LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

MAY 2020

INDEX

LCW NEWS

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

40 years
1980 - 2020

COVID-19

U.S. Department Of Education Releases Section 504 Guidance For Colleges And Universities Regarding Compliance With Federal Civil Rights Laws During COVID-19 National Emergency.

On May 12, 2020, the U.S. Department of Education released a technical assistance document to assist postsecondary institutions with meeting their obligations under federal civil rights laws during the COVID-19 national emergency.

The guidance reminds institutions they must still meet the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (Title II), and other federal disability statutes when providing distance learning. Institutions must provide students with disabilities with academic adjustments, auxiliary aids and services, and reasonable modifications in policies, practices, and procedures, where doing so would not impose an undue burden or fundamentally alter the service, program, or activity. Some of the academic adjustments, auxiliary aids and services, and reasonable modifications in place for students when attending on-campus classes may continue to be effective during distance learning, but institutions may need to adjust to better support students with disabilities through virtual means such as online or telephonic resources. Overall, institutions must provide students with disabilities an equal opportunity to participate in and benefit from its service, program, or activity.

Additionally, the COVID-19 national emergency does not relieve institutions of their legal obligations under Title IX of the Educational Amendments of 1972 (Title IX), Title VI of the Civil Rights Act of 1964, and other civil rights statutes. Institutions should not adopt a blanket policy to delay complaint investigations until campuses resume normal operations or refuse to accept and respond to new complaints, although delays in investigations and adjudications may be unavoidable in particular cases. Institutions should use technology, as appropriate, to conduct these activities remotely, while ensuring that this is done timely, equitably, and consistent with due process protections.

The Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency, along with other documents the Department published related to COVID-19, are available on the Office for Civil Rights' website, https://www2.ed.gov/about/offices/list/ocr/docs/20200512-qa-psi-covid-19.pdf.

FIRM VICTORIES

Peace Officer's Termination Upheld Based On City Council's Independent Review Of Administrative Record.

LCW Partner Laura Drottz Kalty, Senior Counsel David Urban, and Associate Attorney Stephanie Lowe successfully represented a city in a peace officer's termination appeal beginning at the administrative appeal hearing and ending in a victory at the California Court of Appeal. The Court of Appeal affirmed the termination in an unpublished decision.

The case began in June 2013, when the city's police department placed the officer on a performance improvement plan (PIP). In July 2013, the officer stated in the presence of some detectives that he did not trust his supervisors. During a PIP meeting in August 2013, the officer referred to supervisors at the department as "clowns." The department found his comments violated department policies forbidding: (i) disparaging remarks or conduct concerning supervisory authority that "subverts the good order, efficiency and discipline of the Department or which would tend to discredit any member thereof"; and (ii) disobedience or insubordination.

Based on years of progressive discipline dating back to 2008 and the officer's conduct when given a "last chance" during the course of his PIP, in December 2013, the department issued a notice of intent to terminate the officer for his policy violations, prior misconduct, and performance issues. After a Skelly meeting, the department terminated the officer.

During his administrative appeal hearing, the officer admitted making the statements at issue. The hearing officer's written report and recommendation, however, excused the officer's statements as the result of "severe stress" from prior disciplinary actions and the PIP. Further, the hearing officer disagreed with the department that the officer was terminated based upon a multi-year pattern of misconduct and performance issues. The hearing officer concluded that no evidence existed to show the department had just cause to terminate the officer, and that another officer received a much lighter punishment for making false, misleading, or malicious statements. The hearing officer recommended a two-week suspension and that the officer be reinstated in good standing.

The city council rejected the hearing officer's recommendation and upheld the officer's termination. The city council found that a preponderance of the evidence showed that the officer's termination was warranted based on his policy violations and history of poor performance and discipline. Separately, the city council also concluded that the hearing officer had overlooked key evidence in making his recommendation. Several of the hearing officer's findings contradicted the witnesses' testimony, including the officer's admissions. The hearing officer did not cite to evidence in the administrative record to support his findings. The city council noted that the hearing officer had demonstrated bias against the city by spending time with the officer's counsel during multiple smoking breaks at the administrative appeal hearing. The city council rejected the officer's argument that another officer received a lesser punishment for the same offense because the other officer was disrespectful to a peer, while this officer was disrespectful to the superiors in his chain of command. The city council found that the other officer had no sustained complaints, nor a similar history of work performance.

