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.

October 2018

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LCW NEWS

Please note: *Legislative Roundup for Private Education* will be published next month. Therefore, there will be not be a November issue of *Private Educaiton Matters.*

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

DISCRIMINATION

No Valid Claim of Discrimination or Emotional Distress Where Family of Struggling Student Required to Retain an Aide to Assist Student as Condition of Enrollment.

James Doe attended Ancona School, a private school in Chicago, from preschool through fourth grade. During his second, third, and fourth grade years, his teachers had concern regarding his academic abilities and his difficulty focusing. He was performing a full grade level below his peers. He underwent a psychological evaluation in 2015 and was diagnosed with ADHD.

In March 2016, the family had still not received an enrollment contract for James's fifth grade year. Ari Frede, the school principal, sent a letter stating that the school would offer enrollment to James if the Doe family complied with two conditions: first, they needed to hire a one-on-one aide to work with James, and second, they needed to provide information about the risks and benefits of prescribing medication for James's ADHD. The Doe family did not comply.

The family sued the school, alleging that James was treated differently from other students. They claimed his enrollment was conditional based not on the academic concerns, but due to his misbehavior at school. They claimed he was treated differently because the family is Muslim. The Does alleged that other students who misbehaved, including a student who supposedly stated that all Muslims work for ISIS, did not have their enrollment held up. The family claimed the school discriminated against them on the basis of their race and was liable for intentional infliction of emotional distress.

The Does alleged race discrimination under 42 USC section 1981, which required they show they are members of a racial minority, the school had an intent to discriminate on the basis of race, and the discrimination concerned the making of a contract (one of the protected activities under that statute). The court skipped the step of examining the prima facie case of discrimination and moved right to the school's proffered legitimate business reason for its decision to require the Doe family to fulfill two conditions before James could re-enroll.

LCW Welcomes New Partners!

Liebert Cassidy Whitmore is pleased to announce Linda Adler, Jennifer Rosner, and Max Sank have been named partners.
For more information, turn to page 14

The school stated they acted out of concern for James's academic difficulties and his inability to focus during class. They contended the conditions required were closely related to these precise concerns and had nothing to do with any misbehavior. In response, in order to show these reasons were in fact pretextual, the Does argued that other similarly-situated students did not need to fulfill these conditions, and that the principal was known to engage in discrimination and showed personal hostility to James.

The court did not accept any of these arguments as valid. First, the court noted that other students who engaged in disciplinary misbehavior did not have the academic difficulties James did. They were therefore not similarly situated. Furthermore, the school offered ample evidence that showed they had long-standing academic concerns and even told the family the contract was being held up due to a pending academic review. At no time did the school ever mention or reference any behavioral concerns with respect to James.

Next, the court noted that there was no evidence presented by the Doe family to indicate that Frede regularly was known to engage in discrimination. In fact, another school employee who was also a Muslim testified that Frede never treated her differently due to her faith. Finally, the family tried to claim that Frede discriminated against James by giving an example of a time James was accused of calling another student a racial slur and swearing at him. Frede treated the conduct as bullying, which the family tried to use to imply that Frede was biased against James because he was a Muslim. The court noted that no reasonable jury could make that logical leap from calling the use of racial slurs and swear words bullying to inferring that Frede harbored anti-Muslim sentiment toward James. The suit had also named individual members of the Board of Trustees, but the court noted that they would be entitled to summary judgment because they did not individually participate in any of the decisions involving James.

With respect to the claim of intentional infliction of emotional distress, the family needed to show that Frede and the school's behavior were extreme and outrageous, outside the bounds of a normal civil society. The court found that no reasonable juror could find that requiring a one-on-one aide and releasing his spot when the family did not meet the requirement was intolerable or oppressive conduct. The Does also claimed the defendants acted outrageously by permitting a climate of racial prejudice and marginalization of Muslim students, but again, they presented no actual evidence to this effect. The court granted summary judgment in favor of the school.

John Doe et al. v. Board of Trustees for the Ancona School et al., 2018 WL 3438902.

ADMINISTRATIVE LAW

Disciplinary Committee Procedures Should Include an Opportunity for the Committee to Assess the Complainant's Credibility.

While a freshman at Claremont McKenna College, John Doe met Jane Roe, a freshman at neighboring school. On the night of a party, John and Jane engaged in sexual activity that Jane later alleged was a sexual assault in violation of the College's sexual misconduct policy.

The College initiated an investigation and hired a third-party investigator. The investigator interviewed Jane, John, and multiple other witnesses and reviewed other evidence. Pursuant to the College's policies, the investigator provided the parties with a preliminary investigative report. In response, John requested the investigator ask additional questions to witnesses already interviewed, including him and Jane, interview new witnesses, and seek additional documentary evidence. The investigator interviewed one new witness and clarified a point raised by one of the original witnesses, but did not grant any of the other requests. The investigator provided the parties with a final investigative report, and the College concluded the investigation was complete.

The College convened a Committee comprised of the investigator and two members of the College's faculty and staff to evaluate the evidence and decide by majority vote whether John had violated the College's sexual misconduct policy.

The procedures allowed, but did not require, the parties to appear at the meeting and make an oral statement to the Committee. The procedures did not provide for any questioning by the Committee or the parties. Jane did not appear at the meeting. The

Committee issued a written decision finding that John violated the College's sexual misconduct policy.

