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.

March 2018

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LCW NEWS

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STUDENTS

NEGLIGENCE

Student Did Not Assume Risk as Stated in Waiver Where Coach Was Grossly Negligent.

Addy Tauro was a member of the varsity women's lacrosse team at Syracuse University. She alleged that she was injured when the head coach, Gary Gait, threw a lacrosse ball at her head. Tauro had signed a waiver wherein she acknowledged the risks of playing lacrosse and accepted and assumed all such risks. Gait and the University moved to dismiss the complaint based on the waiver.

Tauro argued that the waiver did not preclude her claim because Gait's actions were grossly negligent. The team was engaged in a drill that involved rolling ground balls to players, who had to pick them up and throw them back. During this drill, Gait allegedly picked up a ball and threw it forcefully at Tauro's head. This was not part of the drill and caught Tauro off guard, as she was expecting to bend down for a ground ball. She argued this action was grossly negligent and therefore outside the bounds of the waiver.

The court explained that those who participate in a recreational activity like lacrosse consent to the common risks inherent in the nature of the sport. The participant, however, does not assume the risk of reckless or intentional conduct that created a risk beyond the usual dangers of the activity. At the motion to dismiss stage, the court was required to accept Tauro's allegations as true. Therefore, the claim was not barred by the assumption of risk in the waiver and Tauro could proceed to demonstrate that Gait's actions constituted gross negligence.

Tauro v. Gait and Syracuse University, (2018) 158 A.D.3d 1261.

Note:

Participation in athletics does bring inherent risks of injury to students. However, schools should be on notice that only ordinary negligence can be waived in California (like New York), and therefore any actions that are grossly negligent or intentionally reckless will not be protected by a waiver.

Judge Erred By Dismissing Case Due to Lack of Showing of Gross Negligence When Expert's Testimony Was Evaluated Incorrectly.

Reese Rotblat was a fifth grade student at Oak Hill Academy, a private parochial school in New Jersey, when she was injured by a door that closed on her foot. The door was self-closing and made of metal, and the Rotblats claimed the door slammed shut on her and a protruding piece of metal tore her right Achilles tendon, resulting in surgery. The Rotblats alleged the door malfunctioned and was not properly maintained.

Mr. Rotblat went to the school and opened and closed the door and it again shut too quickly. He also said he saw the protruding metal. He took pictures and video. A week later he returned and noticed the door appeared to have been repaired. According to the Headmaster, he inspected the door within minutes of the accident and found it to be functioning correctly and did not see any protruding metal. He also stated there were no previous injuries caused by the door, and no repairs were made right after the incident. The school did have a surveillance camera near the door but the footage was not maintained because it is erased every thirty days.

The Director of Facilities, Glenn Mission, claimed he did not fix the door after the incident. He also testified that he had no training on how to maintain the self-closing mechanism. He was not aware of any general standards for how quickly the door should close. The Rotblats' expert witness, Theodore Moss, issued a report concluding that the dampening device did not properly slow the door and that the school's maintenance staff were not properly trained on how to address the issues with the door.

Moss based his opinion on his visit to the school, as well as Mr. Rotblat's videos and photos. He stated that the door closed twice as quickly in the video as it did when he visited, indicating to him that it had been repaired. Moss also gave testimony regarding standards for how quickly the door should shut based on both state law and the ADA building standards. The school's insurer requested that a company conduct an inspection of the door. This company concluded that Moss's report was inaccurate, as the video he relied on was not time-stamped and included other variables that could show the door had been subsequently repaired. The school moved for summary judgment and the judge granted the motion, holding the Rotblats did not meet their burden of showing gross negligence. (Like California, New Jersey requires a showing of gross negligence in actions such as this, though New Jersey's requirement is based in statute and California's in case law.)

