

Education Matters

News and Developments in Labor Relations and Education Law for School and Community College District Administration

January 2010

CONTENTS

OUR TOP STORY

Settlement Agreements/Public Meeting Law 1

EMPLOYMENT

Section 1983 Employment Claims 2
 Privacy 3
 Attorney-Client Privilege 4
 Sexual Orientation Discrimination 4
 Race Discrimination 5
 Disability Discrimination 6
 Disability Discrimination/Harassment 7
 Sexual Harassment/Retaliation 7
 Labor Relations 8
 Layoff Health Benefits 10
 Family and Medical Leave Act 10
 Pandemic Flu 11

STUDENTS

Special Education 11

CONSTRUCTION/FACILITIES

Dangerous Conditions 13

DEPARTMENTS

Firm Profile 15
 Firm Publications 15
 Congratulations 15
 Save the Date! - LCW Conference 16
 Train the Trainer Seminars 17
 Firm Activities 18

Education Matters

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

© 2010 Liebert Cassidy Whitmore

LOS ANGELES

6033 W. Century Blvd., Suite 500
 Los Angeles, California 90045
 Tel: (310) 981-2000 Fax: (310) 337-0837

FRESNO

5701 N. West Ave.
 Fresno, CA 93711
 Tel (559) 256-7800 Fax: (559) 449-4535

SAN FRANCISCO

153 Townsend Street, Suite 520
 San Francisco, California 94107
 Tel: (415) 512-3000 Fax: (415) 856-0306

WWW.LCWLEGAL.COM

OUR TOP STORY

SETTLEMENT AGREEMENTS/PUBLIC MEETING LAW

Statutory Maximum Cash Settlement For Termination Of Employment Contract Includes Potential Non-Contractual Claims And Board's Closed Session Mediation With Potential Litigant And Mediator Violated The Brown Act.

A college president's four year employment contract with a community college district provided for an annual salary of approximately of \$227,200 from July 1, 2006 through June 20, 2010. In 2006, the college president initiated an investigation of potential fraud within the College's Horticulture Department. In early 2007, there was public criticism of the college president's role in the investigation. The Board of Trustees' president issued a letter indicating the Board's support for the college president. However, three trustees issued a "minority response" criticizing the Board's responses to various concerns about the investigation. The college president wrote a letter to the Board stating that the minority response was a public negative evaluation of her and violated her due process rights. During a public hearing, one of the minority trustees spoke negatively about the college president's letter and berated her.

The college president retained an attorney to evaluate her claims against the individual trustees. The District believed the college president's claims presented a significant threat of litigation. Consequently, the Board met in closed session with the college president, her counsel, and a mediator. The mediator never entered the boardroom, but groups of Board members in numbers less than a quorum left the room to meet with the mediator. The parties reached a settlement which provided that the college president would step down as president and the District would pay her for 18 months as a consultant, plus \$43,500 in attorney fees and \$650,000 in damages.

A taxpayer, filed a petition for writ of mandate alleging that the District violated the Ralph M. Brown Act, made an unconstitutional gift, and wasted public funds by authorizing a settlement in violation of Government Code sections 53260 and 53261. The trial court sustained the demurrer to the Brown Act cause of action and granted summary judgment in favor of the defendants on the remaining claims. The California Court of Appeal reversed.

With respect to local agency government officers and employees, Section 53260 allows a maximum cash settlement of no more than 18 months of pay and specified benefits upon termination of an employment contract. Section 53261 states that a cash settlement shall not include any other noncash items except health benefits. The District argued that the payment limitations are limited to settlements in exchange for an employee's waiver of contract rights, and

not to the settlement of tort claims. The Court disagreed, and held that Section 53260's statutory payment limitations apply to any "settlement" a public employee may receive under his or her contract in the event that contract is severed or terminated before the end of the contract term. Consequently, the maximum cash settlement applies regardless of the underlying reasons for termination or the employee's legal claims that he or she may possess at the time of termination.

The Brown Act generally requires legislative bodies to hold meetings in public. There is an exception for meetings with legal counsel regarding pending litigation which allows a legislative body to hold a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation. However, here the Board's negotiations with an adverse party and mediation with a private mediator exceeds the scope of activity allowed in a closed session. While the discussions with the mediator were outside the closed session conference room, they constituted serial meetings in violation of the Brown Act. The Brown Act exception for meetings regarding pending litigation only applies to the legislative body's meetings with its own legal counsel.

Page v. MiraCosta Community College District (2009) ___ Cal.App.4th ___ [2009 WL 4021535].

■ EMPLOYMENT

SECTION 1983 EMPLOYMENT CLAIMS

Arizona Charter School is Not a State Actor for Purposes of a Claim Under Section 1983.

Michael Caviness was employed as a teacher at Horizon Community Learning Center, a charter school operated as a non-profit corporation. In February 2006, a female student filed a grievance against Caviness, alleging that "the student-teacher boundary had been crossed." Horizon placed Caviness on paid administrative leave, and initiated an investigation.

The Horizon Board held a hearing in which it questioned the student complainant. Evidence

elicited at the hearing revealed that the female student and Caviness had been communicating via telephone and that the student "had a crush on him." When the student learned that Caviness had an adult girlfriend, the student became upset and retaliated against Caviness by filing the grievance. The Horizon Board determined that Caviness had exercised questionable judgment regarding the extent of his personal communications with the student, and determined not to renew his teaching contract, ending his employment in June 2006.

In April 2006, a school official, Lawrence Pieratt, wrote a letter to Caviness and sent copies to the Horizon Board members and the Arizona Department of Education. Caviness alleged that the letter "contained numerous false and defamatory statements and private information which Pieratt misused" to place Caviness in a bad light.

In July 2006, after the end of his employment term with Horizon, Caviness applied for a position with another school district. The district decided not to hire him after it asked Pieratt to rate Caviness's ability and knowledge as a teacher, and Pieratt declined to rate him. Pieratt stated that he chose not to rate Caviness because the Board had taken the action of non-renewing the contract. Caviness alleged that this information was false and misleading, and for the purpose of harming Caviness. Caviness also alleged that a Horizon employee called him a pedophile.

In December 2006, Caviness requested a name-clearing hearing. Horizon did not respond. In March 2007, Caviness filed a complaint under 42 U.S.C. section 1983, claiming that Horizon deprived him of his liberty interest in finding and obtaining work by making false statements about him in connection with his employment. Caviness further alleged that these actions were taken under "color of state law," as section 1983 claims can only be sustained against state actors. The District Court dismissed Caviness's complaint, finding that Horizon was not a state actor for purposes of section 1983, and Caviness appealed.

In his appeal, Caviness argued that, because charter schools are considered "public schools" under Arizona law, Horizon was acting under color of state law. The Court acknowledged

that Arizona statute makes charter schools public schools. In addition, charter schools must be sponsored by a public school district, the state board of education, or the state board for charter schools. According to the Arizona attorney general, charter schools are deemed to be political subdivisions of the state for purposes of complying with Arizona's Open Meetings Act. Charter schools are, however, exempt from all statutes related to schools, governing boards and school districts, including state teacher certification requirements and rules for the dismissal of teachers.

