LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

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INDEX

LCW NEWS

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TITLE IX

U.S. Department Of Education Issues Question And Answer Guidance Regarding Legal Obligations Under New Title IX Regulations.

The U.S. Department of Education Office for Civil Rights issued an 11-page guidance document entitled "Questions and Answers Regarding the Department's Final Title IX Rule" on September 4, 2020. The Department issued the guidance in response to inquiries received by OCR's new Center for Outreach, Prevention, Education, and Nondiscrimination (OPEN Center).

The guidance addressed questions regarding the effective date of the final regulations, the Title IX coordinator and personnel issues, the definition of sexual harassment, the filing of a formal complaint, and conducting an investigation hearing.

The guidance states that if a complainant either withdrew from school because of sexual harassment and then filed a complaint, or filed a complaint but then withdrew as a result of the sexual harassment or stress of the grievance process, the educational entity has a duty to respond to the report in a manner that is not "deliberately indifferent," or clearly unreasonable in light of known circumstances. The complainant may still be "attempting to participate" in the entity's education program or activity if they intend to re-apply or re-enroll if the educational entity appropriately responds to the sexual harassment, which triggers the educational entity's grievance process.

The guidance also stated that if a complainant did not appear at a live hearing required at the postsecondary level, or chose to not answer cross-examination questions, the Decision-Maker cannot rely upon any statement the complainant made that did not benefit from the "truth-seeking function of cross-examination" in reaching a determination regarding responsibility. This effective excludes all statements provided by the complainant before the hearing—including statements made to the investigator and summarized in the investigation report.

The guidance also approved of a bifurcated grievance process that divides hearings at the postsecondary level between a "responsibility" phase and a "sanctions" phase. The regulations did not preclude a recipient from using one decision-maker to reach the determination regarding responsibility and having another decision-maker determine appropriate remedies for a complainant or appropriate disciplinary sanctions for the respondent. Ultimately, the written determination regarding responsibility must include the remedies and disciplinary sanctions, among other information, and the entity must issue the written determination within the reasonably prompt time frames designated in the entity's grievance process.

Read the Questions and Answers guidance here.

NOTE:

If your school, college, or university needs assistance, please contact one of our five offices statewide. Learn more about LCW's Title IX compliance training programs and other resources by visiting this page.

U.S. Department Of Education Issues Letters In Transgender Student Athletic Complaint That Identify The Department's Approach To Title IX Enforcement In Light Of The Supreme Court's Decision In Bostock.

The U.S. Department of Education Office for Civil Rights issued a letter of notification and a revised letter of impending enforcement action that set the Department's rule to transgender student issues under Title IX in light of the Supreme Court's decision in *Bostock v. Clayton County, Ga* (2020) 590 U.S. __ [2020 WL 3146686].

The revised letter of impending enforcement described complaints filed against the Connecticut Interscholastic Athletic Conference, the Glastonbury Board of Education, and five other Connecticut school districts on behalf of three high school student-athletes and their parents. The complaint alleged the Conference's policy and districts' practices permitting transgender students to participate on the sports team that matched their gender identity was discriminatory against biologically female student-athletes. Specifically, the student-athletes and parents complained the Conference and districts discriminated against female student-athletes based on sex when they allowed biologically male student-athletes to compete in interscholastic girls' track in Connecticut. The complaint alleged the policy and practices denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities. OCR investigated whether these districts denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls' track through implementation of the Conference's policy or the districts' practices, or limited the eligibility or participation of any female student-athletes competing in interscholastic girls' track through implementation of the policy or practices.

In May, OCR found the actions of the Conference and districts resulted in the loss of athletic benefits and opportunities for female student-athletes in violation of Title IX. OCR also determined that the Conference and districts treated student-athletes differently based on sex by denying benefits and opportunities to female students that were available to male students. However, at that time, OCR stated its interpretation of Title IX in the letter was only applicable to these specific complaints.

In June 2020, the Supreme Court issues its opinion in the *Bostock* case and held that Title VII of the Civil Rights Act of 1964 protected employees against discrimination because of their sexual orientation or gender identity. However, the Supreme Court held there were circumstances in which a person's sex was relevant to employment decisions, and distinctions based on the two sexes in such circumstances were permissible because the sexes were not similarly situated. Yet, the Court's decision specifically did not extend to Title IX.

In light of the *Bostock* opinion, OCR reviewed its Title IX interpretations and recent letters and determined the Supreme Court's opinion did not affect its position that Title IX regulations authorized single-sex teams based only on biological sex at birth—male or female—as opposed to a person's gender identity. Where separating students based on sex is permissible, for example, with respect to sex-specific sports teams, OCR decided the separation must be based on biological sex. Therefore, the Department interpreted Title IX regulations (specifically 34 C.F.R. section 106.41(b), regarding operation of athletic teams "for members of each sex") to mean operation of teams for biological males and for biological females, and did not interpret Title IX to authorize separate teams based on each person's transgender status or for members of each gender identity. Accordingly, when an education entity provides "separate teams for members of each sex," the entity must separate those teams based on *biological* sex and not based on homosexual or transgender status.

