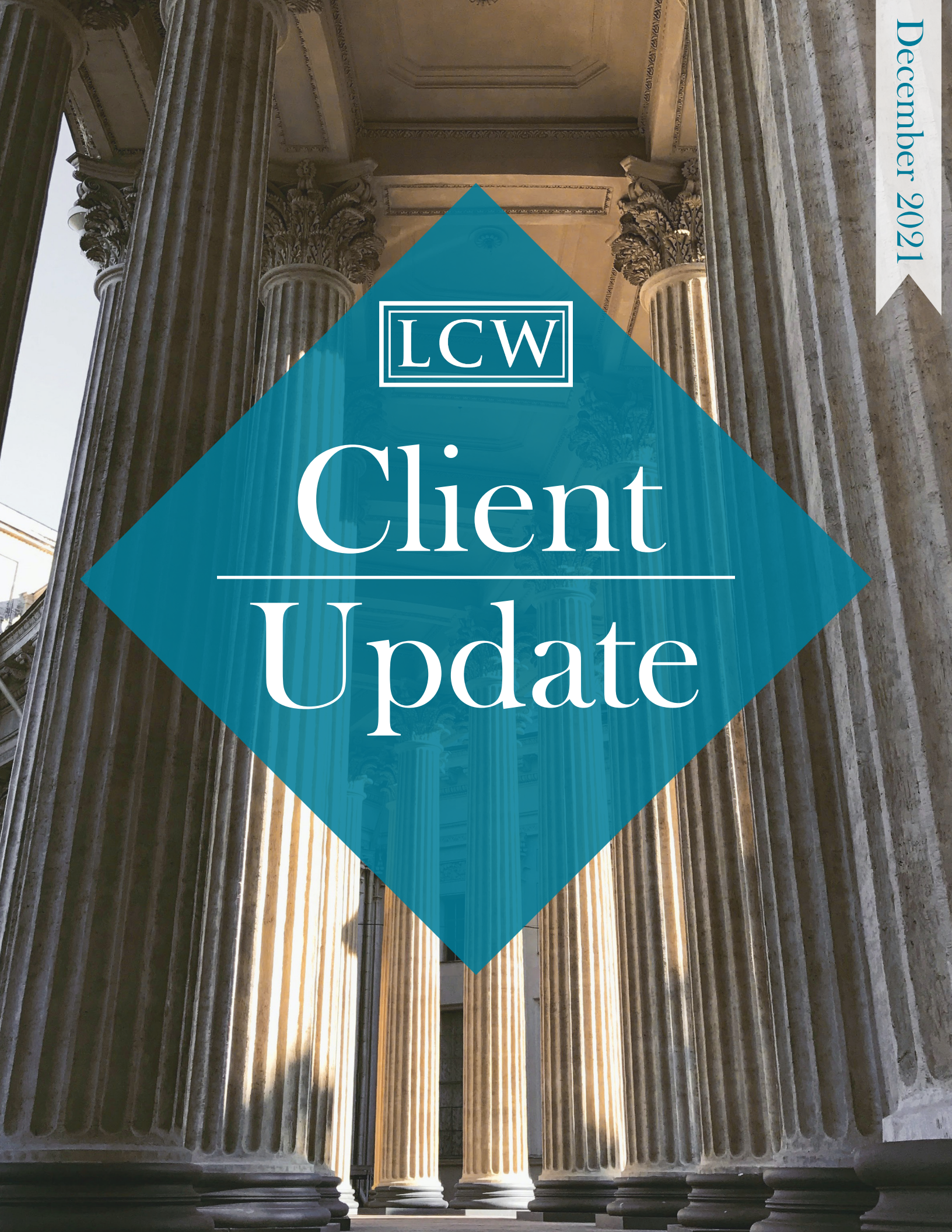

December 2021

LCW

Client Update

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FIRM VICTORIES

Hearing Officer Upholds Termination Of Police Officer Involved In Fatal Shooting.

LCW Managing Partner **Scott Tiedemann** and Associates **Paul Knothe** and **Kaylee Feick** recently prevailed in a police officer termination appeal. The case concerned a field training officer (FTO), who was one of two officers involved in a fatal shooting. The other officer was a probationary officer who had lateraled from another agency.

The probationary officer fired 75 rounds, many of which were through the windshield of a moving vehicle, during a slow speed pursuit on a Saturday morning through a quiet residential neighborhood. During the pursuit, the FTO fired 11 rounds with a high-powered AR-15 rifle. The FTO also failed to: provide effective feedback to the probationer; give the suspect an opportunity to surrender; and use appropriate felony traffic stop tactics. For these reasons, the hearing officer concluded that the police department had just cause to terminate the officer's employment.

Peace Officer's Termination Upheld Following Off-Duty Altercation With Civilian.

LCW Partner **Jennifer Rosner** and Associate **Marek Pienkos** successfully represented a county in a peace officer's termination appeal.

In June 2019, an off-duty deputy sheriff with a county sheriff's department (Department) was dumping rocks and dirt in an open field. A civilian driver stopped to take pictures of the deputy dumping the materials. The civilian told the deputy that she would post the dumping on social media. In response, the deputy threw a rock towards the civilian, which struck her car and caused significant damage. Another law enforcement agency conducted a criminal investigation into the civilian's allegations, but the deputy failed to notify his supervisor about that investigation in violation of Department policy.

In July 2020, the Department terminated the deputy for: (i) conduct that caused discredit and embarrassment to the Department; (ii) failing to notify a supervisor that he was the subject of a criminal investigation; and (iii) conduct unbecoming of a deputy.

The deputy appealed his termination. He alleged the civilian threw a rock at his vehicle first – while his children were inside. He then threw a "clump of something" towards the civilian's vehicle to convince her to get away from him and his children. The deputy admitted that he was angry and used profanity. The deputy claimed his actions were appropriate because he thought his children were in danger. The deputy contended, however, that the civilian was already in her vehicle when he threw the object.

The hearing officer found that despite the dispute over who threw what first, the deputy failed to act in a reasonable or professional manner when he threw something towards the civilian. The hearing officer further noted that the deputy's statement that the civilian was already in her vehicle when he threw did not support his allegation that he did so in self-defense out of fear for his children's safety.

The deputy also alleged that he did not violate California Penal Code Section 374.3 because he was dumping dirt rather than garbage. The hearing officer disagreed, noting that a subsection of Section 374.3 prohibits the dumping of dirt and rocks. The hearing

officer found that the deputy's failure to recognize this, regardless of whether he intended to violate the law, constituted an error in judgment that caused discredit to the Department. Based on the foregoing, the hearing officer upheld the deputy's termination. The hearing officer also noted that the deputy's belief that his conduct was justified was "astounding" and meant that the deputy could repeat similar conduct in the future.

Note:

Peace officers are held to high standards of conduct, whether on-duty or off, given their position of trust with the public. Here, the hearing officer found that the officer's belief that his conduct was justified further supported the penalty of termination.

Peace Officer's Termination Upheld After His Unsafe Driving Killed Two People.

LCW Associate **Paul Knothe** successfully represented a county in a peace officer's termination appeal.

