

PRIVATE SCHOOL MATTERS



NEWS AND DEVELOPMENTS IN SCHOOL AND EMPLOYMENT LAW FOR CALIFORNIA INDEPENDENT AND PRIVATE SCHOOLS

January 2012

FEATURED CASE

MINISTERIAL EXCEPTION

Supreme Court Recognizes That The "Ministerial Exception" Under The First Amendment Precludes Retaliation Claim Brought Under The ADA.

On January 11, 2012, the U.S. Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, No. 10-553, in which the Court recognized for the first time the existence of the "ministerial exception" to employment discrimination laws. That exception allows religious organizations, including religious schools, to make employment decisions affecting "ministers" without being subject to anti-discrimination laws. The ministerial exception is a judicial creation rooted in the First Amendment's Free Exercise and Establishment clauses, and has been applied for many years by federal and state courts.

Most observers of the Court expected it to recognize the exception, as it did. But the more difficult question was how broadly the Court would view the exception. That is, who qualified as a "minister?" The Hosanna-Tabor case involved not an actual "minister" – or priest, rabbi, or other individual with strictly religious duties – but a teacher at a religious school who instructed primarily on secular topics.

The facts of Hosanna-Tabor are as follows (as reported in the **October 2011** edition of *Private School Matters* following oral argument in the case): Hosanna-Tabor Evangelical Lutheran Church and School operates a church and an elementary school. It has two types of faculty: (1) limited-term "lay" or "contract" teachers and (2) for-cause "called" teachers. Called teachers must complete a course of religious study and receive a certificate of admission into the teaching ministry. They receive the title of "commissioned minister."

In 2000, Cheryl Perich began work as a contract teacher but shortly thereafter changed her status to a "called" teacher. Her employment duties remained essentially the same. She taught math, language arts, social studies, science, gym, art, and music. However, Perich also taught a religion class four days per week, attended a chapel with her class once a week, and led her classes in prayer.

In 2004, Perich went out on disability leave. The School Board ultimately offered Perich a "peaceful release" agreement wherein she would release claims against the School in return for a monetary payment. When Perich refused and threatened legal action, however, the Board fired her. It gave the religious reason (as the Supreme Court described it) that "her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."

Perich filed a charge with the Equal Employment Opportunity Commission ("EEOC") for disability discrimination and retaliation under the Americans with Disabilities Act ("ADA"), and the EEOC decided to litigate the charge of retaliation on her behalf. The

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Private School Matters

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

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district court determined that Perich was covered by the ministerial exception and granted summary judgment to the School. But the U.S. Court of Appeals for the Sixth Circuit reversed. It found that because most of Perich's job duties did not have a religious character, and because her "primary" functions were secular, the ministerial exception did not apply.

On January 11, 2012, the U.S. Supreme Court, in a unanimous opinion authored by Chief Justice Roberts, held that the ministerial exception did apply. The opinion began its discussion by describing that both of the "religion clauses" of the First Amendment (the Free Exercise clause and the Establishment clause) "bar the government from interfering with the decision of a religious group to fire one of its ministers." The opinion then recited the history of government interference, or at times deliberate non-interference, in religious organizations' employment decisions, from the Magna Carta through the Cold War. The opinion uses this concise narration of history and case law as a prelude to its holding recognizing the existences of the exception.

After acknowledging the existence of a ministerial exception, the Court set about defining its breadth and limitations. The Court's noted that "Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment."

The Court identified a number of factors it found significant in determining that Perich's employment was subject to the exception:

First, *Hosanna-Tabor* held Perich out as a minister, with a role distinct from that of most of its members.

Second, Perich's title as a minister reflected a "significant degree of religious training" and election to her position by a vote of the church congregation.

Third, Perich claimed a special housing allowance on her taxes that was available only to employees earning their compensation "in the exercise of the ministry" (known as parsonage).

Fourth, Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. The Court observed, among other things, that "Perich taught her students religion four days a week, and led them in prayer three times a day." She had a number of other religious duties as well. The Court made clear that the fact that Perich had a substantial number of secular responsibilities was not dispositive of whether the ministerial exception applied to her.

Although the October 5, 2011 oral argument yielded opinions from the Justices that covered a very broad range of topics and reflected disparate interpretations of the doctrine, the Court's January 11, 2012 opinion largely set aside the apparent differences and focused on areas of agreement. Two Justices wrote concurrences that may serve as guides to future interpretations of the exception. Justice Thomas wrote in a short concurring opinion that the determination of whether an employee qualified as a "minister" for a certain faith was – in itself – a question that could really only be resolved by the religious organization on religious grounds, and not by a secular court. Accordingly, in his view courts should defer to "good faith" decisions by religious organizations as to who qualifies as a minister. The final concurrence by Justice Alito, thought to be one of the Court's most conservative members, joined by Justice Kagan, thought to be one of its most liberal, addressed two issues. It noted that the term "minister" is misleading and should not distort the way the exception applies to religions that do not have "ministers." It also expounded a fairly broad understanding of the term "minister" which included all employees performing a religious function or serving as a messenger or teacher of the faith."

The Court's opinion provides substantial clarity in how the ministerial exception applies, but does not touch directly on a number of subjects that remain to be developed further. For example, what types of institutions may use the exception? To what causes of action does it apply? While lower courts have addressed these issues – and there is dispute among those decisions – the Supreme Court chose not to clarify these points. As Chief Justice Roberts wrote near the conclusion of his decision, "There will be time enough to address the applicability of the exception to other circumstances if and when they arise."

