LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

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LCW NEWS

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in *Education Mattears* should not be acted on without professional advice.

CIVIL RIGHTS

U.S. Department Of Education Office Of Civil Rights Releases Resources To Support Intersex Students.

The U.S. Department of Education Office for Civil Rights (OCR) published a fact sheet that addresses the key issues intersex students face in schools, such as bullying, harassment, and other discrimination related to their physical characteristics. According to the fact sheet, the term "intersex" generally describes people with variations in physical sex characteristics, such as anatomy, hormones, chromosomes, and other traits that differ from expectations associated with male and female bodies.

The fact sheet also offers suggestions on ways schools can support intersex students, including the use of inclusive language on school mission statements, affirmation of students' right to be free of sex discrimination at school, and the advancement of gender-neutral practices.

The fact sheet builds on the Biden Administration's efforts to ensure equal educational opportunities to all students.

SPECIAL EDUCATION

A Stay-Put Order Under IDEA Functions As A Preliminary Injunction.

The Individuals with Disabilities Education Act (IDEA) offers federal funds to states that furnish a free appropriate public education (FAPE) to children with physical or intellectual disabilities.

A school district provides a FAPE by devising an individualized education program (IEP), which identifies instructions for a child's unique educational needs and support services to allow the child to benefit from the instruction. The IEP is developed by an "IEP team," which includes the child's parents, school officials, and teachers. The IEP also documents the child's levels of academic achievement and identifies annual educational goals.

IDEA provides for specific procedural safeguards to address disputes over an IEP. If a parent is not satisfied with the IEP or has another complaint about the school district's provision of the FAPE, the parent can file a complaint with the responsible state or local educational agency. Upon receiving the complaint, the agency must convene a "preliminary meeting" with the IEP team and the child's parents. If the parents are still unsatisfied, the parties can proceed with a due process hearing before a neutral arbiter, who determines whether the child has received a FAPE.

If the parents are aggrieved with the ruling of the arbiter, they then have the right to file a suit in court. However, while the suit is ongoing, IDEA requires that the child remain in their then-current educational placement - a requirement known

as the "stay-put" provision. The "stay-put" acts as an automatic preliminary injunction, meaning the child's IEP plan remains in place until the proceeding is complete.

S.C. is a teenage girl who attends school in Lincoln County School District. S.C. has a severe form of Prader-Willi Syndrome ("PWS"), which causes loss of appetite control, anxiety, depression, and physical and verbal aggression. S.C. had been receiving special education services at the school district since 2015. In May 2020 S.C.'s mother, K.G., filed an administrative challenge claiming the school district was not providing a FAPE to S.C. While the administrative challenge was still pending, a new IEP was approved without input from S.C. and K.G in September 2020.

An Administrative Law Judge (ALJ) conducted a hearing on the challenge. Because the ALJ's review was limited to two years preceding the filing of the complaint, the hearing did not cover the September 2020 IEP. The ALJ found the school did not provide S.C. a FAPE, and ordered S.C. be placed in a residential facility that treats students with PWS at the district's expense.

The school district did not comply with the order, and failed to enroll S.C. in a residential facility. K.G., on behalf of S.C. filed a lawsuit in federal court seeking a stay-put order or a preliminary injunction to compel the school district to comply with the ALJ's order. The trial court denied K.C.'s request on the grounds that K.G. needed to challenge the September 2020 IEP through administrative procedures before filing a suit in court.

The Ninth Circuit held that the trial court misinterpreted that the ALJ's order provided to simultaneous remedies, rather than the immediate transfer to the residential facility until the school district provided an appropriate IEP.

Additionally, the trial court's interpretation of the ALJ's order would require K.G. to file a new due process challenge to the September 2020 IEP in order to receive the benefit of the favorable ALJ ruling, even though the September 2020 was outside the scope of the ALJ's review. The Ninth Circuit held that this was inconsistent with procedural protections of the IDEA. Under this interpretation, parents would be forced to file a due process challenge every time a new IEP is developed without enjoying the benefits of a favorable administrative ruling on a previous challenge.

