LCW Liebert Cassidy Whitmore

Education Matters

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

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LCW NEWS

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FIRST AMENDMENT

Requirement That Individuals Obtain Permits Before Using Sound-Amplifying Devices Imposes A Prior Restraint On Speech.

Joseph Cuviello protested abuse and mistreatment of animals by circuses and other entertainment entities. Cuviello wanted to protest outside Six Flags Discovery Park in Vallejo, California, using a bullhorn to amplify his voice over the sound of rollercoasters and other park attractions.

The City's Municipal Code governs the use of sound amplifying equipment. To use sound amplifying equipment individuals must submit an application to the chief of police along with a fee. The application required the applicant's name, contact information, and basic information about the event. The code required the chief of police to act within ten days of receiving the application. After obtaining the permit, the applicant can only use a sound amplifying device between specific hours, at limited locations, with a maximum power level, and not to amply profane, lewd, indecent, or slanderous speech.

After Cuviello became aware of the permit requirement, he initially did not use a bullhorn when protesting. At another protest, he applied for a permit but never received a reply from the chief of police. At a subsequent demonstration, a police officer approached Cuviello and told him he could not use his bullhorn without a permit.

Cuviello filed a lawsuit against the City alleging violations of his free speech rights under the United States Constitution and California Constitution. Cuviello also asked the trial court for an order preventing the City from enforcing the permit requirement, called a preliminary injunction. To obtain a preliminary injunction preventing the City from enforcing the permit requirement, the Court required Cuviello to show that: (1) he was likely to succeed on the merits on his state or federal claims; (2) he was likely to suffer irreparable harm in the absence of the Court's intervention; (3) the balance of equities tips in his favor; and (4) the Court's intervention was in the public interest.

The trial court denied the preliminary injunction concluding that Cuviello had not established a likelihood of success on the merits of any of his claims. The trial court also held that the City's permit requirements were justified as permissible time, place, and manner restrictions on speech in a public forum. Cuviello appealed.

On appeal, the Court found that the City's permit system must satisfy four criteria. First, the permit system could not delegate overly broad discretion to a government official. Second, the system could not be based on the content of the message. Third, the system must be narrowly tailored to serve a significant governmental interest. Finally, the system must leave open ample alternatives for communication. Here, the only question was whether the trial court erred in its analysis of the third factor.

The Court of Appeal found that it has long been accepted that sound amplifying devices can endanger public health, safety, and welfare, so the permit requirement furthered the City's significant interests. However, the Court found the Municipal Code required a permit for any use of a sound-amplifying device at any volume by any person at any location—without any specifications or limitations. Without any limitations that tailor the permit requirement to circumstances where public peace and traffic safety are actually at risk, the permit requirement covered substantially more speech than necessary to achieve its ends. Accordingly, the trial court erred in concluding Cuviello was unlikely to succeed on the merits of his state constitutional claim.

Additionally, the Court found that Cuviello showed the City's permit requirement violated and continued to violate his free speech rights. For example, after a police officer warned Cuviello that he could not use his bullhorn without a permit, Cuviello stopped using his bullhorn, making his speech less effective in front of a noisy theme park. Furthermore, failure to comply with any Municipal Code requirements constituted either a misdemeanor or infraction, subject to potential criminal penalties. The Court found that although the City had not initiated enforcement action against Cuviello, the threat of enforcement was enough to chill Cuviello's free speech rights, which demonstrated irreparable harm. The Court was not persuaded by the City's argument that Cuviello did not face irreparable harm because he delayed filing the lawsuit against the City for more than a year after he learned of the permit requirements.

Finally, considering the City did not present evidence that its significant interests in regulating the use of sound amplifying devices would be seriously hampered by a ruling in Cuviello's favor, the trial court should not have found the balance of equities tipped in the City's favor. The Court also found that because Cuviello raised a valid free speech claim and demonstrated that the permit requirement caused irreparable harm, it was within the public interest for the Court to issue a preliminary injunction.

The Court reversed the trial court's denial of Cuviello's motion for a preliminary injunction and sent the case back to the trial court for further proceedings.

Cuviello v. City of Vallejo (2019) 944 F.3rd 816.

School District Did Not Violate Parent's First Amendment Rights By Requiring Parent To Communicate Only With Particular Staff Or Only At A Specified Time And Place.

L.F. is the divorced father of two daughters who attended school within the Lake Washington School District in Washington State. L.F. believed his daughters suffered from anxiety and behavioral disorders that adversely affect their educational performance. He had a number of disagreements with District staff regarding the best ways to address these issues and what he saw as discrimination against him as a divorced father.

The District argued that, beginning in March 2015, L.F. engaged in a pattern of abusive communications to school staff including "incessant emails to staff accusing them of wrongdoing, making presumptuous demands," and insulting staff. He would also act in an "aggressive, hostile, and intimidating manner" at in-person meetings District employees

complained that L.F.'s extraordinarily time-consuming communications made District staff feel threatened and intimidated.

In November 2015, the District implemented a Communication Plan for L.F. Under the plan, the District limited L.F.'s substantive communications with the District about his daughters' education to bi-weekly, in-person meetings with two District administrators. The District advised L.F. not to "email or attempt to communicate (in any form) with any District employees" aside from the bi-weekly meetings, "as they will not respond to [his] emails or attempts to communicate." The Communication Plan's restrictions did not apply in the event of an emergency, did not affect L.F.'s right to appeal the decision regarding the accommodation plan, and did not bar him from attending school activities or accessing school records. The District told L.F. he had a right to challenge the Communication Plan by filing an appeal in state court. The District informed its employees who worked with L.F.'s daughters about the Communication Plan via email.

