LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

News and developments in education law, employment law and labor relations for School and Community College District Administration

APRIL 2021

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TITLE IX

Office For Civil Rights Launches Review Of Title IX Regulations To Fulfill President Biden's Executive Order Guaranteeing An Educational Environment Free From Sex Discrimination.

As a result of President Biden issuing the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity on March 8, 2021, the U.S. Department of Education Office for Civil Rights (OCR) announced on April 6, 2021 that it is beginning a comprehensive review of the Department's regulations implementing Title IX of the Education Amendments of 1972.

In a letter to students, educators, and other stakeholders, OCR outlined plans to solicit the public's input on the regulations, ultimately leading to possible revisions through a notice of proposed rulemaking.

The letter explained that OCR will hold public hearings to solicit the public's views and insights on the issue of sexual harassment in school environments, including sexual violence, and discrimination based on sexual orientation and gender identity. Then OCR will determine what additional changes to the Title IX regulations and any related agency actions may be necessary to fulfill the Executive Order. OCR ultimately anticipates publishing a notice of proposed rulemaking to amend existing Title IX regulations. During this review process, the existing Title IX regulations, as amended in 2020, remain in effect.

Additionally, OCR will issue a new question-and-answer document in the coming weeks to assist schools, students, and others in better understanding OCR's expectations with respect to compliance with Title IX and its regulations.

NOTE:

Remember, an educational entity's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. If your school, college, or university needs assistance, please contact one of our five offices statewide. Learn more about LCW's new Title IX compliance training program and other resources by visiting this page.

RETIREMENT

State Teachers' Retirement System Properly Construed Definition Of Final Compensation In Education Code §22134.5 To Incorporate The Definition Of Compensation Earnable In §22115.

The City College of San Francisco hired George Rush in 1974. From July 2008 through February 2009, Rush served as head football coach at a salary of roughly $120,000. From March 2009 through February 2010, Rush served in a position that

he described as "associate dean," in which he earned an annual salary of approximately $160,000 for a portion of the period and $151,000 for the other portion. From March 2010 through June 2010, he resumed serving as the head football coach at a salary of approximately $120,000. Rush retired in 2012 after 38 years of service.

After Rush retired, the California State Teachers Retirement System (CalSTRS) informed him that it calculated his pension using the entire 2009–2010 school year as the period of 12 consecutive months in which he had the highest average annual compensation earnable. During this time, Rush served the first eight months as associate dean and the last four months as football coach.

CalSTRS applied Education Code section 22115, subdivisions (c) and (d) in support of its calculation. These subdivisions provide that if a member worked at least 90 percent of a school year at a higher pay rate, CalSTRS must calculate the member's pension as if the member earned all service credit for the year at the higher rate. However, if the member worked less than 90 percent of the year at the higher rate, as Rush did, CalSTRS must calculate the member's pension by using the weighted average of the two salaries. CalSTRS determined the weighted average equaled $141,569.

Rush disagreed with CalSTRS's calculation and argued that Education Code section 22134.5, subdivision (a) defined "final compensation" as "the highest average annual compensation earnable by a member during *any* period of 12 consecutive months." Rush argued his final compensation must be $160,000, which is what he earned as an associate dean during the 12 consecutive months from March 2009 through February 2010. Using this higher compensation amount would increase Rush's monthly pension.

Rush appealed CalSTRS decision pursuant to Education Code section 22219. Following a hearing, an administrative law judge issued a proposed decision denying Rush's appeal, and an appeals committee of the board adopted the decision. Rush filed a petition in the trial court asking the court to reverse the board's decision. After briefing and a hearing, the trial court issued an order denying Rush's petition. Rush again appealed to the Court of Appeal.

Upon examination of the applicable statutes, the Court of Appeal found the Legislature amended Education Code section 22115 in 1997 to define "compensation earnable:" as the annual creditable compensation that a person would earn in a *school year* if they were employed on a full-time basis and worked full time in that position. However, the Legislature enacted Education Code section 22134.5 in 2000. It defined "final compensation" to mean, for a member with 25 years or more of service, "the highest average annual compensation earnable by a member during any period of 12 consecutive months." When Rush retired in 2012, these statutes provided in pertinent part that "final compensation" meant "the highest average annual compensation earnable by a member during any period of 12 consecutive months" (Section 22134.5, subd. (a)), and "compensation earnable" meant "the creditable compensation a person could earn in a school year for creditable service performed on a full-time basis." (Section 22115, subd. (a).) Accordingly, Rush's appeal questioned the interpretation of two seemingly inconsistent provisions of the Education Code and the constitutionality of applying the versions of those statutes in effect when he retired.

The Court of Appeal held that the definition of "final compensation" in Education Code section 22134.5, subd. (a) included "compensation earnable," and Education Code section 22115 defined that term to refer to the compensation earned in a school year. Moreover, Education Code section 22115 is part of the "Definitions" chapter of the Teachers' Retirement Law (Education Code sections 22100–22177). If a provision in the Definitions chapter defined a term, CalSTRS must apply that definition when construing provisions in the Teachers' Retirement Law that use the term. The definition of "compensation earnable" in Education Code section 22115 thus governed the construction of that term as used in Education Code section 22134.5, subd. (a).

Furthermore, Education Code section 22115, subd. (d) included the sentence, "This subdivision shall be applicable only for purposes of determining final compensation." Therefore, Rush's argument that the definition of "compensation earnable" in Education Code section 22115 did not apply to the determination of final compensation was at odds with the express provisions of the statute. The Court of Appeal found CalSTRS's interpretation was within the range of reasonable statutory construction, and thus the Court deferred to its expertise.

Rush further argued that CalSTRS's determination impaired his vested contractual right to a pension calculated pursuant to Education Code section 22134.5, subd. (a) as enacted in 2000. However, the Court of Appeal found the Legislature's enactment of Education Code section 22134.5, subd. (a) did not reduce any benefits Rush was promised prior to its adoption, so CalSTRS did not unconstitutionally impair an obligation of a contract.