In December 2013, a deputy sheriff with a county sheriff's department (Department) was parked in a patrol car when a civilian volunteer with the Department requested assistance regarding a fight. After numerous units requested additional information on the fight, it was determined that emergency assistance was not needed. Despite this, the deputy drove up to 86 mph in a residential neighborhood to respond to the volunteer's request without activating his vehicle's emergency equipment (i.e., vehicle lights and siren). The deputy collided with another vehicle, killing two passengers in the other vehicle.
Another law enforcement agency responded to and investigated the collision. The investigation determined that the primary cause of the collision was that the deputy was driving at an unsafe speed. The investigation further determined that the deputy was responding to an emergency call without lights or siren.

After the county District Attorney's Office declined to file criminal charges against the deputy, the Department initiated its own investigation. Based this investigation's findings, the Department terminated the deputy in September 2016 for: failing to conform to the standards of a deputy sheriff; displaying an unwillingness and/or inability to operate a patrol vehicle in a safe and responsible manner; and displaying poor behavior by driving at speeds above the posted speed limit, among other reasons.

The deputy appealed his termination. He admitted to speeding prior to the collision and that he was not using his lights or siren. He argued that termination was not the appropriate level of discipline. In support, he alleged that he was not the primary cause of the collision and the resulting fatalities because: (i) the driver of the other vehicle was under the influence of marijuana; and (ii) the passengers killed in the collision were not wearing seatbelts. The hearing officer found that, even if those facts were true, the deputy unnecessarily drove at a dangerously high speed and failed to use his emergency equipment to make his vehicle more visible. Moreover, the other agency's investigation supported that the deputy's unsafe driving was the primary cause of the collision.

The deputy also alleged termination was inappropriate given: his lack of prior discipline for on-duty driving; his tenure with the Department; the level of discipline issued to other deputies involved in fatal collisions; and because he was responding to an emergency call. The hearing officer disagreed, finding that the deputy demonstrated an inability to perform to the standards required of peace officers operating Department-issued vehicles. The hearing officer also noted that the Department need not impose the same level of discipline for all deputies involved in fatal collisions since the circumstances of each collision will be different. Based on the foregoing, the hearing officer upheld the deputy's termination.

Note:

The deputy sheriff did not refute key facts underlying his discipline. Instead, he alleged that termination was excessive discipline. In preparation for such an argument on appeal, agencies should ensure that any notice of termination outlines: all of the reasons why the officer's misconduct harms the public service; and why the agency believes the officer can no longer safely perform peace officer duties.

Peace Officer's Termination Upheld Following Failure To Adequately Investigate Child Abuse Allegations.

LCW Partner **Geoffrey Sheldon** and Senior Counsel **Stefanie Vaudreuil** successfully represented a city in a peace officer's termination appeal.

In April 2018, a civilian reported to city's police department (Department) that her husband physically abused her and her children. The Department then dispatched a police officer to investigate. The officer spoke with the family, including one of the abused children who showed the officer their injuries and confirmed that their father hit them. Although the family

spoke Spanish, the officer did not speak Spanish fluently and failed to request any translation assistance. The officer also failed to report the abuse following the visit. The next day, the children's school contacted Child Protective Services to report the abuse, and another Department investigator responded. That investigator noted the visible injuries on the children and their mother.

The Department then investigated the first officer's response to the child abuse allegations. In August 2018, the Department terminated the officer for failing to investigate the report of child abuse and turning off his body worn camera during the interview with the family without reasonable excuse. The officer appealed his termination.

Following an appeal, a hearing officer issued a non-binding recommendation that officer be reinstated due to a lack of credible evidence to support the termination. Specifically, the hearing officer found that the officer's failure to submit a child abuse report was reasonable because: (i) the Department did not notify the officer that he was being dispatched for a child abuse call; and (ii) the officer believed the children were being disciplined rather than abused. As to the latter issue, the officer alleged he: did not hear certain family members' statements about the child abuse; and believed that some family members were lying to him.

The City Manager reviewed the hearing officer's recommendation in accordance with the applicable memorandum of understanding. Based on this review, the City Manager sustained the officer's termination because: the dispatch call to the officer indicated alleged child abuse; the officer knew that the children were being hit; the officer saw the children's injuries; and the officer failed to ask follow-up questions from other potential witnesses.

The officer filed a petition for writ of mandate to challenge the City Manager's decision in superior court. The officer contended that the City Manager abused his discretion because there was insufficient evidence that the officer failed to report child abuse. The officer alleged he had a subjective belief that there was no abuse to report. The court disagreed, noting that the officer's failure to report the child abuse is viewed under an objective standard as to what a reasonable person would do. The Court found that a reasonable person would have heard key statements by dispatch and the reporting family members about the alleged abuse. The court found that it was the officer's poor investigation – including his failure to request a translator when interviewing the family and his lack of observation and questioning skills--that overlooked the child abuse.

Based on the foregoing, the court denied the officer's petition on the grounds that the City Manager's decision to uphold the termination was within his discretion and supported by the evidence.

Police Chief Had Good Cause To Revoke CCW Privileges From Retired Peace Officer Who Has Severe Emotional Distress And PTSD.

LCW Associates **Christopher Frederick** and **Michael Gerst** successfully represented a city in a retired peace officer's appeal of his revoked endorsement to carry a concealed weapon (CCW).

In November 2019, a police officer retired after 17 years with a city's police department (Department). Prior to his retirement, he was involved in three officer-involved shootings between 2005 and 2017. From 2005 to the present, the officer received psychological counseling and treatment for various issues, including post-traumatic stress disorder (PTSD). Upon his retirement, the officer received a retirement certification card with a CCW endorsement.

California Penal Code Section 26305 and the Department's policies provide that no CCW endorsement shall be issued to an officer retiring because of a psychological disability. Between November 2019 and January 2021, the officer treated with multiple doctors for his continuing PTSD and severe emotional distress, including increased anxiety and irritability. One of the doctors noted that it would not be advisable for the officer to return to law enforcement due to his chronic and significant PTSD.

In February 2021, after reviewing the officer's medical records, the Department's police chief revoked the retired officer's CCW privilege in accordance with Department policies and the Penal Code. The officer appealed to a three-member panel board for hearing. The officer argued that the police chief did not have good cause to revoke the CCW endorsement. The panel board disagreed, unanimously finding that the officer's medical records detailing his severe emotional distress and PTSD symptoms established good cause to revoke his CCW privilege. The hearing board stated explicitly that the law required the chief of police to revoke the retired officer's CCW endorsement.

Note:

The retired officer presented commendations, performance evaluations, and letters of appreciation he received during his employment. The panel board noted that while the officer's personnel records show a distinguished career in law enforcement, that information had no relevance as to whether good cause existed to revoke a CCW endorsement.

LCW Wins Faculty Member Termination Case.

LCW Partner **Pilar Morin** and Senior Counsels **David Urban** and **Meredith Karasch** recently obtained a victory on behalf of a community college district in a faculty member termination case. A college sociology professor was charged with: harassing students on the basis of their gender and LGBTQ status; and interfering with an investigation directive by contacting a student witness.