L.F. followed the requirements of the Communication Plan for a few weeks, but the District found he violated it in January 2016. As a result, the District further restricted the meetings between L.F. and District administrators, cutting back from bi-weekly to once a month. Over the succeeding months, L.F. requested the District lift or modify the Communication Plan, but the District refused.

In March 2017, L.F. sued the District alleging the Communication Plan violated his First Amendment rights and the District discriminated and retaliated against him in violation of both federal and state law.

Both parties requested the Court making a ruling that the other party had no case because were no facts in dispute. The trial court ruled in the District's favor and dismissed all of L.F.'s claims. L.F. appealed.

L.F. argued that the Communication Plan violated his First Amendment rights by prohibiting him from communicating with his children's teachers and by precluding him from challenging District decisions. The Court found this to be an overstatement. The Communication Plan did not entirely prohibit such communication or such challenges; rather, it limited L.F. to specified channels – the bi-weekly meetings – for any communications to which he wanted a response. The Court found the District was within its rights to impose such a limitation. L.F. did not have a constitutional right to force the District to listen to his views, and the First Amendment does not require the District respond to speech directed toward it.

L.F. also argued the District went beyond simply regulating the speech to which it would respond. However, the plan only set a limit on the amount of communications to which the District would respond. The only so-called "sanction" set forth in the plan for unapproved communications was that District employees would not respond to L.F.'s attempts to communicate. Therefore, the Communication Plan regulated the District's conduct, not L.F.'s, and it did not violate L.F.'s First Amendment rights.

Even assuming the Communication Plan restricted L.F.'s speech, the Court of Appeal agreed with the trial court that it did not violate his First Amendment rights. L.F.'s communication occurred in classrooms and other government property that is not open to the general public, so regulation of expressive activity need only be reasonable. The Court agreed with the trial court that the Communication Plan was a reasonable effort to manage a parent's relentless and unproductive communications with District staff. As such, it did not violate L.F.'s First Amendment rights even if it restricted his speech.

Ultimately, the Court affirmed the trial court's ruling in favor of the District.

L. F. v. Lake Washington Sch. Dist. #414 (2020) __ F.3d __ [2020 WL 253572].

SCHOOL FUNDING

The Legislature Has Authority To Determine How It Will Pay For Existing Mandates, And Additional Revenue Is Not The Only Way The Legislature Can Satisfy Its Mandate Obligations.

The California Constitution requires that when the Legislature or any state agency mandates a new program or higher level of service on any local government including a school district, county office of education, or community college district, the State provide funds to reimburse that local government for the costs of the program or increased level of service. The Legislature created the Commission on State Mandates to decide whether a school district is entitled to reimbursement for costs mandated by the state.

State law provides a two-step procedure for school districts to petition the Commission to find a state mandate. First, a school district must file a test claim with the Commission. After a public hearing, the Commission decides whether the statute mandates a new program or increased level of service. Second, if the Commission determines there are costs mandated by the state, it must determine the amount the State will provide to the local entity for reimbursement and adopt parameters and guidelines for the reimbursement. In 2010, the Legislature amended state law to allow the state to seek to amend the reimbursement parameters and guidelines.

The two mandates at issue in this case apply to K12 district. Those are the Graduation Requirements (GR) mandate and the Behavioral Intervention Plans (BIP) mandate. The GR mandate required all students to complete two science courses in order to graduate from high school. The Commission determined in 1987 that this provision imposed a reimbursable state mandate. The BIP mandate arose from legislation that required the State Board of Education to adopt regulations for "the use of behavioral interventions with individuals with exceptional needs receiving special education and related services." In 2000, the Commission found that the adopted regulations imposed a reimbursable mandate. In 2013, the Legislature repealed those regulations, which eliminated the BIP mandate.

In 2010, the Legislature passed a law that allowed the state to reallocate existing education funding to fund the mandates rather than providing additional funding.

The California School Boards Association and various school districts and county offices of education filed a special petition in 2011 asking the trial court to review and reverse the State's decision regarding funding for the mandates. CSBA alleged the state law violated the California Constitution regarding the payment of costs for a state mandate. CSBA did not challenge the state law under Proposition 98, the constitutional amendment that prescribes a minimum level of state funding for education.

The trial court denied CSBA's petition, and CSBA appealed. The Court of Appeal affirmed the trial court's decision and found the state was not limited to providing "additional revenue that was specifically intended to fund the costs of the state mandate" when funding a state mandate. CSBA sought review in the California Supreme Court, which agreed to review the case.

CSBA continued to argue that the state may not "identify pre-existing education funding as mandate payment" but must instead allocate "additional funding" to satisfy its mandate reimbursement obligation under the California Constitution. In contrast, the State argued there was no such constitutional requirement, and the Legislature had flexibility to meet its requirements under the California Constitution in a number of ways, including designating state funding to offset the cost of the mandate.

The Supreme Court found that the California Constitution required the state to "provide a subvention of funds to reimburse" local governments for the costs of state mandates, but it did not prescribe how the Legislature must

provide for such reimbursement. In the absence of any limitations on the Legislature's budgeting authority stated in the California Constitution, the Legislature retained broad power to decide how best to meet the reimbursement requirement. The Legislature may increase, decrease, earmark, or otherwise modify state education funding in order to satisfy reimbursement obligations, so long as its chosen method is consistent with Proposition 98 and other constitutional guarantees.

Therefore, the Legislature acted within its authority when it acted the 2010 statutes directing the use of previously non-mandate state funding prospectively to cover the costs of the existing GR and BIP mandates. Moreover, CSBA did not show that the designated funds were insufficient to cover the GR and BIP mandates in any individual school district.

