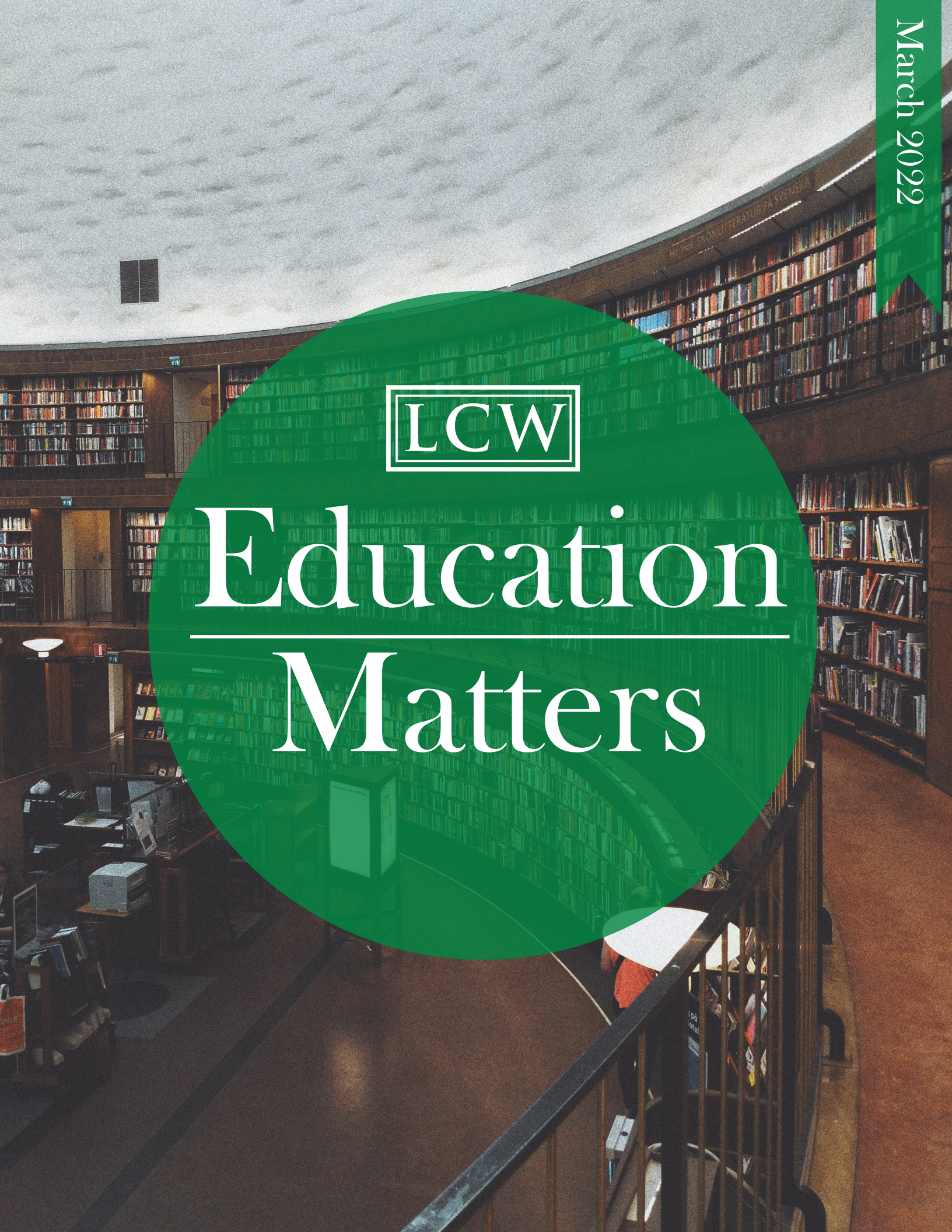

March 2022

LCW

Education Matters

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TITLE IX

U.S. Department Of Education Takes Important Step Towards The Release Of The Proposed Amendments To The Title IX Regulations.

The U.S. Department of Education's Office for Civil Rights (OCR) has sent its draft proposed amendments to the Title IX regulations to the Office of Information and Regulatory Affairs (OIRA) for internal review. The submission of the draft amendments, known as the Notice of Proposed Rulemaking (NPRM), is the first formal step in the federal regulation revision process. OIRA review includes a cost-benefit analysis of the proposed rules and review by the Department of Justice, which has the responsibility to review federal agencies' proposed rules related to civil rights. Following this review process, the Department of Education anticipates it will publish the NPRM in the Federal Register, at which point the public will have the opportunity to comment on the proposed regulations. The Department of Education previously announced it expects the NPRM will be published in April 2022.

The 2020 regulations remain in effect while the rulemaking process is ongoing. As LCW previously reported, OCR has ceased enforcement of 34 C.F.R. § 106.45(b), which prohibits the hearing officer from relying on statements not subject to cross-examination, following a ruling from a federal district court vacating that requirement.

