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.

June 2018

INDEX

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

NEGLIGENCE

University Owes a Limited Duty to Prevent Student's Suicide in Certain Circumstances.

Han Duy Nguyen was a graduate student at MIT's Sloan School of Management. He lived off campus. In May, 2007, after his first academic year at MIT, he contacted the Ph.D. program coordinator regarding his test-taking problems. He was referred to the student disability services coordinator, but he did not want to use that resource because he said his problem was not disability-related. He was referred to the mental health counseling services, but did not agree that he needed such services.

After this referral, Nguyen admitted to the counselor that he previously suffered from depression and had attempted suicide twice before he was ever enrolled at MIT. But he said he was not currently experiencing suicidal ideation. Instead, Nguyen sought treatment outside of MIT's services, at Massachusetts General Hospital. Nguyen did inform David Randall, a dean in the student support office, that he had a history of depression and had seen several therapists. Randall encouraged Nguyen to visit MIT mental health services but Nguyen was resistant. Nguyen said his mental health issues were separate from his academic problems. Randall and other administrators agreed they should keep in touch about any issues with Nguyen.

Nguyen had a history with many mental health professionals over the years. In March 2009, he started seeing a new doctor, who did not believe that Nguyen was at risk of imminent self-harm. He saw this doctor through May 28, 2009, which ended up being five days before his death.

Nguyen's academic problems at MIT were serious. He struggled greatly, but told his academic advisors at MIT only that he suffered from insomnia, and not the full history of his mental health issues and suicide attempts. Nguyen requested extensions on exams, and eventually his faculty advisors felt the best course of action would be for him to pursue a master's degree instead of a Ph.D. Nguyen remained insistent that he wanted to pursue the higher degree.

On June 2, 2009, Nguyen had a dispute via email with the project advisor at the lab he was working in as a summer assistant. He arrived at the lab at 9:00 a.m. and appeared to be acting normal. At 10:51 a.m., Nguyen received a phone call from Professor Birger Wenerfelt, who told Nguyen he was not good at navigating the academic world and should not pursue a Ph.D. The call ended nine minutes later and Nguyen walked to the roof and jumped to his death.

Nguyen's parents sued MIT, alleging the school owed Nguyen a duty of reasonable care and that they breached this duty. There is no general duty to prevent another person from committing suicide. But, in some relationships, special affirmative

duties arise due to the nature of the relationship. Here the court had to assess the nature of the university-student relationship to determine if it imposes any duties regarding suicide prevention.

The court noted that while universities had some control over student life, they certainly did not control every aspect, especially for graduate students like Nguyen who were in their twenties and living off campus. Universities cannot control students' personal mental health decisions. Ultimately, the court concluded that a university does have a special relationship with students and a corresponding duty to take reasonable measures to prevent suicide, but only in certain circumstances. Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculating, or of a student's stated plans to commit suicide, then the university must take reasonable measures to protect the student from self-harm.

The court emphasized that this duty is quite limited. Mere knowledge of suicidal ideation is not enough to trigger the duty. Furthermore, non-clinicians are not expected to discern suicidal tendencies. The duty instead hinges on foreseeability. Reasonable measures will include initiating a suicide prevention policy if such a policy exists. If not, the employee must contact the appropriate officials at the university to assist with obtaining the proper medical care for the student. If the student refuses the care, the officials should notify the student's emergency contact. This duty is also limited by time. If professionals declare the student is no longer a risk, then no further care is required.

This duty balances the privacy and autonomy of adult students and also recognizes that non-clinicians cannot be expected to probe suicidal tendencies that are not expressly evident. In this case, the court found there was no duty. Nguyen was a 25-year-old student living off campus. He did not communicate any plans for suicide or suicidal ideation to university officials. MIT officials had properly advised Nguyen to seek mental health services, but that was two years before his suicide.

Nguyen's father also argued that MIT had adopted a voluntary assumption of a duty of care by offering mental health services. The court disagreed, as there was no evidence that Nguyen ever relied on MIT's services, and no evidence that offering these services increased Nguyen's risk of suicide.