OCR then issued the revised letter to state the letter constituted "a formal statement of OCR's interpretation of Title IX and its implementing regulations," which effectively creates a rule OCR will apply in similar cases in the future.

Ultimately, OCR stated it would take further enforcement action against the Conference and districts.

OCR also issued a letter of notification in a case involving Shelby County Schools notifying the parties that OCR will open an investigation into the complaint allegations. This letter also stated that with respect to complaints that an educational entity's action or policy excluded a person from participation in, denied a person the benefits of, or subjected a person to discrimination under an education program or activity, based on sex, the *Bostock* opinion guided OCR's understanding that discriminating against a person based on their homosexuality or identification as transgender generally involved discrimination based on their biological sex.

Read OCR's letters here.

NOTE:

These letters from OCR could impact current litigation regarding educational entities' policies regarding transgender student inclusion in facilities and athletic programs. Currently, California state law requires equal treatment of LGBTQ students and employees, but OCR's interpretation of Title IX regulations could preempt those protections. LCW will continue monitoring developments.

CIVIL RIGHTS COMPLAINTS

U.S. Department Of Education Revises Case Processing Manual Governing Complaints Of Civil Rights Violations.

The U.S. Department of Education Office for Civil Rights revised its Case Processing Manual effective August 26, 2020. The revised CPM requires OCR to issue a draft resolution letter and draft letter of finding to the educational entity in addition to the proposed resolution agreement and provide the educational entity an opportunity to inform OCR of any factual errors in the draft letters or agreement. The revised CPM also articulates the standard of review for appeals of OCR determinations. Specifically, the CPM states, "OCR reviews appeals to determine whether there is a clear error of fact and/or an error in the legal conclusion that changes the outcome of the determination."

These procedural revisions retain the requirement that OCR provide entities with a copy of the complaint.

Find a copy of the revised CPM found here.

K-12 CURRICULUM

Absent Evidence Of Unlawful Intentional Discrimination, Parents Are Not Entitled To Bring Equal Protection Claims Challenging Curriculum Content. Allegedly Offensive Content That Does Not Penalize, Interfere With, Or Otherwise Burden Religious Exercise Does Not Violate Free Exercise Rights.

The California State Board of Education adopted Content Standards for history and social science in 1998. The Content Standards briefly outlined the history of the world's first major civilizations and religions. The State Board then adopted the Curriculum Framework for history and social science in 2016 after a lengthy comment process that solicited feedback from the public. School districts use the Content Standards and Curriculum Frameworks to design more tailored course curricula.

The non-profit organization, California Parents for the Equalization of Educational Materials and three parents were unhappy with the Standards and Frameworks and filed a lawsuit against the State Department of Education and the State Board of Education alleging violations of several constitutional provisions including Due Process, Equal Protection, and the Establishment and Free Exercise clauses of the First Amendment.

Specifically, the Plaintiffs argued the Department and State Board violated the Equal Protection clause because the content of the Standards and Framework described Hinduism in derogatory terms and from the perspective of a skeptic, but the same material described other religions with respect. Additionally, the Plaintiffs argued the Department and State Board refused to accept all of their proposed edits to the Frameworks, even though it accepted edits from other religious groups during the notice and comment process. The Plaintiffs alleged that the Standards and Frameworks "indoctrinate children with beliefs biased deeply against Hinduism and in favor of the Abrahamic religions," and interfere with the liberty interests of parents to control the upbringing and education of their children. Finally, the Plaintiffs alleged the Standards and Framework unconstitutionally endorsed Judaism, Christianity, and Islam, because the content called for the teaching of religious events, significant to those religions, as historical fact. The Plaintiffs finally alleged the materials had the primary effect of disparaging or denigrating Hinduism. All of the Plaintiffs' constitutional claims related to particular passages in the Standards and Framework they found objectionable. None of the arguments challenged the Department or State Board's overall policy of providing students with an introduction to the major world religions and none related to material students actually see in the classroom.

The Department and State Board filed a motion with the trial court to request a judgment without an evidentiary hearing, known as a motion for summary judgment. At the hearing on the motion for summary judgment, the Plaintiffs offered an expert report to explain the significance of certain terms in the Standards and Framework from the perspective of an academic religious scholar. The trial court declined to consider the expert report and ultimately dismissed all of the Plaintiffs' claims. The Plaintiffs appealed.