The Ninth Circuit also held the trial court failed to ask how the ALJ changed S.C.'s education placement. Federal regulations require that the educational placement must be treated as an agreement between the parents and the state if the hearing officer agrees with the parents that a change is appropriate for purposes of "stay-put." The Ninth Circuit held that the ALJ's order that S.C. be placed in a residential facility constituted an agreement between the state and S.C's parents for purposes of the stay put provision. As such, S.C. must be placed at a residential facility and remain there until the school provides a FAPE that cures the deficiencies of previous IEPs that the ALJ identified in the order.

Accordingly, the Ninth Circuit reversed the trial court's decision.

S.C. by K.G. v. Lincoln Cty. Sch. Dist. (9th Cir. 2021) 16 F.4th 587.

Student ADA Complaint Was Subject To Exhaustion Of Administrative Remedies Under IDEA.

The Individuals with Disabilities Education Act (IDEA) offers federal funds to states that furnish a free appropriate public education (FAPE) to children with physical or intellectual disabilities.

A school district provides a FAPE by devising an individualized education program (IEP), which identifies instructions for a child's unique educational needs and support services to allow the child to benefit from the instruction. The IEP is developed by an "IEP team," which includes the child's parents, school officials, and teachers. The IEP also documents the child's levels of academic achievement and identifies annual educational goals.

IDEA provides for specific procedural safeguards to address disputes over an IEP. If a parent is not satisfied with the IEP or has another complaint about the school district's provision of the FAPE, the parent can file a complaint with the responsible state or local educational agency. Upon receiving the complaint, the agency must convene a "preliminary meeting" with the IEP team and the child's parents, and offer to resolve the dispute through mediation. If the parents are still unsatisfied, the parties can proceed with a due process hearing before a neutral arbiter, who determines whether the child has received a FAPE. If the parents are aggrieved with the ruling, they then have the right to file a suit in civil court.

The Americans with Disability Act (ADA) also requires nondiscriminatory access to the services, programs, and activities of public facilities and requires the facility to implement policies to avoid discrimination. Section 504 of the Rehabilitation Act also imposes similar obligations on programs and activities that are federally funded. Both laws allow parties to file suit for monetary damages or to compel the public entity to comply with the laws.

The requirements of IDEA often overlap with the requirements of the ADA and Section 504 of the Rehabilitation Act. IDEA does not preempt other

claims under these laws by children with disabilities, but requires plaintiffs to exhaust their administrative remedies if they are seeking relief also available under IDEA. In other words, parents with complaints about a FAPE must go through IDEA-specific procedures for relief. If a parent seeks relief for other harms independent of a FAPE denial, then the parent is not subject to this administrative exhaustion rule.

D.D., an elementary school student, has an emotional disability that interferes with his ability to learn. D.D. started receiving special education services in kindergarten to address his physical aggression, impulsiveness, and being off-task. During the school year, D.D.'s mother unsuccessfully requested a one-one-one aide to accommodate D.D.'s needs. D.D. transferred to a different school in the school district for first grade but his behavior escalated. D.D.'s mother again asked for a one-on-one aide but the school instead required D.D.'s mother to pick D.D. up from school early due to his behavior, excluding him from school activities. The school district continued to fail to provide D.D. behavior support and services during the second grade, and the parents eventually withdrew D.D. from public school and enrolled him in nonpublic schools.

D.D. filed a request for mediation and due process hearing with the California Office of Administrative Hearings (OAH). The main allegation was the school district's failure to provide a one-on-one aid or behavioral services needed for D.D. to remain in school and access his education. D.D's request identified several other problems with the school district, including the District's failure to offer D.D. reasonable accommodations in violation of Section 504 and the ADA.

D.D. settled his IDEA claims against the school district during mediation. D.D. then filed a complaint in federal court, alleging the district violated the ADA by failing to provide the same services sought in the IDEA proceedings. As a result, D.D. alleged he has suffered a loss of equal educational opportunity. The trial court dismissed D.D. complaint, and the Ninth Circuit Court of Appeals reversed and found IDEA's administrative exhaustion requirement inapplicable. The Ninth Circuit then set aside the judgment and reheard the case. On appeal, D.D. only argued that his complaint filed in federal court should not be subject to the exhaustion requirement.

