LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

JANUARY 2022

INDEX

LCW NEWS

TITLE IX

Biden Administration Expects To Propose New Title IX Rules In April 2022.

The Department of Education announced it will issue the Title IX notice of proposed rulemaking by April 2022, a month earlier than the May 2022 date listed in last spring's Unified Agenda.

The new timeline for releasing the proposed Title IX rules was included in the federal government's biannual regulatory agenda. The new target date is not binding, but is the Department of Education's best estimate of when it plans an releasing the Title IX proposal for public comment.

The Department of Education's civil rights chief said in a statement that the new date "reflects the Department's commitment to work as speedily as possible toward appropriate and effective regulation in recognition of the importance of ensuring equal access to education for all students and addressing the threat to equal access posed by all forms of sex discrimination, including sexual harassment."

TORTS

School District Has Duty To Protect Student From Sexual Abuse By A Teacher, Even Without Actual Knowledge Of Any Prior Abuse Or Propensity For Abuse.

Jane Doe was a seventh-grade student at one of Lawndale Elementary School District's schools. She participated in the school's band program during regular school hours and joined the afterschool program that also met on weekdays during the summer.

Farr was an instructor in the summer program. After Doe joined the program, Farr began to groom her for sexual abuse. He attended Doe's band class even though he was not a teacher. They spent time alone and engaged in physical contact on school campus. Farr continued to abuse Doe through at least the spring semester. Farr was eventually arrested and pled guilty to oral copulation of a person under the age of 16.

Jane Doe filed a lawsuit against the District, alleging that the District was negligent and breached its mandatory duty to report suspected child abuse under Penal Code section 11166, the Child Abuse and Neglect Reporting Act (CANRA). The District moved for summary judgment, arguing that it had no duty to protect Jane from abuse by Farr because it had no actual knowledge of the abuse and Farr's conduct was "ambiguous." The District also argued that it did not breach its mandatory duty to report suspected child abuse because no District employee could have known or reasonably suspected that Farr abused Doe. Doe submitted evidence that several students observed Farr's conduct towards Farr, and Doe and Farr's conduct was obvious to most of the students in the program. The trial court granted the District's summary judgment. Doe appealed.

The Court of Appeal first discussed the legal duty a school district owes to its students. A school district and its employees have a "special relationship" with its students that require them to use reasonable measures to protect students from foreseeable injuries caused by a teacher's sexual abuse. Whether a defendant has a legal duty to take action to protect a plaintiff from injuries caused by a third party involves a two-step inquiry to determine whether a special relationship exists between the parties or if there is some other set of circumstances that give rise to an affirmative duty to protect. If so, the court must analyze a variety of factors, called the Rowland factors, to determine whether there are policy considerations that would limit this duty. The Court of Appeal held that the trial court failed to conduct this two-step inquiry when it ruled that the District did not have a duty to protect Doe from sexual abuse unless the District had actual knowledge Farr previously engaged in, or had the propensity to engage in, sexual misconduct with minors and that Farr's conduct was too "ambiguous" to rise to a duty of care. While the District agreed it had a special duty to protect Doe, the Court of Appeal determined that the trial court limited the District's duty of care.

The Court of Appeal held that the trial court's ruling that the defendant only has a duty to protect a plaintiff if it has actual knowledge of a third-party's propensity for sexual abuse when the defendant has a special relationship with the plaintiff is not supported in California law. The Court of Appeal analyzed each of the Rowland factors, and held that they do not support limiting the District's duty to protect its students from sexual abuse.

The first Rowland factor is foreseeability. The Court of Appeal rejected the District's argument that Farr's sexual abuse was not foreseeable. Rather, the issue is whether it is reasonably foreseeable that school administrators' failure to take reasonable measures to prevent sexual abuse would injure students, not whether it was foreseeable that a particular teacher would commit sexual abuse. The Court of Appeal reasoned that sexual abuse by members of an organization that provides services exclusively to children, like the District, is reasonably foreseeable even when the organization has no knowledge that the member had previously abused anyone or had the propensity to do so.

The second factor is the degree of certainty that the plaintiff suffered an injury. The Court of Appeal held that this factor may be relevant when the plaintiff's claim involves intangible harm, like emotional distress, and does not warrant limiting claims like Doe's.

The third factor is the closeness of the connection between the defendant's conduct and the injury suffered. The Court of Appeal reasoned that the District's inaction is not distant or indirect to the injury suffered by Doe. In other words, a defendant school district that fails to reasonably supervise employees and students increases the likelihood that an employee will sexual abuse a student that will result in harm to the plaintiff.

The Court of Appeal then assessed the public policy factors under Rowland. The Court first discussed the moral blame factor. Here, the Court of Appeal stated that administrators who fail to notice, identify, and respond to warnings signs that an employee is sexually abusing or will sexually abuse a student bears moral responsibility for the abuse.

The next public policy factor is whether the policy of preventing future harm imposes a cost of those responsible for negligent conduct. The Court of Appeal reasoned that protecting children from sexual abuse weighs heavily in favor of imposing a duty on school districts to take reasonable measures to identify and respond to potential misconduct.

