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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

TITLE IX

Student Adequately Alleged Discrimination On The Basis Of Sex In Title IX Disciplinary Proceeding.

John Doe, a Chinese national, was a teaching assistant pursuing his Ph.D. in chemistry and biochemistry at the University of California Los Angeles on a student visa. John Doe and Jane Roe met in class and began a long-term relationship. They planned to get married after Doe was scheduled to graduate in June 2017.

In February 2017, Doe learned that Roe cheated on him and Doe wanted to end the engagement. They agreed to meet on-campus after Doe taught his class on February 13, but Roe showed up unannounced at Doe's office on-campus before his class. At the time, Roe was not an active student enrolled at UCLA. Roe pounded on the door of the office and Doe, who was meeting with another graduate student at the time, refused to let Roe in. Roe attempted to block the doorway but Doe was eventually able to leave the office and get to his class. Roe followed him and tried to prevent him from entering his classroom.

While Doe taught his class, Roe called the University police and reported that Doe assaulted her. University Police arrested Doe for misdemeanor domestic battery after his class was finished. Two months later, Roe filed a Title IX complaint with the University against Doe alleging multiple instances of misconduct dating back to 2014. Although she was no longer a student, Roe told the University that she still was and UCLA did not verify her status as a student. Roe also alleged she suffered a rib fracture from her encounter with Doe on February 13.

UCLA's Title IX Office charged Doe with violations of policies pertaining to dating violence, stalking, sexual harassment, sexual assault, terrorizing conduct, and conduct that threatens health or safety. The Dean of Students immediately suspended Doe on an interim basis, banned him from campus, and evicted him from student housing.

The University Title IX Office conducted an investigation and found that Doe was only responsible for the February 13 incident. The investigator found this incident violated policy provisions in the UC Policy for Sexual Violence and Sexual Harassment and the UCLA Student Conduct Code. The report found that Roe did not suffer bodily injury, but Doe placed Roe "in reasonable fear of serious bodily injury."

The Assistant Dean of Students accepted the report's findings and suspended Doe from UCLA for two years. Doe appealed the Dean's decision to the University's internal appeals body, which affirmed the Dean's decision and sanction of suspension. In February 13, 2018, Doe filed a petition for writ of mandamus against the Regents of the University of California in state court, challenging the disciplinary proceedings and sanction. The court found in favor of Doe, but Doe had already lost his student visa status.

On December 6, 2019, Doe sued the Regents in federal court alleging the University violated Title IX, the Fourteenth Amendment of the U.S. Constitution, and state law. The trial court dismissed his claims but allowed Doe to amend his claims. Doe filed his amended complaint and only alleged violations of Title IX. The trial court dismissed his amended complaint. Doe appealed to the Ninth Circuit Court of Appeals. The only issue on appeal was whether there was a plausible inference that Doe was discriminated against on the basis of his sex during the course of the disciplinary proceedings based on the facts he alleged on his amended complaint.

The Ninth Circuit stated that Doe's amended complaint contained three categories of allegations: (1) allegations of external pressures, (2) allegations of an internal pattern and practice of bias, and (3) allegations of specific instances of bias in his case. The Ninth Circuit held that these allegations, when taken together, raise a plausible inference of discrimination on the basis of sex.

The amended complaint alleged that external pressures influenced how the University handled its sexual misconduct complaints at the time of Roe's complaint against Doe. The amended complaint pointed to (1) the April 2011 "Dear Colleague" letter from the Department of Education directing schools to take immediate action to eliminate sexual harassment; (2) a report by NPR about sexual assault victims which prompted the "Dear Colleague" letter; (3) a state audit of UCLA following student testimony about a lack of response to sexual harassment claims; (4) an April 29, 2014 guidance document from the Department of Education that stated that the due process rights of the respondent should not unnecessarily delay Title IX protections of the complainant; (5) and a 2014 White House report and 2014 Senate testimony by the then-Assistant of Secretary of Education warning schools that violating Title IX could result in loss of federal funding. The Ninth Circuit found that these external pressures when taken alongside Doe's other allegations in his complaint would affect how UCLA treated respondents in disciplinary proceedings on the basis of sex, even though they occurred in 2017.

The Ninth Circuit found that the amended complaint also alleges enough facts that demonstrate an internal pattern of gender-based decision-making against male respondents. The Ninth Circuit pointed to the allegation in the amended complaint that respondents in Title IX cases are overwhelmingly male and the University has never suspended a female for two years under the same types of facts that resulted in Doe's suspensions.

The Ninth Circuit also held that Doe sufficiently combined the allegations of external pressures and internal bias against males with the facts that are particular in his case. The Ninth Circuit pointed to the allegation that the UCLA Respondent Coordinator told Doe that no woman has ever fabricated allegations against an ex-boyfriend in a Title IX proceeding. The Ninth Circuit reasoned it is plausible to infer that the Coordinator's statement reflects broader gender assumptions within UCLA's Title IX office during its investigation against Doe. The amended complaint also alleges multiple procedural irregularities, including the University's failure to determine Roe's student status at the time of the February 13 incident and not discrediting Roe because she lied about fracturing a rib on February 13. The amended complaint also pointed to the state court's ruling in favor of Doe in the writ proceeding, where the court found that the evidence did not support the Regents' decision to suspend Doe.

Ultimately, the Ninth Circuit held that Doe sufficiently pled a Title IX claim against the Regents.

Doe v. Regents of Univ. of California (9th Cir. 2022) 23 F.4th 930.

Title IX Liability Does Not Exist When University Does Not Have Control Over Context In Which Student-On-Student Harassment Occurred Off-Campus.