Ultimately, the Court of Appeal denied Rush's motion and upheld CalSTRS's calculation of Rush's pension.

Rush v. State Teachers' Ret. Sys. (2021) 62 Cal.App.5th 151.

FIRST AMENDMENT

School District Did Not Violate Constitution Or Title VII In Football Coach Prayer Case.

Bremerton School District (BSD) employed Joseph Kennedy as a football coach at Bremerton High School (BHS) from 2008 to 2015. Kennedy is a practicing Christian, and his religious beliefs required him to give thanks through prayer at the end of each game by kneeling at the 50-yard line. Because Kennedy's religious beliefs occurred on the field where the game was played immediately after the game, spectators including students, parents, and community members would observe Kennedy's religious conduct. While Kennedy initially prayed alone, a group of BHS players soon asked if they could join him. Over time, the group grew to include the majority of the team. Kennedy's religious practice also evolved and he began giving short speeches at midfield after games with participants kneeled around him.

BSD first learned that Kennedy was praying on the field in September 2015, when an opposing team's coach told BHS' principal that Kennedy had asked his team to join him in prayer on the field. After learning of the incident, the Athletic Director spoke with Kennedy and expressed disapproval in the religious practice. In response, Kennedy posted on Facebook "I think I just might have been fired for praying." Subsequently, BSD was flooded with thousands of emails, letters, and telephone calls from around the Country regarding Kennedy's prayer.

BSD's discovery of Kennedy's 50-yard line prayers prompted an inquiry into whether Kennedy was complying with its Religious-Related Activities and Practices policy. That policy provided that school staff should not encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or other devotional activity. BSD's investigation revealed that the coaching staff received little training regarding BSD's policy, so the superintendent sent Kennedy a letter advising him that he could continue to give inspirational talks, but they must remain entirely secular in nature. The letter also noted that student religious activity needed to be entirely student-initiated; Kennedy's actions could not be perceived as an endorsement of that activity; and that while Kennedy was free to engage in religious activity, it could not interfere with his job responsibilities and must be physically separate from any student activity. While Kennedy temporarily prayed after everyone else had left the stadium, he alleged he soon returned to his practice of praying immediately after games. However, BSD received no further reports of Kennedy praying on the field, and BSD officials believed he was complying with its directive.

On October 14, 2015, Kennedy wrote a letter to BSD through his lawyer announcing he would resume praying on the 50-yard line immediately after the conclusion of the October 16, 2015 football game. Kennedy's intention to pray on the field was widely publicized through Kennedy and his representatives, and BSD arranged to secure the field from public access. Following the game, Kennedy prayed as he had indicated he would do, with a large gathering of coaches and players around him. Members of the public also jumped the fence to join him, resulting in a stampede. On October 23, 2015, BSD sent Kennedy a letter explaining that his conduct at the October 16th game violated BSD's policy. While BSD offered Kennedy a private location to pray after games or suggested that he pray after the stadium had emptied, Kennedy responded the only acceptable outcome would be for BSD to permit Kennedy to pray on the 50-yard line immediately after games. Kennedy continued his behavior in violation of BSD's directives. BSD placed him on paid administrative leave on October 26, 2015. During this time, BSD employees felt repercussions due to the attention Kennedy gave the issue, and many were concerned for their safety. Kennedy did not apply for a coaching position for the following season, but he initiated a lawsuit against BSD asserting his First Amendment and Title VII rights were violated.

After significant litigation and numerous appeals, the district court eventually entered judgment in BSD's favor finding that the risk of constitutional liability associated with Kennedy's religious conduct was the sole reason BSD suspended him. The district court also concluded that BSD's actions were justified due to the risk of an Establishment Clause violation if BSD allowed Kennedy to continue with his religious conduct. Kennedy appealed.

On appeal, the Ninth Circuit first considered Kennedy's free speech claim. The Court noted two factors were at issue: 1) whether Kennedy spoke as a private citizen or public employee; and 2) whether BSD had adequate justification for treating Kennedy differently from other members of the general public. If Kennedy spoke as a public employee during his religious activity, his speech would not be constitutionally protected. Similarly, if BSD had adequate justification for treating Kennedy differently from other members of the public, Kennedy's claim would also fail.

As to the first issue, the court noted that when public employees make statements during their official duties, the employees are not speaking as citizens for First Amendment purposes. Thus, the Constitution does not insulate their communications from employer discipline. The Ninth Circuit concluded that Kennedy spoke as a public employee when he was praying on the 50-yard line. Kennedy only had access to the field because of his

employment, and he practiced his religion during a time when he was generally tasked with communicating with students. Kennedy also insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field. Moreover, Kennedy repeatedly acknowledged, and behaved as if, he was a mentor to students specifically at the conclusion of the game.

As to the second issue, the court reasoned that even assuming Kennedy spoke as a private citizen, BSD could still prevail because its justification for treating Kennedy differently from other members of the general public was adequate. Under the Establishment Clause, "Congress shall make no law respecting an establishment of religion." The court noted that it needed to consider the context of Kennedy's actions. Specifically, Kennedy engaged in a media blitz and his religious practice evolved to include a majority of the team. In addition, Kennedy prayed on the 50-yard line after the October 16th game despite that BSD made clear that the field as not open to the public. Thus, the court concluded that had BSD rescinded its directive and allowed Kennedy free rein to pray on the 50-yard line, the public would have perceived that the prayer had BSD's stamp of approval.

Next, the Ninth Circuit addressed Kennedy's free exercise claim. While Kennedy argued that BSD's directive telling him his speeches needed to be secular in nature violated his rights under the Free Exercise Clause, the court disagreed. The court reasoned that BSD's directive and accompanying BSD policy were narrowly tailored to BSD's interest in avoiding a violation of the Establishment Clause. For example, BSD tried repeatedly to work with Kennedy to develop an accommodation that would avoid violating the Establishment Clause, but Kennedy declined to cooperate in that process and insisted that the only acceptable outcome would be praying immediately after the game on the 50-yard line in view of students and spectators.