The officer then petitioned the trial court for a writ of mandate to compel the city council to set aside its decision and to adopt the hearing officer's recommendation instead. The trial court denied the officer's petition. The trial court's independent review of the evidence in the administrative hearing record supported the city council's decision on the merits.

The officer appealed, alleging that he did not receive a fair administrative hearing and that the city and the department improperly alleged that the hearing officer was biased. In addition, the officer alleged that the city council did not independently review the administrative record but had deferred to the written arguments made by the city's legal counsel.

The Court of Appeal upheld the officer's termination. First, the Court of Appeal declined to address arguments related to alleged bias by the hearing officer, since both the trial court and city council had upheld the officer's termination based on the officer's admissions that he violated department policy. The officer's admissions were independent of any alleged hearing officer conduct. Second, the Court found that the officer had forfeited his claim that the penalty of termination was an abuse of discretion because the officer offered no supporting argument. Third, the Court of Appeal held that the officer provided no evidence to support his allegations that the city council failed to independently review the administrative record of the officer's hearing. The Court of Appeal found that the officer presented no evidence or argument to support any trial court error.

NOTE:

This case shows that court challenges to an administrative decision are won or lost during the administrative hearing. This is because the trial court bases its decision on a review of the testimony and evidence in the administrative hearing record. The appellate court then reviews the trial court's decision. Here,

the officer admitted his misconduct on the record at his administrative appeal. The city council properly reviewed those admissions and the other evidence in the administrative hearing record to reject the hearing officer's unsupported decision.

LCW Obtains Victory In Grievance Arbitration.

LCW Partner Adrianna Guzman and Associate Attorney Anni Safarloo recently obtained a victory for a Hospital Authority (Authority) in a grievance arbitration.

Under the parties' Memorandum of Understanding (MOU), employees are entitled to leave time from their Extended Illness Bank (EIB) for illnesses lasting three or more consecutive days. The MOU also provides that employees must use Paid Time Off (PTO) for unscheduled absences of less than three days, unless the absence is protected under the Family and Medical Leave Act or California's Kin Care law. An employee filed a grievance against the Authority complaining that her supervisor had placed her on PTO rather than allowing her access to the EIB, despite the fact she was sick for three consecutive days.

The Union claimed that the Authority should have paid employees from their EIB beginning on the third consecutive day of being absent, whereas the Authority claimed that EIB did not kick in until the employee had been out for three consecutive shifts. Relying on the fundamental tenets of collective bargaining agreement interpretation, the arbitrator agreed with the Authority and denied the grievance.

NOTE:

Here, the parties were not able to resolve the issue through the lower steps of the contractual grievance procedure, so the matter proceeded to arbitration. LCW attorneys proved that the MOU language clearly and unambiguously resolved the grievance in our client's favor.

DISCRIMINATION

ADA Case Dismissed After Employer Learned Employee Did Not Meet The Job Prerequisites.

In 2010, TRAX, a contractor for the Department of the Army, hired Sunny Anthony as a Technical Writer. Anthony had a history of post-traumatic stress disorder and related anxiety and depression. After her condition worsened, Anthony obtained leave under the Family and Medical Leave Act (FMLA) in April 2012. Anthony's physician indicated her condition would likely continue through May 30, 2012.

On June 1, 2012, Anthony requested to work from home, but TRAX denied her request. While TRAX extended her FMLA leave another 30 days, the Benefits Coordinator indicated Anthony would be fired if she did not receive a full medical release from her physician by the time her FMLA leave expired. After Anthony did not submit a full release, TRAX terminated her employment on July 30, 2012.

