LCW Liebert Cassidy Whitmore

Education Matters

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

February 2018

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LCW NEWS

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DUE PROCESS

Employer Did Not Violate Employee's Liberty Interest by Disseminating Letter that Was Not "Stigmatizing" to Employee.

The Fourteenth Amendment to the U.S. Constitution protects public employees from deprivations of their liberty interests without due process of law. Although at-will or probationary employees lack a constitutional property right in continued employment, they do have a liberty interest to pursue a profession. An employee's liberty interest can be threatened when a public employer brings charges or allegations against the employee that are damaging to the employee's reputation for honesty or morality. If the employer publicly discloses information that is "stigmatizing" to the employee's professional reputation in the course of releasing the employee, and the employee disputes the veracity of that information, the employee is entitled to a "name-clearing" meeting.

The Ninth Circuit of the U.S. Court of Appeals found that a public university did not violate an employee's due process rights by publicly disseminating a letter that, while related to the employee's no-cause release from employment, did not accuse the employee of bad faith, willful misconduct, intentional acts, waste or fraud.

Ronald Kramer served as the Executive Director of the Southern Oregon University (SOU) Public Radio station and a related foundation. Kramer's supervisor, Dr. Mary Cullinan, raised concerns that Kramer's dual role created a conflict of interest when the two entities were parties to a single contract. An audit report confirmed this and recommended against Kramer serving in both roles.

When Kramer proposed (for approval by the foundation's Board) resolutions that would secure his foundation position and cause SOU to lose assets, Cullinan obtained an advice letter from SOU counsel which she made publicly available at a foundation board meeting. The letter recommended against securing Kramer's foundation position. It also stated that "[if] any actions of Mr. Kramer or the Foundation's directors…are determined to have been made in bad faith or through willful misconduct," it was unlikely that the parties would be covered by the foundation's liability policy. The liability policy, the letter explained, did not cover "intentional acts, waste, or fraud." The board ultimately rejected Kramer's resolutions.

Cullinan subsequently informed Kramer that his appointment would not be renewed; the non-renewal was without cause. Kramer challenged the non-renewal in a hearing before SOU's Grievance Hearing Committee which awarded him salary and benefits to remedy insufficient notice of the non-renewal. Kramer then sued, alleging that the advice letter deprived him of his liberty interest because it was stigmatizing and was circulated publicly.

The Ninth Circuit found in favor of the employer because the letter was not "stigmatizing" within the meaning of the Fourteenth Amendment. The letter did not explicitly allege that Kramer had engaged in dishonest or immoral conduct; the letter merely made conditional statements, such as if Kramer's actions were found to be in bad faith or willful misconduct, they would not be covered by the foundation's insurance policy. Nor was the letter stigmatizing merely because it mentioned potential legal action against Kramer for breach of his fiduciary duty and violations of applicable Standards of Conduct. These statements, the Ninth Circuit explained, are distinct from the category of charges that the Ninth Circuit has found to be stigmatizing to an employee – for example, a coach is charged with "immoral conduct," or a teacher is dismissed for "offensive conduct." Statements referencing "ethics," "honesty," "openness," or "strengthening accountability and transparency" may implicate an employee's honesty, but the letter did not contain these statements.

Thus, the Ninth Circuit found for the public employer and dismissed Kramer's claims.

Kramer v. Cullinan (9th Cir. 2018) 878 F.3d 1156.

NOTE:

This case is a reminder to public agencies with at-will employees. In releasing at-will employees without cause, do not make any public statement that would harm the employee's reputation to get another job.

FIRST AMENDMENT

Community College Policies Restricting Time and Place of Expressive Conduct and Requiring Permit Unconstitutionally Restrict Students' Rights to Free Speech on Campus.

Kevin Shaw attended Pierce College, one of nine community colleges within the Los Angeles Community College District. On November 2, 2016, Shaw and two other members of the Young Americans for Liberty organization attempted to distribute Spanish–language copies of the United States Constitution and discuss freedom of speech issues with students on the College's campus. Shortly afterward, a College administrator advised them that they were violating the College's free speech policies and would need to obtain a permit to continue distributing their materials and interacting with students. If Shaw did not obtain the permit, the administrator would ask them to leave campus.

Although Shaw immediately filled out the permit application, he noted that the permit application contained additional rules and regulations about expressive conduct that are only available by requesting and obtaining a permit. Only after receiving the permit application do students discover that

1. The College has only one "Free Speech Area" on campus – an area of approximately 616 square feet where applicants could engage in expressive activity;
2. Individuals planning to distribute material on campus are required to go to the Vice President of Student Services's Office between the hours of 9:00 a.m. and 4:00 p.m.;
3. Students must identify the name and address of the organization they represent, the names of the distributors, and the date and time of the distribution; and
4. Students may only use the Free Speech Area from 9:00 a.m. until 7:30 p.m., Monday through Friday. Although these restrictions are not published to students anywhere but the permit, the College enforces these rules

through its Standards of Student Conduct, which it prints in its schedule of classes. A violation of these rules may result in discipline.

Shaw filed a lawsuit against administrators at the District and College and sought to prevent the District and College from enforcing its free speech policies, requested a judgment in his favor, and sought monetary damages for the violation of his First Amendment rights. The Defendants asked the court to dismiss the lawsuit by arguing that:

1. Shaw did not have standing;
2. Shaw failed to state any facts on which relief could be granted;
3. Certain Defendants were not individually liable;
4. the College Defendants were entitled to qualified immunity; and
5. the Eleventh Amendment prohibited Shaw from winning monetary damages against Defendants in their official capacities.

The trial court first addressed Shaw's standing, or ability to demonstrate a connection to and harm from the challenged action. The trial court ruled that Shaw had standing because the Defendants restricted his speech when administrators enforced the College's Free Speech Policy and required Shaw to obtain a permit before continuing to distribute Spanish–language copies of the U.S. Constitution. The Defendants also tried to argue that Shaw did not have standing because College officials did not restrict Shaw's expressive activity on one occasion and also did not restrict a different protest that Shaw observed. Therefore, the Defendants argued, the threat of the District's and College's future enforcement of the policies was low. The trial court was unpersuaded because the College had previously restricted Shaw's expressive activities on campus, and the College's Standards of Student Conduct indicated that violations of its free speech policies would result in discipline.