Finally, the court analyzed Kennedy's claims pursuant to Title VII. Title VII provides "an unlawful employment practice is established when the complaining party demonstrates that . . . religion . . . was a motivating factor for any employment practice." The Ninth Circuit, however, concluded that Kennedy could not establish his failure to rehire, disparate treatment, failure to accommodate, and retaliation claims. Regarding his failure to rehire claim, Kennedy could not show he was adequately performing his job as is required under the law. Instead, Kennedy refused to follow BSD policy and conducted numerous media appearances that led to spectators rushing the field after the October 16th game in disregard of BSD's responsibility to student safety. Kennedy's disparate treatment claim failed because he could not show BSD treated him differently than similar situated employees. This was because Kennedy's conduct was clearly dissimilar to that of other assistant coaches. With respect to his failure to accommodate claim, BSD met its burden in establishing that accommodating Kennedy's religious practices on the 50- yard line would cause an undue hardship. Lastly, with respect to his retaliation claim, BSD had a legitimate reason for placing Kennedy on administrative leave because he made it clear he would continue to pray on the 50-year line immediately following games.
For these reasons, the Ninth Circuit concluded the district court properly entered judgment in BSD's favor on Kennedy's claims.

Kennedy v. Bremerton Sch. Dist., (2021) 991 F.3d 1004.

NOTE:

LCW previously reported on an earlier decision in this case in the October 2017 Education Matters.

University Officials Not Immune From Personal Liability Based On Decisions Creating Viewpoint Discrimination Against Religious Student Organization.

The University of Iowa permits students to form student organizations, and it registers student organizations under its "Registration of Student Organizations" policy. To become a Registered Student Organization (RSO) that receives benefits from the University, the group must meet certain criteria, submit specified information to the University, and abide by the University's policies and procedures.

RSOs must abide by the University's Human Rights Policy, which prohibits discrimination based on protected classes, as defined by the Policy. At the same time, the University's RSO policy allow RSOs to exercise free choice of members as long as it also complies with the Human Rights Policy. Despite this, the University has approved at least six RSOs that expressly limit membership or leadership to individuals in a certain protected class.

In 2017, a student filed a complaint with the University alleging that Business Leaders in Christ (BLinC), a religious organization and RSO that registered in 2014, denied him a leadership position because he was "openly gay." The University investigated the complaint and sustained the allegation despite BLinC's president explaining that BLinC denied the student a leadership position because the student "disagreed with, and would not agree to live by BLinC's religious beliefs."

The University informed BLinC that it could remain an RSO only if it understood the Human Rights Policy and complied with it in the future. BLinC subsequently

revised its constitution and added a "Statement of Faith" that stated sexual relationships are limited to marriage between a man and woman and people must embrace "their God-given sex." BLinC's revised constitution also required its leaders to sign the Statement of Faith.

The University continued to find that BLinC remained in violation of its Human Rights Policy despite these changes and warned BLinC that it could lose its status as an RSO. The University held that the Statement of Faith had the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity, both of which are protected classifications. BLinC appealed to another University official who affirmed the original decision. The University subsequently revoked BLinC's RSO status.

BLinC filed a lawsuit against the University and University officials in December 2017 alleging the University violated its First Amendment rights to freedom of speech and expressive association, freedom of assembly, free exercise of religion, the First Amendment's Religion Clauses, the Fourteenth Amendment's Equal Protection Clause, the federal Higher Education Act, the Iowa Human Rights Act, and various provisions of the Iowa Constitution. BLinC sought reinstatement as an RSO and a finding that the University officials were personally liable for violating BLinC's constitutional rights. The trial court issued an injunction against the University requiring it to restore BLinC's RSO status during the pendency of the litigation.

While the litigation was pending, the University conducted a review of all RSOs to ensure compliance with the Human Rights Policy and other RSO requirements. University staff involved in this review were told that RSO membership could not "be contingent on the agreement, disagreement, subscription to, etc., of stated beliefs/purposes which are covered in the Human Rights Clause."

The trial court ruled in favor of BLinC on its free-speech, free-association, and free-exercise claims, and held that the University violated BLinC's constitutional rights. On BLinC's free-speech and expressive-association claims, the trial court held that the University prevented BLinC from expressing its viewpoints on protected characteristics while permitting other student groups with different views to express those viewpoints. The trial court also held that the University officials infringed on BLinC's religious exercise for similar reasons but granted the University officials qualified immunity from personal liability for all of the violations because it concluded that the law was not clearly established. BLinC appealed the decision regarding qualified immunity for the University officials.

On appeal, BLinC argued the University officials should be personally liable, or not have qualified immunity, because their actions violated clearly established law. The University officials argued the law was not clearly established regarding the uneven enforcement of a nondiscrimination policy against registered student organizations on a university campus, which was the case here.

Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To determine whether the law was clearly established at the time that the University officials violated BLinC's constitutional rights of free speech, expressive association, and free exercise, the Court of Appeal examined previous opinions issued by the U.S. Supreme Court, the Court of Appeals for the Eighth Circuit, and other Courts of Appeal. The Court of Appeals found that the University's recognition of RSOs created a limited public forum—property limited to use by certain groups or dedicated solely to the discussion of certain subjects. The Court of Appeals relied on Supreme Court cases that held that in limited public forums, (1) a public college could not restrict speech or association simply because it found the views expressed by any group to be abhorrent, (2) a university generally may not withhold benefits from a student group because of the group's religious outlook, and (3) a public college could not single out religious organizations for disadvantageous treatment in the forum. Furthermore, the Court of Appeals relied on similar holdings in its own opinions and in cases from other Courts of Appeals.

The Court of Appeals held that the law was clearly established regarding free speech and expressive association in limited public forums as was the case here, and a college or university is prohibited from engaging in viewpoint discrimination against speech otherwise allowed in a limited public forum. Accordingly, the Court of Appeals held that the University officials did not have qualified immunity and may be personally liable.