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C. (U.S., 2012) --- S.Ct. ----, 2012 WL 75047.

Note:

We will report on further developments in this important area of the law for religious employers, including religious schools.

■ STUDENTS AND PARENTS

STUDENT EMPLOYEES

College Entitled to Workers' Compensation Immunity Where Student-Employee Was Injured Within Course And Scope Of Employment.

In the fall of 2004, Joyanne Bruhn was enrolled as a full-time student at Pensacola Christian College, located in Florida. Bruhn entered into a Special Hourly Work Contract with the College, which provided that the College could assign the contract to an affiliate. Bruhn was assigned to work at A Beka Books, Inc., an affiliate of the College located on campus.

Bruhn was involved in an accident while riding her bike and returning to work following her lunch break. She collided with a College van driven by Robert Maddox, another student-employee, at an intersection on campus. After the accident, the College's risk manager submitted a workers' compensation claim for Bruhn and informed her that she was covered by the College's workers' compensation policy because she was an employee who sustained an injury during a reportable period. The risk manager further informed her that the College purchased one corporate policy for workers' compensation insurance that covered the college and its affiliates, including A Beka Books.

In November 2009, Bruhn sued Maddox and the College, alleging that Maddox was negligent and the College was variously liable for his negligence because he was an employee. The College and Maddox filed a motion for summary judgment, which is a request that the Court rule in one party's favor based on certain facts without proceeding to a trial. In their motion, they argued that workers' compensation immunity applied because the College was Bruhn's employer at the time of her injury and she was injured on College premises. The trial court denied the motion, finding that Bruhn was not an employee of the College, but of A Beka Books, which the Court determined were separate legal entities. The College and Maddox appealed.

Florida's workers' compensation system provides that employers are generally immune from liability for negligence claims brought by employees for injuries that occur within the course and scope of employment and that the employee's sole remedy lies with the workers' compensation law. Thus, the question of whether the College and Maddox were entitled to immunity turned on whether Bruhn was an employee of the College and whether her injury occurred within the course and scope of employment.

The Court explained that an employee may work for more than one employer, even while performing a single job. Under the "borrowed servant" doctrine, an employer can lend its employee to another "special employer." In order to qualify as a special employer, it must show that: (1) there was a contract for hire, either express or implied, between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to control the details of the work resided with the special employer. If all three of these factors are established, both employers have the benefit of workers' compensation immunity.

Here, the Court found that Bruhn entered into a student-employment contract with the College and under the terms of the contract, the College assigned her to work with its affiliate, A Beka Books. Thus, the Court determined that Bruhn was an employee of the College, even though she performed work for A Beka Books. Moreover, while Bruhn's injury occurred while she was returning from lunch, Bruhn's injury occurred on campus. As such, the Court determined that she was injured within the course and scope of her employment at the time of the injury. It thus reversed the trial court's ruling and instructed the trial court to grant the College's and Maddox's motion for summary judgment.

Pensacola Christian College v. Bruhn (2011) --- So.3d ---, 2011 WL 6851186.

Note:

California similarly provides for workers' compensation preemption, which provides that the sole recourse for an employee who is injured within the course and scope of his/her employment is California's workers' compensation statutes.

DISABILITIES

U.S. Census Finds 5.2 Percent Of School-Aged Children Have A Disability.

According to the recent U.S. Census Bureau's 2010 census data, 5.2 percent of school-aged children in the United States were reported to have a disability. Of children living in metro areas, approximately 5.0 percent reported having a disability, compared with 6.3 percent of children living outside metro areas. Cognitive difficulties are the most common type of disability reported, according to the census; 89.7 percent of children with cognitive difficulties were enrolled in public schools.

The percentage of school-aged children with disabilities varied throughout the country and between metro and non-metro areas. In California, children living in metro areas had lower disability rates than those living outside metro areas. The San Jose-Sunnyvale-Santa Clara metro area had one of the lowest child disability rates in the country at 2.8 percent.

The complete U.S. Census Bureau Report, School-Aged Children With Disabilities in U.S. Metropolitan Statistical Areas: 2010, is available at <http://www.census.gov/prod/2011pubs/acsbr10-12.pdf>.

■ **EMPLOYMENT**

BREACH OF CONTRACT

Terminated Professor's Breach of Contract Claim For University's Failure To Provide Timely Performance Evaluations Fails Where Professor Fails To Initiate Lawsuit Within Applicable Statute of Limitations.

Walid Taha was born in Egypt and educated in Kuwait University. He began his employment with Rice University, located in Texas, in 2002 as an assistant professor. The University appoints assistant professors to an initial term of four years and if reappointed, they serve a second term of an additional four years. The assistant professor must receive tenure by the end of his seventh year of employment, or the eighth year is the professor's final year with the University.

Taha alleged that, in 2004, the professor in charge of graduate admissions, Joe Warren, made

derogatory comments about Egyptian students. When Taha questioned Warren about this, Warren allegedly became extremely angry and stated, "wait until you are up for tenure." Taha complained about this to the Department Chair, who promised that Warren would speak with Taha about this. Warren never addressed the matter again.