The Court's inquiry was more limited than the question of whether an Arizona charter school is a public school. Rather, because Horizon was a private 501(c)(3) non-profit corporation, the relevant inquiry was whether Horizon's actions with regard to Mr. Caviness in its role as employer constituted "state action." State action, for purposes of section 1983, is found only if there is such a close nexus between the State and the challenged action so that private action is treated as the action of the State itself. Thus, the Court focused on the challenged conduct, not the status of Horizon as a public school. Since Caviness's complaint did not allege that Horizon's actions were taken in the role of a state actor, the Court was required to determine whether "being an Arizona charter school is, by that fact alone, sufficient to make Horizon the government for employment purposes."

The Court noted that, under section 1983, a state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct. When a private individual or entity is endowed by the State with powers or functions governmental in nature, they can become agencies or instrumentalities of the state subject to section 1983, but the challenged function at issue must be "both traditionally and exclusively governmental."

The Court held that the mere fact that Horizon is a private entity performing a function which serves the public does not make Horizon's acts state action. Rather, Horizon's provision of educational services is not a function exclusively and traditionally the prerogative of the state. Therefore, the fact that Arizona law considers charter schools "public schools" does not

create a basis for holding that Horizon acted under color of state law in taking the actions related to Caviness.

Moreover, the State's regulation of personnel actions in charter schools did not mean that Horizon was a State actor for purposes of section 1983. This would only be true if the State has exercised coercive power or has such significant encouragement that the action must be deemed that of the State. In Horizon's case, the Court found that the State did not exercise this coercive power or significant encouragement. The Court relied on the fact that Horizon is expressly exempt from all statutes and rules relating to school districts. State action taken with the mere approval of or acquiescence of the state does not constitute state action. Here, the employment actions were taken by private parties without reference to standards established by the State. As a result, in taking employment actions, Horizon was not a state actor for purposes of section 1983.

Therefore, the Court affirmed the District Court's dismissal of Caviness' claims.

Caviness v. Horizon Community Learning Center (9th Cir. 2010) --- F.3d ---, 1021 WL 6261.

PRIVACY

U.S. Supreme Court To Consider Employee's Privacy Rights Over Text Messages On Employer-Provided Pager.

In our **June 23, 2008 *Special Bulletin***, we reported on the Ninth Circuit Court of Appeals' ruling in *Quon v. Arch Wireless, Inc.* The City of Ontario Police Department had issued police personnel, including Sergeant Quon, alphanumeric text-messaging pagers. The City later obtained transcripts of the text messages and found that Sergeant Quon had sent and received personal and sexually explicit messages on his pager.

Sergeant Quon, his wife, and other employees filed a complaint against ArchWireless alleging violation of the federal Stored Communication Act, and against the City and the Police Chief for violation of their right to be free from

unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution, and violation of their privacy rights under the California Constitution. The district court denied the plaintiffs' summary judgment in full, and granted in part and denied in part the City's summary judgment motion. The plaintiffs appealed the trial court's decision. On appeal, the Ninth Circuit held that the search of the text messages violated the employees' Fourth Amendment and privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and because the search was unreasonable in scope.

On December 14, the U.S. Supreme Court agreed to review the case to determine: 1) Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers; and (2) Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

City of Ontario v. Quon (9th Cir. 2008) 529 F.3d 892, cert. granted Dec. 14, 2009, ___ U.S. ___ [2009 WL 1146443] (No. 08-1332).

ATTORNEY-CLIENT PRIVILEGE

A Client's Privilege Not To Disclose Communications Had With The Client's Attorney Is Absolute.

The Costco Wholesale Corporation sought advice from its outside counsel regarding its employee classification system. Counsel responded with a 22 page opinion letter.

Some time later, Costco was sued for alleged wage and hour violations. The plaintiffs in that action asked that they be provided with the opinion letter. Costco refused on the ground of attorney-client privilege.

The trial court ruled that the opinion letter could be disclosed with its legal opinions redacted. The court directed a referee to conduct an *in camera* review of the letter, and to redact those portions the referee believed to be privileged.

The court of appeal affirmed the trial court, concluding that Costco had not shown that the disclosure of the un-redacted portions of the letter would cause it any harm.

The California Supreme Court reversed the court of appeal. The Supreme Court held that the contents of the letter were irrelevant; that the harm to be avoided was any compromise to the confidentiality of the attorney-client relationship itself. Thus the entire communication is privileged.

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725 [101 Cal.Rptr.3d 758].

SEXUAL ORIENTATION DISCRIMINATION

Ninth Circuit Awards Federal Employees Back Pay Where Employees' Same Sex Spouses Were Denied Health Benefits Notwithstanding The Prohibition Of The Federal Defense Of Marriage Act.

Brad Levenson is a deputy federal public defender and married to someone of the same sex. Karen Golinski is a federal judicial employee and also married to someone of the same sex. The employees married during the brief period when same sex marriages were legal in California. Both employees requested to add their spouses as a family member beneficiary to the Federal Employees Health Benefits Program (FEHBP). However, the Administrative Office of the United States Courts denied the requests on the ground that the federal Defense of Marriage Act (DOMA) prohibits the provision of benefits to same-sex spouses. As the employees are not covered by Title VII as judicial employees, they filed claims challenging the decision through the Ninth Circuit Court of Appeals' Employment

Dispute Resolution plan. The Ninth Circuit ordered the Administrative Office to process the requests for spousal health coverage. Thereupon, the Office of Personnel Management (OPM) intervened and prevented the insurance carrier from processing the request forms as ordered by the Court.

In two separate cases, the Ninth Circuit found that the employees were entitled to back pay under the Back Pay Act. The Back Pay Act entitles judicial employees to back pay if: (1) there has been a personnel action; that (2) is unjustified or unwarranted; and (3) results in a withdrawal or reduction of all or part of the employee's pay, allowances, or differentials. Here the employees were improperly denied health benefits simply because of the sex of their spouse and their sexual orientation. In the Golinski case, the Court found that, even as limited by the DOMA, the FEHBP permits federal employees to provide health insurance coverage to their same-sex spouses. In the Levenson case, the Court held that the denial of health benefits to a same-sex spouse violated the Due Process Clause of the U.S. Constitution because there was no rational basis for the denial of benefits. The Court stated that the denial of same-sex health benefits "is far too attenuated a means of achieving the [DOMA objectives] of 'defending traditional notions of morality' or 'defending and nurturing the institution of traditional, heterosexual marriage.'"

Consequently, the employees were entitled to the amount associated with providing their respective spouses with health, dental, and vision insurance coverage equivalent to those provided under the federal benefits plans. The Court ordered the OPM to rescind its directive prohibiting the employees from enrolling their spouses.

In re Levenson (9th Cir. 2009) 587 F.3d 925; *In re Golinski* (9th Cir. 2009) 587 F.3d 956.

Note:

The current status is that Ninth Circuit's Chief Judge Kozinski ruled on December 22 that the time has run out on the OPM to appeal his November order in favor of Golinski. With the OPM and Judge Kozinski now at impasse, further court proceedings are no doubt in the offing. (Daily Journal, December 24, 2009).

RACE DISCRIMINATION

Black Employee Could Be Similarly Situated To White Employees Even Though Procedurally He Fell Under A Different Compensation Category.

William Houston was the Director of Support Services for the Easton Area School District in Pennsylvania. Houston served on Superintendent Joseph Piazza's cabinet (i.e. administrative team) contemporaneously with employees Louis Ciccarelli, Business Manager; Karl Hettel, Director of Personnel; and Roger Wrazien, Director of Elementary Education. Houston was African-American and the Superintendent and other cabinet members were white.