The Court of Appeal rejected BLinC's claim that the University officials should not have qualified immunity in the organization's free-exercise claims. It held that the law was not clearly established at the time that the University officials' conduct violated BLinC's free-exercise rights.

Bus. Leaders In Christ v. Univ. of Iowa (2921) 991 F.3d 969.

NOTE:

This case is from the United States Court of Appeals for the Eighth Circuit. This case is not binding in California, which is in the Ninth Circuit. But it does provide some insight into how one federal appellate court interpreted qualified immunity in cases involving the First Amendment.

FIRM VICTORIES

Sergeant's Demotion Upheld Due To Misconduct And Abrasive Management Style.

LCW Associate Sue Ann Renfro and Partner Jesse Maddox successfully represented a city in a peace officer's disciplinary appeal.

In 2017, a police sergeant was the subject of a grievance that a subordinate officer filed. An independent investigation sustained findings that the sergeant was discourteous, used obscene language, made disparaging remarks, and falsified a report. The chief of police then demoted the officer from the rank of sergeant to officer.

The officer appealed his demotion to the city's three-member Commission, which found there was just cause for the demotion. However, the Commission found the discipline was excessive and restored the officer to the position of corporal. The officer then filed a petition for writ of administrative mandate with the trial court to challenge the demotion to corporal. The trial court denied the writ petition, holding the weight of the evidence supported the Commission's findings.

The trial court found that sufficient evidence, including testimony from multiple department members, showed that the officer was "seriously lacking" interpersonal skills and that his abrasive management style frustrated the agency's efficiency and mission. The court found that evidence also showed that the officer regularly issued instructions and orders to subordinates in an "abrupt, rude and inappropriate manner" and at times in the presence of citizens or other officers. The court noted that the officer's intimidating tactics as a supervisor resulted in the mishandling of an investigation. The officer was repeatedly advised to improve how he communicated with other officers; he even received a counseling session for berating another officer in front of others.

Based on these facts, the trial court held that there was no abuse of discretion in demoting the officer to corporal.

NOTE:

The trial court indicated that the department could expect more from the former sergeant because of his supervisory responsibilities. This fact, coupled with the counseling that the sergeant received, showed that his demotion to corporal was an appropriate penalty.

Fire Captain's Termination Upheld Following Off-Duty Assault.

LCW Associate Tony Carvalho successfully represented a city in a termination appeal involving a fire department captain.

In October 2018, the captain and his wife attended a birthday party at a colleague's home. In attendance were the friends and family of the hosts, as well as other fire department personnel. The captain's brother, who was another fire department employee and with whom the captain had a fraught personal relationship, also attended the party with his wife. During the party, the captain's brother made a derogatory comment about the captain's wife, which resulted in the captain striking his brother.

The city determined that the captain's actions during the party violated multiple department policies, including policies on proper conduct and good order. Following a pre-disciplinary meeting, the city terminated the captain.

The captain appealed his termination and alleged that his brother was not a credible witness in light of his brother's inconsistent statements at the party about the captain's wife, as well as other incidents unrelated to the party. The captain claimed he did not strike his brother first, and that his actions were in defense of his wife--who the captain claimed was in imminent physical danger from his brother. The captain also presented evidence to support lesser discipline, including his lengthy, discipline-free tenure with the city and testimony from other fire department personnel about his character.

The hearing officer found that even assuming the captain's brother was not a credible witness, the weight of the remaining evidence from other witnesses supported that the captain struck the first blow while his brother was turned away from him. As such, no persuasive evidence indicated that the captain had reason to believe he or his wife were at risk of imminent danger at the time of the assault. The hearing officer also found that the act occurred in front of members of the public, including young children at the party.

The hearing officer upheld the termination in light of the captain's responsibility to set a good example for his community, whether on-duty or off-duty, particularly given his supervisory rank within the fire department.

The hearing officer concluded the captain's actions were the antithesis of what the public expects from fire department personnel.

NOTE:

Fire safety officers have a position of trust with the public. These officers, particularly at the supervisory level, are held to high standards of conduct, whether on-duty or off-duty. The off-duty misconduct in this case had a nexus to the job because the assault was on a fellow firefighter and occurred at a party attended by the public and other department firefighters.

DISCRIMINATION

District Court Was Wrong To Dismiss University Professor's U.S. Equal Pay Act Claim.

Jennifer Freyd is a Professor of Psychology at the University of Oregon (University) and a leader in the field on the psychology of trauma. At the University, Freyd is the principal investigator at the Freyd Dynamics Laboratory where she conducts empirical studies related to the effects of trauma and is responsible for running the laboratory and supervising both doctoral candidates and undergraduate students. Freyd is the editor of the *Journal of Trauma & Dissociation* and has served on the editorial board for many other journals. In addition, Freyd has served in a variety of roles at the University, and consults for other entities.

The University adjusts tenured faculty salaries using two different mechanisms. First, a merit raise is based on job performance and the contributions made in the areas of research, teaching, and service. Second, a retention raise is based on whether the faculty member is being recruited by another academic institution. To determine whether to grant a retention raise, the University considers many factors, including: the faculty member's productivity and contribution to the University; if the faculty member's departure is imminent in the absence of a raise; any previous retention increases; implications for internal equity within the unit; and the strategic goals of the University. While Freyd received initial inquiries from other universities, she never had a retention negotiation nor received a retention raise.

In 2014, as part of an unrelated public records request, Freyd unintentionally received salary information for the Psychology Department faculty. That information showed she was making between $14,000 and $42,000 less per year than four male colleagues with comparable rank and tenure. Each of those four men had received retention raises or had at least one retention negotiation. Freyd conducted her own regression analysis on the data and noticed a marked disparity in pay between the genders. Freyd and two other female psychology professors then conducted a second regression analysis, which presented similar results.