The only claim that survived summary judgment was regarding whether Nguyen was a student or employee at the time of his suicide, as he was working as a lab assistant for the summer. MIT argued he was an employee and therefore any tort claims are actually covered under the Worker's Compensation system. Nguyen's parents argued he was still a student. Whether the June 2, 2009 phone call was school or work related was also a matter better left to a fact finder.

Dzung Duy Nguyen v. MIT (2018) –N.E.3d--, 2018 WL 2090610.

NOTE:

An interesting point mentioned at the end of the case was that the only issue to survive summary judgment related to the question of whether Nguyen was technically a student or an employee of MIT at the time of his suicide. He was working in a research lab during the summer, but enrolled as a graduate student. His status is critical, because it governs whether the Worker's Compensation system is implicated as the sole means of recovery for the family. Graduate students are considered students in some aspects, but employees in others, as seen in many recent attempts by graduate students to unionize at colleges and universities across the country.

DISABILITY DISCRIMINATION

Rutgers University Settles With OCR Regarding Student Removed from School Due to Mental Illness.

The Office of Civil Rights (OCR) of the Department of Justice is responsible for enforcing Title II of the Americans with Disabilities Act, pertaining to public educational entities. It is analogous to Title III, which governs private schools and universities.

During the 2016-2017 school year, the student in question was enrolled in the University's School of Engineering. In the spring semester, she was hospitalized on three occasions, dealing with mental health issues. She emailed the Program Director that summer and asked about changing her grades to reflect approved absences. She was told in response that she was being involuntarily removed from the University.

The University maintains a Safety Intervention Policy dealing with the involuntary removal of students

who pose a credible risk of harm to individuals in the community. There is a process that governs the steps that must be pursued before a student can be withdrawn. OCR determined the process itself was neutral on its face, as it applies in the same manner regardless of whether the student has a disability and allows for an individualized assessment.

This student had asked that the University allow her to make up missed assignments and lab work. But shortly thereafter, the University informed her that her appeal of her withdrawal was denied. Ultimately, during OCR's investigation, the University decided it was in its best interest to reach some sort of agreement to voluntarily resolve the student's complaints.

Part of the settlement holds that the University must conduct an individualized assessment to determine whether this student may return to class in accordance with the Safety Intervention Policy. The University also must analyze what possible reasonable modifications might sufficiently mitigate any risk posed by the student. If the University concludes that she is no longer a risk, or there are reasonable measures that might be taken to reduce the risk, she will be re-admitted. The University also must offer her the chance to make up her course work if she is re-enrolled. If she is not re-enrolled, the University will offer her the chance to have her "F" grades changed to Withdraw.

For more information, see: *https://bit.ly/2IKz7dX*

Note:

Although the details are vague in the settlement agreement, there are at least two good lessons from this case. The first is that OCR pointed out that the University's safety assessment policy was neutral, as it treated students the same whether they had a disability or not, and allows for individualized assessment depending on the facts and circumstances of each student's case. Second, the University agreed that if the student was not re-admitted, she at least would have the option of having her transcript show that she withdrew instead of that she failed. Sometimes, when settling difficult matters like this one, it helps for schools and colleges to be flexible on how to notate incomplete classwork fora student while still being accurate about the records.

EMPLOYEES

AGE DISCRIMINATION

No Age Discrimination Where New Teacher Replacing Fired Teacher Was Over 40 and Only Seven Years Younger.

Caroleann Morris worked as a school teacher at several elementary schools throughout her career. In 2011, she was hired as a pre-K teacher at MBTA, which is operated by the Archdiocese of Chicago. She was 52 years old at the time. Students at MBTA generally came from low-income, non-English speaking families and behavior problems were widespread.

During the 2013-2014 school year, Morris was assigned to teach second grade. The Principal, Sister Erica Jordan, observed Morris's class and found the children loud and off-task, and she had an informal conversation with Morris. In late November of that school year, Sandra Anderson joined MBTA and was assigned as a mentor. Morris alleged that Anderson began picking on her and two other teachers who were close in age. Anderson conducted several formal evaluations of Morris. She critiqued Morris's performance, but Morris disputed her feedback.