John appealed the decision under the College's procedures, but the College denied his appeal. The College suspended John for one year and implemented additional sanctions against him.

John then requested a trial court set aside the College's sanctions against him, but the trial court denied his request, stating that John received a fair hearing at the College. Additionally, the trial court held that John had no right to review and respond to the evidence the Committee considered, and he failed to show prejudice from the investigator's decision not to grant his requests for additional investigative steps. John appealed.

On appeal, John argued he was denied a fair hearing because neither he nor the Committee was able to ask any questions of Jane, who did not appear at the meeting, and therefore, the Committee had no basis for evaluating her credibility. The Court of Appeal agreed that Jane's failure to appear at the hearing, either in person or via videoconference or other means, deprived John of a fair hearing where John faced potentially serious consequences and the case against him turned on the Committee finding Jane credible.

In its analysis, the court examined recent court decisions to distill to a set of core principles applicable to cases where the accused student faces a severe penalty and the school's determination turns on the complaining witness's credibility. First, the accused student is entitled to "a process by which the respondent may question, if even indirectly, the complainant." Second, the complaining witness must be before the finder of fact either physically or through videoconference or similar technology so the finder of fact can assess the complaining witness's credibility in responding to its own questions or those proposed by the accused student.

Here, Jane's allegations against John were still crucial to the Committee's determination of misconduct even if the Committee relied on other evidence to "corroborate" those allegations. Although the investigator, who was on the Committee, had the opportunity to assess the credibility of both parties, the other Committee members did not.

Ultimately, the court held that a school's obligation in a case turning on the complaining witness's credibility is to "provide a means for the [fact finder] to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser." Schools can use many methods to meet this obligation, including granting the fact finder discretion to exclude or rephrase questions from the responding witness as appropriate and ask its own questions, physically separating the witnesses, or having a witness appear remotely via appropriate technology. Accordingly, the Court of Appeal reversed the trial court's decision and instructed the court to review John's request to review the College's decision.

Doe v. Claremont McKenna College (2018) __ Cal. App.5th __ [2018 WL 3751345].

Note:

> *For any disciplinary process a private school or college maintains, there should be a clear process of investigation. If the school or college is using an outside investigator, it is important to make sure that investigator's methods comply with the school or college's own standards. For example, if the school or college policy requires a written report, then the outside investigator must provide one as part of his or her services. Ultimately, the accused in any disciplinary situation needs to receive due process to ensure the investigation is fair.*

EMPLOYEES

SALARY HISTORY

California Legislature Aims to Clarify Salary History and Equal Pay Statutes.

Assembly Bill 2282, signed into law by Governor Brown on July 18, 2018, attempts to clarify elements of California's salary history and equal pay statutes, Labor Code sections 432.3 and 1197.5. This legislation, which appears to help answer several common questions about these statutes, takes effect January 1, 2019.

The salary history statute, Labor Code section 432.3, went into effect January 1, 2018. In short, Labor Code section 432.3 prohibits employers from seeking an applicant's salary history in previous private sector employment, requires an employer to provide an

applicant with the pay scale for the position upon reasonable request, and restricts how employers can use properly-obtained salary history information. For more detail, please refer to our previous blog post here.

AB 2822 answers four questions employers had about section 432.3:

1. Does asking about an applicant's salary expectations constitute "seeking" his or her salary history?

No. This was a commonly-asked question by employers, concerned that asking an applicant for his or her salary expectations would be seen as a back-door way of "seeking" salary history. The amended section 432.3, at subdivision (i), now reads "Nothing in this section shall prohibit an employer from asking an applicant about his or her salary expectation for the position being applied for."

2. Is a current employee who applies for a different position with the employer an "applicant"?

No. New subdivision (k) defines "applicant" as an "individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." This language avoids placing the employer in the untenable position of being required to avoid consideration of salary history information that is already in their possession.

3. What is a "pay scale?"

For purposes of the requirement that an applicant be provided with the pay scale for a position upon reasonable request, a revision to subdivision (c) defines "pay scale" as "a salary or hourly wage range." Other pay, such as bonus pay, need not be included in the pay scale provided to an applicant.

4. What constitutes a "reasonable request" for a pay scale?

AB 2282 further revises subdivision (c) of Labor Code 432.3 to define a "reasonable request" for a pay scale as "a request made after an applicant has completed an initial interview with the employer." Therefore, an employer is not required to comply with a request for a pay scale from an applicant who has not completed an interview.

California's Equal Pay Act, originally enacted in 1949, has been subject to several recent revisions. First, it was amended effective January 1, 2017, to prohibit employers from relying solely on an applicant's previous salary in making pay determinations. It was amended again effective January 1, 2018, to specify that public sector employers are subject to the equal pay laws, with the exception of the Section 1199.5, which makes it a misdemeanor to fail to provide equal pay to employees of differing sexes, races, or ethnicities.

AB 2282 revises Section 1197.5 to further restrict consideration of an employee's prior salary in making a pay determination. The statute currently provides that "Prior salary shall not, by itself, justify any disparity in compensation;" when the revision goes into effect on January 1, 2019, the phrase "by itself" will be deleted.

However, AB 2822 also specifically permits an employer to make a compensation decision for one of its current employees based on that current employee's existing salary, so long as any wage differential resulting from that compensation is justified by a seniority system, a merit system, a system that measures earning by quantitate or quality of production, or a bona fide factor other than race or ethnicity, such as education, training, or experience.