Finally, CSBA also argued that the law allowing the state to seek to amend the reimbursement parameters and guidelines violated the separation of powers because it allowed the state to overrule the Commission's determinations regarding reimbursable costs, which previous courts found to final and binding unless set aside after judicial review. Accordingly, CSBA argued the proper way to revisit a mandate determination was to file a test claim with the Commission. The Court held CSBA's argument was not applicable in this case because the state never sought to change the Commission's underlying GR and BIP mandate determination. Moreover, the changes in state law did not nullify the Commission's decisions, so the state laws did not violate the separation of powers.

California Sch. Boards Assn. v. State of California (2019) 8 Cal. 713.

EMPLOYEE DISCIPLINE

Civil Service Commission Abused Its Discretion By Reducing Deputy's Discipline.

In 2010, Los Angeles County Sheriff's Department (Department) Deputies Mark Montez and Omar Lopez strip-searched an inmate who stole items from a commissary cart. Lopez searched the inmate while Montez monitored the hallway to provide security. During the search, Lopez struck the inmate multiple times with his fist. Montez was aware of the assault, but did not participate.

After the inmate threatened the commissary employee who reported the theft, Lopez took the inmate to a control booth and shoved his face into a wall, causing severe bleeding. Montez was not present during the second assault, but he arrived shortly thereafter. Montez also stood in front of the bloody wall, which led the Department to determine he was aware of the second assault. Montez did not report either assault. A custody assistant, a non-sworn employee working in the facility, also observed the second assault but did not report it.

In the subsequent investigation, Montez denied hearing any indications of assault during the first incident, and denied observing blood on the wall after the second incident. As a result, the County terminated Montez for failing to report the use of force and making false statements during the investigation.

Montez appealed his discharge to the County's Civil Service Commission. The Commission found that the Department had proven the misconduct. But, the Commission decided Montez' penalty was too severe because of the lesser penalty a non-sworn custody assistant received. The custody assistant, who witnessed but failed to report the second assault, also made false statements during the investigation. The custody assistant, however, received only

a five-day retraining discipline with pay. The Commission reduced Montez's discharge to a 30-day suspension without pay.

The County petitioned the trial court to overturn the Commission's penalty determination. The trial court agreed with the County, and issued an order directing the Commission to set aside its decision to reduce Montez's discipline. Montez appealed.

On appeal, the court determined that the Commission abused its discretion when it reduced Montez's discipline. Courts will not change the disciplinary penalty that an administrative body – like the Commission – imposes, unless there has been an abuse of discretion. In public employee discipline cases, the primary consideration in assessing the disciplinary penalty is the extent to which the employee's conduct resulted in harm to the public service. Other relevant factors are the circumstance surrounding the misconduct, and the likelihood of its recurrence. If the administrative body's findings are not in dispute, however, an abuse of discretion occurs when the findings do not support its decision.

In this case, the Commission's findings were not in dispute. Montez had failed to report two incidents of inmate abuse and had not been truthful in the Department's investigation. Peace officers are held to higher standards of conduct than civilian employees. Courts consider peace officer dishonesty to be highly injurious to the employing agencies and the public service. The court concluded that Montez's failure to report two incidents of abuse of an inmate constituted an "inexcusable neglect of his duty to safeguard the jail population," and his lies during the subsequent investigation "brought discredit upon his position and department, and forever undermined his credibility."

Moreover, Montez never recanted the false statements he made to the Department's investigators, and repeated them at the hearing before the Commission. The court found that honesty is not an isolated or transient behavior; instead, it is a continuing trait of character. The court found that the County did not need to retain deputies who lie to protect other deputies who harm inmates.

Thus, the court found that the Commission's decision to reduce Montez's discharge to a 30-day suspension was unsupported by its own findings.

County of Los Angeles v. Civil Service Com. of County of Los Angeles (2019) 40 Cal.App.5th 871.

NOTE:

This case is another in a long line of cases that finds that termination is an appropriate penalty for peace officer dishonesty. Also important to this decision was that the deputy continued to be dishonest at his appeal hearing.

LABOR RELATIONS

Union Not Required To Exhaust Administrative Remedies Because MOU Did Not Provide For Class Grievances.

The Association for Los Angeles Deputy Sheriffs (ALADS) represents non-management deputy sheriffs and peace officers employed in the County of Los Angeles District Attorney's office. In 2017, the memorandum of understanding (MOU) between ALADS and the County contained provisions requiring the County to match compensation increases given to other safety employee unions. The MOU also contained a grievance procedure that ended in binding arbitration, to resolve any alleged violations of the MOU's terms. However, the MOU did not provide for class grievances.

During the MOU's effective period, the County approved a salary adjustment for another County safety employee union. ALADS thereafter initiated two grievances concerning the County's alleged failure to increase the salaries of ALADS's members to match the salary adjustment

approved for other safety employees. As part of the grievance procedure, ALADS sent written requests for arbitration to the Employee Relations Commission (ERCOM). The County objected to the requests because ALADS could not initiate a grievance on behalf of the individuals it represents. According to ALADS, the County also refused to comply with a discovery order from ERCOM. As a result, the arbitrator handling the grievances took the scheduled arbitrations off calendar.

ALADS then sued the County; its lawsuit requested a writ of mandate requiring the County to comply with the MOU's compensation provisions. The County filed a demurrer on the grounds that ALADS failed to exhaust the administrative remedies provided by the MOU. The trial court agreed and sustained the demurrer without leave to amend.

The Court of Appeal reversed and remanded the case back to the trial court for further proceedings. The failure to arbitrate in accordance with the grievance procedures in a MOU is a failure to exhaust administrative remedies. The Court of Appeal examined an exception to the exhaustion of remedies requirement. Under that exception, exhaustion of administrative remedies is not required if the available remedy is inadequate, or if pursuing that remedy would be futile.

