LCW Liebert Cassidy Whitmore

Private Education Matters

News and developments in education law, employment law and labor relations for California Independent and Private Schools and Colleges.

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LCW NEWS

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STUDENTS

DISABILITY DISCRIMINATION

Claim May Proceed Where College Did Not Enact Accommodations Student Thought Were Accepted.

Jane Doe was a student at Skidmore College. During the summer between her second and third years, she began cognitive behavioral therapy. That fall, she failed two courses and in January of the next year, 2017, doctors diagnosed her with major depressive disorder and ADHD. Both Doe and her mother contacted an administrator in order to get the appropriate accommodations in place. The three women met and discussed accommodations that Doe's doctor recommended, including copying her parents on communications about missed assignments and distributing her course syllabi and grades to her parents.

There was some dispute as to which accommodations the College agreed to, with the College claiming it only agreed to let the parents know if Doe received a notice about a missed deadline or assignment. During her spring 2017 classes, Doe failed to turn in a final paper on time. The professor informed the ADA office via email and the office forwarded the information to Doe's parents. Doe then requested an extension and passed the course. In a history class, Doe missed a few deadlines and failed to turn in a crucial assignment. In that case, there was no message sent to the ADA office and Doe failed the class. Doe argued that if the accommodation had been properly provided by contacting the parents about the missed deadline, Doe would have been able to rectify the situation and turn in her work.

Doe sued the College, alleging violations of the ADA as a result of the College's failure to provide certain accommodations and failure to engage in the interactive process to develop alternative accommodations. She sought expungement of her failing grade and the opportunity to complete the requirements. The College argued that the accommodations it did agree to went above and beyond the ADA requirements and the others were unreasonable. An example of the accommodations that were requested but not enacted were copying the parents on all communications from professors and requiring all communications to be made via phone or text in addition to email. The College argued that part of their job was to teach students how to take responsibility for their own assignments and classes and it would alter the nature of the program to permit Doe to rely on her parents.

To state a claim under Title III of the ADA, Doe needed to show that she was disabled and the College discriminated against her by denying her the full and equal opportunity to enjoy its services. Discrimination can occur when qualified individuals are denied reasonable accommodations. The parties agree that Doe was disabled under the ADA. The court noted that academic institutions are generally awarded great deference in determining if an accommodation is reasonable. A

college does not need to provide every requested accommodation of the individual's choice. But, the court's analysis requires a fact-specific case-by-case inquiry to consider the reasonableness of the accommodations.

The court determined that Doe had satisfied her initial burden because there was no evidence that the College would have to fundamentally alter its academic requirements by granting the proposed accommodations. While the court was sympathetic to the College's stated goal of making sure students are self-sufficient and independent, that must be balanced against Doe's specific diagnoses and their impact on her ability to juggle deadlines. If those accommodations had been implemented at the beginning of the semester, the parents would have been made aware of each deadline and it would not have been left to the end of the semester when Doe had already missed the deadline.

As for the interactive process claim, the court here found that Doe did raise a triable issue of fact. She alleged that the College agreed to implement the accommodations, but then without warning or explanation, unilaterally implemented only half of the discussed accommodations. By failing to communicate those changes, the College may not have engaged in the interactive process in good faith. Doe's claim was allowed to proceed.

Doe v. Skidmore College, 2018 WL 3979588.

NOTE:

The interactive process discussion in this case provides helpful insight into the importance of providing written confirmation to those who request accommodations regarding which accommodations were discussed and which accommodations were agreed to by the parties. This not only provides a written record of the agreed upon accommodations, but also can serve as evidence that the private school or college did engage in the process in good faith.

DISCIPLINARY INVESTIGATION

Court Upholds University's Finding that Student Cheated on Exam When Based on Reasonable Inference of Evidence and When the Discipline Process Provided a Fair Hearing for the Student.

In May 2015, the professors and laboratory manager for a biology class at the University of Southern California submitted a report to the Office of Student Judicial Affairs and Community Standards. The report stated the professors believed John Doe, a student in the biology class, and a second student ("Student B") shared answers on the final exam through written notes on their examination booklets.

The University advised Doe that it was charging him with violating the University's Student Conduct Code regarding academic dishonesty. The University provided him with information about the student conduct review process and asked him to schedule a meeting with the review officer.

Doe requested a copy of the report, which the University provided. The University did not provide Doe copies of the examination booklets with handwritten answers, the multiple choice answer sheet, or chart showing the faculty's comparison of answers, but the University advised Doe he could review, but not copy, these documents.

Doe met with the review officer and described what happened from his perspective. He insisted he had not cheated, accused Student B of copying Doe's answers, and stated he had not studied for the exam with Student B. The review officer also spoke to Student B, who denied cheating but stated he had studied with Doe on at least one occasion. Based on the evidence, the review officer determined Doe engaged in the alleged academic violations. The University notified Doe that it was considering suspending him as a sanction because this was his second academy integrity violation.

The University advised Doe that he could have an attorney represent him in further proceedings. Later, Doe, along with his mother, reviewed his own exam booklet. Doe, along with his father, also reviewed Student B's exam booklet. Doe provided the University with the results of a polygraph exam in attempts to prove he did not share answers with Student B. Doe also submitted a character reference from a professor.

The review officer provided Doe with his written decision from the administrative review and advised him of his right to appeal to the Student Behavior Appeals Panel. The decision concluded that Doe engaged in academic dishonesty and identified specific pieces of evidence that contributed to the finding. The report also imposed a sanction of an "F" grade in the class, a two-semester suspension, and required Doe to attend and successfully complete an ethics workshop.

