

Education Matters

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

December 2009

CONTENTS

STUDENTS

Special Education 1
 Search and Seizure 4
 First Amendment 6

EMPLOYMENT

Labor Relations 7
 PERS Retirement 8
 Harassment 8
 Race Discrimination 9
 Disability Discrimination 9
 Pregnancy Discrimination 10
 Sexual Harassment 11
 Required EEOC Posting 12
 Family Medical Leave Act 12
 Due Process 13
 First Amendment 14

GOVERNANCE/ADMINISTRATION

Public Meetings 15

DEPARTMENTS

Firm Publications 16
 Compliant EEO Plans 16
 Firm Profile 17
 Save the Date 17
 Firm Activities 18

Education Matters

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

© 2009 Liebert Cassidy Whitmore

LOS ANGELES

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

FRESNO

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

SAN FRANCISCO

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

WWW.LCWLEGAL.COM

STUDENTS

SPECIAL EDUCATION

Where Residential Placement is Not Necessary to Meet Student's Educational Needs, District is Not Required to Reimburse for Costs of Placement.

R.J., a student in the Ashland School District, was born in 1987. When she was in second grade, she was diagnosed with attention deficit hyperactivity disorder (ADHD). In 2001, R.J. enrolled in the Ashland School District. The District established an individualized education program (IEP) to provide R.J. special education services. R.J.'s parents consented to the IEP.

In April 2004, the IEP team began planning for R.J.'s transition to high school. At this time, R.J. began seeing a school counselor, with whom she discussed her parents' divorce, and issues related to another student with whom she had a romantic relationship. At this time, R.J. began showing signs of depression. In November 2004, a school psychologist evaluated R.J. and found that her ADHD was not having a significant impact on her classroom performance. However, the IEP team continued her previous IEP with only minor changes.

During 2005, R.J. continued showing signs of depression and began engaging in risky behaviors, including having a relationship with an adult custodian who was employed at her school. She was also seen harming herself by sticking safety pins in her arm. In February 2005, R.J.'s parents removed her from school, and the District provided R.J. with an at-home tutor. R.J. also continued to see a school counselor. After returning to school in Spring 2005, R.J. continued to engage in risky behavior outside of school, including sneaking out of the house to visit a reportedly abusive boyfriend and the school custodian.

In September 2005, R.J.'s mother notified the school that she was considering placing R.J. in a residential treatment facility. The District convened an IEP meeting, during which R.J.'s teachers commented that she had made positive progress in her classes and was earning A's and B's. R.J.'s mother expressed concerns about R.J.'s risky behavior outside of school, and her defiance at home. The District's director of student services noted that R.J.'s mother's concerns seemed to stem exclusively from R.J.'s behavior away from school. At the conclusion of the meeting, the IEP team decided to keep R.J.'s existing IEP in place.

In late November 2005, R.J.'s mother formally notified the District that she was placing R.J. in a residential facility. The District held an IEP meeting on December 9, 2005, but R.J.'s parents did not attend. The team agreed that R.J. was successful in her current placement, and "did not need a special class or special school to address issues of work completion, tardiness or trustworthy behavior." The team revised the IEP to include specially designed instruction on social communication.

Notwithstanding the new IEP, R.J.'s parents placed R.J. at a residential facility, Mount Bachelor Academy. In August 2006, she was expelled. Her parents enrolled

her in a second facility, Copper Canyon Academy, where R.J.'s treatment plan included individual and group psychotherapy. R.J.'s parents sought reimbursement from the District for the tuition at both facilities. The state hearing officer granted partial reimbursement to R.J.'s parents. The hearing officer found that the Mount Bachelor placement had not been appropriate, but that the Copper Canyon placement was appropriate; thus, R.J.'s parents were entitled to reimbursement for that portion of the tuition payments.

The District brought an action in the federal district court, seeking review of the hearing officer's decision, pursuant to 20 U.S.C. Section 1415(i)(2) of the Individuals with Disabilities in Education Act (IDEA). The district court found in favor of the District, and R.J.'s parents appealed to the Ninth Circuit Court of Appeals. R.J.'s parents alleged that the district court did not apply the proper standard of review, and that the court should have reviewed the hearing officer's findings of fact for "clear error" and his grant of reimbursement for "abuse of discretion."

The Ninth Circuit Court of Appeals rejected this argument. The IDEA provides that the district court must review the records of the hearing officer; hear additional evidence at the request of a party; and grant such relief as the court determines is appropriate, based on a preponderance of the evidence. While "due weight" is to be given to the hearing officer's findings, the Court had previously construed this language as requiring a *de novo* review. This standard of review permits the district court to review the evidence and reach its own conclusions regarding the appropriate relief. This standard is less deferential to the hearing officer than a "clear error" or "abuse of discretion" standard would be. Since the district court employed a *de novo* standard in the present case, the Court of Appeals found that the district court had utilized the proper standard of review.

In addition, R.J.'s parents challenged the denial of reimbursement for the Copper Canyon placement. Parents may be reimbursed for private school tuition under the IDEA only when the placement is appropriate. Placement at a residential facility is appropriate only when the placement is "necessary to provide special education and related services." Separate schooling is required only when the nature and severity of the child's disability makes education in regular classes unsatisfactory.

R.J.'s parents claimed that the Copper Canyon placement was appropriate because it provided both "special education" and "related services," both of which are required under the IDEA. The Court of

Appeals analyzed this argument by looking at the definitions of "special education" and "related services" under the IDEA. "Special education" is defined as "specially designed instruction...to meet the unique needs of a child with a disability." "Related services" are those services which may be required "to assist a child with a disability to benefit from special education." Based on those definitions, the analysis of whether a particular placement or service is appropriate focuses on whether "the placement may be considered necessary for educational purposes." Based on those definitions, if a placement is made for the purpose of addressing medical, social or emotional problems apart from the learning process, then it is not appropriate.

The Court of Appeals went on to find that the Copper Canyon placement was not required for any educational reason. Rather, it was a response to R.J.'s risky behaviors outside of school, and her defiant attitude at home. The Court noted that R.J.'s mother had specifically referenced her daughter's behavior outside of school as being her primary concern at the IEP meeting. On the other hand, R.J.'s educational progress was considered positive and successful by the IEP team. The Court of Appeals found that, in considering these facts, the district court had undertaken the appropriate analysis and had reached the appropriate conclusion. Accordingly, R.J.'s parents were not entitled to reimbursement for R.J.'s placement at Copper Canyon, because the placement was not required for any educational purpose.

Ashland School District v. Parents of Student R.J. (9th Cir. 2009) --- F.3d ---, 2009 WL 4546736

Where Parents Did Not Complain Regarding Individualized Educational Program and Failed to Provide Proper Notice of Objections to Their Son's IEP, School District Was Not Required to Provide Reimbursement for Private School Tuition for Residential Placement.