ALADS argued that because class-wide relief was not available through the MOU's grievance process, it would need to prosecute separate individual grievance actions on behalf of each of its 7,800 members. The Court of Appeal agreed that would be an onerous, time-consuming process. The Court of Appeal decided that remedy was inadequate and that the exception to the exhaustion requirement applied.

There is no need to exhaust administrative remedies if the judicial action seeks relief on behalf of a class, and the available administrative procedures do not provide class-wide relief. Although ALADS's action against the County was a representative action on behalf of its members and not a class action, that distinction was immaterial because ALADS sought relief on behalf of a designated group of persons (its members), which was similar to a class action.

ALADS v. County of Los Angeles (2019) 2019 WL 6463183.

NOTE:

This case illustrates why an agency may not always rely on a failure to exhaust administrative remedies defense despite a failure to use an MOU grievance procedure. Accordingly, agencies should closely examine their grievance procedures and consider whether to provide for class grievances.

County And Privately-Owned Medical Clinics Were Joint Employers.

Ventura County owns and operates Ventura County Medical Center (VCMC). VCMC contracts with a number of privately-owned clinics to provide medical services throughout the County.

The contracts between VCMC and the clinics are almost identical. Each clinic is owned by a physician, who serves as the clinic's medical director. Under the contracts, the clinics manage day-to-day operations and provide physicians and staff. However, the County provides and maintains the facilities, equipment, and furnishings for the clinics to operate; approves the operating budget for each clinic; and owns all revenues and accounts payable that the clinics generate. The County also trains clinic employees on VCMC policies. Clinic employees must attend a VCMC orientation and wear a badge that affiliates them with VCMC. Further, the County periodically reviews the work of clinic employees and conducts audits. Clinic employees could be disciplined if they did not follow VCMC policies.

SEIU, Local 721 (SEIU) sought to represent clinic employees. However, the County refused to process the representation petition. The County said it was not the "employer, joint or otherwise,

of the persons SEIU purports to represent." Subsequently, SEIU filed an unfair practice charge with the Public Employment Relations Board (PERB) alleging that the County violated the Meyers-Milias-Brown Act by denying the petition.

The Administrative Law Judge (ALJ) dismissed the unfair practice charge. The ALJ found that PERB did not have jurisdiction because the County was not a single or joint employer of the clinic employees. SEIU challenged the ALJ's decision, and PERB reversed the ruling. PERB found that SEIU had meet its burden of proof under both the single and joint employer doctrines. The County then petitioned the California Court of Appeal to review PERB's decision.

The court affirmed PERB's decision and concluded that the County and the private medical clinics are joint employers. A joint employer relationship exists when two or more employers exert significant control over the same employees so as to share or co-determine essential terms and conditions of employment. A joint-employer relationship is established if an entity retains the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed. The court found that substantial evidence supported PERB's finding that the County was a joint employer of clinic employees.

For example, the clinic employees' salaries and benefits were part of the clinic's annual operating budget, which the County had to approve. The County also owned all revenues and accounts payable that a clinic generates. Moreover, the County had a right to control patient care and personnel policies, training, and other employment conditions. Finally, the County indicated that it had a right to control clinic operations on its various federal and state reporting forms. Thus, the court determined PERB correctly found the County was a joint employer of the clinic employees.

County of Ventura v. Public Employment Relations Bd. (2019) 42 Cal.App.5th 443.

NOTE:

Many agencies believe that contracting for services prevents a joint employment relationship. This case shows that significant control can create a joint employment.

WAGE AND HOUR

Judge Not Required To Approve FLSA Litigation Settlement.

Mei Xing Yu worked as a sushi chef at a restaurant owned and operated by Hasaki Restaurant, Inc. Yu sued Hasaki in New York State, on behalf of other similarly situated employees, for violating the Fair Labor Standards Act (FLSA) overtime provisions and New York labor laws. About three months later, Hasaki sent Yu a settlement offer for $20,000 plus reasonable attorneys' fees pursuant to Federal Rule of Civil Procedure 68 (Rule 68 offer).

Within a month, Yu sent the court notice that he was accepting the Rule 68 offer. The judge did not enter judgment. Instead, the judge directed the parties to submit a joint letter explaining why the settlement was fair and reasonable. Alternatively, the judge allowed the parties to argue why they believed that the judge was not required to approve their Rule 68 settlement.

The parties submitted a joint letter stating their opinion that the judge was not required to approve their settlement. The US Secretary of Labor submitted an amicus brief stating that judicial approval was required for FLSA settlements. Although Rule 68 contains mandatory language requiring the clerk of the court to enter judgment without judicial approval, the judge noted that there were narrow exceptions to that rule for bankruptcy and class action settlements. The judge decided that FLSA settlements also fell within that narrow exception

of Rule 68 offers that require judicial approval. The parties appealed to the US Court of Appeals for the Second Circuit.

The Second Circuit reviewed whether a Rule 68 offer of judgment that disposes of a FLSA claim in litigation needs to be reviewed by a district court or the US Department of Labor (DOL) for fairness before the clerk of the court can enter judgment.

The Second Circuit found that although FLSA authorizes the DOL to bring FLSA actions and to supervise the payment of unpaid wages or overtime pay, nothing in the FLSA commands that FLSA litigation can only be settled with a judge's approval. Conversely, the bankruptcy law, for example, explicitly requires judicial approval of settlements.

The Second Circuit also reviewed and dismissed several arguments that the amici parties raised to support their contention that judicial review and approval was required for FLSA settlements. The Second Circuit decided that no implied requirement for judicial approval could be read into Supreme Court or other court precedents, the FLSA's legislative history, or the remedial purpose of the FLSA.

Mei Xing Yu, et al v. Hasaki Restaurant, et al. (2019) 944 F.3rd 395.