The Ninth Circuit rejected D.D.'s argument that the basis of his ADA complaint is not the denial of FAPE. The Ninth Circuit reasoned that the gravamen of D.D.'s complaint is that the school district failed to provide the accommodations that he needed to access his education, and as a result he suffered loss educational opportunity. The accommodations D.D. identified in the complaint, such as the one-on-one aid and other supportive services to manage his behavior, are the core components of receiving a FAPE. Therefore, because the essence of D.D.'s complaint was that he was injured by the school district's failure to provide a FAPE, D.D. triggered the exhaustion requirement.

The Ninth Circuit also rejected D.D.'s argument that he did not need to exhaust administrative remedies because he sought monetary damages for emotional distress, which are not available under IDEA. The Ninth Circuit held that a plaintiff cannot avoid the exhaustion requirement by limiting the relief sought to just monetary damages.

Ultimately, the Ninth Circuit held that the trial court did not err in dismissing D.D.'s complaint because it was subject to the exhaustion rule.

D.D. v. Los Angeles Unified School Dist. (9th Cir. 2021) ____ F.4th ____ [2021 WL 5407763].

SOVEREIGN IMMUNITY

Student's Aide Did Not Act With Deliberate Indifference When He Was Unaware Student Was In Pool When Student Drowned; IDEA Does Not Provide An Exception To Immunity From Liability Under State Law.

Erick Ortiz was an autistic high school student in the Los Angeles Unified School District (LAUSD) who attended an end-of-year party at a park. In accordance with Erick's Individualized Education Plan (IEP), LAUSD provided an aide to supervise him throughout the day. During the party, Erick told school aide Lopez that he was going to the park's swimming pool, which was monitored by three lifeguards. Lopez did not enter the pool area, but watched Erick from a designated observation area as required by the pool rules. At some point, Lopez saw Erick exit the pool and enter the locker room. Lopez then left the observation area to wait for Erick to exit the locker room. Unknown to Lopez, Erick did not change in the locker room and instead returned to the pool. Lopez shortly thereafter began looking for Erick. When Lopez checked the pool, he saw lifeguards attempt to resuscitate Erick, who had drowned.

Erick's parents sued LAUSD, the aide, and several school employees for negligence and wrongful death, and a federal section 1983 claim for deprivation of familial relationship. The trial court granted judgment in favor of the defendants on all claims. Erick's parents appealed.

To recover damages under a section 1983 claim, a plaintiff must establish that the defendant deprived him of a constitutional right while "acting under color of

state law." A section 1983 claim can arise when the state affirmatively places a plaintiff in danger by acting with deliberate indifference to a known or obvious danger. A defendant who acts with deliberate indifference recognizes the unreasonable risks, ignore those risks, and intentionally exposes plaintiff to such risks without regard to consequences to the plaintiff. The court evaluates whether the defendant acted under deliberate indifference under a subjective test.

The Ninth Circuit found there was no factual dispute that the aide, Lopez, was unaware of any immediate danger to Erick because he thought Erick was in the locker room. Additionally, even if Lopez did not supervise Erick as closely as he could have, there were three lifeguards at the pool who were also responsible for student safety. The Ninth Circuit also found that Lopez had no actual knowledge to the fact that Erick was going to drown because Lopez thought Erick was still in the locker room.

Additionally, the Ninth Circuit found that no jury would find that Lopez was deliberately indifferent to Erick's safety because he lost track of Erick earlier in the day. Additionally, because there were other lifeguards at the pool, no jury would conclude that Lopez intentionally exposed Erick to an unreasonable risk.

The Ninth Circuit also rejected the parents' argument that Lopez allowed Erick to enter a more dangerous situation. There was undisputed evidence that Erick was never left completely without protection - Lopez monitored Erick when he was at the pool, and three other lifeguards also monitored the pool. Therefore, the Ninth Circuit upheld the trial court's judgment in favor of the defendants on the federal section 1983 claim.

In an accompanying opinion, the Ninth Circuit also addressed Erick's parents' argument that Education Code section 35330 does not apply because the Individuals with Disabilities Education Act (IDEA) and Education Code section 44808 are exceptions to section 35330. Section 35330 immunizes schools from all claims against schools during or by reason of a field trip or excursion. Section 44808 allows liability against a school that has provided transportation to a student from school premises, has undertaken a school-sponsored activity off the premises of the school, and has specifically assumed responsibility or liability, or and has failed to exercise reasonable care under the circumstances.