The Court of Appeal reversed the trial court's order against the district, and ordered the trial court to issue a writ instructing the arbitrator to terminate the faculty member's employment. The decision emphasized that the unfit faculty member should not be reinstated, and that the member's lack of remorse further confirmed that dismissal was the appropriate remedy. The majority opinion also recognized the harm the faculty member's conduct had on students. LCW handled the disciplinary appeal arbitration, Petition for Writ of Mandate and the appeal.

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NEW TO THE FIRM!

Hannah Dodge is an Associate in the San Francisco office of LCW where she advises clients on education, labor and employment law matters. She is experienced in facilitating discovery motions, evidentiary hearings and trial conferences, and has further expertise managing motions and trials, and mediating and resolving student-parent-university disputes.

Alicia Arman is an Associate in the San Francisco office of LCW where she advises clients on education, labor and employment law matters. Aly has worked in both private schools and charter schools and as such has particular interest in education law.

Jack Begley is an Associate in the Los Angeles office of LCW. He is experienced in labor and employment matters, including wage and hour law and the Fair Employment and Housing Act, and has handled varied phases of litigation, defended client depositions, conferred with clients on case status and discovery responses, and is a keen legal researcher.

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DISCRIMINATION

Manicurist Can Pursue HWE Claim After Manager Directed Him To Continue With Pedicure Despite Customer's Sexual Propositions.

Vincent Fried worked as a manicurist at a salon in the Wynn Hotel (Wynn) in Las Vegas, Nevada from April 2005 to July 2017.

Fried alleged that he complained to management that female manicurists received more appointments than males. In March 2017, Fried threw a pencil at a computer out of frustration with the disparity. His manager disciplined him and commented that he might want to pursue other work. Specifically, she mentioned that Fried was working in a "female job related environment." Another coworker told him that if he wanted more clients, he should wear a wig to look like a woman.

In June 2017, Fried was assigned to provide a pedicure to a male customer. The customer asked Fried to give him a massage in his hotel room and said he had massage oil. When Fried responded they do not do that kind of service, the customer made an explicit sexual proposition. Fried immediately reported the conduct to the same manager. Although Fried reported he no longer felt comfortable interacting with the customer, the manager directed him to finish the pedicure and "get it over with." In total, the customer made five or six inappropriate sexual references to Fried during the pedicure. Fried attempted to speak with the manager about the incident on two occasions afterwards, but she told him she would talk to him "when she got a chance." Fried never reported the incident to Human Resources.

A week later, Fried was in the salon's breakroom. A female coworker told Fried he should not be upset about the interaction and should take it as a compliment. Another female coworker allegedly said that Fried wanted to engage in the sexual activity because he kept mentioning it.

Fried then brought suit against the Wynn for sex discrimination, retaliation, and hostile work environment (HWE) in violation of Title VII of the Civil Rights Act of 1964. The district court granted Wynn's motion for summary judgment. Fried appealed.

In this portion of the appeal, the Ninth Circuit considered Fried's HWE claim. Title VII prohibits sex discrimination, including sexual harassment, in employment. To establish a case for HWE under Title VII, an employee must show: (1) he was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. To determine whether an environment is sufficient hostile or abusive, a court must consider all of the circumstances including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Fried argued that four incidents created a HWE: (1) the manager's suggestion he seek employment in a field that is not female-related; (2) his coworker's suggestion that he should wear a wig; (3) his manager's response to his report that a customer had sexually propositioned him; and (4) his coworker's remark that he should take the customer's proposition as a compliment and that Fried actually wanted to engage in the sexual activity.

On appeal, the court determined that comments the manger and coworker made about the "female related job environment" and the wig were not sufficiently severe or pervasive to support a HWE. The court noted that because these comments occurred on only three occasions, the comments would need to be proportionately more severe to make up for their relative infrequency. The court concluded that even viewed cumulatively, this type of infrequently joking or teasing was part of the ordinary tribulations of the workplace.

& HARASSMENT

However, the court concluded the manager's response to the customer's unwelcome sexual advances could independently create a HWE. The court reasoned that it is well established that an employer can create a HWE by failing to take immediate and corrective action in response to sexual harassment or racial discrimination that the employer knew or should have known about. Here, the manager not only failed to take immediate corrective action, but she also directed Fried to return to the customer and complete the service. The manager's direction not only discounted and condoned the customer's sexual harassment, but also conveyed that Fried was expected to tolerate it as part of his job.

In addition, the court concluded that the coworkers' comments on the customer's sexual proposition could also be severe or pervasive enough to support Fried's claim. The court noted that a reasonable jury could find these comments created a HWE because the cumulative effect of the coworkers' and manager's conduct must be considered.

For these reasons, the court concluded that a reasonable factfinder could decide that the Wynn created a HWE at the salon. Thus, the Ninth Circuit reversed the district court's decision and remanded the case for further proceedings.

Fried v. Wynn Las Vegas, LLC, 2021 WL 5366989 (9th Cir. Nov. 18, 2021) unpublished.

Note:

This case shows how a manager's conduct sets the tone in a workplace. The law has long held that customers can create a HWE for employees and that employers have a duty to protect their employees from harassing customers. Yet, the manager's failure to take the manicurist's complaints seriously, and her direction that the manicurist endure the customer's harassment, wrongly communicated to the staff that harassment was part of the job. Supervisors and managers must be trained to take complaints of harassment seriously and to address them promptly.

Terminated RN Could Not Show Hospital's Reasons For Her Discharge Were Pretextual.

Kimberly Wilkin began working at the Community Hospital of the Monterey Peninsula (Hospital) as a registered nurse in 2005.

In November 2016, Wilkin received a written disciplinary notice for poor attendance after receiving three courtesy warnings that she could be disciplined if her attendance did not improve. Over the next 14 months, Wilkin's attendance continued to be poor. While Wilkin requested and received intermittent family leave under the Family and Medical Leave Act ("FMLA") and other medical leave during this time, her absences exceeded the frequency of FMLA-protected intermittent leave that her healthcare provider had estimated. Wilkin was repeatedly counseled that her attendance issues could result in her termination.

In November 2017, a director was asked to investigate whether a patient received medication without supporting documentation, in violation of Hospital policy. The director found that Wilkin had failed to properly document her handling and administration of Narcan to the patient. During her investigation, the director found numerous incidents when Wilkin signed off on the administration of medication, including controlled substances, but failed to properly document each administration. For example, Wilkin used a system override function to pull syringes of morphine, some without a written physician's order, and failed to document how much, if any, was either given to the patient or discarded.

The director subsequently terminated Wilkin's employment in late December for: failure to accurately document her handling and administration of controlled substances; and ongoing attendance issues. However, after Wilkin requested a reasonable accommodation in the form of a medical leave of absence,

the Hospital determined that Wilkin would not be immediately discharged. After further investigation, on January 16, 2018, Wilkin received written notice she was being terminated. That day, the Hospital also filed a complaint with the Board of Registered Nursing regarding Wilkin's handling and administration of controlled substances.

Wilkins then sued the Hospital, alleging her discharge: was disability discrimination, retaliation, and otherwise violated the Fair Employment and Housing Act (FEHA); resulted in the unlawful denial of medical leave and violation of the California Family Rights Act (CFRA) and the FMLA; and was wrongful termination in violation of public policy. The trial court entered judgment in the Hospital's favor, finding that Wilkin did not produce any evidence showing the Hospital fabricated its reasons for her termination.