The next factor is the burden of imposing a duty on the defendant. Here, the Court of Appeal noted that the District already has policies in place to detect and prevent sexual abuse by teachers onto students, and trains staff to recognize signs of abuse. The Court of Appeal reasoned that imposing a duty on a defendant that already has policies and trainings in place to prevent sexual abuse is not burdensome.

The last public policy factor is the availability of insurance for the risk involved. The Court of Appeal determined this factor does not weigh for or against imposing a limited duty on the District because the District has not stated whether it has obtained insurance to cover sexual abuse claims.

Thus, the Rowland factors do not weigh in favor of limiting school administrators' duty to prevent sexual abuse to circumstances where administrators have actual knowledge that a specific instructor previously engaged in sexual abuse and where misconduct is not "ambiguous."

The Court of Appeal also agreed with the trial court's finding that the District did not breach its mandatory duty to report suspected child abuse. Specifically, the Court of Appeal held that the District's mandatory reporting duties are imposed when the District has a reasonable suspicion of abuse based on facts actually known to them, not what the District should have known. The reporting duties under Penal Code section 11166 use an objective reasonable standard. A plaintiff bringing a cause of action for breach of the mandatory duty under CANRA must prove it was objectively reasonable for a mandated reporter to suspect abuse

based on the facts the reporter actually knew, not based on facts the reporter reasonably should have discovered. While Doe presented evidence that other students witnessed Farr's conduct towards Doe, employees who supervised or worked with Farr denied seeing Farr physically interact with Doe on school campus. Therefore, the District's obligations under CANRA were not triggered because there was no evidence that a school district employee knew facts in which a reasonable person would suspect child abuse.

Doe v. Lawndale Elementary Sch. Dist. (2021) 72 Cal.App.5th 113.

SPECIAL EDUCATION

Student's Individualized Education Program Was Not Inadequate Where The Goals Addressed Her Needs.

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

School districts provide a FAPE primarily through an individualized education program (IEP). The IEP is developed by the child's IEP team, which includes the child's parents, teachers, and school officials. The IEP also documents the child's levels of academic achievement and identifies annual educational goals.

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

B.W.'s parents and Capistrano Unified School District disagreed about the services provided to B.W throughout her kindergarten year. At the end of the year, at the IEP team meeting, B.W.'s parents were concerned that several different people had helped B.W. throughout the years so that B.W. did not know who was supporting her. B.W.'s parents brought their own expert to the meeting, who recommended B.W. should have support throughout the entire length of the school day. The District disagreed.

After B.W. started first grade, the IEP team met again. The District proposed new goals and accommodations that reflected the parents' expert's recommendations. B.W.'s parents received a copy of the annual IEP offer but never consented or requested another meeting.

A couple of months later, B.W.'s parents filed an administrative due process complaint alleging inadequacies with the kindergarten and first-grade IEP. That winter, B.W.'s parents unilaterally withdrew B.W. from public school and enrolled her at a private school. B.W.'s parents told the District that B.W. would stay in private school for the rest of the school year and for second grade. B.W.'s parents sought reimbursement for the private school tuition, programs, and related services for both school years. The District denied the request for reimbursement and offered an IEP meeting. B.W.'s parents did not respond and they paid her registration fees for the private school. They also withdrew their administrative due process complaint. B.W.'s first grade IEP expired at the end of the school year.

B.W. attended private school for the second grade, and B.W.'s parents filed a new due process complaint requesting reimbursement for the private school costs. The District again denied the request and offered an IEP meeting. Eventually, the District filed an administrative complaint, asking an Administrative Law Judge (ALJ) to order an assessment of B.W. or release the District from its IEP obligations.

Near the end of B.W.'s second grade, the District held an annual IEP meeting for B.W. The parents agreed the assessment was necessary but they did not consent. Shortly after, B.W.'s counsel consented to the District's plan to assess B.W. but only if the District withdrew its complaint. The District did so, but B.W. was never produced for an assessment.

With respect to B.W.'s parents' second complaint, and the ALJ ruled in favor of B.W.'s parents on most of the issues, concluding that the District denied B.W. a FAPE. Both parties filed complaints challenging the decision in federal court. The trial court reversed and affirmed the ALJ's order in part. Both parties appealed, and the Ninth Circuit addressed the following issues left on appeal: (1) whether the goals in the District's first grade IEP were inadequate, (2) whether the District had to file for due process to defend the first grade IEP, and (3) whether the District needed to develop a second grade IEP.

On the first issue, the Ninth Circuit held that the first grade IEP goals were adequate because they addressed B.W.'s needs and the District considered the parents' expert's recommendations. The Ninth Circuit rejected the parents' argument that there were no goals dedicated to classroom specialization, redirection, or behavior

support. The parents' own experts testified that the IEP addressed B.W.'s recommended goals and that the proposed goals were appropriate.

B.W.'s parents also argued that the IEP goals were inadequate because their expert recommended that B.W. have no more than two behavior tutors during the day. The Ninth Circuit held that the trial court properly found that the IEP team considered the parents' concerned and disagreed, but did not infringe in the parents' participation in their child's FAPE. The Ninth Circuit reasoned that parents' participation does not require school administrators automatically defer to parents' concerns. Additionally, the Ninth Circuit rejected the parents' argument that the District's inconsistency of classroom support data rendered the goals of the IEP inadequate under IDEA. Rather, IDEA requires that the IEP be reasonably calculated to enable a child to make progress in light of the child's individual needs, and does not require the IEP team to rely on quantitative data to do so.