In the spring 2016, the Psychology Department conducted a mandatory annual self-study. The self-study revealed an annual average difference of $25,000 in salary between male and female professors. The study concluded this discrepancy appeared to have emerged mostly as a result of retention raises. Indeed, of the 20 retention negotiations from 2006 through 2016, only four affected female faculty and only one of the successful retention cases involved a woman.

Several months later, the Department Head conducted his own regression analysis and sent his results to the Dean and Associate Dean of the College of Arts and Sciences. The Department Head recommended the University address its "most glaring" inequity case –Freyd. But, the Dean and Associate Dean concluded Freyd's compensation "was not unfairly, discriminatorily, or improperly set." Accordingly, she was denied a raise.

Freyd sued the University, the Dean. and Assistant Dean alleging, among other claims, violations of the U.S. Equal Pay Act, Title VII of the Civil Rights Act, and Title IX. The district court found in favor of the University because Freyd could not show that she and her comparators performed substantially equal or comparable work. The district court also concluded that Freyd didn't have sufficient evidence of disparate impact or discriminatory intent, and that the University did show its salary practices were job related and a business necessity. Freyd appealed.

The U.S. Equal Pay Act prohibits wage discrimination based on sex. The Act requires a female employee to show that a male employee is paid different wages for equal work in jobs that are "substantially equal."

On appeal, the Ninth Circuit concluded the district court was wrong to rule in the University's favor on Freyd's Equal Pay Act claim. Specifically, the court concluded that a reasonable jury could find that Freyd and her comparators perform a "common core of tasks" and do substantially equal work. For example, Freyd and three of the comparators are all full professors in the Psychology Department who conduct research, teach classes, advise students, serve actively on University committees, and participate in relevant associations and organizations. While their duties may not have been identical, the court reasoned that their responsibilities were not so unique that they could not be compared for purposes of the Equal Pay Act.

The Ninth Circuit also found that the district court erred in dismissing Freyd's Title VII disparate impact claim. To establish disparate impact under Title VII, an employee must show that a seemingly neutral employment practice has a significantly discriminatory impact on a protected group. The employee also must establish that the challenged practice is: not job related; or is inconsistent with business necessity. Here, the court noted that Freyd challenged the practice of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority. Further, because of numerous factors related to gender, female faculty may be less willing to move and thus less likely to entertain an overture from another institution. It also noted that Freyd had significant evidence that the University's practices caused a significant discriminatory impact on female faculty. Freyd's evidence included the statistical analysis of an economist who concluded female professors earned $15,000 less than male professors, as well as the University's own self-study data. Finally, the court noted that Freyd may be able to establish the University's retention raise practice was not a business necessity because she offered an alternative practice that may be equally effective in accomplishing the University's goal of retaining talented faculty.

However, the Ninth Circuit determined that the district court was right to rule in the University's favor with respect to Freyd's Title VII and Title IX disparate treatment claims. Regarding Freyd's TVII disparate treatment claim, the court noted that because equity raises and retention raises are not comparable, it could not say that Freyd's comparators were treated "more favorably" than she was. Similarly, Freyd's Title IX disparate treatment claim failed because Freyd presented no evidence of intentional discrimination.

The Ninth Circuit remanded the case back to the district court for further proceedings on Freyd's Equal Pay Act and disparate treatment claims.

Freyd v. Univ. of Oregon (2021) 990 F.3d 1211.

NOTE:

This case involved the US Equal Pay Act, which prohibits wage discrimination only on the basis of sex. California's Equal Pay Act (Labor Code sections 432.3 and 1197.5) prohibits wage discrimination on the basis of sex, race, and ethnicity. California's law provides employees greater protection than the US Equal Pay law because it prevents an employer from relying on an employee's salary history to justify a wage disparity. Conducting an equal pay audit can ensure that all employees are paid similarly for substantially equal or similar work.

CALIFORNIA PUBLIC RECORDS ACT

Disclosing Peace Officer Records Related To Dishonesty Was Protected Activity Under Anti-SLAPP Statute.

In 2018, the City of Rio Vista (City) terminated police officer John Collondrez after an investigation found he was dishonest and committed misconduct, including making false reports. Collondrez appealed his termination. Prior to his appeal hearing, the parties' reached a settlement. The City agreed to pay $35,000 to Collondrez and he agreed to resign from his employment, effective December 2017. The settlement agreement stated that the City would maintain all disciplinary notices and investigation materials related to Collondrez's employment in his personnel file and that those records would only be released as required by law or court order. The agreement also stated the City would notify Collondrez of any request to release his personnel records.

In January 2019, the City received a number of media requests under the California Public Records Act (CPRA) for records related to Collondrez's disciplinary action. The City produced responsive records from Collondrez's personnel file and gave him prior notice of some, but not all of the disclosures. The media then reported information from the disclosed records, and Collondrez's subsequent employer (Uber) terminated his employment in February 2019 in light of his prior misconduct.

Collondrez then sued the City and Police Chief Dan Dailey for breach of contract, invasion of privacy, interference with prospective economic advantage, and intentional infliction of emotional distress. The City moved to strike the complaint under California's anti-SLAPP statute, on the grounds that it was required to disclose Collondrez's records pursuant to Penal Code section 832.7 and the CPRA.

A court examines an anti-SLAPP motion, which allows for the early dismissal of a case that thwarts constitutionally-protected speech, in two parts: (i) whether a defendant has shown the challenged cause of action arises from protected activity; and (ii) whether the plaintiff has demonstrated a probability of prevailing on the claim. Under this framework, the trial court granted the City's motion to strike in part, finding that Collondrez had shown a probability of prevailing on

his causes of action for breach of contract and invasion of privacy, but not on his other two causes of action. Both parties appealed, and the California Court of Appeal affirmed in part and reversed in part.

As to the first element of the anti-SLAPP framework, Collondrez argued on appeal that his causes of action did not arise from protected activity because the essence of his complaint was not the release of his personnel information, but rather the City's failure to give him pre-release notice of disclosure in accordance with the settlement agreement. The Court of Appeal disagreed, holding that the complaint arose from the protected speech, namely, the City's release of Collondrez's personnel information to media outlets.