Wilkin appealed, and the California Court of Appeal affirmed the trial court. California courts use a three-stage burden-shifting test to analyze FEHA discrimination and retaliation claims. Under this test, the employee must first establish the essential elements of the claims. If the employee can do so, the burden shifts back to the employer to show that the allegedly discriminatory or retaliatory action was taken for a legitimate, non-discriminatory and non-retaliatory reason. If the employer meets this burden, the presumption of discrimination or retaliation disappears and the employee then has the opportunity to attack the employer's legitimate reason as pretextual.

The court found that the Hospital produced evidence that it terminated Wilkin's employment because she: 1) repeatedly failed to properly document the administration of patient medication and the discarding of unused medication; and 2) was chronically absent over the prior 14 months.

At Wilkin's deposition, for example, she admitted that she had failed to comply with the Hospital's drug handling policy and she acknowledged she had administered a drug to a patient for nearly an hour before she retrieved the drug from the medication dispensing machine. In addition, the Hospital produced evidence of Wilkin's long history of attendance problems including: disciplinary notices issued in November 2016, December 2016, February 2017; meetings in September and November 2017 to discuss the ongoing concerns; and many warnings to improve her attendance. Thus, the court found the Hospital met its burden of presenting non-discriminatory and non-retaliatory reasons for Wilkin's termination.

Further, the court concluded that Wilkin failed to present any evidence that the Hospital's stated reasons for terminating her employment were either false or pretextual as required under the burden-shifting framework. It was undisputed Wilkin had attendance issues unrelated to any disability or health condition, and that she violated the Hospital's policy regarding the documentation and handling of patient medication. The court rejected each of Wilkin's arguments to the contrary. The Hospital never denied Wilkin's FMLA leave; it corrected any mistakes it discovered in Wilkin's timekeeping records; and the director met with Wilkin to discuss the documentation issues before terminating her employment.

For these reasons, the court concluded that the trial court properly granted summary judgment to the Hospital on Wilkin's discrimination and retaliation claims. It also affirmed the trial court's ruling with respect to Wilkin's other claims. Specifically, it found she could not maintain claims for failure to accommodate or failure to engage in the interaction process because requesting that she be placed on a medical leave of absence instead of being discharged for violation of the Hospital's policies does not qualify as a reasonable accommodation under California law. Further, because the court found in the Hospital's favor regarding her discrimination and retaliation claims, Wilkin could not establish a "failure to prevent" cause of action. Finally, Wilkin could not offer any evidence that the Hospital's decision to discipline her and terminate her employment was because of her CFRA and/or FMLA leave.

Wilkin v. Cmty. Hosp. of the Monterey Peninsula, 2021 WL 5371427 (Cal. Ct. App. Oct. 26, 2021).

Note:

The Hospital was able to establish its reasons for terminating Wilkin's employment were not motivated by discrimination given Wilkin's admitted violations of Hospital policy, and the amount of counseling and discipline Wilkin received over the course of a 14-month period. In addition, the Hospital was able to distinguish Wilkin's protected absences from her unprotected ones. This level of documentation is required to avoid a retaliation-for-protected-activity claim.

Employee Exhausted FEHA Administrative Remedies Despite Misnaming Employer.

On September 8, 2017, Gloria Guzman filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) asserting various claims including discrimination, harassment, and retaliation against her employer – a car dealership – after it terminated her employment in May 2017. In her DFEH complaint, Guzman identified her employer as "Hooman Enterprises Inc. DBA Hooman Chevrolet." Guzman also individually named her supervisors, including owner Hooman Nissani.

The DFEH subsequently issued Guzman a right to sue notice, and she initiated a lawsuit against "Hooman Enterprises Inc. DBA Hooman Chevrolet" on September 14, 2017 for violations of the Fair Employment and Housing Act (FEHA). On January 23, 2018, the dealership filed an answer to Guzman's complaint using the name "Hooman Chevrolet of Culver City."

In October 2018, Guzman learned that the true legal name of the dealership was "NBA Automotive Inc. dba Hooman Chevrolet of Culver City." At Guzman's request, the court amended the complaint to substitute the legal name of the dealership. On April 25, 2019, Guzman filed an amended administrative complaint with the DFEH naming "NBA Automotive, Inc." as the respondent. The DFEH accepted the amended complaint and deemed it "to have the same filing date of the original complaint."

The matter proceeded to a jury trial, and the jury found in favor of Guzman on some of her claims and in favor of NBA Automotive on others. In total, the jury awarded Guzman $245,892 in damages. Following the trial, the dealership filed motions to overturn the verdict on the grounds that Guzman failed to exhaust her administrative remedies as required under the FEHA. The court denied the dealership's motions, and it timely appealed.

The dealership argued that Guzman did not exhaust her remedies because her original administrative complaint identified "Hooman Enterprises, Inc." rather than "NBA Automotive, Inc. dba Hooman Chevrolet of Culver City" as her employer. Under the FEHA at the time, an employee had one year from the date upon which the alleged unlawful practice occurred to file an administrative complaint. That complaint must state "the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of….." The timely filing of an administrative complaint is a prerequisite to suing in court for damages.

On appeal, however, the court concluded Guzman exhausted her administrative remedies. The court noted that while Guzman did not state NBA Automotive's full correct legal name, she nonetheless stated that the fictitious business name of her employer was "Hooman Chevrolet," a name virtually identical to "Hooman Chevrolet of Culver City" (NBA Automotive's actual fictitious business name). In addition, Guzman's administrative complaint listed the address of Hooman Chevrolet in Culver City and named the owner. The court further reasoned that she provided a detailed description of her employer, stated the names of the accused individuals, and named the supervisors and managers employed by the dealership. Thus, any reasonable investigation would have revealed that NBA Automotive was Guzman's employer, and the information in the complaint gave NBA sufficient notice.

Moreover, the court suggested that because the dealership did not disclose its true legal name until months into discovery, it knew Guzman intended to identify it in her administrative complaint and it tried to deprive Guzman of her right to pursue her claims.

The court concluded that to allow NBA Automotive to escape liability merely because Guzman identified it with a name that was nearly the same as her employer's actual fictitious business name "would be contrary to the purposes of the FEHA."

Guzman v. NBA Auto., Inc., 68 Cal. App. 5th 1109 (2021).

Note:

Courts tend to excuse employees who make mistakes on administrative complaints provided that the mistake does not prevent the DFEH from investigating and conciliating. There have been a number of similar decisions in California in recent months, such as Clark v. Superior Ct. of San Diego Cty., *62 Cal. App. 5th 289 (2021), which we reported on in the* May 2021 Client Update.

RETIREMENT

Retirees Had No Vested Right To Health Insurance Benefits Under County Retirement Plan.

In January 1993, the County of Orange and the Orange County Employee Retirement System (OCERS) entered into a memorandum of understanding (MOU). That MOU allowed the County to access surplus investment earnings controlled by OCERS and to deposit a portion of the surplus into an Additional Retirement Benefit Account (ARBA) to pay for health insurance of present and future County employees. In April 1993, the County adopted the Retiree Medical Plan, funded by investment earnings from the ARBA account and mandatory employee deductions. The Retiree Medical Plan explicitly stated that the plan did not create any vested rights to benefits. The County's intent was to induce employees to retire early.