Soon after, Anthony filed a lawsuit against TRAX under the Americans with Disabilities Act (ADA) alleging that the company failed to conduct the legally-required interactive process with her and that she was terminated because of her disability. Over the course of the litigation, TRAX discovered that contrary to her representation on her employment application, Anthony lacked the bachelor's degree required for all Technical Writers. The district court dismissed Anthony's claims against TRAX, finding that in light of the after-acquired evidence that Anthony did not have a bachelor's degree, she was not a "qualified individual" entitled to protection under the ADA.

The ADA protects only "qualified individuals" from employment disability discrimination. The law defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA's implementing regulations further expand this definition of the term "qualified." Under the regulations, there is a two-step inquiry for determining if the individual is qualified. First, the individual must satisfy the prerequisites of the job. Second, the individual must be able to perform the essential functions of the position, with or without reasonable accommodation.

On appeal, the Ninth Circuit affirmed the district court's dismissal of the case. Anthony argued that the U.S. Supreme Court case *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352 precluded the use of after-acquired evidence to demonstrate that she was unqualified because she failed to satisfy the prerequisites prong. The court disagreed because Anthony's case was different. In *McKennon*, the employer had conceded it had unlawfully discriminated against the employee on the basis of age, so it could not use after-acquired evidence of employee wrongdoing to excuse its discrimination by asserting that the employee would have been fired anyway. The Ninth Circuit concluded that the limitation on the use of after-acquired evidence under the *McKennon* case did not apply to evidence that shows that an ADA plaintiff is not a "qualified individual."

Additionally, the Ninth Circuit found that TRAX had no obligation to have an interactive process with Anthony to identify and implement reasonable accommodations.

The court noted that under the ADA, an employer is obligated to engage in the interactive process only if the individual is "otherwise qualified." The court reasoned that because it was undisputed that Anthony did not satisfy the job prerequisites for the Technical Writer position, she was not "otherwise qualified," and TRAX was not obligated to engage in the interactive process.

Anthony v. Trax Int'l Corp. (2020) 955 F.3d 1123.

NOTE:

Unlike the ADA, California's anti-discrimination statute does not specifically require that an employee be "otherwise qualified" in order to trigger the right to an interactive process. (Government Code section 12940 subdivision (n).) In order to prove a case of disability discrimination under California law, however, employees must show prove they are a "qualified individual. . . who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." (2 Cal. Code Regs. sections 11065 subd. (o) and 11066 subd. (a).)

Employee Does Not Need To Establish But-For Causation To Prevail Under The ADEA.

Noris Babb, who was born in 1960, is a clinical pharmacist at the U.S. Department of Veterans Affairs Medical Center in Bay Pines, Florida. In 2014, Babb sued the Secretary of Veterans Affairs (VA) alleging, among other claims, a violation of the federal Age Discrimination in Employment Act (ADEA). Babb's age discrimination claim was based on the following personnel actions: (1) in 2013, the VA took away Babb's "advanced scope" designation, which made her eligible for promotion; (2) she was denied training opportunities and passed over for positions in the hospital's anticoagulation clinic; and (3) in 2014, Babb was placed in a new position in which her holiday pay was reduced. Babb also alleged that her supervisors made a variety of age-related comments.

The district court dismissed Babb's claims finding, that while Babb established a prima facie case of discrimination, the VA had legitimate reasons for its actions and no jury could reasonably conclude those reasons were pretextual. The case made its way to the U.S. Supreme Court.

The ADEA provides that "all personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." On appeal, the VA argued that this provision imposes liability only when age is a but-for cause of an employment decision. In other words, the alleged unlawful conduct would not have occurred but for the employee's age. Babb, on the other hand, argued that this ADEA language prohibits any adverse consideration of age in the decision-making process. Accordingly, Babb argued that but-for causation of a challenged employment decision was not needed.