Orlando Bradford was a university football player at the University of Arizona. During the 2015-2016 school year, he assaulted two female students, Student A and Lida DeGroote. Student A told police that Bradford hit and choked her repeatedly and the University issued a no-contact order against Bradford in April 2016. Bradford then moved off-campus and lived with another football player. Student A also told the Title IX investigator that she believed Bradford was living with DeGroote. DeGroote did not offer any information about Bradford to university officials, but DeGroote's mother told a university administrator that she was concerned about DeGroote's safety and referenced bruises on DeGroote's arm.

In February 2016, Bradford started dating MacKenzie Brown. In September 2016, Bradford physically assaulted Brown multiple times at his off-campus apartment, and Brown suffered significant injuries. Brown told her mother about the assault and her mother reported the abuse to the police. Bradford was then arrested. The next day, DeGroote's mother made an anonymous report to the police that Bradford abused her daughter. The University placed Bradford an interim suspension after his arrest and the football coach removed him from the team. Bradford was expelled from the University a month after his arrest.

Brown sued the University, alleging it violated Title IX by failing to respond appropriately to reports that Bradford assaulted Student A and DeGroote. The trial court ruled in favor of the University because Brown

did not offer any evidence that the University exercised control over the context of Brown's abuse. Brown appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit rejected Brown's theory that the University should be liable because it had control over the context in which Bradford previously assaulted two other students. The Ninth Circuit cited the U.S. Supreme Court decision, Davis v. Monroe County Board of Education, which set out two separate control requirements in order to find liability – the educational institute must have control over the harasser and control over the context of the harassment. The Ninth Circuit agreed with Brown that the University exercised substantial control over Bradford because he was a student at the University. However, the Ninth Circuit held that University did not have substantial control over the context of Brown's assault, which occurred off-campus.

The Ninth Circuit explained that the control-over-context requirement arises from the limitation of Title IX, which addresses discrimination occurring only under an "education program or activity receiving Federal financial assistance." The limitation recognizes that just because a person who is subject to an educational institution's rules or authority engages in misconduct does not necessarily mean the misconduct occurs under the institution's education program. The Ninth Circuit reasoned that the unlike other Title IX cases, Brown was not assaulted on school property or during a school-related activity, and Brown did not go to Bradford's apartment for a school-related purpose. Furthermore, the University did not have control over Bradford's off-campus apartment, unlike its on-campus housing.

Ultimately, the Ninth Circuit agreed with the trial court and held in favor of the University.

Brown v. Arizona (9th Cir. 2022) 23 F.4th 1173.

SPECIAL EDUCATION

School District Provided Student With A Free Appropriate Education Even Without Using Parents' Preferred Teaching Method.

The Individuals with Disabilities Education Act (IDEA) gives federal funds to states that provide a free appropriate public education (FAPE) to children with disabilities. An eligible child has a right to a FAPE, which includes both instruction tailored to meet the child's needs and also support services to allow the child to benefit from such instruction.

School districts provide a FAPE primarily through an individualized education program (IEP). The IEP is developed by the child's IEP team, which includes the child's parents, teachers, and school officials. 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 the parents are unsatisfied with the IEP, the parties can proceed with a due process hearing before a neutral arbiter, who determines whether the child has received a FAPE.

A.S. attended elementary school in the Issaquah School District. Before A.S. started second grade, her parents requested an IDEA evaluation because they thought she had dyslexia. A retired school psychologist evaluated A.S., and determined she demonstrated academic and cognitive strengths and weaknesses consistent with dyslexia. The psychologist also determined she was eligible for services under IDEA's "specific learning disability" category, which includes conditions like dyslexia.

At the beginning of A.S.'s second grade, the District agreed to conduct its own initial evaluation. The resulting report cited the school psychologist's own assessment and observations and concluded A.S. was eligible for services under IDEA. A.S.'s second grade IEP provided her with 40 minutes of reading and writing instruction per day and several accommodations for her general-education instruction. Her teachers used a variety of reading programs when instructing A.S., including programs designed for students who have difficulty reading.

In February of that school year, her parents were concerned that A.S. was not making enough progress toward her IEP goals and requested another an IEP meeting. Her parents requested numerous additional accommodations, including Orton-Gillingham Approach training for A.S.'s teachers. Orton-Gillingham Approach is an instructional method for reading that the parents thought would be best for a student with dyslexia. The District denied their request. While A.S.'s second-grade report card reflected progress in her general and special education classes, like reading, she fell short of meeting her IEP goals.

At the beginning of A.S.'s third-grade year, A.S.'s IEP team met with an outside facilitator. A.S.'s parents again requested that A.S.'s teachers receive Orton-Gillingham Approach training and that A.S.'s disability category be changed from "specific learning disability" to "dyslexia." The District denied both requests, stating that "specific learning disability" services was the eligibility category for dyslexia. A.S. continued to make progress in reading.

After A.S's third-grade IEP meeting, her parents requested an independent educational evaluation (IEE). The District did not think an IEE was necessary and filed a request for an administrative hearing to demonstrate that its internal evaluations were appropriate. A.S.'s parents filed their own hearing request shortly after, alleging that the District denied A.S. a FAPE during her second and third-grade years.

The administrative law judge (ALJ) found that the District's evaluation was appropriate and the IEP did not deny A.S. a FAPE. The ALJ concluded that the District was not required to specifically assess A.S. for dyslexia because it identified A.S. as having a specific learning disability, that dyslexia is one of many specific learning disabilities, and testing in dyslexia is not necessary to determine A.S.'s educational needs.

The parents then sued the District in federal court. The trial court ruled in favor of the District and upheld the ALJ's order. A.S.'s parents appealed.

The Ninth Circuit held that the District did not violate the IDEA. The Ninth Circuit found that there is little distinction between dyslexia and the broader "specific learning disability" as defined in IDEA. The District conducted assessments to evaluate A.S.'s reading and writing skills, which are areas that dyslexia impact, and determined she needed special education services to address those skills. The District also incorporated the parents' outside evaluator's assessments that tested for difficulties in A.S.'s phonological processing, which is an area often included in the term dyslexia. The Ninth Circuit held that the District's evaluation was not deficient merely because it did not use the term "dyslexia" in the manner A.S.'s parents would have preferred.