E.H., a student in the Ashland School District, began suffering emotional problems in 1998, while in the third grade. He also had difficulty with peer integration, and began suffering from migraine headaches. By 2000, E.H.'s headaches were so severe that E.H.'s parents hospitalized him. His treating physician determined that he suffered from anxiety and depression, and that the migraines had

a medical origin but were triggered by psychological factors.

The District determined that E.H. was eligible for special education services and developed an individualized educational program (IEP), as required by the Individuals with Disabilities in Education Act (IDEA). After the District implemented E.H.'s IEP, he repeated the fifth grade, and his progress improved. Between 2001 and 2002, E.H. was successful in school. However, in 2003, he became depressed and began to talk about suicide. He also suffered from frequent migraines. In 2003, during eighth grade, E.H. attended only one class a day at a regular middle school, and spent the rest of the day at a District-operated alternative education program.

In September 2003, the District provided E.H.'s parents with a 23 page pamphlet which notified them of their rights and responsibilities under the IDEA. Among other things, the pamphlet notified them that a court or hearing officer may refuse to reimburse them for private school costs if they failed to notify the District of objections to their son's IEP prior to private school enrollment. On the other hand, the District did not notify E.H.'s parents that, under some circumstances, it might be required to pay for residential educational facilities.

In April 2004, near the end of E.H.'s eighth grade year, the District convened an IEP team meeting to consider strategies for E.H.'s transition to high school. Over the summer, E.H. was hospitalized on two occasions for suicide attempts, and his treating physicians and therapists recommended residential treatment for him, rather than ordinary public school. In September 2004, shortly after E.H. was released from the hospital, the District re-convened the IEP team to draft a new IEP. The parents stated that they would like to enroll E.H. at Willow Wind, a special district program in which E.H. had previously been enrolled, but the program refused to accept E.H., because it could not monitor him closely enough to prevent another suicide attempt. The District's personnel wrote a new IEP, placing E.H. at Ashland High School, to which the parents did not object. The parents did, however, indicate that they were searching for a residential facility for E.H.

By November 2004, E.H.'s emotional problems resurfaced, and his parents took him out of school. The District provided a private tutor for E.H. The District did not draft a new IEP, because it believed that the home placement was only temporary pending a transfer to a private residential facility. Shortly thereafter, E.H. was hospitalized again for a suicide attempt and for threatening family mem-

bers. In January 2005, E.H.'s parents placed him at Youth Care, a private out-of-state residential treatment program. Youth Care provided psychological care, intensive counseling and educational support sessions.

Prior to the transfer to Youth Care, E.H.'s parents had never indicated any dissatisfaction with the educational program the District provided to E.H. However, after E.H. had been enrolled in Youth Care for approximately seven months, E.H.'s parents mailed a letter to the District, indicating that they were unhappy with the District's educational services and requesting reimbursement for the cost of the residential placement. After receiving this letter, the District convened an IEP meeting in December 2005 to draft a new IEP. The parents rejected the new IEP and requested a due process hearing before a state hearing officer to determine whether the District had provided E.H. a Free Appropriate Public Education ("FAPE") as required by the IDEA.

The hearing officer found that the September 2004 and December 2005 IEP's did not provide E.H. with FAPE. The hearing officer also found that Youth Care did provide FAPE to E.H., and was, therefore, an appropriate placement. The District argued that E.H.'s parents placed E.H. at Youth Care because of his medical needs, and not his educational needs. Therefore, the District argued, it was not required to reimburse E.H.'s parents. In his analysis, the hearing officer stated that E.H.'s medical problems and emotional problems were "intertwined" and, thus, the District was obligated to pay for residential treatment. The hearing officer did, however, reduce the amount of reimbursement based on the fact that E.H.'s parents failed to notify the District of their concerns with the educational services the District provided to E.H., which is required pursuant to Oregon law.

The District appealed to the federal district court. Conducting an independent review of the evidence, the district court reversed the hearing officer's award of reimbursement. The district court looked at several factors, including the cost of the placement, the parents' failure to notify the district of objections to E.H.'s IEP and the evidence that the placement was for medical and not educational reasons. The parents appealed.

E.H.'s parents first challenged the standard of review utilized by the district court to review the hearing officer's decision. The parents argued that an "abuse of discretion" standard was appropriate. Such a standard gives significant deference to the hearing officer's decision. The Ninth Circuit Court of Appeals found, instead, that the appropriate stan-

dard of review is *de novo*, which gives less deference to the hearing officer. The *de novo* standard allows the reviewing court to review the evidence and reach its own evidence, and to determine how much weight to give to the hearing officer's determinations. The Court of Appeals found that the IDEA requires that the district court undertake this level of review.

The parents also argued that the district court should not have considered the cost of the particular residential placement in determining whether the placement was appropriate. The parents argued that the cost of the placement was irrelevant. The Court of Appeals rejected this argument, noting that the IDEA requires a school district to pay for "reasonable, non-medical expenses associated with" a residential placement. In denying reimbursement, the district court found that much of the expense of E.H.'s residential care was directed to his medical care, and was unrelated to his educational needs. The Court of Appeals found that, because the IDEA requires that a district pay only for reasonable, non-medical expenses related to residential placement, the district court had properly considered the cost of Youth Care in determining whether the school district was required to reimburse E.H.'s parents.

E.H.'s parents argued that the district court improperly considered their failure to give the District notice of their objections to E.H.'s IEP as a factor in denying reimbursement. The IDEA grants a district court discretion to reduce or deny reimbursement if the parents failed to notify the school district of objections to their child's IEP prior to withdrawing the student from public school. The Court of Appeals, therefore, concluded that the statute expressly permitted the district court to deny relief *solely* on the basis of the parents' failure to provide notice of their objections to the IEP. In addition, the Court of Appeals noted that it had previously held that failure to give notice is a relevant consideration in determining whether to deny reimbursement. The fact that the District was aware that the parents were seeking a residential placement was not enough to outweigh the parents' failure to give notice of their objections.

The parents claimed that the school district was deficient in providing notice of their rights, and that the District should have reminded the parents of the District's potential obligation to fund residential placement. Under the IDEA, a district must notify the parents of their rights and obligations under the IDEA. In this case, the Court of Appeals found that the pamphlet the District provided to the parents in September 2003 was sufficient to provide the parental notice required by the IDEA.

Finally, E.H.'s parents challenged the district court's determination that E.H.'s placement was for medical, rather than educational, purposes. The IDEA requires that a district provide an education that meets a student's "academic, social, health, emotional, communicative, physical and vocational needs." In addition, an IEP must contain a statement of educational and any related services the district will provide. Related services include those services which assist the student in obtaining an education.

The IDEA does not require a district to provide for all of a student's medical needs. In fact, with regard to residential placement, the IDEA's regulations provide only that a district must pay non-medical costs of placement. Therefore, a court's analysis regarding reimbursement must be focused on whether the placement is "necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process."