Warren subsequently became the Department Chair. Taha later applied for early tenure and requested that Warren recuse himself from the tenure committee, but Warren refused. Taha also requested that the dean remove Warren from the committee, but the dean did not. Taha claims that Warren made false accusations about him to the committee and was therefore denied tenure. The committee informed Taha that his teaching was not up to Rice's standards.

On June 2, 2011, Taha sued the University, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act, breach of contract, fraud, negligent representation and detrimental reliance. With regard to the breach of contract claim, Taha claimed that he was denied constructive criticism and peer review, which materially affected his tenure application. Specifically, he alleged that the University failed to provide him with faculty performance reviews as required by University policy, despite multiple requests by Taha for annual reviews.

The University moved to dismiss Taha's breach of contract claim on the basis that it was barred by the applicable statute of limitations. A statute of limitations is the time period within which an action must be initiated. In Texas, a cause of action for breach of contract must be brought not later than four years after the claim accrues. A cause of action "accrues", meaning the statute of limitations begins to run, when a reasonable person knows, or should have known, both his or her injury and the cause of that injury.

Here, the University argued that Taha's claim for breach of contract accrued in 2004 and 2005, when the University should have provided performance reviews per the terms of its policy. Taha argued that while the policy established when initial evaluations should be given, it did not establish any timeline for written statements in connection with noted deficiencies. Since the policy was silent as to these written statements, the determination of the time period was a question of fact that precluded summary judgment.

The University countered that Taha's distinction between the evaluations and written statement was

an unreasonable interpretation of the policy because under the policy, the written statement would only be provided if the evaluation revealed performance deficiencies. Moreover, it argued that the obligation to provide a written statement never arose, because it was contingent on Taha's receipt of his performance evaluation, which Taha alleged he never received.

The Court agreed with the University, finding that his cause of action accrued in 2005 when he failed to receive his evaluation. As such, it concluded that his claim was barred by the statute of limitations.

Taha next argued that the Court should defer the accrual of his claim because he had no way of knowing that the Department thought his teaching abilities were deficient until the denial of his tenure. The Court quickly dismissed this argument, finding that Taha's breach of contract claim was based on his contention that the University filed to provide performance evaluations as required by its policy. Taha should have known that he did not receive these evaluations when they became due. The Court thus granted the University's motion to dismiss this cause of action.

Taha v. William Marsh Rice University (2011) Slip Copy, 2011 WL 6057846.

Note:

Though the University was able to prevail in this case, the result could have been drastically different had Taha initiated his lawsuit in a timely manner. Schools should always provide timely and accurate performance evaluations. The failure to provide evaluations can preclude Schools from asserting performance-based reasons for separating employees, and can also result in a breach of contract claim, as demonstrated in this case.

DEFAMATION

Dismissed Board Member's Defamation Action Against School Fails Where Board Member Cannot Show Malice By The School.

Jon Andrew Delahoussaye served on the Board of the Catholic High School of New Iberia in Louisiana. In 2009, the School's Chancellor, Reverend Charles Langlois, issued Delahoussaye a letter dismissing him from the Board. Following Delahoussaye's dismissal, the principal of the

School, Dr. Uhl, read the letter from Langlois to Delahoussaye aloud during a Board meeting.

Delahoussaye sued the School for defamation and intentional infliction of emotional distress. He claimed that the School's actions in reading the letter aloud damaged his reputation and caused him severe emotional distress. The School filed a motion for summary judgment, which is a request that the Court rule in one party's favor based on certain facts without proceeding to a trial. Delahoussaye opposed the motion and as alleged support, he submitted a declaration from his father, who corroborated Delahoussaye's allegations that the School's actions had damaged his reputation and caused emotional distress.

The trial court found that the father's declaration was "self-serving" and granted the School's motion for summary judgment. Delahoussaye appealed.

On appeal, Delahoussaye argued that the trial court erred by making a credibility determination with regard to his father's declaration. The Court began by explaining that in order to establish a defamation cause of action, a plaintiff must show: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault or malice by the publisher; and (4) resulting injury. The School argued that Delahoussaye failed to produce evidence establishing all of the elements of defamation.

The Court agreed, finding that the father's declaration only spoke to the issue of damages and did not establish the other elements of defamation, namely malice or fault on the part of the School. As such, the Court sustained the trial court's grant of summary judgment to the School, thereby disposing of Delahoussaye's claim.

Delahoussaye v. Roman Catholic Diocese of Lafayette (2011) --- S.3d ---, 2011 WL 6781004.

Note:

This case highlights some of the issues that can arise when severing relationships with employees and board members. In California, employees' personnel information is protected by the California Constitution's right to privacy. When imposing any employment action, and particularly when separating an employee from employment, schools should never publicize or discuss the confidential personnel information with any individuals who are not authorized to receive such information.

California similarly provides for a defamation cause of action with similar elements. In California, to establish this cause of action, a claimant must show: (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage. (Price v. Operating Engineers Local Union No. 3 (2011) 195 Cal.App.4th 962, 970.)

DISABILITY DISCRIMINATION

School Did Not Violate ADA By Terminating Allegedly Alcoholic Employee Where Employee Unable To Prove He Was Disabled Within The Meaning Of The ADA.

The Glen Mills School is a school and rehabilitation center for delinquent youths in Pennsylvania. The School operates a residential program, and also provides a community-based program that oversees students who live at home. In order to monitor the students who live at home, the School provides its Community Management Services Specialists with a vehicle to travel to and transport students to appointments. The School has a zero tolerance policy that applied to illegal drug use and the use of alcohol while driving a School vehicle.