Piazza resigned in 1997 and requested that he be paid for all unused sick days. The Board of Education approved the request. In 1998, Houston retired and, pursuant to policy, the District paid him 25% of the value of his unused sick days. Ciccarelli, Hettel, and Wrazien all retired within a few months of each other in 1999. Although the general policy was to pay employees 25% of the value of their unused sick days, Superintendent Meck agreed to pay them 100% of their unused sick days.

Pennsylvania state law (Act 93) requires school employers to adopt compensation plans for certain school administrators. Houston and Wrazien were covered by the District's Act 93 compensation plan, but Piazza, Ciccarelli, and Hettel were not.

Houston sued the District for race discrimination in violation of Title VII because of the District's failure to pay him 100% of the value of his unused sick days. The district court excluded evidence of Piazza, Ciccarelli, and Hettel's retirement packages, finding that they were not similarly situated employees because they were not Act 93 employees. At the end of the trial, the court entered judgment in favor of the District. In an unpublished case, the Third Circuit Court of Appeals reversed and remanded.

To make a comparison of the plaintiff's treatment to that of an employee outside the plaintiff's protected class for a discrimination claim,

the plaintiff must show that he and the employee are similarly situated in all relevant respects. Whether a factor is relevant for purposes of a similarly situated analysis must be determined by the context of each case.

In determining whether the employees were similarly situated, the district court here only considered whether the employees had Act 93 status. The court did not consider the evidence showing that Act 93 status was not determinative as to the amount of sick time paid to District employees upon retirement. Houston offered evidence demonstrating that the District's Act 93 plan did not specify the percentage of unused sick days that would be paid upon retirement. Moreover the District had a general policy of paying all employees, regardless of Act 93 status, 25% of their unused sick days at retirement.

Superintendent Meck retained the discretion to pay both Act 93 and non-Act 93 employees more than 25% of their unused sick days. Consequently, the employees' Act 93 status was not dispositive as to whether they were similarly situated to Houston. At minimum, Ciccarelli and Hettel could be similarly situated to Houston because they were all long-term employees of the District, held positions of roughly equivalent rank during the same time period, and retired within a year of each other. Therefore, the district court should have allowed Houston to compare his retirement package to Ciccarelli, Hettel, and Wrazien's packages.

Houston v. Easton Area School District (3d Cir. 2009) 2009 WL 4609756.

DISABILITY DISCRIMINATION

As Under The Americans With Disabilities Act, Independent Contractors Can Assert Employment Disability Discrimination Claims Under The Rehabilitation Act.

Dr. Lester Fleming is an anesthesiologist who suffers from sickle cell anemia. He applied for an anesthesiologist position at the Yuma Regional Medical Center. However, Yuma told

Fleming that it would not be able to accommodate his operating room and call schedules. Fleming sued Yuma for disability discrimination in violation of the Rehabilitation Act. The district court granted summary judgment in favor of Yuma, finding that independent contractors, such as Fleming, are not protected by the Rehabilitation Act. The Ninth Circuit Court of Appeals reversed.

The Rehabilitation Act allows for individuals subjected to disability discrimination to sue in connection with any program or activity receiving federal financial assistance. The Act provides that it will follow the standards applied under Title I of the Americans with Disabilities Act (ADA) when determining whether an alleged act of employment discrimination violates the Rehabilitation Act. The appellate courts have split regarding whether the Rehabilitation Act incorporates Title I literally or selectively. The Sixth and Eighth Circuit Courts of Appeals have adopted a literal interpretation and, consequently, have found that the Rehabilitation Act only covers employer-employee relationships. Adopting a selective interpretation, the Tenth Circuit has found that the Act covers all individuals subject to discrimination under any program or activity receiving federal financial assistance who may bring an employment discrimination claim based on the standards found in the ADA.

Here the Ninth Circuit agreed with the Tenth Circuit's selective interpretation of the statute. As such, employment discrimination claims are not limited to employer-employee relationships, and an independent contractor can assert an employment discrimination case under the Rehabilitation Act.

Fleming v. Yuma Regional Medical Center (9th Cir. 2009) 587 F.3d 938.



DISABILITY DISCRIMINATION/HARASSMENT

California Supreme Court Holds That The Same Evidence Can Support Claims for Both Harassment and Discrimination.

Charlene Roby was a customer service liaison for McKesson Corporation. She suffered from panic attacks which restricted her ability to perform her job. The Company had an attendance policy which placed particular emphasis on 24-hour advance notice for all absences, including medical absences. The policy operated to the disadvantage of employees like Roby who suffered from medical conditions that might require several unexpected absences in close succession. Roby's frequent absences created tension between her and her supervisor, Karen Schoener.

Schoener frequently made negative comments in front of other employees about Roby's body odor, even though Schoener knew that Roby's medication was causing the odor. Schoener would call Roby "disgusting" because of the sores and the excessive sweating caused by Roby's medical condition. She openly ostracized Roby in the office, refused to respond to Roby's greetings, and ignored her during staff meetings. She frequently reprimanded Roby in front of co-workers and excluded Roby from office parties. After Roby was absent on numerous occasions, the Company terminated her employment.

Roby sued the Company and Schoener for discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA). The jury found in Roby's favor. The California Court of Appeal found there was insufficient evidence to support the jury's harassment verdict because the evidence had to be allocated either to the discrimination or the harassment claim, but could not support both claims. The California Supreme Court reversed, finding that evidence of a supervisor's personnel management decisions are admissible to prove harassment so long as the decisions were made to convey a harassing message.

The California Supreme Court has previously held that discrimination and harassment are

separate and distinct wrongs under FEHA. A discrimination claim must be based on some official action taken by the employer - the exercise of personnel management authority properly delegated by an employer to a supervisory employee. On the other hand, harassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment communicates an offensive message to the harassed employee.

Although discrimination and harassment are separate wrongs, some official employment actions taken in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. Schoener was sending Roby a harassing message by shunning her during staff meetings and reprimanding her in front of co-workers. In addition, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus. Consequently, discrimination and harassment claims can have overlapping evidence.

Roby v. McKesson Corp. (2009) 47 Cal.4th 686.

SEXUAL HARASSMENT/RETALIATION

Supervisor's Sporadic References To Employee's Attractive Appearance Are Insufficient To Support Harassment Claim; Retaliation Claim Fails Where Decisionmakers Were Unaware of Complaint.

Alicia Haberman worked as a sales representative for Cengage Learning, Inc., a textbook publishing company. In 2005, Eric Bredenberg, the Company's national sales manager, asked Haberman how she could look so pretty so early in the morning. He later told Haberman that a certain school administrator was "pretty hot for being an older woman." In 2006, Haberman's supervisor, Christina Pineda Kinsky, asked Haberman if she was dating Bredenberg because he had said that she was "drop dead gorgeous."

In February 2007, Bredenberg referred to Haberman as a gorgeous strawberry blonde. In

March, he called Haberman from his cell phone while they were both parking for a convention, and he said he was coming right up behind her and that it felt pretty good. In March, Haberman began reporting to Rick Reed.

In April 2007, Bredenberg told Haberman that one of the textbook authors had the "hots" for her and asked whether she would ever go out with the author. In May, Bredenberg told Haberman that his grief counselor told him he should not make any changes for one year after the death of his wife, and Bredenberg said he just wanted to have sex without a relationship. He asked Haberman how she knew whether someone was good in bed. Bredenberg asked Haberman if she had any friends who just wanted to have sex.