The Court of Appeals upheld the trial court's decision that the Plaintiffs' based their Equal Protection claim on objections to course content, which, without evidence of unlawful intentional discrimination, was barred by previous Ninth Circuit Court rulings. On appeal, the Plaintiffs also argued the State Board failed to incorporate their requested edits into the Frameworks and solicited and accepted suggestions from a group of historical scholars they argued was hostile to Hinduism.

However, the Plaintiffs did not describe this process as discriminatory. The Court of Appeals found that although the Plaintiffs did not like the edits, a dislike of challenged content of the Standards or Framework did not constitute a constitutional violation of Equal Protection absent an allegation of discriminatory policy or intent. Because the Plaintiffs did not allege a discriminatory policy or intent, the Court of Appeals upheld the trial court's decision to dismiss the Plaintiffs' Equal Protection claims.

The trial court also dismissed the Plaintiffs' Free Exercise clause claim because it found the Plaintiffs failed to allege that the Department or State Board imposed any burden on their religious exercise or practice. On appeal, the Plaintiffs argued the trial court failed to consider recent Supreme Court decisions that eliminated the requirement that they plead a burden on their religious exercise. The Court of Appeals was not persuaded. Here, the state did not provide financial or other benefits not did it carve out any exclusion for religious education in the curriculum materials. Additionally, the Plaintiffs did not allege that the state assessed any penalty or coerced conduct. Therefore, although the trial court did not analyze the specific cases identified by the Plaintiffs, the cases would not alter the trial court's analysis that the Plaintiffs failed to allege any specific religious conduct that was affected by the Department or State Board's actions. Ultimately, offensive content that does not penalize, interfere with, or otherwise burden religious exercise does not violate Free Exercise rights.

Next, the Plaintiffs argued the Department and State Board violated the Fourteenth Amendment guarantee of due process because the curricular materials were "religiously bigoted." However, the Court of Appeals held the Fourteenth Amendment guaranteed parents a right to make decisions regarding the "care, custody, and control of their children," but parents did not have the right to choose the curriculum of the educational forum of their choice. Accordingly, the Court of Appeals agreed with the trial court that the Plaintiffs did not state a valid substantive due process claim.

Plaintiffs also argued the trial court mishandled their Establishment clause claims. Specifically, the Plaintiffs argued that an objective reading of Standards and Framework revealed an impermissible endorsement of Judaism, Christianity, and Islam, and the trial court incorrectly granted the State Board summary judgment on the Plaintiffs' claim that those materials disparaged Hinduism. The Plaintiffs also argued the trial court should not have excluded their expert report produced at summary judgment.

The Court of Appeals held the Standards and Frameworks did not call for the teaching of biblical events or figures as historical fact, thereby implicitly endorsing Judaism, Christianity, and Islam. The materials did not take a position on the historical accuracy of the stories or figures, and the Supreme Court stated that mere inclusion of passages from the Bible in course materials did not violate the Constitution. The Court of Appeals did not find that an objective reading of the Standards and Framework supported the Plaintiff's claims that the materials were disparaging Hinduism. Instead, the Standards and Framework reflect careful crafting by the State Board to achieve a balanced portrayal of different world religions. Furthermore, the Court of Appeals held it must evaluate the Standards and Framework from the perspective of an objective, reasonable observer and not that of an academic who is an expert in the field, so an expert report is irrelevant to the trial court's determination. Accordingly, the Department and State Board did not violate the Establishment Clause.

Finally, the Court of Appeals agreed with the trial court's conclusion that the challenged content of the Standards and Framework, and process leading up to the Framework's adoption, did not disparage or otherwise express hostility to Hinduism in violation of the Constitution.

California Parents for the Equalization of Educ. Materials v. Torlakson (2020) __ F.3d __ [2020 WL 5247607].

FIRM VICTORY

Court Upholds Peace Officer's Suspension For Making False Statements.

LCW Attorneys Suzanne Solomon and Kelsey Cropper successfully represented a city in a peace officer's disciplinary appeal.

The officer issued a letter to his union's members while he was the acting union president. The letter was critical of changes the department's chief had implemented. The letter stated that the chief had circulated a memorandum, which allegedly indicated that the department's Internal Affairs investigations needed "process improvements." The letter also stated that the chief removed an Internal Affairs lieutenant and appointed a new lieutenant only two weeks after circulating the memorandum.

Following an investigation, the department issued the officer a 44-hour suspension. The suspension was based on violation of department policy because the officer knew his letter included false or misleading statements that were reasonably calculated to harm the department or its members. The department concluded that the letter created a false impression that the chief removed the lieutenant from his assignment with Internal

Affairs due to poor performance. In fact, the lieutenant voluntarily requested to rotate out of his Internal Affairs assignment. The department also alleged: the officer knew this fact before writing the letter; and the letter caused significant disruption because of its implication that the lieutenant was removed for poor performance.