Roland Kennedy worked for the School for 29 years before he was separated in April 2009. During his tenure with the School, he worked in various positions. Kennedy was never intoxicated at work, never brought alcohol onto campus and never talked to any of his colleagues about an alcohol problem. His final position before he was separated was a Community Management Services Specialist. In this function, he drove students in a van belonging to the School and was permitted to take the van home after work.

On April 10, 2009, Kennedy drove the School van to a bar after work and, after consuming alcohol, crashed the van into a parked car. He ultimately pled guilty to driving under the influence. Kennedy informed his supervisor the day after the accident. The Director of Admissions later called Kennedy to discuss the accident. A few days later, Kennedy met with the Director of Admissions and his supervisor to discuss the incident. He admitted that he had driven the School van while intoxicated and the School terminated him. Kennedy did not mention that he suffered from alcoholism during the meeting.

After his DUI conviction, Kennedy participated in an Alcoholics Anonymous program and DUI program, as ordered by the court. He completed the program and passed three alcohol analysis tests.

Kennedy sued the School, alleging that it terminated him because of his alcoholism and that the School failed to accommodate his alcoholism, both in violation of the Americans with Disabilities Act ("ADA"). The School filed a motion for summary judgment, which is a request that the Court rule in one party's favor based on certain facts without proceeding to a trial.

The ADA prohibits employers, including schools, from discriminating against individuals because of their disability. To establish a *prima facie* case of discrimination within the meaning of the ADA, a claimant must show: (1) that he is disabled within the meaning of the ADA; (2) that he is otherwise qualified for the job, with or without accommodations; and (3) that he was subjected to an adverse employment decision as a result of the discrimination.

The ADA defines disability as (1) having a physical or mental impairment that substantially limits one or more major life activities; (2) having a record of such impairment; or (3) being regarded as having such an impairment. Here, the School argued that it was entitled to summary judgment because there was no record that Kennedy is disabled within the meaning of the ADA.

The Court noted that while Kennedy's complaint alleged that he suffered from alcoholism, Kennedy did not identify a single life activity that was limited by his condition. Rather, the evidence showed that during the last fifteen years of his employment with the School, Kennedy was also employed on a full-time basis with the Devereaux Foundation; he successfully held these two full-time jobs and was never intoxicated at either job; he received promotions and pay raises several times; and he was able to successfully complete the DUI program as ordered by the court. Kennedy further testified that he had not driven drunk since the accident, and has abstained from alcohol. Thus, the Court concluded that Kennedy failed to prove that he had a disability within the meaning of the ADA and granted summary judgment in the School's favor on both causes of action.

Kennedy v. Glen Mills School, Inc. (2011) Slip Copy, 2011 WL 5552865.

Note:

Here, the School did not have any notice or suspicion that Kennedy may have had a disability. Note that if, however, a school does have notice or reasonably believes that an individual may be disabled, it is obligated under the ADA to undergo an interactive process with that employee to determine whether any reasonable accommodations exist.

Teacher Who Failed To Meet Job Requirements Was Not A “Qualified” Individual With A Disability.

Trish Johnson, who had a history of depression and bipolar disorder, taught special education in the Boundary County School District No. 11 in Idaho. Her employment contract required her to maintain the qualifications required to teach special education during the 2007-2008 school year. In Idaho, teachers are required to have a teaching certificate. Johnson’s five-year teaching certificate was set to expire around the start of the 2007-2008 school year. To renew her certificate, she had to complete at least three semester hours of college-level professional development training.

As of the summer of 2007, Johnson still had not completed the required training. She experienced a major depressive episode that rendered her unable to take any college courses. Johnson asked the District’s Board of Trustees to apply for provisional authorization from the State to allow her to teach without a certificate during the upcoming school year. The Board denied the request because of Johnson’s lack of action over the last five years to maintain her certificate. The District then terminated Johnson’s employment.

Johnson sued the District for disability discrimination in violation of the Americans with Disabilities Act (ADA). The district court entered summary judgment in favor of the District. The Ninth Circuit Court of Appeals affirmed.

The ADA prohibits discrimination against a qualified individual with a disability because of the disability. To prevail on her disability discrimination claim, Johnson had to first show that she was a qualified individual with a disability. A qualified individual has the requisite skills, experience, education and other job-related requirements of the position, and who, with or without reasonable accommodation, can perform the essential functions of such position. The employer is not required to provide a reasonable

accommodation to ensure that the individual can satisfy the job prerequisites.

The Ninth Circuit noted that, unless an individual independently satisfies the job prerequisites, she is not otherwise qualified and the employer is not obligated to furnish any reasonable accommodation that would enable her to perform the essential job functions. As a result, the District was not required to request provisional authorization from the State because Johnson was not a qualified individual who was entitled to a reasonable accommodation.

Johnson v. Board of Trustees of the Boundary County School District No. 101 (9th Cir. 2011) ___ F.3d ___ [2011 WL 6091313].

Note:

Though this case concerns a public school district, the principles apply equally to independent and private schools. In this case, the teacher challenged only the school district’s refusal to change the job requirements in order to accommodate her disability. The same result would likely have occurred had the teacher sued under California’s anti-discrimination law because the Fair Employment and Housing Act also requires that an individual prove that he or she is qualified in order to be entitled to receive a reasonable accommodation. (See Green v. State of California (2007) 42 Cal.4th 254.).