Doe appealed the review officer's decision to the Student Behavior Appeals Panel at the University. In the appeal, Doe argued the review officer's decision lacked evidentiary support, violated the procedural protections for students set forth in the University's Student Conduct Code, and imposed excessive sanctions. The panel rejected Doe's appeal. The Vice President for Student Affairs then reviewed the review officer's decision and the Panel's decision and approved the findings and sanctions imposed.

Doe filed a petition with a trial court requesting the court review the University's decision to deny his appeal and prevent the University from enforcing sanctions against him. The trial court agreed to suspend the sanctions against Doe pending further review.

Following briefing and oral argument, the trial court issued a decision granting Doe's petition and found the University's decision to impose sanctions was not supported by substantial evidence. The trial court ordered the University to vacate its administrative decision and the sanctions imposed on Doe. However, the trial court also concluded the University had provided Doe a fair administrative hearing because it provided Doe with clear notice of the allegations against him and he was informed of the University's written policies and procedures related to the administrative review process. Additionally, the University made all evidence it considered available to Doe, and Doe reviewed this evidence. Doe also had multiple face-to-face meetings with a representative of the University where he had the opportunity to object to the charges against him and explain his version of the facts. Finally, the trial court noted that the University fully complied with its policies and procedures and conducted a fair hearing. The University appealed.

Because the trial court prevented the University from suspending Doe, Doe completed his coursework and graduated in May 2017. However, the University refused to issue him a transcript pending resolution of its appeal. Doe filed a petition with the Court of Appeal to request the Court enforce the trial court's ruling. Doe argued withholding his degree and his transcript, which he needed to apply to medical school and to seek employment, violated the trial court's order that prevented the University from imposing sanctions against him. The University opposed Doe's petition, contending that it was not required to give Doe an "A" in the biology class while its appeal was pending. The Court of Appeal granted Doe's petition and directed the University to "(1) reinstate John Doe as a student in good standing, (2) issue a transcript showing the grade to which he would otherwise be entitled absent the allegation of cheating, (3) allow Doe to register for classes, if he would otherwise be entitled absent the cheating allegation, and (4) issue Doe a diploma, if he would otherwise be entitled to it absent the cheating allegation."

On the University's original appeal, the Court of Appeal considered whether the University "proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion."

The Court of Appeal looked closely at the evidence the University relied on when making its decision regarding the academic dishonesty violations against Doe. The Court of Appeal noted the following facts: Doe and Student B sat next to each other during the final examination, had the same version of the examination although adjacent students were supposed to have different versions, answered 46 of the 50 examination questions identically, and wrote large letter answers in the margins of the examination booklets that would be visible to the students sitting next to them. Although Doe and Student B insisted they generally wrote answers in the margins of multiple-choice examinations to facilitate checking their answers, the laboratory manager who reported the violation stated in the summary of the incident that neither of the students had written anything next to the multiple-choice questions on a different biology exam. In addition, Student B, who performed better on the final than his "C" academic average, while denying he had cheated, contradicted Doe's claim that the two of them had not studied together for the examination. Although the Court of Appeal acknowledged that these facts could have been the product of independent work, it held the University's conclusion that the facts were the result of cheating was a reasonable interference, grounded in evidence.

Doe argued the Court of Appeal should affirm the trial court's order reversing the University's decision because the University's decision-making process violated the University's own procedural rules and was fundamentally unfair. Specifically, Doe argued the University failed to timely provide him with his and Student B's examination booklets with lettering in the margins, the key evidence used against him, and chilled his right to gather information relevant to the cheating charge from witnesses.

The Court of Appeal found that Doe exercised his right to review the examination papers, and the procedure the University required for this review complied with its rules and satisfied the requirements for a fair hearing.

Doe's second complaint of procedural unfairness—that the University severely compromised his ability to gather evidence to defend against the charge of cheating—is based on the review officer's admonition when sending Doe a copy of the faculty report not to engage in inappropriate contact with the reporting individuals or other witnesses. Although Doe contends this warning deterred him from interviewing Student B, the examination proctors, and other students sitting near him during the examination, cautioning Doe to refrain from improper tactics when speaking to potential witnesses did not preclude him from reaching out to any of those individuals or to have one of his parents, who assisted him during this process, or a lawyer do so. The decision to refrain from appropriate contact with potential witnesses was Doe's alone. Furthermore, Doe did not raise this argument during his appeal to the Panel, so he forfeited the argument on appeal.

Ultimately, the Court of Appeal reversed the trial court's decision in USC's favor.

Doe v. University of Southern California, et al. (2018) __Cal. App.5th __ [2018 WL 4878834].

NOTE:

While private schools and colleges are not subject to the same constitutional due process standards as their public counterparts, they are still required to provide a fundamentally fair process. Private schools and colleges should make sure they have disciplinary procedures in place and that such procedures are followed consistently and carefully.

EMPLOYEES

ADA

The Americans With Disabilities Act Amendments Act Expanded the Scope of the ADA's "Regarded-As" Definition of Disability.

Herman Nunies worked for HIE as a five-gallon delivery driver in Kauai. His duties included loading and unloading the delivery vehicle and delivering five-gallon water jugs as well as occasionally assisting in the warehouse. Sometime in mid-June 2013, Nunies wanted to transfer to a part-time warehouse position. He said it was because of pain in his shoulder, but HIE claimed they were under the impression it was because he wanted to focus more on his side business. Nunies found another employee to swap positions with him.

Nunies's supervisor, Victor Watabu, told Nunies that the main office tentatively approved the switch on June 14, 2013. A few days later, Nunies informed Watabu about his shoulder pain. The worker's compensation paperwork stated June 17 as the reporting date of the injury. Two days after that, Nunies was told the switch would not go through and his last day of work would be July 3 because his position was being eliminated due to budget cuts. However, on June 26, Nunies saw an ad in the paper for the part-time warehouse position he was told no longer existed.