The Defendants also argued that Shaw failed to state a claim under the First Amendment. The extent to which the government may regulate speech at a school largely depends on how the area at issue is characterized. Courts traditionally categorize property as either a public forum, a designated public forum, or a non-public forum. Each of these categorizations provides a different standard of review. Shaw contended that Defendants' regulations violate the First Amendment in at least two ways:

1. Defendants' limitation of speech to only the Free Speech Area was not a reasonable time, place, or manner restriction; and
2. Despite designating a Free Speech Area, Defendants' permitting requirement was an unconstitutional prior restraint.

Shaw argued that the College's entire campus is a traditional public forum where the government must show that a content-based exclusion of expressive conduct is necessary to serve a compelling state interest and the regulation is narrowly drawn to achieve that interest. If the regulation is content-neutral, the government may establish reasonable time, place, and manner restrictions that are narrowly tailored to achieve a significant government interest, so long as there are ample alternative channels of communication. In the alternative, Shaw argued, the College's campus is at least a designated public forum where reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to achieve a compelling state interest. The Defendants argued the campus was not a public forum because its primary mission was to provide education and District Board rules declared the campus to be a non-public forum, which would allow the Defendants more leeway in restricting speech on campus.

To determine how to categorize the campus, the trial court considered the actual use and purposes of the property, the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and the

traditional or historic use of both the property in question and other similar properties. When administrators stopped Shaw from distributing materials, he was alongside a large thoroughfare and was not disrupting campus operations or interfering with foot traffic. The trial court found that these areas are traditional public fora, regardless of the College's regulations naming them non-public fora. Therefore, the Defendants were limited in their ability to create content-based restrictions on expressive conduct.

The Defendants then tried to argue that District policy allows the President of each college to designate areas outside of the Free Speech Areas where students may exercise expressive conduct. This supports a finding that the District designated, or at least provided authority to designate, certain areas of the campus outside of the Free Speech Area as public fora. These actions, if proven true, would also nullify the policies declaring the entire campus a non-public forum, so the Court then evaluated the nature of Defendants' policies. The question is whether Defendants narrowly tailored their regulations, and whether students had alternate avenues of communication. Ultimately, the trial court found that the Defendants' 616-square-foot free speech area did not achieve the Defendants' stated goals without unnecessarily impeding students' First Amendment rights. Alternatively, the Defendants could limit expression to areas away from classrooms or impose restrictions on the time students are able to express themselves. Additionally, although the College provided billboards for student use, placing a pamphlet on a billboard is a different medium of expression, and does not sufficiently permit students alternative channels of expression. Therefore, the trial court rejected the District's argument that Shaw failed to state a claim under the First Amendment.

Shaw also alleged that the College requires students to complete a permit application prior to using the Free Speech Area, and the policy "does not limit the discretion of...administrators responsible for its enforcement, to deny or approve an application because of the content or viewpoint of the speaker's intended message." Defendants claimed the administrators do not have any discretion to deny a permit, other than on the grounds that the Free Speech Area was already been reserved by another speaker or group at the time requested. Yet, Defendants could not provide evidence that it provided those guidelines to administrators. Thus, because the College did not provide "narrow objective, and definite standards" to administrators to guide their decision making, the Defendants' argument failed.

Shaw also argued that having to identify himself during the permitting process is improper because it interfered with his right to anonymity. Defendants argued that only administrators knew of Shaw's identity, and therefore Shaw maintained his anonymity with respect to individuals who may happen upon him while he is exercising his rights. However, the Defendant failed to include these facts in their written argument, so the trial court did not consider it. Accordingly, Shaw adequately pleaded the permitting process constitutes an unlawful prior restraint.

Defendants also asked to the trial court to dismiss the case on the grounds that Shaw did not prove the Defendants' caused his legal injury. However, Shaw outlined the role each of the Defendants played in restricting his expressive conduct, and the Defendant's failed to respond to this argument. Accordingly, the trial court denied Defendants' motion on these grounds.

Defendants also asked the trial court to dismiss the case on the grounds that Shaw cannot assert monetary damages against the individual Defendants in their official capacities. Shaw conceded that he may not assert monetary claims against the individuals in their official capacities, but maintained he may pursue damages against them in their individual capacities. The trial court agreed but also found the Defendants were entitled to qualified immunity, which precluded a claim for monetary damages. Accordingly, the trial court granted the Defendants' motion

only to allow the dismissal of Shaw's claims for monetary damages against the individual defendants in their individual capacities.

Finally, the Defendants requested Shaw provide more reasons and supporting facts in his lawsuit, but the Court found that Shaw provided enough information to give the Defendants the opportunity to frame a written response. The Court denied the Defendants' request.

Ultimately, the Court denied, in part, and granted, in part, Defendant's motion to dismiss the case and for a more definite statement. The case will continue before the United States District Court.

Shaw v. Burke (Jan. 17, 2018, 2:17–CV–02386–ODW (PLAx)) [nonpub. opn.] [2018 WL 459661].

NOTE:

This is an unpublished case, and we cannot rely on it for precedent. The case does provide some insight as to how a court might interpret a similar challenge to restrictions on First Amendment rights.

Policies Prohibiting Picketing on District-Owned Property Violated the First Amendment of Teachers and Students.

In anticipation of a teachers' strike in May 2012, the Jackson County School District No. 9 adopted policies that prohibited picketing on property owned or leased by the school district, prohibited strikers from coming on school grounds, even for reasons unrelated to the strike, and prohibited signs and banners at any facilities owned or leased by the school district without advance written approval by the district superintendent.

The policies were motivated by the strike, and the District enforced the policies during the strike. Plaintiff Dave Carrell, president of the union and District employee, testified that he was turned away by a security guard when he tried to attend a weekend flower sale at the high school during the strike. Plaintiff Staci Boyer, a District student, was prohibited from parking in the school's parking lot with a sign on her car's back windshield that stated "I Support D9 Teachers."

