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PRIVATE EDUCATION MATTERS

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges.

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LCW NEWS

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

EMPLOYEES

ASSOCIATION DISCRIMINATION

COVID-19 Could Be A Basis For An Association Discrimination Claim Under The Americans With Disabilities Act.

Jaquaishala Champion worked at Mannington Mills, a flooring manufacturing company. Champion's brother, Alvin Evans, also worked for Mannington Mills at the same facility. On March 26, 2020, Evans started feeling ill and went to the emergency room where he was tested for COVID-19. Four days later, Evans' test for COVID-19 came back positive, and the Director of Human Resources asked Champion if she had been near Evans on March 26 when he began feeling ill. Champion denied being around her brother at or outside of work around the time he became symptomatic. Champion had forgotten that she had a four-minute conversation with Evans before her shift while the two of them stood a few feet apart from one another in the Mannington Mills's parking lot after work on March 26.

After several employees reported seeing Champion speak with her brother in the parking lot on March 26, Champion's supervisor asked her if this was true. Champion told her supervisor that it was true, and her supervisor sent her home to quarantine for fourteen days. A few days later, the Director of Human Resources called Champion and told her Mannington Mills had terminated her from her position. Champion brought a claim of association discrimination under the Americans with Disabilities Act ("ADA") against Mannington Mills, which alleged that they terminated her because of her association with her brother who she contended was disabled due to COVID-19.

The ADA prohibits association discrimination, which is generally defined as the exclusion or otherwise denial of equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship. An individual has a disability if that person has a "physical or mental impairment that substantially limits one or more major life activities," a record of such an impairment," or is "regarded as having such an impairment." For purposes of an association discrimination claim under the ADA, current federal case law requires a plaintiff to base a claim on association with an individual with a known disability – the "regarded as" basis is not sufficient.

The court determined that Champion had failed to show that Evans had a known disability (i.e., that his COVID-19 diagnosis caused a physical or mental impairment that substantially limited one or more of his major life activities), which was necessary for her claim to proceed. The court explained that a COVID-19 infection alone does not mean an individual is disabled; an individual must still allege factual matter demonstrating the presence of a physical or mental impairment that substantially limits one or more major life activities. For example, with regard to the ADA and COVID-19, this showing could be in the form of

facts showing that COVID-19 substantially limited an individual's ability to care for oneself, perform manual tasks, see, hear, eat, sleep, walk, stand, lift, bend, speak, breath, learn, read, concentrate, think, communicate, or work. Because Champion failed to make this showing, the court dismissed her claim.

Champion v. Mannington Mills, Inc. (M.D. Ga., May 10, 2021, No. 5:21-CV-00012-TES) 2021 WL 2212067.

NOTE:

On December 14, 2021, the Equal Employment Opportunity Commission ("EEOC") issued guidance clarifying when COVID-19 may be a disability. For more information, please see the December 27, 2021, LCW special bulletin, EEOC Releases Updated Guidance Clarifying When COVID-19 May Constitute a Disability.

RELIGIOUS DISCRIMINATION

Court Denied Employee's Request To Prevent Implementation Of Unpaid Leave As Religious Accommodation To Employer's COVID-19 Vaccine Policy.

United Airlines mandated COVID-19 vaccinations for its employees. Jaymee Barrington, who worked for United, claimed that her sincerely held Christian faith prevented her from taking the COVID-19 vaccine and she requested a religious accommodation. United granted her request and placed her on a leave of absence without pay as an accommodation. United also told her she would "be welcomed back to work once COVID-19 testing protocols are in place for [her] location and work area," but she would be separated from the company if her position was filled while she was out on leave. United gave Barrington five days to respond to the accommodation. Barrington then sought a preliminary injunction preventing United from placing her on unpaid leave.

To receive a preliminary injunction, Barrington was required to show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to her if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause to United; and (4) the injunction, if issued, will not adversely affect the public interest.

Under Title VII, employers must provide reasonable accommodation for an employee's sincerely held religious beliefs or show that reasonable accommodation would be an undue hardship on the employer. Employers must also engage in an interactive process with employees making requests for reasonable accommodations. That is, they must engage in good faith communications with employees about potential accommodations.