The trial court judge also rejected Moss's expert opinion, finding it unsupported by the facts and unsustainable given the contradictory testimony that the door had not been repaired. The Rotblats appealed, and argued the court erred in rejecting Moss's testimony. The court agreed with the Rotblats, explaining that at the summary judgment phase, the judge was required to view the facts in the light most favorable to the Rotblats. Instead, the judge weighed evidence to determine the truth of the matter rather than simply determining if there was a genuine issue for trial. The court then explained procedural rules specific to New Jersey regarding how to weigh an expert's opinion and found the court did not properly follow those rules. The appeals court remanded the case for reconsideration.

Rotblat by Rotblat v. Oak Hill Academy, 2018 WL 636699.

NOTE:

While this case was focused on the expert opinion, it illustrates the critical role maintenance and facilities workers play in issues of negligence related to injuries on campus. Facilities Department heads should be trained in proper maintenance standards, and schools should ensure that facilities are inspected on a regular basis. While accidents will happen, schools can take simple steps to remove hazards and maintain the premises so it is functional and safe.

EMPLOYEES

SEXUAL ORIENTATION DISCRIMINATION

Second Circuit Becomes the Second One to Declare Title VII Bars Discrimination on Basis of Sexual Orientation.

The Second Circuit joined the Seventh Circuit to become only the second federal circuit to decide that discrimination on the basis of sexual orientation is prohibited under Title VII as a form of sex discrimination. In prior cases, the court had ruled that, while discrimination based on gender stereotypes was a form of sex discrimination, such logic did not extend to claims that the stereotype in question related to the employee's sexual orientation.

In this case, a male skydiving instructor, Mr. Zarda, was fired. He alleged he was fired for being openly gay after he tried to reassure a client that she should not be worried about being strapped to him on a tandem dive. The company claimed the instructor actually touched the female client inappropriately. But Zarda claimed all the male instructors joked about being strapped to female customers and he was the only one who was terminated for his comments.

The court explained its reasoning that sexual orientation discrimination is a subset of sex discrimination and thus barred by Title VII. The court referred to changing social mores and recent EEOC positions to justify its revised approach to this question. The court found the matter akin to questions about gender stereotyping, which are prohibited under the law. One stereotype about a person is that, based on his or her gender, he or she should be attracted to someone of the opposite gender. The court cited the recent Seventh Circuit decision "that same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes."

In recent years the Seventh and Second Circuits have ruled that Title VII prohibits discrimination on the basis of sexual orientation, while the Eleventh Circuit reached the opposite conclusion. It seems likely that this question will reach the Supreme Court at some point in order to resolve the split between circuits on this important and common question. While employees in California are already protected under state law against discrimination based on sexual orientation, the Ninth Circuit has not yet recognized this right under federal law.

Zarda v. Altitude Express, (2018) --- F.3d ---, 2018 WL 1040820.

MANDATED REPORTING

New Online Reporting System Active in Certain Counties Including Los Angeles County.

Los Angeles County has begun use of the online Child Abuse Reporting Electronic System (CARES). Certain mandated reporters, including school personnel, may now use the online CARES system to report non-urgent cases of suspected abuse or neglect. The system will ask introductory questions to help the reporter determine if the report qualifies as non-urgent or, in the alternative, if the reporter should use the telephone hotline.

For more information about the online system, please see: https://reportchildabusela.org/Help/Video

WAGE AND HOUR

California Supreme Court Rules that State Law Requires a Different Regular Rate of Pay Calculation than the Fair Labor Standards Act.

On March 5, 2018, the California Supreme Court issued a decision in the case *Alvarado v. Dart Container Corporation*, in which employee Hector Alvarado sued his employer under the California Labor Code for back overtime compensation under the theory that his employer had incorrectly calculated his "regular rate of pay."

Under both the California Labor Code and the Federal Fair Labor Standards Act (FLSA), the regular rate of pay is the rate an employer must use to pay overtime premiums to overtime eligible employees who work overtime hours. The regular rate of pay can change from workweek to workweek because it must reflect the per-hour value of all compensation the employee has earned. This includes additional compensation an employee could earn on an hourly basis and any non-hourly compensation an employee could earn. Specifically at issue in *Alvarado* was how to calculate the per-hour value of a lump sum bonus of $15 per day paid for work performed on a weekend day for purposes of the regular rate under California law.