As to the second element, the Court of Appeal held Collondrez failed to show a probability of prevailing on the merits of any cause of action against the City because the City was compelled to produce his personnel information regarding any "sustained findings" of officer dishonesty pursuant to Penal Code section 832.7 and the CPRA. Notably, the Court of Appeal disagreed with Collondrez's argument that the settlement agreement meant that there was no "sustained finding" of officer dishonesty against him, and that therefore, the City was not compelled to disclose his records. The Court of Appeal found that a "sustained finding" is established when an officer has had the opportunity to appeal, and not solely when an appeal is actually completed. Collondrez was provided the opportunity to appeal his termination, and therefore his records concerned a "sustained finding" of dishonesty and were properly disclosed as required by the CPRA requests.

Since Collondrez's entire complaint against the City was based on a claim of wrongful disclosure of his records, the Court of Appeal held the City's anti-SLAPP motion should have been granted in full and decided in favor of the City.

Collondrez v. City of Rio Vista (2021) 61 Cal.App.5th 1039.

NOTE:

Anti-SLAPP motions are a powerful tool for early dismissal of lawsuits involving issues of protected speech. This case affirms that the disclosure of peace officer records pursuant to a CPRA request is protected speech that can be protected under the anti-SLAPP statute. This case is important because the Court of Appeal held that a "sustained finding" of dishonesty that triggers a CPRA disclosure is established when an officer has had the opportunity to appeal, and not solely when an appeal is actually completed. As a result, a settlement agreement that is completed after the officer has an opportunity to appeal discipline does not prevent the discovery of certain peace officer records.

Certain Peace Officer Records Created Before 2019 Must Be Disclosed In Response To CPRA Requests.

On January 1, 2019, Senate Bill 1421 (SB 1421) went into effect, which amended Penal Code section 832.7 to allow disclosure of peace officer records related to officer-involved shootings, serious use of force and sustained findings of sexual assault or serious dishonesty under the California Public Records Act (CPRA). Previously, these records could only be accessed through a *Pitchess* motion using the judicial process laid out in Evidence Code sections 1044 and 1045.

Following the passage of SB 1421, the Ventura County Deputy Sheriffs' Association (Association) sued the County of Ventura (County) and the Sheriff of Ventura County for a court order confirming that Section 832.7 only required disclosure of peace officer records for conduct occurring after January 1, 2019.

While the case was pending in the trial court, the California Court of Appeal's First District issued an opinion in *Walnut Creek Police Officers' Association v. City of Walnut Creek (Walnut Creek)*, which held that SB 1421 required the disclosure of peace officer records created prior to January 1, 2019. Despite the *Walnut Creek* decision, the trial court found for the Association and issued a permanent injunction preventing the County from disclosing peace officer records that were created prior to 2019 in response to CPRA requests.

The County's Public Defender intervened and appealed to the Court of Appeal's Second District, alleging the trial court was bound by the *Walnut Creek* decision. On appeal, the Association argued SB 1421 cannot retroactively divest peace officers of their right to confidentiality in records. The Court of Appeal disagreed with the Association and reversed the trial court's judgment.

Relying on the *Walnut Creek* decision, the Court of Appeal found that Section 832.7 adequately safeguards an officer's right to privacy by only requiring disclosure of records under limited circumstances, including instances of egregious misconduct. The Court of Appeal also found that the Legislature intended SB 1421 to apply to pre-2019 records in accordance with its stated goal of increasing transparency regarding incidents of peace officer misconduct.

For these reasons, the Court of Appeal held that the trial court erred in failing to follow *Walnut Creek*, and held SB 1421 applies retroactively to require the disclosure of responsive records created prior to 2019.

Ventura County Deputy Sheriffs' Association v. County of Ventura (2021) 61 Cal.App.5th 585.

NOTE:

This case again affirms that SB 1421 applies retroactively to peace officer records created prior to January 1, 2019. LCW attorneys can help agencies comply in full with their CPRA obligations.

LABOR RELATIONS

PERB Concluded City Did Not Establish Good Cause For Its Untimely Answer.

Alfonso Garcia filed an unfair practice charge against the City and County of San Francisco alleging the City interfered with his protected rights and retaliated against him for his union activities by placing him on paid administrative leave and reassigning him to a new worksite.

On December 6, 2019, the Public Employment Relations Board's (PERB's) Office of the General Counsel (OGC) issued a formal complaint to the City. PERB regulations required the City to file an answer within 20 calendar days from the date the complaint was served. That same day, the OGC also issued two complaints to the City in companion cases and dismissed eight other charges Garcia and another employee had filed against it. While the City filed answers to the complaints in the companion cases, it did not file an answer to Garcia's charge.

On April 30, 2020, the City filed a motion to dismiss all three related cases, contending the complaint allegations had already been resolved through binding arbitration under with the collective bargaining agreement between the City and the union. On May 8, 2020, the City filed an answer to Garcia's complaint. Garcia filed an opposition to the motion to dismiss, arguing the City's answer and motion were untimely.

Subsequently, the Administrative Law Judge (ALJ) asked the City's counsel to provide good cause as to why the City's late answer should be excused. In response, the City's counsel submitted a declaration indicating she filed a late answer because she had not realized the City did not respond to the charge. She also noted that: the complaint was nearly identical to the complaints in the companion cases; the charging parties initially filed 12 PERB charges within a short period of time; and one of her colleagues had handled filing the answers because she was preparing for consecutive jury trials. Accordingly, the City argued that the failure to timely file an answer was an oversight and there was no prejudice to Garcia.

Nevertheless, the ALJ issued a proposed decision concluding the City failed to establish good cause to excuse the late filing. Thus, the ALJ deemed the allegations in the complaint and underlying unfair practice charge to be true, and issued a proposed remedial order. The City timely filed exceptions to the proposed decision.