Employers who have questions about the effects of AB 2282 should seek advice from trusted employment counsel.

FREE SPEECH

Free Speech Rights at Private Colleges and Universities.

Controversies over free speech, disruptive protests, sharp debates among faculty, withdrawal of invitations to controversial speakers, and interference with rights of expression happen just as much at private as at public colleges and universities. The difference, however, is that the First Amendment to the U.S. Constitution binds only public actors. At a public college or university, students and employees can assert First Amendment claims against the institution if it tries to discipline or censor them for speech activities. Students and employees at a private institution, however, do not have that option,

because the institution is not bound by the First Amendment.

There are three ways in which, even without any First Amendment protections, those at private colleges and universities do have expression rights that are safeguarded by law. Private educators have to take these rights into consideration when making personnel, disciplinary, and other decisions that involve student and employee expression.

First, faculty members often have academic freedom rights and other speech rights they can enforce against their employer as a matter of contract law. Many private colleges and universities have academic freedom policies that state in broad terms that members of the faculty have the right to engage in scholarship, teaching, and expression that can clash with the views of the institution. If the institution disciplines a faculty member for such activities, the faculty member can bring a claim for breach of agreement if the policy is found to be contractual in nature and the discipline allegedly violates the policy provision.

The case *McAdams v. Marquette University*, decided last month by the Wisconsin Supreme Court, involves this type of contractual claim of academic freedom rights. Professor McAdams, a tenured professor of philosophy, wrote on his personal blog criticizing a philosophy instructor at the university because she had not permitted a discussion in her classroom questioning gay rights. McAdams's post described that the instructor had written on the board among other issues "gay rights" and said "everybody agrees on this, and there is no need to discuss it." A student approached the instructor after class and said gay rights should be open to discussion. The post described that the instructor responded, "you don't have a right in this class to make homophobic comments," and then invited the student to drop the class. McAdams contended this was a stifling of free expression, and posted links to the instructor's personal webpage, leading to harsh emails to the instructor from third parties.

The university placed McAdams on leave and then suspended him. McAdams asserted a breach of contract claim against the university, arguing that it had violated its own academic freedom policies. The Wisconsin Supreme Court held that Professor McAdams should prevail on his claim and required that he be reinstated with back pay.

Second, in California, a 1992 statute known as the Leonard Law gives students at private colleges and universities free speech rights they can assert against their own institution. The statute was intended to transplant constitutional free speech rights students have off campus so that they apply in some way on campus. It provides:

No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution. (Cal. Educ. Code § 94367(a).)

There is some uncertainty how exactly the statute operates. The consensus is that students obtain some speech rights at a private college and university akin to those that students have at public colleges and universities, although by its terms, the Leonard Law protections are weaker than those provided by the First Amendment. For example, students cannot obtain damages for an institution's violation of the Leonard Law. Instead, declaratory and injunctive relief and attorney's fees are available. Also, to violate the law, an institution must "make or enforce a rule subjecting a student to disciplinary sanctions" and the rule must apply "solely" on the basis of protected expression. (Cal. Educ. Code, § 94367(a).)

There is scant authority interpreting how the Leonard Law should work to confer student speech rights. In one case, *Crosby v. South Orange County Community College District*, the California Court of Appeal held that the statute (in particular, the component that applies to community colleges) did not turn the campus library into a public forum, and determined that the statute did not transplant every speech right a student might have outside campus in any context, for example in the home, onto the college campus.

Also, the courts have not determined whether the Leonard Law requires private institutions to open up speech areas on campus the same way public colleges and universities are expected to open up areas, although many private colleges and universities have reserved areas for free expression of students. (Also as a matter of contract law, policies at private institutions often confer speech rights on students that they can enforce under contract principles.)

Finally, employees of private institutions have substantial rights under labor relations laws, even if those employees have no union representing them. The federal National Labor Relations Act ("NLRA") affords employees the right to engage in concerted activity for their mutual aid or protection, and this can include rights to picket and protest regarding wages, hours, and working conditions, rights to post about these matters on social media, and the right to criticize the institution and management. The National Labor Relations Board, the federal agency responsible for enforcing the NLRA, has recently determined that graduate student assistants qualify as employees for protection under the Act. (The case is being reviewed by the federal courts and a decision will likely issue in the coming year.)

No doubt, vigorous protest and debate will continue in higher education in 2018 and 2019, and likely result in further developments in this area. We will report on important developments as they occur.

DISABILITY HARASSMENT

Jury Awards Employee $500,000 in Damages for Severe and Pervasive Harassment.

Augustine Caldera was a correctional officer at the California State Institute for Men in Chino for over 20 years. Caldera has a speech impediment, and stammers when he speaks. Starting in 2006, Caldera began working within the administrative segregation (Ad Seg) unit of the Prison as a mental health escort officer. The Ad Seg unit consists of two to three halls, or housing facilities. Caldera's primary duties were to transport inmates to and from their mental health appointments. He worked frequently with Sergeant Grove, and at some point during their time in the Ad Seg unit, Sergeant Grove began to mimic and mock Caldera's speech impediment.