Anderson arranged for a behavioral specialist to observe Morris. She concluded that Morris did not have the skills to address her students' behavioral problems. In May 2014, Morris received an evaluation indicating that she needed to improve her student engagement and classroom management. However, some aspects of her performance had improved, and she was offered a contract renewal for the 2014-2015 school year.

At the end of the 2013-2014 school year, an improvement plan was supposedly prepared for Morris, but she claims she never received it. It was unsigned. In the new school year, Morris was assigned the second-grade classroom that contained the students with the worst behavioral problems. Anderson observed Morris's teaching four times that year. She counseled Morris on how to improve her performance. She also requested a meeting with Morris to discuss classroom management. In May, Anderson and Jordan told Morris that her contract would not be renewed for the following year. Morris was 55 years old.

Morris sued for age discrimination. The court noted that for her to establish a claim, she needed to show that age was the "but-for" cause of her termination. Here, there was ample evidence that age was not the determinative factor, as the teacher MBTA hired to replace Morris was

48 years old, just 7 years younger than Morris. Also, the average age of the elementary school teachers was nearly 49.

The only age-related evidence Morris presented was that she was assigned the students with more behavioral problems and that Anderson "picked on" her and two other teachers close to her in age. The court did not find this evidence persuasive of age discrimination. Given the minimal age difference between Morris and her replacement, the court believed no reasonable juror could find that Morris's age was the cause of her termination. The school's motion for summary judgment was granted.

Caroleann Morris v. The Catholic Bishop of Chicago, 2018 WL 2087450.

NOTE:

The employee argued she never received the performance improvement plan and since it was unsigned, there was no proof she did. Although employees are sometimes angry and refuse to sign these plans, school and college administrators should make sure to make a contemporaneous dated note on the plan that the employee received it but refused to sign. This will help serve as documentation that the employee received the plan.

MANDATED REPORTING

Teacher Not Liable for Violation of Mandating Reported Law for Not Reporting Her Own Daughter's Suspected Abuse.

Tanya James-Buhl is a public school teacher in the state of Washington. She has three daughters, none of whom are her students. In May 2015, one of the daughters told her pastor that she was being sexually abused by her stepfather Joshua Hodges. The pastor called Child Protective Services. During the course of the investigation, CPS discovered that all three of the girls had told their mother about the abuse as early as January of that year. All of the abuse occurred in the home.

The state of Washington charged James-Buhl with failure to report abuse under the mandated reporting law, as she was a mandated reporter due to her job. The trial court agreed with James-Buhl that the charges should be dropped because she learned about the abuse in her parental role, not her professional role. The Court of Appeals reversed, holding that the law required the mandated reporter to reporter even though the information was obtained at home. James-Buhl appealed.

The question on appeal for the state supreme court was whether the section of the mandated reporter law that applied to teachers still applied when the victims were the teacher's own children (and not her students) and the abuse was perpetrated by another family member in the home. By interpreting the actual language of the statute, the court found that the plain meaning of the law requires teachers to report child abuse when there is reasonable cause to believe the incident occurred. But the court did not believe that this duty is always present, and instead held that the duty only applies when there is a connection between the reporter's professional position and the knowledge of the abuse.

The court ultimately held that the mandated reporter law does not impose an unlimited, ever-present duty on people who are reporters due to their profession. In essence, the court ruled that the proper interpretation of that subsection was similar to the California mandated reporter statute, under which the reporter must obtain reasonable suspicion of the abuse within the course and scope of his or her employment. Because James-Buhl only learned of her daughters' allegations in her role as a mother, the mandated reporter law did not apply to her in that situation.

State v. James-Buhl (2018) 415 P.3d 234.

WAGE AND HOUR

CA Court of Appeal Holds that an Employer's Failure to Find or Understand an Amended City Ordinance Does Not Preclude the Enforcement of "Waiting Time" Penalties.