The officer sued. He challenged his suspension on the grounds that the department violated his constitutional right to free speech. The officer argued that although false statements standing alone are not deserving of constitutional protection, erroneous statements are inevitable in free debate and must be protected. Further, the officer alleged that even if his statement about the lieutenant's removal was false, his speech, when examined in its content, form, and context, was a matter of public concern and was therefore deserving of First Amendment protections.

The trial court disagreed. The administrative record showed that before the officer issued the letter, the City Manager had advised the officer that the lieutenant had voluntarily left the Internal Affairs assignment. The court noted that since the officer knew his statement about the lieutenant's removal was false, the statement should not receive constitutional protection. The court also held the false statement was harmful to the reputation and authority of both the lieutenant and the department, given the punitive connotations of a lieutenant being "removed" from an internal affairs assignment. The court found the officer's actions caused actual injury and harm to the legitimate interests of the department in maintaining and promoting the trust and integrity of its members. The court found the officer's statements were not constitutionally protected and upheld the officer's suspension.

NOTE:

The misconduct in this case threatened the integrity of the department's internal affairs process, but also drew complex First Amendment free speech and association defenses. This firm victory shows that agencies can count on LCW attorneys to be trusted advisors who protect their department's good order and institutions.

DISCIPLINE

Appellate Court Upholds Deputy's Termination For Failing To Report Use Of Force.

Meghan Pasos was a deputy sheriff with the Los Angeles County Sheriff's Department (Department) at the Men's Central Jail. Another deputy, Omar Lopez, took an inmate to an area outside of the view of surveillance cameras and pushed the inmate's head against a wall, causing severe bleeding from the inmate's face. The use of force also left blood on the inmate's clothes, the wall and the floor. Pasos was standing approximately four or five feet away at the time of the assault, but claimed she was monitoring inmates in a nearby hallway and was not paying attention to Lopez and the inmate. Pasos then turned around to see the bloodied inmate, and Lopez confirmed he had shoved the inmate's head into the wall. Pasos told Lopez to "handle the paperwork" to which Lopez replied that he would, but he never did so.

The inmate later reported his assault. Since no deputies reported a use of force incident involving the inmate, the Department opened an investigation into the inmate's complaint. During her interview, Pasos admitted she did not report the incident because she was afraid of the repercussions of "ratting on" a fellow deputy.

Following the investigation, the Department discharged Pasos based on her failure to report Lopez's use of force or to seek medical assistance for the inmate. The division's acting chief determined discharge was appropriate because Pasos's conduct violated the Department's policies on general behavior, performance standards, use of force procedures, and safeguarding persons in custody. Further, the chief determined Pasos's conduct perpetuated a code of silence among the deputies, which undermined the Department's operation of the jail and brought embarrassment to the Department. A panel of three commanders from other divisions reviewed Pasos's case and agreed with the chief's decision.

Pasos appealed her discharge to the Los Angeles County Civil Service Commission (Commission). The Commission sustained the discharge based on the grounds that Pasos's behavior was so egregious that it merited the highest level of discipline. Pasos then challenged her discharge in superior court. The trial court held the Commission abused its discretion in upholding the discharge. The trial court said the chief could not discharge every deputy involved in any aspect of inmate abuse in order to deflect media and public criticism. The trial court said that the chief's job was to impose fair and appropriate discipline for each instance of misconduct. The trial court found for Pasos and directed the Commission to set aside her discharge, award her back pay, and consider a lesser penalty.

The Department appealed, claiming the trial court substituted its own discretion for that of the Department in determining the appropriate penalty. The California Court of Appeal agreed and reversed.

First, the Court of Appeal held the Department followed its written guidelines for discipline by discharging Pasos. Pasos's failure to report the use of force was egregious because it perpetuated a code of silence among deputies in the jail, which encouraged other deputies to ignore

their responsibilities, and brought embarrassment to the Department. That type of misconduct violated the Department's general behavior policy, which states that the penalty may range from a written reprimand to discharge.

Second, the Court of Appeal upheld the penalty of discharge because Pasos's conduct harmed the public service. Pasos's claim she had no duty to report ran counter to her initial stated reason for not reporting the use of force—that she did not want to "rat" on her partner. The penalty of discharge was supported because Pasos's actions betrayed the public's trust in peace officers to guard the peace and security of the community. The Court of Appeal noted that California cases often hold that a betrayal of the public trust is grounds for termination. The Court of Appeal noted in a footnote that this misconduct was likely to recur given Pasos's stated fear from the consequences of "ratting" on a fellow deputy, and minimization of her responsibility to report the severe battery.

For these reasons, the Court of Appeal reversed the trial court's order and ordered the trial court to enter a new judgment upholding Pasos's discharge.