WORKPLACE VIOLENCE

Court Expands Employers' Ability To Obtain Workplace Violence Restraining Orders.

A recent California Court of Appeal ruling provides employers an important weapon to combat workplace violence. The Court in *Kaiser Foundation Hospitals v. Wilson* ruled that courts may consider and rely on hearsay evidence to grant workplace violence restraining orders and injunctions. This is a significant departure from the usual rule that hearsay cannot be admitted into evidence or relied on to support a Court order.

As with all workplace violence cases, the facts are not pleasant. After Kaiser terminated his wife, Jeff Wilson became irate, started making violent threats toward Kaiser employees, including that he was going to “kill someone”, “going to flip his lid” and “do something he would regret.” Wilson also reportedly told his therapist he was going to shoot a

Kaiser employee. In response, Kaiser sought and obtained a temporary restraining order and then a permanent injunction, barring Wilson from Kaiser facilities and from any contact or communication with Kaiser employees.

Wilson challenged the Court's temporary restraining order and permanent injunction, arguing they were based on hearsay statements that cannot be admitted into evidence or relied on by the Court. Kaiser acknowledged that most of the evidence was hearsay-- threats Wilson reportedly made to employees who did not testify-- but argued courts may consider and rely on hearsay when granting workplace violence restraining orders and injunctions.

In a somewhat surprising, but welcome ruling, the Court of Appeal agreed with Kaiser, expanding an employer's ability to obtain workplace violence temporary restraining orders and permanent injunctions. The Court reasoned that under the hearsay rule (Evidence Code section 1200) hearsay is generally inadmissible, "except as provided by law." Since the statute governing workplace violence hearings (Code of Civil Procedure section 527.8) expressly provides: "At the hearing, the judge shall receive any testimony that is relevant" it is one of the exceptions to the general rule that hearsay is inadmissible. This exception is logical, the Court explained, because the whole point of the workplace violence statute is to prevent workplace violence and the Court's ability to consider all relevant testimony strengthens its ability to protect employees from violence.

What This Means For Employers

The Kaiser case increases employers' ability to obtain workplace violence restraining orders and injunctions, but also increases their responsibility to seek such orders, because employers can rely on any relevant evidence, not only admissible relevant evidence. If an employer has relevant evidence of violence or credible threats of violence in the workplace, it should not disregard that evidence or decline to seek a restraining order simply because the evidence is hearsay. The failure to seek a workplace violence restraining order and permanent injunction when the employer is on notice of violence or credible threats of workplace violence, can result in liability.

WAGE AND HOUR

Split Shift Premium Is Based On The Minimum Wage for the Workday, and Not On The Employee's Normal Wage.

Daniel Krofta works for Airtouch Cellular as a customer service representative selling cell phones, accessories, and service plans. Once or twice a month, the Company held meetings for 60-90 minutes. On five occasions, Krofta worked a split shift where he would work a short shift (i.e. attend the meeting) in the morning followed by a longer shift later the same day.

Krofta sued the Company for failing to pay him a split shift premium in violation of the Industrial Welfare Commission's (IWC) Wage Order No. 4-2001. The superior court granted summary judgment in favor of the Company, and the California Court of Appeal affirmed.

The IWC is empowered to issue regulations known as "wage orders", which govern wages, hours, and working conditions in the State of California. Wage Order 4 defines a "split shift" as a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods. The "Minimum Wages" portion of the Wage Order states: "When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday..."

The Court found that, although Krofta occasionally worked split shifts, he was not entitled to a split shift premium because the Company paid him more than the minimum wage for all hours worked plus one additional hour for the split shift premium. For example, Krofta earned \$10.58 per hour and worked 8 hours for a total of \$84.64 (8 x \$10.58). This amount was still greater than the minimum wage of \$6.75 times 8 hours, plus one additional "hour's pay at the minimum wage" for a total of \$60.75. The Court found that the wage order only requires that one hour at the minimum wage must be paid if the employee works a split shift; the wage order does not require that an employee who earns more than the minimum wage must be paid his or her full wage for the split shift. Thus, while the wage order applied to Krofta, the provision did not provide him with any tangible benefit because he was paid more than the minimum amount required by the wage order.

Aleman v. Airtouch Cellular (2011) ___ Cal.App.4th ___, 2011 WL 6382127.

Note:

Most school employees will fall under the provisions of IWC Wage Order No. 4-2001.

NON-PROFIT CORPORATIONS**Board Of Non-Profit Corporation That Received Public Funding Was Contractually Required To Comply With The Brown Act.**

Options-A Child Care and Human Services Agency is a non-profit corporation that administers subsidized services to families in Los Angeles County under contract with the State of California Department of Education. Under Options' contract with the Department of Education, Options agreed to comply with the Ralph M. Brown Act with respect to the publicly funded programs.

Options' board of directors met regarding publicly funded programs, but did not post a publicly accessible agenda before the meeting, identify which items would be discussed in executive session, or announce those items during the public portion of the meeting. The written reports distributed to the directors were not made available to the public.