The Ninth Circuit rejected the parents' argument that IDEA provides for an exception to state liability law. IDEA allows students to file a suit in court under federal law against the state for violations of the statute. However, IDEA does not require states to permit state law claims for violating its obligations under federal law.

The Ninth Circuit also rejected the parents' argument that section 44808 provides an exception to section 35330. The Ninth Circuit reasoned that section 44808 does not preclude immunity when a school already has statutory immunity under section 35330. The parents did not dispute that the end-of-year party was a field trip and therefore, the school district is immune under section 35330.

Ultimately, the Ninth Circuit upheld the trial court's decision that LAUSD was immune from liability pursuant to section 35330.

Herrera v. Los Angeles Unified School Dist. (9th Cir. 2021) ____ F.4th ____ [2021 WL 5626373]; Herrera v. Los Angeles Unified School Dist. (9th Cir. 2021) ____ F.4th ____ [2021 WL 5647960], (unpublished).

Public School Has Statutory Immunity From Liability For Student's Suicide.

Kennedy Leroy attended Ayala High School in Chino Valley Unified School District. Kennedy suffered from Tourette's Syndrome, sensory integration disorder, and borderline Asperger's Syndrome. Kennedy attended a virtual school program partly because of his health issues, but physically attended a cooking class during his sophomore year. Several students bullied Kennedy during every cooking class, including a student named M.D.

Kennedy reported M.D.'s bullying to school administrators, telling them that M.D. called him a faggot, harassed him, and that "he couldn't take it anymore." At the request of Carlos A. Purther, the school's assistant principal, M.D. signed a No Contact Contract. The contract stated M.D. could not contact Kennedy in any way. Purther talked to Christopher Leroy, Kennedy's father, who thought the solution was reasonable. Kennedy also signed a No Contact Contract. Kennedy did not tell his father who was bullying him or what M.D. had done or said to him, and never mentioned the situation again to his father.

A few weeks after signing the No Contact Contract, Kennedy complained that M.D. was causing Kennedy to suffer painful Tourette's ticks. However, Kennedy later signed an incident report, which stated that M.D. had not spoken to him. M.D. also denied speaking to Kennedy after signing the No Contact Contract.

Kennedy committed suicide two days after his last day of the school year. The LeRoys sued the school district, Purther, and the school's principal for Kennedy's death. The LeRoys alleged that Kennedy committed suicide because he was bullied, which the defendants failed to address and prevent.

The defendants filed a motion of summary judgment, and the trial court granted the motion in their favor. The trial court held that the negligence claims failed because the defendants did not breach any duty they owed to Kennedy and were immune from liability under Education Code section 44808. The LeRoys appealed to the Court of Appeal.

The Court of Appeal agreed with the defendants' argument that they are immune from liability under Education Code section 44808. Section 44808 provides:

> *Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.*

In order for the LeRoys to prevail on their negligence claim, they must show that the defendants owed Kennedy a duty of care, they breached that duty, and their breach was the proximate cause of Kennedy's injuries. The LeRoys argued that the defendants are not immune under section 44808 because they "failed to exercise reasonable care under the circumstances." The defendants argued that section 44808 imposes liability for a student's off-campus activities when a student is involved in activities supervised or undertaken by the school.

The Court of Appeal reasoned that Kennedy committed suicide off-campus during summer break in his parents' home. The school district and its employees were not and should not have been supervising Kennedy at the time. Additionally, no one assumed responsibility for Kennedy at the time of his suicide. Therefore, the Court of Appeal held the defendants are immune from liability for Kennedy's death under section 44808.

Ultimately, the Court of Appeal affirmed the trial court's judgment in favor of the defendants.

LeRoy v. Yarboi (2021) 71 Cal.App.5th 737.

STUDENT DUE PROCESS

Live Hearing With Cross-Examination Of Witnesses Was Not Required In Student Disciplinary Case Where Witness Credibility Was Not Central To Investigator's Findings.