Labor unions then entered into MOUs with the County providing that the County would administer a Retiree Medical Insurance Plan and retirees would receive a Retiree Medical Insurance Grant. As a result, County employees received a monthly grant to defray the cost of health care premiums from 1993 through 2007. However, beginning in 2004, the County negotiated with its labor unions to restructure the retiree medical program, which was underfunded. The County ultimately approved an agreement with the unions that reduced benefits for retirees.

A group of County retirees, then filed a class action complaint alleging, among other claims, that the County intended in the 1993 MOU to create an implied vested right to the monthly grant, and then breached that MOU by reducing the benefit in 2004. The district court granted judgment in the County's favor, and retirees appealed. The case made its way to the Ninth Circuit.

First, the Ninth Circuit held that the April 1993 Retiree Medical Plan did not create any vested right to the monthly grant benefits. Under California precedent, a person bears a "heavy burden" to overcome the presumption that the legislature did not intend to create vested rights. The evidence of a vested implied right in an ordinance or resolution must be "unmistakable." Since the April 1993 Retiree Medical Plan explicitly said that the plan did not create any vested right to the benefit, the retirees' claim to an implied vested right was foreclosed.

Next, the Ninth Circuit rejected the retirees' argument that the MOUs contained a contradictory implied term. The court held that at the summary judgment stage, the County provided evidence that the Retiree Medical Plan was adopted by resolution and therefore became governing law with respect to the monthly grant benefits. As existing County law, the Retiree Medical Plan became part of the MOUs, which were of limited duration and expired on their own terms by a specific date. Absent express language that the monthly grant benefits vested, the right to the benefits expired when the MOUs expired.

Moreover, the Ninth Circuit disagreed with retirees' argument that the plan was void because the County drafted and imposed the anti-vesting provisions in the Retiree Medical Plan without collective bargaining. As a preliminary matter, the court held that any claim the Retiree Medical Plan was void based on a failure to bargain was barred under the three-year statute of limitations in effect at that time for unfair practice charges. In any event, the Ninth Circuit further held that the Retiree Medical Plan was not unilaterally imposed on the unions and their employees without collective bargaining because the unions had the option to reject the plan or to negotiate different terms. Instead, the unions signed the MOUs that adopted the Retiree Medical Plan. Thus, the process was consistent with the Meyers-Milias Brown Act.

Finally, the Ninth Circuit concluded that the monthly grant benefits were not deferred compensation, which would vest upon retirement like pension benefits. The court reasoned that the Retiree Medical Plan did not provide insurance benefits, but rather it provided the opportunity for employees to purchase health insurance at a reduced

cost. Unlike deferred compensation, which is earned by merely accepting employment, access to the health benefit required the employee to choose to pay his portion of the health insurance premium.

For these reasons, the Ninth Circuit affirmed the district court's decision in favor of the County.

Harris v. Cty. of Orange, 17 F.4th 849 (9th Cir. 2021).

Note:

One judge on the panel dissented in part. That judge argued that in order to prevail at the summary judgment stage, the County needed to demonstrate – without relying on the Retiree Medical Plan's anti-vesting term – that the retirees had no evidence proving that the pre-plan MOU created an implied vested right. Because the County did not do this, that judge would have reversed the district court's decision. The majority stated that the dissent relied upon the "mistaken assumption" that the Grant Benefit was deferred compensation, instead of an optional benefit.

LCW In The News

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

In the Dec. 1 *HR Dive* article "Back to Basics: The fluctuating workweek method doesn't give employers an overtime pass," Associate **Stephanie Lowe** breaks down what the Fair Labor Standards Act states about the fluctuating workweek method and overtime pay in regard to nonexempt employees as well as the four requirements employers must meet to use this method.

Partner **Peter Brown** and Associates **Alex Volberding**, **Brian Dierzé** and **Daniel Seitz** weighed in on the Occupational Safety and Health Administration's (OSHA) new COVID-19 Emergency Temporary Standard in a Nov. 15 *Daily Journal* column entitled "Will OSHA's new COVID regulation reach California employers?" The ETS would impose numerous COVID-19-related requirements on medium and large private employers that are subject to OSHA jurisdiction.

KNX News interviewed Associate **Alex Volberding** on November 8 on the recent passing of the Infrastructure Investment and Jobs Act. The segment mentioned the bill was passed with the hope of boosting job openings in low-income communities and helping marginalized communities earn a pathway to the middle class through careers in the building and construction trades. "There's a massive infusion of resources into communities across the country," said Volberding. "One of the things this bill does is establish project owners to do local hiring and establish a preference for individuals in the communities where the development or project is being constructed." He added that historically many of the building and construction trades have not provided equal opportunities to women or people of color.

Managing Partner **Scott Tiedemann** weighed in on Senate Bill 2 and what it means for policing practices in the Oct. 12 *23ABC News Bakersfield* article "ACLU, Faith in the Valley say Department of Justice, Bakersfield Police reform plan not enough." Concerning the newly signed bill that allows for police decertification based on misconduct, Scott said, "The accountability division is going to investigate police officers for what they call serious misconduct and the police accountability board is going to make recommendations to the overall post-commission about revoking certification for police officers that they believe have engaged in serious misconduct." He added that police officers will be investigated for misconduct due to the bill.

Partner **Steve Berliner** penned "Public Agency Risks Grow Under New Calif. Pension Law," which was published in the Oct. 8 Employment Authority section of *Law360*. In the piece, Steve addresses Senate Bill 278, which was recently signed into law by Gov. Gavin Newsom and takes effect on Jan. 1, 2022. Steve explains how the bill will impact public agencies that contract with the California Public Employees' Retirement System and details how employee pensions are affected.

Managing Partner **Scott Tiedemann** commented on Governor Gavin Newsom's recent signing of SB 2 into law, which will decertify peace officers who have committed serious misconduct. In the Oct. 4 *Daily Californi*an article "Gov. Newsom signs bill to decertify peace officers for serious misconduct," Tiedemann stated that while POST was previously used only to deliver certificates to peace officers who work in California, POST will now be able to revoke certificates under the new bill. Tiedemann also said SB 2 has its shortcomings. For instance, the definition of "unreasonable" use of force is still unclear and the bill does not address police force retention issues or how increased police scrutiny may attract lower quality applicants who may be prone to more police misconduct. "When you look at this law in general, there are ideas that are really good. When the details are examined and they're applied to different situations, there are going to be problems," said Tiedemann.

Partner **Heather DeBlanc** weighed in on cafeteria plans—optional spending accounts and insurance benefits that meet health and caregiving needs—in the Oct. 5 *SHRM* piece "Taking Another Look at Cafeteria Plans." Heather states that, "Cafeteria plans are a necessity if your employees are making salary-reduction elections so that a portion of their salary, pretax, is directed toward [health or other insurance] premiums and tax-advantaged spending accounts. In order for an employee to divert salary to pretax premiums, a cafeteria plan document must be in place and approved by the governing body of the employer."