NOTE:

This case is limited to FLSA cases that are filed in the Second Circuit and settled through Rule 68 offers of compromise. It is unknown if the Ninth Circuit, which covers California, would follow this precedent. Because this case is thorough and well-reasoned, however, it is persuasive.

DISABILITY

Case Dismissed Because Employee Presented No Evidence Of An Adverse Employment Action And Failed To Notify Employer Of A Disability.

John Doe worked as a psychologist at Ironwood State Prison for the California Department of Corrections and Rehabilitation (CDCR). Between 2013 and 2016, Doe submitted three accommodation requests to assist him with his concentration, including a quieter workspace, a thumb drive, and a small recorder. In support of his requests, Doe submitted medical notes from his physician, which indicated that Doe had a "learning disability," a "chronic work related medical condition" and a "physical disability" that made him "easily distracted" and disorganized when under stress.

When CDCR could not accommodate Doe's requests, he voluntarily took two paid medical leaves of absence. In 2016, during a third leave of absence, Doe submitted his resignation. Doe then sued CDCR, alleging discrimination, retaliation, and harassment based on disability in violation of the Fair Employment and Housing Act (FEHA). Doe alleged he had two disabilities: asthma and dyslexia. Doe also alleged CDCR violated FEHA by failing to both accommodate his disabilities and engage in the interactive process.

The trial court granted summary judgment for CDCR and Doe appealed. The California Court of Appeal affirmed summary judgment for CDCR on the following grounds.

The Court of Appeal held that Doe's discrimination and retaliation claims failed because he presented no evidence that he was subjected to an adverse employment action—an essential element of both claims. Doe alleged CDCR subjected him to adverse employment actions by (i) criticizing his work performance, (ii) ordering a wellness check when he was out sick, (iii) suspecting him of bringing his personal cell phone into work in violation of work policy, (iv) assigning him to a primary crisis position on

the same day as a union meeting, and (v) forcing him to take medical leave when he did not receive his requested accommodations.

The Court of Appeal held that the CDCR's alleged actions were minor conduct that upset Doe, but did not threaten to materially affect the terms and conditions of his job. Therefore, the actions did not reach the level of an adverse employment action. Further, Doe's decision to take medical leave was not an adverse employment action because the leave was voluntary and Doe requested it. The Court of Appeal also affirmed that CDCR's failure to accommodate Doe's alleged disability did not qualify as an adverse employment action for the purposes of a discrimination or retaliation claim.

As for Doe's harassment claim, the Court of Appeal held that none of the alleged conduct was subjectively severe enough to constitute harassment. Rather, each incident involved a personnel decision by Doe's supervisor within the scope of his supervisory duties. Simply because Doe felt his supervisor performed those duties in a negative or malicious way did not transform the conduct into disability harassment. Finally, the Court of Appeal held that Doe's accommodation and interactive process claims failed because he presented insufficient evidence to support that CDCR was on notice that he had a FEHA-covered disability. Doe's medical notes indicated that he had a "chronic work related medical condition" and "physical disability," but did not state that Doe had asthma or dyslexia. Further, the medical notes failed to describe the extent of limitations his disability caused, which rendered CDCR unable to determine whether it could reasonably accommodate Doe.

Doe v. Department of Corrections and Rehabilitation (2019) 43 Cal.App.5th 721.

NOTE:

Employers should request employees provide reasonable documentation to support a request for accommodation for an alleged disability. This allows the employer to determine whether there is an FEHA-covered disability and to consider the full range of potential accommodations in the interactive process.

IMMUNITY

Agency Not Liable For Collision Because Deputies Acknowledged Receipt Of Pursuit Policies.

Vehicle Code section 17004.7 gives a public agency immunity from liability for collisions involving peace officer pursuits if the agency follows a written vehicular pursuit policy and provides annual trainings on the topic.

In April 2014, the Alameda County Sheriff's Office (Sheriff's Office) revised its vehicle pursuit policy (Policy). The lengthy Policy included guidelines on "initiating, continuing, or terminating pursuits," which covered 15 of the 19 guidelines established by the Commission on Peace Officer Standards and Training (POST Commission). The Policy also included guidelines on "aircraft support procedures," which similarly outlined considerations established by the POST Commission. The Sheriff's Office also provided annual training on vehicular pursuits through a training video covering the same topics and guidelines addressed in the Policy.

The Sheriff's Office required its peace officers to certify electronically that they read and understood the agency's employment policies. Supervisors within the Sheriff's Office would audit these electronic certifications and follow up with those peace officers who failed to timely comply with the agency's policy certification requirements. By October 2014, the Sheriff's Office obtained electronic certifications from approximately 80% of its peace officers for the revised Policy.

In October 2014, a car fleeing from Sheriff's Office deputies struck William Riley. Riley then sued the Sheriff's Office. The trial court granted

summary judgment for the Sheriff's Office, holding that the agency complied with the policy and training requirements under Section 17004.7. Therefore, the Sheriff's Office was immune from liability for Riley's injuries.

On appeal, Riley argued that (i) the Policy was not properly promulgated within the meaning of Section 17004.7 and (ii) the Policy failed to satisfy Section 17004.7's training requirements and minimum standards regarding speed and air support. The California Court of Appeal disagreed with Riley's contentions, and affirmed the trial court's ruling that the Sheriff's Office was immune from liability.

Specifically, the Court of Appeal held that the Sheriff's Office properly promulgated its Policy. Riley argued that Section 17004.7 required the Policy to contain explicit certification language. But, the Court of Appeal held that the statute required only that all peace officers of an agency certify in writing that they received, read, and understood the policy. Therefore, the electronic signature page was sufficient under Section 17004.7. The statute did not require the Sheriff's Office to include similar certification language in the Policy itself.