In this case, the Court of Appeals found that the record contained sufficient evidence that E.H. was placed in Youth Care for medical and not educational reasons. The record established that during at least the first six months of his stay at Youth Care, E.H. was unable to devote much time or effort to schoolwork. Moreover, E.H.'s case manager testified that the parents told him that they were searching for a residential placement because of E.H.'s problems at home, not at school, including his threats to harm his family members.

Ashland School Dist. v. Parents of Student E.H. (9th Cir. 2009) --- F.3d ----, 2009 WL 4546620

SEARCH AND SEIZURE

Two Hour Interview of Student By Social Worker and Sheriff Deputy on School Grounds Regarding Suspected Child Abuse Violated Student's Fourth Amendment Right to Be Free from Unreasonable Search and Seizure, but Officials Were Entitled to Qualified Immunity.

Nimrod Greene was arrested on February 12, 2003 for suspected sexual abuse of a seven-year old boy. Nimrod also had two daughters, S.G. and K.G. The boy's parents told officials that she suspected that Nimrod had also engaged in inappropriate behavior

with his daughters. Upon receiving this information, as well as notice that Nimrod had been released from jail, Bob Camreta, a social worker with the Oregon Department of Human Services, sought to interview S.G. at school regarding the allegations.

Camreta thought the school would be a good place to interview S.G. because she would feel safe, and the interview would be conducted away from the potential influence of suspects, including her parents. Camreta did not inform S.G.'s mother, Sarah Greene, of the interview or obtain her consent. He also did not obtain a warrant or court order before conducting the interview. Camreta was accompanied by Deputy Sheriff James Alford during the interview.

S.G.'s school provided a private room for the interview. A school counselor, Terry Friesen, pulled S.G. from her class for the purpose of the interview. No school officials were present during the interview. Camreta met with S.G. for two hours. According to Camreta, S.G. accused her father of inappropriate behavior during the interview. According to S.G., however, she denied any inappropriate behavior at first, and only began to acquiesce because Camreta continued to ask her the same questions over and over and she wanted the interview to end.

Based on the interview and resulting investigation, Nimrod was indicted on six counts of felony assault of S.G. and her sister, K.G. After Nimrod was released on bail, S.G. and K.G. were removed from the custody of their mother and placed under the guardianship of the State of Oregon.

Sarah Greene sued Camreta and Alford for, among other things, violating the Fourth Amendment when they seized and interrogated S.G. in a private office at her school for two hours without a warrant, probable cause, or parental consent. Greene also sued the school district and the County. The district court granted summary judgment to all defendants.

The Greens appealed to the Ninth Circuit Court of Appeals. Camreta and Alford did not deny that the interview constituted a "seizure" for purposes of the Fourth Amendment. They argued, however, that the seizure was reasonable, and did not require a warrant. The Court of Appeals framed the issue as: "whether an in-school seizure and interrogation of a suspected child abuse victim is always permissible under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant."

The Court of Appeals noted that it had not addressed this specific question before, but in a

similar case had held that the seizure and interrogation of a suspected child abuse victim in her home without a warrant violated the Fourth Amendment. Camreta and Alford argued that the analysis of whether the seizure was reasonable was different because the interrogation occurred on school grounds. They relied on a U.S. Supreme Court case, *New Jersey v. T.L.O.*, which provides that searches and seizures which occur in schools are subject to a lower standard than searches and seizures which occur outside of school grounds. *T.L.O.*'s holding was based on the reasoning that the Fourth Amendment's warrant requirement was "unsuited to the school environment" because it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Camreta and Alford argued that this reasoning should be applied to all searches and seizures in public schools, regardless of the official who conducts the search or seizure. The Court of Appeals disagreed.

The Court of Appeals found that the analysis in *T.L.O.* was limited to searches carried out by school officials. In fact, in *T.L.O.* the Supreme Court stated that it was "expressing no opinion" regarding the legality of searches and seizures conducted for law enforcement purposes. As a result, *T.L.O.*'s holding was not controlling here, because S.G. was interrogated by a social worker and a deputy sheriff without the involvement of school officials. The court also noted that the ability to search or seize students without a warrant is based on the "special needs" of a school to maintain order and discipline on school grounds. Here, the interrogation was not for the purpose of determining if S.G. was acting improperly or violating school rules. Her interview was incident to an investigation of a person who did not attend the school. Thus, no "special need" was implicated by her interview.

Camreta and Alford also raised another "special needs" argument. They claimed that a state's need to protect children from sexual abuse "justifies a departure from both the warrant and probable cause requirements" of the Fourth Amendment. A "special needs" case is analyzed by determining whether the government has identified some need "beyond the normal need for law enforcement." Camreta and Alford argued that this was such a case, due to the nature of the allegations, and also because the seizure was incident to an administrative determination by the Department of Human Services, rather than a law enforcement investigation.

The Court of Appeals noted that, in previous cases, traditional Fourth Amendment protections have not been relaxed for administrative searches when the

main purpose of the search or seizure was to gather evidence for use in subsequent criminal proceedings or where law enforcement personnel were substantially involved in the search or seizure. Here, both of these circumstances were present. Law enforcement was actively investigating the allegations of sexual abuse at the time of the interview. Moreover, law enforcement personnel was present at the interview in question.

Finally, Oregon law provided that both law enforcement and the Department of Human Services were involved in administrative determinations and actions related to child abuse. The Court of Appeals held, then, that "law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the 'special needs' doctrine."

The Court of Appeals' ultimate holding on the question of the Fourth Amendment violation was that the decision to seize and interrogate S.G. without a warrant or parental consent was unconstitutional. (In a footnote, the Court also noted that the fact that Camreta and Alford received permission from school officials to conduct an interview did not absolve them from liability.) However, the court found that Camreta and Alford were entitled to "qualified immunity."

Qualified immunity protects government officials from liability for civil damages when their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known. The burden of demonstrating that the right allegedly violated was "clearly established" at the time of the incident falls on the party bringing the suit. Here, the Court of Appeals found that the right of a student to be free from warrantless interrogation at school for the purpose of a child abuse investigation was not clearly established at the time Camreta and Alford interrogated S.G. The Court of Appeals cautioned, however, that as a result of this particular case, government officials and law enforcement are now on notice that such conduct is unconstitutional, so qualified immunity for similar conduct will no longer be available.

Greene v. Camreta (9th Cir. 2009) --- F.3d ----, 2009 WL 4674129



FIRST AMENDMENT

School District Policy Prohibiting Literature Distribution During Class Time and During Lunch Period Did Not Violate Students' First Amendment Right to Free Speech.