In April 2010, Defendant Grill Concepts opened a restaurant near the LAX Airport, located within the LAX Westin Hotel. This hotel was positioned within an area designated by the City of Los Angeles as the Airport Hospitality Enhancement Zone ("the Zone"). A city ordinance compelled hotel employers within the Zone to pay hotel workers a living wage. This wage was higher than the state and local minimum wage.

Though the city ordinance was passed in 2007, an amendment to the ordinance went into effect in July 2010. This amendment altered the way hotel employers should calculate the living wage and resulted in larger annual adjustments to this wage.

Since Grill Concepts' restaurant employees were "hotel workers" within the meaning of the ordinance, Grill Concepts paid them a living wage. However, until June 2014, Grill Concepts calculated the living wage based on the original ordinance without taking the July 2010 amendment into account.

In April 2014, a class of current and former restaurant employees sued Grill Concepts, claiming Grill Concepts' failure to pay them the living wage mandated by the amendment constituted a violation of the ordinance. The class sought reimbursement for underpayment of the living wage, and class members who had since quit or been fired sought additional "waiting time" penalties.

Employers can be liable for waiting time penalties when an employee's final paycheck is for less than what is owed, whether that is based on the minimum wage, a prevailing wage, or a mandatory living wage. This rule applies regardless of whether the employee quits or is fired. The term "waiting time penalty" is used because the penalty is granted for effectively making the employee wait for his or her correct final paycheck.

Still, under California Labor Code Section 203, in order for an employer to be liable for waiting time penalties, the failure to pay must be willful. Willful means that the failure to pay was intentional, but does not require any deliberate evil purpose or malice toward the other party. Grill Concepts argued that its underpayment of employees was not willful, because it was caused by its inability to locate the amended ordinance, rather than a deliberate decision not to abide by the amended ordinance.

However, the California Court of Appeal rejected this argument, holding that Grill Concepts' inability to find the amended ordinance did not preclude a finding that its failure to pay was willful. The court emphasized the long-standing principle that ignorance of the law is no excuse. Moreover, the court noted that Grill Concepts' human resources director had suspected the company might be underpaying its employees after seeing a newspaper article that referenced a higher living wage. Grill Concepts never adequately followed up on this matter or asked any other employer within the Zone what living wage they were paying. Instead, Grill Concepts periodically ran an identical internet search that repeatedly failed to display the amended ordinance. Accordingly, the court found that Grill Concepts' ignorance of the law, coupled with its negligence in failing to look it up, was not an acceptable justification for underpaying its employees.

Additionally, Grill Concepts also argued that even if it had successfully located the amended ordinance, the living wage requirement was so confusing to apply that it was unconstitutionally vague, meaning its failure to follow the amended ordinance was not willful. However, the court also rejected this argument, finding that the living wage requirement was not unconstitutionally vague because it could be given a "reasonable and practical construction."

In its reasoning, the court emphasized that there is a strong presumption of constitutionality for a law such as this one. In fact, a law that regulates business behavior makes this presumption even stronger, because such laws have a narrower reach and businesses are expected to consult relevant legislation. Demonstrating that a law is difficult to ascertain or apply, that it lacks extreme precision, or that it requires interpretation is not enough to establish unconstitutional vagueness.

Furthermore, the court noted that no evidence indicated that any other employer in the Zone had any problem reading the amended ordinance to pay its employees the proper living wage. This lack of evidence weighed against Grill Concepts, further refuting its vagueness challenge.

Finally, Grill Concepts also argued that trial courts have the discretion to waive or reduce waiting time penalties. The court also rejected this argument, stating that the California Labor Code does not imbue trial courts with such discretion. In its reasoning, the court referenced policy concerns, explaining that the purpose of the waiting time penalty is to compel employers to pay workers who quit or are fired within statutorily required deadlines, since a delay in payment is adverse to the public welfare. The court pronounced: "We will not construe a statute in a way that undermines its purpose."