The strike ended, and the District rescinded the policies shortly after. The Eagle Point Education Association/SOBC/OEA, Carrell, and Boyer filed a civil rights action against the District contending that the District infringed on their First Amendment rights.

The trial court declared that the District violated Plaintiffs' free speech rights under the First Amendment and under the Oregon Constitution. The trial court prohibited the District from re-enacting the policies and awarded Plaintiffs nominal damages in the amount of $100. Plaintiffs requested the District pay their attorney's fees and costs, and the parties agreed to the amount of $150,000. However, the District reserved the right to challenge on appeal Plaintiffs' entitlement to the award. The District then appealed both the ruling and the monetary award.

At the Court of Appeal, the District argued its policies were a form of government speech and therefore not subject to the Free Speech Clause. If the policies were instead regulatory policies restricting private speech on government property, then the Free Speech Clause would apply and the policies would be subject to further analysis. The government speech doctrine applied only if observers might reasonably have concluded that the District itself endorsed the pro-strike positions, which Plaintiffs sought to express. Here a reasonable observer would not think that the pro-strike message of the strikers or their supporters was a statement made or endorsed by the District. Because the policies were not government speech, the Court subjected them to further review to determine whether the censorship was appropriate.

The Court determined the property covered by the District policies was a non-public forum where the government has the greatest authority to restrict speech. Speech in a non-public forum

can be restricted, but the restrictions must be (1) reasonable and (2) not an effort to suppress expression merely because public officials oppose the speaker's view. Although the Court recognized the District had a legitimate interest in keeping its schools open and in avoiding disruption of its mission to educate students, it ruled that the District policies did not satisfy either requirement. The District's generalized fear of "disruption" is not enough. The District needed "reasonable ground to fear" that some disruption would occur.

Furthermore, the Court also concluded that the policies were not viewpoint neutral. Viewpoint discrimination occurs when the specific opinion or perspective of the speaker is the rationale for the restriction. Here, there was no question the District enacted the policies because of the impending strike.

The Court also found the Districts policies to be overbroad because they covered all District property (even locations where instruction did not take place), targeted all signs (even non-inflammatory ones), prohibited all strikers from entering campus (even to pick up children), and applied at all times, including after school hours.

Therefore, the Court of Appeal found the District policies violated the First Amendment rights of the plaintiffs. The District then attempted to shift blame for violating the student's right by arguing that the restriction imposed on Boyer was not an application of the District policies, but rather a decision of the security guard who denied her the permission to park on campus with the sign in her back windshield. The Court found that there is no suggestion that the security officer would have taken any action but for the adoption and enforcement of the policies, so the District was properly held liable for the violation. Lastly, the Court of Appeal affirmed the award of attorney's fees and costs.

Eagle Point Educational Association/SOBC/OEA v. Jackson County School District No. 9 (9th Cir.2018) 880 F.3d 1097.

CHARTER SCHOOLS

Chartering Authority Not Required to Act Within 60 Days on Charter School's Request to Add New Location.

Today's Fresh Start Charter School operates a public charter school authorized by the Inglewood Unified School District. Its original charter was authorized in 2009 for a location on West Imperial Highway in Inglewood. This charter was renewed in 2012. In November 2015, the School submitted a document to the District that sought both the renewal of its charter for the location on West Imperial Highway and the authorization to operate a second site in Los Angeles.

The Title 5, section 11966.4 provides: "If within 60 days of its receipt of a petition for renewal, a district governing board has not made a written factual finding as mandated by Education Code section 47605 subdivision (b), the absence of written factual findings shall be deemed an approval of the petition for renewal." Sixty days after the School submitted its petition, the District had not made any factual findings concerning the School's petition.

In early February 2016, the Charter School's Superintendent contacted the District's executive director. The executive director informed the superintendent that due inadvertence, the District would just then commence the review of the Charter and schedule the matter for receipt by the State Administrator, a public hearing, and action as required by the Education Code. In response, the Charter School's superintendent took the position that the petition was deemed approved by operation of law, based on the absence of factual findings within 60 days of its submission. She attended the March 9, 2016, District Board meeting where the School's petition was considered and objected to the untimely review of the petition.

An April 8, 2016, staff report to the State Administrator of the District concluded that the

School's charter was automatically renewed because the District did not take action on it within 60 days of its receipt. However, the report treated the School's request for approval of the Los Angeles location as a "material revision" that was not subject to the 60-day automatic renewal and recommended denial of that request for failure to meet the requirements under the Education Code. The matter was placed on the District's Board agenda. At the meeting on May 11, 2016, the State Administrator adopted the proposed resolution that acknowledged the automatic renewal of the School's charter but denied its request to operate the Los Angeles location.

The School filed a petition with the trial court seeking an order directing the District and the State Administrator to set aside the resolution denying the request to operate the second location. The School argued that its entire petition was approved by operation of law based on the District's failure to act within 60 days, and the District improperly "carved away" the request for the Los Angeles location as a material revision. The trial court rejected this argument and denied the requested relief. The School appealed.

The core question in this case is whether the approval by operation of law of a petition for renewal of a charter school also applies to a request for material revision of a charter contained in the same petition. This turns on the applicable statutes and regulations governing the approval processes. There are three categories of approval governing charter schools: an initial petition for the establishment of a charter school; a petition to renew an existing charter; and a petition for approval of a material revision to an existing charter. The approval procedure for each category is different.

Here, the School's initial petition for establishment of a charter school was granted in July 2009 and renewed in March 2012. Once the School received approval to establish the charter school, its later intent to establish operations at an additional location was governed by Education Code section 47605, subdivision (a)(4). Accordingly, it was required to request a material revision to its charter from the granting authority, and the District required to consider this request at an open, public meeting. Approval of the additional location would constitute a material revision to the School's charter.

The School followed the filing procedure when it submitted a combined petition to the District for both the renewal and material revision of the School's charter. This petition specified the Los Angeles location as the proposed additional site. Inclusion of the renewal request and the material revision in the same petition does not change the fact that the School was seeking two different types of approval, each with its own criteria and process.

The School argued it was not petitioning to amend its existing charter, but instead was petitioning for approval of a new proposed charter. However, new charters are subject to different approval requirements, and petitions for new charters are not deemed automatically approved after the expiration of 60 days.