Ultimately, the Supreme Court relied on the plain meaning of the statutory language to determine that age did not need to be a but-for cause of an employment decision in order for there to be a violation of the ADEA. The Supreme Court reasoned that while age needed to be a but-for cause of discrimination, it did not need to be a but-for cause of the personnel action itself. It noted that if age discrimination plays any part in the way a decision is made, then the action is not "free from" any discrimination as required by the ADEA. Thus, the Supreme Court found that the ADEA does not require proof that an employment decision would have turned out differently if age had not been taken into account.

However, the Supreme Court found that but-for causation is important in determining the appropriate remedy for an ADEA claim. It reasoned that employees who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back pay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these employees must show that age discrimination was a but-for cause of the employment outcome.

Babb v. Wilkie (2020) __ U.S. __ [140 S.Ct. 1168].

NOTE:

In our April 2020 Client Update, we reported on Comcast Corp. v. National Association of African American-Owned Media, *another Supreme Court case discussing the causation necessary to prevail on a discrimination claim. In* Comcast, *the Supreme Court confirmed a but-for causation standard for Section 1981 discrimination claims. Accordingly, public agencies should be aware that different types of discrimination claims use different causation standards.*

Trial Court Properly Dismissed Discrimination Claims Against Staffing Agencies.

Bonnie Ducksworth and Pamela Pollock are customer service representatives at Tri-Modal Distribution Services. Both Ducksworth and Pollock applied for their positions at Tri-Modal through Scotts Labor Leasing Company, Inc., a staffing agency. Accordingly, Scotts hired Ducksworth and Pollock, and leased them to Tri-Modal in 1996 and 1997, respectively. In 2006, another staffing agency, Pacific Leasing, Inc., took over Scotts' role for Ducksworth and Pollock.

Both Scotts and Pacific were responsible for tracking and processing payroll, health insurance, workers' compensation, and other payments for employees leased to Tri-Modal. However, Scotts and Pacific were not involved in the day-to-day supervision of Ducksworth and Pollock. For example, Tri-Modal set their work schedules and provided them with their work assignments. The decision to give any employee leased by Scotts or Pacific to Tri-Modal a raise was made solely by Tri-Modal.

After failing to be promoted for decades, Ducksworth and Pollock sued Tri-Modal, Scotts, and Pacific for racial discrimination under the Fair Employment and Housing Act. Pollock also alleged sexual harassment against Tri-Modal and its executive vice president, Mike Kelso. Pollock alleged that after she ended a dating relationship with Kelso, he blocked her promotions. The trial court dismissed the racial discrimination claim against Scotts and Pacific because undisputed evidence showed that Tri-Modal solely made the decision to promote an employee. The trial court also dismissed Pollock's sexual harassment claim against Kelso based on the statute of limitations. Ducksworth and Pollock appealed.

On appeal, the court affirmed the trial court's decision to dismiss the racial discrimination claim against Scott and Pacific. The court noted that because they were not involved in the decisions Ducksworth and Pollack attacked, they could not be liable for discrimination.

The court also confirmed that the trial court correctly dismissed Kelso from the action. Under the FEHA at that time, an employee was required to first file a complaint with the Department of Fair Employment and Housing within one year from the alleged misconduct. Pollock filed her DFEH complaint on April 18, 2018, so she could only bring claims for conduct occurring after April 18, 2017. While the decision to promote another employee over Pollock was made in March 2017, Pollock alleged that her DFEH complaint was still timely because the promotion did not take effect until May 1, 2017. However, the court disagreed. The court noted that based on the language of the FEHA, the statute of limitations for a failure to promote claim runs from when the employer tells the employee they have been given (or denied) a promotion. Accordingly, because alleged misconduct occurred before April 18, 2017, Pollock's claim was barred by the statute of limitations.

Ducksworth v. Tri-Modal Distribution Servs. (2020) 47 Cal. App.5th 532.

NOTE:

This case demonstrates the importance of evaluating the statute of limitations for an employee alleging claims under the FEHA. As of January 1, 2020, the time within which an employee must file a complaint with the DFEH has been expanded from one to three years from the date of the alleged discrimination. (Government Code section 12960(e).)

DID YOU KNOW....?