Nunies sued alleging violation of the ADA. The district court granted summary judgment for HIE on all claims. That court reasoned that Nunies did not have a disability under the ADA and that he did not establish that HIE perceived him as having a disability. Nunies appealed. To set forth a prima facie case of disability discrimination, Nunies needed to show that he was disabled within the meaning of the ADA, he was qualified to perform the functions of the job with or without reasonable accommodation, and HIE terminated him because of his disability.

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities of the individual, or that the individual has a record of such impairment or is regarded as having the impairment. The ADA does not define "physical or mental impairment." Under the ADAAA (ADA Amendments Act of 2008), an individual is regarded as having an impairment if

he establishes he has been subjected to a prohibited action because of the actual or perceived impairment whether or not the impairment actually limits or is perceived to limit a major life activity. Prior to these 2008 amendments, a plaintiff had to provide evidence that the employer subjectively believed the plaintiff was limited.

Based on the ADAAA, the appeals court held that it was error for the district court to require Nunies to present evidence that HIE believed Nunies was substantially limited in a major life activity. A reasonable jury could find that HIE effectively terminated Nunies because of its knowledge of his shoulder injury. The evidence showed everything was going fine and then days after learning about the shoulder injury, Nunies was fired and saw an ad for a job he was told did not exist.

HIE argued that the "regarded-as" definition of disability does not apply to "transitory and minor" impairments. However, the court noted the burden was not on Nunies to show his injury was not transitory or minor, but rather was on HIE to show it was.

With respect to the issue of having an actual disability, Nunies needed to show that his physical impairment substantially limits one or more major life activities. Nunies identified the activities of working and lifting. He was unable to lift his arm above chest height without experiencing stabbing pain and numbness. Therefore, the district court erred in concluding that Nunies did not meet the definition of having an actual disability under the ADA. The trial court's decision was reversed and the case remanded.

Nunies v. HIE Holdings, Inc. (2018) –F.3d--, 2018 WL 5660628.

REASONABLE ACCOMMODATIONS

Employee Had to Prove to the Jury that a Reasonable Accommodation Was Available.

Danny Snapp worked for Burlington Northern Santa Fe Railway Co. ("BNSF") as a trainmaster. However, after being diagnosed with sleep apnea, and undergoing two failed surgeries to correct the condition, a fitness for duty evaluation determined Snapp was totally disabled. Snapp took a disability leave for approximately five years until his disability benefits were discontinued for lack of evidence of a continuing disability. Snapp did not request reinstatement or request a reasonable accommodation during this time but instead demanded that BNSF reinstate his disability benefits. BNSF informed Snapp that he had 60 days to secure a position consistent with BNSF's long-term disability program. After he failed to do so, BNSF terminated Snapp's employment.

Snapp sued BNSF, claiming the company failed to accommodate his alleged disability in violation of the Americans with Disabilities Act. At trial, the jury decided in favor of BNSF, finding no disability discrimination occurred.

On appeal, the Ninth Circuit affirmed the jury's determination and rejected Snapp's claim that BNSF was responsible for proving that no reasonable accommodation was available to Snapp. The Ninth Circuit confirmed that to prevail at trial, an employee alleging disability discrimination due to the employer's alleged failure to accommodate must prove: 1) that the employee is a qualified individual; 2) the employer received notice of the employee's disability, and 3) a reasonable accommodation was available that would not create an undue hardship for the employer. Thus, Snapp's claim that it was BNSF's burden to prove a reasonable accommodation was available in order to avoid liability failed. The Ninth Circuit affirmed the jury's decision in favor of BNSF.

Snapp v. BNSF Railway Company (2018) 889 F.3d 1088.

Note:

California's Fair Employment and Housing Act (FEHA) provides employees and applicants greater rights than the ADA does. The FEHA, unlike the ADA, makes it unlawful for the employer to fail to provide an interactive process. Under the ADA, there is no standalone cause of action for failure to provide an interactive process; there is only liability if a reasonable accommodation was possible and the employer did not provide it. California employers must provide an interactive process upon an appropriate request to avoid liability.

MINISTERIAL EXCEPTION

Ministerial Exception Does Not Bar A Breach Of Contract Action If It Does Not Excessively Entangle The Court In Religious Matters.

Simpson University is a California religious organization that owns and operates a seminary to

educate clergy. The University is affiliated with the Christian and Missionary Alliance (C&MA). The Seminary courses include Biblical studies, Christian counseling, preaching, ministry leadership, and theological studies. Sarah Sumner was the Dean of the Seminary. Her employment contract provided that she would receive a clergy housing allowance and required her affirmation and acceptance of the University's Statement of Faith. Her job requirements included a commitment to Christ-centered education, a doctorate in ministry or a related field, and being licensed with the C&MA. While a Dean, she also taught religious courses in the seminary.

The relevant faculty handbook provided the process by which administrative faculty could be terminated. One of those reasons related to performance problems. Sumner was first terminated June 22, 2011, primarily for insubordination. She appealed that termination and was eventually reinstated. Following her reinstatement, Sumner began telling other University personnel to "tell the truth" about her initial termination. Acting Provost Robin Dummer wrote a letter to Sumner informing her that she had violated the protocols that were put in place when she was reinstated. Sumner replied that she was never given a list of protocols she was required to follow. Ten days later Dummer terminated Sumner's employment. Sumner sued for breach of contract, gender discrimination, defamation, invasion of privacy, and intentional infliction of emotional distress. She later dismissed the gender discrimination claim. The trial court granted summary judgment to the University on account of the ministerial exception. Sumner appealed.