Four families in the Plano Independent School District alleged that, over a three year period, students were not allowed to distribute various religious materials in school, based on a District policy prohibiting such distribution. While the suit was pending, the District adopted a new policy which permitted distribution of materials only at the following times: 1) 30 minutes before and after school; 2) three annual parties; 3) recess; and 4) during school hours, but only passively at designated tables. Students are generally prohibited from distributing items at all other times and places. Middle and secondary students were permitted to distribute material in the hallways during non-instructional time and in the cafeteria during lunch. Elementary students were not permitted to distribute materials at these times, however. The policy did not specifically apply to religious materials, but to all distribution by students.

The District's governing board added a preamble to the policy which described the District's intent in adopting it. The purpose of the policy was, among other things, to decrease distractions and disruption, to increase the time available and dedicated to learning, to facilitate the safe, organized and structured movements of students between classes and at lunch, and to reduce litter. Based on the new policy, the District moved for summary judgment. The district court found the families' challenge to the 2004 policy was moot, since it was no longer in place. The court also found the 2005 policy constitutional. The families appealed.

The Fifth Circuit Court of Appeals found in favor of the District. The holding was based on the particular standard the court utilized in analyzing First Amendment protections. The parents claimed that the policy banned distribution of religious materials based on the particular content of the materials, and thus was subject to a high standard of review - i.e., that the distribution must cause a "substantial disruption" of school activities to be regulated.

However, the Court of Appeals determined that because the District's policy did not restrict items based on their content, the proper standard of review was the standard applied to content-neutral restrictions, also known as "time, place and man-

ner" restrictions. This standard was set forth by the Supreme Court in *United States v. O'Brien*, which holds that content-neutral policies must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication. In addition, the regulation may not burden substantially more speech than necessary to achieve the government's interest. This is a less difficult standard to meet than the standard the plaintiffs argued should apply.

Applying the *O'Brien* standard, the Court of Appeals found that the policy was reasonable and constitutional because the District had demonstrated a significant, legitimate interest in maintaining order, and decreasing disruption. (It is important to note that the District's addition of a preamble helped it establish a significant government interest in promulgating the policy.) The Court also found that the policy was "narrowly tailored" in that it applied only to distribution of multiple items to multiple students. Students wishing to pass a note to or share an item with one other person, for example, would not be prohibited from doing so. Finally, the policies provided ample alternative channels of communication, by providing students with several opportunities to distribute materials at recess, lunch, at specially designated tables and before and after school.

The Court of Appeals also found that the District was permitted to ban distribution of materials by elementary students in the cafeteria, due to the District's particular challenges in maintaining order in that area and the lack of maturity in the student population. Since the elementary school students still had several other opportunities to distribute literature, and given the District's important interest in maintaining order, the Court of Appeals held that the policy was constitutional.

Morgan v. Plano Independent School Dist. (5th Cir. 2009) --- F.3d ----, 2009 WL 4265219



■ EMPLOYMENT

LABOR RELATIONS

District Did Not Violate the Educational Employment Relations Act By Prohibiting Union From Distributing Political Endorsements in District Mailboxes.

The United Association of Conejo Teachers attempted to place a newsletter containing political endorsements into employee mailboxes at various school sites in the Conejo Valley Unified School District. Among other things, the newsletter endorsed a particular candidate for governor and three candidates for the District's governing board. The names and qualifications of other candidates were not listed.

The District prohibited the Union from using the mailboxes to distribute the newsletter on the ground that it contained partisan campaign materials in violation of Education Code Section 7054. Section 7054 provides that no school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including but not limited to any candidate for election to the governing board of the district.

The Union filed an unfair practice charge with the Public Employment Relations Board alleging that the District had interfered with the Union's rights and violated the Educational Employment Relations Act (EERA). The Board agent dismissed the charge and PERB affirmed the dismissal.

PERB cited to the recent California Supreme Court *San Leandro Unified School District* case, which addressed a similar situation. In *San Leandro*, the California Supreme Court found that the broad term "equipment" in Section 7054 encompassed mailboxes specially constructed at taxpayer expense to serve as a school's internal communication channel, which one group may not use to its exclusive political advantage. The California Supreme Court concluded that a rule prohibiting candidate endorsement literature in school mailboxes is a reasonable regulation lawful under EERA because it enforces the directive of Section 7054.

United Ass'n of Conejo Teachers v. Conejo Valley Unified School District (2009) PERB Dec. No. 2054 [33 PERC 136].

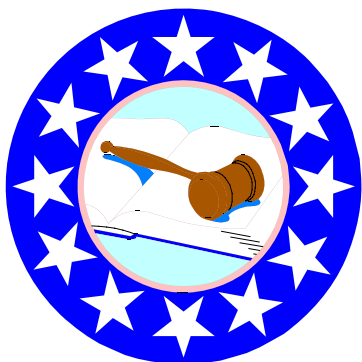
PERS RETIREMENT

In Three Agencies CalPERS Reverses Decisions To Reduce Retiree Benefits

Steve Berliner, of our Los Angeles Office, successfully appealed three different decisions by CalPERS reducing the retirement benefits of retirees at three agencies. In all three matters, CalPERS reversed its decision in response to the written appeals, and no hearing or further litigation was required.

In the first two, CalPERS reduced the reported final compensation by approximately \$2,000 and \$3,000 per month respectively. This decrease would result in reductions of retirement benefits of similar amounts. CalPERS had determined that the excluded compensation was "final settlement pay", which are payments made in excess of regular pay given in contemplation of a separation from employment, such as a planned retirement. The employers both filed written appeals with CalPERS and requested formal hearings, arguing that the definition of final settlement pay was not met under either set of facts. In response, CalPERS reversed its decisions, provided the relief requested and did not require a hearing.

In the third matter, CalPERS reduced the final compensation of a non-safety employee by 5% (the amount of a recent pay increase), asserting that the 5% represented an excluded conversion to compensation of non-reportable benefits. The key factor in CalPERS' initial decision was that the resolution granting the increase indicated that it was given in lieu of the benefit, which was simultaneously eliminated. The employer argued that the benefit that was eliminated was permanently eliminated, not just for a limited period of time, and therefore, was not a conversion of an excluded benefit. As in the previous two matters, CalPERS agreed with the legal arguments in the employer's appeal and reversed its decision without requiring a hearing.



HARASSMENT

Harassment That Stopped As A Result Of Employer Action, And Subsequently Resumed, Did Not Constitute A Continuing Violation Bringing It Within The 180 Day Limitations Period.

Jelinda Stewart worked for the Mississippi Transportation Commission (MDOT). Her supervisor, Jerry Loftin, made sexually explicit comments to her from the start of her employment. He would "hit" on her constantly and he tried to kiss her on several occasions. In September 2004, Stewart complained to Loftin's supervisor about the harassing conduct and Loftin was reprimanded. The MDOT also removed Stewart from Loftin's supervision. For sixteen months, Loftin's harassment ceased. In December 2005, Stewart's supervisor retired and Loftin got his job. Loftin told Stewart that they should be sweet to each other and over the course of a month, he told Stewart that he loved her approximately six times.