Diaz v. Grill Concepts Services, Inc. (2018) --Cal.Rptr.3d--, 2018 WL 2355295.

NOTE:

This case was decided by the California Court of Appeal, meaning it is controlling California precedent. Because trial courts have no discretion to waive or reduce waiting time penalties, it is critical that schools and colleges

clearly understand the local, state, and federal wage and hour laws that apply to them. This case reaffirmed the long-held legal principle that ignorance of the law is not an excuse. If there is uncertainty about whether a new or amended law applies consult legal counsel. Schools and colleges should also make sure to pay all final paychecks in a timely manner so as to avoid penalties.

PREGNANCY DISCRIMINATION

Discrimination Claim Can Proceed Where Employer Falsely Told Pregnant Extern That No Job Openings Were Available.

Ada Abed worked as a dental extern in the Western Dental Services Napa office. Many externs go on to become full time employees once their externship is over and Abed was told her externship was like a 4-6 week job interview. Western Dental posted for jobs both when an actual position was available, and also as a tactic to keep a current pool of applications for positions that might open up at any time. Abed began her externship in May 2015. She was pregnant at the time, but did not disclose her status to her employers.

Abed was supervised by Sabrina Strickling, a registered dental assistant. Strickling did not have authority to hire or fire people. Abed consistently received high marks for her work and Strickling ranked her as above average in all categories. At some point, Strickling saw a bottle of pre-natal vitamins in Abed's purse and commented to another employee that Abed must be pregnant. Strickling and another dental assistant, Miranda DeHaro, discussed Abed's pregnancy and DeHaro said it "wouldn't be convenient" for the office. Strickling agreed.

Strickling testified that she was told to inform Abed that there were no open positions in Napa, but the person who allegedly gave that order did not remember that. Abed told Strickling that she really only wanted to work in the Napa office. She did not apply for a position there since Strickling told her none were available. However, before her externship ended, Abed learned there was a posting online for an open position in Napa. On Abed's last day, Strickling told her that she should contact the Napa office about open positions after she had her baby. Less than a week later, a new extern was brought on who was offered a permanent position within a few weeks. Abed sued under the FEHA for claims of pregnancy discrimination and invasion of privacy. Western Dental was granted summary judgment and Abed appealed.

Under the FEHA, an employer may not refuse to hire someone or discriminate against them due to their pregnancy. Failure-to-hire claims are subject to the burden shifting framework of *McDonnell Douglas*. Abed has the initial burden of establishing a prima facie case of discrimination. In most failure-to-hire cases, the prima facie case involves showing that the plaintiff applied for a job. Here, Abed never applied for a job because she was told there was no opening. But the court here noted that such a showing is not required depending on the circumstances involved. This was not a typical failure-to-hire claim, since part of the accusation was that Western Dental hid from Abed the fact that there was in fact an opening available. Abed did raise triable issues that Western Dental failed to tell her about the opening because of her pregnancy. She should not be penalized because she did not go on to apply for a job she was told did not exist.

Abed had expressed interest in a dental assistant position and was affirmatively told there were no current openings. Yet within weeks, a subsequent extern filled that very position. The court held that employers are not immune from liability when they lie about available jobs in order to persuade candidates not to apply. Abed also presented significant evidence that there was discriminatory animus behind Western Dental's actions. Strickling made several remarks about not wanting Abed to work in the Napa office if she was pregnant. Although Strickland did not have ultimate hiring authority, she did supervise the externs and evaluated their performance. She was also involved in the specific events that led Abed not to seek a position. The court recognized that ultimately a jury may agree with Western Dental, but Abed had presented enough of a claim to proceed beyond summary judgment.

Abed v. Western Dental Services, Inc. (2018) –Cal.Rptr.3d--, 2018 WL 2328418.

NOTE:

Pregnancy can be a delicate topic that employers often do not know how to navigate. There are no rules about when an employee must reveal her pregnancy to her employer. Employers in general should never comment on an employee's pregnancy or the impact it might have on the workplace outside of official conversations about planned leaves or accommodations.