The court assessed both whether Simpson University was a religious organization for the purpose of the ministerial exception, as well as whether Sumner qualified as a minister. The court looked at the University's bylaws describing it as a "Christ-centered learning community," its affiliation with C&MA, and its requirement that all employees participate in Christian services. The court even stated that courts are in general agreement that private religious schools are religious organizations for the purposes of the ministerial exception. The court agreed that the University qualified.

The court also found that Sumner was a minister for purposes of the exception. She was the dean of a theological seminary whose job included teaching religion courses and promoting the seminary through public appearances, including preaching. Sumner oversaw a team of employees whose job was to provide for the spiritual formation of the students. Even if some duties were administrative in nature, the school she was hired to oversee was dedicated to the training of the religion's own clergy.

In explaining the factors the court looked to regarding the ministerial exception, the court acknowledged that the landmark Supreme Court case on the matter expressly stated that it expressed no view on whether the exception bars breach of contract actions. Other non-California courts have held that contract actions are not barred if the interpretation of the contract does not require the court to resolve a religious question or controversy.

Here, the issue of Sumner's firing related to the issue of whether she was insubordinate. She claims she never knew there were protocols that had to be followed, and so if she was not aware of the protocols, she could not have been insubordinate. The court agreed that this type of dispute is not barred by the ministerial exception. Reviewing the contract cause of action would not require the court to "wade into doctrinal waters" because it does not concern Sumner's performance as a religious leader or a review of her religious qualifications.

The tort claims were different from the contract claim. The tort claims did relate to her performance as a religious leader and the court found this made those claims too close to her religious functions to allow the claims to move forward. The court reasoned that if it permitted the acts taken against Sumner to be framed as tortious acts, then the ministerial exception would be rendered meaningless. Only the breach of contract claim could proceed.

Sumner v. Simpson University (2018)—Cal.Rptr.3d--, 2018 WL 4579765.

NOTE:

This case provides important insight into how California courts would reason about what types of claims are not barred by the ministerial exception. Religious schools and colleges that employ ministers through the use of employment agreements should be prepared that breach of contract actions will not be treated as barred by the ministerial exception. This might be an important consideration when deciding whether to terminate an employee during a contract term or wait until the contract expires and chose instead not to offer a new agreement.

NEW LEGISLATION

New Legislation Will Impact Litigation of FEHA Claims and Employer-Employee Agreements.

In response to the "#MeToo" movement, the California Legislature passed a number of bills intended to protect employees from workplace harassment and discrimination under the Fair Employment and Housing Act (FEHA). On September 30, 2018, Governor Jerry Brown signed these bills into law.

Senate Bill 1300 (SB 1300) creates a new section under FEHA (Government Code Section 12923), which mandates the following:

> The "severe or pervasive" legal standard is clarified, so that a single incident of harassing conduct is now sufficient to create a triable issue of fact regarding the existence of a hostile work environment; this means it will be harder to dismiss harassment claims at the summary judgment stage;
>
> A plaintiff no longer needs to prove his or her "tangible productivity" declined as a result of harassment in a workplace harassment suit, and may instead show a "reasonable person" subject to the alleged discriminatory conduct would find the harassment altered working conditions so as to make it more difficult to work;
>
> Any discriminatory remark, even if made by a non-decisionmaker or not made directly in the context of an employment decision, may be relevant (i.e., admissible) evidence of discrimination in a FEHA claim; and
>
> The legal standard for sexual harassment will not vary by type of workplace, and courts will therefore only consider the nature of the workplace in a harassment claim when "engaging in or witnessing prurient conduct or commentary" is integral to the performance of an employee's job duties.

Finally, SB 1300 limits a prevailing employer's ability to recover attorney and expert witness fees unless a court finds a plaintiff's action was "frivolous, unreasonable, or totally without foundation."

In practice, these changes to the FEHA will make it much easier for plaintiffs to file, litigate, and win harassment and discrimination claims against California employers. Getting these types of claims dismissed prior to trial will, beginning January 1, 2019, be much more difficult. As Government Code Section 12923 now explicitly states, "[h]arassment cases are rarely appropriate for disposition on summary judgment."

Accordingly, it is vital that employers take effective corrective action immediately when claims of harassment and/or discrimination arise. Employers should also review their harassment and discrimination policies to ensure they are compliant with these changes to the FEHA.

SB 1300 prohibits an employer from requiring that an employee sign a nondisparagement agreement, confidentiality agreement, or any other document denying the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment. SB 1300 also makes it unlawful for an employer to require an employee waive FEHA rights or claims in exchange for a raise or bonus or as a condition of employment unless the release is a voluntary negotiated settlement agreement filed by an employee in court or an alternative dispute resolution forum, before an administrative agency, or through an employer's internal complaint process.

Senate Bill 820 (SB 820) prohibits confidentiality clauses in settlement agreements if they would limit the disclosure of factual information related to sexual assault, sexual harassment, or workplace harassment or discrimination based on sex.

Assembly Bill 3109 (AB 3109) prohibits a contract or settlement agreement entered into on or after January 1, 2019 from limiting a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract where the party has been required or requested to attend the proceeding.

Employers should note these restrictions on the use of certain clauses in employment contracts, settlement agreements, and other agreements between employers and employees. An employer's failure to comply with these restrictions will result in a finding that certain provisions of the written agreement are contrary to public policy and unenforceable, potentially leaving an employer open to liability.

SB 1300 allows, but does not require, an employer to provide "bystander intervention training" to enable bystanders to identify problematic behaviors in the workplace, including sexual harassment, and intervene as appropriate.