Note:

An educational entity's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. 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 program and other resources by visiting this page.

Did you miss the 2022 LCW Conference? Don't worry - we've got you covered!

We're thrilled to announce that registration is now open for the Virtual Employment Law Seminar taking place on April 27, 2022.

Don't miss out on a sampling of 2022 LCW Conference sessions presented live in a virtual format; they will also be available on-demand! Attendees will have full access to 12+ sessions through May 28 to watch at their leisure.

Sessions include:

- A Legal Tune Up to Get, and Stay, in Peak Legal Shape
- Managing a Remote or Hybrid Workforce
- Navigating Key Labor Relations Topics in Bargaining
- The Impact of Diversity, Equity and Inclusion Efforts on Employment Litigation

Register Today!

STUDENTS

California Court Of Appeal Finds District Did Not Have Mandatory Duty To Defend Former Student Athlete From Lawsuit Against Injured Referee.

Vanndrya Srouy was a student at Crawford High School (Crawford) in the San Diego Unified School District (the District) and a member of Crawford's varsity football team. During one of his football games, Srouy blocked an opposing player who then fell onto a football referee, John Herlich. After Srouy graduated from high school, Herlich filed suit against Srouy and the District claiming that he was injured when Srouy blocked the opponent. The District (as a co-defendant) rejected Srouy's tender of defense in the Herlich lawsuit. A tender of defense is when one party is responsible for defending another party in a lawsuit and paying all the costs associated with that defense.

Srouy then filed a lawsuit against the District alleging the District acted wrongfully when it refused to defend him in the Herlich lawsuit, and sought to recover the legal fees and costs he incurred in defending himself from that case. Srouy alleged this duty arose under the free school guarantee and the equal protection clause of the California Constitution; title 5, section 350 of the California Code of Regulations; and Education Code Section 44808. Srouy alleged the District violated Education Code Section 44808 by failing to protect his safety and well-being in connection with the aftermath of the football game and by "failing to insure the absence of financial injury to [Srouy] as a result of the Herlich lawsuit." He also alleged that under article IX, section 5 of the California Constitution, the guarantee of a free school extends to ensuring a student does not incur legal fees and costs from a lawsuit arising from an extracurricular activity for which the student receives class credit. Title 5, section 350, of the California Code of Regulations states: "A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law." Srouy claimed that the attorney fees and costs he incurred in defending against the Herlich lawsuit constituted a "charge not specifically authorized by law" that the District failed to prevent him from incurring.

The District challenged the legal sufficiency of the complaint, arguing that none of the provisions on which Srouy relied upon imposed a mandatory duty on the District to prevent a student from incurring attorney fees and costs in the defense of a lawsuit.

The trial court agreed with the District and dismissed Srouy's operative complaint. The court found Srouy had not succeeded in establishing that the District was under a mandatory duty to "protect or indemnify [him] from incurring attorney fees." The court reasoned that incurring legal fees was not the type of harm that Education Code Section 44808 was designed to prevent. The court further found that while article IX, section 5 of the California Constitution, and title 5, section 350 of the California Code of Regulations prohibit schools from charging students fees to enroll or participate in educational extracurricular activities, they did not obligate schools to prevent students from being "required to pay [an] attorney for fees incurred in representing [the student] in litigation outside of school." Srouy appealed to the Court of Appeal.

On appeal, the Court of Appeal affirmed the trial court's judgment, and concluded that the provisions Srouy relied upon did not impose a mandatory duty on the District to defend Srouy from the Herlich lawsuit. The Court of Appeal rejected Srouy's argument that Education Code Section 44808 imposed a mandatory duty on the District, reasoning that the provision was not intended to broaden the scope of school district liability as Srouy sought to do on appeal. Additionally, the Court of Appeal held that the equal protection clause of the California Constitution does not afford litigants a right to recover individual monetary damages. The Court of Appeal concluded its opinion in stating: "Although Srouy's plight evokes our sympathy, our ability to respond is constrained by the law, and the allegations of this case do not afford a judicial solution. We leave it to the Legislature to determine whether the needs of student athletes in Srouy's position are sufficiently addressed by current law, and if not, to craft an appropriate solution."

Ultimately, the Court of Appeal agreed with the District and dismissed the case.

Srouy v. San Diego Unified Sch. Dist. (2022) __ Cal.App.4th __ [2022 WL 557183].

California Supreme Court Denies UC Regents' Petition For Review And Application For Stay In Case Pausing Increases In UC Berkeley's Student Enrollment; Governor Signs Law To Stop Enrollment Cuts.