Regulations promulgated by the U.S. Department of Labor (DOL) unequivocally state how to calculate an employee's regular rate under the FLSA when he or she is paid a lump sum bonus. As set forth in the DOL regulations at 29 C.F.R. section 778.110(b), to calculate the per-hour value of a lump sum bonus under the FLSA, an employer must divide the weekly bonus amount by the total hours actually worked by the employee in the week. In *Alvarado*, the employer followed the FLSA in its method of calculating the regular rate when an employee was paid the $15 per day bonus. The plaintiff challenged this method as illegal under state law.

In a matter of first impression, the California Supreme Court departed from the federal regular rate standard, opining that under state law, the per-hour value of a lump sum bonus such as that paid to Mr. Alvarado must be calculated by dividing the lump sum bonus by the number of non-overtime hours actually worked in the week. Under California law as announced in *Alvarado*, to arrive at the per-hour value of the $75 bonus, the employer must divide the $75 by 40, the

number of non-overtime hours actually worked in the week. The California method results in a per-hour value of $1.88 (as opposed to the $1.50 result under the FLSA), which would be added to the $30 hourly rate for a regular rate of $31.88 (as opposed to the $31.50 result under the FLSA).

The California Supreme Court's decision is limited to flat-sum bonuses or pays (e.g., $75 a week, $300 per month or any flat dollar amount that can be converted into a weekly equivalent). As such, other pays which are not flat-sum amounts are likely not covered by the decision. The significance of this case for private sector employers in California may be great where employers have been relying on the FLSA to incorporate non-discretionary lump sum bonuses (or other flat-sum payments) into the regular rate calculation.

Alvarado v. Dart Container Corporation, (2018) --- P.3d ---, 2018 WL 1146645.

NOTE:

Some schools use flat-sum stipends to pay non-exempt employees for extra duties. For example, non-exempt employees who coach are sometimes paid with a stipend for the season. This is different from a bonus, which is generally a set amount not meant as compensation for certain hours worked. Stipends should not be used for non-exempt employees as a means of compensation for hours worked. Non-exempt employees must track their time and be paid for actual time worked. While the stipend amount may be equal to or more than the hourly compensation, recordkeeping requirements mean non-exempt employees should be tracking their actual time worked.

ARBITRATION AGREEMENTS

Mandatory Binding Arbitration Provision With Explicit Exception for NLRA-Related Cases Is Lawful.

Royal Motor Sales, a California car dealership, maintained a Binding Arbitration Agreement (BAA), which served as a replacement for the former Alternative Dispute Resolution Policy (ADRP). The BAA was enacted beginning in May 2016. It stated that all employment disputes were subject to binding arbitration, but explicitly made an exception for claims arising under the National Labor Relations Act, disability benefits claims, and Workers' Compensation matters.

The General Counsel of the NLRB argued that this policy violates the NLRA because the exception for NLRA-related claims was insufficient and not clear enough, meaning employees would still think they could not file a claim in front of the NLRB. The judge in this matter disagreed, explaining that the explicit exclusion of Board charges was clear, unqualified, and located in the second sentence immediately following the language mandating arbitration.

The judge also found the language was not overbroad, as the second sentence of the provision clearly and unconditionally excluded claims arising under the NLRA from the mandatory arbitration process. A policy or rule is not overbroad simply because some employee could interpret it to prohibit protected activity; instead, it is only unlawful if an employee reasonably would interpret it as such. Here, the judge determined that due to the clear language in the provision, an employee could not reasonably interpret it to mean that he or she could not bring a charge in front of the NLRB.

The judge then analyzed the prior ADRP, since employees who signed that version were still bound by it. That provision, in contrast, was found to violate the NLRA. The exclusion of NLRA-related claims does not appear until well into the policy, after repeated claims that all matters are subject to binding arbitration. Even though the new policy is acceptable, this former policy is not, and therefore maintaining it as to employees who signed that version is unlawful.