On the promulgation issue, the Court of Appeal also held that the Sheriff's Office showed that it had a system in place reasonably designed to apprise all peace officers of the Policy, and that supervisors followed up with officers who failed to certify electronically that they read and understood the Policy. The Sheriff's Office failed to obtain certifications from approximately 20% of peace officers at the time of Riley's injury, but the Court of Appeal held that while the agency could improve its follow-up process, the current procedures were nonetheless adequate under Section 17004.7.

The Policy satisfied minimum standards relating to speed and air support under Section 17004.7. Although the Policy failed to include a section that specifically addressed speed, the Policy did address the relevant POST Commission's guidelines. Similarly, the Policy's section on air support sufficiently addressed the POST Commission's guidelines. The Court of Appeal declined to require explicit reference to each POST guideline when the Policy as a whole furthered the Legislature's goal of encouraging fewer and safer pursuits. Similarly, the Sheriff's Office driver training video was sufficient under Section 17004.7 because it presented the same guidelines outlined in the Policy.

Riley v. Alameda County Sheriff's Office (2019) 43 Cal.App.5th 492.

NOTE:

This case illustrates the importance of having updated written policies that peace officers timely acknowledge, either in writing or electronically.

CALIFORNIA PUBLIC RECORDS ACT

Attorneys' Fees Awarded To Newspaper That Defeated A Reverse-CPRA Action.

The Metropolitan Water District (MWD) is a cooperative water wholesaler with 26 members including the City of Los Angeles Department of Water and Power (DWP). In 2014, following then-Governor Brown's declaration that California was in a drought, MWD began a Turf Removal Rebate Program (Program). The Program provided money or rebates to customers of its member agencies who replaced their grass with drought tolerant landscaping. MWD paid $370 to $450 million in rebates. There were about 40,000 participants in the Program, 7,800 of whom were DWP customers. The City of Los Angeles's Controller questioned the utility of the Program and observed that the rebates were concentrated in certain neighborhoods and certain businesses.

On May 19, 2015, a reporter for the San Diego Union Tribune (Tribune) made a California Public Records Act (CPRA) request to MWD for

information related to the participants in the Program including their names, addresses, and rebate amounts.

Before responding to the Tribune's request, the MWD provided a copy of the request to DWP. DWP objected to revealing its customers' names and addresses. DWP and MWD thereafter agreed that MWD's disclosure would be limited and redacted.

On July 31, 2015, DWP sued to prevent MWD from releasing information about anyone (even individuals who were not DWP customers) who participated in the Program. This type of lawsuit is referred to as a "reverse CPRA" action. Reverse CPRA actions are viewed as necessary to protect the privacy rights of individuals whose personal information may be contained in government records. The trial court issued a temporary restraining order to prevent the disclosure of DWP customer information. The West Basin Municipal Water District, Foothill Municipal Water District, and the Upper San Gabriel Municipal Water Districts (Utility Intervenors) thereafter joined DWP's lawsuit and sought similar retraining orders for their own customers.

On August 6, 2015, the Tribune intervened in DWP's lawsuit against MWD and at the same time, filed a CPRA cross-petition against MWD to compel the disclosure of the names and addresses of Program recipients.

On January 15, 2016, the trial court denied DWP's writ petition and granted the Tribune's cross-petition to compel disclosure of the records from MWD. The trial court also awarded the Tribune's attorneys' fees for intervening in the reverse CPRA lawsuit. However, the trial court declined to award the Tribune attorneys' fees for the legal briefing on the Tribune's fee motion.

The California Court of Appeal upheld the trial court's decision to award attorneys' fees to the Tribune on the reverse CPRA action. The Court of Appeal found that the Tribune meet the requirements of Code of Civil Procedure section 1021.5, which is known as the "private attorney general" exception to the general rule that parties bear their own attorneys' fees. The court reasoned that the Tribune was attempting to enforce the public's right to know how the government uses public money, and that disclosure of the records sought would confer a significant benefit to the public.

The Court of Appeal overturned the trial court's decision to deny the Tribune its fees for work related to briefing on its motion for attorneys' fees. The Court of Appeal found that the attorney work was not duplicative, and the Tribune was entitled to those fees as the prevailing party.

City of Los Angeles v. Metropolitan Water District (2019) 42 Cal. App.5th 290.

NOTE:

Agencies considering bringing a reverse CPRA action must consider the possibility of an attorneys' fee award against the agency if the party seeking the records intervenes in that action, and is receives a ruling ordering disclosure of the records at issue.

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.

Assembly Bill No. 5 goes into effect January 1, 2020 at Labor Code section 2750.3. AB 5 codifies the "ABC" test for determining independent contract status that the California Supreme Court adopted in its 2018 decision *Dynamex Operations West, Inc. v. Superior Court,4 Cal.5th 903* (2018).

New Department of Labor regulations, effective January 15, 2020, clarify that holiday in lieu pay may be excluded from the regular rate of pay. (29 CFR section 778.219(a)(4).)

As of January 1, 2020, employers will now be required to provide a private lactation room other than a bathroom that must be in "close proximity to the employee's workspace." (Senate Bill No. 142.) Previously, California employers were only required to allow employees to use their break time to express breast milk and to provide a private location other than a bathroom for such lactation accommodation. (Labor Code section 1031.)

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 and explained that the agency accidentally overpaid an employee. The Human Resources Manager wanted to know if the district could unilaterally withhold the amount the district overpaid the employee from the employee's next paycheck.

Answer: The attorney advised that the district could not withhold any amount from the employee's paycheck because doing so would be unlawful "self-help." The attorney explained that the district could ask the employee to voluntarily repay the amount or recover the funds in small claims court.