Employers should review all training materials and procedures to ensure they are satisfying not only their existing obligations, but also all new requirements established by these new bills.

We expect these legislative changes will have significant impact on existing litigation once they go into effect on January 1, 2019. Please consult with legal counsel about these new laws and their anticipated effects.

DFEH Provides Guidance on Impact of New SB 1343 Harassment Training Requirements: Some Questions Answered, Many Still Remain – Including Possibility that ALL Supervisory and Nonsupervisory Employees Need to Be Trained or Retrained Again in 2019.

Since 2005, Assembly Bill 1825 has required that private sector employers (including private schools and universities) with 50 or more employees provide two hours of sexual harassment training to supervisory employees within six months of assuming a supervisory position and again at least every two years. This has commonly been referred to as "AB 1825" supervisor harassment training and is codified under Government Code section 12950.1 and interpreted in the Department of Fair Employment and Housing's (DFEH) regulations at 2 C.C.R. § 11024.

As part of the 2018 Legislative Session, Governor Jerry Brown signed into law Senate Bill 1343, which expands existing harassment training requirements to lower the threshold down to 5 or more employees, and to mandate one hour of harassment training for nonsupervisory employees. While the law becomes effective January 1, 2019, it requires most existing nonsupervisory employees to undergo harassment training by January 1, 2020. In the case of temporary and seasonal employees, such training must be provided within certain timelines after January 1, 2020. To assist employers in satisfying this obligation, SB 1343 also directs the DFEH to develop and make available two interactive, online training courses – a two-hour training for supervisory employees and a one-hour training for nonsupervisory employees.

While on the surface, SB 1343 appears to simply expand mandated harassment training requirements to include all nonsupervisory employees, the implementation of this new law has raised a number of questions for employers. Among them, how employers can administer a training program that will comply with the new requirement and whether any previous mandated or optional harassment trainings provided to employees will satisfy this new law.

On November 26, 2018, the DFEH announced a new online resources page for employers (**https://bit.ly/2DZA1oG**), which includes information on required postings and other tools for addressing California's discrimination and harassment laws. Also included is a "*Sexual Harassment Prevention Training and SB 1343 FAQ*" to assist with SB 1343 compliance (**https://bit.ly/2EU3OPg**).

While the DFEH's SB 1343 FAQ sheet addresses some interpretation questions, it leaves many questions unanswered. In addition, the DFEH's SB 1343 FAQ sheet implies that all supervisory employees (with the exception of temporary or seasonal employees) will need to be trained or retrained in 2019, regardless of whether they were provided compliant harassment training in 2018.

Responding to some common questions, below is our understanding of the law as written and initially interpreted by the DFEH in its SB 1343 FAQ sheet:

Who is now required to undergo harassment training under SB 1343?

Under SB 1343, most California employees must undergo harassment training. Supervisory employees who have already been covered by AB 1825 harassment training requirements must continue to receive at least two hours of harassment training within six months of becoming a supervisor, and at least every two years thereafter. Nonsupervisory employees now must receive at least one hour of harassment training within six months of hire and at least every two years thereafter.

Seasonal and temporary employees, or "*any employee that is hired to work for less than six months*" are required to undergo the applicable supervisory or nonsupervisory training within 30 calendar days after

the hire date or within 100 hours worked, whichever occurs first. SB 1343 clarifies that temporary employees provided by an outside temporary services employer (e.g., temp agency) must be provided any applicable harassment training by that temporary services employer.

When will the DFEH issue the online interactive training courses to comply with SB 1343?

SB 1343 requires the DFEH to develop and make available to employers on its website online, interactive training courses that satisfy the two-hour supervisory and one-hour nonsupervisory training requirements. However, the DFEH's SB 1343 FAQ sheet indicates that the DFEH expects to have these courses available by "*late 2019*", and it does not provide a more specific date for the release of the online training materials.

In the meantime, the DFEH has issued a "*toolkit*" for sexual harassment prevention, which includes a sample training presentation that employers may use in conjunction with a qualified trainer, as defined in the existing DFEH regulations at 2 C.C.R. § 11024. (**https://bit.ly/2BFJ3no**)

In short, compliance with SB 1343's training requirements in calendar year 2019 may either have to wait until "late 2019" for the DFEH to provide its materials or utilize sooner alternate sources.

What is the difference between the one-hour nonsupervisory harassment training and the two-hour supervisory harassment training required under SB 1343?

Other than the shorter training time, SB 1343 does not specify how the new one-hour harassment training for nonsupervisory employees should differ from the existing two-hour harassment training for supervisory employees.

The required content in the existing two-hour AB 1825 supervisory harassment training – including requirements specific to supervisory employees – is set forth in the DFEH's regulations at 2 C.C.R. § 11024. The DFEH's SB 1343 FAQ sheet references these existing regulations but does not note that the regulations have not been revised relative to SB 1343. It is likely that future DFEH rulemaking will result in revised regulations, but no regulatory changes have been proposed at this time, and the DFEH has not announced a timeline for any such changes. Absent further clarification from the DFEH, the only insight into what content is required in the new one-hour nonsupervisory harassment training will be the DFEH's own online training course, which is scheduled to be released in "late 2019" as mentioned above.

At this time, we recommend modeling the one-hour training for nonsupervisory employees closely after the existing DFEH regulations for AB 1825 supervisor trainings at 2 C.C.R. § 11024. However, where the existing regulations are specific to supervisory employees, we believe such content would not need to be included in a nonsupervisory employee training.

When is the deadline to provide harassment training to employees under SB 1343?