Anderson Enterprises, Inc. d/b/a Royal Motor Sales and Isidro Miranda, Case 20-CA-187567 (JD(SF)-51-17).

NOTE:

This is a good reminder that when a school updates its arbitration clause, it should require all employees, both new and returning, to sign the updated version. Policies should be regularly updated to make sure they reflect best practices and current law regarding arbitration, and it creates risk to have some employees covered by an outdated version.

MINISTERIAL EXCEPTION

Chaplain at Primarily Secular Hospital Deemed a Minister Under the Exception.

New York Methodist Hospital was founded in 1881, by a Methodist minister with financing from a Methodist charity as the first Methodist hospital in the world. In 1975 the Hospital decided to amend its Articles of Incorporation to become a secular institution by removing any reference to a religious mission. The Hospital's own materials refer to it as a secular institution. Despite these changes, the Hospital still references its religious heritage and touts its mission of providing an ecumenical program of pastoral care. Three of the 17 Board members are Methodist ministers and the Bylaws state that meetings begin with a prayer.

The Department of Pastoral Care employs chaplains to minister to patients, facilitate the patient's receiving rituals, and counsel patients and their families as they deal with crises and loss. A chaplain does not have to be ordained as a minister, but must have a Master's Degree in Divinity or its equivalent. Marlon Penn worked as a chaplain at the Hospital, where he admits he was primarily responsible for ministry. He wanted to be promoted, but never was. Others who were not African-American were promoted instead of him. Penn's supervisor, Mr. Poulos, said he was not chosen for promotion for a couple of reasons: first, a resident had complained about a prayer Penn used as being exclusionary; second, Poulos and Penn disagreed philosophically about the time constraints on ministry.

Penn sued for discrimination on the basis of his religion and race. After his EEOC complaint was filed, there were several incidents where Penn made errors. He improperly completed a referral card, causing a patient to die without receiving his last rights. A patient whose fetus died complained about Penn's counseling because he mentioned her partner's race. Finally, a Resident Chaplain complained that Penn made inappropriate sexual remarks. The Hospital conducted an investigation and Penn was terminated.

After Penn sued the Hospital for discrimination under Title VII, the Hospital moved for summary judgment, arguing that the Ministerial Exception barred Penn's claims. The district court agreed and Penn appealed. The court noted that there is no rigid formula for when the Ministerial Exception applies. Courts must look to several factors to determine the religious nature of the employer and the religious aspects of that employee's duties. The Exception is not limited to only heads of religious congregations. The court found that the Hospital was a religious organization, despite Penn's insistence that it is only a secular institution.

The court found, however, that the Department of Pastoral Care, in which Penn was employed, retained a critical aspect of the Hospital's historic religious mission. The Department employees, such as Penn, performed religious rituals, organized religious services, prayed with patients and families, and oversaw distribution of Bibles. The court also pointed out that if it were to resolve the issues regarding Penn's termination, it would necessarily be entangled in religious decisions since the disputes with Poulos were all religious in nature. For example, the court would need to determine the importance of a patient's last rites to determine how grave Penn's error was, or if the prayer he selected was truly exclusionary. The Ministerial Exception exists precisely to avoid this type of entanglement. For those reasons, the summary judgment for the Hospital was upheld and Penn's claims were barred by the Ministerial Exception.

Penn v. New York Methodist Hospital, (2018)--F.3d--, 2018 WL 1177293.

Note:

Some religious schools are more secular in nature than others. Despite this, many still maintain positions and roles that speak directly to the religious mission of the institution. This case shows how the analysis under the Ministerial Exception looks to the specifics of each employer and the precise duties of the employee in question to determine if the exception applies. Schools with employees who serve in religious roles should maintain job descriptions that clearly convey the religious purposes of the position.