Pasos v. Los Angeles County Civil Service Commission (2020) 52 Cal.App.5th 690.

NOTE:

The public is more keenly aware and critical use of force incidents. This case demonstrates that a "code of silence" regarding these incidents, and the resulting breach of trust between the agency and the public, harms the public service and supports severe discipline.

DISCRIMINATION

Employee Did Not Prove Discriminatory Animus For Supervisors' Age-Related Comments.

Virgina Arnold worked at Dignity Health as a medical assistant. During her employment, Arnold received numerous verbal and written warnings for various performance deficiencies. In September 2012, Arnold's supervisor issued her a final written warning and three-day suspension for failing to follow Dignity's process for addressing scheduling errors. Arnold's union grieved her final warning and a previous warning. Dignity and the union agreed to reclassify Arnold's prior warnings to a lesser level of warning. Under the agreement, Dignity also issued a new final written warning and three-day suspension for additional instances of misconduct that occurred while the grievance was pending.

In June 2013, Arnold's supervisor contended that Arnold threw away a specimen cup still containing patient health information. Arnold refused to take responsibility when her supervisor questioned her and blamed a co-worker. Arnold's supervisor also learned that Arnold kept a photograph of a male model with his shirt unbuttoned in a cupboard near her desk, which her supervisor concluded was inappropriate in the workplace.

Given Arnold's previous discipline, Dignity determined that termination was necessary. Arnold's supervisor provided her with a letter explaining she was being terminated for: (1) failure to safeguard personal health information, a HIPAA violation; (2) display of inappropriate materials in the workplace; (3) careless performance of duties; (4) failure to communicate honestly during the course of the investigation; and (5) failure to take responsibility for her actions.

Following her termination, Arnold initiated a lawsuit against Dignity and other employees alleging discrimination, harassment, and retaliation based on her age and her association with her African-American coworkers in violation of the California Fair Employment and Housing Act. Arnold is over seventy and African-American. To support her age claims, Arnold cited multiple instances when her supervisors commented on her age and asked about her plans for retirement. Arnold claimed that after learning she had recently celebrated her birthday, one of her supervisors stated, "Oh, I never knew you were that old" and "Oh, how come you haven't retired?" To support her association claims, Arnold alleged Dignity failed to follow up on a complaint she made that her African-American coworkers were being mistreated.

Ultimately, the trial court decided in favor of Dignity's pre-trial motion, finding that Dignity established legitimate, non-discriminatory reasons that were not pretextual for terminating Arnold's employment. Arnold appealed the trial court's decision regarding her claims for discrimination based on her age and association with African-Americans.

The FEHA makes it unlawful for an employer to discriminate against an employee because of several protected classifications, including age and association with those of a protected status. California courts use a three-stage burden-shifting test to analyze FEHA discrimination claims. Under this test, the employee must first establish the essential elements of a discrimination claim. If the employee can do so, the burden shifts back to the employer to show that the allegedly discriminatory action was taken for a legitimate, non-discriminatory reason. If the employer meets this burden, the presumption of discrimination disappears and the employee then has the opportunity to attack the employer's legitimate reason as pretext for discrimination.

On appeal, Arnold argued that the trial court was wrong to enter judgment in favor of Dignity because Arnold had presented evidence that Dignity's reasons for terminating her employment were not credible. She also argued she presented substantial evidence of age and association discrimination, including that her supervisors repeatedly used age-based discriminatory language and did not respond to her complaints regarding racially prejudiced behavior toward other African-American employees. The Court of Appeal, however, found that the trial court properly entered judgment in favor of Dignity.

Regarding Arnold's age discrimination claim, the court noted that the supervisors who made comments about her age were not materially involved in the decision to terminate her employment. Thus, any comments Arnold's supervisors made did not support the conclusion Dignity terminated her based on discriminatory animus. The court also concluded that age-based comments - such as the supervisors saying they did not know she was "that old" or asking her why she had not retired - did not indicate a discriminatory motive. The court opined that the comments one of Arnold's supervisors made around her birthday occurred during "a natural and appropriate occasion for discussing a person's age and future plans."

As to Arnold's association discrimination claim, the court found that the employee to whom Arnold complained about the mistreatment of other African-American employees was also not involved in Arnold's termination. There was no evidence that anyone involved in the decision to terminate Arnold's employment knew about her complaint or that it factored into the determination to fire Arnold. Accordingly, the Court of Appeal held that the trial court did not err in entering judgment in favor of Dignity for Arnold's claim for association discrimination.

Arnold v. Dignity Health (2020) 53 Cal.App.5th 412.

NOTE:

This case concluded that the comments Arnold's supervisors made about her age did not indicate a discriminatory motive, and were "benign and even complimentary." Regardless, it is very poor form for an employer to express surprise that an employee is "that old." LCW advises public agencies to refrain from making comments about an employee's age not only to limit the risk of an age discrimination claim, but to simply be a good employer.