While many of the incidents were undocumented because Caldera did not initially think to press charges and therefore did not believe he would have to testify in court, there were several instances to which other officers and prison employees were witnesses. In total, Caldera believes there had been between 5 and 15 different times when Grove had mocked or mimicked his speech. One of the prison doctors, Dr. Jordan, testified that he himself had witnessed at least 12 incidents and that he believed a culture of mocking Caldera existed at the Prison.

One of the more dramatic instances involved Grove mimicking Caldera's stutter over the prison's radio system, which could be heard by about 50 other officers. Another Officer, Konrad, testified to the effect this incident had on Caldera, saying that it had shocked and saddened Caldera. Caldera's reactions to the harassment ranged from anger to deep sadness. While the harassment took a toll on him, it was something to which he had grown accustomed.

On September 2, 2008, Officers Grove and Caldera, along with Dr. Jordan, were all present in a main corridor of the prison during a shift change at 2:00pm. It is estimated there were about 24 correctional officers present at the time. Officers Caldera and Grove began speaking, and Grove started to curse at Caldera while also mocking Caldera's stutter despite Caldera's threat to file a formal complaint. These insults by Grove were overheard by Dr. Jordan and others.

On September 9, 2008, Caldera filed a complaint with the Equal Employment Opportunity (EEO) office against Grove. However, two days later, Caldera learned that Grove was being reassigned so that they would both be in the same hall of the Ad Seg unit. Caldera expressed his concerns to all of his superiors, but Grove was nonetheless transferred to his hall.

On October 3, 2008, Officers Grove, Caldera, and Lara were all in attendance at a training class for prison supervisors. Grove mimicked and mocked Caldera's speech impediment while also demeaning him throughout the class. Lara witnessed all of this, and no one stepped in to admonish Grove or try and curb his behavior.

Caldera sued the California Department of Corrections and Rehabilitation (CDCR), alleging disability harassment, failure to prevent harassment, and retaliation. The primary issue for the case was whether the harassing conduct was severe and pervasive. Generally, the law prohibiting harassment is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that are sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Severe harassment means "strongly critical and condemnatory" or "inflicting pain and distress;" pervasive harassment means "to become diffused throughout every part of." The court considers any

or all of the following factors: (1) the nature of the conduct; (2) how often and over what period of time the conduct occurred; (3) the circumstances under which the conduct occurred; (4) whether the conduct was physically threatening or humiliating; and (5) the extent to which the conduct unreasonably interfered with an employee's work performance. Additionally, they consider whether a reasonable person in the victim's shoes would have been similarly offended.

Since witnesses attested to multiple events, which occurred somewhere around a dozen times throughout the course of two years, and because it was alleged to be part of the Prison culture, and because Grove was able to get away with his behavior in front of supervisors, the court ruled that the behavior was pervasive throughout Caldera's employment. The court also ruled that Grove's behavior was severe, as it was very pointed, Caldera experienced the ridicule first hand, and it occurred many times and often publicly in front of Caldera's peers, which was humiliating.

While the Prison and its employees downplayed the seriousness of the harassing conduct as teasing and offhand remarks, the jury ultimately ruled the conduct was indeed severe and pervasive. Furthermore, the jury decided that the Prison had failed to take all reasonable steps necessary to prevent future harassment. In order for a plaintiff to succeed on a failure to prevent harassment claim, there must have been (1) severe and pervasive harassment that took place, (2) which the employer failed to take all reasonable steps to prevent, and (3) the plaintiff suffers injury, damage, loss or harm as a result of the failure.

Although the Prison periodically conducted anti-harassment trainings and has policies regarding harassment, Grove was still able to harass Caldera in front of a group of supervisors without admonition. This was after Caldera had already filed a complaint with the EEO and Grove had received a cease–and-desist letter. Also, Caldera's complaint to the EEO was practically ignored as Grove was transferred to Caldera's unit immediately afterward. Furthermore, Dr. Jordan's testimony that there was a culture of harassing Caldera held great weight in the case. The CDCR was found liable for failing to prevent harassment in addition to the harassment charge itself.

Caldera v. Dep't of Corrections and Rehabilitation (2018) 25 Cal.App.5th 31.

Note:

Pervasive and Severe are legal terms of art. This means that they are subject to multiple meanings when it comes to facing possible liability for a harassment lawsuit. While the guidance above lays out several factors and considerations the courts use in determining what is severe and pervasive, it is the jury, or trier of fact, that serves as the ultimate referee. There is no magic number of incidents or triggering words that will automatically render a defendant liable for harassment. Furthermore, upon receiving any notice or complaint of any harassing behavior, employers must immediately step in and take all reasonable actions to prevent any such future behavior. Merely having harassment trainings and policies may not insulate an employer from liability, especially if the harassment is committed by a supervisor or in the presence of a supervisor.

RESPONDEAT SUPERIOR/ LIABILITY

Employee Must Have Been Driving Personal Vehicle in the Course and Scope of His Employment in Order to Extend Vicarious Liability to His Employer.

Donald Prigo worked for the County of Los Angeles ("the County") as a deputy public defender. As a trial lawyer, he used his personal vehicle for numerous job-related tasks, such as driving to courthouses for court appearances, visiting jails in order to meet with clients, viewing crime scenes, and occasionally visiting the coroner's office or meeting witnesses. Prigo used his car as a regular part of his job, and he could not realistically do this job in Los Angeles without a vehicle.