MEDICAL MARIJUANA

Employers May Soon Be Required to Accommodate Employee Use of Medical Marijuana.

Since recreational marijuana was legalized in California in 2016, many have assumed that employment protections for marijuana users would likely expand, either via legislation or though litigation. We are already seeing small steps in that direction. For instance, San Francisco recently amended its ban-the-box ordinance to, among other things, prohibit employers from taking action against applicants or employees for marijuana offenses related to conduct that has since been legalized in California (such as certain offenses for non-commercial use and cultivation of marijuana).

A recent bill, known as AB 2609, would go much further and protect current medical marijuana users from discrimination in employment. Currently, 11 states (Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island) provide some level of employment protection to individuals who use medical marijuana, though the level of that protection varies from state to state.

California, which was the first state to legalize medical marijuana, has no such protections. But that would change if AB 2609 becomes law. In its current form, the proposed bill would amend the Fair Employment and Housing Act ("FEHA") to require employers to engage in the interactive process, and reasonably accommodate, the use of medical marijuana when the use is by a qualified patient or person with an identification card (as defined in the Health and Safety Code) and the use is to treat a known physical or mental disability or known medical condition.

The FEHA would be amended to state that the Legislature intends to "make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person" based on his or her status as a medical marijuana patient or "the use of cannabis by those persons for medical purposes." However, the bill does not go so far as to make use of medical marijuana a protected classification under the FEHA (i.e., like sex, race, religion, age, etc.). A previous version of the bill added "status as, or positive drug test for cannabis by, a qualified patient or person with an identification card, as those terms are defined in Section 11362.7 of the Health and Safety Code" to the list of protected characteristics of applicants and employees under the FEHA, but that language has been stricken from the current draft of the bill.

The bill includes two critical limitations on these new protections.

First and foremost, AB 2609 explicitly states that employers can still discipline or terminate an employee who "is impaired" at work or during work hours because of the medical use of cannabis. However, as a practical matter, it may be difficult for employers to prove whether an employee was under the influence of marijuana at work because the tests that are currently available are not sensitive enough to determine when the marijuana was consumed and/or whether someone is currently under the influence.

The bill also acknowledges that marijuana, including medical marijuana, is still illegal under federal law. Employers can refuse to hire or terminate a medical marijuana user if hiring or continuing to employ that person would "cause the employer to lose a monetary or licensing-related benefit under federal law or regulations."

Note:

If AB 2609 passes, it will be the first time employers have been required to alter their policies and procedures to conform to the changing landscape in California regarding marijuana use. LCW will continue to monitor the bill's progress through the Legislature and report back regarding future developments.

ARBITRATION AGREEMENTS

Supreme Court Overturns Ninth Circuit and Rules Employers Can Force Employees to Waive Rights to Class Actions in Arbitration Agreements.

In one of the most eagerly awaited decisions of this Supreme Court term, the Court held that class action waivers in arbitration agreements were enforceable. One of the cases on appeal was *Ernst & Young LLP v. Morris*, which we reported on in the September 2016 issue. In that case, the Ninth Circuit ruled that the class action waiver in the mandatory arbitration

agreement was not enforceable because it was subject to the Federal Arbitration Act's savings clause and violated the NLRA by barring employees from engaging in concerted activity.

The Supreme Court reversed the Ninth Circuit decision. The Court first noted that the savings clause in the FAA only refers to other grounds for finding a contract unenforceable, such as fraud or duress or unconscionability. None of those reasons was present in this case. Instead, the plaintiffs tried to argue that illegality under the NLRA is another ground for revocation of a contract. The Court did not find that argument persuasive.

It is true that Section 7 of the NLRA permits concerted activity by employees for the purpose of mutual aid and protection. But the Court's majority found that this language does not address the use of class or collective action, or even arbitration. It instead refers to activities like collective bargaining and striking. The NLRA itself does not address any issues relating to how employee grievances may be brought in a court of law. The majority also noted that had Congress intended the law to prohibit class or collective actions, it would have done so, as it did in other laws. While many may debate the policy impact of permitting class or collective actions by employees, the Court ultimately held that the law itself does not prohibit employers from maintaining class action waivers in mandatory arbitration agreements.