The Ninth Circuit also held that the District was not required use the Orton-Gillingham Approach at the parents' request. The Ninth Circuit reasoned that school districts are entitled to deference to decide what methods are appropriate to meet the individualized needs of a student, unless a specific method is necessary to enable a student to receive a FAPE. The Ninth Circuit stated that A.S.'s parents did not demonstrate that the Orton-Gillingham Approach was necessary for A.S. to receive an FAPE. Additionally, the Ninth Circuit found that A.S. made appropriate educational progress without the Orton-Gillingham Approach in her special-education instruction and general-education instruction. The Ninth Circuit held that IDEA does not require students with special-education services perform the same with students as general-education instruction. Rather, IDEA requires that the IEP is tailored to a student's individual circumstances and is reasonably calculated to help that student in light of those circumstances.

The Ninth Circuit upheld the ALJ's order and held in favor of the District.

Crofts v. Issaquah Sch. Dist. No. 411 (9th Cir. 2022) 22 F.4th 1048.

BUSINESS AND FACILITIES

Funding Statutes Providing For Reimbursement To School Districts For Mandate-Claim Amounts Do Not Violate California Constitution.

Under article XIII B, section 6, subdivision (a) of the California Constitution, the State of California must reimburse local governments when it requires them to provide a "new program or higher level of service." This provision prohibits the state from shifting financial responsibility for carrying out government functions to local agencies.

In 2017, the state legislature enacted Government Code section 17581.96, in which the Legislature appropriated money for distribution to school districts for reimbursement of unpaid claims for state-mandated local program costs and interest for fiscal year 2017-2018 pursuant to Section 6 of article XIII B. The remaining funds would serve as unrestricted state funding that could be used as each school district found appropriate. In 2018, the Legislature enacted a similar statute, Government Code section 17581.97, in which the Legislature appropriated funds for distribution to school districts for reimbursement of claims for the 2018-2019 fiscal year. Like section 17581.96, the school districts could use the rest of the funds as unrestricted state funding.

The San Diego Unified School District challenged sections 17581.96 and 17581.97 in a petition for writ of mandate and complaint against the State of California and the State Controller. The District alleged both statutes violated the California Constitution and the Government Code, reasoning that the statutes erased mandate claim amounts fully due and owed to them under Section 6 of article XIII B, without providing any actual findings. The trial court found in favor the State of California and the District appealed.

On appeal, the District argued the two statutes conflicted with the requirements of Section 6 of article XIII B because the statutes "erased" the amounts owed to them. The Court of Appeal rejected this argument because the two statutes did not eliminate any outstanding mandate claims without proper payment; rather, they call for payment of the claims.

The District also argued that school districts were left with less money to spend to advance their "local missions" because the Legislature used the funds distributed under the two statutes to reimburse local districts. The Court of Appeal rejected this argument and stated that nothing in Section 6 of article XIII B requires the state to provide funding to school districts to advance their "local missions." The Court of Appeal also held that the statute does not violate Section 6 of article XIII B simply because it leaves school districts with less funding than what they would prefer. Furthermore, article XVI, section 8 of the California Constitution prescribes a minimum level of funding for education, and the District never alleged they lacked the minimum level of funding under this provision of the Constitution.

The District also argued that the two statutes failed to provide sufficient funding to cover mandate costs because the District did not receive any subvention. The Court of Appeal rejected this argument because the District did not identify any school district that received insufficient funding under the two statutes to cover outstanding claims of mandate costs. The Court of Appeal also rejected the District's argument that the state Constitution requires the state to supply equivalent per-student funding for all school districts.

Finally, the District also alleged the two statutes erased the mandate obligation under Section 6 of article XIII B by simply designating unrestricted state funding. The Court of Appeal rejected this argument, holding that the Legislature has broad authority to decide how to meet the reimbursement requirement under Section 6 of article XIII B. The Court also rejected the District's claim that the two statutes required school districts to use the one-time funding for "other purposes," which infringes on school districts' local control and flexibility to use education funding to address their unique needs. The Court of Appeal held that the clear language of the two statutes provides that the funding first satisfy outstanding claims pursuant to Section 6 of article XIII B for reimbursement of state-mandated local programs, then the remaining funds could be used as the school districts saw fit.

Ultimately, the Court of Appeal affirmed the trial court's ruling and found in favor of the State of California.

San Diego Unified Sch. Dist. v. California (2022) 73 Cal.App.5th 852.

FIRM VICTORY

LCW Wins Dismissal Of Terminated Peace Officer's Lawsuit.

LCW Associate Attorneys **Nathan Jackson** and **Lars Reed** successfully represented a city in a lawsuit that a former police officer brought.

In the spring of 2021, the city's police department launched an internal affairs investigation into the police officer's alleged misconduct. In April 2021, the district attorney's office filed criminal charges against the officer. The officer was represented by counsel both in the criminal proceeding and in the internal affairs investigation. Once the investigation and all pre-disciplinary processes were completed, the department terminated the officer, and the officer appealed.

The memorandum of understanding (MOU) between the city and the police union outlined the exclusive process for the officer to appeal his firing. The MOU contained a multi-step grievance procedure, and each step contained specific deadlines for the officer to request to advance his appeal. The officer's counsel missed the deadline to advance the appeal to arbitration by over a month. The city manager denied the officer's arbitration request on the grounds that the officer waived further appeal rights under the MOU.

The officer filed a lawsuit seeking declaratory relief from the trial court and an order for the city to arbitrate his termination appeal. The officer's counsel indicated that the failure to meet the MOU's deadlines was due in part to members of his family falling ill. He argued that his failure to timely request arbitration was due to excusable neglect. He further argued that relief was appropriate given the fundamental due process rights at stake.

