angeles

April 20, 2018

San Diego

April 20, 2018

Fresno

April 27, 2018

9:00 a.m. - 4:00 p.m.

Location: LCW Offices

Cost:

$1,500 each or $1,350 each if ERC Member

You are eligible to attend LCW's Train the Trainer session if you meet any of the following:

1. "Attorneys" serving as in-house counsel, admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

2. "Human resource professionals" or "harassment prevention consultants" working as employees with a minimum of two or more years of practical experience in one or more of the following; a) designing or conducting discrimination, retaliation and sexual harassment prevention training; b) responding to sexual harassment complaints or other discrimination complaints; c) conducting investigations of sexual harassment complaints; or d) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or

3. "Professors or instructors" in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

Attendees Will Receive:

- 6 hours of instruction to be completed in one day
- Facilitator Guide, PowerPoint slides and case studies (on CD and hard copy) complete with detailed speakers' notes for use in future presentations
- Participant Guide for distribution in their future presentations
- Legal updates, where warranted, through 2020, including updated slides and facilitator/participant guides
- Certificate of Attendance for "Train the Trainer session"
- Ability for 5 employees from their own agency to attend the pre-scheduled workshop

Registration:

Visit https://www.lcwlegal.com/events-and-training/webinars-seminars for more information and to register online. Please contact Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or 310.981.2051 for more information on how to bring this training to your agency.

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