Stewart complained about the behavior and the MDOT immediately launched an investigation and placed Stewart on paid administrative leave while the investigation was pending. When the investigation was over, Loftin was moved to a different building and Stewart was reassigned to Travis Boyle. She retained the same position, salary and duties, but her workload increased significantly and she was given greater responsibility. Stewart claims that other employees were told not to fraternize with her, that she was not allowed to close her office door, and that the locks on her door were changed.

Stewart sued the Commission for sexual harassment, maintaining a hostile work environment, and retaliation in violation of Title VII. The district court granted summary judgment in favor of the MDOT. The Fifth Circuit Court of Appeals affirmed.

A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. A charge must be filed with the EEOC within 180 days of the alleged unlawful employment practice. The continuing violation doctrine allows a plaintiff to file suit based on events that are within and outside of the statutory time period

if the various acts constitute one unlawful employment practice. However, the continuing violation doctrine requires that the violation be continuing. An intervening action by the employer will sever the acts that preceded it from those subsequent to it, precluding liability for preceding acts outside the filing window.

Here, because the MDOT immediately investigated the harassing behavior in 2004 and the harassment stopped for 16 months, Stewart could not rely on the prior incidents as part of her harassment claim. The MDOT's action was reasonably calculated to end the harassment and, in fact, did so. It is immaterial that the harassment resumed much later due to a subsequent decision unrelated to the remedial action of reassigning Stewart. And the 2006 incidents, alone, were not enough to state a claim for a hostile work environment. Although Stewart found that conduct subjectively offensive, the Fifth Circuit held that the conduct was not objectively severe or pervasive enough to support a genuine issue of sexual harassment.

The Court also found there was no retaliation. Although Stewart was placed on administrative leave, she was paid for the three week duration and she was not required to use her accumulated leave time. Moreover, there was no stigma attached to the leave. Thus, it was not an adverse action. Likewise, Stewart's reassignment to a new supervisor was not an adverse action. Her job title, grade, hours, salary and benefits were not affected. Although she was given more work and responsibility, Stewart thrived, managed the workload well and received a promotion in 2007. Her success confirms that her transfer was not adverse in nature.

Stewart v. Mississippi Transportation Comm'n (5th Cir. 2009) ___ F.3d ___ [2009 WL 3366930].

RACE DISCRIMINATION

Black Firefighter Sues City Of New Haven Claiming That Lieutenant Promotion Exam Had A Disparate Impact.

In 2003, Michael Briscoe, who is African-American, applied for a promotion to lieutenant with the City of New Haven, Connecticut fire department. The written portion of the exam constituted 60 percent of each candidate's overall score and the oral portion counted for 40 percent. Briscoe scored the highest of the 77 candidates on the oral portion of the exam, but his overall rank

was 24th because he did not score well on the written exam.

The City initially refused to use the results of the promotional exam because the City found that the scores appeared to disproportionately benefit Caucasian candidates. As we reported in our **August 2009 issue of *Education Matters***, in *Ricci v. DeStefano* the U.S. Supreme Court ruled that the City had to certify the results of the promotional exam because an employer's fear of litigation by racial minorities cannot justify race discrimination against white employees unless there is a strong basis in evidence for believing that the minorities could prove a disparate impact claim.

Less than four months after the *Ricci* decision, on October 15, Briscoe who was one of the unsuccessful minority candidates in *Ricci*, sued the City alleging in his complaint that the oral portion of the exam is a better method to assess managerial and leadership skills and would have less disparate impact on African Americans. He further alleged that the norm among public safety agencies is to weigh the oral component of the exam at 70 percent. The top 13 ranked candidates from the 2003 written exam were all white, and none of them scored well on the oral exam. Briscoe contends that if the oral exam had comprised of 70 percent of the overall score, he would have ranked fourth overall and there would be three African Americans among the top 12 candidates.

This lawsuit, which is presently being litigated in the federal district court in Connecticut, is an early "fallout" from the *Ricci* case decision. We will keep you advised.

Briscoe v. New Haven (D. Conn. Oct. 15, 2009) Case No. 3:09cv1642.

DISABILITY DISCRIMINATION

Employee Could Not Claim Failure To Accommodate For Period Prior To The Time She Advised The Employer Of The Specific Accommodation She Needed.

Renae Ekstrand successfully taught at Somerset Elementary School for the Somerset School District for several years. For 2005-2006, based on her request, the District moved her from kindergarten to the first grade. The school reassigned her to a first-grade classroom with no exterior windows. Ekstrand told the principal that she had seasonal

affective disorder, a form of depression, and would have difficulty working in a room without natural light. She requested to transfer to a classroom with natural light several times prior and during the first several weeks of the school year. Although there were two alternate rooms with exterior windows available, the District did not change Ekstrand's classroom.

Ekstrand began by identifying the lack of natural light as an issue that would impair her ability to function, but soon identified other issues that exacerbated her depression, such as noise distractions from the adjacent common area, inadequate ventilation, and the untimely manner in which the District installed various educational necessities, such as bulletin boards, a map, a desk, and a locking cabinet. The District worked with Ekstrand to fix these issues but did not reassign her to a different classroom.

After the start of the school year, Ekstrand began experiencing fatigue, anxiety and other symptoms of depression. On October 17, she sought medical attention and went on a leave of absence for three months. While on leave, she twice requested a room switch. Her depression worsened and she was unable to return to the District for the remainder of the school year and the following school year.

Ekstrand sued the District for failing to accommodate her in violation of the Americans with Disabilities Act (ADA). The district court granted summary judgment in favor of the District. The Seventh Circuit Court of Appeals reversed in part and affirmed in part.

In order to establish a failure to accommodate claim, Ekstrand had to present evidence showing that she attempted to engage in an interactive communication process with the District to determine a reasonable accommodation, and that the District was responsible for any breakdown that occurred in that process. When there is a communication breakdown, the court isolates the cause of the breakdown and then assigns responsibility. Courts have found that mentally disabled employees must make their employers aware of any non-obvious, medically necessary accommodations with corroborating evidence such as a doctor's note, or at least orally relaying a statement from a doctor, before an employer may be required under the ADA's reasonableness standard to provide a specific accommodation the employee requests.

The Seventh Circuit found that the District was aware of Ekstrand's disability, but was not aware that natural light was a necessary treatment for sea-

sonal affective disorder until November 28, 2005, when Ekstrand's psychologist advised the District that natural light was the key to her improvement. Thus, the District did not fail to reasonably accommodate Ekstrand prior to November 28 when the District responded to her other requests for accommodation but not the classroom transfer. However, after November 28, a reasonable jury could find that the District failed to reasonably accommodate Ekstrand because it did not provide her a room with natural light.

Ekstrand v. School District of Somerset (7th Cir. 2009) 583 F.3d 972.