LCW filed a demurrer on behalf of the city. One of the grounds for demurrer was that declaratory relief was not an available remedy for the officer because there was no dispute as to the MOU's language and the officer's rights under it. The court agreed. The officer had not shown the MOU language was ambiguous. The MOU stated that the failure to meet the timelines for advancing the grievance forfeited further grievance rights. The court also found the officer's counsel's failure to timely advance arbitration was not the result of excusable neglect, because the failure to meet a simple deadline was not an oversight that a reasonably prudent person would make. The officer sought leave to amend his lawsuit, and this request was denied.

Based on the foregoing, the court sustained the city's demurrer without leave to amend, because the officer's claim arose from an MOU that is subject to only one reasonable interpretation.

NOTE:

A demurrer is a request for a court to dismiss a case because the case is not viable. A demurrer is a powerful tool that can save public educational entities money by getting lawsuits dismissed at the pleading stage, without a trial or discovery. LCW attorneys can help public educational entities identify legal deficiencies in a lawsuit that may make a case appropriate for demurrer.

POBR

City Properly Terminated Two Peace Officers Who Played Video Games Rather Than Respond To A Robbery, And Who Lied To Cover Up Their Neglect Of Duty.

On April 15, 2017, Louis Lozano and Eric Mitchell, two police officers for the City of Los Angeles (City), were working as partners when they received a radio call for a robbery in progress at a mall near their location. Sergeant Jose Gomez, their patrol supervisor that day, later radioed their patrol unit and requested that they respond to the robbery to assist a captain. The officers did not respond to the Sergeant.

Later that evening, the Sergeant met with the two officers to ask if they had heard the call for backup regarding the robbery. The two officers said that they did not hear the call due to loud noise in their surrounding area. The Sergeant counseled them for not listening to the radio and advised them to move to a location where they could hear their radio in the future. The Sergeant then reviewed the digital in-car video system (DICVS) recording from the day, which showed that the officers did hear the radio communications about the robbery, but elected not to respond. The Department then initiated an investigation, which determined – based on the DICVS recording – that the officers chose to play "Pokémon Go" rather than respond to the radio. Although the officers claimed they were not playing the game while on duty, the investigation determined that they were not truthful.

Based on the investigation's findings, the Department charged the officers with multiple counts of misconduct, including failing to: respond to a robbery-in-progress call; respond over the radio when their unit was called; and handle an assigned radio call. The officers were also charged with playing "Pokémon Go" while on patrol, and making false or misleading statements during the personnel investigation.

A board of rights found the officers guilty on all but one count and unanimously recommended that they be fired. The Department's Chief of Police adopted the board's penalty recommendation and terminated them. The officers filed a petition for writ of administrative mandate challenging the City's decision to terminate their employment. The trial court denied the petition, and they appealed.

On appeal, the officers alleged the City unlawfully used the DICVS recording in their disciplinary proceeding because the recording captured their private conversations. They alleged the Department violated its Special Order No. 45, which states that the DICVS may not be used to monitor private conversations between employees. The Court of Appeal disagreed, noting that another Department guideline clarified that if a personal communication between employees is recorded on the DICVS, it will not be used to adjudicate a personnel complaint "unless there is evidence of criminal or egregious misconduct."

The officers also alleged that the use of the DICVS recording violated Penal Code Section 632, which prohibits intentional eavesdropping by means of any recording device without the consent of all parties. The Court of Appeal disagreed, finding that the officers failed to present any evidence as to who was responsible for turning on the DICVS recording.

The officers also alleged the City denied them protections under the Public Safety Officers Procedural Bill of Rights Act (POBR) because Sergeant Gomez questioned them without affording them the opportunity to have a legal representative present. Again, the Court of Appeal disagreed, finding that the Sergeant's meeting with the officers was a routine contact between supervisor and subordinates. The Court noted that the Sergeant had no evidence when he met with the officers that they had heard and ignored the radio calls. Therefore, Sergeant Gomez did not violate the POBR by meeting with the officers without their representative.

For these reasons, the Court of Appeal affirmed judgment for the City and upheld the officers' terminations.

Lozano v. City of Los Angeles (2022) 73 Cal.App.5th 711.

NOTE:

The Court of Appeal relied on the Department's unambiguous guidelines that vehicle recordings could be used in some circumstances for personnel investigations and discipline. LCW attorneys regularly assist public educational entities to ensure that any guidelines or policies align with applicable law.

WHISTLEBLOWER RETALIATION

California Supreme Court Confirms Employee-Friendly Test For Evaluating Whistleblower Retaliation Claims.

Wallen Lawson worked as a territory manager for PPG Architectural Finishes, Inc. (PPG) -- a paint and coatings manufacturer -- from 2015 until he was fired in 2017. PPG used two metrics to evaluate Lawson's work performance: 1) his ability to meet sales goals; and 2) his scores on "market walks" during which PPG managers shadowed Lawson as he did his work. While Lawson received the highest possible score on his first market walk, his scores thereafter took a nosedive. He also frequently missed his monthly sales targets. In Spring 2017, PPG placed Lawson on a performance improvement plan.

During this same time, Lawson alleged his direct supervisor began ordering him to intentionally mistint slow-selling PPG paint products so that PPG could avoid buying back what would otherwise be excess unsold product. Lawson did not agree with this mistinting order, and he filed two anonymous complaints with PPG's central ethics hotline. He also told his supervisor he refused to participate in mistinting. PPG investigated the issue and told the supervisor to discontinue the order. Yet, the supervisor continued to directly supervise Lawson and oversee his market walk evaluations. After Lawson failed to improve as outlined in his performance improvement plan, his supervisor recommended that he be fired. PPG then terminated Lawson's employment.