UC Davis student Jane Roe and her roommate shared a room in a residence hall, and John Doe lived on another floor of the same building. On December 2, 2017, a group of students including John, were socializing in Jane's dorm room. Jane became intoxicated, vomited, and fell asleep in the residence hall bathroom. Later that evening, John and Jane had sex. On January 26, 2018, Jane reported to the Title IX Office that John had nonconsensual sexual intercourse with her.

The 2016 UC Policy on Sexual Violence and Sexual Harassment prohibits sexual misconduct, including sexual assault. The policy also defines consent as "affirmative, conscious, voluntary, and revocable." Wendy Lilliedoll, Office of the Provost and Executive Vice Chancellor, conducted an investigation in accordance with the UC policy.

After her investigation was complete, Lilliedoll sent the parties a summary of the evidence gathered for the investigation. In response, John made several written comments to Lilliedoll's evidence summary and Lilliedoll followed up with the comments that she found were material.

Lilliedoll found that Jane was severely intoxicated, which affected her ability to recall and observe relevant events. Lilliedoll also found John motivated to exaggerate events regarding the issue of consent because there were serious consequences for violating UC policy. Lilliedoll recommended finding was that Jane did not provide consent, a reasonable person in John's position should have understood her condition, and that John did not take reasonable steps to evaluate Jane's consent.

The Office of Student Support and Judicial Affairs (OSSJA), which decides whether any policy violations occurred, agreed with the investigator's findings. OSSJA determined the appropriate sanction was dismissal. John requested an administrative appeal. Notices were sent to the parties about the hearing. Jane's notice stated she did not have to attend the appeal hearing, and she did not.

After the appeal hearing, the hearing officer upheld the findings of the original decision and modified the sanction by setting aside the dismissal and imposing a two-year suspension and exclusion from university housing. John submitted a second-level appeal to the Assistant Vice Chancellor of Student Affairs, who denied the appeal.

On February 21, 2019, John Doe filed a petition for writ of administrative mandate and declaratory relief. John argued the proceedings were unfair because a single person (Lilliedoll) investigated the allegations and made findings of fact. John also argued that he was denied fair process, relying on recent case law that held a fair process in university adjudication proceedings required a live hearing with cross-examination where witness credibility is at issue and the disciplinary sanction is severe. John also alleged Lilliedoll was biased and there was not substantial evidence that Jane was incapacitated.

The Court of Appeal rejected John's claim that there was not substantial evidence that Jane was incapacitated due to alcohol and a reasonable person in John's position should have known that. The Court of Appeal agreed with the university that John's account of the events was sufficient enough to establish Jane was unable to consent. As a result, witness credibility was not a central to the adjudication and the procedures outlined in recent case law of a live hearing with the opportunity to cross-examine adverse witnesses were not required. Additionally, the accounts of eyewitnesses provide substantial evidence that Jane lacked capacity to consent.

The Court of Appeal also rejected John's claim that Lilliedoll did not conduct a fair, thorough, and impartial investigation as required by UC policy because Lilliedoll rejected his theory that Jane was motivated to fabricate her allegations. The Court of Appeal held John had a right to an impartial investigator, not a right to have his theory that Jane fabricated her allegations accepted by the investigator.

The Court of Appeal also rejected John's claim that Lilliedoll rejected evidence favorable to John. The Court of Appeal pointed to the appeal hearing officer's findings that Lilliedoll thoroughly considered all the evidence, including John's own account of the events, to reach her conclusion that Jane was incapacitated. John was also given several opportunities to explain his version of the events to Lilliedoll.

Accordingly, the Court of Appeal denied John's writ of petition.

Doe v. Regents of the Univ. of California (2021) 70 Cal.App.5th 494.

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 (2021) 70 Cal.App.5th 521.

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 educational entities' administrative decisions to terminate a public employee's employment.

ACADEMIC EMPLOYEES

Court Of Appeal Instructs Arbitrator To Terminate Faculty Member's Employment.

In a case involving a college sociology professor charged with harassing students on the basis of their gender and LGBTQ status and for interfering with an investigation directive by contacting a student witness, the Court of Appeal issued a 2-1 unpublished decision in the community college district's favor. The Court of Appeal reversed the trial court and ordered that it 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 his lack of remorse further confirmed dismissal as 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 in the trial court, and the appeal in the Court of Appeal.