WRIT PROCEEDINGS

Student Could Not Establish That Disciplinary Process For Dating Violence Was Unfair.

John Doe was a senior at the University of California, Santa Barbara (UCSB) with fellow student Jane Roe. John and Jane agreed they were in a dating relationship for almost two years before they broke up in June 2016. John also admitted that on July 7, 2016, after their breakup, he "grabbed" Jane, "screamed in her face and shook her," and "eventually dragged her out of the bed to the front door" of his home. John called the police and reported that Jane would not leave his home, but when the police arrived, they detained him.

Following this incident, the UCSB Title IX Office received a mandated report of possible dating violence involving John and Jane. In September 2016, Jane filed a complaint against John. The Title IX Office initiated a formal investigation. The Title IX Office sent John a notice of the complaint that informed him that Jane alleged he committed dating violence against her when he "physically assaulted her on or around July 7, 2016."

The Title IX investigator interviewed Jane and six witnesses. While the investigator tried to interview John, he was studying abroad and had limited availability. Instead, John responded to the allegations in writing. He admitted he grabbed Jane, screamed in her face, shook her to wake her up, and eventually dragged her out of his roommate's bed to the front door while she pretended to be asleep.

At some point, the initial investigator left her position and another investigator took over. The new investigator attempted to schedule a debrief interview with Jane and John in order to prepare the investigative report. However, he was never able to schedule an interview with John. The investigator interpreted John's lack of response as "a decision not to participate in the debrief," and he prepared the investigative report.

The investigation determined, under a preponderance-of-the-evidence standard, that John violated the UC policy against dating violence. Much of the investigator's decision was based on John's own written statement in which he admitted to grabbing, shaking, and dragging Jane. The Office of Judicial Affairs concurred with the findings and found John responsible for violating the UC Policy against dating violence. The Assistant Dean suspended John from UCSB for three years. Because John had completed his degree, the suspension resulted in a three-year hold of his degree and diploma, with an exclusion from campus.

Subsequently, John submitted an appeal to the review committee on the grounds of: procedural error; unreasonable decision based on the evidence; and disproportionate discipline. As to procedural error, John argued the investigation took too long, involved multiple investigators, and he was not given a fair chance to meet with investigators for a debrief interview. For his claim the suspension was an unreasonable decision, John contended the finding that Jane "sustained severe injuries" was not true. Finally, he urged that a three-year freeze on his diploma was excessive because there were no "serious injuries."

After a hearing, the review committee denied the appeal. It found that John had ample opportunity to participate, and that the definition of dating violence does not require "severe" injury. John then petitioned for a writ of administrative mandate seeking to set aside the

disciplinary decision and suspension. After the trial court denied the petition, John appealed.

A UC student may challenge a disciplinary suspension or expulsion by a petition for writ of administrative mandate. That petition is the process a court uses to review an administrative decision. To prevail, a student must show the agency: (1) was acting without, or in excess of, its jurisdiction; (2) deprived the student of a fair administrative hearing; or (3) committed a prejudicial abuse of discretion.

John argued that UCSB failed to provide a fair process and the factual findings were not supported by substantial evidence. The appellate court disagreed. With respect to fair process, the court noted that student disciplinary proceedings in university settings do not require "all the safeguards and formalities of a criminal trial." In this case, John submitted a detailed written response that admitted the essential allegations of Jane's complaint. Thus, credibility of witnesses was not central to the determination, and John was not denied a fair process just because the investigator did not personally observe the witnesses, or because John did not have an opportunity to cross-examine witnesses.

Further, the court concluded that UCSB could rely on evidence that John was not available for the debrief interview. The investigator began attempting to schedule a debrief interview with John in February 2017, and John repeatedly changed his availability or failed to respond altogether. In addition, by April 18, 2017, the investigator informed John that if he did not respond by April 25th, he would assume John was declining to participate in the interview and would proceed to the next step in the process. John never responded to the investigator's final communication about scheduling an interview in the first two weeks of May. For these reasons, the court rejected John's argument it was unfair of the investigators to stop attempting to schedule an interview with him.

The court similarly rejected John's other arguments, including that UCSB failed to provide John information in an electronic format; that the investigator improperly relied on information John didn't have from Jane's debrief interview; and that UCSB failed to follow its own administrative policies. Accordingly, the court affirmed the trial court's ruling denying John's petition.

Doe v. Regents of Univ. of California, 70 Cal. App. 5th 521 (2021).

Note:

A petition for writ of administrative mandate allows a person to challenge an administrative decision that was reached after an evidentiary hearing. The procedure for writs of administrative mandate is outlined in Code of Civil Procedure Section 1094.5. This procedure may apply to local agency administrative decisions to terminate a public employee's employment.

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BENEFITS CORNER

Employers Can Offer Premium Discounts To Incentivize COVID-19 Vaccination But Cannot Otherwise Deny Benefits To Unvaccinated Individuals.

An employer can offer premium discounts to incentivize vaccination if it has a wellness program that meets certain requirements.

Under existing law, employer group health plans are generally prohibited from discriminating against individuals in benefit eligibility, premiums, or contributions based on health factors. Although employers cannot deny health benefits to unvaccinated employees, if the employer's wellness program meets certain requirements, the employer's program may allow premium discounts, rebates, or modification of otherwise applicable cost-sharing requirements.

On October 4, 2021, Centers for Medicare & Medicaid Services (CMS) issued FAQ guidance, in part, explaining that a group health plan (or health insurance issuer offering coverage in connection with a group health plan) can offer participants a premium discount for receiving a COVID-19 vaccination, if the discount otherwise complies with the existing regulations governing wellness programs set forth in 26 CFR 54.9802-1(f)(3), 29 CFR 2590.702(f)(3), and 45 CFR 146.121(f)(3).

Under these regulations, a wellness plan with a premium discount that requires an individual to complete an activity related to a health factor, in this case obtaining a COVID-19 vaccination, to receive a discount must comply with the following five criteria:

1. The program must give eligible individuals the opportunity to qualify for the reward at least once per year.
2. The reward, such as a COVID-19 vaccine incentive, together with the reward for other health-contingent wellness programs with respect to the plan, must not exceed 30 percent of the cost of coverage, in most instances.
3. The program must be reasonably designed to promote health or prevent disease.
4. The full reward under the wellness program must be available to all similarly-situated individuals (which includes allowing a "reasonable alternative standard" or waiver of the regular standard for obtaining the reward for any individual for whom satisfying the regular standard is unreasonably difficult due to a medical condition or is medically inadvisable). For example, the wellness program may offer a waiver or the option to attest to following other COVID-19-related guidelines to individuals for whom vaccination is unreasonably difficult due to a medical condition or medically inadvisable in order to qualify for the full reward.
5. The plan or issuer must disclose in all plan materials describing the terms of the wellness program the availability of a reasonable alternative standard to qualify for the reward (and, if applicable, the possibility of waiver of the regular standard), including contact information for obtaining a reasonable alternative standard and a statement that recommendations of an individual's personal physician will be accommodated.