In 2018, Save Berkeley's Neighborhoods, a California non-profit group of Berkeley residents formed "to improve the quality of life and protect the environment," challenged the University of California, Berkeley's admissions process in a lawsuit. Save Berkeley's Neighborhoods argued that the university failed to provide enough on-campus housing for its students while it continued to increase and exceed its student enrollment in violation of the California Environmental Quality Act. The Save Berkeley's Neighborhood group asserted that the university's plans for expansion caused displacement among existing residents.

In August 2021, a trial court ordered UC Berkeley to freeze its enrollment and suspend any further increases in student enrollment at UC Berkeley in academic years 2022-2023 and later – which results in approximately 3,000 fewer seats than planned for fall 2022. The University of California Board of Regents appealed the ruling seeking to stay the order to freeze enrollment while the appellate process proceeds.

On March 3, 2022, the California Supreme Court announced that it would not be reviewing the appeal from the UC Board of Regents where the trial court ordered the university to cap its campus enrollment at the 2020-2021 levels. As a result, UC Berkeley would have been required to cut enrollment before the Fall 2022 semester.

On March 11, 2022, the California legislature introduced and unanimously passed Senate Bill 118, which gave California public colleges and universities 18 months to address California Environmental Quality Act-related issues before a court may issue a decision impacting enrollment growth. On March 14, Governor Newsom signed the legislation, which had immediate and retroactive effect for UC Berkeley, and negated the enrollment freeze ordered by the trial court.

Events & Training

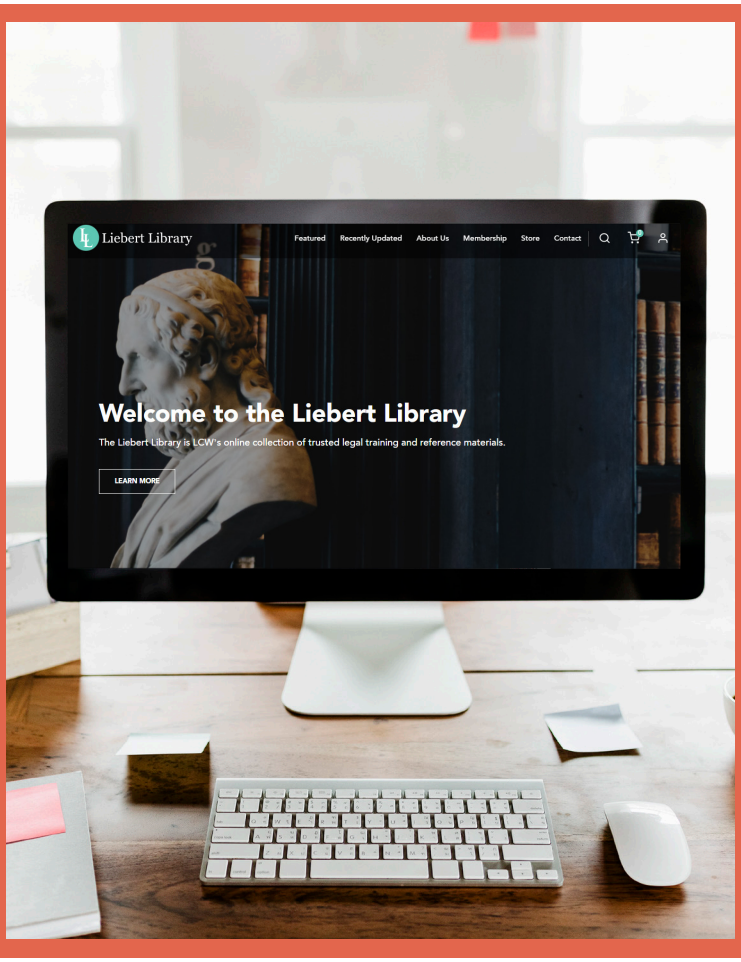
For more information on some of our upcoming events and trainings, click on the icons below:

Consortium

Seminars

Webinars

Introducing Our Newly Improved Liebert Library Website!



We are proud to announce the long rumored update to the Liebert Library is officially live! We have added many new features with the goal to improve the user experience:

Dynamic Search Ability:
Upgraded search ability allows users to locate the legal reference materials they are searching for quickly. The new filtering ability assists subscribers in easily distinguishing product categories. To begin searching click the hourglass logo on the top menu bar.

Ability to Add Sub Users:
The most requested feature has been the ability for Primary Account Holders to add more than one user to access their organization's subscription. We are excited to announce this feature has been added! Once Sub Users are created, they will receive an email notifying them an account has been created for them and prompt them to login. You can view and manage your Sub Users from the "Create Sub Users" page at any time.

Featured Resources Section:
A new section of the site where LCW showcases some of its most timely or topical legal reference materials! This frequently updated section can be accessed after logging in to the site and clicking "Featured" from the top menu bar.