In June, Reed counseled Haberman about her sales deficiency. In August, the Company president recommended placing Haberman on a performance improvement plan (PIP) because her sales had fallen short of the sales goal for the past two and a half years. As Haberman had a large potential sale pending, Reed decided to give Haberman until the end of September to improve her sales. In early September, Haberman complained to Reed that she was being harassed. By September 30, Haberman's sales were still very low. Consequently, Reed placed her on a PIP. In October, Haberman complained to the human resources department that she was being harassed, but she refused to provide specific details. The next day, Bredenberg told Haberman that a customer's contractor had the "hots" for her and wanted to date her. Haberman subsequently submitted an expense reimbursement request which included numerous expenses for personal charges. After Haberman removed the personal charges and resubmitted her request, Reed approved the request and Haberman was fully reimbursed.

Haberman sued the Company and Bredenberg for sexual harassment and retaliation in violation of the Fair Employment and Housing Act. The trial court granted summary judgment in favor of the defendants. The California Court of Appeal affirmed.

To establish a hostile work environment claim, an employee must show that the harassing conduct was severe enough or sufficiently pervasive to alter the conditions of employment.

The Court found that Bredenberg's conduct was not sufficiently severe or pervasive to create a hostile work environment. Bredenberg made brief and isolated comments to Haberman over a two to three year period. He never propositioned her or even asked her out on a date. He also never threatened her or used explicit language in her presence. Although Bredenberg occasionally commented on her attractive appearance or informed Haberman that someone else had expressed interest in her, the Court found these incidents to be isolated, sporadic, and often trivial.

As for her retaliation claim, Haberman could not show a causal link between any adverse action and her harassment complaint. The Company president had recommended placing her on a PIP in August 2007 before she made her complaint. Although Haberman alleges that she complained to Pineda Kinsky in 2005 and 2006 about Bredenberg's alleged sexual harassment, it was undisputed that Pineda Kinsky never reported any such complaint. Thus, the individuals who made the decision to place Haberman on a PIP were unaware of any complaint before that decision was made.

Haberman v. Cengage Learning, Inc. (2009) ___ Cal.App.4th ___ [2009 WL 4693065].

LABOR RELATIONS

Union Had To Expressly Notify Agency Of Its Refusal To Negotiate Regarding Non-Mandatory Subjects Of Bargaining Before It Could State A Claim Against Agency For Conditional Bargaining.

The California Correctional Peace Officers Association and the State of California (Department of Personnel Administration) were negotiating a successor memorandum of understanding. The negotiations included non-mandatory subjects of bargaining that would require a waiver of the employees' statutory rights, such as the use of sick leave and Fair Labor Standards Act exemptions. On August 22, 2007, the State issued its last, best, final offer (LBFO), which included these non-mandatory subjects of bargaining.

On August 31, the Union sent the State a letter stating, "Your current proposal has several sections that requires us to agree to waive state law for our members. That is not a legitimate effort towards an agreement." The letter also asked for further clarification regarding the LBFO's sections regarding use of sick leave and FLSA exemptions. In a September 5 letter to the State, the Union excluded the disputed sections and listed the 133 proposals the Union found acceptable from the LBFO. The State later implemented the LBFO.

The Union filed an unfair practice charge with PERB alleging that the State engaged in conditional bargaining in violation of the Dills Act state employee bargaining law. The Board agent dismissed the charge and PERB adopted the dismissal.

Parties may negotiate over the inclusion of non-mandatory subjects of bargaining. But a party may not legally insist upon the acceptance of such proposals if the Union has clearly expressed a refusal to further bargain over them. The Union must put the employer on notice of its opposition to further negotiate regarding a non-mandatory proposal. Here the Union fails to meet this notice requirement because its communications with the State did not put the State on notice that it opposed negotiations on the non-mandatory subjects. The Union expressed its belief that the State's proposals sought a waiver of state law, but did not communicate whether the Union would be willing to consider such proposals. In addition, the Union accepted some, but not all, of the State's proposal and requested clarification on other non-mandatory proposals. The Union's conduct does not communicate opposition to further negotiations and, in fact, could be construed as demonstrating a willingness to continue negotiations over these subjects.

California Correctional Peace Officers Ass'n v. State of California (Department of Personnel Administration) (2009) PERB Dec. No. 2081S [33 PERC ¶ ____].

Note:

A party may, but is not required to negotiate over non-mandatory subjects of bargaining, and may, but is not required to agree to non-mandatory subjects, nor submit them to impasse procedures. But the refusing party must clearly put the other party on notice of its refusal.

Employer's Rejection Of Probationary Employee Was Based On Poor Job Performance Rather Than Retaliation.

Michael Menaster worked for the State of California Department of Social Services (DSS). He quickly became the subject of numerous employee complaints concerning his behavior, including comments that he was intrusive, loud, gossiped, talked excessively, and made inappropriate and offensive comments to and about co-workers. Menaster also made numerous complaints to his Union representative about his working conditions. DSS placed him on administrative leave while it prepared to reject him from probation.

Menaster filed an unfair practice charge with PERB, alleging that the State retaliated against him. The administrative law judge found that the State did not violate Menaster's rights under the Dills State Bargaining Act and dismissed the complaint. The Board adopted the proposed decision.

To rebut Menaster's *prima facie* case of discrimination, the State provided substantial evidence that DSS placed Menaster on administrative leave because of his performance issues. Specifically, DSS showed the Department's history of counseling him regarding his problems with his co-workers.

An employee's protected activity does not insulate him from adverse actions by the employer. PERB will not review whether a discharge is based on just cause. PERB will only review whether the decision was made for reasons protected by the statutes administered by PERB. Here DSS consistently explained and documented its expectations and concerns with Menaster's performance prior to placing him on leave and making the decision to reject him from probation.

Menaster v. State of California (Department of Social Services) (2009) PERB Dec. No. 2072S [33 PERC ¶ 177].

LAYOFF HEALTH BENEFITS

COBRA Premium Reduction Extended Through February 2010.

As we reported in our **March 2009 *Education Matters***, the American Recovery and Reinvestment Act (ARRA) included a 65% COBRA subsidy for employees involuntarily terminated from their employment between September 1, 2008 and December 31, 2009. On December 19, the Department of Defense Appropriations Act, 2010 (2010 DOD Act) amended ARRA to extend the COBRA premium reduction.

Under the amendment, individuals who are involuntarily terminated between September 1, 2008 and February 28, 2010 qualify for the subsidy. Moreover, the premium reduction applies to periods of health coverage that began on or after February 17, 2009 and lasts for up to 15 months (instead of 9 months under the original ARRA).

The Department of Labor recently published a fact sheet regarding the parameters of the COBRA subsidy

The fact sheet can be found at:
<http://www.dol.gov/ebsa/newsroom/fsco-brapremiumreduction.html>

FAMILY AND MEDICAL LEAVE ACT

Employee Warned About Her Negative Job Performance Prior To Her Medical Leave Could Not Establish Claim For Retaliation.

Julie Stephens Long worked for the Teachers' Retirement System of the State of Illinois (TRS). As a payroll clerk, Long's job responsibilities included enrolling members in the electronic fund transfer (EFT) program and entering EFT information into a database. When she initially started with TRS, Long received positive performance evaluations. However, in June 2005, she missed 25% of her scheduled work days. In July 2005, she missed 40% of her

scheduled days. In addition, contrary to her supervisor's direction, she failed to train employees from other departments on the EFT process. In late July 2005, Long's supervisor Marshall Branham told Long that he was withdrawing his recommendation that she receive a promotion.