Seventh Circuit Confirms Lower Court Ruling That Hebrew and Jewish Studies Teacher Is A Minister.

In our July/August 2017 issue, we discussed the case involving Miriam Grussgott, a Hebrew and Judaic Studies teacher at Milwaukee Jewish Day School. The court in that case ruled Grussgott was a minister

covered by the ministerial exception. Here the Seventh Circuit affirmed that decision, noting that while Grussgott's job title and use of her title did not support a conclusion that she was a minister, her actual substantive job duties and her role at the school do.

Grussgott was expected to integrate religious teachings into her Hebrew lessons, meaning she was not simply teaching the language as a language, but rather as part of the Jewish tradition. Furthermore, she performed important religious functions, such as teaching students about prayer and Torah, and praying with the students. Even though Grussgott claimed that she taught Judaism from a "cultural" and not religious place, the more important factor was that she did fulfill religious functions for the school. The school expected her to transmit the Jewish faith to the students and those duties make her subject to the ministerial exception.

Grussgott argued that because the school maintained a general non-discrimination policy the school was waiving the protections of the ministerial exception. The court disagreed with this analysis and noted that there is no requirement that an organization must exclude members of other faiths or not protect other groups in order to be subject to the exception. The court specifically noted that "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer."

Grussgott v. Milwaukee Jewish Day School, Inc., (2018) --- F.3d ---, 2018 WL 832447.

NOTE:

The language regarding the school's general non-discrimination policy is important, as schools sometimes seek the proper balance between maintaining their religious identity while also protecting members of all protected classifications. Here the court specifically stated that maintaining a broad non-discrimination policy does not preclude a school from arguing it is specifically religious in nature and that some of its employees may be deemed ministers under the exception.

SEPARATION AGREEMENTS

ALJ Rules That Confidentiality and Prohibition on Pursuing Claims Sections of a Separation Agreement are Unlawful.

Baylor University Medical Center fired an employee and offered her $10,000 in exchange for signing a Confidential Settlement Agreement and General Release. She refused to sign the Agreement and instead filed a charge with NLRB, alleging that the Agreement was illegal. The University had entered into similar agreements with 26 other former employees in the prior year.

The first clause at issue was entitled "No Participation in Claims" and stated that the former employee, unless compelled by law, may not pursue, assist with, or participate in any claim brought by any third party against the University. The second clause at issue was entitled "Confidentiality" and stated that the former employee must keep confidential all information of Baylor, including information concerning finances, employees, and other financial and personal information about employees. The final clause at issue was entitled "Non-Disparagement" and stated that the former employee may not make disparaging or negative comments about the University or certain specified parties.

The judge noted that the NLRB recently announced a new standard for evaluating whether a facially neutral rule or policy, when reasonably interpreted, would interfere with NLRA rights. The Board would evaluate the nature and extent of the potential impact on NLRA rights and balance that against the legitimate justifications associated with the rule or policy. This analysis would lead to the creation of three separate categories, one for rules that were lawful to maintain, one for rules that require individual scrutiny, and one for rules that were unlawful.

Here, the judge ruled that the "No Participation in Claims" clause was unlawful because it would have the predictable impact of barring the employee from, for example, providing information to NLRB agents in furtherance of charges filed against the University. The University was not able to offer a legitimate reason for why a former employee would be barred from providing information to the NLRB that is unrelated to their own termination or may vindicate another charge.

The "Confidentiality" provision was also ruled unlawful. The judge held that employees would reasonably understand the language to prohibit them from discussing wages, benefits, and other working conditions after their separation. While Baylor argued it was trying to prevent the release of confidential medical information, the wording was far broader than that. Finally, the "Non-Disparagement" clause was held lawful. Employers are permitted to maintain rules requiring general civility.

Baylor University Medical Center and Doris S. Camacho, Case 16-CA-195335 (JD-11-18).

Note:

The analysis the judge references was used to analyze handbook provisions, not individual separation agreements. It will be interesting to note if the Board as a whole agrees that the new standard is applicable to individual agreements where consideration is paid in exchange for the release and not just general employment policies and rules.