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

- Layoffs and furloughs are similar in that they may occur due to non-disciplinary reasons, such as a lack of work or lack of funds. In general, a layoff is a temporary or permanent separation from employment, while a furlough is a temporary unpaid leave of absence or reduced schedule. Furloughs allow employers to retain employees despite being temporarily unable to pay them.
- The U.S. CARES Act creates the Federal Pandemic Unemployment Compensation (FPUC) program, which provides $600 in weekly federal assistance to eligible and qualified individuals who receive state unemployment compensation.
- The U.S. Pandemic Emergency Unemployment Compensation (PEUC) program expands unemployment insurance coverage beyond the time provided by state unemployment.
- Employees working in California may be eligible to receive state unemployment compensation if their employers make regular contributions to the state unemployment compensation fund on behalf of their employees through payroll taxes.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

Question: A district contacted LCW to ask whether it is lawful to take employees' body temperatures before allowing them to begin work for the day during the COVID-19 pandemic.

Answer: In general, taking an employee's temperature is a medical examination. The federal Americans with Disabilities Act and the California Fair Employment and Housing Act generally require that any mandatory medical test of employees be job related and consistent with business necessity. Because the Centers for Disease Control and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, however, the U.S. Equal Employment Opportunity Commission issued guidance that says employers may measure employees' body temperature. The California Department of Fair Employment and Housing also issued guidance that allows employers to take employees' body temperatures for the limited purpose of evaluating the risk that the employee's presence in the workplace poses to others in the workplace in light of the COVID-19 pandemic.

In addition, requiring employees to have their temperatures taken upon reporting to work is likely a change in the terms and conditions of employment. Accordingly, this will generally require an agency to give a bargaining unit notice and the opportunity to meet and confer about the change.

BENEFITS CORNER

CARES Act Authorizes Employer Assistance Toward Student Loan Repayment.

Under section 127 of the Internal Revenue Code, employers with a qualifying educational assistance plan may reimburse up to $5,250 of an employee's eligible educational expenses on a nontaxable basis. In response to COVID-19, the CARES Act temporarily expands eligible expenses under section 127 to include employer assistance toward qualified student loan repayment. Employers may direct payment to the employee or the lender directly, and may cover principal and/or interest. However, only employer payments made during 2020 qualify.

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Jun. 5 **"Creating a Culture of Respect"**
Southern CA CCD ERC | Webinar | Kristi Recchia

Jun. 11 **"Conducting Disciplinary Investigations: Who, What, When and How"**
South Bay ERC | Webinar | Melanie L. Chaney

Jun. 17 **"Maximizing Supervisory Skills for the First Line Supervisor Part 1"**
Monterey Bay ERC | Webinar | Kristi Recchia

Jun. 18 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
L.A. County Human Resources Consortium | Webinar | Laura Drottz Kalty

Jun. 18 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
San Mateo County ERC | Webinar | Erin Kunze

Jun. 25 **"Maximizing Supervisory Skills for the First Line Supervisor Part 2"**
Orange County ERC | Webinar | Kristi Recchia

Customized Training

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

Jun. 1 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Ventura | Ventura | Shelline Bennett

Jun. 2 **"Employee and Labor Relations: Roles and the Legal Basis"**
Orange County Sanitation District | Webinar | T. Oliver Yee

Jun. 9 **"Board Ethics and Conflicts of Interest"**
San Jose-Evergreen Community College District | Webinar | Laura Schulkind

Jun. 10 **"Payroll Issues"**
City of Oxnard | Oxnard | Amit Katzir

Jun. 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Kristin D. Lindgren

Jun. 12 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Town of Truckee | Truckee | Jack Hughes

Jun. 15 **"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"**
East Bay Regional Park District | Oakland | Kelsey Cropper

Jun. 16 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Gage C. Dungy

Jun. 23	**"Unconscious Bias"** City of Tracy | Webinar | Kristin D. Lindgren
Jun. 29	**"Privacy Issues in the Workplace"** City of Richmond | Richmond | Brian J. Hoffman

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