Barrington alleged that United failed to engage in an interactive process with her before determining the available accommodation. Barrington contended that United should have offered her alternative accommodations, such as mask wearing, periodic testing, social distancing, or moving her to an alternative position. United contended that it offered Barrington a reasonable accommodation in the form of an unpaid leave of absence. United further asserted that the alternative accommodations suggested by Barrington would constitute an undue hardship on the airline, in the form of additional hiring, training, and costs, and Barrington's presence in the workplace would jeopardize the lives and health of other United employees based on information from the Centers for Disease Control and Prevention (CDC).

Based on the available facts, the court found that United had engaged in an interactive process with Barrington by responding to Barrington's request for an accommodation, notifying her by email of the proposed accommodation, and giving her five days to respond. Therefore, the court held that Barrington was unlikely to succeed on the merits of her reasonable accommodation or interactive process claims.

Barrington also alleged that United Airlines retaliated against her for making a request for a reasonable accommodation by delaying her exemption for approximately three weeks. The court found that Barrington failed to show how this delay amounted to an adverse action, and held that Barrington was unlikely to succeed on the merits of this claim as well. Therefore, the court denied Barrington's request for a preliminary injunction.

Barrington v. United Airlines, Inc. (D. Colo., Oct. 14, 2021, No. 21-CV-2602-RMR-STV) 2021 WL 4840855.

NOTE:

Employers have a legal obligation to engage in an interactive process with employees who request an accommodation because they have a religious belief, practice, or observance that conflict with a workplace policy or requirement, and to determine what reasonable accommodations may exist. California employers that are subject to the Fair Employment and Housing Act have a similar obligation under that law.

HOSTILE WORK ENVIRONMENT

Employee Can Pursue HWE Claim After Manager Directed Him To Work With Customer Despite 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.

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 sufficiently 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 coworkers' remarks 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 two 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. Nov. 18, 2021) 2021 WL 5366989 (unpublished).

NOTE:

This case shows how a supervisor's conduct sets the tone in a workplace. The law has long held that third parties can create a HWE for employees and that employers have a duty to protect their employees from harassing third parties. Yet, the supervisor'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.

DISABILITY DISCRIMINATION

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 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. The Hospital repeatedly counseled Wilkin that her attendance issues could result in her termination.

In November 2017, a hospital director investigated whether a patient received medication without supporting documentation, in violation of Hospital policy. The director found that Wilkin had failed to document her handling and administration of the medication to the patient properly. During her investigation, the director found numerous incidents when Wilkin signed off on the administration of medication, including controlled substances, but failed to document each administration appropriately. 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 given to the patient or discarded.

The director subsequently terminated Wilkin's employment in late December for: failure to document her handling and administration of controlled substances accurately and ongoing attendance issues. However, after Wilkin requested a reasonable accommodation in the form of a medical leave of absence, the Hospital determined not to immediately discharge Wilkin. After further investigation, on January 16, 2018, the Hospital terminated Wilkin and filed a complaint with the Board of Registered Nursing regarding Wilkin's handling and administration of controlled substances.

Wilkins then sued the Hospital, for disability discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA); unlawful denial of medical leave and violation of the California Family Rights Act (CFRA) and the Family and Medical Leave Act (FMLA); and 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 document the administration of patient medication and the discarding of unused medication properly; 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. In addition, the Hospital produced evidence of Wilkin's long history of attendance problems including, disciplinary notices issued in November 2016, December 2016, and February 2017; meetings in September and November 2017 to discuss performance concerns; and many warnings that she would be disciplined if her attendance did not improve. 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/CFRA 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 interactive 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 (Cal. Ct. App. Oct. 26, 2021) 2021 WL 5371427.

NOTE:

Here, the employer 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 employer was able to distinguish Wilkin's protected absences from her unprotected ones. This level of documentation is necessary to help defend against a retaliation-for-protected-activity claim.

DFEH

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. (2021) 68 Cal. App. 5th 1109.

NOTE:

Courts tend to excuse employees who make mistakes on administrative complaints provided that the mistake does not prevent the DFEH from the investigation and conciliation of the complaint.

STUDENTS

FAIR PROCESS & DISCIPLINE

Cross-Examination Of Witnesses Not Always Required In Student Disciplinary Hearing.

UC Davis students Jane Roe and John Doe lived in a campus residence hall. On December 2, 2017, Jane, John, and a group of students were socializing in Jane's dorm room. Jane became intoxicated, vomited, and fell asleep in the bathroom. Later that evening, John and Jane had sex. About two months later, 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 requires "affirmative, conscious, voluntary, and revocable" consent. Wendy Lilliedoll, Office of the Provost and Executive Vice Chancellor, conducted an investigation in accordance with the UC policy. She sent the parties a summary of the evidence gathered as part of 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 concluded 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. John, therefore, violated the UC Policy when he had sex with Jane. The Office of Student Support and Judicial Affairs, which decides whether any policy violations occurred, agreed with the investigator's findings and expelled John. He appealed. Jane did not participate in the appeal as permitted by UC Policy.