IMMIGRATION/AB 450

State Issues Guidance Regarding Compliance with AB 450.

Both the state Attorney General's office and the Department of Industrial Relations have released guidance regarding employers' obligations under AB 450. This bill, the Immigrant Worker Protection Act, imposes certain requirements on employers with respect to inspections by immigration enforcement agents. Employers must give employees specific notice about inspections and must prohibit certain types of inspections that are without notice or subpoena.

The new published guidance goes into detail about the requirements, the penalties for violation, and the meanings of terms like "voluntary consent" with respect to allowing immigration enforcement agencies on premises.

Guidance from the Attorney General can be found at: https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/iwpa.pdf.

FAQ from DIR can be found at: https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/immigration-ab450.pdf.

BUSINESS AND FACILITIES

NEGLIGENCE/TORTS

Property Owner Not Liable for Unforeseeable Injury in Parking Lot Leased to Third Party.

Massco owned a gas station in Los Angeles which it leased to the owners of a taco truck during evening and late night hours. The lease did not require the truck owners to provide any security or parking assistance. In the early morning hours, Travis Sakai and his wife and friends went to get a taco. The lot was very crowded, so Sakai backed up to exit. He accidentally hit a car behind him, causing some damage to his car, but no injury.

Sakai got out of his car and told the other driver that it was his fault and he had insurance. He attempted to exchange insurance information with the driver. Instead, the driver jumped back into his car, backed up very quickly and sped off. As he drove away, he struck Sakai and dragged him into the street, causing serious injuries.

Sakai sued Massco for premises liability and negligence, claiming Sakai's injuries were caused by inadequate parking or security to direct traffic. Massco moved for summary judgment, arguing that Sakai could not prove causation and the trial court granted the motion. Sakai appealed.

A negligence claim requires showing that Massco owed Sakai a legal duty, that the duty was breached, and that the breach was the proximate cause of the injury. In California, people are responsible not only for their willful acts, but also for injuries resulting from their lack of ordinary care, unless the person has brought the injury on himself. In determining whether liability exists, courts look to factors such as the foreseeability of harm, the connection between the injured person's own actions and his injury, the policy of preventing future harm, and the availability of insurance for the risk.

Here, the court found that the type of injury Sakai suffered (being injured by a car in a parking lot) was reasonably foreseeable. However, here the injury was caused by the intervening act of a third party and not simply the conditions of the parking lot. The other driver's conduct was not foreseeable or a result of the fact that Massco did not require parking attendants

or security. In fact, the evidence showed all involved considered the driver's actions to be highly unusual and unexpected. While Massco was certainly on notice that the parking lot could be crowded with pedestrians when the taco truck was there, there was no evidence that drivers would be barreling in or out at dangerously high speeds.

The court ultimately found that Massco could not have reasonably anticipated the bizarre conduct of the driver that struck Sakai. But Sakai argued that Massco should have installed parking controls such as an attendant, signage, vehicle pathways or cones. The court was not persuaded by this argument, responding that this is too great a burden for someone leasing space to another business. There is no evidence these measures would have prevented the incident which actually injured him. The court declined to hold that the owner of a parking lot, who leases that lot out to a vendor, is responsible for all harm that occurs during the hours of the lease despite intervening acts by third parties.

Sakai v. Massco Investments, LLC, (2018) ---Cal.Rptr.3d---, 2018 WL 1101620.

NOTE:

Many schools lease out space on their property to third parties, such as camps, or other organizations. While schools that do so should make sure their lease agreements are clear on safety and security measures, this case shows that a school will not necessarily be liable for all injuries sustained on its property.

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.

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: A CFO called and said they wanted to change their enrollment agreement language to note that there is a surcharge for those families paying by credit card. They had heard the law had changed and wanted to know what they could say.