The School argued that since its renewal petition specified the additional Los Angeles school site, approval of the renewal petition by operation of law approved the Los Angeles location because that site was incorporated into the renewed charter and did not amount to a material revision to the charter. But the Court of Appeal explained the regulatory scheme specifically distinguishes between the approval procedure for a petition for renewal and the procedure for approval of an additional school site after an initial charter petition has been granted. The process for adding an additional location is separately described as a "material revision," and there is no time frame for consideration of such a request, no written findings required for denial, and no provision for the request to be deemed approved in the absence of timely action.

The additional location in this case was being proposed after the approval of the initial charter, so it did not undergo any detailed review or

public consideration at the time the charter school was established. Allowing approval of the Los Angeles location by operation of law would short circuit the consideration of the proposed location at an open public meeting, as required by Education Code section 47605, subdivision (a)(4). The Court of Appeal found that the Legislature did not include a time imperative for approval of an additional location, nor is there any regulatory consequence similar to that for renewal petitions.

The Court of Appeal agreed with the District and the trial court that the deemed approval applies to the petition to renew the charter, but not to the request for a material revision to add the Los Angeles location. The District retained the authority to consider the request for material revision to add the Los Angeles location despite the fact that the renewal petition had been deemed approved.

Today's Fresh Start Charter School v. Inglewood Unified School District, et al. (Feb. 7, 2018, No. B280986) __ Cal.4th __ [2018 WL 739700].

LEGAL ADVISORIES

California Community Colleges Chancellor's Office (CCCCO) Issued Legal Advisory Regarding Recent Additions to Nonresident Tuition Exemptions.

As a result of legislative changes effective January 1, 2018, the CCCCO Legal Affairs Division issued a legal advisory to provide information on new laws affecting residency, student immigrant visas, and military dependents.

Under the California Education Code, nonresidents of California pay nonresident tuition in addition to other fees required by the institution, but the Education Code authorizes a number of exceptions to this requirement.

Under previous state law, certain students who either attended California elementary or secondary schools (or both) for a total of three or more years or attained equivalent credits in California were exempt from nonresident tuition. This year, the Legislature expanded the exemption to allow adult school and noncredit course work to establish eligibility for the exemption. The Legal Advisory identifies the eligibility requirements established under Senate Bill 68.

Additionally, the Legal Advisory discusses Assembly Bill 343, which established a new exemption from nonresident tuition for refugees with special immigrant visas (SIVs) who fled Afghanistan, Iraq, Syria or other countries.

The Legal Advisory also notes that AB 172 extended resident classification to specified dependents of transferred or retired members, provided the dependent was admitted to a public postsecondary institution prior to the transfer or retirement.

The Legal Advisory also provides the California Nonresident Tuition Exemption Request form, which is required by the Board of Governors for community colleges when determining a student's eligibility for an exemption. The advisory included an updated list of Frequently Asked Questions regarding residency determinations, forms and verification, eligibility issues, immigration issues, financial aid, and other relevant concerns.

To read the legal advisory, visit http://extranet.cccco.edu/Divisions/Legal/Advisories.aspx.

California Community Colleges Chancellor's Office (CCCCO) Issued Legal Advisory Regarding "Sanctuary" Jurisdiction Legislation – Senate Bill 54 (2017) and Assembly Bill 21 (2017).

As a result of legislative changes effective January 1, 2018, the CCCCO Legal Affairs Division issued a legal advisory to provide information regarding recent California "sanctuary" jurisdiction legislation that prohibits state and local agencies from using resources to further certain federal

immigration enforcement efforts. These new laws went into effect on January 1, 2018.

In 2017, the California Legislature passed Senate Bill 54, which eliminated state and local law enforcement discretion to use money and personnel to investigate, interrogate, detain, detect, or arrest persons, or to conduct other activities for immigration enforcement purposes. Exceptions exist related to individuals who have committed serious crimes. This legislation applies expressly to community college police.

The Legal Advisory outlines the types of cooperation with federal immigration enforcement efforts that are expressly prohibited under SB 54 and the law's effects upon community college police. Additionally, the Legal Advisory clarifies the types of cooperation that are permitted under the new legislation.

Additionally, Assembly Bill 21 places a number of affirmative obligations on community college districts to prevent student, staff, and faculty from participation in federal immigration enforcement efforts. The Legal Advisory outlines the obligations placed on community college districts and provides exemplars of administrative and judicial subpoenas and warrants, which are the only reason an immigration officer may be allowed access to nonpublic areas of a community college campus.

To read the legal advisory, visit http://extranet.cccco.edu/Divisions/Legal/Advisories.aspx.

To read LCW's Legislative Update for Public Education, which includes more information on AB 21 and other legislative changes that went into effect this year, visit https://www.lcwlegal.com/news.

TITLE IX

Federal Rulemaking Process Regarding New Title IX Regulation Begins in March.

On September 7, 2017, United States Secretary of Education Betsy DeVos announced the United States Department of Education would launch a public comment period to inform the development of new federal Title IX regulations pertaining to campus sexual assault policies. This is significant because a federal regulation, as opposed to a Dear Colleague Letter, has greater force in establishing the obligations of educational institutions. In the announcement, Secretary DeVos requested recommendations from "important perspectives" regarding Title IX enforcement issues including alternative models to traditional adjudication, the appropriate standard of proof for campus-based proceedings, investigation methods, and the role of campus officials.

By law, Federal agencies must consult the public during rulemaking. Anyone, including individuals or institutions, may submit a comment aimed at developing and improving federal regulations, and the Department of Education will review and consider all submissions.

The Department of Education recently announced that in March 2018, it will present its Notice of Proposed Rulemaking, which is the formal public notice issued when the agency announces its intent to publish a particular regulation. The public comment period will begin in March 2018. The public comment period is an opportunity to be heard and make a record of ideas or positions on the topic. Institutions should consider utilizing the public comment period.

LCW will continue to monitor the notice-and-comment process and provide information as it becomes available.