In August of 2013, Prigo left his office after work to go home. He had not used his car to drive anywhere job-related during that particular work day. On his way home, he headed toward a post office to mail his rent check. As he turned into the post office, he hit a car driven by Kevin Vargas. Vargas' car was forced off the road and injured Jake Newland, a pedestrian.

Newland filed a complaint for negligence against Prigo, the County, and Vargas. After jury selection,

an eight-day trial was held specifically to determine whether Prigo was expressly or impliedly required to use his personal vehicle for work purposes. Despite the County's objections and requests for particular jury instructions, the trial court stated that whether Prigo was acting within the course and scope of his employment at the time the accident occurred was not an issue in the case. The jury found that Prigo was required to use his personal vehicle to perform his County job. Then, in the next phase of the trial, the jury found that Prigo's negligence caused the accident. Because of both of these findings, the trial court entered judgment against the County in the amount of over 13 million dollars.

The County filed a motion for judgment notwithstanding the verdict, requesting that the presiding judge overrule the decision of the jury. A judge may grant such a motion only if he or she determines that insufficient evidence supported the verdict. The trial court denied this motion, and the County appealed this decision to the California Court of Appeal.

The doctrine of respondeat superior imposes vicarious liability on an employer for an employee's conduct when such conduct occurs within the course and scope of employment. The main rationale for this doctrine is that losses that foreseeably result from the conduct of an enterprise should be assumed by that enterprise as a cost of doing business.

However, an employee's commute to and from the workplace is generally considered to not be within the course and scope of employment, meaning that an employer would not be vicariously liable for any tort committed during that commute. This rule is commonly referred to as the "going and coming rule." Exceptions to the going and coming rule exist, such as when an employer requires the employee to bring a car to work. In order to apply this required vehicle exception, Newland needed to demonstrate that (1) "the County required Prigo to drive his car to and from the workplace at the time of the accident," or (2) "Prigo's use of the car provided a benefit to the County at the time of the accident."

On appeal, the County argued that there was insufficient evidence to support finding it vicariously liable for Prigo's negligence. Specifically, the County maintained that the car accident did not occur in the course and scope of Prigo's employment. Furthermore, the County contended that it neither required Prigo to drive his car to and from work nor received a benefit from his use of the car at the time of the accident. The Court of Appeal agreed, and it reversed the trial court's judgment.

In its reasoning, the court described three policy factors that underlie the respondeat superior doctrine: preventing the reoccurrence of future injuries, assuring compensation to victims, and ensuring that a victim's losses are borne by the enterprise that gave rise to the injuries. The court found that none of these policy factors supported applying the doctrine to this case, explaining that "[p]ublic policy does not support imposing liability on the County for the tortious conduct of an employee who was not driving in the course and scope of his employment at the time of the accident."

Moreover, the court found that, although Prigo had been required to drive his car for work-related duties in the past, no evidence supported that he was actually required to drive to and from work on the specific date of the accident. The court noted that Prigo's need to use his car to perform tasks on the job was not an everyday occurrence. Additionally, he knew in advance when he would need his car for these tasks, and could make these plans ahead of time. Overall, although the use of his personal car to perform job duties was ostensibly the most preferable option, it was not a requirement imposed by the County.

Finally, the court determined that no evidence supported a finding that the County received any benefit from Prigo's use of his car at the time of the accident. No evidence indicated that the County "relied on or expected Prigo to make his car available on days that he did not have outside tasks." In fact, Prigo had a history of using public transportation and carpooling on days that he did not have to fulfill any duties outside the office.

Ultimately, the court held that there was insufficient evidence to support a finding that Prigo was driving in the course and scope of his employment when he injured Newland. Furthermore, the required vehicle exception did not apply because the County neither required Prigo to drive his car nor received a benefit from him driving his car at the time of the accident. Accordingly, the trial court erred when it denied the motion for judgment notwithstanding the verdict, and the appellate court reversed the judgment.

Newland v. Cty. of L.A. (2018) 24 Cal.App.5th 676.

Note:

This case was decided by the California Court of Appeal, meaning it is controlling California precedent. The outcome of this case is positive for private schools and colleges, since the court found that an employer was not vicariously liable for an employee's negligent driving since the accident did not occur in the course and scope of his employment, even though the employee relied on his personal vehicle to accomplish his job duties. Still, private schools should take note of the required vehicle exception discussed by the court. Under this exception, if a school requires an employee to drive a car to and from work and that car provides a benefit to the school at the time of an accident, the school could be held vicariously liable for the conduct of that employee. Boarding schools in particular should be careful around these issues, as the line can get blurry between personal car trips and trips that are in the course and scope of employment.

WAGE AND HOUR/PAGA

Plaintiff Can Bring PAGA Action For Violations He Personally Was Not Harmed By.

Forrest Huff was a security guard for Securitas, a company that provided security for companies. Huff worked at three different locations over the course of a year. After he quit his job, he sued Securitas for Labor Code violations, including late payment of wages. The suit was brought as a Private Attorney General Act claim. The trial court found that Huff was not a temporary services employee, and therefore Huff could not pursue penalties as a PAGA representative for employees who were considered temporary services employees, because he was not harmed by the Labor Code violations specific to temporary service employees.

Huff moved for a new trial and the court concluded that so long as Huff could prove he was harmed by some of the Labor Code violations, he could serve as the PAGA representative even for those claims for which he was not personally harmed. The court granted the new trial and Securitas appealed from that decision.