Independent Contractor Surgeon Was Not Entitled To Title VII Protections.

David Henry is a board-certified general and bariatric surgeon licensed to practice medicine in Hawaii. Dr. Henry joined the staff of Adventist Health Castle Medical Center (Castle) in 2015 and performed surgeries there.

During his time at Castle, Dr. Henry signed two agreements with the medical center. Under the first agreement, Dr. Henry agreed to operate a full-time private practice of medicine. The second agreement required Dr. Henry to be on-call in Castle's emergency department for five days each month. Both agreements indicated that Dr. Henry "shall at all times be an independent contractor."

While on call, Dr. Henry was not required to be present at Castle's facility unless there was an emergency. When performing surgeries for Castle, Castle decided which surgical assistants would support him, supervised their performance and pay, and determined which medical record system would be used for care provided at the facility. Castle required Henry to comply with its Code of Conduct and bylaws, and it paid Henry $100 per 24-hour on-call shift if there was no emergency intervention, and $500 for each emergency he handled. Castle issued Dr. Henry a 1099 tax form, and it did not provide any employee benefits. Dr. Henry also leased space from Castle for elective surgeries on non-Castle patients, and performed some surgeries at a competing hospital where he had clinical privileges.

While working at Castle, Dr. Henry complained about discrimination. Dr. Henry's complaint initiated a review of his past surgeries, which led to his precautionary suspension and eventually the recommendation that his clinical privileges be revoked until he completed additional training and demonstrated competency in various areas of concern. Dr. Henry then sued Castle, alleging violations of Title VII of the Civil Rights Act of 1964 for racial discrimination and retaliation.

Castle moved to dismiss the case. Castle argued that because Dr. Henry was an independent contractor and not an employee, he was not entitled to Title VII protections. The district court agreed and found in favor of Castle. Dr. Henry appealed to the U.S. Court of Appeals for the Ninth Circuit.

In deciding whether an individual is an employee under Title VII, courts evaluate "the hiring party's right to control the manner and means by which the product is accomplished." Courts make this determination considering a number of factors including: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the

relationship between the parties; (5) whether the hiring party has to right to assign additional projects to the hired party; (6) the extent of the hired party's discretion of when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.

Applying these factors to this case, the Ninth Circuit concluded that the district court properly determined Dr. Henry was an independent contractor, and not an employee. First, the court considered Dr. Henry's compensation. The court reasoned Castle only paid Dr. Henry for on-call time –$100 per shift or $500 per emergency intervention—which accounted for 10% of his earnings. Castle did not provide any employee benefits. Dr. Henry and Castle also reported his earnings to the IRS as if Dr. Henry were an independent contractor. The court noted that these factors weighed in favor of Dr. Henry's independent contractor status.

Second, the court found that Dr. Henry's limited obligations to Castle also indicated an independent contractor relationship. Dr. Henry had the freedom to run his own private practice, was only required to be on call in Castle's emergency department five days per month, and was free to be elsewhere during his on-call shifts unless an emergency arose. Dr. Henry also leased Castle space for elective surgeries on his own patients and performed general surgeries at a competing hospital. The court noted that employees generally do not have this level of work freedom and that Castle did not have the level of control present in employment relationships.

Finally, the court emphasized that both contracts between Dr. Henry and Castle called him an independent contractor. Dr. Henry argued that the high skill level that surgeries require, Castle's provision of assistants and medical equipment, and Castle's mandatory professional standards weighed in favor of an employment relationship. The court concluded these factors did not outweigh the evidence suggesting he was an independent contractor.

Thus, the Ninth Circuit found that Dr. Henry was not entitled to Title VII protections as an independent contractor.

Henry v. Adventist Health Castle Med. Ctr. (2020) 970 F.3d 1126.

NOTE:

This case demonstrates that independent contractor or employee status depends of an analysis of many factors. LCW attorneys regularly help public agencies determine whether individuals are properly classified as independent contractors under the federal standard discussed in this case and under California's more pro-employee standard.

HARASSMENT

Continuing Violation Exception Saves Sexual Harassment Claims.

Daisy Arias worked for Blue Fountain Pools and Spas (Blue Fountain). While Arias was working for Blue Fountain, she experienced sustained, egregious sexual harassment, primarily from a salesperson named Sean Lagrave who worked in the same office. Arias repeatedly complained about Lagrave's conduct over the course of her decade-long employment. In April 2017, Lagrave yelled at her, used gender slurs, and physically assaulted her. Arias told the owner of Blue Fountain at the time, Farhad Farhadian, that she wasn't comfortable returning to work with Lagrave. Farhadian refused to remove Lagrave and subsequently terminated Arias' health insurance. Before Farhadian told Arias to pick up her final paycheck, he had repeatedly ignored her complaints and participated himself in creating a sexualized office environment.