The FAQs also confirm that a group health plan or health insurance issuer may not condition eligibility for benefits or coverage for otherwise covered items or services to treat COVID-19 on participants, beneficiaries, or enrollees being vaccinated. Benefits under the plan must be uniformly available to all similarly-situated individuals and any restriction on benefits must apply uniformly to all similarly-situated individuals and must not be directed at individuals

based on a health factor. Accordingly, plans and issuers may not discriminate in eligibility for benefits or coverage based on whether or not an individual obtains a COVID-19 vaccination, except as to a wellness program incentive.

Under the Affordable Care Act's (ACA's) employer shared responsibility provisions, the lowest cost plan an employer offers to a full-time employee must be "affordable" otherwise the employer may have exposure to penalties. The FAQs also indicate that wellness incentives related to the receipt of COVID-19 vaccinations are disregarded for purposes of determining whether employer-sponsored health coverage is affordable and vaccination surcharges are included in the affordability calculation. Therefore, implementation of a vaccination incentive could impact whether an employer owes a shared responsibility payment under the ACA.

For example, based on the FAQs, if the individual premium contribution under a COVID-19 vaccination wellness program was reduced by 25 percent, this reduction is disregarded for purposes of determining whether the employer's offer of that coverage is affordable for purposes of assessing liability for the employer shared responsibility payment. Conversely, if an individual's premium contribution for health coverage under a COVID-19 vaccination wellness program is increased by a 25 percent surcharge for a non-vaccinated individual, that surcharge would be considered in assessing affordability.

Therefore, the FAQs clarify that, if the employer offers a premium incentive to employees who receive the COVID-19 vaccine, the employer is required to use the rate charged to individuals who do not receive the vaccine when determining whether the coverage is affordable. This may create an affordability issue, depending on the premium cost of the plan, the employer contribution, amount of any premium surcharge, and any cash in lieu or flex dollars. Finally, the FAQs note that compliance with the above-discussed regulations in implementing a COVID-19 vaccination incentive is not determinative of compliance with any other applicable law, such as the Public Health Service Act, ERISA, the IRS Code, or other state or federal law, including the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. Employers should be mindful that implementation of a COVID-19 vaccine incentive program is fact-specific for each employer. You should consult with LCW attorneys to discuss legal requirements applicable to your program.

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 October 25, 2021, the Equal Employment Opportunity Commission (EEOC) added a new section on religious accommodations to its guidance concerning COVID-19 and equal employment opportunity (EEO) laws, entitled: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws." The new section applies general EEOC guidance concerning religious accommodation to COVID-19 vaccination requirements. The new section clarifies: the process for an employee to make a request for religious accommodation; how the employer should evaluate such requests; and when an employer may seek additional information from the employee requesting the accommodation.

- On November 6, the Fifth Circuit of the US Court of Appeals granted an emergency stay prohibiting enforcement of the November 4, 2021 federal OSHA regulations. Those regulations are intended to increase COVID-19 vaccination rates on a nation-wide basis. The federal government will provide the Court an expedited reply to the motion for a permanent injunction before the Court decides whether the regulations are lawful.

- SB 278 requires local agencies to pay CalPERS the full cost of any overpayments made to the retiree on the disallowed compensation and pay a 20% penalty of the amount calculated as a lump sum.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

A human resources manager contacted LCW to inquire whether the agency could require all new hires to undergo pre-employment drug testing.

Question:

Answer:

There are limitations on pre-employment drug testing. There must be a special need for the testing that is based on the job functions. (*See Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147.) A special need generally exists if the essential job functions are of a safety-sensitive nature. Thus, pre-employment drug testing requirements can be applied only if new applicants are being considered for jobs with safety sensitive essential functions.

SPOTLIGHT ARTICLE

Infrastructure Bill Paves Path for Expanded Use of Project Labor Agreements, More Equity in the Building Trades

Featuring: Alex Volberding

In response to President Biden's Nov. 15, 2021 signing of the Infrastructure Investment and Jobs Act, LCW Associate Alex Volberding explores Project Labor Agreements in the Nov. 22 *American City & County* piece "Infrastructure Bill Paves Path for Expanded Use of Project Labor Agreements, More Equity in the Building Trades." In the article, Alex explains PLAs, their importance and how the infrastructure bill may facilitate PLA use and provide job opportunities to historically marginalized communities that have traditionally been excluded by the building and construction trades. Read the article in full below.

On November 15, 2021, President Joe Biden delivered on a key part of his domestic agenda when he signed into law the Infrastructure Investment and Jobs Act, a $1.2 trillion infrastructure and jobs bill. In so doing, President Biden also fulfilled a major campaign promise to the building and construction trades unions that his administration would work to "rebuild America's crumbling infrastructure" and would "prioritize Project Labor and Community Workforce Agreements" in doing so.

This piece examines Project Labor Agreements (PLAs), explaining what they are, why they are important and how the infrastructure bill may facilitate their use and job opportunities to communities that have historically been marginalized or excluded by the building and construction trades.

Overview of PLAs

PLAs are pre-hire labor agreements that establish the terms and conditions of work on construction projects. PLAs are intended improve the efficiency of project delivery by improving labor relations and reducing the potential for labor strife between the contractors and workers and among workers. To accomplish this objective, PLAs typically include provisions for resolving grievances between contractors and workers and jurisdictional disputes between workers in different construction trades. Most importantly, PLAs prohibit strikes, lockouts, and other work stoppages and slowdowns that would adversely affect project delivery.

The building and construction trades unions favor PLAs because the agreements generally include other provisions that align with labor interests, including: that union hiring halls refer all workers to the project; that workers referred to perform project work pay union dues for their time on the project; and that contractors contribute to union trust funds for workers' retirement and health care. Groups that are aligned with nonunion contractors often oppose the use of PLAs as imposing a competitive advantage for union contractors that normally operate under PLA-like conditions.

While many state and local governments have adopted PLAs for construction projects in their respective jurisdictions, the use of PLAs at the federal level has depended largely on the party occupying the White House, with Democrats favoring the use of PLAs and Republicans opposing them. In 2009, President Obama issued Executive Order (EO) 13502, which encouraged executive agencies to require PLAs on "large-scale construction projects" where the cost to the federal

government was $25 million or more. While President Trump did not rescind the Obama-era order, his administration did not invest in PLAs. President Biden, on the other hand, with his "Build Back Better" campaign message has made infrastructure spending and PLAs a key part of his first term domestic policy agenda.

"A blue collar blueprint to rebuild America"

After the House of Representatives passed the infrastructure bill, President Biden hailed the bill as "a blue collar blueprint to rebuild America" and a "once in a generation investment that's [going to] create millions of jobs." Importantly, most of the jobs that will be created will not require a college degree. Rather, most of these jobs will require only a high school diploma or equivalent and an apprenticeship or journeyperson credential in one of the construction or building trades.

Jobs in the building trades can provide a means of socio-economic mobility to individuals in lower income brackets, and PLAs can facilitate entry into and advancement in the building trades. Certain PLAs expressly address these types of issues by providing hiring preferences to small businesses, disadvantaged businesses, and women-owned business, by providing pre-apprenticeship and apprenticeship opportunities, and by hiring individuals from local communities to perform project work. The infrastructure bill invests in each of these areas, providing for geographic or economic hiring preference to encourage workforce diversity, the creation of pre-apprenticeship opportunities that will address barriers to employment among traditionally unrepresented populations, and education and job training for underrepresented groups.