Lawson sued PPG. He alleged that PPG had fired him because he "blew the whistle" on his supervisor's mistinting order, in violation of Labor Code Section 1102.5. Section 1102.5 prohibits an employer from retaliating against an employee for disclosing information to a government agency or person with authority to investigate if the employee "has reasonable cause to believe" the information discloses a violation of a state or federal statute, rule, or regulation.

In considering PPG's motion for summary judgment, the district court applied the three-part burden-shifting framework the U.S. Supreme Court laid out in McDonnell Douglas Corp. v. Green. Under this framework, the employee must first establish a prima facie case of unlawful retaliation. Next, the employer must state a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's stated reason is actually a pretext for retaliation. The district court determined that Lawson could not satisfy the third step of this McDonnell Douglas test, and it entered judgment in favor of PPG on Lawson's whistleblower retaliation claim.

On appeal, Lawson argued that the district court was wrong to use the McDonnell Douglas framework. Instead, he contended that the court should have followed Labor Code Section 1102.6. Under Section 1102.6, Lawson only needed to show that his whistleblowing was a "contributing factor" in his dismissal. Section 1102.6 did not require Lawson to show that PPG's stated reason was pretextual. The Ninth Circuit asked the California Supreme Court to decide the issue.

The California Supreme Court clarified that Labor Code Section 1102.6, and not McDonnell Douglas, is the framework for litigating whistleblower claims under Labor Code Section 1102.5. After all, Labor Code Section 1102.6 describes the standards and burdens of proof for both parties in a Labor Code Section 1102.5 retaliation case. First, the employee must demonstrate "by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. Second, once the employee has made that showing, the employer has to prove by "clear and convincing evidence" that the alleged adverse employment action would have occurred for legitimate, independent reasons, even if the employee was not involved in protected whistleblowing activities.

The Court noted that other courts addressing burden-shifting frameworks similar to Section 1102.6 have found the McDonnell Douglas framework to be inapplicable. For instance, nearly all courts to address the issue have concluded that McDonnell Douglas does not apply to First Amendment retaliation claims, or to federal statutes that are similar to Labor Code Section 1102.6.

Finally, the Court found that there was no reason why Labor Code Section 1102.5 would require employees to prove that any of employer's proffered legitimate reasons were pretextual. This is because Section 1102.5 prohibits employers from considering the employee's protected whistleblowing as any "contributing factor" to an adverse employment action. Requiring an employee to also prove the falsity of any potentially legitimate reasons the employer may have had for an adverse employment action would be inconsistent with the Legislature's intent to encourage reporting of wrongdoing.

Lawson v. PPG Architectural Finishes, Inc. (2022) 12 Cal.5th 703.

NOTE:

Although Labor Code Section 1102.6 has specifically stated the framework for adjudicating Labor Code Section 1102.5 claims since 2004, California courts were not consistently applying Section 1102.6's employee-friendly test. Instead, some California Courts were ignoring Section 1102.6 and applying the more employer-friendly McDonnel Douglas test.

FAIR EMPLOYMENT AND HOUSING ACT

Trial Court Was Wrong To Reduce Former Employee's Request For Attorney's Fees.

Renee Vines sued his former employer, O'Reilly Auto Enterprises (O'Reilly) for race and age-based discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (FEHA). Vines, a 59-year-old Black man, contended his supervisor and others created false and misleading reviews of him, yelled at him, and denied his requests for training that younger, non-Black employees had received. Vines also claimed that although he repeatedly complained to O'Reilly's management regarding the harassment and discrimination, O'Reilly took no remedial action. Instead, he alleged the company began investigating him in order to find a reason to terminate his employment. At the investigator's recommendation, O'Reilly terminated Vines.

The trial court granted judgment for O'Reilly's on Vines' age harassment and age discrimination claims, finding that Vines had failed to present any evidence his age had anything to do with his termination or O'Reilly's alleged discrimination, harassment, or retaliation. However, Vines' race-based and retaliation claims proceeded to a jury trial. The jury then returned a verdict in favor of Vines for his retaliation claim, but against him on his race discrimination and harassment causes of action. The jury awarded Vines $70,200 in damages.

Following the jury trial, Vines moved the court for an award of $809,681.25 in attorneys' fees. Vines supported hismotion with multiple attorney declarations, billing records, and other exhibits. For example, one of Vines' attorneys responded to multiple rounds of written discovery, took more than 10 depositions in several states, and participated in a 10-day jury trial. O'Reilly argued that Vines was not the prevailing party for purposes of an award of attorneys' fees, but even if he was, his fee request should be denied or reduced because the amount of fees he requested was excessive given the nominal jury award and Vines' limited success. Vines had only prevailed on two of his six claims, and while the jury awarded just over $70,000 in damages, Vines had sought over $2.5 million. They also argued that Vines' claim for attorneys' fees included unreasonable billing entries and hourly rates. The trial court issued an order awarding Vines $129,540.44 in attorneys' fees. The trial court found that Vines' unsuccessful discrimination and harassment claims were not significantly related or intertwined with his successful retaliation claim so as to support his request for $809,681.25 in fees. Vines appealed.

Under the FEHA, a court has the discretion to award attorneys' fees and costs. In order to calculate an attorneys' fee award under the FEHA, courts generally use the well-established lodestar method, which is the product of the number of hours spent on the cases, times and applicable hourly rate. The court then has the discretion to increase or reduce the lodestar by applying a positive or negative "multiplier" based on a number of factors.

In California, the extent of an employee's success is a crucial factor in determining the amount of a prevailing party's attorneys' fees. When a prevailing party succeeds on only some claims, courts make a two-part inquiry: first, did the employee prevail on claims that were unrelated to the claims on which he succeeded? Second, did the employee achieve a level of success that makes the hours expended a satisfactory basis for making a fee award? If, however, a lawsuit consists of related claims, the attorneys' fee awarded for an employee who has obtained "substantial relief" should not be reduced merely for the reason the employee did not succeed on each contention raised.