Recently Updated Section:
Are you interested in seeing what materials have been updated most recently? We created a new page that lists the most recent materials in one place. This section is accessible after logging into the site and clicking "Recently Updated" from the top menu bar.

Register and begin exploring the Liebert Library site today!

If you have any questions about your subscription, the materials on the site, or if you are having difficult accessing your account, please email Library@lcwlegal.com.

CIVIL RIGHTS

Former Student's Constitutional Claims Against University Were Untimely.

Kino Bonelli, a Black student, transferred to Grand Canyon University (GCU) in August 2013. On February 19, 2017, Bonelli attempted to enter GCU through its main entrance. When a campus public safety officer asked Bonelli for his student ID, Bonelli held up his ID card and indicated he would present his ID to the officers standing up ahead. After a series of heated interactions, an officer took Bonelli's student ID and denied him entry onto campus.

A week later, Alan Boelter, GCU's Student Conduct Coordinator, informed Bonelli that he was being investigated for violating GCU's code of conduct for failing to comply with the officer's request for identification. Bonelli explained that he had showed the officers his ID and they confiscated it. Boeotler later retrieved Bonelli's ID and gave it back to him. Two months later, Bonelli graduated with his undergraduate degree and began a graduate program at GCU.

On July 25, 2017, in the early hours of the morning, Bonelli was studying on campus when a public safety officer asked for his ID. Bonelli complied with the request. The officer searched Bonelli's name in a database and determined that Bonelli was enrolled at GCU but not living on campus. He told Bonelli that GCU policy did not allow commuter students on campus at certain hours. Bonelli argued that GCU did not have this policy, and that he was unaware of this policy. Bonelli offered to leave, but the officer told him he could stay. Bonelli left anyway.

Five days later, GCU's Campus Safety Supervisor, Michael Martinez, issued a campus-wide "Be On The Lookout," or BOLO, for Bonelli. The BOLO stated that Bonelli tried to enter GCU despite not being enrolled there, and that after refusing to show his ID, Bonelli became disorderedly and remained on campus without permission. The BOLO also stated that Bonelli was a former student and was using his old ID to gain access to campus. Bonelli contacted GCU arguing the BOLO was false and sought to get the BOLO lifted so he can attend class. The BOLO was withdrawn a week after it was issued.

Several days later, GCU informed Bonelli that he had been reported for violations of the student conduct code for hostile and disruptive behavior and for failing to comply with a directive from a school official. Bonelli disputed the allegations, but Campus Safety Manager Steve Young defended the allegations, despite knowing they were false.

On August 24, 2017, GCU issued Bonelli an "official disciplinary warning." The warning stated that it was Bonelli's first and only warning, and that if additional incidents occured, he would be subject to disciplinary measures including removal from his graduate program, suspension, and expulsion.

Bonelli spoke to GCU's Vice President and Dean of Institutional Effectiveness about his disciplinary warning. The Vice President found that Bonelli was credible and that he had suffered civil rights violations and racial discrimination.

On January 20, 2020, Bonelli sued GCU, alleging five violations of his civil rights under federal law. He brought the first three under 42 U.S.C. § 1983 for: (1) unreasonable seizure of his person and property in February 2017 in violation of the Fourth Amendment of the U.S. Constitution; (2) unreasonable detention in June 2014; and (3) violation of his First Amendment rights from the February 2017. He also alleged two counts of racial discrimination under 42 U.S.C. §§ 1981 and 2000d.

The trial court found Bonelli's claims were time-barred and dismissed his complaint. Bonelli appealed.

The Ninth Circuit agreed with the trial court that Bonelli's claims were untimely. The statute of limitations for federal civil rights claims is based on the statute of limitations of the state in which the lawsuit is filed. Here, Bonelli filed his lawsuit in Arizona, where the statute of limitations is two years. While state law determines the length of the limitations period, federal law determines when a civil rights claim accrues. Under federal law, a civil rights claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action.

The Ninth Circuit held that the statute of limitations on both § 1983 claims began to run on February 19, 2017 and July 25, 2017, the date of Bonelli's encounters with the public safety officers. The Ninth Circuit also determined that the racial discrimination claims accrued beginning August 24, 2017, the date GCU issued Bonelli an official disciplinary warning. The Ninth Circuit found that Bonelli did not claim that GCU engaged in discriminatory acts beyond August 24, 2017, and there is no dispute that Bonelli was aware of his alleged injuries from racial discrimination by this date. The Ninth Circuit rejected Bonelli's reliance on the Heck v. Humphrey decision, arguing that his claims did not accrue until August 29, 2018, when GCU rescinded Bonelli's disciplinary warning. Heck is a U.S. Supreme Court case in which the Supreme Court held that a § 1983 claim does not accrue until the conviction or sentence of a state prisoner seeking damages. The Ninth Circuit held that because Bonelli had not been convicted, the holding in Heck does not apply.