In September 2005, Branham met with Long to discuss several errors Long had made in the EFT system and the negative impact her absenteeism had on her coworkers. Human Resources Director Gina Larkin later met with Branham and Branham's supervisor, Sally Sherman, to discuss Long's performance. Through the meetings, Larkin learned about the numerous errors Long had made and the various complaints that were made about her work. In October, TRS approved Long's request to take intermittent leave under the Family and Medical Leave Act (FMLA) for her medical condition. Long informed TRS that her earliest absence related to her medical condition was on September 22.

In December and January, Long was absent 14 days that were not FMLA-related. In January 2006, Larkin met with Branham and Sherman again to discuss Long's continuing negative job performance. Larkin later reviewed Long's performance evaluations, TRS member complaints related to her work and the comments from Branham and Sherman. Larkin then met with TRS's executive director Jon Bauman twice regarding Long's job performance. Larkin recommended that Bauman, who had the final decisionmaking authority regarding personnel decisions, terminate Long. In February 2006, after reviewing Long's performance evaluations and discussing member complaints with Branham, Bauman decided to terminate Long.

Long sued TRS for retaliation in violation of the FMLA. The district court granted summary judgment in favor of TRS. The Seventh Circuit Court of Appeals affirmed.

The FMLA prohibits employers from discriminating against employees based on their having taken FMLA leave. To establish a retaliation claim, an employee must show a causal connection between his or her protected activity and an adverse action. Here Long could not demonstrate a causal connection between her FMLA leave and her termination because TRS had

warned Long about her performance problems before she requested to take FMLA leave.

Long was also unable to show that TRS had any retaliatory animus because Bauman - the decisionmaker - did not know about her FMLA leave. And, even assuming Branham had an unlawful motive, Bauman reached the decision to terminate Long after he reviewed Long's performance evaluations and the member complaints, and after he met with Larkin twice regarding Long's poor job performance. Thus, any retaliatory animus Barnham may have had did not taint Bauman's decision.

Long v. Teachers' Retirement System of the State of Illinois (7th Cir. 2009) 585 F.3d 344.

PANDEMIC FLU

Occupational Safety And Health Administration Creates H1N1 Flu Safety Website And Publishes Fact Sheets For Employers And Workers.

The Occupational Safety and Health Administration (OSHA) recently released fact sheets for workers and employers on a new "Workplace Safety and H1N1" website. The website describes basic precautions for protecting employees against the H1N1 flu virus.

Among other things, the website includes guidance for non-health care employers. OSHA advises employers to encourage employees to stay at home, institute sick-leave and medical surveillance policies, implement infection control measures such as cough etiquette, implement social distancing policies, encourage vaccinations, prepare for school closures, and keep the workplace clean.

OSHA's H1N1 influenza website is available at <http://www.osha.gov/h1n1/index.html>



STUDENTS

SPECIAL EDUCATION

ALJ Has No Jurisdiction Over IDEA Due Process Complaint Where Complaint Is Filed After Student Withdrew From the Defendant District Prior to Filing Complaint.

C.N. was born in March 1998 and was tested for Autism Spectrum Disorder (ASD) in 2001. Although testing ruled out ASD, further testing revealed that C.N. had a communication disorder and attentional and hyperactivity problems. C.N. was ultimately designated as developmentally delayed with speech and language impairment. C.N. was a student at Lincoln Elementary School within the District in Willmar, Minnesota.

Upon C.N.'s diagnosis, when C.N. was in kindergarten, the school convened a team, and created an individualized education program (IEP). C.N.'s IEP included a behavior intervention plan (BIP), which authorized the use of restraint holds and seclusion when C.N. exhibited various target behavior. C.N.'s parent, J.N. alleged that she objected to the use of restraint holds and seclusion, but the District continued to include them in the BIP. Later, an outside evaluator recommended against seclusion and J.N. continued to object to the use of restraints and seclusion. During all relevant times, however, the IEP authorized restraint holds and seclusion.

During C.N.'s time at Lincoln Elementary, C.N. was taught by Lisa Van Der Heiden, a special education teacher. Ms. Van Der Heiden occasionally used restraint holds and seclusion authorized in the BIP, and recorded the incidents in behavioral and communication logs she kept for her students.

C.N.'s parent alleged that Van Der Heiden used the restraint and seclusion techniques improperly and excessively and also mistreated C.N., including by verbally abusing C.N., denying C.N. the use of a restroom, and requiring C.N. to hold a physical posture for a certain period of time under threat of seclusion. In addition, a

paraprofessional reported Van Der Heiden to the Minnesota Department of Education's (MDE) Maltreatment of Minors Division for maltreatment of C.N. Upon learning of the complaint, J.N. also filed a complaint with MDE. The MDE investigations concluded that Van Der Heiden violated a number of C.N.'s rights by denying her access to the restroom.

During MDE's investigation, the District placed Van Der Heiden on leave and conducted its own investigation. The District found evidence that Van Der Heiden denied students access to the restroom, but ultimately declined to discipline her. Van Der Heiden returned to her position at Lincoln, but had no further contact with C.N. During this time, J.N. requested information from the District Superintendent regarding Van Der Heiden's status, but the Superintendent refused to divulge any information. In response, J.N. pulled C.N. from Lincoln and placed her in a private school and, for the next school year, a different public school district. Thereafter, she filed a compliance complaint with MDE, challenging the adequacy of the services provided by the District. The ALJ granted the District's motion to dismiss the hearing, as C.N. was no longer enrolled in the District.

Upon C.N.'s appeal, the District continued to argue that C.N.'s claims against the District could not be adjudicated as C.N. had left the District and moved to a different public school district. The District relied on an earlier Eighth Circuit case, *Thompson v. Board of Special School District No. 1*, which held that, "if a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved."

C.N. argued that a statutory change, which required that the State oversee due process hearings rather than individual school districts, overruled the holding in *Thompson*. The Court did not agree. Rather, the Court stated that the purpose of a due process hearing is to give a district the opportunity to address and remedy the complaint by the parent and student. Moreover, the new statute still required that the due process hearing be held in the district currently responsible for the child's education. At the time of C.N.'s complaint, a different public school district was responsible for providing services. As

a result, the ALJ did not have any jurisdiction over a complaint against the defendant District.

C.N. v. Wilmar Public Schools, Independent School Dist. No. 347 (8th Cir. 2010) --- F.3d. ---, 2010 WL 27047.

Student Was Not Entitled To Attorney's Fees for IDEA Complaint Because Student Was Not Substantially Justified in Rejecting District's Settlement Offer at Resolution Meeting.

R.R. was a student of the El Paso Independent School District, who suffered from Attention Deficit/Hyperactivity Disorder. R.R. received special education services from the District for twelve years under the Individuals with Disabilities in Education Act (IDEA). In 2005, R.R. was struggling in school, despite receiving accommodative services that included test preparation and study skills assistance. Later that year, R.R. failed the Texas standardized skills assessment test for the third consecutive year. R.R. requested to be re-evaluated for special education services. The District convened a meeting of a committee to evaluate R.R.'s academic placement, and the team determined that R.R. did not need additional evaluation or a change to current academic placement or accommodative services. The team based this decision on the fact that R.R. was close to passing the test.

In 2006, R.R. failed the standardized skills assessment again, and again requested an evaluation to determine his eligibility for special education services. The District convened a meeting to discuss his request, but R.R. cancelled the meeting and filed a request for a state due process hearing. At the required pre-resolution meeting, the District contended that there was no dispute between the parties because it was willing to provide all of the relief requested in the complaint. The District requested a quantification of R.R.'s attorney's fees, but R.R. refused and left the meeting.