On the second issue, the Ninth Circuit rejected the parents' argument that the District had an obligation to file a due process claim to defend the first grade IEP when the parents disagreed that the IEP offer was adequate. Under the IDEA regulations, parental consent is generally not required for a revision of the annual IEP. However, the regulations allows states to require parental consent for other services, including IEP revisions, if the state "ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE." Under California Education Code section 56346, parents may consent to some components of an IEP and not others. In that situation, the components consented to "shall be implemented so as not to delay providing instruction and services to the child." However, if a public agency determines that the proposed component to which the parent does not consent to is necessary to provide a FAPE, the public agency must file a due process hearing. Therefore, it is only the public agency's determination that triggers an obligation to file a due process complaint. Because the District had determined that the implementation of the first grade IEP was not necessary for B.W.'s receipt of a FAPE, it did not need to file for due process.

On the final issue, the Ninth Circuit held that the District does not need to prepare an IEP if a child has been enrolled in private school by her parents and a claim for reimbursement has been filed. Under IDEA, parents who unilaterally enroll their child in private school can seek reimbursement for the costs of special education and related services when a school district fails to provide a FAPE and the private school placement is appropriate. However, the district only needs to prepare an IEP if the parents ask for one after a child has been enrolled in private school. The school district's obligation to prepare an IEP does not depend on whether the parents make a claim for reimbursement. Because B.W.'s parents unilaterally enrolled her in private school, and the District did not need to prepare an IEP, even though the parents filed a claim for reimbursement.

Ultimately, the Ninth Circuit affirmed the trial court's ruling.

Capistrano Unified Sch. Dist. v. S.W. (9th Cir. 2021) 21 F.4th 1125.

COVID-19

Court Declined To Enjoin Termination Of Firefighters Who Didn't Abide By COVID-19 Vaccine Mandate.

On August 18, 2021, the Los Angeles City Council adopted Ordinance No. 187134, requiring all current and future City of Los Angeles (City) employees to be fully vaccinated for COVID-19 by October 19, 2021, or request an exemption to the vaccine mandate based on a sincerely held religious belief or individual medical condition.

On September 24, 2021, the Los Angeles Fire Department (Department) emailed all employees to notify them to report their vaccination status in compliance with the City's vaccine mandate. On October 14, 2021, the City issued a "Last, Best, and Final Offer" regarding any non-compliance. This offer gave City employees who failed to timely comply with the vaccine requirement, and who were not seeking a medical or religious exemption, to comply by December 18, 2021, if they agreed to certain conditions, including bi-weekly testing at their own expense. Any employees who failed to show proof of vaccination by the new deadline would be subject to corrective action – involuntary separation from City employment, including placement on unpaid leave pending a Skelly conference on the proposed separation.

In response, the Firefighters4Freedom Foundation (the Foundation) filed a lawsuit against the City. The Foundation is a non-profit organization representing firefighters who were placed on administrative leave for failing to comply with the vaccine mandate or to seek an exemption. The Foundation alleged that the City's actions violated the firefighters' privacy and due process rights, among other claims.

On November 16, 2021, the Foundation moved for a preliminary injunction to bar the City from terminating or placing any City firefighter on unpaid leave for non-compliance with the City's vaccination mandate without

first providing due process, including the right to a hearing before an impartial hearing officer under the Firefighters Procedural Bill of Rights Act (FBOR).

In order to determine whether to issue a preliminary injunction, the trial court assessed: (i) the likelihood that the firefighters would prevail on the merits of their claims at trial; and (ii) the interim harm that the firefighters were likely to sustain if the injunction was denied as compared to the harm that the City was likely to incur if the preliminary injunction was issued. The trial court denied the motion, finding that the Foundation had not satisfied its burden of proof as to either factor.

The court found that the Foundation was unlikely to prevail on the merits of its claims at trial. The Foundation had not shown a due process violation because the firefighters had ample notice of the vaccine mandate and were placed on unpaid leave pending a Skelly meeting before their termination. The court found that this constituted adequate due process, particularly given the emergency COVID-19 created.

The court also found that the Foundation could not present sufficient evidence that the City Council abused its discretion in passing the vaccination mandate. The Foundation alleged that the City did not have sufficient evidence to declare a state of emergency due to COVID-19. The Court disagreed, citing in part to evidence of how COVID-19 outbreaks in fire stations to upend daily life and threaten public safety.

The Foundation failed to show a violation of the unvaccinated firefighters' privacy rights. Supervening public concerns – namely, the City's goal to protect the City's workforce and the public it serves from COVID-19 – clearly outweighed the firefighters' privacy rights. The court also noted that none of the Foundation-represented firefighters had sought a religious or medical exemption.