SB 1343 requires that supervisory and nonsupervisory employees of private sector employers with 5 or more employees receive the harassment training between January 1, 2019 and January 1, 2020. After the initial training, follow-up training must be provided to employees every two years thereafter. In addition, any new supervisory or nonsupervisory employees who assume such positions on or after January 1, 2019 are required to undergo their initial harassment training within six months of assuming such a position.

The only exception to this rule applies to seasonal and temporary employees who are hired to work for less than six months – the obligation to provide training to such employees does not become effective until January 1, 2020. On or after that date, SB 1343 requires the employer to provide training to seasonal or temporary employees hired to work less than six months within 30 calendar days from the date of hire, or before the employee reaches 100 hours worked, whichever comes first.

If my school already provided the required AB 1825 supervisory employee harassment training in calendar year 2018 as part of their two-year training track in accordance with existing law, does SB 1343 require us to retrain those employees again in 2019?

Based on the DFEH's SB 1343 FAQ sheet, the answer appears to be "Yes". SB 1343 amends Government Code section 12950.1(a) to add the following new sentence:

An employer who has provided this training and education to an employee after January 1, 2019, is not required to provide training and education by the January 1, 2020, deadline.

Practically speaking, this new sentence is awkward in its application. If an employer that is required to provide the applicable harassment training by January 1, 2020 provides such training after January 1, 2019, that employer would then not be required to provide the training by the January 1, 2020 deadline. This sentence would probably make more sense if the initial date referenced was ***January 1, 2018***, and not January 1, 2019. Therefore, it is not clear if this language was intentional or a clerical error on the part of the Legislature.

More importantly, this new sentence in Section 12950.1(a) does not distinguish between existing AB 1825 supervisory training that employers are already mandated to provide every two years and the new SB 1343 nonsupervisory training. **As a result, a possible interpretation of Section 12950.1(a) is that employers who provided the required supervisory training in calendar year 2018 believing such supervisory employees would not need to be trained again until calendar year 2020 would now have to retrain the same employees a year earlier in calendar year 2019**.

The DFEH's SB 1343 FAQ sheet appears to follow this interpretation that ALL supervisory and nonsupervisory employees (except temporary or seasonal employees) be trained or retrained in calendar year 2019, regardless of whether they were otherwise previously provided harassment training in calendar year 2018 in accordance with existing law. As noted in the DFEH's SB 1343 FAQ sheet:

What if my employees were trained between January 1 and December 31, 2018?

The law requires that employees be trained during calendar year 2019. Employees who were trained in 2018 or before will need to be retrained.

As a result of this initial interpretation from the DFEH, some employers who provided the required every-two-year supervisory training in calendar year 2018 may now have to provide the training again, one year sooner in calendar year 2019.

While this is the DFEH's initial interpretation of SB 1343, we believe there is a strong possibility the DFEH will either provide additional clarification or the Legislature may provide clean-up legislation to address this scenario.

Keep in mind that nothing in SB 1343 changes the existing two-hour harassment training requirements for supervisory employees. To require supervisory employees who were provided the required harassment training in calendar year 2018 to be retrained a year early does not seem necessary or consistent with the intent of the original law, in addition to creating additional expense and operational impacts to the affected employer. **Therefore, schools who have supervisory employees who were trained in calendar year 2018 may want to wait and see if the DFEH or Legislature provides clarification on the impact of SB 1343 before scheduling affected employees for retraining in calendar year 2019.**

My school has already been providing harassment training to nonsupervisory employees. Are we already in compliance with SB 1343? When do we have to train these employees again?

This is also an issue that is not entirely clear under SB 1343's bill language and the DFEH's interpretation of the new law. Prior to SB 1343, many employers voluntarily chose to require nonsupervisory employees to attend harassment trainings. In many instances, employers had nonsupervisory employees attend the same AB 1825-compliant, supervisor trainings.

However, as noted above, SB 1343's bill language and modifications to Government Code section 12950.1 does not provide any indication of what type of training will satisfy the obligations of the new non-supervisor training. It would seem reasonable that any harassment training provided to nonsupervisory employees prior to SB 1343 that is otherwise in compliance with existing DFEH regulations at 2 C.C.R. § 11024 would be compliant with this new law. However, this is not entirely clear based on SB 1343's statutory language.

Furthermore, as noted above, to the extent any such compliant harassment training was provided to nonsupervisory employees in calendar year 2018 or before, it appears that the DFEH's initial interpretation of SB 1343 requires that all nonsupervisory employees be retrained in calendar year 2019. Absent further clarification from the DFEH or the Legislature, it

appears that any previous harassment training provided to nonsupervisory employees will not satisfy SB 1343's requirements, and such employees should be retrained in calendar year 2019.

My school has new employees who were provided SB 1343 compliant harassment training at their previous employment. Does our school need to provide them harassment training again? What about seasonal and temporary employees who return to our school each year and were previously provided harassment training? Does our school have to provide them harassment training each time they are re-hired as a seasonal or temporary employee?

This is another question that is not entirely clear based on SB 1343's statutory language. However, existing DFEH regulations regarding supervisory employees who were previously trained provides some guidance that may be extended to these other scenarios. As noted under 2 C.C.R. § 11024(b)(5):

> *(5) Duplicate Training. A supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.*

Since the DFEH's SB 1343 FAQ sheet references and incorporates these existing regulations, there is a strong argument that 2 C.C.R § 11024 (b)(5) would also apply to new employees who were trained previously or to previous seasonal or temporary employees who were trained at previous employment within the past two years. In such a scenario, the employer would need to provide the affected employee a copy of the employer's anti-harassment policy and then ensure that any follow-up harassment training be provided otherwise in accordance with the law. Nonetheless, we caution employers to await further clarification on this issue from the DFEH.