A union and a member of the public sued Options for (1) violation of the Brown Act and (2) breach of contract. They alleged that they were intended beneficiaries of the contractual provisions regarding compliance with the Brown Act. The trial court found in favor of Options on both claims. On appeal, the California Court of Appeal found that a government contractor cannot be sued directly under the Brown Act. However, the Court also found that members of the public are the intended beneficiaries of such a contractual provision and can enforce the provision as third-party beneficiaries of the contract.

The Brown Act requires legislative bodies of a local agency to comply with certain meeting requirements to ensure transparency in governance. A legislative body includes: a local body created by statute; a board of a local agency created by a legislative body; and a board that governs a private corporation that receives funds from a local agency and whose governing body includes a full voting member of the legislative body of the local agency appointed to that governing body.

Options is not a legislative body under the Brown Act because it is not a board of a local public agency, nor was it created by any elected legislative body. Finally, no member of Options' board of directors was appointed by a local public agency.

Nevertheless, the Court found that Options was contractually bound to comply with the Brown Act. And because the contract provision regarding compliance with the Brown Act was designed to ensure that Options' board meetings regarding publicly funded programs would be open to the public, the Court found that the intended beneficiary of these contractual provisions was the general public. As such, a member of the public could enforce the contract provision.

Service Employees Inter. Union, Local 99 v. Options-A Child Care and Human Services Agency (2011) 200 Cal.App.4th 869 [133 Cal.Rptr.3d 73].

Note:

The only reason this non-profit was required to comply with the Brown Act was that it was contractually required to do so. Non-profit corporations should think carefully before contractually agreeing to comply with laws that would otherwise be inapplicable to them because it can create potentially liability.





FIRM PUBLICATIONS

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Elizabeth Arce of our **Los Angeles** office authored the article, "Recent EEOC Disability Discrimination Lawsuits Are A Reminder To Employers To Comply With The ADA" which appeared in the December 9, 2011 issue of the *Law360*. The original blog post can be viewed by visiting the link listed above and/or searching the keywords, "EEOC."

David Urban of our **Los Angeles** office authored the article, "First Amendment Issues in Public Employment and Education for 2012" which appeared in the December 30, 2011 issue of the *Los Angeles/San Francisco Daily Journal*. The original blog post can be viewed by visiting the link listed above and/or searching the keywords, "First Amendment."

David Urban of our **Los Angeles** office authored the article, "Federal Court in California Decides "Religious Banners" Case On First Amendment Rights Of Public School Teachers" which appeared in the January/February 2012 issue of the *Small School Districts' Association Newsletter*. The original blog post can be viewed by visiting the link listed above and/or searching the keywords, "Religious Banners."

To view archive articles, please go to:

www.lcwlegal.com/lcw-attorney-authored-articles?archive=1

**New
to
the
Firm**

Liebert Cassidy Whitmore Welcomes A New Associate

Maila Labadie joins the San Francisco office. Maila provides representation and legal counsel to Liebert Cassidy Whitmore clients in matters pertaining to education, employment and labor law.

Maila can be reached at 415.512.3000 or emailed at mlabadie@lcwlegal.com

CONGRATULATIONS



Congratulations to San Francisco Partner Jack Hughes. He and his wife Alyssa welcomed the arrival of their daughter Maggie Ruth on December 13th.

We also Congratulate Los Angeles Associate Damon Brown. He and his wife Elizabeth welcomed the arrival of their son Mason Conner on December 28th.

We wish both families much happiness!

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Workshop Training

- February 8 **“Front Line Defense” and “Difficult Conversations”**
San Gabriel Valley ERC | Alhambra | Laura Kalty
- February 8 **“Front Line Defense” and “Difficult Conversations”**
Central Coast ERC | Paso Robles | Donna R. Evans
- February 9 **“Public Sector Employment Law Update” and “Terminating the Employment Relationship”**
San Diego ERC | Poway | Mark Meyerhoff
- February 9 **“Difficult Conversations”**
Los Angeles County Human Resources Consortium | Los Angeles | Donna R. Evans
- February 9 **“Managing Leave Laws and the Discipline Process”**
Central Valley ERC | Hanford | Gage Dungy
- February 9 **“Healthcare Reform” and “Front Line Defense”**
Gateway Public ERC | Pico Rivera | Heather DeBlanc and Geoff Sheldon
- February 9 **“Supervisory Skills for the First Line Supervisor/Manager”**
NorCal ERC | San Ramon | Kelly Tuffo
- February 10 **“Governance Issues for Educational Entities”**
Central CA CCD ERC | Webinar | Eileen O'Hare-Anderson
- February 10 **“Sick and Disabled Employees” and “The Disability Interactive Process”**
Southern California Community College District (SCCCD) ERC | Ventura | Michael Blacher
- February 15 **“Front Line Defense” and “Ethics in Public Service”**
Coachella Valley ERC | La Quinta | Mark Meyerhoff
- February 15 **“Managing Performance Through Evaluation” and “Prevention and Control of Absenteeism and Abuse of Leave Law”**
Orange County Human Resources Consortium | Buena Park | Frances Rogers
- February 15 **“A Supervisor’s Employment Relations Primer”**
San Mateo County ERC | Brisbane | Kelly Tuffo
- February 22 **“Advanced Investigations of Harassment Complaints” and “Public Sector Employment Law Update”**
Ventura/Santa Barbara ERC | Santa Barbara | Connie C. Almond
- February 22 **“Super Manager or Super Spy: The Use of Technology in Monitoring Employee Conduct”**
Monterey Bay ERC | Webinar | Pilar Morin
- February 23 **“Difficult Conversations” and “Front Line Defense”**
Imperial Valley ERC | Imperial | Laura Kalty
- February 23 **“Healthcare Reform” and “Advanced Investigations of Harassment Complaints”**
North State ERC | Redding | Alison Neufeld
- February 28 **“Parent and Student Handbooks”**
Bay Area Jewish Schools Consortium | Foster City | Alison Neufeld
- February 29 **“Employee Due Process Rights and ‘Skelly:’ A Guide to Implementing Public Employee Discipline” and “Performance Management: Evaluation, Documentation and Discipline”**
Sonoma/Marin ERC | Rohnert Park | Suzanne Solomon
- March 1 **“Managing Employee Injuries, Disability and Occupational Safety Part I”**
Los Angeles County Human Resources Consortium | Los Angeles | Douglas M. Bray