On appeal, Vines argued that the trial court erred when it found that his unsuccessful claims were not sufficiently related to his successful claims. He argued that the trial court failed to recognize that he had to prove the conduct underlying his discrimination and harassment claims in order to prove the reasonableness of his belief that the conduct was unlawful, as was required to succeed on his retaliation cause of action. The California Court of Appeal agreed. In order for Vines to prevail on his retaliation claim, he had to show that his beliefs that O'Reilly was discriminating and harassing him against him were reasonable.

Vines also argued that the trial court wrongly reduced fees for specific billing entries that O'Reilly had contended were unreasonable, such as reducing by two-thirds the amount of fees for the depositions of witnesses in Missouri, not awarding certain fees for travel, and reducing Vines' attorney's hourly rate from $525 to $425, among other things. The court concluded that Vines forfeited his challenge to those reductions by making those arguments too late. In any event, the court reversed the trial court's award and remanded the matter for further proceedings.

Vines v. O'Reilly Auto Enterprises, LLC (2022) 74 Cal.App.5th 174.

NOTE:

Fee awards to prevailing employees in FEHA cases promote the important public policy in favor of eliminating discrimination in the workplace. This case demonstrates that even if an employee wins nominal damages, attorneys' fees can be substantial.

COVID-19

USSC Blocks Federal Vaccination Or Test Rule.

On September 9, 2021, President Biden announced a "new plan to require more Americans to be vaccinated." As part of that plan, the President said that the U.S. Secretary of Labor would issue an emergency rule to require all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." Two months later, the Secretary of Labor issued the promised emergency standard. After the federal Occupational Safety and Health Administration (OSHA) published the standard on November 5, 2021, scores of parties – including states, businesses, trade groups and nonprofit organizations – filed petitions for review.

The consolidated cases made their way to the U.S. Supreme Court (USSC). Congress authorized OSHA to issue "emergency" regulations if OSHA determines that employees face grave danger from exposure to substances or agents determined to be toxic or physically harmful. Congress also gave OSHA the power to issue emergency standards as necessary to protect employees from such dangers. Despite that broad Congressional authority, the USSC's 6-3 majority decision held that the OSHA rule exceeded its authority. The majority held the rule was a "broad public health measure" rather than a "workplace safety standard." The USSC reinstated a stay of the OSHA vaccine or test rule.

Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin. (2022) 142 S. Ct. 661.

NOTE:

In California, it remains to be seen whether the Occupational Safety and Health Standards Board (OSHSB), which disseminates workplace safety standards for employers in California, will adopt similar vaccination/testing requirements. Until OSHSB takes such an action, most employers in California will have discretionary authority to decide whether to require their employees be vaccinated or tested for COVID-19. Employers may choose to mandate vaccinations for their employees, subject to their obligations to reasonably accommodate employees who are unable to be vaccinated due to disability or a sincerely held religious belief.

USSC Upholds Vaccination Mandate For Health Care Facilities.

In November 2021, the U.S Secretary of Health and Human Services announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff – unless exempt for medical or religious reasons – are vaccinated against COVID-19. A facility's failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs. The Secretary issued the rule after finding that vaccination of health care workers against COVID-19 was necessary for the "health and safety of individuals [for] whom care and services are furnished." The Secretary issued the rule as an interim final rule, rather than through the typical notice-and-comment procedures, after finding "good cause" that the rule should be effective immediately.

Shortly after the interim rule's announcement, two groups of states filed separate actions challenging the rule. After two district courts enjoined enforcement of the rule, the Government requested that the U.S. Supreme Court ("USSC") lift the injunctions.

On appeal, the USSC lifted the injunctions. The USSC reasoned that the Secretary's rule fell within his authority to impose conditions on the receipt of Medicare and Medicaid funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." Because COVID-19 is a contagious and dangerous disease – especially for Medicare and Medicaid patients – the USSC found the rule fit squarely within the Secretary's power. In addition, the USSC noted that healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions. The Secretary also routinely imposes conditions that relate to the qualifications of healthcare workers.

The USSC rejected the states' remaining contentions, finding that the interim rule was not arbitrary or capricious and that the interim rule did consider that it might cause staffing shortages in some areas. It also found that the Secretary had valid justification to forgo notice and comment. Accordingly, the USSC upheld the vaccination mandate for employees in health care facilities.

Biden v. Missouri (2022) 142 S. Ct. 647, 651.

NOTE:

In California, this decision should have minimal impact since the California Department of Public Health (CDPH) already requires that health care facilities ensure their workers are fully vaccinated against COVID-19.

WAGE AND HOUR

Trial Court Properly Denied Class Certification For State Law Wage And Hour Lawsuit.

From approximately 2013 to 2016, Jason Cirrincione worked at American Scissor Lift, Inc (ASL) as a non-exempt, hourly employee. ASL rents heavy machinery equipment such a scissor lifts and machine booms. Cirrincione's primary duties included painting and assembling rental equipment. Cirrincione and other hourly employees were eligible for production bonuses each pay period based on the amount of equipment they prepared.

In April 2018, Cirrincione filed a class action complaint against ASL for various California wage and hour violations, including failure to pay overtime wages, failure to pay minimum wages, failure to provide meal and rest breaks, and failure to pay reimbursement expenses. Cirrincione purported to represent as many as 50 former and current employees of ASL. The claims challenged ASL's policy and/or practice of rounding work time, which allegedly resulted in the systematic underpayment of wages.

In October 2019, Cirrincione moved for class certification, seeking to certify multiple subclasses, including: a rounding subclass, two meal break subclasses, two rest break subclasses, a no reimbursement subclass, and a final wage subclass. After a hearing, the trial court issued an order denying the class certification motion because Cirrincione failed to establish the requirements necessary to proceed on a class basis.