Ultimately, the Ninth Circuit agreed with the trial court and held that Bonelli's suit was untimely.

Bonelli v. Grand Canyon Univ. (9th Cir. 2022) ___ F.4th___ [2022 WL 729277].

POBR

At-Will Police Chief's Employment Agreement Gave Him A Right To An Evidentiary Administrative Appeal.

In November 2016, Samuel Joseph became the chief of police for the City of Atwater (City). Joseph's employment agreement stated he could be removed as police chief for any reason. The agreement also said that if the City Manager removed Joseph as police chief for any reason other than willful misconduct in office or conviction of a crime of moral turpitude, Joseph would be given the option to either: return to his prior position of police lieutenant; or receive a severance.

On September 28, 2018, the City Manager issued a notice of intent to terminate Joseph for "willful and other misconduct," including violations of multiple sections of the California Penal Code and other mismanagement issues. The notice also described Joseph's right to appeal the termination decision in a non-evidentiary hearing with no right of cross-examination and the City was not required to carry the burden of proving the charges.

On October 4, 2018, Joseph's attorney notified the City that Joseph would appeal the proposed termination. The attorney objected to the appeal procedure outlined in the City's notice. Joseph's attorney claimed that Joseph was entitled to an evidentiary appeal in which the City had the burden of proving the charges and he had the right to cross-examination before a neutral hearing officer.

After further correspondence, Joseph and the City were unable to agree on the type of hearing required by the Peace Officers Procedural Bill of Rights Act (POBR). The City Manager then issued Joseph a final notice of termination on November 15, 2018.
Joseph filed a petition for writ of administrative mandate challenging the City's decision to terminate his employment. The trial court denied the petition, concluding that Joseph was an at-will employee under his employment agreement. The trial court further found that the City satisfied the statutory requirement of providing Joseph with an opportunity for administrative appeal as required under the POBR for at-will employees under Government Code Section 3304(c).

Joseph appealed, alleging the trial court wrongly considered him as an at-will employee for all purposes because his employment agreement gave him a right to return to the position of lieutenant if his termination was without cause. The Court of Appeal agreed, finding that the employment agreement unambiguously created a hybrid employment relationship between the City and Joseph. Although Joseph's employment as chief of police was at-will, his employment as a lieutenant could only be terminated for cause. The Court interpreted Joseph's contract to mean that City's right to terminate Joseph's employment as a lieutenant was limited to the specified reasons—that is, willful misconduct or conviction of a crime of moral turpitude—which necessitated Joseph receive certain procedural protections. The Court found that this contractual limitation on City's right to terminate Joseph's overall employment was more specific than the sentence stating Joseph was an at-will employee. Therefore, the Court found that the employment agreement gave Joseph the right to for-cause procedural protections if the City chose to terminate him for willful misconduct.

Joseph further alleged the City's decision to terminate his employment for willful misconduct deprived him of his right to employment as a lieutenant without affording him POBR procedural rights. Again, the Court of Appeal agreed. Because Joseph was also being terminated from his for-cause position as a lieutenant, he was entitled to a full, evidentiary administrative appeal pursuant to Government Code Section 3304(b). Since the appellate record did not contain any rules and procedures for such an appeal, the Court of Appeal considered the scope of the required procedural protections for a for-cause peace officer.

The Court of Appeal held that an evidentiary POBR administrative appeal required: 1) an independent reexamination of the decision; 2) by a decisionmaker who was not involved in the initial determination; 3) the

independent decision maker is to make factual findings to bridge the analytical gap between the evidence and the ultimate decision; 4) the hearing is treated as a de novo proceeding at which no facts are taken as established; and 5) the proponent of a particular fact bears the burden of establishing it; and 6) the hearing could not be closed to the public over an officer's objection.

Based on the foregoing, the Court of Appeal reversed the trial court's order denying Joseph's petition for writ of mandate and directed the trial court to issue a writ of mandate directing the City to provide Joseph with an opportunity for an administrative appeal that complied with the minimum POBR procedural protections the Court outlined.

Joseph v. City of Atwater, 2022 WL 391821 (Cal. Ct. App. Feb. 9, 2022).

Note:

This case illustrates how critically important the terms of an employment agreement can be. Although the employment agreement stated that Joseph's employment as a police chief was at will, the Court found that the employment agreement gave Joseph the right to for-cause procedural protections if the City chose to terminate him for willful misconduct.

Upcoming Webinar!

Don't Leave Money on the Table—How to Recover $$$ from the Federal Government for Your Agency's COVID Leave Payments and Other COVID Costs

FAIR EMPLOYMENT

Black Physician Proves State Agency Discriminated By Failing To Interview Her And By Revoking Her Credentials.