Read more about the recent changes to Title IX enforcement: https://www.lcwlegal.com/news/us-department-of-education-rescinds-2011-dear-colleague-letter-and-issues-interim-guidance-on-title-ix-and-sexual-violence

BUSINESS & FACILITIES

Post-Judgment Withdrawal of a Fair Market Value Deposit in an Eminent Domain Case May be Subject to a Bond.

Tri-City Health Care District ("District") entered into ground and building leases with a medical company, Medical Acquisition Company, Inc. ("MAC"). Pursuant to the ground lease, the District leased land to MAC and MAC agreed to construct a medical building on the land. Pursuant to the building lease, MAC agreed to sublease portions of the completed medical building to Tri-City.

Several contract disputes arose between the parties and, eventually, the District filed a motion to take immediate possession of the ground lease under Code of Civil Procedure Section 1255.410. This statute, known as the "quick-take" provision, allows a condemning agency to take immediate possession of real property before trial on an eminent domain case by depositing the probable amount of compensation, as determined by appraisal. The District deposited $4.7 million, the probable compensation determined by an appraiser, with the State Treasurer.

MAC agreed to the District's possession of the building and withdrew the $4.7 million. The case proceeded to trial where a jury found that the fair market value of the building was closer to $17 million. The trial court entered judgment in favor of MAC, which reflected the jury's fair market value determination. The trial court also entered an order requiring the District to increase its deposit by $12.2 million. The District filed an appeal from the judgment. In addition, the District sought to abandon the eminent domain proceeding altogether, which the trial court denied. The District filed an appeal of that order as well.

While its two appeals were pending, the District deposited the additional funds with the State Treasurer. Soon thereafter, MAC applied for the release of the entire remaining deposit without a bond. The trial court allowed MAC to withdraw an additional $4.4 million, but required a bond before MAC could withdraw the remaining amount. MAC appealed the trial court's order.

On appeal, MAC argued that after judgment, the withdrawal of a deposit in an eminent domain case is not subject to a bond or undertaking. The Court of Appeal rejected MAC's argument. The Court concluded any post-judgment withdrawal of a deposit in an eminent domain case is governed by Code of Civil Procedure Section 1268.140, which specifically allows a court, in its discretion, to impose a bond or undertaking. (Code Civ. Proc., § 1268.140, subd. (c).) The Court held that, based on the procedural posture of the case, the trial court did not abuse its discretion in requiring a bond because the District had a claim to the deposit if its appeals were successful.

Medical Acquisition Company, Inc. v. The Superior Court of San Diego County (2018) 19 Cal.App.5th 313.

RETIREMENT

CalPERS Raises Pensionable Compensation Caps for 2018.

CalPERS has updated its pensionable compensation limits for Classic and Public Employees' Pension Reform Act (PEPRA) members for 2018.

The compensation limit for classic members for the 2018 calendar year is $275,000; raised from $270,000 in 2017. The compensation limit for new members for the 2018 calendar year is $121,388 for Social Security Participants and $145, 666

for Non-Social Security Participants. In 2017, the compensation limits for new members was $118,775 for Social Security Participants and $142,530 for Non-Social Security participants. Employees with membership dates prior to July 1, 1996 are not impacted by these limits.

These new caps limit the amount of compensation taken into account under a defined benefit retirement plan. When a classic or new member reaches the applicable compensation cap, the public employer is not required to pay retirement contributions on additional compensation earned by the employee above the cap. Thus, for a classic member who earns $280,000, in 2018, an employer is not obligated to pay retirement contributions on the $5,000 earned after the $275,000 cap is reached. Similarly, the employee will not pay retirement contributions on compensation earned above the cap.

Public employers must continue to monitor whether an employee meets or exceeds the 2018 caps and must notify employees when the cap is reached. Employers must also continue to report an employee's compensation earned to CalPERS, even if the compensation exceeds the applicable cap.

NOTE:

Employers should notify all classic or PEPRA members who are subject to the compensation limit requirements of the changes to the CalPERS caps on earnable compensation. The full CalPERS Circular Letter is available here: https://www.calpers.ca.gov/docs/circular-letters/2018/200-001-18.pdf.

California Court of Appeal Opinion Injects Uncertainty as to Public Employee Pensions and "Vested Rights."

A recent California Court of Appeal opinion is contrary to previous opinions regarding California pension benefits and public employee "vested rights." The January 8, 2018 opinion in *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* addressed the issue of whether pension systems governed by the County Employees Retirement Law of 1937 (CERL) can change the definition of compensation earnable under the Public Employee Pension Reform Act of 2013 (PEPRA) for employees hired before PEPRA's January 1, 2013 effective date. In addition, the Court addressed the limits of public employee "vested rights" to immutable pension benefits. The case is significant for CERL and CalPERS employers.

The case arose after California enacted the Public Employee Pension Reform Act of 2013 (PEPRA). PEPRA was enacted to address the significant, statewide underfunding of public pension systems. Among other things, PEPRA amended the pension systems governed by the County Employee's Retirement Law of 1937 (CERL) and expressly excluded several items from CERL's long-standing definition of "compensation earnable" for employees hired prior to PEPRA's effective date ("Legacy Members").

In response to these changes, labor organizations representing members of CERL systems sued to challenge the exclusion of pay items that were previously included as compensation earnable. They also alleged that Legacy Members had a constitutionally protected "vested right" to pension benefits as those benefits existed prior to the enactment of PEPRA, and that PEPRA unconstitutionally interfered with, or "impaired" those vested rights. The trial court largely disagreed with the labor organizations and CERL members, and the multiple parties appealed the trial court's decision.

On appeal, California's First District reviewed: whether retirement boards have discretion to include pay items in compensation earnable that are not listed in CERL's statutory categories, and whether PEPRA in fact unconstitutionally impaired Legacy Members' vested pension rights.

First, the Court found that retirement boards do not possess discretion to include additional pay items in compensation earnable. An item of compensation is only includable in a member's pensionable compensation if it falls within one of CERL's statutory compensation categories.