DISCRIMINATION & HARASSMENT

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.

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 (9th Cir. 2021) 18 F.4th 643.

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. Wilkin 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) 71 Cal. App.5th 806.

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.

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 (9th Cir. 2021) 17 F.4th 849.

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.

FIRST AMENDMENT

Court Allows Police Officers To Proceed With Their Defamation Claim Based On City Councilmember's Statements.

In February 2016, Scott Miller and Michael Spaulding, two police officers in the City of Seattle, Washington, shot and killed Che Taylor, a Black man, while attempting to make an arrest. A few days after the shooting, Kshama Sawant, a member of the Seattle City Council, told a crowd in front of the Seattle Police Department: "The brutal murder of Che Taylor, just a blatant murder at the hands of the police, show[s] how urgently we need to keep building our movement for basic human rights for black people and brown people." Sawant called for the Seattle Police Department to be held "accountable for their reprehensible actions, individual actions. We need justice on the individual actions and we need to turn the tide on the systemic police brutality and racial profiling." In June 2017, following the fatal shooting of another person of color, Sawant repeated her allegation that "Taylor was murdered by the police."

In 2018, Miller and Spaulding filed an action against Sawant, claiming that she had defamed them by falsely accusing them of racial profiling and murder. Although Sawant did not identify the officers by name in her comments, they alleged that their families, friends, colleagues, and members of the public all knew that they were the officers who shot Taylor. The officers alleged that Sawant's remarks were thus "of and concerning" them, as required to state a claim for defamation under Washington law.

The district court dismissed the officers' defamation claims on the ground that their complaint failed to plausibly allege that Sawant's remarks were "of and concerning" them. Specifically, the district court concluded that Sawant's statements did not target the officers, but rather spoke to broader issues of police accountability.

The officers appealed, and the Ninth Circuit Court of Appeals reversed. The Ninth Circuit noted that although Sawant's remarks appeared to be aimed in part at the police generally, some of her words referred specifically to the officers who shot Taylor, including her reference to the "individual actions" taken. The Ninth Circuit noted that this language suggested that Sawant was singling out Miller and Spaulding—characterizing them as murderers and calling for them to be held individually accountable.

The Ninth Circuit also noted that some who heard the remarks may have understood Sawant's remarks as communicating criticism of police generally, but stated that the officers plausibly alleged that their family, friends and community understood the comments to be directed at Miller and Spaulding. They were the only police officers involved in the shooting, and the only "police" to whom the statements could apply. Thus, the officers' allegations met the "of and concerning" standard under Washington law.

Sawant alleged that she could not be held liable, even if readers and listeners reasonably understood her remarks to refer to the two officers, because she was not responsible for making their identities public. The Ninth Circuit disagreed, noting that no applicable case authority distinguishes between information acquired from the speaker of the alleged defamatory remarks and information acquired from other sources in the context of a viable defamation claim.

Sawant also alleged that allowing police officers to file defamation claims based on the knowledge and conclusions of friends, families, and colleagues of those officers will allow officers to silence critics of law enforcement. The Ninth Circuit again disagreed, noting that case authority is clear that defamation claims may be based on how a communication is understood by individuals who know the plaintiffs.

Based on the foregoing, the Court reversed and remanded the case to the district court for further proceedings.

Miller v. Sawant (9th Cir. 2021) 18 F.4th 328.

NOTE:

The Ninth Circuit noted that it was not deciding whether the City Councilmember was liable for defaming the officers. Rather, the Ninth Circuit only held that the officers plausibly pleaded a single element of their defamation claims at issue on appeal – the "of and concerning" element.

GOVERNMENT CLAIMS ACT

Former Employee's Failure To Timely File A Claim For Damages With A Fire Protection District Prevented Lawsuit.