RESPONSE: The attorney explained that over the past two years the law on this has changed. The laws that prohibited companies from stating one base price and then noting there would be a surcharge for credit card customers were challenged on free speech grounds. Businesses claimed that the law prohibited them from phrasing their pricing in the way that they preferred. Since the law did not prohibit giving a cash discount, it was the way it was phrased, and not the actual act, that was prohibited. This made the free speech approach a successful one. Schools can now list the standard price for annual tuition and add that those choosing to pay by credit card will be charged extra. Sometimes it is the tuition management company that does this, so schools can make clear they are not the actual party charging the surcharge. Most credit card companies stopped prohibiting this practice several years ago as part of large class action settlements. Still, schools should make sure their arrangements with credit card companies do not prohibit the surcharge.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Apr. 12 **"Social Media + Cyberbullying"**
ACSI | Webinar | Stacy Velloff

Apr. 17 **"Bullying: Employees and Students"**
CAIS Consortium | Webinar | Judith S. Islas

Apr. 25 **"Emerging Legal Issues for Private Schools"**
Builders of Jewish Education | Los Angeles | Michael Blacher

Speaking Engagements

Apr. 17 **"TBD"**
California Association of Independent Schools (CAIS) Leading from the Middle Conference | Palm Springs | Michael Blacher

Seminars/Webinars

Apr. 11 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | San Francisco | Erin Kunze

Apr. 19 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | San Francisco | Suzanne Solomon

Apr. 20 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

Apr. 20 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | Los Angeles | Christopher S. Frederick

Apr. 27 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

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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.

LCW Victory Named "2017 Top Verdict"

Jesse Maddox

Kimberly Horiuchi

We are excited to announce that LCW's litigation victory on behalf of the City of Stockton has been named a "Top Verdict" of 2017 by the Daily Journal. The matter was recognized as one of the most impactful defense verdicts of the year.

LCW Partner **Jesse Maddox** and Associate Attorney **Kimberly Horiuchi** won a complete defense verdict on behalf of the City of Stockton in a pregnancy discrimination and whistleblower retaliation lawsuit filed by the City's former Manager of Violence Prevention. The City of Stockton hired Jessica Glynn to serve in a new and prominent position created to oversee a new, community-based program aimed at reducing the City's violent crime. Prior to hiring Glynn, the City had been hard hit by the recession and the economic fallout of high foreclosures, and ultimately filed for bankruptcy. Given an increase in violent crime and a decrease in resources to combat such crime, the City was forced to innovate a new violence prevention strategy. The City's new strategy required going to the taxpayers and asking them to pass a sales tax increase just after declaring bankruptcy. The citizens approved the tax increase, and the City proceeded to hire Glynn. Approximately four months later, the City determined Glynn was not effectively overseeing the program, which led to a loss in funding and dysfunction within the violence prevention program. Although Glynn was eight months pregnant, the City could not risk further deterioration of the nascent violence prevention program given its importance to the community and limited resources. As a result, the City terminated Glynn's employment. Within weeks of her termination, Glynn sued the City in federal court for pregnancy discrimination and whistleblower retaliation, among other claims.

The City again faced a difficult decision. Given its limited resources, it could have chosen to settle the case, rather than let a jury determine whether the City appropriately terminated the employment if an eight-months pregnant employee. The City chose to dedicate its resources to defending its employment decision at trial, where Glynn sought approximately $1.4 million in damages. Ultimately, the Jury unanimously decided that the City had not terminated Glynn's employment because she was pregnant or had allegedly reported unlawful conduct. This case demonstrates the difficult balance many public entities face between conservative and prudent employment practices, and serving the best interests of policy and the community.

The Daily Journal highlighted the defense's strategy of inverting the Glynn's claims of discrimination by arguing to the jury that she was implicitly biased when she made stereotypical assumptions about her supervisor based on his religion. The Daily Journal also noted that the defense team convinced the jury that since Glynn was not effective as the Violence Prevention Manager, it had to terminate her to insure that it could achieve the goal of reducing its crime rate.

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