The hearing officer upheld the findings but 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 alleged Lilliedoll was biased and that substantial evidence did not support the finding that Jane was incapacitated. He also argued the University denied him a fair process because he could not cross-examine Jane.

The Court of Appeal rejected John's claim that Liliedoll was biased and that there was not substantial evidence that Jane was incapacitated. Lilliedoll conducted a fair, thorough, and impartial investigation as required by UC policy. She thoroughly considered all the evidence, including John's own, repeated account of the events, to reach her conclusion that Jane was incapacitated. Liliedoll simply rejected his theory that Jane was motivated to fabricate her allegations. The Court of Appeal also held that John received a fair process. The Court of Appeal agreed with the university that John's account of the events, along with those of eyewitnesses, established that Jane was unable to consent. As a result, witness credibility was not central to the adjudication and therefore John did not have a right to cross-examine adverse witnesses.

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.

NOTE:

This case involved a public college and arose in the context of Title IX. Still, private K-12 schools, colleges, and universities in California – even where Title IX does not apply – must provide a fair process (i.e., fundamental

fairness) to students who are accused of misconduct and facing disciplinary action. This case highlights the necessity to investigate thoroughly, provide the accused the opportunity to respond to the allegations, and follow internal procedures.

Student Could Not Establish That Disciplinary Process Was Unfair.

John Doe was a senior at the University of California, Santa Barbara (UCSB) along with his fellow student and girlfriend, Jane Roe. The two dated for almost two years before they broke up in June 2016. On July 7, 2016, John admitted that he "grabbed" Jane, "screamed in her face and shook her," and "eventually dragged her out of [his roommate's] bed to the front door" of his home while she pretended to sleep. 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 and 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 an interview with Jane and John in order to prepare the investigative report. However, the investigator was never able to schedule an interview with John. He interpreted John's lack of response as "a decision not to participate," and he prepared the investigative report.

The investigator 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 an 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 university: (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. Similarly the second investigator did not deny John a fair process because he did not personally observe the witnesses, or because John did not have an opportunity to cross-examine them since their credibility was not at issue.

Further, the court concluded that UCSB could rely on evidence that John avoided an interview. The second investigator began attempting to schedule an 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.

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. It applies to some private K-12 discipline and most private college and university student discipline.

TITLE IX

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.

NOTE:

Title IX applies to private colleges and universities, as well as private K-12 schools that have accepted certain federal financial funds or assistance, though there are exceptions for religious educational institutions.

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...?

Each month, LCW provides quick legal tidbits with valuable information on various topics important to private K-12 schools, colleges, and universities in California:

- 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 makes the following clarifications: 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. For more information, please see the October 29, 2021, LCW special bulletin, EEOC Publishes New Guidance on Religious Accommodation Requests.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

NOVEMBER THROUGH JANUARY

□ Issue Performance Evaluations

- We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to continue employment for the following school year is made. Schools that do not conduct regular performance reviews have difficulty and often incur legal liability terminating problem employees - especially when there is a lack of notice regarding problems.

  ▪ Consider using Performance Improvement Plans but remember it is important to do the necessary follow up and follow through on any support the School has agreed to provide in the Performance Improvement Plan.

□ Compensation Committee Review of Compensation before issuing employee contracts

- The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.

□ Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.

□ If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.

□ Review tuition rates and fees relative to economic and demographic data for the School's target market to determine whether to change the rates.

□ Review student financial aid policies.

□ Review, revise, and update enrollment/tuition agreements based on changes to the law and best practice recommendations.

□ File all tax forms in a timely manner:

- Forms 990, 990EZ

  ▪ Form 990:

  - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.

  ▪ Form 990-EZ

  - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990-EZ.

  ▪ A School below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).

  ▪ The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.

  ▪ The School should make its IRS form 990 available in the business office for inspection.

- Other required Tax Forms common to business who have employees include Forms 940, 941, 1099, W-2, 5500

□ Annual review of finances (if fiscal year ended January 1st)

- The School's financial results should be reviewed annually by person(s) independent of the School's financial processes (including initiating and recording transactions and physical custody of School assets). For schools not required to have an audit, this can be accomplished by a trustee with the requisite financial skills to conduct such a review.