BENEFITS CORNER

ACA's Cadillac Tax Repealed.

Previously delayed until 2022, the Affordable Care Act's so-called "Cadillac Tax" has now been repealed entirely as part of a government spending bill signed into law on December 20, 2019. The excise tax, which was set at 40%, would have applied to employer-sponsored healthcare plans with annual premiums exceeding certain dollar thresholds for single or family coverage.

Fifth Circuit Affirms Unconstitutionality Of ACA Individual Mandate, Directs District Court To Reassess Whether Other Parts Of The Law Can Stand.

The U.S. Court of Appeals for the Fifth Circuit has ruled that the Affordable Care Act's Individual Mandate is unconstitutional, partially upholding a controversial federal District Court decision out of Texas. Under the Individual Mandate as initially conceived, individuals who declined to purchase health insurance coverage could incur a monetary penalty known as the "shared responsibility payment." In response to early legal challenges questioning Congress' authority to establish the Individual Mandate, the U.S. Supreme Court construed the shared responsibility payment as a tax that fell within Congress' power of taxation under the U.S. Constitution. However, according to the District

Court and now the Fifth Circuit, this constitutional hook was eliminated when Congress reduced the shared responsibility payment to zero as part of the Tax Cuts and Jobs Act of 2017.

But the Fifth Circuit challenged the lower court on the issue of severability. According to the District Court, the Individual Mandate is inextricably linked to the ACA's other parts such that they cannot be severed. The District Court therefore held that absent the Individual Mandate, the entire ACA, which includes various provisions directed at employers, is invalid.

Not so fast, said the Fifth Circuit. While declining to decide the severability issue itself, the Fifth Circuit criticized the District Court opinion for "not explain[ing] with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the [I]ndividual [M]andate." Accordingly, the Fifth Circuit remanded (i.e., sent the decision back to) the District Court, directing it to "employ a finer-toothed comb" and "conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate."

So what does all of this mean for employers wondering about that status of the ACA's employer-directed provisions? For now, the answer is very little. Absent congressional action, the ruling is likely to keep the operational parts of the ACA in legal limbo for several months, if not years. In the meantime, employers should continue to comply with the ACA's employer shared responsibility provisions, restrictions on reimbursement arrangements that constitute "employer payments plans," and various reporting requirements, as applicable. (See our Special Bulletin at lcwlegal.com/news for upcoming reporting deadlines.)

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New to the Firm

Ariana Hernandes is an Associate in our Fresno office where she provides advice and counsel in employment and education law matters.

She can be reached at 559.449.7816 or ahernandes@lcwlegal.com.

Shane Young is an Associate in our San Francisco office where he advises clients in labor and employment matters including employee hiring, firing, and discipline, personnel grievances, complaints by and against employees, internal policies, and labor relations.

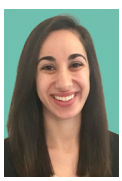
He can be reached at 415.512.3000 or syoung@lcwlegal.com.

Jessica Tam is an Associate in our San Francisco office and provides counsel to the cities, counties, special districts and education clients on a range of labor, employment and education matters.

She can be reached at 415.512.3035 or jtam@lcwlegal.com.

Savana Manglona is an Associate in our Sacramento office and provides advice and counsel to clients pertaining to labor and employment law and litigation. She also supports the firm's legislative tracking efforts on labor and employment law legislation.

She can be reached at 916.584.7023 or smanglona@lcwlegal.com.



Daniella Bahrynian is an Associate in our Los Angeles office. She assists public sector agencies and educational institutions on a variety of matters including labor, employment, and education law. Prior to becoming a lawyer, Daniella taught third grade for three years through Teach for America.

She can be reached at 310.981.2061 or dbahrynian@lcwlegal.com.

TRAIN THE TRAINER PROGRAM

BECOME A CERTIFIED HARASSMENT PREVENTION TRAINER FOR YOUR AGENCY

LCW Train the Trainer sessions will provide you with the necessary training tools to conduct the mandatory AB 1825, SB 1343, AB 2053, and AB 1661 training at your organization.

California Law (AB 1825, SB 1343) requires employers to provide harassment prevention training to all employees by the end of 2020. Every two years, supervisors must participate in the 2-hour course, and now, non-supervisors must participate in the 1-hour course.

QUICK FACTS:

- Trainers will become certified to train both supervisors and non-supervisors.
- One-day sessions provide 6 hours of instruction.
- Attendees receive updated LCW materials for 2 years.
- Pricing: $2,000 per person ($1,800 for ERC members).

UPCOMING DATES

San Diego - March 3, 2020
Fresno - March 16, 2020
San Francisco - March 31, 2020
Los Angeles - April 14, 2020

9:00 AM - 4:00 PM

TO REGISTER

Contact Anna Sanzone-Ortiz
Telephone: 310-981-2051
Email: asanzone-ortiz@lcwlegal.com

WWW.LCWLEGAL.COM/TRAIN-THE-TRAINER

Firm Publications

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

Managing Partner **Scott Tiedemann** authored an article for the *Daily Journal*'s New Laws Supplement on SB 230, which requires police agencies to update their force policies and training.

Fresno Partner **Che Johnson** and Sacramento Attorney **Lars Reed** authored an article for *American City & County* titled "How California Public Agencies Can Reform Pension Benefits"

Congratulations to San Francisco Partner **Linda Adler** for being quoted in a *Law360* article about AB 5 and the new Independent Contractor test and how businesses should take a close look in light of the new law.

Fresno Partner **Che Johnson** and Sacramento Attorney **Lars Reed** authored an article for the *Daily Journal* on the looming pension reform for public agencies.

Sacramento Partner **Gage Dungy** and Associate **Savana Manglona** authored an article for *Bloomberg Law* on the new lactation accomodation requirements that take effect Jan. 1, 2020.