Second, the Court's decision as to whether PEPRA unconstitutionally impaired the vested pension rights of Legacy Members is a significant departure from previous California Court of Appeal cases. *Marin Assn. of Public Employees v. Marin County Employee's Retirement Assn.* held that public pension system members are not entitled to an immutable, unchanging pension benefit for the entirety of employment, but are entitled only to a "reasonable" pension. The Marin opinion further held that detrimental pension modifications need not always be accompanied by comparable new advantages to pensioners. The Marin opinion ultimately concluded that PEPRA's modifications to the CERL definition of compensation earnable for Legacy Members was "reasonable" and therefore, did not impair their constitutionally protected vested rights.

By contrast, the opinion in Alameda County rejected the reasoning in Marin and instead held that detrimental changes to the vested pension benefits of Legacy Members could only be justified by compelling evidence that the required changes manifest a material relation to the successful operation of the pension system. The Court determined that this analysis must be done on an individualized basis and directed the trial court to conduct the required analysis for each of the retirement systems at issue. The Court of Appeal therefore remanded the cases back to the trial court.

The California Supreme Court had previously granted review of the Marin case, but then put that case in abeyance until the Alameda County case was decided, presumably in order to consolidate both cases should the Supreme Court also grant review of the Alameda County decision. Unless such a review occurs, the Alameda County and Marin cases remain as two divergent decisions on the fundamental notion of a vested right to immutable pension benefits in the aftermath of PEPRA.

Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn (2018) 19 Cal.App.5th 61.

NOTE:

LCW will continue to provide updates on these, and other decisions relevant to pension benefits and vested rights. A full discussion of the Alameda County decision and related developments in retirement law is available here: https://www.calpublicagencylaboremploymentblog.com/pension/california-court-of-appeal-issues-a-contrary-decision-addressing-vested-rights-of-public-employees-in-the-aftermath-of-pepra-where-will-the-supreme-court-land/

DISCRIMINATION

Obesity May Be a Disability or a Perceived Disability under California's Fair Employment and Housing Act.

Ketryn Cornell was an obese woman who was fired from the Berkeley Tennis Club ("Club") after having worked there for over 15 years. Cornell sued the Club, claiming that: her obesity was a disability; that her termination was disability discrimination; and that a Club manager harassed her due to her disabled status, among other claims.

Cornell was obese since childhood. Beginning in 1997, Cornell worked at the Club as a lifeguard and pool manager and received positive performance reviews, raises, and bonuses. In 2012, a new manager instituted a requirement that Club employees wear shirts bearing the Club's logo. When Cornell said she would need a specially-ordered T-shirt size, the manager mocked her, asked her about weight-loss surgery, and ultimately ordered her a shirt that was

five sizes too small. Cornell ultimately bought her own shirt, having been humiliated by the manger's conduct. The manager subsequently denied Cornell's requests to work extra shifts, refused to consider her for promotions, and paid her less than a newlyhired employee even though the two performed the same duties.

In 2013, the Club terminated Cornell for allegedly secretly recording a Club board meeting held to discuss personnel issues. Managers suspected that Cornell had planted a recording device when she helped set up the meeting room. However, the Club did not fully investigate the matter prior to terminating Cornell.

Upon being terminated, Cornell sued the Club under the Fair Employment and Housing Act (FEHA), alleging disability discrimination and other claims. The trial court granted the Club's motion for summary judgment and dismissed Cornell's FEHA claims, holding that Cornell had failed to produce evidence that her obesity qualified as a disability. Cornell appealed. The Court of Appeal reinstated Cornell's claims of disability discrimination and harassment.

A key issue before the Court of Appeal was whether Cornell could establish that her obesity was a disability within the meaning of FEHA. Under the FEHA, a physical disability is defined as any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that (1) affects one or more of several body systems, and (2) limits a major life activity. Affected body systems may include the neurological, organ, respiratory, musculoskeletal, skin, or digestive systems, among others. A condition limits a major life activity (such as physical, mental or social activities, or working) if the condition makes achievement of the activity difficult.

First, in reinstating Cornell's discrimination claim, the Court of Appeal followed the California Supreme Court's decision in *Cassista v. Community Foods*, Inc., a case which recognized that obesity can result from a physiological condition affecting a bodily system, and may limit a major life activity. The Court of Appeal agreed that under Cassista, an employee claiming a disability due to obesity must be able to produce evidence showing the obesity has some physiological, systemic basis. Cornell presented evidence from a physician who opined that her obesity "is more likely than not caused by a genetic condition affecting metabolism." The Club needed to, but did not provide evidence disproving that Cornell's obesity has a physiological cause. Thus, the Club could not win summary judgment on Cornell's disability claims.

The Court of Appeal also concluded that the Club's failure to conduct a follow-up investigation of the recorder incident, and the manager's comments to Cornell precluded summary judgement on Cornell's discrimination claims. The fact that Cornell's managers did not fully question her about the recorder incident or perform a follow up investigation, raised a question for the jury on the issue whether Club management actually believed that Cornell planted the recorder. A jury could conclude that the recorder incident was a mere pretext for the Club's true discriminatory motive.

Second, the Court of Appeal reinstated Cornell's harassment claim because Cornell's evidence raised a question for a jury to decide: whether the alleged harassment was sufficiently severe or pervasive to constitute harassment. Claims of harassment are actionable under FEHA if an employee shows a "concerted pattern of harassment of a repeated, routine, or generalized nature" that would create a hostile work environment from the perspective of a reasonable person. Isolated, non-severe offensive statements do not generally support harassment claims. The Court of Appeal found that the manager's comments about Cornell's weight, and eating habits, by themselves, were not extreme and were too isolated to be severe or pervasive. However, the manager had also reduced Cornell's hours, passed her over for internal job openings, and paid her lower wages than an employee performing the same duties. This combination of

evidence precluded summary judgment in the Club's favor on Cornell's harassment claim.

Finally, the Court of Appeal noted that obesity may constitute a perceived disability that triggers employer obligations under the FEHA. FEHA defines physical disabilities to include: 1) "[b]eing regarded or treated by the employer . . . as having, or having had" a condition "that has no present disabling effect but may become [an actual] physical disability," and also 2) "any physical condition that makes achievement of a major life activity difficult." It is not necessary for an obese employee to actually be disabled, or for an employer to perceive that a plaintiff's obesity has a physiological cause, in order for FEHA to apply.