Dr. Vickie Mabry-Height is a Black physician who was 52-years-old in May 2008. In February 2008, she applied for a physician/surgeon position at Chuckawalla Valley State Prison (CVSP) in Blythe, California. After the Department of Corrections and Rehabilitation (Department) confirmed she met the minimum qualifications and she passed the examination, the Department notified her that she would be placed on an eligibility list. Mabry-Height initially withdrew her application, but about two months later, she reconsidered her decision and informed the Department that she wanted to be considered for an interview again.

Although the Department had already filled the position at CVSP in Blythe, the Department decided to interview Mabry-Height and others in May 2008 in an attempt to fill vacant positions in another region. After informing Mabry-Height of the situation, the medical director persuaded her to continue with the interview. The medical director would have offered Mabry-Height a position in the other region; however, she was not willing to relocate.

In June 2008, Mabry-Height started working for a third-party provider that contracts with the Department to provide needed medical personnel to correctional institutions. Mabry-Height then worked various shifts at Centinela State Prison (CSP) between June and October 2008. During this time, Mabry-Height submitted a second application for employment with the Department, again seeking a physician/surgeon position. She indicated she was willing to work at CVSP, CSP, or the California Rehabilitation Center (CRC).

After submitting her second application, Mabry-Height inquired with the CVSP facility. A doctor informed her that there was an open position and that the Department was beginning to schedule interviews. However, no one at the Department contacted Mabry-Height to schedule an interview. Four days later, the Department hired Dr. James Veltmeyer, a Hispanic male between 21 and 39 years of age, to fill a physician/surgeon position at that facility. According to the Department's documentation, Veltmeyer interviewed for the position on March 2008 and did not submit his employment application until more than two weeks after the interview.

On July 29, 2008, the Department interviewed for another open physician/surgeon position at CVSP. Dr. Mabry-Height was not invited to participate. For this position, the Department hired Dr. Patricia James, a white woman between 40 and 69 years of age. James' qualifications were comparable to Mabry-Height's.

In August 2008, Mabry-Height told the health care manager at CSP she was interested in a position there. Mabry-Height then spent more than an hour in the cafeteria working on her application during one of her regular shifts. The health care manager informed her this area was "off grounds" because it was not within the medical provider area. Mabry-Height also deducted the time she spent working on her application from her timesheet. However, the health care manager mentioned this when the credentialing unit inquired about Mabry-Height's suitability for future employment. The health care manager also indicated that Mabry-Height's "levels of enthusiasm, confidence, and cooperative behavior were not always as consistently high as other registry physicians."

Around this time, Dr. Ko, an Asian male, was hired for a physician/surgeon position at CSP. Again, Mabry-Height was not invited to interview. One month later, Mabry-

AND HOUSING ACT

Height learned that the credentialing unit would be revoking her credentials; she was told not to report for any future shifts.

Mabry-Height then filed a complaint with the State Personnel Board (Board). After the Board determined that Mabry-Height failed to establish unlawful discrimination, she filed a writ of administrative mandamus in superior court to challenge the Board's decision. That court granted the petition and directed the Board to set aside its decision and reconsider the matter.

Upon reconsideration, the Board again determined that Mabry-Height failed to establish discrimination as to the position she interviewed for in May 2008. This time, however, the Board determined that the Department failed to give any legitimate, nondiscriminatory reasons for its decision not to interview her for positions at CVSP in July and August 2008 or at CSP in August 2008. In addition, the Board determined the Department's vague and inconsistent reasons for revoking her credentialing failed to show that its decision was taken for a legitimate, non-discriminatory reason.

Next, the Department filed a writ petition seeking to set aside the Board's decision on reconsideration. The trial court denied the petition, and the Department appealed.

The California Court of Appeal noted that California has adopted a three-stage burden-shifting test for discrimination claims under the Fair Employment and Housing Act. First, the employee must establish a prima facie case of discrimination. If the employee does so, a presumption of discrimination arises. Second, the burden then shifts to the employer to rebut the presumption by producing evidence that it took the action for legitimate, nondiscriminatory reasons. If the employer does so, the presumption of discrimination disappears. Third, the employee can attack the employer's reasons for acting as pretext for discrimination, or can offer any other evidence of discriminatory motive. Evidence of dishonest reasons, for example, may show unlawful bias. If the case includes evidence of both discriminatory and nondiscriminatory motives, the employee must prove discrimination was a "substantial factor" in the employment decision.

On appeal, the Department argued that Mabry-Height was required to show by a preponderance of the evidence that discrimination was a "substantial motivating factor" in the adverse employment decisions. While the court agreed that this burden exists, it disagreed with the Department as to how this inquiry fits into the analysis. The court concluded that this burden only applies to the third stage of the analysis, if the presumption of discrimination has dropped out of the case.