PREGNANCY DISCRIMINATION

Court Remands For Retrial Jury Award For Pregnancy Discrimination Because Of Trial Court's Erroneous Mixed-Motive Jury Instruction.

In October 2004, the City of Santa Monica hired Wynona Harris as a bus driver trainee. Shortly into her 40-day training period, she was involved in a "preventable" accident. The City's guidelines state that preventable accidents are an indication of unsafe driving and those who drive in an unsafe manner will not pass probation. In mid-November 2004, Harris successfully completed her training period, and the City promoted her to the position of probationary part-time bus driver. As a probationary driver, Harris was an at-will employee. During her three month probation period, Harris had a second preventable accident.

On February 18, Harris reported late to work and consequently earned her first "miss-out." A miss-out occurs when an employee fails to give her supervisor at least one hour's notice that he or she will not be reporting for his or her assigned shift. Each miss-out or late report incurs 25 demerit points. Harris' supervisor testified that a probationary employee faces termination if he or she accumulates 50 demerit points in any rolling 90-day period. On March 1, Harris received a performance evaluation with an overall performance rating of "further development needed." Her supervisor allegedly told her that her rating would have been "demonstrates quality performance" but for the accident. The evaluation also says "Keep up the great job!" under "goals to work on during the next review period." On April 27, Harris incurred a second miss-out. In early May, the Transit Services Manager told the Assistant Director that Harris was not meeting the City's standards for continued

employment because she had two miss-outs, two preventable accidents, and had been evaluated as "further development needed."

About one week later, Harris walked by supervisor George Reynoso. Reynoso told Harris to tuck in her shirt because it was hanging loose, and Harris told Reynoso that she was pregnant. Reynoso then asked her to get a doctor's note clearing her to continue to work. A few days later, Reynoso attended a meeting and received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list, and she was subsequently terminated.

Harris sued the City alleging sex discrimination and that the City terminated her because of her pregnancy. At trial, the City asked the Court to instruct the jury on the City's "mixed-motives" defense. Under the mixed motives defense, even if the employer's action was motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish that its legitimate reason, standing alone, would have induced it to make the same decision. Although there was substantial evidence of Harris' deficient performance which, standing alone, lawfully permitted the City to discharge her, the trial court refused to issue the mixed motives jury instruction, and the jury returned a verdict in favor of Harris. The trial court denied the City's motion for judgment notwithstanding the verdict and a new trial. The California Court of Appeal reversed the trial court, set aside the jury verdict, and remanded the case for a new trial.

The Court found that the trial court's refusal to issue the mixed motives jury instruction was erroneous and prevented the City from establishing that it would have terminated Harris for legitimate reasons alone, notwithstanding discrimination. Before learning of Harris's pregnancy, the City had documented five performance issues: two preventable accidents, two miss-outs, and a performance evaluation warning "further development needed." As an at-will employee, the City could have terminated Harris for any of these five issues. By failing to instruct the jury on the mixed motives defense, the court denied the City a complete defense had the jury found that the City would have terminated Harris for performance reasons even if she had not been pregnant. The jury was improperly instructed that if it found that Harris' pregnancy was a motivating factor, the City was liable for discrimination.

Harris v. City of Santa Monica (2009) 101 Cal.Rptr.3d 61.

SEXUAL HARASSMENT

Supervisor's Outrageous Sexual Harassment Constituted Constructive Discharge Of Female Employee, And Entitled Her To Damages.

Brooke Anderson began working as the front office manager for Artifer U.S.A. in late December 2006. Her supervisor was Ramez Suliman. Suliman routinely made sexually explicit comments to Anderson about one of the company's female sales staff. Suliman persistently commented on how beautiful and hot Anderson looked despite her objections. In addition, he installed a webcam on Anderson's computer pointed at her chest. Every time she removed the camera, he would put it back so it would face her chest.

Suliman gave Anderson unwelcome gifts, like money to buy sexier clothes and a bottle of wine so she and her husband would have sex. Suliman went to Anderson's home, said she looked good and grabbed her toward him. When Anderson's husband was out of town, Suliman called Anderson, tried to get her to meet him, and sexually propositioned her. The next work day, he told Anderson that he was really pissed at her and that after he got off the phone with her he had to have sex with another woman in order to stop thinking about her. After Anderson walked away, she heard Suliman violently pull an office door frame off its hinges and the door splintered. Anderson left work and never returned. Suliman subsequently left her over a dozen angry voicemail messages.

Anderson filed a charge with the Department of Fair Employment and Housing (DFEH) for sexual harassment, sex discrimination, and failure to prevent harassment. After an evidentiary hearing, the DFEH ordered the Company and Suliman to pay Anderson over \$60,000 in damages and an administrative fine of \$25,000.

The DFEH found an abundance of evidence that Suliman sexually harassed and discriminated against Anderson. This unlawful conduct included frequent comments about Anderson's personal appearance and insinuations about her sex life with her husband. Suliman also gave Anderson unwanted gifts to buy sexier clothing and to enhance her sex life. Moreover, Suliman's sexual conduct included unwanted physical grabbing and sexual propositions. As a result of Suliman's conduct, Anderson was anxious, nervous, and frightened.

For a constructive discharge, the employer must

either intentionally create or knowingly permit working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. Here Anderson was constructively discharged as a result of Suliman's verbal assaults, physical grabbing, sexually explicit telephone calls and comments, and violent reaction. Suliman created working conditions so intolerable that a reasonable person in Anderson's situation would have no option other than to resign.

The Company failed to take all reasonable steps to prevent sexual harassment because it failed to provide a copy of its anti-discrimination and anti-harassment policy to Anderson, and failed to post the FEHA-mandated notices advising its employees of their rights and responsibilities concerning complaints of discrimination or harassment. Moreover, the Company and Suliman never undertook training in sexual harassment or discrimination prevention, nor trained their employees.

Dept. Fair Empl. & Hous. v. Artifer U.S.A. (Sept. 30 2009) No. 09-05-P, FEHC Precedential Decs. _____, CEB ___, p. ___.)

Note:

The last paragraph makes clear that here the employer failed to take any of the requisite steps to avoid, and to promptly address, sexual harassment in the workplace. The result would likely have been different had the employer's policies and actions been otherwise.

REQUIRED EEOC POSTING

Employers Must Post The EEOC's New Workplace Poster Which Complies With The Requirements Of The New Genetic Information Nondiscrimination Act And ADA Amendments Act.

The Equal Employment Opportunity Commission has revised and published the workplace notice that employers covered by federal anti-discrimination laws must post. The new notice includes requirements set forth by the new Genetic Information Nondiscrimination Act and the ADA Amendments Act.

The EEOC states that to comply with the posting requirements under the federal civil rights laws, employers can download and print an "EEO is the Law" poster supplement, provided on the EEOC's website, and post that document alongside the EEOC's September 2002 edition of the poster. In the alternative, employers can download, print, and post the November 2009 version of the EEOC poster.