Ketryn Cornell v. Berkeley Tennis Club (2017) 18 Cal. App.5th 908.

NOTE:

The Cornell decision makes clear that obesity may be a disability within the meaning of FEHA if it has a physiological cause or if an employer perceives the condition to be disabling. In light of this decision, employers should be sure to investigate employee complaints of disability discrimination due to obesity, as well as employee requests for accommodation based upon obesity. Additionally, employers who fairly investigate alleged employee misconduct that could serve as the basis for disciplining or terminating the employee may be in a better position to defend against claims of discrimination if the employer's decision is later challenged.

WRONGFUL TERMINATION

Employer's Use of Criticism, Demotion, and Performance Improvement Plan Did Not Amount to an Employee's Constructive Discharge.

An employee cannot prove a constructive discharge claim based solely on the employee's personal, subjective reactions and objections to the employer's use of standard disciplinary procedures, unless the employee presents evidence that the procedures were used as part of a pattern to mistreat the employee.

A "constructive discharge" occurs when an employer intentionally creates, or knowingly permits the existence of working conditions that are so intolerable that they would compel a reasonable person in the employee's position to resign. But an employee can only prevail on a constructive discharge claim by proving that working conditions were "unusually aggravated" or that they amount to a "continuous pattern of mistreatment." The California Court of Appeal explained that this is an objective standard that focuses on the nature of the working conditions and not on the employee's subjective reaction to the conditions.

In this case, T.J. Simers was a sports columnist for the Los Angeles Times (Times) who wrote a thrice weekly column. He received consistently positive performance reviews and positive feedback. However, following criticism about the tone and substance of several of his columns, Times management decided to reduce the frequency of Simers' columns to two times per week. Subsequently, the paper became aware that Simers may have violated the Times' newsroom ethics guidelines by, among other things, making a pitch for outside work without the necessary approval from a Times editor. The Times suspended Simers' column pending further investigation. Simers was subsequently demoted without a reduction in pay pending the outcome of the investigation, and was provided with a final written warning. Simers ultimately left the Times, accepted a position at another newspaper, and sued the Times for constructive discharge.

The Court of Appeal reviewed the evidence Simers presented about his working conditions at the Times. Simers' evidence showed, among other things: the Times reduced the frequency of publication of his columns; he was accused of unethical conduct; he was referred to as a "public embarrassment" to the Times in reference to his

alleged ethical breach; Times' managers criticized his writing as sloppy and not up to standards; his columns were suspended; he was demoted; the Times issued a final warning; and placed him on a performance improvement plan which could potentially lead to termination.

The Court of Appeal found that Simers' evidence was insufficient to show the required aggravated conditions or pattern of mistreatment for a constructive discharge claim. The problem, the Court of Appeal noted, was that some of Simers' allegations were based solely on his "subjective reaction to standard employer disciplinary actions – criticism, investigation, demotion, performance plan – that … are well within an employer's prerogative for running its business." Using these methods does not constitute constructive discharge "[u]nless those standard tools are employed in an unusually aggravated manner or involve a pattern of continuous mistreatment…" In reaching this conclusion, the Court of Appeal applied the standards set forth in *Scott v. Pacific Gas & Electric Co.*, and *Turner v. Anheuser-Bush, Inc.*

T.J. Simers v. Los Angeles Times Communications, LLC, (2018) 18 Cal.App.5th 1248.

NOTE:

This case provides encouragement for employers to address employee work performance by using counseling, performance improvement plans and disciplinary action.

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Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit **www.lcwlegal.com/news**.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of our ***Education Matters*** newsletter.

If you have any questions, contact Nick Rescigno at 310.981.2000 or info@lcwlegal.com.

SAVE SOME MONEY AND BE IN COMPLIANCE

BECOME A CERTIFIED AB 1825, AB 2053, AND AB 1661 TRAINER FOR YOUR AGENCY

Government Code Section 12950.1 (AB 1825), requires employers with 50 or more employees to provide harassment prevention training to all supervisory employees every two years and to new supervisors within 6 months of their assumption of a supervisory position.

Liebert Cassidy Whitmore, leaders in client education, is offering "Train the Trainer" sessions to provide you with the necessary tools to conduct mandatory of AB1825 (harassment/retaliation), AB2053 (bullying), and AB1661 (elected officials) training for your agency.

You are eligible to attend LCW's Train the Trainer session if you meet any of the following:

1. "Attorneys" serving as in-house counsel, admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or
2. "Human resource professionals" or "harassment prevention consultants" working as employees with a minimum of two or more years of practical experience in one or more of the following; a) designing or conducting discrimination, retaliation and sexual harassment prevention training; b) responding to sexual harassment complaints or other discrimination complaints; c) conducting investigations of sexual harassment complaints; or d) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or
3. "Professors or instructors" in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

TRAIN THE TRAINER SEMINARS

SAN FRANCISCO
APRIL 11, 2018

LOS ANGELES
APRIL 20, 2018

SAN DIEGO
APRIL 20, 2018

FRESNO
April 27, 2018

9:00 a.m. - 4:00 p.m.

Location: LCW Offices

Cost:

$1,500 each or $1,350 each if ERC Member

ATTENDEES WILL RECEIVE:

- 6 hours of instruction to be completed in one day
- Facilitator Guide, PowerPoint slides and case studies (on CD and hard copy) complete with detailed speakers' notes for use in future presentations
- Participant Guide for distribution in their future presentations
- Legal updates, where warranted, through 2020, including updated slides and facilitator/participant guides
- Certificate of Attendance for "Train the Trainer session"
- Ability for 5 employees from their own agency to attend the pre-scheduled workshop

REGISTRATION:

Visit https://www.lcwlegal.com/events-and-training/webinars-seminars for more information and to register online. Please contact Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or 310.981.2051 for more information on how to bring this training to your agency.

Three LCW Attorneys Honored by the 2018 Southern California Super Lawyers

Geoffrey S. Sheldon, partner in the Los Angeles office, is receiving this honor for the second year in a row. Geoff is the Chair of the Firm's Public Safety Practice Group and also a member of the Litigation Practice Group's Executive Committee. He has successfully defended clients in numerous employment litigation and administrative hearings, making him one of LCW's top litigation experts.