Lastly, the trial court found that the balance of harm weighed "overwhelmingly" against granting an injunction. The court acknowledged that while individual firefighters who were on unpaid leave incurred a "severe harm," the COVID-19 deaths significantly outweighed that monetary loss. The trial court acknowledged that there have been 1,477,842 COVID-19 cases and 26,001 COVID-19 deaths to date in Los Angeles County, excluding cases and deaths in the cities of Long Beach and Pasadena. Based on the foregoing, the court denied the Foundation's motion for preliminary injunction.

Firefighters4Freedom Foundation v. City of Los Angeles, Case No. 21STCV34490 (Super. Ct. Cal. Dec. 21, 2021).

NOTE:

Because this is a trial court decision, it is not binding legal precedent on any parties other than the City of Los Angeles and its firefighters. This decision does show how a court may rule on challenges to COVID-19 vaccine mandates. LCW attorneys monitor all vaccination decisions applicable to California employers and will provide an update on developments.

DISCRIMINATION & HARASSMENT

Comments About Employee's Retirement Did Not Establish Any Claims.

ProTec is a San-Diego based company that provides services to homeowners' associations. In 2014, ProTec hired Laura Swirski as its Human Resources Manager. Swirski was 53 years old.

In August 2016, Swirski sent an email to ProTec managers stating that "leaders who don't listen will eventually be surrounded by people who have nothing to say." A manager forwarded the email to another manager noting that "coworkers who don't listen to (and do) what their boss asks them to do will be looking for another job." The manager inadvertently copied Swirski on the correspondence. Swirski subsequently met with the manager privately and informed him that she was uncomfortable with his comments and felt threatened. The manager apologized for his "transgression" and later sent the other ProTec managers two articles from Swirski explaining the importance of listening and building personal connections with employees.

In January 2018, ProTec engaged a consultant to train certain employees to use an employee assessment tool. Swirski volunteered to train in the tool. In response, ProTec's Chief Financial Officer (CFO) asked Swirski how long she expected to remain working at ProTec. Following the CFO's inquiry, Swirski emailed the executive team noting that she had no plans to retire and wanted to work at ProtTec for a long time. The CFO later told Swirski that she did not mean to offend her or imply that the question was at all age-related. Swirski ultimately received the training.

Following this incident, ProTec employees made other comments about Swirski that she believed were age-related. For example, the consultant noted that it was "unknown" how long Swirski would remain working at ProtTec at a company retreat. In addition, other managers made a joke about Swirski's lack of technological proficiency. One manager transferred the responsibility of maintaining an Excel spreadsheet

with a company staffing plan to his executive assistant because she was "younger and better at technology." Swirski also heard some managers make comments that certain potential employees were "too old" or "fat" to climb ladders or do other physical work required of a technician. Afterwards, Swirski believed that managers began discussing human resources issues with employees other than Swirski.

In August 2019, a former employee made claims of sexual harassment and fraud against ProTec. Swirski was the main point of contact between ProTec and its employment attorney, but she felt that managers were undermining her by interfering in the lawsuit. Also during this time, a manager informed Swirski that employees were complaining that she was receiving special treatment for being allowed to bring her dog to the office. On three occasions, the manager told Swirski that she could have a good retirement by taking her dog to hospitals and retirement homes as a therapy dog. On October 28, 2019, Swirski gave ProTec her letter of resignation. She was 59 years old. ProTec hired Barbara Jimenez, age 52, to replace Swirski.

After her resignation. Swirski initiated a lawsuit against ProTec alleging, among other claims, age discrimination, hostile work environment, retaliation, and failure to prevent retaliation and harassment. ProTec moved for judgment in its favor.

First, the court found that there was no evidence of any age discrimination. The comments about Swirski's retirement did not reference her age and appeared to be discrete, isolated remarks. Further, the comments about her technological proficiency were not clearly motivated by age-related animus, but rather were made in relation to her Excel spreadsheet skills or lack thereof. The court also found that there was insufficient evidence that the comments about hiring "old" people for the technician position were motivated by discriminatory intent instead of safety concerns related to performing manual labor. Finally, the court reasoned that Swirski could not show that a substantially younger employee replaced her. Jimenez was 52 years old; a protected age and only seven years younger than Swirski. Thus, the court concluded that, at most, Swirski's evidence showed the frustrating and uncomfortable interactions with coworkers that permeate any workplace.

Second, Swirski cited four incidents that she argued created hostile work conditions: 1) the August 2016 email in which the manager wrote that "coworkers who don't listen to (and do) what their boss asks them to do will soon be looking for another job; 2) the January 2018 comment about how long Swirski expected to remain working at ProTec; 3) the comment at the company retreat about how much longer Swirski intended to work at ProTec; and 4) the comments that a potential employees were "too old" or "too fat" for certain positions. She also suggested that the comments made to her about her technology proficiency and her dog lent to this hostile work environment (HWE). The court noted that only one of these comments actually referenced Swirski's age, and they were not sufficient to support an inference of harassment since they were not severe or pervasive. Instead, these were sporadic and isolated comments that could not rise to the level of an HWE.

Third, the court concluded that Swirski also could not establish her retaliation claims. Swirski could not demonstrate that she participated in protected activity, a necessary element of a retaliation claim. Swirski never complained about age discrimination to an outside agency during her employment, nor did she inform anyone in ProTec's management. The court noted that complaints about personal grievances, or vague or conclusory remarks, do not put an employer on notice as to what conduct it should investigate, and are not sufficient to be protected activity. In addition, even if Swirski could establish any protected activity, she still did not present any evidence of a causal connection between her complaints and her alleged constructive discharge.