With respect to the proposed rounding subclass, the trial court rejected Cirrincione's contention that an employer's practice of rounding work time without a uniform, written rounding policy violates California law. It also noted that ASL's rounding practice varied from location to location and from supervisor to supervisor. For similar reasons, the trial court determined the claims of the other subclasses were not appropriate for class treatment. Cirrincione appealed.

On appeal, Cirrincione contended that the trial court was wrong to conclude that his rounding claim was not suitable for class treatment because ASL had a practice of rounding employee time but no written rounding policy. The California Court of Appeal rejected Cirrincione's arguments, and stated that the trial court properly discussed the law governing the rounding claim. The court found the trial court properly rejected Cirrincione's unsupported assertion that an employer's practice of rounding employees' work time without a written policy violates California law. An employer in California is entitled to round its employees' work time if the rounding is done in a "fair and neutral" manner that does not result, over a period in time, in the failure to properly compensate employees for all the time they have actually worked. Under this standard, an employer's rounding policy or practice is "fair and neutral" if on average, it neither over- or under-pays. Thus, the court concluded that the trial court did not err in refusing to certify the proposed rounding subclass. The court also affirmed the trial court's decision as to the other subclasses.

Cirrincione v. Am. Scissor Lift, Inc. (2022) 73 Cal.App.5th 619.

NOTE:

This case involves California wage and hour claims that generally do not apply to public educational entities. However, the Fair Labor Standards Act (FLSA) regulations (which do apply to public educational entities) include similar language on the rounding issues. FLSA regulations allow employers to round time, as long as this rounding does not result in a failure to count as hours worked all the time employees have actually worked over a period of time.

LABOR RELATIONS

County Ordered To Bargain The Effects Of A Surveillance Technology Ordinance.

In November 2014, the County of Santa Clara's (County) Board of Supervisors (Board) began considering legislation that would ensure that the use of County-owned surveillance technology -- such as drone cameras, automated license plate readers, and GPS –- protected both community safety and individual privacy.

In early 2016, the Board's Finance and Government Operations Committee reviewed a proposed ordinance (Ordinance) that prohibited a County department from acquiring or operating new County-owned surveillance technology unless the department first gave the Board an impact report and a use policy, and received the Board's approval. The Ordinance made it a criminal misdemeanor to intentionally misuse County-owned surveillance technology: for a purpose prohibited in a Board-approved use policy; or in a way that did not comply with the Ordinance.

In February 2016, the Santa Clara County District Attorney Investigators' Association (Association) learned that the Board's Finance and Government Operations Committee would be considering the proposed Ordinance. The Association President attended the Committee meeting to object to two of the Ordinance's provisions. The Committee made no substantive changes, and recommended that the Board adopt the proposed Ordinance.

On May 6, 2016, the Association sent a written demand to the County to meet and confer over the proposed Ordinance and its effects on Association members. The Association's letter contended that the Ordinance "contemplates new and significant workplace restrictions and responsibilities" that would increase workload and potentially expose Association members to harm. The County's Labor Relations Director immediately responded to the Association's letter. The parties scheduled a meeting for May 17.

At the May 17 meeting with the County, the Association identified four concerns with the Ordinance: 1) the definition of "surveillance technology" was vague and broad; 2) the reporting requirements would increase workload, which could impact employee productivity; 3) the reporting requirements would compromise employee safety by giving the public advance notice of what surveillance technology is deployed and where; and 4) the criminal misdemeanor penalty criminalized workplace conduct and, when paired with the vague definition of surveillance technology, would create untenable working conditions.

The parties met again on May 27 to discuss these issues and the Association issued a number of proposals. The parties were not able to reach an agreement that resolved the Association's concerns that day. At the end of the meeting, the Association believed that the Labor Relations Director was going to speak with Board members and other individuals in the County to figure out how to address the Association's issues.

The Labor Relations Director brought the Association's concerns to the Board. The County did not inform the Association of any response, and neither party declared impasse.

On June 21, 2016, the Board adopted the proposed Ordinance without any changes, and it became effective one month later. The Association then filed an unfair practice charge against the County.

The Public Employment Relations Board's (PERB) Office of the General Counsel subsequently issued a complaint alleging that the County violated the Meyers-Milias-Brown Act when the Board adopted the Ordinance "without having negotiated with the Association to agreement or through completion of negotiations concerning the decision to implement the change in policy and/or the effects of the change in policy." An administrative law judge (ALJ) found that the County had no obligation to bargain over its decision to adopt the Ordinance but upheld the Association's effects bargaining claim.

The Association filed the following exceptions to the ALJ's decision: 1) the County had a duty to bargain over the definition of the term "surveillance technology" and over the provision establishing criminal misdemeanor liability for misuse of the technology; and 2) as a remedy for not bargaining over these terms, PERB should void the Ordinance in whole or in part.

PERB first concluded that the County was not required to bargain its decisions regarding the definition of the term "surveillance technology", or the criminal misdemeanor provision. PERB concluded that these provisions fell into a category of managerial decisions that directly affect employment, but also involve the employer's retained freedom to manage its affairs. PERB concluded that the benefits of bargaining the surveillance technology definition did not outweigh management's need for freedom to protect the public's privacy and safety. PERB held that the County was not required to bargain its decision regarding criminal misdemeanor liability because this part of the Ordinance applied a general criminal law to all persons and not just to County employees.

PERB noted that even when an employer has no obligation to bargain over a particular decision, it must still provide notice to employee associations and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. PERB found that the County indeed had an obligation to bargain the effects of these issues on the scope of Association members' employment. The Association put the County on notice that it wished to bargain over not just workload and safety, but also the consequences to employees found to have violated the Ordinance. The County had not responded to the Association's proposed alternatives. Thus, PERB found the County failed to bargain in good faith over consequences to employees for violating the Ordinance.