March 2	“Healthcare Reform” Central CA CCD ERC Webinar Heather DeBlanc
March 7	“Retaliation” and “Sick and Disabled Employees” Gold Country ERC Citrus Heights Gage Dungy
March 7	“Front Line Defense” and “Difficult Conversations” Bay Area ERC Palo Alto Suzanne Solomon
March 8	“Employees and Driving” Gateway Public ERC Huntington Park Mark Meyerhoff
March 8	“Labor Code 101 for Public Agencies” East Inland Empire ERC Fontana Elizabeth Tom Arce
March 8	“Public Sector Employment Law Update” East Inland Empire ERC Fontana Laura Kalty
March 8	“Managing Employee Injuries, Disability and Occupational Safety Part II” Los Angeles County Human Resources Consortium Los Angeles Douglas M. Bray
March 9	“Difficult Conversations” and “Managing the Marginal Employee” Central Coast Personnel Council Consortium Santa Barbara Michael Blacher
March 14	“Front Line Defense” and “Difficult Conversations” Napa/Solano/Yolo ERC Vacaville Suzanne Solomon
March 14	“Employee and Student Contracts” and “Private School Law 101” Builders of Jewish Education Consortium Los Angeles Michael Blacher
March 15	“Legal Issues Related to Generational Diversity and Succession Planning: Opportunities for Building a Stronger Workforce” and “Sick and Disabled Employees” Monterey Bay ERC Hollister Jack Hughes
March 15	“Front Line Defense” and “Difficult Conversations” West Inland Empire ERC Diamond Bar Laura Kalty
March 16	“Current Developments in Workers’ Compensation” Central CA CCD ERC Webinar Doug Bray
March 16	“Terminating the Employment Relationship” SCCCD ERC Webinar Eileen O’Hare-Anderson
March 16	“Terminating the Employment Relationship” Northern CA CCD ERC Webinar Eileen O’Hare-Anderson
March 16	“Terminating the Employment Relationship” Bay Area CCD ERC Webinar Eileen O’Hare-Anderson
March 20	“Legal Issues Related to Generational Diversity and Succession Planning: Opportunities for Building a Stronger Workforce” and “Front Line Defense” South Bay ERC Torrance Mark Meyerhoff
March 21	“Labor Code 101 for Public Agencies” and “Preventing Workplace Harassment, Discrimination and Retaliation” San Gabriel Valley ERC Alhambra Elizabeth Tom Arce
March 21	“Difficult Conversations” and “Managing the Marginal Employee” Ventura/Santa Barbara ERC Thousand Oaks Donna R. Evans
March 21	“Mandated Fact-finding: What Now?” and “Retaliation” Sonoma/Marin ERC Rohnert Park Richard Bolanos
March 21	“Terminating the Employment Relationship” and “Public Sector Employment Law Update” Central Coast ERC San Luis Obispo Geoffrey S. Sheldon
March 22	“Sick and Disabled Employees” Orange County Human Resources Consortium Tustin Peter J. Brown

- March 27 **“Difficult Conversations” and “Performance Management: Evaluation, Documentation and Discipline”**
San Mateo County ERC | Foster City | Suzanne Solomon
- March 28 **“Front Line Defense” and “Difficult Conversations”**
North State ERC | Redding | Alison Neufeld
- March 28 **“Supervisory Skills for the First Line Supervisor/Manager”**
Mendocino County ERC | Ukiah | Kelly Tuffo
- March 28 **“Discipline: Putting It into Practice”**
Humboldt County ERC | Fortuna | Suzanne Solomon
- March 29 **“Public Sector Employment Law Update” and “Terminating the Employment Relationship”**
North San Diego County ERC | Carlsbad | Geoffrey Sheldon
- March 29 **“Terminating the Employment Relationship” and “Mandated Fact-finding: What Now?”**
NorCal ERC | Concord | Richard Bolanos
- March 29 **“Discipline: Putting It into Practice”**
Humboldt County ERC | Fortuna | Suzanne Solomon
- March 29 **“Terminating the Employment Relationship” and “Advanced FLSA”**
Central Valley ERC | Hanford | Jesse Maddox