Finally, because Swirski could not establish her harassment or retaliation claims, the court determined that her failure to prevent retaliation and harassment claim also failed.

For these reasons, the court entered judgment in ProTec's favor on Swirski's claims.

Swirski v. ProTec Building Services, Inc. (S.D. Cal. Dec. 6, 2021) 2021 WL 5771222 (slip opinion).

NOTE:

This is a district court case that has not been appealed to date. Case law is clear that an employee cannot maintain a failure to prevent claim if he or she has not been discriminated against or harassed.

PUBLIC RECORDS ACT

County Ordered To Produce 42,582 Emails Spanning Six Years.

Dean Getz is a member of the Serrano El Dorado Owners Association (Serrano). The place where he lives was developed and managed by Parker Development Company (Parker). On March 29, 2018, Getz submitted a request to the County of El Dorado under California

Public Records Act (CPRA) Getz wanted records regarding the County's contacts with Serrano and Parker. Getz initially requested all "development plans, proposals, reports and applicable correspondence including electronic (e.g. email) records" between the County and any other party pertaining to the planned development.

In response, the County used software and search terms to locate potential records. A County employee reviewed each document to determine the responsiveness to the request. The employee also worked with county counsel to review the responsive records for records that could be withheld due to attorney client privilege or work product. The County then produced an index of responsive documents, including emails, on a CD with hyperlinks to the texts of the emails or documents.

After reviewing the CD, Getz believed that the County did not produce all responsive records. On August 1, 2018, Getz submitted another CPRA request seeking all emails between the County and anyone with email domains from Serrano, Parker, and two other businesses – a law firm and a political consulting firm – dating back to January 1, 2013. On August 28, 2018, the County notified Getz that approximately 47,000 emails were potentially responsive to the request, of which 42,582 were newly identified. The County estimated it would take 40 to 50 business days to review and sort responsive records. As a result, the County asked Getz to "further refine" his request to allow for a more focused search and to reduce the County's burden in reviewing the responsive records. Getz responded that he did not believe he was required to narrow the focus of the request and that the County was required to produce all requested documents.

On March 25, 2019, the County produced an index of the 42,582 emails and asked Getz to narrow his focus to describe identifiable public records relevant to his inquiry. The index identified the sender, recipient, subject, date and whether the email had an attachment. Unlike the prior index, the emails were not readable; the index contained no hyperlinked text. Getz responded that having reviewed the index, he could not find a way to reduce his request because the information he sought seemed to be prevalent throughout the index. He also reiterated his request that the 42,582 emails be produced without further delay. The County did not respond.

On April 2, 2019, Getz submitted another CPRA request to the County for all records from April 2, 2018 to April 2, 2019 pertaining to the district attorney's efforts to review a misdemeanor Getz allegedly committed but for which he was never charged. The County acknowledged receipt of the request and noted "to the extent there are records responsive to this request with the District Attorney's Office, they are not provided because they are records in investigatory files and those records are completely exempt from disclosure under California Government Code 6245(f)." Getz replied that since the statute of limitations had run on the charge, the exemption did not apply because there was no prospect of law enforcement. The County did not respond further.

Getz then filed a petition for writ of mandate directing the County to produce the records he requested on both August 28, 2019 and April 2, 2019. The trial court denied Getz's petition on the grounds that his request for emails was overbroad, and the district attorney had met its burden of demonstrating that the documents related to the misdemeanor investigation were exempt. Getz appealed.

The California Court of Appeal disagreed with the trial court's finding that the request for emails was "overbroad and unduly burdensome". Records requests always impose some burden on government agencies, but an agency is obligated to comply so long as the records can be located with reasonable effort. The court concluded that because the County had already located and indexed the 42,582 emails without objection, the County had demonstrated that the records could be located with reasonable effort and the volume of material was not unmanageable.

Further, the court found that the County failed to provide sufficient evidence that it would be required to review all 42,852 emails to determine which of those emails were responsive. Getz's request was simply for all emails between the County and the several domain names he provided, and the County's search identified 42,852 emails that met those criteria. There was no evidence that those emails contained anything but County business with those entities, as opposed to primarily personal matters between employees of those entities.

The County also argued that some of the requested documents were drafts that need not be disclosed under Government Code Section 6254(a). The court disagreed. In order for a document to be withheld as a draft, the County had to prove: 1) the record sought is a preliminary draft, note, or memorandum; (2) the record is not retained by the public agency in the ordinary course of business; and (3) the public interest in withholding the draft must clearly outweigh the public interest in disclosure. The court found that the County did not provide evidence those criteria were met.

The court also disagreed with the County's contention that all of the emails with the law firm domain name had to be reviewed for attorney-client privilege. The court found that the County's privilege argument: only

extended to a discrete subset of the e-mails requested; failed to identify any specific privileged e-mails or documents; and was equivocal regarding whether any privileged e-mails or documents even existed. The court noted that only emails with the law firm or specifically referencing County legal matters would need to be reviewed for attorney-client privilege.