Epic Systems Corp. v. Lewis (2018) --S.Ct.--, 2018 WL 2292444.

NOTE:

This is a major decision that settles an issue that employers have been uncertain about for many years. After the Ninth Circuit held such waivers unenforceable, California employers were forced to remove class action waivers from employee arbitration agreements. Schools and colleges that maintain such agreements may now re-insert class action waivers if they choose. If the arbitration agreement is revised make sure all employees sign the revised version, not just new employees. Although this decision is widely seen as a victory for employers, one thing to consider is that employers are required to pay the full cost of arbitrators' fees. Therefore, the possibility of incurring substantial costs based on a large amount of individual claims versus one larger class action is something that should be considered.

BUSINESS AND FACILITIES

CONSTRUCTION CONTRACTS

Schools and Colleges Should Only Withhold The Specific Payment Or Retention That Is Tied To The Disputed Work.

California's Prompt Pay Act, including Civil Code section 8800 et seq., requires a school or college to pay contractors within specific timeframes:

- A school's or college's progress payments to a contractor must be made within 30 days after demand for payment per the contract;

- A school or college must pay withheld retention within 45 days of completion of the work.

Similar provisions apply to Contractors:

- A Contractor must pay its subcontractors within seven days after receipt of a progress payment. (Bus. & Prof. Code 7108.5)

- A Contractor must pay withheld retention to subcontractors within ten days of receipt of retention from school.

These laws allow a school or college to withhold payment when there is a "good faith dispute." Case law was split as to whether any good faith dispute could justify a withholding or whether the payment otherwise due had to be tied to the disputed work in order to be withheld. The California Supreme Court has now resolved this split. Now, if a school or college wants to withhold payments on a construction project because of a good faith dispute, the school or college must have a good faith basis for contesting the specific payment that it withholds.

In 2010, Universal City Studios ("Universal") entered into agreements to build a new ride at its theme park. For the new attraction that would become Transformers: The Ride, Universal selected Coast Iron & Steel Co. ("Coast Iron") as the direct contractor to design, furnish, and install metal work. Universal agreed to pay Coast Iron on a monthly basis for amounts billed, minus a ten percent withholding – referred to in the construction industry as "retention" – as protection against nonperformance.

Upon its receipt of payments from Universal, Coast Iron was contractually responsible for making corresponding payments to its subcontractors. One such subcontractor was United Riggers & Erectors, Inc. ("United Riggers") which was responsible for installing the metal work Coast Iron fabricated and supplied. The contract between Coast Iron and United Riggers called for United Riggers to receive approximately $700,000 for its work. Due to approved change orders that amount eventually rose to just under $1.5 million.

United Riggers completed its work to Coast Iron's satisfaction. In March 2012, once all work on the project was finished, Coast Iron asked United Riggers for a final bill. In its final bill, United Riggers demanded additional amounts that would have brought its pay to $1.85 million. United Riggers stated the additional amounts resulted from Coast Iron's mismanagement of the project. Coast Iron refused payment, responding instead that it would "see [United Riggers] in court!!"

In August 2012, Universal paid out the ten percent withheld as retention to Coast Iron, which in turn owed $149,602.52 of that amount to United Riggers. Although United Riggers requested payment, Coast Iron refused to pay forward any part of the retention to United Riggers.

In January 2013, United Riggers sued Coast Iron claiming that Coast Iron had violated the "prompt payment statute" by failing to make timely payment of the retention monies Coast Iron had received from Universal and in turn owed United Riggers.

Coast Iron argued that the prompt payment statute has an exception for good faith disputes. This exception provides: "If a good faith dispute exists between the direct contractor and a subcontractor, the direct contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount." (Civ. Code, § 8814, subd. (c).) Coast Iron argued that the good faith exception is without limitation, and thus, a good faith dispute as to any matter can support withholding.