Customized Training

- February 6 **“Board Meetings: Parliamentary Procedure and Brown Act Update”**
San Gabriel Unified School District | Mary Dowell
- February 8 **“Supervisory Skills for the First Line Supervisor/Manager”**
Novato Fire Protection District | Morin Jacob
- February 9, **“Preventing Workplace Harassment, Discrimination and Retaliation”**
22 City of Arcadia | Laura Kalty
- February 10 **“Creating an Ethical Mindset”**
Palomar College | San Marcos | Mary Dowell
- February 14 **“Ethics in Public Service”**
Imperial Irrigation District | El Centro | Mark Meyerhoff
- February 15 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Fresno | Shelline Bennett
- February 15 **“Mitigating Employment Liability Risks for Law Enforcement”**
ERMA | Walnut Creek | Morin I. Jacob
- February 15 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Torrance | Laura Kalty
- February 15 **“Ethics in Public Service”**
Hartnell Community College District | Salinas | Laura Schulkind
- February 15, **“Legal Update”**
28 Orange County Probation | Santa Ana | J. Scott Tiedemann
- February 21 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Modesto | Gage Dungy
- February 22, **“Difficult Conversations and Managing the Marginal Employee”**
24 Novato Fire Protection District | Morin Jacob
- February 23 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Glendale | Donna R. Evans
- February 24 **“EEO Training”**
Mt. San Antonio College | Walnut | Mary Dowell

- February 27 **“Performance Evaluations”**
Tri-City Mental Health Center | Pomona | Laura Kalty
- February 29 **“Supervisory Skills for the First Line Supervisor/Manager”**
South Coast Air Quality Management District | Diamond Bar | Mark Meyerhoff
- March 1 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
County of San Luis Obispo | Laura Kalty
- March 2 **“Leaves, Leaves and More Leaves”**
Allan Hancock College | Santa Maria | Bruce Barsook
- March 6 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Fresno | Gage Dungy
- March 8 **“Managing Performance: How to Manage the Marginal Employee; Performance Improvement Plan”**
Ohlone College | Fremont | Eileen O’Hare-Anderson
- March 9, 23 **“Difficult Conversations and Managing the Marginal Employee”**
Novato Fire Protection District | Morin Jacob
- March 13, 15 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Torrance | Donna R. Evans
- March 15 **“Public Sector Employment Law Update and HR Roundtable”**
City of Beverly Hill | Mark Meyerhoff
- March 21 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Arcadia | Laura Kalty

Speaking Engagements

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

- February 10 **“Super Manager or Super Spy: The Use of Technology in Monitoring Employee Conduct”**
UC Davis Forensic Science Lab Leadership Program | Davis | Jack Hughes
- February 15 **“Successful Leadership – How It Can Keep You Out of Trouble”**
Public Agency Risk Management Association Annual (PARMA) Conference | Monterey | Donna R. Evans
- February 16 **“My First Closed Session”**
Southern California Public Labor Relations Council | Lakewood | Peter J. Brown
- February 16 **“Performance Evaluations”**
International Public Management Association (IPMA) - HR San Diego Chapter Meeting | San Diego | Judith S. Islas
- February 16 **“Public Sector Employment Law Update”**
Southern California Public Labor Relations Council | Lakewood | J. Scott Tiedemann
- February 17 **“The High Cost of Retirement: Strategies for California’s Public Employer”**
PARMA Annual Conference | Monterey | Steven Berliner
- February 27 **“You Be The Judge! A Mock Trial Employment Law Trial”**
National Business Officers Association (NBOA) Annual Conference | Seattle | Michael Blacher and Donna Williamson
- February 28 **“What You Never Imagined: A Wage and Hour Audit of Independent Schools”**
NBOA Annual Conference | Seattle | Donna Williamson
- February 28 **“E-Signatures: Do They Create a Binding Agreement?”**
NBOA Annual Conference | Seattle | Michael Blacher

- February 28 **“Innovative, but Illegal: Wage and Hour Misconceptions in Independent Schools”**
NBOA Annual Conference | Seattle | Donna Williamson
- March 1 **“When the Walls Come Tumbling Down: MySpace, Your Space, School Space”**
NAIS Annual Conference | Seattle | Michael Blacher and Donna Williamson
- March 2 **“Board Relations (The Brown Act)”**
Cerritos College Leadership Academy | Cerritos | Mary Dowell
- March 2 **“Innovative, but Illegal: Wage and Hour Misconceptions at Independent Schools”**
NAIS Annual Conference | Seattle | Donna Williamson
- March 8 **“The New Fact Finding Requirements and Changes to AB 1028”**
County Personnel Administrators Association of California | Fresno | Gage Dungy and Shelline Bennett
- March 8 **“Legislative and Case Law Update”**
California County Counsel’s Association Employment Law Conference | Monterey | Cynthia O’Neill
- March 19 **“When Johnny (or Janie) Comes Marching Home - Hooray, Your Veterans Are Back... Now What?”**
College and University Professional Association for HR (CUPA-HR) Western Region Conf. | Sacramento | Alison Neufeld
- March 19 **“Social Networking or Not Working: Do’s and Don’ts in Building on Relationships in Social Media”**
CUPA-HR Western Region Conf. | Sacramento | Pilar Morin
- March 22 **“Best Personnel Practices”**
California & Pacific Southwest Recreation & Park Training Conference | Long Beach | Mark Meyerhoff
- March 22 **“Labor Law Update”**
Southern California Public Management Association Annual Conference | Alhambra | J. Scott Tiedemann

To view our current calendar of events, please visit: www.lcwlegal.com/calendar.aspx



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