The Court of Appeal agreed that the County did not need to provide records related Getz's alleged involvement in filing a false police report. Government Code Section 6254(f) allows public agencies to withhold records of "investigations conducted by . . . any state or local police agency" or "any investigatory or security files complied by any state or local police agency… for correctional, law enforcement, or licensing purposes." Because Getz was investigated for allegedly filing a false police report, the trial court properly denied Getz's request for documents related to the district attorney's review of the investigation.

The Court of Appeal thus directed the County to produce the text of emails and any attachments on the County's index of 42,852 emails and pay Getz's costs and reasonable attorneys' fees.

Getz v. Superior Ct. of El Dorado Cty. (2021) 72 Cal.App.5th 637.

NOTE:

The Court of Appeal acknowledged that digital communications produce an enormous volume of public records, but also noted that computer software makes those records easier to produce. The County's ability to provide an index of the 42,582 emails indicated that Getz's request was not "overbroad and unduly burdensome", because the County had already located and indexed the responsive documents using the criteria in Getz's request.

WRONGFUL TERMINATION

Chief Deputy Who Campaigned On Stopping Extramarital Sexual Relationships In The Department Loses The First Round On His Wrongful Discharge Claim.

In 2018, Justin Fleeman, then a Chief Deputy with the Kern County (County) Sheriff's Department (Department), ran for election for County Sheriff. One of Fleeman's campaign messages was that he would stop Department employees from having extramarital sexual relationships with other employees, among other types of conduct that Fleeman deemed inappropriate. During his campaign, Fleeman spoke of a Department employee having a sexual relationship with another employee's spouse.

Following Fleeman's election defeat, the Department placed Fleeman on administrative leave pending an investigation into some of his campaign statements. On February 28, 2019, Fleeman filed a tort claim against the County regarding his placement on leave. On March 6, 2019, the County rejected Fleeman's tort claim.

The Department's investigation determined that Fleeman's campaign statements amounted to an improper disclosure of confidential information about the Department employee. Based in part on this finding, the Department terminated Fleeman. Following his termination, Fleeman filed a second tort claim, alleging that he was improperly investigated and terminated because of his campaign statements. On September 25, 2019, the County rejected Fleeman's second tort claim.

Thereafter, Fleeman filed suit against the County for wrongful termination in violation of Labor Code Section 232.5, among other claims. Under Labor Code Section 232.5, an employer may not discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's "working conditions."

Under the Government Claims Act (Act), any claim for personal injury must include the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim." The County moved to dismiss Fleeman's wrongful termination claim on the grounds that the two government tort claims Fleeman presented failed to provide adequate notice of a Labor Code Section 232.5 claim because they: (i) did not notify the County of Fleeman's allegation that he was improperly terminated for disclosing information about "workplace conditions"; and (ii) failed to identify Labor Code Section 232.5 as the state law at issue. The district court disagreed, noting that Fleeman's second tort claim put the County notice of the act (his termination) and the relevant circumstances surrounding that act, namely that Fleeman had shared with the public his concerns about Department employees' sexual conduct.

The County also moved to dismiss Fleeman's wrongful termination claim on the ground that Fleeman failed to state a cognizable claim under Labor Code Section 232.5. Fleeman failed to identify the "workplace condition" related to the sexual conduct. The district court agreed, noting that although Fleeman's complaint alleged that he disclosed allegedly improper sexual behavior, he did not cite to any County policy that addressed such behavior. The district court granted the County's motion to dismiss Fleeman's wrongful termination claim, but granted Fleeman the opportunity to try again to state a claim under Labor Code Section 232.5.

Fleeman v. Cty. of Kern (E. D. Cal. Nov. 24, 2021) 2021 WL 5514498 (unpublished).

NOTE:

As this decision shows, a government tort claim does not have to specifically identify the alleged statutory violation, but merely needs to put an public educational entity on notice of the act giving rise to the claim and the circumstances surrounding that act.

QUALIFIED IMMUNITY

Officer Gets Qualified Immunity For Acting On Content Of Reporter's Speech During Protest.

JIn June 2019, the Spokane Public Library hosted a children's book reading event called "Drag Queen Story Hour." The event proved to be controversial, and drew protesters to the library. The police separated 150 protesters and 300 counterprotesters into two zones near the library.

Afshin Yaghtin, both the editor in chief and a journalist for Saved Magazine (Saved), sought to cover the event. He wore his press badge, and he identified himself to police officers as a member of the press. Yaghtin alleged he was assigned a police "detail" to accompany him through a crowd of counterprotesters to the library entrance. One Spokane police officer, Kevin Vaughn, warned Yaghtin that he would be subject to arrest if he started "engaging people" or caused "a problem."

While Yaghtin was walking through the counterprotest zone, he began to converse with a counterprotester who asked him whether he was the person who had previously advocated for the execution of gay people. When Yaghtin responded "No that is what the Bible says," an unidentified officer, Officer Doe, told Yaghtin he was not exercising his press rights and was instead engaging the counterprotester. Yaghtin responded that he was "asked a question" and "was there to comply." Officer Doe then directed the counterprotesters to get out of the way and let Yaghtin continue to move through the zone.