Arias then filed a complaint with the California Department of Fair Employment and Housing (DFEH) and sued Blue Fountain, Farhadian, and Lagrave alleging, among other claims, sexual harassment and failure to prevent sexual harassment. Blue Fountain, Farhadian, and Lagrave filed a motion to have the claims dismissed. The trial court denied their motion. Blue Fountain, Farhadian, and Lagrave brought a petition for writ of mandate to renew their argument that Arias' claims were barred by the statute of limitations.

Under the Fair Employment and Housing Act at the time this case began, an employee was required to first file a complaint with the DFEH within one year of the alleged misconduct. However, courts recognize an exception for continuing violations. To establish a continuing violation, an employee must show that the employer's actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. In their writ petition, Blue Fountain, Farhadian, and Lagrave argued that Arias could not meet the third element– that Blue Fountain's actions had acquired a degree of permanence – because Arias admitted she felt that further complaints about the hostile work environment were futile after the company's prior management failed to address her numerous complaints. The Court of Appeal disagreed.

First, the Court of Appeal noted that Arias presented evidence of several incidents of sexual harassment that occurred in the one year preceding her termination that were within the complaint-filing period. Accordingly, the court concluded it would have been improper for the trial court to dismiss her claims, even if it determined the incidents outside the limitations period could not be the basis for liability.

Second, the court found that while Arias had been subject to sexual harassment since she started working at Blue Fountain in 2006, Farhadian purchased the company and took over operations in January 2015. Thus, even if the conduct of prior management made Arias' further complaining futile, the arrival of new management created a new opportunity to seek help and Arias could establish a continuing violation with respect to all of the complained of conduct that occurred during Farhadian's ownership.

Finally, the court identified a factual dispute over whether and when Blue Fountain made clear no action would be taken and whether a reasonable employee would have decided complaining was futile. Because Arias continued making complaints and tried complaining to different people, the Court of Appeal reasoned that this question needed to be resolved by a jury, not the trial court.

Accordingly, the court denied Blue Fountain, Farhadian, and Lagrave's writ petition and concluded that Arias' claims could proceed to trial.

Blue Fountain Pools and Spas Inc. v. Superior Court of San Bernardino County (2020) 53 Cal.App.5th 239.

NOTE:

Effective January 1, 2020, an employee now has three years, instead of the one year, from the date of the allegedly discriminatory conduct to file an administrative complaint with the Department of Fair Employment and Housing. (Gov. 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.

- Effective July 1, 2020, California law increases the maximum length of paid family leave benefits from 6 weeks to 8 weeks. (Unemployment Insurance Code section 3301(d).)
- Although an education entity cannot consider an applicant's prior salary history when determining whether to offer employment, an entity can consider salary information that is publicly available under the CPRA or FOIA. (Labor Code section 432.3(e).)
- When President Franklin D. Roosevelt signed the Fair Labor Standards Act on June 25, 1938, the Act set the minimum hourly wage at $0.25. Over 82 years later, the federal minimum wage is now $7.25. California's minimum wage is $12.00 for employers with up to 25 employees and $13.00 for employers with 26 or more employees.

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 entity, 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 human resources manager asked whether a district is required to reimburse employees for teleworking expenses.

Answer: California Labor Code section 2802 requires an employer to pay for expenses an employee incurs in the course of performing work duties. However, the issue of whether Labor Code section 2802 applies to public agencies is unsettled. Section 2802 does not expressly state that it applies to public entities, and California courts have held that public entities are not subject to general Labor Code provisions unless expressly included. To date, there are no published court decisions that specifically address whether public agencies are required to reimburse employees for work-related use of the internet or cell phones.

In a situation like this, a district must consider that there is a risk in not following Labor Code section 2802. To eliminate the risk, the district could provide reimbursement for expenses associated with remote work, such as internet and cell phone usage.

Title IX Compliance for Community College Districts

After a decade of changing guidance, the U.S. Department of Education issued new Title IX regulations in May 2020. These new regulations came into effect on August 14, 2020 and Districts are expected to comply with and train employees. If this seems like a daunting task, don't fret! LCW has you covered. We are offering compliance training, guidance on completing required forms, a Q&A session, and sample forms to ensure your District is compliant.