After a bench trial, the trial court agreed with Coast Iron and entered judgment in its favor. United Riggers appealed. The Court of Appeal reversed, finding that the payment withhold should be limited to disputes specifically related to the withheld monies. Accordingly, Coast Iron could not use the parties' dispute over project mismanagement to justify withholding United Riggers' portion of the retention. Coast Iron appealed, but the California Supreme Court affirmed. The Court explained that: "The dispute exception excuses payment only when a good faith dispute exists over a statutory or contractual precondition to that payment, such as the adequacy of the construction work for which the payment is consideration. Controversies concerning unrelated work or additional payments above the amount both sides agree is owed will not excuse delay; a direct contractor cannot withhold payment where the underlying obligation to pay those specific monies is undisputed." The Court concluded that a dispute such as the one between United Riggers and Coast Iron in which the subcontractor added fees for change orders or damages allegedly caused by the contractor's mismanagement does not excuse prompt payment of the retention bonus.

United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2018) __Cal. __, 2018 WL 2188916

Note:

This case involves the "good faith dispute" exception in the prompt payment statutes governing retention payments from direct contractors to subcontractors. If the owner improperly withholds the retention sums, it is liable for two percent per month interest on the withheld sum, plus attorney fees and costs. This decision makes clear that owners cannot withhold payment of retention fees to contractors unless there is good faith dispute about the amount of the retention fees themselves as opposed to a more general dispute about the work performed. The "good faith dispute" exception exists in the prompt payment statutes governing retention payments from owners to direct contracts in projects. (Civ. Code §8812.) The Court's analysis and holding will likely apply with equal force in all prompt pay act contexts.

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.

JUNE
Conduct Exit Interviews:

Conduct exit interviews at the end of the school year for employees who are leaving, whether voluntarily or not. These interviews not only provide good information for and are a best practice but they can also be helpful in defending a lawsuit if a disgruntled employee decides to sue.

MID-JUNE THROUGH END OF JULY
Update Employee and Student/Parent Handbooks

The handbooks should be reviewed at the end of the school year to ensure that the policies are legally compliant, and consistent with the employee agreements, and the tuition agreements that were executed. The school or college should also add any policies that it would like to implement.

Conduct review of the school's or college's Bylaws (does not necessarily need to be done every year).

Review of Insurance Benefit plans:

Review the school's insurance plan plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.

- Workers Compensation Insurance plans generally expire on July 1st.
- Other insurance policies generally expire between July 1st and December 1st.

Ensure summer construction projects begin so they may be completed before the beginning of the new school year.

CONSORTIUM CALL OF THE MONTH

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

ISSUE: A Dean of Student Life called and told an attorney that a parent informed the school that her daughter needed to bring her emotional support hamster to school with her. The school did not know how to respond to this request.

RESPONSE: The attorney explained that Title III of the ADA applies to private schools and colleges with respect to accommodating student disabilities. The ADA does not require the accommodation of emotional support animals. The ADA only requires a school or college to allow the use of a service dog that has been specially trained to perform tasks for the disabled student. If the person requesting the emotional support animal were an employee, then the school would need to consider that a request for accommodation under the FEHA, but since FEHA does not apply to students, that is not relevant in this case. If the school was a boarding school or college and the student lived on campus in a dorm, the Fair Housing Act might apply and the accommodation may need to be discussed as part of an interactive process. But, in the actual situation at this school, the school was not obligated under the law to make the accommodation. The school might, however, be obligated under its own policies to consider the request if the policies are broader than the ADA requirements.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Customized Training

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

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

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

Speaking Engagements

July 17 **"Answers to All Your Legal Questions"**
Small School District's Association (SSDA) New Superintendents' Symposium | Sacramento | Kristin D. Lindgren

Seminars/Webinars

Aug. 14 **"Mandated Reporter Training for California Private Schools"**
Liebert Cassidy Whitmore | Webinar | Julie L. Strom

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

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

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

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