When an employee brings a PAGA action, he does so as a representative of the state's labor law enforcement agency, not a representative of the other employees. That is why 75% of the penalties go to the state and only 25% go to the harmed employees. An employee may only bring a PAGA action if the state declined to pursue the particular violations at issue. Securitas argued that a plaintiff may only recover penalties under the Act if the violations against other employees are the same as the violations against the plaintiff.

The court disagreed with Securitas' logic. The court noted that the statute says an action may be brought by an employee against whom "one or more" of the alleged violations was committed. This opens the possibility that the representative employee was not harmed by the same violations as every other employee. If the goal of the PAGA was to achieve maximum compliance with the Labor Code, it would not make sense to interpret the law as preventing a PAGA plaintiff from seeking penalties for all violations committed by the employer. Securitas' argument was essentially trying to make a PAGA action into a class action, but they are two different things.

Just as the Labor Commission has the authority to seek penalties for all known violations by an employer, so too does the PAGA representative, as the representative of the state, have that authority. The trial court correctly held that Huff may serve as the PAGA representative and the new trial was properly granted.

Huff v. Securitas Security Services USA, Inc., (2018) --Cal. Rptr.3d--, 2018 WL 2328672.

Note:

Even though the Supreme Court recently ruled that arbitration agreements can be drafted to prohibit any class actions by employees, PAGA claims are different from class actions. Courts have ruled that PAGA claims cannot be waived via an arbitration agreement because plaintiffs in PAGA claims represent the state and not the individual. Therefore, California employers cannot use arbitration agreements to fully eliminate the possibility of some sort of representative action.

Waiting Period Penalties Do Not Apply Where Employee Quit After Closing Hours on Friday.

Taryn Nishiki worked at Danko Meredith, APC, a law firm, as an office manager and paralegal. She quit her job via email at 6:38 p.m. on Friday November 14,

2014. In the email she stated that her unused vacation time needed to be paid to her within 72 hours of her resignation. She copied the firm's bookkeeper, who forwarded the email to the partners the next morning. Nishiki was owed $2,880.31 in unused vacation time. It was mailed to her via check on Tuesday November 18. There was a problem with the check because the written amount had an error and stated the amount of $2,800.31, or $80 less than she was owed.

On Wednesday, November 26, Nishiki emailed Mr. Meredith, one of the firm's partners, telling him the bank would not take her check because of the discrepancy between the written and numerical amounts. She asserted that she was owed waiting time penalties since she could not cash her check. Meredith responded via email that no check had been returned to them as non-negotiable. He said if she wants them to issue another check, they can do that, or they can issue an additional $80 for the difference. The firm mailed Nishiki a corrected check on December 5, 2014.

Nishiki filed a complaint with the Labor Commissioner, claiming she was still owed vacation days and rest period premiums, and she requested waiting time penalties in the amount of $7,500, calculated as 30 days at the rate of $250 per day. The hearing officer found Nishiki had received all her vacation time and was not owed rest period premiums, but that she was entitled to waiting time penalties for the 17 days between November 18 when she got her check and December 5, when she got the corrected version. Danko Meredith appealed and at trial the court agreed with the hearing officer and awarded attorney's fees to Nishiki. Danko Meredith appealed again.

The court explained that under the Labor Code, employees are owed their final check, including unused vacation time, within 72 hours after their resignation. Danko Meredith argued that the 72-hour period did not begin to run when Nishiki sent her email on Friday evening, but on the opening of business on Monday the 18th. The court agreed that the time period did not begin Friday evening the 14th, as any other interpretation would be contrary to the intent of the law, which gives employers the full 72 hours to prepare the check. If Nishiki's interpretation were correct, employers would have less than a single workday to prepare the final check. The court did not decide if the 72 hours started when the bookkeeper received the email the following morning or if it began Monday, as under either interpretation, the Tuesday check was timely.

The court also found that evidence showed the mistake on the check was nothing more than a clerical error. The employer did not intend to make the check non-negotiable and under those circumstances, the error was not regarded as willful. But, the employer got word of the problem on November 26 and waited until December 5 to issue a replacement. The court held that Nishiki was entitled to waiting time penalties for those nine days that she had to wait for the replacement check to be sent to her.

Danko Meredith also challenged the award of attorney's fees, since Nishiki only prevailed on one of her three original charges. They relied on the principle that where a statute allows attorney's fees for a prevailing party, a court may reduce the fees if the plaintiff achieves only limited success. The court disagreed with this reasoning, since the statute in question here explicitly provides that an employee is successful if the court awards an amount greater than zero. Furthermore, it was Danko Meredith who forced the continued action with their appeals, so they cannot now argue Nishiki couldn't collect attorney's fees. The attorney's fees award was appropriate.

Nishiki v. Danko Meredith, APC, (2018) 25 Cal.App.5th 883.

BUSINESS AND FACILITIES

NEW LEGISLATION

California Must Achieve 100 Percent Clean Energy by 2045.