In resolving the exceptions, PERB first affirmed the ALJ's conclusion that the City failed to establish good cause. In general, good cause to excuse a late filing exists if the delay is short and based on circumstances that were either unanticipated or beyond the party's control. Further, regardless of the particular reason, the party must provide a "reasonable and credible" explanation or show it at least made a conscientious effort to comply with the filing deadline. PERB reasoned the City's counsel could have filed the answer on time "had she exercised reasonable diligence in reviewing the case documents received from PERB" and that a heavy caseload provides no excuse for failing to do so. Thus, PERB determined the City could not establish good cause.

Next, PERB concluded that the ALJ did not improperly add any allegation to the complaint that the City reassigned Garcia to a new facility because he exercised Meyers-Milias-Brown Act (MMBA) rights. PERB noted that while the complaint did not expressly allege the City reassigned Garcia because of his protected activity, it nonetheless contended the City took adverse employment action against him by reassigning him to a different facility. Further, in its motion to dismiss, the City acknowledged that Garcia alleged the City retaliated against him for his protected activities by placing him on administrative leave and reassigning him. For these reasons, PERB concluded the City understood the complaint to encompass the retaliatory reassignment allegation and the ALJ did not err in addressing it.

Finally, PERB concluded that the ALJ's remedial order was proper. In the ALJ's proposed order, the ALJ ordered that the City make Garcia whole for any losses he incurred as a result of the misconduct; reinstate Garcia to his prior position or to a substantially similar position; post copies of the Notice to all work locations where notices are customarily posted; and cease and

desist from imposing reprisals, discriminating against, or interfering with the exercise of protected MMBA rights.

While the City argued this proposed order was overbroad, PERB disagreed. PERB reasoned that the notice requirement is educational for the represented employees and that the purpose of a cease and desist order is to prohibit future unlawful conduct. Further, PERB reasoned that Garcia should have the opportunity to establish any financial losses in compliance proceedings, and that the City's authority to reassign its employees to particular worksites did not prevent PERB from ordering the City to offer Garcia reinstatement to his former, or a substantially similar, position.

City and County of San Francisco, PERB Dec. No. 2757-M (2021).

NOTE:

This decision shows that PERB strictly enforces filing deadlines, and the good cause requirements for excusing failure to meet filing deadlines.

CONSORTIUM CALL OF THE MONTH

Question: A Human Resources manager contacted LCW to ask whether an employee, who used a sick day because he had symptoms related to his COVID-19 vaccine, could use COVID-19 Supplemental Paid Sick leave to cover the day he had already taken in February 2021.

Answer: LCW advised the manager that under Senate Bill (SB) 95, one of the qualifying reasons for the new COVID-19 Supplemental Paid Sick Leave is that the employee was having symptoms related to a COVID-19 vaccine that prevented the employee from being able to work or telework. However, since the sick day was already paid, there is no obligation to retroactively recode the employee's sick leave usage. If this leave occurs after March 29, 2021, the leave qualifies for COVID-19 Supplemental Paid Sick Leave.

DID YOU KNOW...?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- On March 29, 2021, Senate Bill (SB) 95 went into effect, codifying new obligations on public agency employers to provide COVID-19 Supplemental Paid Sick Leave. The new law applies to employees who are unable to work or telework because of anyone of several qualifying reasons. SB 95 provides a new employee entitlement to such leave retroactivity to January 1, 2021 and effective through September 30, 2021. See LCW's Special Bulletin here.

- On March 11, 2021, President Biden signed House Resolution (HR) 1319, the American Rescue Plan Act. The Act provides aid to local governments through the $130-billion Coronavirus Local Fiscal Recovery Fund and extends CARES Act unemployment provisions. See LCW's Special Bulletins on this topic here.

- Cal/OSHA regulations require a 14-day quarantine period following a known COVID-19 exposure. (*See* 8 C.C.R. 3205(c)(10)(B).) Therefore, LCW recommends that employers continue to adhere to the Cal/OSHA regulatory requirements and require that employees with close contact exposures observe the full 14-day quarantine period.

Firm Publications

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

Partner Brian P. Walter was quoted in the April 6 issue of *WorldatWork's* Workspan Daily section in a piece highlighting potential increases in lawsuits involving employees who spend "off the clock" time taking part in health screening and/or other tasks designed to help ensure a safe workplace.

In a recent *KFI News* segment with reporter Corbin Carson, Partner Mark Meverhoff discussed whether police officers have First Amendment rights that allow them to make comments on social media. While police officers do indeed have personal free speech rights, Mark shared that there is a significant difference between personal free speech and speech of public concern. He indicated that statements about the public should not cause a level of disruption that impacts the officer's department (i.e. offensive comments or those that advocate violence), and that new laws call for more diversity/bias training and expanded background checks to avoid hiring officers that engage in behavior that may negatively impact their departments.

Managing Partner Scott Tiedemann recently discussed details of the high-profile Kelly Thomas case with *KFI News* reporter Corbin Carson. As attorney for the City of Fullerton, which prevailed, Scott said it has taken nine years of lawsuits and appeals to uphold terminations of police officers involved in the use of force against Thomas. "It's really hard in the moment when there are protests—hundreds … thousands of people protesting saying 'The officers need to be fired,'" said Scott. "If you cave into that pressure and you don't do things right on the front end, you can find yourself years later having your decisions overturned." Scott explained that procedural mistakes can cost millions in back pay and rob the public of the justice they are demanding in this type of case, and he shared that the last two police officers involved in this case recently abandoned their lawsuits in which they unsuccessfully tried to be reinstated to their positions in law enforcement..

Partner Mark Meverhoff recently took part in a *KNX 1070 Newsradio* segment with reporter Craig Fiegener in which Mark discussed a new law that will require public safety applicants for employment in California to be screened for implicit or explicit biases. This law will go into effect in January 2022 and puts pressure on public safety departments to determine how best to conduct such screening. Mark also discussed the issue of public safety departments limiting the private speech of police personnel that is so prevalent amidst high-profile social and political issues.