Employers can print the "EEO is the Law" supplement at:
http://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf

Employers can print the November 2009 edition of the poster at:
http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf

Employers can also order copies of the new posters in English, Spanish, Chinese, and Arabic from the EEOC. Information on ordering posters is available at:
<http://www1.eeoc.gov/employers/poster.cfm>

FAMILY MEDICAL LEAVE ACT

Department Of Labor Publishes Frequently Asked Questions Regarding Pandemic Flu And Its Interaction With The Family And Medical Leave Act.

On November 13, the Department of Labor (DOL) published frequently asked questions (FAQs) regarding the effect of pandemic flu under the Family and Medical Leave Act (FMLA). The FAQs address, among other things, whether an employee can take FMLA leave to care for a family member infected with the flu and whether an employer can require an employee who is showing symptoms of pandemic flu to go home. The DOL encourages employers to review their leave policies and consider providing increased flexibility to their employees and their families.

A full copy of the DOL's publication "Pandemic Flu and the Family and Medical Leave Act: Questions and Answers" can be found at:
http://www.dol.gov/whd/healthcare/flu_FMLA.pdf

Employee Who Retired Was Not Constructively Discharged Where School Officials Made Isolated Comments Suggesting That He Retire Early Due To His Health Problems.

Felix Lara was a custodian/building operator for Unified School District #501 in Kansas. During his last few years of employment, he suffered ill health and took three months of Family and Medical Leave Act (FMLA) leave in 2002 and 15 weeks of leave in March 2004, including 12 weeks of FMLA leave. In September 2004, he suffered an abdominal hernia at work and missed almost three months of work while on workers' compensation leave. On September 24, 2004, Lara sent the District notice of his intent to retire in August 2005.

Lara sued the District for age discrimination and FMLA retaliation. The district court granted summary judgment in favor of the District. The Tenth Circuit Court of Appeals affirmed.

For a discrimination or retaliation claim, a plaintiff must show that he or she was subjected to an adverse action. However, Lara was not terminated by the District, but rather he retired. Lara claims that he was actually discharged based on assertions of undesirable treatment at work. But an actual discharge does not occur when the employee chooses to resign rather than work under undesirable conditions. And to show that he was constructively discharged, Lara would have to show that the District deliberately made or allowed his working conditions to become so intolerable that the employee has no other choice but to quit.

Lara offered evidence that the principal told him that he was having a streak of bad luck with his health and he hoped it would not continue. The human resources director, Jill Lincoln, also allegedly told him he was "too old" and was "getting on in age" and should consider early retirement because he was missing too much work, having too many medical problems, and costing the District money. Lincoln also told Lara that if he did not opt for retirement, she would transfer him to a District service center. Lara admitted that he did not know what duties he would be assigned at the service center and whether his pay would be effected. The principal also told Lara that he was costing the District quite a bit of money and that, with his health problems, he should retire and enjoy the good life. However, the principal never threatened him. No school official made any retirement-related comments to Lara after September 2004.

The Tenth Circuit found that Lara was not constructively discharged because the school officials made only isolated remarks about Lara's retirement plans, none of which were threatening or harassing. For an employee to be constructively discharged, there must be aggravating factors that make staying on the job intolerable. Although Lara alleges that Lincoln threatened to transfer him if he did not take early retirement, there is no evidence that the transfer would have had any materially adverse consequences on his working conditions. A lateral transfer is not an adverse employment action.

Lara v. Unified School District # 501 (10th Cir. 2009) 2009 WL 3382612.

DUE PROCESS

College Administrator Publicly Terminated For Dishonesty Was Entitled To Post-Termination Name-Clearing Hearing.

Douglas Rush was the President of Ozarka College in Arkansas. The Board of Trustees began questioning Rush's performance when a committee he oversaw made suspicious purchases in violation of state law, and when he failed to follow Board policy and procedure during a nonrenewal of a teacher's contract. The Board questioned Rush about these incidents during two meetings. The press subsequently asked Rush about whether the Board was holding illegal meetings, and Rush responded that he believed the Board had held two illegal meetings.

In closed session, the Board discussed Rush's employment contract and Rush had the opportunity to respond. After the closed session, the Board resumed the open meeting and voted to terminate Rush's contract for dishonesty, insubordination, failure to comply with state laws, and willful disregard of Board policy after being warned that this would not be tolerated. Rush did not ask to speak during the open session. However, a month later he requested a name-clearing hearing and the Board denied the request.

Rush sued the Board members alleging that they retaliated against him for speaking to the press and violated his due process rights. The district court awarded the Board members summary judgment on Rush's First Amendment claim, but denied them qualified immunity on the due process claim because Rush's right to a name-clearing hearing was clearly established. The Eighth Circuit Court

of Appeals affirmed.

To establish an unconstitutional liberty interest deprivation, the plaintiff must show that: (1) he was stigmatized by the statements; (2) those statements were made public by the employer; and (3) he denied the stigmatizing statements. Here Rush's employment was terminated in an open session of the Board for alleged misconduct including dishonesty - a stigmatizing charge. Thus, the Board violated his liberty interest.

A government official is entitled to qualified immunity even if he or she violates an individual's rights if the right is not clearly established so that a reasonable official would not understand that he or she is violating that right. The Board members argued that it was objectively reasonable for them to believe that a second hearing was not required because Rush had an opportunity to respond during closed session. However, a name-clearing hearing must occur at a meaningful time and in a meaningful manner. Here Rush did not have an opportunity to respond after the stigmatizing statements were made. In addition, the closed session was not open to the public, so Rush was not given the opportunity to rebut the allegations to everyone who heard them. As Rush had a right to a post-termination name-clearing hearing and that right was clearly established, the Board members were not entitled to qualified immunity.

Rush v. Perryman (8th Cir. 2009) 579 F.3d 908.

FIRST AMENDMENT

U.S. Supreme Court Precedent Establishing The Boundaries Of Public Employee Free Speech Rights Under The U.S. Constitution Apply Equally To Those Rights Under The California Constitution.

Michael Kaye was a law librarian with the San Diego County Public Law Library. In March 2006, he wrote a lengthy email to his supervisor, which he copied to his coworkers. In the email, Kaye criticized the management of the library's reference department, including recent schedule changes. He also accused the management of being vindictive and unprofessional. The Library subsequently terminated Kaye for insubordination and serious misconduct.

Kaye submitted a post-termination administrative

appeal to the Board of Trustees. A senior deputy from the County Counsel's office then contacted Kaye advising him that his employment was at-will by statute and his only right to appeal was through the Library's grievance procedure. The senior deputy's letter did not comment on the merits of Kaye's discharge. Kaye submitted a grievance and argued his position before the Board at an open session on November 29. The senior deputy attended the open session, but did not comment on or respond to Kaye's arguments. Rather, the Library director responded to Kaye's arguments. The Board deliberated in closed session with the senior deputy present. The Board reconvened in closed session on December 4 and upheld the termination.