- The School should have within its financial statements a letter from the School's independent

accountants outlining the audit work performed and a summary of results.

- Schools should consider following the California Nonprofit Integrity Act when conducting audits, which include formation of an audit committee:

  ▪ Although the Act expressly exempts educational institutions from the requirement of having an audit committee, inclusion of such a committee reflects a "best practice" that is consistent with the legal trend toward such compliance. The audit committee is responsible for recommending the retention and termination of an independent auditor and may negotiate the independent auditor's compensation. If an organization chooses to utilize an audit committee, the committee, which must be appointed by the Board, should not include any members of the staff, including the president or chief executive officer and the treasurer or chief financial officer. If the corporation has a finance committee, it must be separate from the audit committee. Members of the finance committee may serve on the audit committee; however, the chairperson of the audit committee may not be a member of the finance committee and members of the finance committee shall constitute less than one-half of the membership of the audit committee. It is recommended that these restrictions on makeup of the Audit Committee be expressly written into the Bylaws.

JANUARY/FEBRUARY

□ Review and revise/update annual employment contracts.

□ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

FEBRUARY- EARLY MARCH

□ Issue enrollment/tuition agreements for the following school year.

□ Review field trip forms and agreements for any spring/summer field trips.

□ Tax documents must be filed if School conducts raffles:

- Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

□ Planning for Spring Fundraising Event

□ Summer Program

- Consider whether summer program will be offered by the school and if so, identify the nature of the program and anticipated staffing and other requirements.

- Review, revise, and update summer program enrollment agreements based on changes to the law and best practice recommendations.

MARCH- END OF APRIL

□ The budget for next school year should be approved by the Board.

□ Issue contracts to existing staff for the next school year.

□ Issue letters to current staff who the School is not inviting to come back the following year.

□ Assess vacancies in relation to enrollment.

□ Post job announcements and conduct recruiting

- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

□ Summer Program

- Advise staff of summer program and opportunity to apply to work in the summer, and that hiring decisions will be made after final enrollment numbers are determined in the end of May.

- Distribute information on summer program to parents and set deadline for registration by end of April.

- Enter into Facilities Use Agreement for Summer Program, if not operating summer program

□ Transportation Agreements

- Assess transportation needs for summer/next year

- Update/renew relevant contracts

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: An administrator of an independent school with human resources responsibilities contacted an LCW attorney to ask whether the school could legally require all new hires to undergo pre-employment drug testing.

RESPONSE: The LCW attorney explained that there are limitations on pre-employment drug testing. Drug testing is considered a medical examination, so it must be job related and consistent with business necessity. Essentially, there must be a special need for the drug testing that is based on the job functions. (See Lanier v. City of Woodburn (9th Cir. 2008) 518 F.3d 1147.) A special need may exist if the new hire will be working in a position with essential job functions that are of a safety-sensitive nature. For example, pre-employment drug testing may be appropriate for employees who will have significant driving duties as part of their position. Nevertheless, drug testing, as with other medical examinations, may only be performed after a conditional job offer has been made.

New to the Firm

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.

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.

Firm Publications

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

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.

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.

In the Dec. 1 HR Dive article "Back to Basics: The fluctuating workweek method doesn't give employers an overtime pass," LCW 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. 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.

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 private education practice, the firm also assists nonprofit organizations across the state. To learn more, visit our Nonprofit page.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

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

Jan. 11 **"Private School Office Hours"**

Association of Christian Schools International (ACSI) Consortium, Builders of Jewish Educaiton (BJE) Consortium, California Association of Independent School (CAIS) Consortium & Golden State Independent School Consortium | Webinar | Heather DeBlanc & Brian P. Walter

Customized Trainings

Jan. 12 **"Interviewing Training"**

The Urban School | Webinar | Grace Chan

Speaking Engagements

Jan. 30 **"Receiving Risk-Free Donations and Faultless Fundraising"**

California Association of Independent Schools (CAIS) Trustee School Head Conference | Webinar | Heather DeBlanc & Laura Konigsberg

Jan. 30 **"Annual Legal Update for California Independent Schools"**

CAIS Trustee School Head Conference | Webinar | Michael Blacher & Donna Williamson

Jan. 30 **"Operating in a COVID World"**

CAIS Trustee School Head Conference | Webinar | Linda K. Adler & Stacy L. Velloff & Brett A. Overby

Private Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Private Education Matters*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.