On September 10, 2018, Governor Jerry Brown signed Senate Bill 100 into law, which mandates that California must achieve 100 percent clean and renewable energy by 2045. Governor Brown also signed an executive order establishing that California's new statewide goal is to achieve carbon neutrality by no later than 2045. Current law requires that the State achieve 50 percent carbon neutrality by 2030. This ambitious modification increases this percentage to 60 percent by 2030, and doubles that 50 percent goal by requiring that renewable energy

and zero-carbon resources supply 100 percent of electricity for California end-use customers and state agencies by 2045. California is only the second state after Hawaii to require that all of its energy come from clean renewable sources.

The California Air Resources Board will work with state agencies to develop a framework for implementing and measuring carbon neutrality goals. State agencies will request the support of colleges, businesses, communities and others to help California obtain all of its energy from clean sources.

The State may request schools and colleges assist it in achieving these goals by spreading the word across their communities and setting an example by achieving carbon neutrality for their own campuses. Schools and colleges can get a head start on these statewide requirements by installing solar panels or implementing other proven methods of producing clean and eligible renewable energy resources. Schools and colleges should ensure they have the appropriate protections and assurances in place when entering into service or installation contracts with renewable energy resources companies.

Note:

We would be happy to assist schools with their clean and renewable energy resource needs. Our attorneys include a LEED Green Associate, an accreditation by LEED as a professional with extensive knowledge of green design, construction, and operations.

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.

OCTOBER 1ST THROUGH 15TH

File Verification of Private School Instruction:

Every person, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level shall between the first and 15th day of October of each year, file with the Superintendent of Public Instruction an affidavit or statement, under penalty of perjury, by the owner or other head setting forth the following information for the current year:

- (a) All names, whether real or fictitious, of the person, firm, association, partnership, or corporation under which it has done and is doing business.
- (b) The address, including city and street, of every place of doing business of the person, firm, association, partnership, or corporation within the State of California.
- (c) The address, including city and street, of the location of the records of the person, firm, association, partnership, or corporation, and the name and address, including city and street, of the custodian of such records.
- (d) The names and addresses, including city and street, of the directors, if any, and principal officers of the person, firm, association, partnership, or corporation.
- (e) The school enrollment, by grades, number of teachers, coeducational or enrollment limited to boys or girls and boarding facilities.
- (f) That the following records are maintained at the address stated, and are true and accurate:
  - 1. The attendance of the pupils in a register that indicates clearly every absence from school for a half day or more during each day that school is maintained during the year. (Education Code Section 48222.)
  - 2. The courses of study offered by the institution.
  - 3. The names and addresses, including city and street, of its faculty, together with a record of the educational qualifications of each.
- (g) Criminal record summary information of applicants that have been obtained pursuant to Education Code Section 44237.

NOVEMBER THROUGH JANUARY

- Issue Performance Evaluations
  - We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed

before the decision to renew the teacher for the following school year is made. Schools that do not conduct regular performance reviews may have difficulty terminating problem employees - especially when there is a lack of notice regarding problems.
    - Consider using Performance Improvement Plans as long as you are able and willing to do the necessary follow up to them.
  - Compensation Committee Review of Compensation before issuing employee contracts
  - The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.
  - Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.
- If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.
- Review student financial aid policies.
- Review and revise Enrollment/Tuition Agreements.
- File all tax forms in a timely manner:
  - Forms 990, 990EZ
    - Form 990:
      - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.
    - Form 990EZ
      - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990EZ.
    - A school below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).
    - The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.
    - The school should make its IRS form 990 available in the business office for inspection.
  - Other Required Tax Forms Common to Business who Have Employees Include Forms 940, 941, 1099, W-2, 5500

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 said that two weeks into the new school year, a long term school family revealed that over the summer, the parents had decided to divorce. The relationship has become acrimonious, and the mother asked the Dean of Students to write a letter describing how much she has volunteered at the school and how involved she is with her son's education. The letter did not need to say anything negative about the father, just the truth about the mother's involvement with the school. The administrator wanted to know if they should write this letter. The mother also told the administrator that there was a chance she was going to file a restraining order against the father, as he had become very angry lately and was lashing out at the family.

RESPONSE: The attorney told the administrator that the Dean should not voluntarily write this letter. The Dean can gently tell the mom the school's policy is not to become involved in divorce proceedings between two parents at the school. While the school will certainly comply with a lawful subpoena for information or records where possible, it will not proactively create documents to help one parent against another in a divorce. As for the restraining order issue, the attorney told the administrator that if the mother did eventually obtain a restraining order, and anything in the order affects school life (such as the father being able to pick up the kids or be present on campus), then the school should receive a copy of the order. The school must do what's possible to comply with a lawful restraining order, and should work with the parents to figure out the best way to comply while minimizing impact on school life where possible.

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New to the Firm

Tony Carvalho is a new associate in our Fresno office and assists clients in matters pertaining to employment law, wage and hour, and litigation. His main areas of focus include harassment and discrimination of all types, wage and hour claims, and wrongful termination claims. He is also fluent in Spanish and Portuguese. Tony can be reached 559-256-7803 or tcarvalho@lcwlegal.com.

Lars T. Reed is a new associate in our Sacramento office where he provides counsel and representation to clients on matters involving employment law and litigation. Lars has experience in all aspects of the litigation process from pre-litigation advice to enforcement and appeals. He is fluent in Norwegian, and also speaks Swedish and Danish. Lars can be reached at 916-584-7011 or lreed@lcwlegal.com.