Sacramento Partner **Gage Dungy** and Associate **Savana Manglona** authored an article for Law.com's *The Recorder* on "What Employers Should Know About California's New Lactation Accommodation Requirements."

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Jan. 29 **"Exercising Your Management Rights"**
Gold Country ERC | Webinar | Richard Bolanos

Jan. 30 **"Managing the Marginal Employee"**
L.A. County Human Resources Consortium | Webinar | Melanie L. Chaney

Jan. 31 **"Public Works Construction Project: From Bidding Through Completion"**
Central CA CCD ERC | Webinar | Christopher Fallon

Feb. 5 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"** & **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Central Valley ERC | Clovis | Jesse Maddox

Feb. 5 **"Finding the Facts: Employee Misconduct & Disciplinary Investigations"** & **"Public Sector Employment Law Update"**
Coachella Valley ERC | Palm Desert | Geoffrey S. Sheldon

Feb. 6 **"Addressing Workplace Violence"** & **"Iron Fists or Kid Gloves: Retaliation in the Workplace"**
Imperial Valley ERC | El Centro | Stefanie K. Vaudreuil

Feb. 6 **"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement"**
North San Diego County ERC | Rancho Santa Fe | Frances Rogers & Jeremiah Heisler

Feb. 7 **"Going Outside the Classified Service: Short-Term Employees Substitutes and Professional Experts"** & **"Accusations of Workplace Bullying: A Growing Concern"**
Bay Area CCD ERC | Hayward | Laura Schulkind & Amy Brandt

Feb. 12 **"Navigating the Crossroads of Discipline and Disability Accommodation"** & **"Management Guide to Public Sector Labor Relations"**
Central Coast ERC | Arroyo Grande | Che I. Johnson

Feb. 12 **"Disaster Service Workers - If You Call Them, Will They Come?"** & **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
NorCal ERC | Pleasant Hill | Lisa S. Charbonneau

Feb. 12 **"The Future is Now - Embracing Generational Diversity and Succession Planning"** & **"Disaster Service Workers - If You Call Them, Will They Come?"**
North State ERC | Redding | Gage C. Dungy

Feb. 12 **"Navigating the Crossroads of Discipline and Disability Accommodation"** & **"Privacy Issues in the Workplace"**
Ventura/Santa Barbara ERC | Simi Valley | T. Oliver Yee

Feb. 13 **"A Guide to Implementing Public Employee Discipline"**
Gateway Public ERC | Long Beach | Mark Meyerhoff

Feb. 13 **"Management Guide to Public Sector Labor Relations"**
San Mateo County ERC | Webinar | Richard Bolanos

Feb. 13 **"12 Steps to Avoiding Liability"** & **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
West Inland Empire ERC | Diamond Bar | Laura Drottz Kalty

Feb. 19 **"Finding the Facts: Employee Misconduct & Disciplinary Investigations"** & **"Management Guide to Public Sector Labor Relations"**
San Gabriel Valley ERC | Alhambra | Melanie L. Chaney

Feb. 19 **"Prevention and Control of Absenteeism and Abuse of Leave"**
South Bay ERC | Palos Verdes Estates | Danny Y. Yoo

Feb. 20 **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
LA County Human Resources Consortium | Los Angeles | Christopher S. Frederick

Feb. 20 **"Legal Issues Regarding Hiring"** & **"File That! Best Practices for Document and Record Management"**
Napa/Solano/Yolo ERC | Napa | Jack Hughes

Feb. 21 **"Governance Issues for Educational Entities"**
Central CA CCD ERC | Webinar | Eileen O'Hare-Anderson

Feb. 28 **"Privacy Issues in Community Colleges"**
SCCCD ERC | Anaheim | Pilar Morin

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training/training.

Feb. 4 **"Maximizing Performance Through Evaluation, Documentation, and Corrective Action"**
City of Ventura | Kristi Recchia

Feb. 4 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Rancho Santiago Community College District | AM - Orange & PM - Santa Ana | Laura Schulkind

Feb. 6 **"Inclusive Leadership"**
San Diego County Water Authority | San Diego | Kristi Recchia

Feb. 11 **"Maximizing Supervisory Skills for the First Line Supervisor"**
City of Clovis | Shelline Bennett

Feb. 11 **"The Brown Act"**
San Jose-Evergreen Community College District | San Jose | Laura Schulkind

Feb. 19 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of La Habra | Christopher S. Frederick

Speaking Engagements

Feb. 7 **"Legal Update"**
College and University Professional Association for Human Resources (CUPA-HR) Southern California Chapter Winter Conference | Los Angeles | Judith S. Islas

Feb. 20	**"Labor Relations in 2020"** Southern California Public Labor Relations Council (SCPLRC) Annual Conference | Lakewood | Laura Drottz Kalty
Feb. 20	**"Legal Trends"** SCPLRC Annual Conference | Lakewood | J. Scott Tiedemann
Feb. 26	**"Title IX Crisis Response: Practical Steps for Administrations"** Association of California Community College Administrators (ACCCA) Annual Conference | Riverside | Pilar Morin & Jenny Denny & Dr. Valyncia Raphael
Feb. 27	**"The Key "Human Resource" Skills that All Administrators Should Have: and a Training Series Designed to Build Those Skills"** ACCCA Annual Conference | Riverside | Laura Schulkind
Feb. 28	**"Legal Eagles"** ACCCA Annual Conference | Riverside | Laura Schulkind & Eileen O'Hare-Anderson & Pilar Morin

Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit **www.lcwlegal.com/news**.

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

If you have any questions, contact Jaja Hsu at 310.981.2000 or info@lcwlegal.com.

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