The day of the meeting, the District formalized the offer made at the resolution meeting in a written settlement offer. The resolution included everything offered at the resolution meeting

and initially suggested an attorney's fees award of \$3,000. The District also stated that it remained ready to negotiate a private settlement and requested the amount of attorney's fees that would be necessary to finalize the settlement. R.R. refused the offer and proceeded to the due process hearing.

At hearing, the District made a motion to dismiss R.R.'s complaint on the basis that there was no dispute between the parties as it was willing to grant all of the requested relief. The hearing officer denied the request and proceeded with the hearing. The officer entered judgment in favor of R.R. and ordered the District to conduct a full evaluation of R.R. In April 2007, R.R. and the District each filed suit in federal court under the Individuals with Disabilities in Education Act (IDEA). The District argued that the hearing officer erred in denying its motion to dismiss, and also sought attorney's fees based on the allegation that R.R.'s litigation was frivolous. R.R. also sought attorney's fees as the prevailing party in the due process hearing.

The district court held that R.R. was justified in rejecting the District's settlement offer and continuing his litigation to obtain an "enforceable order." As part of this holding, the court found that there was a justiciable dispute because the District had not offered an enforceable settlement offer, because, the court ruled, the settlement offered was not enforceable in either state or federal court. The court also awarded attorney's fees to R.R. in the amount of over \$45,000. The District appealed, and the Court of Appeals found in the District's favor.

Under the IDEA, attorney's fees are awarded to a prevailing party. A prevailing party is one that attains a remedy that both (1) alters the legal relationship between the school district and the handicapped; and 2) fosters the purposes of the IDEA. The Court held that, in order to meet the requirement for a prevailing party, "a litigant must attain some judicial imprimatur on a material alteration of the legal relationship in order to be a prevailing party."

The District argued R.R. was not a prevailing party, because it offered R.R. all of the requested relief before litigation. Therefore, the District argued, R.R.'s attainment of relief did not alter the legal relationship between the parties or foster the purposes of the IDEA. In

addition, Section 1415(i)(3)(D)(i) of the IDEA states that attorneys' fees may not be awarded in any action for legal services performed subsequent to the time of a written offer of settlement if the court finds that the relief finally obtained is not more favorable than the offer of settlement. However, a party can still be considered a prevailing party under this set of circumstances, and such a party may be entitled to attorneys' fees for services rendered prior to the offer of settlement.

The Court held that the settlement offered by the District would have, in fact, been enforceable by R.R., because Courts may enforce settlement agreements reached at a resolution meeting, pursuant to precedent and a provision of the IDEA. Moreover, the Court held that R.R. was not substantially justified in rejecting the District's settlement offer, because he did not need to continue the litigation to obtain an enforceable agreement covering all requested relief. Therefore, R.R. was not entitled to attorney's fees for work provided after the District's settlement offer. The Court also held that R.R. was not entitled to fees for work performed before the resolution meeting, because the District also offered attorney's fees in the settlement offer.

El Paso Independent School Dist. v. R.R. (5th Cir. 2009) --- F.3d ---, 2009 WL 4828747.

■ CONSTRUCTION/FACILITIES

DANGEROUS CONDITIONS

One Employer's Failure To Report A Dangerous Condition At Multi-Employer Worksite May Be Breach Of Duty To Other Employers' Workers.

All Bay Contractors Inc. ("All Bay") was the general contractor who hired Pacific Northstar Mechanical ("PNM") as a subcontractor for a tenant improvement project. During the project, a PNM employee received an electrical shock from an ungrounded light fixture that was present at the project site. The PNM foreman knew of the minor injury but did not report it. Three

weeks later, an All Bay employee touched the ungrounded light fixture and fell from his ladder. He fell on another employee and both were severely injured.

The two All Bay employees sued PNM for negligence. This court noted that neither the common law nor the applicable construction contract created a duty on the part of PNM to take affirmative steps to protect non-PNM employees from hazards that PNM did not create. However, the court agreed that reading Labor Code section 6304.5, section 6400 subdivision (b) and Cal-OSHA regulation 336.11 together create a duty to notify about known hazards. A breach of this duty renders the offending employer subject to citation and constitutes actionable negligence whether or not the injured party is the employer's own employee.

In 1999, the Legislature amended Labor Code section 6304.5 to provide that the statutes governing workplace safety and the occupational safety and health standards adopted under Cal-OSHA are admissible under Evidence Code in the same manner as any other statute, ordinance, or regulation. As a result, section 6304.5 codified the common law doctrine of negligence per se, pursuant to which statutes and regulations may be used to establish duties and standards of care in negligence actions.

The court found that Labor Code section 6304.5 did not limit suits against nongovernmental defendants for their failure to comply with their duty under Cal-OSHA regulation 336.11 to report workplace hazards to the controlling employer at a multiemployer worksite. Labor Code section 6304.5 does forbid injured workers from suing the State of California based solely on its failure to comply with its duty to inspect workplace facilities to insure their safety.

California Code of Regulations, title 8, section 336.11 provides that an employer who would otherwise be subject to a citation for violation of Labor Code section 6400 subdivision (b)(1) may avoid the citation upon satisfying each of five (5) conditions.

Specifically in this situation, the exposing employer may avoid citation if it can demonstrate that the creating, controlling, and/or the correcting employers were specifically notified or were aware if the hazards to which its employees were exposed.

The court ruled that, when read together, the amendments to Labor Code section 6304.5 and Cal-OSHA regulations 336.10 and 336.11, impose a duty on each employer, at a multiemployer worksite, to report all nonobvious hazards about which the employer learns because its employees were exposed to them during the course of their work, even if the employer in question did not create the hazard. A breach of that duty is actionable in tort by any worker at the site who is subsequently injured by the hazard that was not reported.

Suarez v. Pacific Northstar Mechanical, Inc. (2009) 180 Cal.App.4th 430.

Note:

We recommend that construction contracts include safety-reporting provisions for worksites with multiple employers working together. In the case above, the subcontractor did not violate the terms of the contract, which did not require reporting of hazards. The hazard existed at the site and since the subcontractor did not create or perform work on the hazardous condition, it was not obligated to report it to others working at the site. Despite the fact that one of its own employees had a minor injury, no one reported the hazardous condition to others at the worksite. As a result, severe injuries occurred and the subcontractor was held to have breached its duty to workers on the site that were not its own employees.





FIRM PROFILE
Grace Y. Chan
Associate

Grace Y. Chan, an associate in the San Francisco office, provides client representation and legal counsel to clients in matters pertaining to employment and labor law

Grace's professional experience has been particularly extensive in the litigation area. She has handled the preparation of witnesses, depositions and all aspects of discovery and trial preparation, law and motion proceedings, settlement negotiations, administrative hearings and trial work. Subject matters have included employment discrimination, the Fair Labor Standards Act and workers compensation issues.

Grace received her Juris Doctorate at The Catholic University of America, Columbus School of Law in Washington, DC. Grace received her Bachelor of Arts degree in English and American Literature from New York University. Grace is also admitted to practice in the District of Columbia.

While not practicing law, Grace enjoys traveling, reading and cooking.



Firm Publications

Jeffrey Freedman of our Los Angeles office authored the article, "Firefighters: Immunized to What Extent?" which appeared in the December 14, 2009 issue of the Los Angeles/San Francisco Daily Journal. The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "firefighter".