In addition, the court concluded there was no abuse of discretion when the Board concluded the Department did not satisfy its stage-two burden of producing substantial evidence of legitimate, nondiscriminatory reasons for the challenged conduct. Indeed, the court noted that the Department failed to present any evidence explaining why Mabry-Height was not interviewed for the positions that Veltmeyer, James, and Ko filled. Further, the Department could not meet its burden as to its decision to revoke Mabry-Height's credentialing. The reasons the Department provided at the time to Dr. Mabry-Height were later contradicted by the testimony offered at the hearing. No one from the credentialing unit testified that as to the actual reasons for revoking her credentialing.

For these reasons, the court affirmed the Board's second decision.

Dep't of Corr. & Rehab. v. State Pers. Bd., 2022 WL 354657 (Cal. Ct. App. Feb. 7, 2022).

Note:

This case shows that an employer's decisions must be supported by legitimate, non-discriminatory reasons. Before deciding not to interview a qualified candidate and before deciding to revoke a credential, for example, the employer or agency should document all of the legitimate reasons for its decision in an attorney-client memorandum or in consultation with an attorney. If the reasons for a decision are vague or conflicting, then the employer should reconsider.

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.

- On February 28, 2022, the California Department of Public Health (CDPH) issued updated COVID-19 guidance about the use of face coverings in indoor public settings. The new guidance took effect on March 1, 2022, except that it does not apply within any local jurisdiction that has more restrictive requirements. Under the new guidance, the requirement that unvaccinated persons wear a mask in indoor public settings is now only a strong recommendation that all persons, regardless of vaccine status, continue indoor masking.

- On February 9, 2022, Governor Newsom signed Senate Bill (SB) 114 into law. The law reauthorizes COVID-19 Supplemental Paid Sick Leave (SPSL). The new law is Labor Code section 248.6, and provides paid leave entitlements to employees who are unable to work or telework due to a number of qualifying reasons related to COVID-19. The law became effective on February 19, 2022 and requires covered employers of 26 or more employees to provide SPSL to qualifying employees retroactive to January 1, 2022 and through September 30, 2022.

- Employers have a management right to mandate vaccinations, but must negotiate any bargainable effects of that decision with employee organizations upon request. In *Regents of the University of California* (2021) PERB Decision No. 2783-H, PERB held that the University's decision to require that employees be vaccinated for influenza was outside the scope of representation, and that the University was therefore not obligated to bargain the decision with affected employee organizations prior to its adoption. While PERB concluded that the University was still obligated to bargain the effects of the decision, PERB's holding that the decision itself was not negotiable removes a major obstacle preventing public employers from adopting vaccination requirements for their employees.

App Developer's "At-Will" Offer Letter Did Not Defeat Employee's Labor Code Section 970 Lawsuit.

In July 2018, Kevin White and Smule, Inc. discussed the possibility of White working for the company. Smule, Inc. (Smule) develops and markets consumer applications with a specialty in music social applications. Smule told White it had significant problems with its development process, it was not operating efficiently, and it lacked an experienced project manager. Smule wanted White to restructure the company's project management operations and develop a functional project management team that would enable Smule to grow its business. Smule hoped White could: identify major deficiencies and start bringing in competent personnel within 30 days; complete a reorganization in one to two years; and develop training protocols and manuals over the next couple of years. Smule indicated that if While could successfully reorganize the project management operations, the need for White's skills would continue to evolve and his role would expand. White requested a director title. Smule agreed to a title of "lead project manager" and indicated it would revisit the title in one year. White said he was only interested in a secure, long-term position, and Smule said that was exactly what they were offering.

White alleged that Smule's representations led him to conclude his job was long term. White then resigned from his employment in Washington and moved his family to the Bay Area. White signed an employment offer that stated: "Smule maintains an employment-at-will relationship with its employees. This means that both you and Smule retain the right to terminate this employment relationship at any time and for any reason. . . This offer letter constitutes our complete offer package. Any promises or representations, either oral or written, which are not contained in this letter are not valid and are not binding on Smule."

Five months after White began work and only two weeks after he submitted an improvement plan, Smule terminated him on the grounds that his job was being eliminated.

White sued Smule, alleging the company violated California Labor Code Section 970. White alleged that Smule knew its statements to him were false. White alleged Smule merely wanted "to experiment with [him] and to determine what immediate recommendations he would make." Labor Code Section 970 prohibits employers from inducing employees to relocate and accept employment with knowingly false representations regarding the kind, character, or existence of work, or the length of work. The trial court entered judgment in Smule's favor finding that as an at-will employee, White unreasonable relied on any representations to the contrary. White appealed.