On March 9, 2018, Katherine Wood resigned from her position as an administrative secretary with the Pioneer Fire Protection District (District). Under the Government Claims Act (Act), no lawsuit for damages may be maintained against a public entity unless a written claim has first been presented to the entity. Any claim for personal injury must be presented no later than six months after the "accrual of the cause of action." Wood presented a claim to the County of El Dorado (County) on the last day to present a claim. Her claim alleged that she was constructively discharged, harassed, and retaliated against for reporting improper use of District funds. The County rejected Wood's claim because the District is a separate public agency over which the County has no control.

Wood then presented her claim to the District, which the District returned as untimely because it was not presented within six months of her alleged constructive discharge. Wood submitted an application to the District for leave to present a late claim based on mistake, inadvertence, surprise, and excusable neglect because her legal counsel was not aware that the District required claim forms to be submitted directly to the District rather than to the County. The District denied Wood's application.

Wood filed a petition for relief from the claim presentation requirement with the superior court on the same grounds of mistake and excusable neglect. Wood alleged that her counsel reviewed Wood's personnel file, which included County personnel forms, and confirmed that District personnel were paid by the County. Wood further alleged that the District's website does not provide information about submitting a claim, and that her counsel had previously submitted other claims to small fire districts within the County directly to the County's Board of Supervisors, which were then processed through the County. The superior court denied the petition.

Wood appealed. She alleged that the superior court abused its discretion by ignoring her "uncontradicted evidence" of mistake and excusable neglect. The California Court of Appeal disagreed, noting that the District submitted evidence that contradicted Wood's version of events, and that demonstrated a lack of diligence by Wood's counsel. For example, the Court stated that Wood's counsel obtained her personnel file from the District itself and that, while County checks are used to pay District employees, all employee compensation and benefits come from the District alone. The Court of Appeal noted that Wood's counsel should have done more to discern the relationship between the District and the County. Under these circumstances, the Court of Appeal concluded that a reasonably prudent person would have submitted a timely claim to the District and affirmed the superior court's denial of Wood's petition.

Wood v. Pioneer Fire Protection District (Cal. Ct. App. Oct. 26, 2021) 2021 WL 4962699, unpublished.

NOTE:

A person may seek relief for failing to present a timely claim for damages to a public educational entities in limited circumstances, such as excusable mistake. This case demonstrates that courts are very exacting on those who do not carefully follow the claims' filing requirements. Public educational entities can avoid lawsuits based on untimely or improperly filed claims for damages.

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.

SB 278 – Shifts Financial Exposure To Employers For CalPERS Compensation Reporting Errors.

The Public Employees' Retirement Law (PERL) provides a defined benefit retirement plan administered by CalPERS, for employees of participating public agencies. In 2013, the Public Employees' Pension Reform Act (PEPRA) made changes to the categories of compensation that can be included in some employees' retirement benefit calculation. The complex scheme of governing statutes, regulations, and administrative guidance sometimes leads to unintended reporting errors. In addition, because the specific items of

compensation at a given agency are often the product of negotiations, the parties sometimes inadvertently negotiate criteria that makes a pay item non-reportable on technical grounds.

Under existing law, if CalPERS determined that a disallowed item of compensation was included when calculating a retiree's retirement benefit allowance, the retiree would have to repay CalPERS for the amount that was overpaid, and their retirement allowance would be reduced going forward based on what they should have received if the improper pay item was not reported. SB 278 was enacted to protect retirees from this kind of financial exposure, and in doing so, it transfers almost all of the risk of misreported compensation to the employer.

Under SB 278, local agencies must pay CalPERS the full cost of any overpayments received and retained by the retiree, as well as a 20-percent penalty of the present value of the projected lifetime and survivor benefit. Ninety percent of the penalty is paid directly to the retiree and 10 percent is paid as a penalty to CalPERS.

For current employees, SB 278 does not make significant changes, as it allows improper contributions to act as a credit towards a public agency's future contributions, and any contributions paid by the employee on the disallowed compensation is returned. There are no overpayments to address because the employee has not yet retired or started receiving a retirement allowance.

With respect to retired members, the penalty is triggered where the following conditions are met:

1. The compensation was reported to the system and contributions were made on that compensation while the member was actively employed;
2. The compensation was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes and the employer and the recognized employee organization did not knowingly agree to compensation that was disallowed;
3. The determination by the system that compensation was disallowed was made after the date of retirement; and
4. The member was not aware that the compensation was disallowed at the time it was reported.