In conclusion, there is a lot about the application of SB 1343's new harassment training requirements that remains to be settled. While the DFEH's SB 1343 FAQ sheet provides some guidance, it appears that many unanswered questions remain. LCW is actively working to seek clarification from the DFEH and the Legislature and will provide further updates as the information becomes available.

In the meantime, LCW offers both supervisory and nonsupervisory harassment trainings that are complaint with SB 1343. For more information on our training programs, contact our Training Coordinator **Anna Sanzone-Ortiz** at asanzone@lcwlegal.com or (310) 981-2051 or Director of Marketing and Training **Cynthia Weldon** at cweldon@lcwlegal.com or (310) 981-2000.

If you have any questions about this Special Bulletin, please contact attorneys in our Los Angeles, San Francisco, Fresno, Sacramento, or San Diego offices for further guidance.

INDEPENDENT CONTRACTOR

Dynamex Case ABC Test to Determine Independent Contractor Status Applies Only to Wage Order Claims.

Jesus Garcia worked for Border Transporation Group (BTG) as a cab driver. He leased his vehicle permit from the company, as well as paid for the radio dispatch service. His agreement stated he was an independent contractor and not an employee of BTG. After he left BTG he sued for various wage and hour violations, including unpaid wages, failure to pay overtime, failure to provide meal and rest breaks, failure to furnish wage statements, waiting time penalties, and wrongful termination in violation of public policy. BTG moved for summary judgment, arguing that as an independent contractor he could not bring these claims. The trial court agreed, and Garcia appealed.

During the time the appeal was ongoing, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court*, which established a new ABC test to determine whether someone was an employee or contractor. This new test was different from the long-standing analysis described in the prior *Borello* case.

The court here held that the new ABC test in *Dynamex* only applies to claims raised under the IWC Wage Orders and not statutory claims. The court noted that *Dynamex* did not reject *Borello* or purport to replace it in every instance. Therefore, Garcia's wage order-based claims (unpaid wages, failure to pay minimum wage, failure

to provide meal and rest breaks, failure to furnish itemized wage statements, and the unfair competition claims based on those) would be analyzed under *Dynamex*'s ABC test.

Under the ABC test, the employer must demonstrate all three factors are met. The court here discussed the third factor, which requires that the individual in question is customarily engaged in an independent business of the same nature as the work performed. BTG attempted to argue that since Garcia had the right to perform cab-driving work independently or for others, the third factor was met. However, the court disagreed, holding that the ruling in *Dynamex* indicated that the individual not only could be engaged, but also actually is engaged in such trade or business. The *Borello* standard would be used to analyze the non-wage order causes of action, such as wrongful termination in violation of public policy or waiting time penalties.

Here, Garcia did not drive for anyone other than BTG and did not establish his services as an independent business or trade. As a result, BTG could not establish all three prongs of the ABC test and Garcia's claims could proceed.

Garcia v. Border Transportation Group, LLC (2018) –Cal. Rptr.3d--, 2018 WL 5118546.

NOTE:

This clarification of the Dynamex *ruling is important. Private schools and colleges should make sure that independent contractors are properly classified as such. The burden is on the employer to prove someone is not an employee.*

CONSUMER REPORTS

California Supreme Court Confirms Validity of Two Background Check Laws.

The California Supreme Court confirmed that employers can, and must, comply with two California laws governing job applicant consumer reports (or background checks): the Investigative Consumer Reporting Agencies Act ("ICRAA"); and the Consumer Credit Reporting Act ("CCRA"). The case addressed similarities and differences between these two laws, and clarified that employers must comply with both laws when applicable.

The ICRAA defines a "consumer report" as a report on an individual's character, general reputation, personal characteristics and similar information. Among other things, the ICRAA requires that an employer that procures such information from job applicants or existing employees must certify that: 1) the employer has provided the individual who is the subject of the report with a clear notice that discloses the requirements of the ICRAA; and 2) the subject of the report authorized the report in writing.

The CCRA defines "consumer report" as any communication by a consumer reporting agency bearing on credit worthiness, credit standing, or credit capacity that is "used or is expected to be used . . . for . . . employment purposes" but excludes reports that are based "solely on …character…reputation, personal characteristics…obtained through personal interviews with neighbors, friends or associates…"

The court found that both statutes apply to reports containing information about character and creditworthiness when the reports are based on public information and interviews, and are used for employment background check purposes.

In this case, Eileen Connor worked as a school bus driver with Laidlaw Education Services, which was later acquired by First Student. When First Student conducted background checks on Connor and other employees, the employees sued, claiming that First Student did not provide them with the notice required by the ICRAA. In its defense, First Student argued that because of overlap between the two statutes, the ICRAA was unconstitutionally vague and should not be enforced. Rejecting this argument, the Court found that the requirements of both statutes are sufficiently clear, and each regulates information that the other does not. The Court concluded that both statutes applied to the report on Connor, and First Student must comply with both.

Connor v. First Student, 5 Cal.5th 1026 (2018).

NOTE:

The Supreme Court's decision resolves conflicting decisions issued by California's appellate divisions and makes clear that if there is potential overlap between the ICRAA and CCRA, and the substance of a consumer report relates to creditworthiness and character, an employer may be required to comply with both statutes. LCW's earlier discussion of the Court of Appeals decision in Connor v. First Student is available here: **https://bit.ly/2EPHEPj.**

IMMIGRATION/DISCRIMINATION

UCSD Penalized for Requiring Certain Employees to Re-Verify Work Status.