New to the Firm

Brian Dierzé is an Associate in the Los Angeles office of LCW where he advises clients on all aspects of labor and employment law. Brian is skilled in contract review, in-depth research into legal and legislative issues and provides guidance to LCW public sector clients..

He can be reached at 310.981.2731 or bdierze@lcwlegal.com.

Daniel Seitz is an Associate in the Los Angeles office of LCW where he advises clients on all aspects of labor and employment law, retirement and labor relations issues. He is experienced in law and motion and appellate practice and works with the firm's public sector clients on discipline issues, retirement and labor relations matters, and compliance with state and federal COVID-19 laws and regulations.

He can be reached at 310.981.2316 or dseitz@lcwlegal.com.

Joel Guerra is an Associate in LCW's Sacramento office where he advises clients on all manner of employment-related matters. He is experienced in defending harassment, discrimination, retaliation, and wrongful termination claims; appearing before administrative tribunals and state court writ departments to resolve disability retirement claims; and settling wage and hour class, collective, and representative actions.

He can be reached at 209.617.5549 or jguerra@lcwlegal.com.

Title IX Training Series for California Community Colleges

LCW invites administrators from across your community college district—Title IX Coordinators, academic affairs, student discipline, human resources, facilities, risk management, DSPS, safety & police, athletics, and other employees involved in the Title IX complaint process—to join us in discussing legal requirements and operational strategies for compliance with Title IX.

After a decade of changing guidance, the U.S. Department of Education, Office of Civil Rights issued new Title IX regulations on May 6, 2020. LCW's three-part training will help district administrators and Title IX staff analyze the new regulations, which became effective on August 14, 2020, and identify strategies and best practices for implementing the regulations in California community college districts.

This three-part training will provide:

- **A detailed discussion of the requirements of the Title IX complaint process from the initial report through investigations and hearing to the final appeal;**
- **An analysis of significant changes in the Title IX regulations, such as the definitions of sexual harassment and formal complaints;**
- **A discussion on how the new Title IX regulations affect a district's responsibilities under California law;**
- **Best practices to ensure compliance and efficacy; and**
- **Interactive opportunities for participants to test their understanding.**

Part 1: Title IX Obligations Before the Investigation

May 14, 2021
9am - 12pm

- Strategies to assess reports of sexual harassment and determine whether the report triggers a district's Title IX obligations and complaint process; and
- Discussion of the complaint process before an investigation, including emergency removals, administrative leave, complaint dismissals, confidential requirements, and the role of advisors.

Part 2: Title IX Informal Resolutions and Investigations

June 2, 2021
9am - 12pm

An overview of informal resolution options; and discussion of requirements for investigations, including notice requirements, relevancy determinations, facilitating evidence review, and sharing investigative reports.

Part 3: Title IX Hearings and Determinations

July 9, 2021
9am - 12pm

- An interactive review of the requirements for live Title IX hearings, including the role of an advisor, conducting cross examination, and the role of a Decision-Maker;
- Strategies to troubleshoot during the live hearing and prepare the written determination of responsibility; and
- Discussion on imposing discipline and finalizing appeals.

Click Here for More Information.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

May 7 **"Going Outside the Classified Service: Short-Term Employees, Substitutes and Professional Experts"**
Central CA CCD ERC | Webinar | Amy Brandt

May 21 **"Navigating the Crossroads of Discipline and Disability Accommodation"**
SCCCD ERC | Webinar | Jennifer M. Rosner

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training.

Apr. 23 **"The Brown Act"**
Mt. San Jacinto College | Webinar | T. Oliver Yee

Apr. 26 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Contra Costa Community College District | Webinar | Amy Brandt

Apr. 27 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
San Jose-Evergreen Community College District | Webinar | Laura Schulkind

Apr. 29 **"Title IX"**
Mt. San Antonio Community College District | Webinar | Pilar Morin & Jenny Denny

Apr. 30 **"Title IX"**
Southern 30 | Webinar | Pilar Morin & Jenny Denny

May 27 **"Title IX"**
Mt. San Antonio Community College District | Webinar | Pilar Morin & Jenny Denny

May 28 **"Title IX"**
Southern 30 | Webinar | Pilar Morin & Jenny Denny

Seminars/Webinars

For more information and to register, please visit www.lcwlegal.com/events-and-training.

Apr. 29 **"Labor Relations Academy: Bargaining Over Benefits: Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Steven M. Berliner

Apr. 30 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

May 11 **"Are Your Exempt Employees Really Exempt?"**
Liebert Cassidy Whitmore | Webinar | T. Oliver Yee

May 12 **"Labor Relations Academy: Communication Counts: Part 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Jack Hughes

May 19 **"Labor Relations Academy: Communication Counts: Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Jack Hughes

Speaking Engagements

May 12 **"Burning Brown Act Issues You Need to Understand"**
Community College League of California (CCLC) Executive Assistants Workshop | Webinar | Eileen O'Hare-Anderson

May 12 **"Defining Board & Staff Roles and Relationships"**
CCLC Executive Assistants Workshop | Webinar | T. Oliver Yee

May 12 **"Managing COVID-19 Issues: Now and What's Next"**
CCLC Executive Assistants Workshop | Webinar | Meredith Karasch & Alysha Stein-Manes

May 13 **"Mock Negotiations/Introduction to Interest Based Bargaining"**
ACHRO Human Resources Leadership Academy | Webinar | Melanie L. Chaney

May 14 **"Legal Update"**
CCLC Policy & Procedure Service Workshop | Webinar | Eileen O'Hare-Anderson

May 18 **"Emerging from the COVID-19 Pandemic: What Campus May Look Like in the Fall and What Districts Should Do to Prepare"**
Association of Chief Business Officials (ACBO) Spring Conference | Webinar | Meredith Karasch & Alysha Stein-Manes

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore.
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