The statutory language raises several questions that will require guidance from CalPERS or may need to be litigated, both with regard to the specific criteria outlined above, and with regard to the enforcement of the retroactive component of the statute. In addition, the statute leaves unresolved lingering questions about what statute of limitations applies to CalPERS when seeking to collect overpayments from employers. LCW will continue to monitor any new guidance issued regarding this statute.

If the statute is interpreted to have broad retroactive effect, it may very well incentivize CalPERS to start aggressively auditing local agencies, because any unfunded liabilities for inadvertently misreported compensation would be shifted directly to the employer and compensation carrying unfunded liabilities can be removed from the books. CalPERS also receives a portion of the prospective reduction of benefits as a penalty against the agency. The potential combined retroactive liability and penalties for public employers could be significant – and impossible to predict. While SB 278 has a provision for CalPERS to review labor agreements prospectively and provide guidance, the statute does not specify that CalPERS' approval will be binding and prevent a later negative determination.

Public educational entities should consult with trusted legal counsel to scrutinize pay items currently being reported to CalPERS and correct any compliance issues identified as soon as possible to reduce the potential financial exposure for future retirees.

(SB 278 adds Section 20164.5 to the Government Code.)

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.

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.

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

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.

New to the Firm

La Rita R. Turner is an Associate in the Los Angeles office of LCW. She is an experienced litigator and has handled FEHA, whistleblower retaliation, wage and hour claims, and class actions in state and federal courts.

She can be reached at 310.981.2311 or lturner@lcwlegal.com.

Jennifer Puza is an Associate in the Sacramento office of LCW where she advises clients in matters pertaining to labor and employment law. She has experience conducting investigations into allegations of discrimination, hostile work environment, and harassment and advises clients on FMLA and CFRA matters, and works with clients on employee discipline, wage and hour laws, and bargaining unit grievances.

She can be reached at 916.584.7025 or jpuza@lcwlegal.com.

Firm Publications

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

LCW Managing Partner Scott Tiedemann weighed in on Senate Bill 2 and what it means for policing practices in the Oct. 12 23*ABC 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.

KNX News interviewed LCW 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.

LCW 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.

Are you involved as a volunteer for a nonprofit organization? You may be interested in our Nonprofit Newsletter and Nonprofit Legislative Round Up.

In addition to our Public Education practice, the firm also assists nonprofit organizations across the state. To learn more, visit our Nonprofit Page.

We are back in person!
Join us in San Francisco
on February 3 - 4, 2022.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

Jan. 12 **"Public Sector Employment Law Update"**

Gold Country ERC & Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore

Jan. 12 **"A Guide to Implementing Public Employee Discipline"**

North State ERC & San Joaquin Valley ERC | Webinar | Michael Youril & Joel Guerra

Jan. 13 **"Public Sector Employment Law Update"**

Coachella Valley ERC & East Inland Empire ERC & San Diego ERC | Webinar | Richard S. Whitmore

Jan. 13 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**

Los Angeles County Human Resources Consortium | Webinar | Laura Drottz Kalty

Jan. 21 **"Managing Performance Through Evaluation"**

Bay Area Community College District ERC | Webinar | Meredith Karasch

Jan. 21 **"Public Sector Employment Law Update"**

Central CA Community College District ERC & Southern California Community College District ERC | Webinar | T. Oliver Yee

Jan. 27 **"Public Sector Employment Law Update"**

North San Diego County ERC & South Bay ERC | Webinar | Richard S. Whitmore

Customized Trainings

Jan. 12 **"A Guide to Classified Disciplinary Procedures"**

Yuba Community College District | Webinar | Eileen O'Hare-Anderson

Jan. 13, 20 & 26 **"Title IX"**

Long Beach City College | Webinar | Pilar Morin & Monica M. Espejo

Jan. 19 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**

Ohlone College | Webinar | Alysha Stein-Manes

Jan. 27 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**

Gavilan College | Webinar | Amy Brandt

Jan. 28 **"Maximizing Performance Through Evaluation, Documentation, and Corrective Action"**

Cal Matters | Webinar | T. Oliver Yee

Jan. 28 **"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

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