Ronnie Arenas is a new associate in our Los Angeles Office where he assists clients in matters regarding labor and employment law. Ronnie has experience in all phases of litigation, from the pleading stage through trial. He represents cities, counties, and public schools in legal matters arising out of public employment, including issues involving discrimination, harassment, wrongful termination, and retaliation. Ronnie is fluent in Spanish. He can be reached at 310-981-2038 or rarenas@lcwlegal.com.

Bryan Rome joins our Fresno office where he provides advice and counsel as well as civil litigation assistance to the firm's public entity clients. Bryan is experienced in all aspects of discovery and motion practice, including drafting demurrers, motions for summary judgment, appellate briefs, and writ petitions. Bryan has also represented public entities in administrative hearings and appeals, in Pitchess motions, and in criminal prosecutions. Bryan has experience conducting legal research, preparing written analysis on legal matters, and conducting mediations. He can be reached at 559.256.7816 or brome@lcwlegal.com.

Emanuela Tala joins our Los Angeles office where she provides representation and legal counsel to clients in matters related to employment law and litigation. She has defended employers in litigation claims for discrimination, harassment, retaliation, wage and hour, and other employment claims. Emanuela has successfully argued dispositive motions, including motions for summary judgment. She can be reached at 310-981-2000 or etala@lcwlegal.com.

LINDA ADLER JENNIFER ROSNER MAX SANK

OUR NEW PARTNERS

Liebert Cassidy Whitmore (LCW) is pleased to announce that Linda Adler, Jennifer Rosner and Max Sank have been named Partner effective October 1, 2018.

"We are extremely proud to welcome this group to the partnership," said J. Scott Tiedemann, Managing Partner of LCW. "Linda, Jennifer and Max are experts in their respective areas of law and embody the qualities that our clients expect from LCW. We are very fortunate to call them our partners and look forwards to their contributions for years to come."

Linda Adler advises on business and risk management practices and policies in the areas of preventing harassment claims, student discipline and expulsion, faculty and staff discipline and termination, equal employment opportunity law compliance, and contracts. She also regularly conducts training classes for faculty, staff and administrators on sexual harassment, discrimination, retaliation and disability accommodations. Adler received her JD from Santa Clara School of Law.

Jennifer Rosner is a prolific litigator with experience in lawsuits involving discrimination, harassment and retaliation, disciplinary and due process issues. She has been successful in obtaining summary judgments on behalf of clients in both state and federal court and has extensive appellate and administrative appeal experience. Rosner also works closely with local agencies on every facet of the disability accommodation process and is a sought-after speaker on topics such as disability and the interactive process, managing the marginal employment, the Fair Labor Standards Act (FLSA), harassment, discrimination and retaliation. Rosner received her JD at Loyola Marymount University School of Law.

Max Sank's areas of expertise include the interactive process and reasonable accommodations for employees and students, workplace and student investigations, employment/enrollment agreements (including arbitration agreements), and student discipline. He is passionate about advising clients on employment law and student matter issues to help them avoid disputes when possible. Sank is also one of the firm's top litigators and has successfully defended schools in matters brought by employees and students, such as racial harassment, age discrimination, and breach of employment and enrollment agreements. Sank received his JD from the University of Southern California School of Law.

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Firm Activities

Consortium Training

Nov. 8 **"2019 Legislative Update for California Private Schools"**
Builders of Jewish Education ERC | Webinar | Linda K. Adler

Nov. 29 **"Waivers for Field Trips and School Activities"**
BAIS Consortium | Webinar | Grace Chan

Speaking Engagements

Oct. 30 **"Legal Update"**
CAL-ISBOA & ATLIS | Los Angeles | Michael Blacher & Heather DeBlanc

Nov. 6 **"Legal Update Including New Statutes" and "Investigations: 10 Steps to Protect Your School From Litigation"**
Gallagher's Independent School Business Officers Seminar | Santa Clara | Linda K. Adler

Nov. 7 **"Legal Update Including New Statutes" and "Investigations: 10 Steps to Protect Your School from Litigation"**
Gallagher's Independent School Business Officers Seminar | Lafayette | Linda K. Adler

Nov. 8 **"Investigations: 10 Steps to Protect Your School from Litigation" and "Legal Update Including New Statutes"**
Gallagher's Independent School Business Officers Seminar | San Francisco | Donna Williamson

Nov. 13 **"Investigations: 10 Steps to Protect Your School from Litigation" and "Legal Update Including New Statutes"**
Gallagher's Independent School Business Officers Seminar | Glendale | Michael Blacher

Nov. 14 **"Investigations: 10 Steps to Protect Your School From Litigation" and "Legal Update Including New Statutes"**
Gallagher's Independent School Business Officers Seminar | Los Angeles | Julie L. Strom & Michael Blacher

Nov. 15 **"Investigations: 10 Steps to Protect Your School From Litigation" and "Legal Update Including New Statutes"**
Gallagher's Independent School Business Officers Seminar | Orange | Julie L. Strom

Customized Training

Nov. 5 **"Preventing Harassment, Discrimination and Retaliation in the Independent School Environment/Setting"**
Abraham Joshua Heschel Day School | Northridge | Julie L. Strom

Nov. 15 **"Understanding Professional Boundaries"**
Oakwood School | North Hollywood | Michael Blacher

Seminars/Webinars

Nov. 8 **"2019 Legislative Update for California Private Schools"**
Liebert Cassidy Whitmore | Webinar | Linda K. Adler

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