Our experience assisting educational institutions with Title IX manners includes the following:

- Policies and Procedures: We assist our clients in creating and updating their anti-harassment, discrimination and disciplinary, policies, including the publication and distribution. We also assist our clients in implementation operating procedures.
- Compliance: We have assisted our clients in auditing their policies and procedures to ensure compliance with changes in the law. We also work with and address issues pertaining to Title IX Coordinators, complaint and investigation procedures, third party complaints, and privacy concerns.
- Grievance Procedures: We help clients create written grievance procedures, including reporting policies and protocols.
- Investigations: We assist clients in investigations of alleged Title IX violations, including fact-finding.
- Discipline: We assist clients with disciplinary procedures, and in implementing discipline against employees and students.
- OCR: We assist clients in addressing complaints and inquiries from the Department of Education, Office of Civil Rights.
- Litigation: We are statewide experts in the defense of actions brought by students alleging school-related violations, including harassment and discrimination and have a robust writ practice.
- Training: As a leading provider of client education, we regularly provide Title IX training, for individual institutions through our customized training program as well as through group webinars and seminars.

Visit our website for more information: https://www.lcwlegal.com/lcw-title-ix-training-program

Management Training Workshops

Firm Activities

Consortium Training

Oct. 1 **"Difficult Conversations"**
Imperial Valley ERC | Webinar | Stacey H. Sullivan

Oct. 1 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
NorCal ERC | Webinar | Kelsey Cropper

Oct. 2	**"Evaluation, Discipline and Non Re-Employment of Contract Faculty"** Central CA CCD ERC | Webinar | Eileen O'Hare-Anderson
Oct. 7	**"Finding the Facts: Employee Misconduct & Disciplinary Investigations"** Central Coast ERC | Webinar | Shelline Bennett
Oct. 8	**"Managing the Marginal Employee"** East Inland Empire ERC | Webinar | Christopher S. Frederick
Oct. 8	**"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"** San Diego ERC | Webinar | Kristi Recchia
Oct. 8	**"Navigating the Crossroads of Discipline and Disability Accommodation"** Orange County ERC | Webinar | Jennifer Rosner
Oct. 9	**"Reductions in Staffing: Academic Employees"** Bay Area CCD ERC | Webinar | Kristin D. Lindgren
Oct. 13	**"Difficult Conversations"** San Mateo County ERC | Webinar | Heather R. Coffman
Oct. 14	**"Supervisor's Guide to Public Sector Employment Law"** North State ERC | Webinar | Jack Hughes
Oct. 14	**"Family and Medical Care Leave Acts"** San Gabriel Valley ERC | Webinar | Danny Y. Yoo
Oct. 15	**"Principles for Public Safety Employment"** Bay Area ERC | Webinar | Suzanne Solomon
Oct. 16	**"Human Resources Academy I for Community College Districts"** SCCCD ERC | Webinar | Alysha Stein-Manes
Oct. 21	**"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"** Coachella Valley ERC | Webinar | Kristi Recchia
Oct. 21	**"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement - Part 1"** Sonoma/Marin ERC | Webinar | Richard Bolanos & Jessica A. Tyndall
Oct. 22	**"Public Meeting Law (Brown Act) and Public Records Act: Review and Update"** Ventura County Schools Self-Funding Authority | Webinar | T. Oliver Yee
Oct. 28	**"Unfair Practice Charges and PERB"** Central Valley ERC | Webinar | Che I. Johnson
Oct. 28	**"Moving Into the Future"** Monterey Bay ERC | Webinar | Erin Kunze
Oct. 29	**"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"** West Inland Empire ERC | Webinar | Kristi Recchia
Oct. 29	**"Public Sector Employment Law Update"** Orange County ERC | Webinar | Richard S. Whitmore

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.

Oct. 5 **"Special Education"**
Morgan Hill Unified School District | Webinar | Laura Schulkind & Amy Brandt

Oct. 8 **"Maximizing Performance Through Evaluation, Documentation, and Corrective Action"**
City of Long Beach | Webinar | Stacey H. Sullivan

Oct. 13 **"Bias Is A Four Letter Word - But It Doesn't Have to Be"**
Riverside County District Attorney's Office | Webinar | Suzanne Solomon

Oct. 20 **"Legal Aspects of Violence in the Workplace"**
City of Stockton | Webinar | Kristin D. Lindgren

Oct. 27 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Mark Meyerhoff

Oct. 27 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Brian J. Hoffman

Oct. 28 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Millbrae | Webinar | Kelsey Cropper

Oct. 29 **"Ethics in Public Service"**
Merced County | Webinar | Michael Youril

Speaking Engagements

Oct. 10 **"State and Federal Laws & Leaves of Absence"**
Association of California School Administrators (ACSA) Personnel Academy | Webinar | Kristin D. Lindgren

Seminars/Webinars

For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

Oct. 15 **"New Changes To The California Family Rights Act - SB 1383 - What You Need To Know"**
Liebert Cassidy Whitmore | Webinar | Peter J. Brown

Oct. 22 **"2021 Legislative Update for Public Safety"**
Liebert Cassidy Whitmore | Webinar | Geoffrey S. Sheldon

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore.
The information in ***Education Matters*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.