Huge potential for expansion of PLAs

President Biden's commitment to PLAs coupled with $550 billion in new infrastructure spending signals a potentially dramatic increase in the number of PLA projects that the federal government approves over the next decade.

Consider that, in the decade following the issuance of EO 13502 in 2009, the Federal Highway Administration (FHA) approved more than 400 PLA projects with a total contract value of more than $11 billion, and in the next five fiscal years, the infrastructure bill will provide approximately $300 billion in federal funding for highway and highway safety construction alone, not to mention the other three-quarters of the funding in the bill. Should the FHA require that all "large-scale construction projects" use PLAs, the FHA could theoretically fund up to 12,000 PLA projects. While this theoretical limit is just that, the potential exists for a huge increase the number of PLAs.

President Biden's campaign promise of Build Back Better and the enactment of the infrastructure bill will undoubtedly spur job growth in the building trades over the next decade. The question is for whom.

It remains to be seen whether the infrastructure bill's targeted hiring and job training provisions will create transformational change in the construction industry as the Biden Administration intends, or whether investments in such programs will be criticized as inefficient and targeted for reduction in future years. State and local governments, particularly those that have not previously adopted PLAs to govern their construction projects should familiarize themselves with the key provisions of such agreements because proponents and opponents of PLAs, and community groups that advocate for targeted hiring and job training provisions as parts of such agreements, will likely become more active in lobbying on these issues in the coming years.

Alexander Volberding has spent his career working for and with public agencies. He is a member of the firm's Labor Relations practice group and has broad and deep experience working with a wide range of collective bargaining statutes, including the National Labor Relation Act (NLRA) and the Meyers-Milias-Brown-Act (MMBA). Volberding is well-versed in bargaining strategy and tactics and negotiates collective bargaining agreements with employee organizations and Project Labor Agreements (PLAs) with building and construction trades councils. He can be reached at avolberding@lcwlegal.com.

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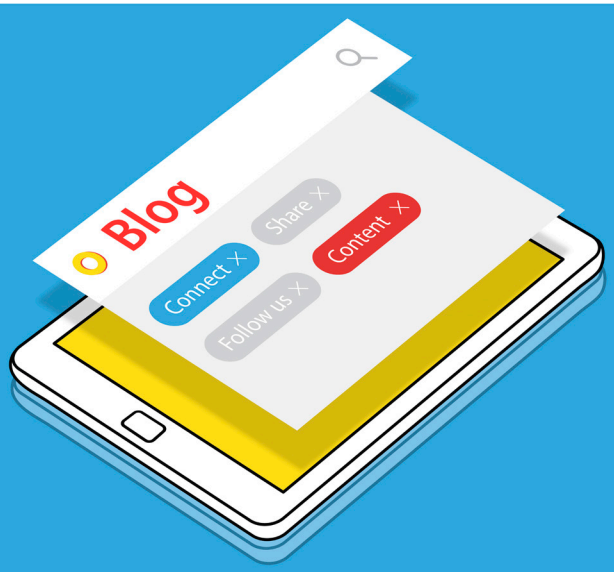

ON THE BLOG

Federal COVID-19 Discrimination Case Provides Essential Reminder for California Employers

By: Brett A. Overby

Since the COVID-19 pandemic first began, it has had a multitude of evolving impacts on the operation of the workplace. One impact is the increased number of requests employers are receiving from employees for reasonable accommodations. These increases are attributed to various factors, which have evolved as the pandemic has progressed. At the outset of the COVID-19 pandemic, many of the requests for reasonable accommodations arose from employees with medical conditions that placed them at higher risk if they contracted COVID-19. With the development and approval of the COVID-19 vaccine and the establishment of COVID-19 vaccine requirements for employees, many of the requests for reasonable accommodations began to arise from employees with disabilities preventing them from being vaccinated or from employees with sincerely held religious beliefs, practices, or observances that conflicted with the requirement that they be vaccinated. As California employers navigate these requests, a recent federal case provides an essential reminder for California employers.

Employers Must Engage in a Good Faith Interactive Process

In *Madrigal v. Performance Transportation, LLC*, the federal district court for the Northern District of California, analyzed multiple claims arising under the Fair Employment and Housing Act (FEHA) that were brought by Jorge Madrigal, who worked as a driver for Performance Transportation, LLC (PTL). The facts are as follows:

Madrigal's essential functions as a driver included driving and delivering food items to PTL's customers. When the COVID-19 pandemic began, Madrigal was on a medical leave, which his doctor extended because Madrigal had diabetes, which put him at high risk for severe illness if he contracted COVID-19. Several months later, Madrigal provided PTL with a doctor's note stating that he could return to work if he minimized contact with other people for six to twelve months during the COVID-19 pandemic due to his high-risk status. Madrigal requested a reasonable accommodation to that effect, and asserted he could perform the essential functions of his position with this accommodation.

Madrigal met with three PTL employees about his request for a reasonable accommodation. During the meeting, PTL denied Madrigal's request to work in PTL's warehouse, as a way to minimize contact with other persons, and ended the meeting without offering Madrigal any other reasonable accommodations. Ten days later, PTL fired Madrigal and stated that no reasonable accommodations were available for him.

Madrigal filed a complaint against PTL, which alleged a wrongful termination claim and several FEHA claims, including claims for (1) disability discrimination, (2) failure to accommodate, (3) failure to engage in a good faith interactive process, and (4) retaliation. PTL filed a motion to dismiss each of Madrigal's claims. After analyzing each of Madrigal's claims, the court granted PTL's motion to dismiss because Madrigal's complaint lacked sufficient information to support his claims. However, the court gave Madrigal the opportunity to amend his complaint to provide additional supportive information. After Madrigal amended his complaint, the court again analyzed each of Madrigal's claims.

In reviewing the facts, the court found that Madrigal had provided sufficient facts to support each of his claims. Importantly, the court found that Madrigal sufficiently pled his failure to accommodate and failure to engage in an interactive process claim because the facts he provided showed he made a reasonable request for accommodation, that PTL denied the request without offering any options for accommodations, that PTL made no attempt to accommodate his disability, and that there were several different accommodations available that PTL did not explore before terminating Madrigal. Therefore, the court did not grant PTL's motion to dismiss, and allowed Madrigal's complaint to proceed.

The *Madrigal* case provides the essential reminder of an employer's legal obligation to engage in a "timely, good faith, interactive process" with employees in response to their requests for reasonable accommodation, and an employer's legal obligation to make reasonable efforts to identify appropriate reasonable accommodations. The interactive process is intended to be a flexible one that involves participation by both the employer and the individual with a disability. In most circumstances, an employer will not fulfill their obligation to engage in the interactive process if the employer does not consider whether the employee's requested accommodation is reasonable or offer alternate accommodations that would enable the employee to perform essential job duties with or without reasonable accommodation. While this case is still at the pleading stage, moving forward, the employer will have to demonstrate that the employee's requested accommodation was not reasonable and that no other reasonable accommodations were available that would enable the employee to perform his or her essential job duties, including but not limited to reassigning the employee to an alternate vacant position for which the employee is qualified.

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