This is the fifth time that **J. Scott Tiedemann** has been selected to this list. As the Managing Partner of LCW, Scott is a leading advocate and trusted advisor to public safety agencies across California. In addition, Scott represents a wide variety of government agencies in labor and employment matter.

Brian P. Walter, partner in the Los Angeles office, is receiving this honor for the twelfth time (ninth consecutive year). Brian represents clients in all aspects of employment and labor law and has handled class actions and collective actions in federal and state courts. He is also the Chair of the Firm's Litigation Practice Group, advises and counsels clients on FLSA issues, and is a popular presenter for LCW trainings.

Liebert Cassidy Whitmore congratulates them for being honored in their work!

Train the Trainer Refresher Sessions

Fresno - March 28, 2018

San Diego and Los Angeles - March 30, 2018

San Francisco - April 19, 2018

Time: **9:00 a.m. - 12:00 p.m.**

Location: **Liebert Cassidy Whitmore Offices**

Cost: **$1,000 each or $900 each if ERC Member**

Liebert Cassidy Whitmore is offering "Train the Trainer" refresher sessions to provide you with the necessary tools to continue conducting mandatory AB 1825 (Govt. Code Section 12950.1) training for your agency.

If you have attended one of LCW's previous Train the Trainer sessions, you are eligible to attend the Refresher course.

Registration:

Visit https://www.lcwlegal.com/events-and-training/webinars-seminars for more information and to register online. Please contact Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or 310.981.2051 for more information on how to bring this training to your agency.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Mar. 7 **"Maximizing Performance Through Evaluation, Documentation and Discipline"**
Los Angeles County Human Resources | Los Angeles | Melanie L. Chaney

Mar. 7 **"Public Sector Employment Law Update"**
Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore

Mar. 8 **"Workplace Bullying: A Growing Concern" and "Difficult Conversations"**
Central Valley ERC | Hanford | Che I. Johnson

Mar. 8 **"Iron Fists or Kid Gloves: Retaliation in the Workplace" and "Navigating the Crossroads of Discipline and Disability Accomodation"**
East Inland Empire ERC | Fontana | T. Oliver Yee & Kevin J. Chicas

Mar. 8 **"Introduction to the FLSA"**
Gold Country ERC | Webinar and Nevada City | Gage C. Dungy

Mar. 14 **"The Art of Writing the Performance Evaluation"** and **"Inclusive Leadership"**
Coachella Valley ERC | Indio | Kristi Recchia

Mar. 14 **"Introduction to the FLSA"**
Gateway Public ERC | Santa Fe Springs | Jennifer Palagi

Mar. 14 **"Workplace Bullying: A Growing Concern"** and **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"**
San Joaquin Valley ERC | Merced | Kimberly A. Horiuchi

Mar. 15 **"Moving Into the Future"**
Bay Area ERC | Milpitas and Webinar | Erin Kunze

Mar. 15 **"The Art of Writing the Performance Evaluation"**
San Mateo County ERC | Foster City | Heather R. Coffman

Mar. 20 **"Difficult Conversations"** and **"Inclusive Leadership"**
North San Diego County ERC | Vista | Kristi Recchia

Mar. 22 **"Workers' Compensation: Managing Employee Injuries, Disability and Occupational Safety"**
West Inland Empire ERC | Diamond Bar | Jeremiah Heisler

Mar. 28 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Sonoma/Marin ERC | Rohnert Park | Kelly Tuffo

Customized Training

Mar. 1,8,9,15,22 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Irvine | Christopher S. Frederick

Mar. 2 **"Ethics in Public Service"**
County of San Luis Obispo | San Luis Obispo | Laura Kalty

Mar. 6	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Stockton | Kristin D. Lindgren
Mar. 7	**"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"** East Bay Regional Park District | Castro Valley | Erin Kunze
Mar. 13	**"Motivation, Influence & Accountability in the Public Sector"** City of Beverly Hills | Kristi Recchia
Mar. 15	**"MOU's, Leaves and Accommodations"** City of Santa Monica | Laura Kalty
Mar. 15	**"Must-Have Employment Policies and Guide to Making an Offer of Employment and Guide to Lawful Termination and The Disability Interactive Process"** CSRMA | Oakland | Lisa S. Charbonneau
Mar. 21	**"Progressive Discipline"** Mono County | AM workshop - Mammoth Lakes & PM workshop - Bridgeport | Gage C. Dungy
Mar. 22	**"Introduction to Public Service"** City of Stockton | Gage C. Dungy
Mar. 28	**"Preventing Workplace Harassment, Discrimination and Retaliation and File That! Best Practices for Document Record Management"** City of Riverside | Christopher S. Frederick
Mar. 29	**"Performance Management: Evaluation, Documentation and Discipline"** ERMA | West Hollywood | Jennifer Rosner
Mar. 30	**"Preventing Workplace Harassment, Discrimination and Retaliation"** ERMA | Farmersville | Kimberly A. Horiuchi

Speaking Engagement

Mar. 1	**"Legal Update"** County Counsels Association (CCA) | Oakland | Morin I. Jacob
Mar. 15	**"Sexual Harassment and AB 1661"** League of California Cities Los Angeles Division | Cerritos | Jennifer Rosner
Mar. 15	**"Preparing for Your Next Arbitration- The Who's, When's, Why's, and How's"** Northern California Chapter International Public Management Association Annual Conference | Rohnert Park | Richard Bolanos
Mar. 21	**"Critical Legal Update on Labor and Employment Laws Impacting Police Personnel"** California Police Chiefs Association (CPCA) Annual Conference | Long Beach | TBD
Mar. 23	**"Elimination of Bias in the Legal Profession"** City Attorney's Association of San Diego (CAASD) | Palm Springs | Jennifer Rosner

Seminars/Webinars

Register Today: ***www.lcwlegal.com/events-and-training***

Mar. 22	**"Costing Labor Contracts"** Liebert Cassidy Whitmore | Central Valley | Peter J. Brown & Kristi Recchia

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