To win a Section 970 claim, the employee must prove: 1) the employer made representations about the kind or character of work, or how long the work would last; 2) the employer's representations were not true; 3) the employer knew when it made the representations that they were not true; 4) the employer intended that the employee rely on the representations; 5) the employee reasonably relied on the representations and changed his or her residence for the purpose of working for the employer; 6) the employee was harmed; and 7) the employee's reliance on the employer's representations was a substantial factor in causing his or her harm.

The trial court granted Smule's motion for summary judgment. The California Court of Appeal reversed. The court concluded that an at-will acknowledgement does not, as a matter of law, defeat a Section 970 claim. Even with an at-will provision, an employee can establish that a reasonable reliance on an employer's promises regarding the kind, character, or existence of work the employee was hired to perform. Because Smule failed to produce evidence that White unjustifiably relied on its statements, it was not entitled to judgment.

Further, the court determined that Smule was not entitled to keep its trial court victory on the grounds that White failed to establish either a knowingly false representation, or actual reliance, in White's opposition to Smule's motion for summary judgment. Smule did not show that White did not possess, and could not reasonably obtain, evidence that Smule made promises with no intent to perform. While White may have lacked personal knowledge of the intent at issue, that did

not conclusively establish that he could not prove such intent. Instead, all of the evidence in the record established that a reasonable trier of fact could infer that Smule never intended to employ someone in the lead project manager position, and wanted nothing more from White than a consultation or improvement plan on how Smule could enhance its operations.

The court also found that Smule could not prove White lacked actual reliance on its representations because the parties did not have adequate opportunity to address that argument in the trial court.

The court found there was a triable issue of fact regarding whether Smule violated Section 970, and reversed the trial court ruling.

White v. Smule, Inc., 2022 WL 503811 (Cal. Ct. App. Jan. 27, 2022).

Note:

Generally speaking, most Labor Code sections do not apply to public entities. However, this case demonstrates that it is a bad idea to make promises about long-term employment to an applicant, regardless of whether an applicant later receives an offer of "at-will" employment.

CONSORTIUM CALL OF THE MONTH

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

Question

A human resources manager contacted LCW to ask whether an agency's volunteers are covered under worker's compensation.

Answer

The attorney advised that public agency volunteers are not employees for purposes of workers' compensation unless the agency's governing board has adopted a resolution to extend workers' compensation benefits to them. (Labor Code Section 3363.5.) In order to qualify for workers' compensation benefits under this law, the volunteers must perform services without pay, but can receive meals, lodging, and reimbursement of expenses.

LABOR RELATIONS

Trial Court Properly Dismissed Lawsuit Local Government Officials Filed Against PERB.

A group of elected local government officials -- including members of some California city councils, school boards, and special purpose districts-- filed a complaint against the Public Employment Relations Board (PERB). The complaint made a pre-enforcement challenge to California Government Code Section 3550. Section 3550 states in part: "[a] public employer shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization." The elected officials alleged that as part of their duties, they often engage directly in labor-management discussions, comment publicly on bargaining proposals, or take positions on the terms of a proposed collective bargaining agreement. However, they claimed that after the enactment of Section 3550 in 2017, they have refrained from speaking about issues relating to public unions. While the elected officials did not contend that the PERB had taken any enforcement action against them or their agencies, they alleged that if they were to speak out, their agencies would face threats of unfair labor charges.

As a result, the officials sued PERB alleging that Section 3550 violates their First Amendment rights. The U.S. district court dismissed the case finding, among other things, that the elected officials could not bring the action because Section 3550 applies only to "public employers," and not to individual elected officials. The elected officials appealed.

On appeal, the Ninth Circuit panel concluded that the district court was right to dismiss the case. First, the panel noted that Section 3550 does not regulate the officials' individual speech. The panel also noted that any restrictions the statute does impose on their ability to speak on behalf of the public employers they represent did not injure their constitutionally-protected individual interests. The panel held that the officials had not shown that they had a well-founded fear that PERB would impute their statements in their individual capacities to their public employers, or that they incurred an injury sufficient enough to allow them to pursue the issue.

Second, the panel held that the officials failed to show that the district court erred in determining that any amendment to their complaint would be futile. The officials were not able to provide any additional details they would add to their lawsuit if given the opportunity to do so.

For these and other reasons, the panel remanded the case to the district court to enter judgment dismissing the case without prejudice.

Barke v. Banks, 25 F.4th 714 (9th Cir. 2022).

Note:

The court explained that Government Code Section 3550 was "part of a broader legislative package designed to address the impact of Janus v. American Federation of State, County, & Municipal Employees, Council 31, *138 S. Ct. 2448 (2018)." In* Janus, *the Supreme Court held that the First Amendment barred "States and public-sector unions" from "extract[ing] agency fees from nonconsenting employees." The 2018 amendment added the language prohibiting a public employer from deterring or discouraging public employees "from authorizing dues or fee deductions to an employee organization," presumably to minimize the financial impact of the Janus decision on public-sector unions.*

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