In August 2020, after amending their complaint, Yaghtin and Saved filed a lawsuit against the Spokane Police Department, the Department's Chief of Police, and Officer Doe for violations of their First Amendment rights. Yaghtin and Saved contended that the police officers violated their right to freedom of the press when Officer Doe monitored Yaghtin's communications and intervened in the conversation between Yaghtin and a counterprotester. They also alleged that the City adopted the officer's actions as policy "through silent acquiescence." The district court dismissed the lawsuit. Yaghtin and Saved appealed.

On appeal, Yaghtin and Saved argued that Officer Doe was not entitled to qualified immunity. The Ninth Circuit panel disagreed. Qualified immunity shields government officials who perform discretionary functions from liability for civil damages. To get this immunity, the government has to show that its employee's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Courts use a two-prong test to determine whether a police officer is entitled to qualified immunity: 1) was there a violation of a constitutional right; and 2) was that right was clearly established at the time of the officer's alleged misconduct. The panel concluded that, the second prong was dispositive. The panel was not aware of any precedent that would alert Officer Doe that his actions violated clearly established First Amendment law. Considering the lack of any precedent to the contrary, it was reasonable for Officer Doe to believe that it was lawful for him to examine the substance of Yaghtin's speech in order to enforce the separate protest zone policy.

Further, the panel rejected Yaghtin and Saved's argument that the district court erred in dismissing their First Amendment claim against the Spokane Police Department. The panel reasoned that even assuming Spokane police officers violated Yaghtin's First Amendment rights, nothing in the complaint indicated any Police Department policy, custom, or practice leading to that violation. The Ninth Circuit noted that there was no case law supporting their theory that a city's silence about a single incident could support the finding of a city-wide custom. Instead, it determined that Yaghtin's allegations amounted to no more than an "isolated or sporadic incident" that could not form the basis of liability.

Saved Magazine. v. Spokane Police Dep't (9th Cir. 2021) 19 F.4th 1193.

NOTE:

The basis for the "clearly established" prong of the qualified immunity from suit test is fairness; it would be unfair to hold government officials to a rule that reasonable people were not aware of at the time.

PUBLIC BENEFITS

Assembly Bill 396 – Requires The Department Of Social Services To Establish Guidelines For Community College Districts, California State University And University Of California To Obtain Approval Of Campus-Based Educational Programs That Meet The Federal Requirements To Provide CalFresh Benefits To Eligible Students.

Existing federal law provides for the Supplemental Nutrition Assistance Program (SNAP), known in California as CalFresh. The federal government benefits allocated to the state are distributed to eligible individuals by the county. To qualify for CalFresh benefits, individuals must satisfy the eligibility requirements established by federal law.

Existing federal law provides that students who are enrolled in college or other institutions of higher education at least half-time are not eligible for SNAP benefits unless students meet one of several exemptions, including participating in an employment and training program for low-income households operated by a state or local government.

This bill requires the State Department of Social Services (the "Department") to issue a guidance letter, no later than May 31, 2022, to counties, the Chancellor's Office of the California Community Colleges, the Chancellor's Office of the California State University and the Office of the President of the University of California that clarifies the following:

1. The state and federal eligibility requirements for a campus-based program to be a state-approved local educational program that increase employability that qualifies for the CalFresh student eligibility exemption; and
2. The application and approval process for a campus-based program to be approved by the Department as a state-approved local education program that increases employability, including, but not limited to, identifying the supporting documents that must be submitted for program approval.

Campus-based programs at a campus of the California Community Colleges or the California State University eligible for qualification must submit an application for the program on or before September 1, 2022. The applications must be submitted to the Department. Campus-based programs created after September 1, 2022, are required to submit an application within six months following the formation of the program. If a program is available at more than one campus, the application must list each campus the program is available. The certification application may be submitted by an individual campus administration, by the Chancellor's Office of the California Community Colleges, or the Chancellor's Office of the California State University on behalf of the campus-based program. The bill requests that campuses of the University of California submit an application under the same period. An individual campus administration or the Office of the President of the University of California may submit the application.

The bill requires the Department approve the campus-based programs that meet the eligibility requirements established in the Department's guidance letter upon receipt of an application.

On or before September 1, 2023, and annually thereafter, the Department is also required to report to the Assembly Committee on Higher Education, the Assembly Committee on Human Services, the Senate Committee on Education, and the Senate Committee on Human Services the following:

1. The number of approved programs, disaggregated by name and campus;
2. The number of pending applications, disaggregated by name and campus; and
3. The number of applications denied, disaggregated by name and campus along with the reason for denial.

The Department is also required to post the report on its internet website.

AB 396 adds section 18901.12 to the Welfare and Institutions Code.