We would like to congratulate **Connie Chuang** on her recent marriage to Charles Almond. Connie is an associate in the Los Angeles office. We wish them both many years of joy and happiness.

Save the Date!



Liebert Cassidy Whitmore 12th Annual Public Sector Employment Law Conference

Please join us February 25 and 26, 2010.

By popular demand the 2010 conference will be held at the San Francisco Hyatt Regency.

A series of presentations focused on the special issues impacting the educational community are planned, including:

- * Collective Bargaining Challenges for Schools and Colleges
- * Speaking Freely or Shouting “Fire”?
- * Overlapping Leave Challenges

For your campus safety officers, we offer:

- * Public Safety Update
- * Conducting Effective Public Safety Investigations
- * An Outsider’s Guide to Public Safety Personnel Issues
- * Public Safety: Does Anyone Not Retire On Disability Anymore?

These and many more sessions are listed in the conference brochure, which is available at www.lcwlegal.com. Complete descriptions for all classes, as well as registration material are also available.

We hope that you can join us.

To make your hotel reservations online: <https://resweb.passkey.com/go/LCWL2>



Train the Trainer Seminars

Teach Mandatory Harassment Training

Train the Trainer Refresher

Need to be re-certified as a trainer? Liebert Cassidy Whitmore is offering "Train the Trainer" refresher sessions to provide you with the necessary tools to **continue** conducting mandatory AB 1825 (Govt. Code Section 12950.1) training for your agency.

San Francisco - March 11, 2010

Fresno - March 18, 2010

Los Angeles - March 26, 2010

Time: 9:00 a.m. - 12:00 Noon

Location: Liebert Cassidy Whitmore Offices
6033 West Century Boulevard., Suite 500, Los Angeles, CA 90045
153 Townsend Street, Suite 520, San Francisco, CA 94107
5701 N. West Avenue, Fresno, CA 93711

Cost: \$1,000 each or \$900 each if ERC Member

Registration:
Visit www.lcwlegal.com for more information and to download the registration form.

Become a Certified AB 1825 Trainer

A key component of Government Code Section 12950.1 (AB 1825) compliance is the provision of preventing harassment training to all supervisory employees every two years and to new supervisors within 6 months of their assumption of a supervisory position. Liebert Cassidy Whitmore is offering "Train the Trainer" sessions to provide you with the necessary tools to conduct mandatory AB 1825 training for your agency.

Los Angeles - April 20, 2009

San Francisco - April 21, 2010

Fresno - April 28, 2010

Time: 9:00 a.m. - 4:00 p.m.

Location: Liebert Cassidy Whitmore Offices
Please see above for office locations

Cost: \$1,500 each or \$1,350 each if ERC Member

Registration:
Visit www.lcwlegal.com for more information and to download the registration form.

Please contact us for more information on how to bring this training to your agency by contacting Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or (310) 981-2051.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Workshop Training

January 13	"Exercising Your Management Rights" and "Public Sector Employment Law Update" San Joaquin Valley ERC Oakdale Richard Whitmore
January 13	"Advanced FLSA" and "Leaves, Leaves and More Leaves" San Gabriel Valley ERC Alhambra Brian Walter
January 14	"12 Steps to Avoiding Liability" and "Embracing Diversity" Napa/Solano/Yolo ERC Vacaville Cynthia O'Neill
January 14	"Handling Grievances" LA County Management Attorneys (LACMA) Consortium Los Angeles Michael Blacher
January 14	"Discipline: Putting It into Practice" West Inland Empire ERC Upland James Oldendorph and Mark Meyerhoff
January 15	"Creating a Culture of Respect" and "From Model Plan to Your Plan: Developing Compliant EEO Plans That Work" Southern CA Community College Districts (CCD) ERC Mission Viejo Laura Schulkind
January 15	"Employee Due Process Rights and 'Skelly:' A Guide to Implementing Classified Employee Discipline" and "Managing Performance Through Evaluation" Central Coast Personnel Council (CCPC) Santa Barbara Pilar Morin
January 20	"Supervisory Skills for the First Line Supervisor/Manager" Central Valley ERC Hanford Frances Rogers
January 20	"Checking References: The Most Important Part of the Hiring Process" Gold Country ERC Webinar Kelly Tuffo
January 21	"Performance Management: Evaluation, Documentation and Discipline" and "Public Sector Employment Law Update" South Bay ERC Gardena Melanie Poturica
January 27	"A Guide to Labor Negotiations" North State ERC Chico Jack Hughes
January 29	"California Code of Regulations: Education Code and Title V" and "Sick and Disabled Employees" Central CA CCD ERC Bakersfield Peter Brown
February 3	"Advanced FLSA" and "Public Sector Employment Law Update" Ventura/Santa Barbara ERC Santa Paula Peter Brown
February 3	"Human Resources Academy" Bureau of Jewish Education Consortium Los Angeles Michael Blacher
February 3	"Performance Management: Evaluation, Documentation and Discipline" and "Public Sector Employment Law Update" San Mateo County ERC Brisbane Richard Whitmore
February 4	"Advanced FLSA" and "FLSA: New Developments and Hot Topics" East Inland Empire ERC Fontana Peter Brown
February 4	"Managing Performance Through Evaluation" and "Public Sector Employment Law Update" North San Diego County ERC Carlsbad Melanie Poturica
February 4	"The Meaning of At-Will, Part-Time and Contract Employment" Gateway Public ERC Lynwood Linda Jenson

February 5	"Leaves, Leaves, and More Leaves" and "The Disability Interactive Process" Northern CA CCD ERC Sacramento Laura Schulkind
February 5	"The Disability Interactive Process" Southern CA CCDs ERC Long Beach Michael Blacher
February 9	"Exercising Your Management Rights" and "Leaves, Leaves and More Leaves" Bay Area ERC Cupertino Jack Hughes
February 10	"12 Steps to Avoiding Liability" and "Prevention and Control of Absenteeism and Abuse of Leave" Los Angeles County Human Resources Consortium Alhambra Laura Kalty
February 10	"Performance Management: Evaluation, Documentation and Discipline" and "Public Sector Employment Law Update" Central Coast ERC Arroyo Grande Melanie Poturica
February 11	"Managing Leave Laws and the Discipline Process" San Diego ERC Carlsbad Michael Blacher
February 16	"Employee Due Process Rights and 'Skelly': A Guide to Implementing Public Employee Discipline" and "Public Sector Employment Law Update" Coachella Valley ERC Indio Melanie Poturica
February 18	"Discipline: Putting It into Practice" Imperial Valley ERC Imperial James Oldendorph
February 18	"Supervisory Skills for the First Line Supervisor/Manager" Orange County ERC Costa Mesa Donna Evans

Customized Training Presentations

January 5	"Managing the Marginal Employee" and "12 Steps to Avoiding Liability" County of Sonoma Santa Rosa Jack Hughes
January 6	"Disability Interactive Process" and "Conducting Investigations" County of Sonoma Santa Rosa Jack Hughes
January 13	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Gage Dungy
January 14	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Arcadia Jennifer Hong
January 19	"Workplace Security" and "FLSA" County of Sonoma Santa Rosa Jack Hughes
January 20	"Preventing Workplace Harassment, Discrimination and Retaliation" Fresno County Employment Opportunity Commission Fresno Shelline Bennett
January 22	"Ethics" Hartnell Community College District Salinas Laura Schulkind
January 26	"Supervisory Skills for the First Line Supervisor/Manager" City of Glendale Scott Tiedemann
January 26, 27, 28	"Preventing Workplace Harassment, Discrimination and Retaliation" Bakersfield College Bakersfield Laura Schulkind
January 26	"Managing the Marginal Employee" County of Ventura, Human Services Agency Ventura Donna Evans
January 26, 27	"Preventing Workplace Harassment, Discrimination and Retaliation" City of South Pasadena Laura Kalty