PERB directed the County to meet and confer over the effects of the Ordinance. It also ordered the County to cease and desist from enforcing the Ordinance against Association-represented employees until: 1) the parties reach an overall agreement on each of the specified effects; 2) the parties conclude their effects negotiations in a bona fide impasse; or 3) the Association fails to pursue effects negotiations in good faith.

County of Santa Clara, PERB Decision No. 2799-M (2021).

NOTE:

This decision outlines three distinct categories of managerial decisions. Decisions that only have an indirect and attenuated impact on the employment relationship such as advertising, product design, and financing are not mandatory subjects of bargaining. Decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls, are always mandatory subjects of bargaining. Finally, decisions that directly affect employment, such as eliminating jobs, but involve the employer's retained freedom to manage its affairs, may not be mandatory subjects of bargaining, but these are the closest cases.

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 January 1, 2022, California's minimum wage became $15/hour for employers with greater than 26 employees.
- AB 1033 expands the definition of "parent" under the California Family Rights Act (CFRA) to include a "parent-in-law." Accordingly, employees are eligible to take CFRA leave to care for parent-in-laws.

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 an agency can consider salary history for a job applicant currently working in the public sector whose previous salary is publicly available.

Answer: Labor Code Section 432.3(b) generally prohibits employers from seeking salary history information from a job applicant. This means that employers cannot ask about salary history on the application or at the job offer stage (or any stage of the application process). However, this law provides an exception for salary history that is public information pursuant state and federal laws, including the California Public Records Act or the federal Freedom of Information Act. (Labor Code Section 432.3(e).) Since public sector employee salaries are posted on line and/or are typically subject to disclosure, the agency could seek publicly available salary history information.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

DEVELOPING POSITIVE PARTNERSHIPS AND LEADERSHIP EXCELLENCE FOR LABOR RELATIONS PROFESSIONALS

Each workshop includes both traditional training and interactive simulations to develop skills helpful to labor relations professionals.

2022 Webinar Schedule:

Nuts & Bolts of Negotiations
Session 1: 03.24 & 03.31 | 1:30pm - 5:00pm
Session 2: 09.22 & 09.29 | 1:30pm - 5:00pm

Bargaining Over Benefits
Session 1: 06.16 & 06.23 | 1:30pm - 5:00pm
Session 2: 12.08 & 12.15 | 1:30pm - 5:00pm

PERB Academy
Session 1: 04.21 & 04.28 | 1:30pm - 5:00pm
Session 2: 10.20 & 10.27 | 1:30pm - 5:00pm

Communication Counts!
Session 1: 07.21 & 07.28 | 1:30pm - 5:00pm

Trends & Topics at the Table
Session 1: 05.19 & 05.26 | 1:30pm - 5:00pm
Session 2: 11.03 & 11.10 | 1:30pm - 5:00pm

Rules of Engagement
Session 1: 08.18 & 08.25 | 1:30pm - 5:00pm

***Each class consists of two dates/parts.**
Participation in both dates/parts is required for certification.

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Visit our website: www.lcwlegal.com/lrcp

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

Mar. 4 **"Creating a Culture of Respect"**
Bay Area Community College District & Central California Community College District & Southern California Community College District ERCs | Webinar | Yesenia Z. Carrillo

Mar. 10 **"Prevention and Control of Absenteeism and Abuse of Leave"**
Central Valley & Gateway Public ERCs | Webinar | T. Oliver Yee

Mar. 11 **"Mandated Reporting"**
Central CA Community College District ERC | Webinar | Heather R. Coffman

Mar. 16 **"Workplace Bullying: A Growing Concern"**
Bay Area & Central Coast ERCs | Webinar | Christopher S. Frederick

Mar. 22 **"FERPA"**
Ventura County Schools Self-Funding Authority ERC | Ventura | Alysha Stein-Manes

Mar. 23 **"The Art of Writing the Performance Evaluation"**
Monterey Bay & Napa/Solano/Yolo & San Gabriel Valley & South Bay & Ventura/Santa Barbara ERCs | Webinar | Stephanie J. Lowe

Mar. 30 **"Managing COVID-19 Issues: Now and What's Next"**
Humboldt County & NorCal & Orange County ERCs | Webinar | Alexander Volberding & Daniel Seitz

Customized Trainings

Mar. 9 **"Tying it All Together – Leadership and Managing"**
Yuba Community College District | Webinar | Eileen O'Hare-Anderson

Speaking Engagements

Feb. 24 **"The Administrator's Perspective: Equal Employment Opportunity Hiring for Student Success"**
ACCCA Annual Conference | Monterey | Amy Brandt & Alysha Stein-Manes & Andrea Barrera Ingley

Feb. 25 **"Layoffs: If You Need Them, Are You Ready?"**
ACCCA Annual Conference | Monterey | Eileen O'Hare-Anderson & David Betts

Feb. 25 **"Town Hall - Legal Eagles"**
ACCCA Annual Conference | Monterey | Pilar Morin & Eileen O'Hare-Anderson & Amy Brandt & Alysha Stein-Manes

Feb. 28 **"First Amendment Issues in a Politically Charged World"**
Public Agency Risk Management Association (PARMA) Annual Conference | Anaheim | Mark Meyerhoff

Mar. 14 **"Preparing for CBA Negotiations - What Charter Schools Need to Know"**
California Charter Schools Association (CCSA) Conference | Long Beach | T. Oliver Yee

Mar. 30 **""But… It's Our Standard Contract" - Sign This, Not That"**
California Association of School Business Officials (CASBO) 2022 Annual Conference | Sacramento | Christopher Fallon

Seminars/Webinars

Mar. 24 **"Nuts & Bolts of Negotiations - Part 1"**
Liebert Cassidy Whitmore | Webinar | Laura Drottz Kalty & Peter J. Brown

Mar. 31 **"Nuts & Bolts of Negotiations - Part 2"**
Liebert Cassidy Whitmore | Webinar | Laura Drottz Kalty & Peter J. Brown

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