DID YOU KNOW...?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- On December 13, 2021, the California Department of Public Health (CDPH) issued updated guidance concerning the use of face coverings. The guidance requires that all individuals, regardless of their vaccination status, wear face coverings while in indoor public settings between December 15, 2021 and January 15, 2022.
- On December 14, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) released guidance clarifying the circumstances under which a COVID-19 case may constitute a disability under federal equal employment opportunity laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The EEOC guidance provides that the ADA's existing three-part definition for "disability" applies to COVID-19 as it does to other health and medical conditions. Specifically, an employer should consider an applicant or employee who has COVID-19, or who has recovered from COVID-19, as disabled if they satisfy one or more of the following three criteria: 1) "Actual" Disability; 2) "Record of" a Disability; and 3) "Regarded as" an Individual with a Disability.
- On December 16, 2021, the Occupational Safety and Health Standards Board (OSHSB) adopted a number of amendments to the Emergency Temporary Standards (Cal/OSHA COVID-19 Regulations) including several amendments to regulatory definitions, such as the definitions for "COVID-19 test," "face covering," and "worksite."

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 city called to inquire whether there were any risks with requiring a DMV records check for all job applicants (not just individuals applying for driving-related jobs).

Answer: First, all pre-employment tests must be job-related and consistent with business necessity. (2 Cal.Code Regs Section 11017(a).) A test is consistent with business necessity if the agency can prove that the test is necessary for its safe and efficient operations. As a result, a DMV check would not be appropriate for an applicant who was applying for a no-driving job.

Second, Government Code Section 12952 prohibits California employers with five or more employees from asking applicants to disclose conviction information until after the employer has made a conditional offer of employment. Because a DMV records check may contain information related to a conviction (i.e., a driving under the influence conviction), the best practice would be to wait to run the check until after a conditional offer.

New to the Firm

Dana L. Burch is a Senior Counsel in the San Francisco office of LCW. An experienced litigator, Dana is well versed in all phases of litigation including discovery, depositions, law and motion, settlement negotiations, trials, and appeals.

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Tyler Shill is an Associate in the San Francisco office of Liebert Cassidy Whitmore where he represents a variety of educational intuitions including school districts, county offices of education, community college districts, universities, and private schools—on labor and employment and education law matters.

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Madison Tanner is an Associate in our San Diego office where she advises clients on a variety of labor, employment and education matters.

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Victoria M. Gomez Phillips is an Associate in the Los Angeles office of Liebert Cassidy Whitmore. Victoria advises clients on business and transactional matters, including legal and business risks concerning strategic partnerships, contracts, employment, operations, and organizational policies.

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

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

Firm Publications

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

In the Dec. 8, 2021 *EducationWeek* article "Teaching Unvaccinated Students Separately? This District Will Be the First to Try It," LCW Senior Counsel Meredith Karasch weighed in on the legal challenges that school districts may face if they establish separate schools for unvaccinated students. Karasch explained that "in addition to possible shutdown by the state or by county health departments, [school districts] could face lawsuits for breaching a key legal standard: their duties to protect students from foreseeable danger, and to provide a safe and healthy workplace for staff." She also advised districts to "think very carefully about the issues before putting something like this into place."

In the Jan. 19th *Behind the Badge* article "SB 2 and the New POST," LCW Associate Joung Yim details Senate Bill 2, which is intended to increase accountability for misconduct by peace officers, and highlights the five significant changes enacted by the law.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

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

North San Diego County & Sonoma/Marin & South Bay ERCs | Webinar | Richard S. Whitmore

Feb. 10 **"Labor Negotiations from Beginning to End"**

Northern CA Community College District (NCCCD) ERC | Webinar | T. Oliver Yee

Feb. 11 **"Advanced Investigations of Harassment and Other Formal Employee Complaints"**

CCCD ERC | Webinar | Pilar Morin

Feb. 16 **"Managing Performance Through Evaluation"**

Ventura County Schools Self-Funding Authority ERC | Ventura | Meredith Karasch

Feb. 17 **"Human Resources Academy II"**

SCCCD ERC | Webinar | Melanie L. Chaney

Feb. 23 **"The Art of Writing the Performance Evaluation"**

Central Coast & Imperial Valley & NorCal ERCs & Orange County Consortium | Webinar | Stephanie J. Lowe

Customized Trainings

Jan. 26 **"Title IX"**

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

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

Gavilan College | Webinar | Amy Brandt

Jan. 28 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**

Contra Costa Community College District | Webinar | Amy Brandt

Feb. 9 **"A Guide to Academic Disciplinary Procedures/Non Re-employment of Contract Faculty"**

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

Feb. 11 **"Maximizing Performance Through Evaluation, Documentation, and Corrective Action"**

Cal Matters | Webinar | T. Oliver Yee

Speaking Engagements

Jan. 28 **"Ethics Training Workshop"**

Community College League of California (CCLC) 2022 Effective Trusteeship & Board Chair Workshops | Sacramento | Eileen O'Hare Anderson

Feb. 24 **"The Administrator's Perspective: Equal Employment Opportunity Hiring for Student Success"**

Association of California Community College Administrators (ACCCA) Annual Conference | Monterey | Amy Brandt & Alysha Stein-Manes & Andrea Barrera Ingley

Feb. 25 **"Layoffs: If You Need Them, Are You Ready?"**

ACCCA Annual Conference| Monterey | Eileen O'Hare-Anderson & David Betts

Feb. 28 **"First Amendment Issues in a Politically Charged World"**

Public Agency Risk Managers Association (PARMA) Annual Conference| Anaheim | Mark Meyerhoff

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, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.