January 27	"Labor & Employment Relations Issues During Lean Economic Times" Employment Risk Management Authority (ERMA) Ontario Donna Evans
January 28	"Conflict of Interest and Ethics in Public Service" City of Beverly Hills Donna Evans
January 29	"Preventing Workplace Harassment, Discrimination and Retaliation" City of South Pasadena Laura Kalty
February 1	"Safety" UC Berkeley Principal Leadership Institute Berkeley Laura Schulkind
February 9,24	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Arcadia Jennifer Hong
February 9	"Preventing Workplace Harassment, Discrimination and Retaliation" City of Fresno Shelline Bennett
February 9	"Preventing Workplace Harassment, Discrimination and Retaliation" and "Violence in the Workplace" City of El Segundo Donna Evans
February 17	"Labor & Employment Relations Issues During Lean Economic Times" ERMA Menlo Park Jack Hughes
February 18	"Effective Disciplinary Practices" and "Drugs & Alcohol Issues" County of Sonoma Santa Rosa Jack Hughes
February 22	"Discipline" UC Berkeley Principal Leadership Institute Berkeley Laura Schulkind
February 22	"Preventing Workplace Harassment, Discrimination and Retaliation" County of Sonoma Santa Rosa Jack Hughes

Speaking Engagements

LCW appreciates the invitation to address professional organizations and associations. To learn how you can have an LCW presentation at your association meeting, contact info@lcwlegal.com.

January 12	"The Top 10 Pointers on Conducting an Effective Investigation" Professionals in Human Resources Association (PIHRA) Annual Legal Update Garden Grove Laura Kalty
January 13	"The Top 10 Pointers on Conducting an Effective Investigation" PIHRA Annual Legal Update Ontario Laura Kalty
January 13	"How Do Schools Avoid Practices Which Can Be Considered Collusion" Bureau of Jewish Education Heads of Day School Meeting Encino Michael Blacher
January 13	"Public Sector Employment Law Update" International Public Management Association for Human Resources Riverside Melanie Poturica
January 14	"Substance Abuse for Attorneys" Greater Inland Empire Municipal Lawyers Association Meeting Colton Melanie Poturica
January 14	"The Top 10 Pointers on Conducting an Effective Investigation" PIHRA Annual Legal Update Universal City Laura Kalty
January 18	"Emerging Legal Issues for Jewish Schools" North American Jewish Day School Conference Teaneck, New Jersey Michael Blacher

January 21	"Public Sector Employment Law Update" International Public Management Association (IPMA) - HR Chapter Meeting Encinitas Richard Whitmore
January 23	"Harassment and Social Media" The State Bar of California Section Educational Institute Long Beach Michael Blacher
January 23	"Wage and Hour Issues for Heads of School and Board Members" California Association of Independent Schools (CAIS) Trustee/School Head Conference San Francisco Brian Walter and Donna Williamson
January 23	"Annual Legal Update for California Independent Schools" CAIS Trustee/School Head Conference San Francisco Melanie Poturica and Donna Williamson
January 27	"Public Sector Employment Law Update" IPMA - HR Mother Lode Chapter Roseville Richard Whitmore
January 28	"Public Sector Employment Law Update" Redwood Empire Municipal Insurance Fund Rohnert Park Richard Whitmore
January 28	"Crisis Management: How to Approach Chaos in an Organized and Thoughtful Manner" Independent School Administrators and Business Officers Annual Seminar Los Angeles Michael Blacher and Melanie Poturica
January 28	"The Grievance Arbitration Process" National Public Employer Labor Relations Association (NPELRA) Academy II Phoenix Donna Williamson
January 29	"Labor and Employment Issues in Lean Economic Times" Northern California Municipal Human Resources Management Group Conference Napa Richard Whitmore
January 29	"Peace Officers Bill of Rights" Peace Officers Association of Los Angeles County Seminar Los Angeles Mark Meyerhoff
February 5	"Fair Labor Standards Act Hot Topics" Minnesota Public Employers Labor Relations Association Minnetonka, MN Peter Brown
February 9	"Prevention and Control of Absenteeism and Abuse of Leaves" National Public Employer Labor Relations Association (NPELRA) Webinar Peter Brown
February 10	"FLSA Hot Topics" Texas Public Employer Labor Relations Association San Antonio Peter Brown
February 17	"My Employee Filed a Lawsuit, What Now?" Public Agency Risk Managers Association (PARMA) Annual Conference Sacramento Shelline Bennett
February 17	"Personnel Rules Audits: Are Your Policies and Procedures in Mint Condition?" PARMA Annual Conference Sacramento Mark Meyerhoff
February 18	"Legal Eagles" Association of California Community College Administrators (ACCCA) Annual Conference San Francisco Michael Blacher, Mary Dowell, Pilar Morin, Eileen O'Hare Anderson and Laura Schulkind
February 18	"Preventing Harassment in the Workplace" NPELRA Webinar Mark Meyerhoff
February 18	"Public Agency Issues in Lean Times" California Society of Municipal Finance Officers Los Angeles Peter Brown

- February 18 **"Harassment and the Social Media"**
ACCCA Annual Conference | San Francisco | Michael Blacher
- February 18 **"Performance Improvement Plans and Last Chance Agreements"**
Southern California Public Labor Relations Association (SCPMA) Annual Conference | Lakewood | Scott Tiedemann
- February 18 **"Public Sector Employment Law Update"**
SCPMA Annual Conference | Lakewood | Richard Whitmore
- February 19 **"When a Campus is Threatened by Violence: What Administrators Can Do To Ensure Safety"**
ACCCA Annual Conference | San Francisco | Pilar Morin
- February 19 **"Ethics in Community College Governance and Administration"**
ACCCA Annual Conference | San Francisco | Mary Dowell
- February 22 **"Teacher, Coach, Volunteer: Wage and Hour Issues in Independent Schools"**
National Business Officers Association (NBOA) Annual Conference | San Francisco | Brian Walter and Donna Williamson
- February 24 **"Doing It Right: Cost Cutting and Reducing Liability in Lean Times"**
NBOA Annual Conference | San Francisco | Melanie Poturica and Donna Williamson
- February 25, 26 **Liebert Cassidy Whitmore** Annual Public Sector Employment Law Conference | San Francisco

§



Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please send your name, agency, address, city, state, zip, phone number, fax number and e-mail address to info@lcwlegal.com.

*Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of **Education Matters**.*

If you have any questions, call Cynthia Weldon at (310) 981-2000.

LIEBERT CASSIDY WHITMORE

6033 West Century Blvd., Suite 500
Los Angeles, CA 90045

PRSRT STD
U.S. POSTAGE
PAID
LOS ANGELES CA
PERMIT #33068

Copyright ©2010, LIEBERT CASSIDY WHITMORE

Requests for permission to reproduce all or part of this publication should be addressed to Cynthia Weldon, Director of Training and Marketing at (310) 981-2000.

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in *Education Matters* should not be acted on without professional advice. To contact us, please call (310) 981-2000, (559) 256-7800 or (415) 512-3000 or e-mail info@lcwlegal.com.