Kaye sued the Board and the Library alleging, among other things, that his discharge violated the free speech clause in the California Constitution and that the Board violated the Brown Act. The trial court granted summary adjudication in favor of the library. The California Court of Appeal affirmed.

In *Garcetti v. Ceballos*, the U.S. Supreme Court set forth a two step analysis for public employee free speech cases. First, the court must determine whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment claim. If the answer is yes, then the question becomes whether the government entity had an adequate justification for treating the employee differently from any other member of the general public.

Kaye conceded that if *Garcetti* applies to his claim, his claim fails. But he argued that *Garcetti* should not apply to violations of the California Constitution's free speech clause because it is broader than its federal counterpart. The Court disagreed and found no reason *Garcetti* should not apply, pointing out that California courts routinely follow Supreme Court precedents in addressing public employee free speech matters.

Kaye also argued that the Board violated the Brown Act by using the same attorney who advocated on behalf of the Library to advise the Board in closed session. However, the Brown Act allows the Board to meet in closed session regarding employee discipline or dismissals. Moreover, the Brown Act does not limit whom the Board may choose to advise it when it conducts meetings involving employment matters.

To the extent that Kaye contends that the Board's choice of advisory counsel violated his due process rights, his claim would also fail. There is no evidence that the senior deputy county counsel actual-

ly represented the Library. The attorney only spoke to Kaye about the procedural requirements for him to challenge his dismissal and the attorney's actions were consistent with those of a legal adviser to the Board and not an advocate for the Library.

Kaye v. Board of Trustees of the San Diego County Public Law Library (2009) ___ Cal.Rptr.3d ___ [2009 WL 3738795]

■ GOVERNANCE/ADMINISTRATION

PUBLIC MEETINGS

First Amendment Does Not Protect Member Of The Public Ejected From City Council Meeting Whose Speech And Conduct Was Disruptive.

Robert Norse was ejected from two meetings of the Santa Cruz City Council -- one in 2002 and one in 2004. In 2002, Norse had given the mayor a Nazi salute in support of a disruptive member of the audience who had refused to leave the podium after the mayor ruled that the speaker's time had expired, and that the portion of the meeting devoted to public comments had ended. Norse's salute was obviously intended as a criticism or condemnation of the mayor's ruling. In 2004, Norse was engaged in a parade about the Council chambers protesting the Council's action, and his conduct was clearly disruptive. On both occasions, the Council ejected Norse based on the Council's rule authorizing removal of any person who interrupts and refuses

to keep quiet...or otherwise disrupts the proceedings of the Council.

Norse sued the City, the mayor, and the councilmembers alleging violation of his First Amendment rights. The district court dismissed the case. The Ninth Circuit Court of Appeals initially reversed, finding that there was no way of assessing the reasonableness of the mayor's actions in the 2002 meeting. On remand, the district court ruled that the mayor acted reasonably in ordering both of Norse's ejections because he was supporting the conduct of disruptive individuals, and the court granted the individuals qualified immunity. On appeal, the Ninth Circuit affirmed.

Presiding officers have great discretion in enforcing reasonable rules for the orderly conduct of meetings. But the rules may not be enforced to suppress a particular viewpoint. Here it is clear that the salute was in protest of the mayor's enforcing the time limitations and in support of the disruption that had just occurred. The ejection was not on account of any permissible expression of a point of view. Consequently, the councilmembers did not violate Norse's constitutional rights by ejecting him from the meeting.

Moreover, even if the Council had violated Norse's rights, it would not have been clear to a reasonable person in the mayor and Council's position that the ejection was unlawful, given the difficult circumstances and threat of disorder that was presented by the disruptions. Thus, they would have been entitled to qualified immunity.

Norse v. City of Santa Cruz (9th Cir. 2009) ___ F.3d ___ [2009 WL 3582694].





Firm Publications

Steven Berliner and **Camille Townsend** of our Los Angeles office co-authored the article, "New Law Proposes Paid Sick Leave for H1N1 Virus" which appeared in the November 16, 2009 issue of the Los Angeles/San Francisco Daily Journal. The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "H1N1".

Suzanne Solomon and **Cynthia O'Neill** of our San Francisco office co-authored the article, "Employment Testing: Avoiding the Pitfalls of *Ricci v. Destefano*" which appeared in the November 2009 issue of the California Public Employee Relations Journal (CPEP). The complete article can be read online at <http://www.lcwlegal.com/newspublications/newsandpubsearch.asp> and search for the keyword "Ricci".

Compliant EEO Plans



From Model Plan to Your Plan: Developing Compliant EEO Plans That Work

California Community College Districts are required to develop their own Equal Employment Opportunity Plans- which must be compliant with the State Chancellor's regulations, the Education Code, the California Constitution (including Proposition 209) and federal law. Unfortunately, these sources of law (and the cases that interpret them) are dynamic, conflicting and difficult to navigate.

Liebert Cassidy Whitmore has developed a three hour introductory-level workshop designed to walk supervisors and managers through each step in developing their EEO plans. The workshop will explain the current state of the law and offer participants practical suggestions for creating a compliant EEO Plan.

To schedule a training at your District, contact Anna Sanzone-Ortiz at (310) 981-2051 or asanzone-ortiz@lcwlegal.com.



FIRM PROFILE
Jennifer Rosner
Associate

Jennifer has extensive experience defending employers against harassment, discrimination, retaliation, and Section 1983 claims. She also has considerable experience with law enforcement issues, including the Public Safety Officers Procedural Bill of Rights Act, and defending law enforcement agencies in such areas as officer discipline and Pitchess Motion hearings.

Prior to joining Liebert Cassidy Whitmore's Los Angeles office, Jennifer practiced employment, business and general civil litigation. She has experience with managing cases from inception through trial and has served as lead counsel in both Superior and Federal Court cases.

Jennifer earned her Juris Doctorate from Loyola Law School in Los Angeles and her Bachelor of Arts in History from University of California, Los Angeles. While not practicing law, Jennifer enjoys playing tennis, traveling, reading and spending time with family.



Conference Brochure and Online Registration Now Available



Join us February 25 & 26, 2010, in historic San Francisco, CA for the **12th Annual LCW Public Sector Employment Law Conference**.

The 2010 conference will be at the Hyatt Regency San Francisco located on the Embarcadero waterfront which overlooks San Francisco Bay.

Conference registration is now available online at www.lcwlegal.com.
To make your hotel reservations online: <https://resweb.passkey.com/go/LCWL2>

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Workshop Training

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

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

Customized Training Presentations

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

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

Speaking Engagements

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

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

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

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



LIEBERT CASSIDY WHITMORE

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

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

Copyright ©2009, LIEBERT CASSIDY WHITMORE

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

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