The Department of Justice reached a settlement agreement with University of California, San Diego regarding its practice of unnecessarily requiring certain work-authorized immigrant employees to re-establish their work authorization while American employees were not treated similarly. The employees were permanently work authorized, and the decision to make them re-establish their authorization was allegedly based on their citizenship status. The University agreed to pay a settlement of $4,712.40 and not to request more or different authorization documents than is required by law.

For more information, see: **https://bit.ly/2Tdm2Q0.**

BUSINESS AND FACILITIES

529 ACCOUNTS

California Department of Treasury Issues Press Release Regarding Use of 529 Accounts for K-12 Tuition.

The federal tax reform bill of 2017 changed the law to allow for parents to use 529 college savings accounts to pay for up to $10,000 in tuition per year at K-12 schools. The California Franchise Tax Board has determined that "the earnings portion of any distribution from any 529 plan to pay for tuition expenses at a public, private or religious elementary, middle, or high school or any amount rolled-over from a qualified tuition program to an ABLE account will be subject to California income tax and an additional 2.5% California tax."

In the wake of the 2017 law, some schools were wondering if enrolled families would be able to take advantage of the new 529 rules to assist with tuition payments for K-12 schools. Schools should advise parents to consult with their own tax professionals about the use of 529 funds and should not give any advice about the tax consequences of such payments.

For the full press release and more information, see: **https://bit.ly/2V7nZiu**.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

NOVEMBER THROUGH JANUARY

- Issue Performance Evaluations
  - We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to renew the teacher for the following school year is made. Schools that do not conduct regular performance reviews may have difficulty terminating problem employees - especially when there is a lack of notice regarding problems.
    - Consider using Performance Improvement Plans as long as you are able and willing to do the necessary follow up to them.
- Compensation Committee Review of Compensation before issuing employee contracts
  - The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.
- Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.
- If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.
- Review student financial aid policies.
- Review and revise Enrollment/Tuition Agreements.
- File all tax forms in a timely manner:
  - Forms 990, 990EZ
    - Form 990:
      - Tax-exempt organizations must file a Form 990 if the annual gross receipts

are more than $200,000, or the total assets are more than $500,000.
- Form 990EZ
  - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990EZ.
- A school below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).
- The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.
- The school should make its IRS form 990 available in the business office for inspection.
- Other Required Tax Forms Common to Business who Have Employees Include Forms 940, 941, 1099, W-2, 5500

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: An HR Director called and wondered if there were any special leaves that might be applicable to employees who are affected by the recent wildfires across the state. Several school employees could not make it into work for a few days due to evacuation orders and other logistical issues. The school wanted to make sure the employees were treated fairly under the law.

RESPONSE: The attorney responded that the only special leave related to this situation was a Labor Code section that permits volunteer fire fighters and emergency responders to take an unpaid leave of absence to assist with such disasters. But here, the employees in question did not serve in those roles and were simply affected by the disasters. Even though there was not a special leave dedicated to this situations, the school could still assist employees by taking measures such as allowing remote work or flexed hours where possible, allowing for unpaid leave if employees did not have paid leave in their bank, or helping to coordinate volunteer efforts where other employees could be of assistance, such as donations or places to stay.

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FIRM PUBLICATIONS

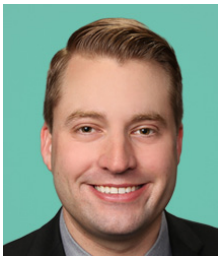
To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

"Garcetti and Academic Freedom" authored by **David Urban,** of our Los Angeles office, was published on December 3, 2018 in National Association of College and University Attorneys' *NACUANOTES.*

The articles can be viewed by visiting the link listed above.

New to the Firm

Kaylee Feick is an Associate in Liebert Cassidy Whitmore's Los Angeles office where she provides representation and counsel to clients in all matters pertaining to labor, employment, and education law. She provides support in litigation claims for discrimination, harassment, retaliation, wage and hour disputes, and other employment matters. She can be reached at 310.981.2735 or kfeick@lcwlegal.com.



Andrew Pramschufer is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he provides assistance to clients in matters pertaining to labor and employment law. Andrew has experience researching and drafting pleadings, motions, and memoranda, including demurrers, motions to dismiss, and motions for summary judgment. He also advises clients on remedial measures, including drafting settlement agreements and releases of liability. He can be reached at 310.981.2000 or apramschufer@lcwlegal.com.

Alexander (Alex) Volberding is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he provides assistance to clients in matters pertaining to labor and employment law and litigation. Alex has significant experience drafting and negotiating Project Labor Agreements (PLAs) on behalf of public sector clients throughout the state, as well as providing advice and counsel to clients regarding issues that arise under such agreements after adoption, including disputes about payments and threatened work stoppages. He can be reached 310.981.2021 or avolberding@lcwlegal.com.

Casey Williams is an employment litigator and nonprofit business attorney, based in Liebert Cassidy Whitmore's San Francisco office. Her dynamic practice is focused on helping mission-driven organizations achieve their goals while staying compliant and working through complex disputes. She can be reached at 415.512.3018 or cwilliams@lcwlegal.com.

Management Training Workshops

Firm Activities

Consortium Training

Jan. 15 **"Governance Best Practices"**
CAIS | Webinar | Grace Chan

Jan. 16 **"Leading With Courageous Authenticity"**
Builders of Jewish Education Consortium | Los Angeles | Elizabeth Tom Arce

Customized Training

Jan. 17 **"Privacy"**
The Buckley School | Sherman Oaks | Michael Blacher

Speaking Engagements

Jan. 22 **"Legal and Legislative Update"**
American Camp Association (ACA) Business of Camps Seminar | Buena Park | Judith S. Islas

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