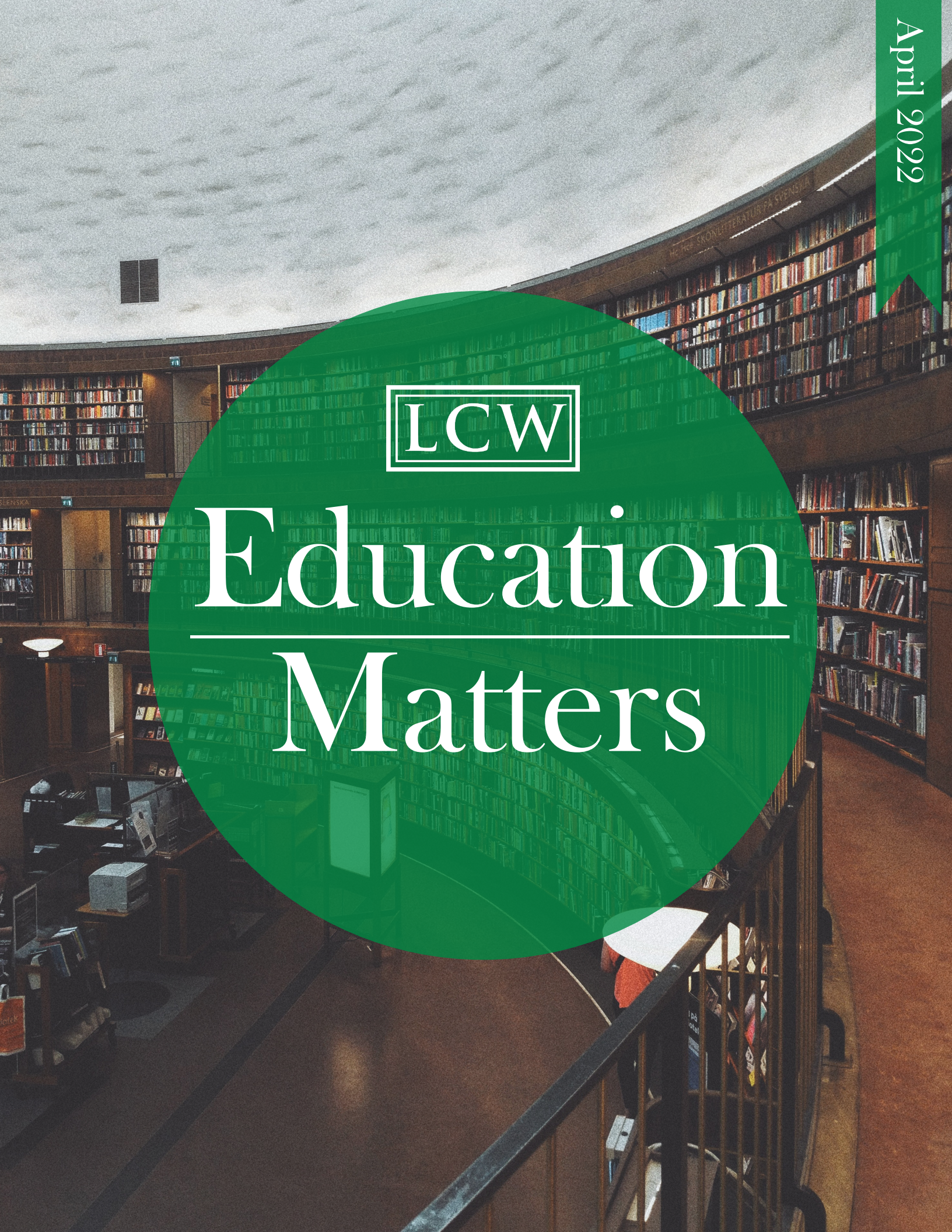

April 2022

LCW

Education Matters

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Contributors:

T. Oliver Yee
Partner | Los Angeles

Savana Jefferson
Associate | Sacramento

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FIRST AMENDMENT

Qualified Immunity Insulated School Board From Paying Damages.

James Riley owns and operates Riley's American Heritage Farms (Riley's Farms), which provides historical reenactments and apple picking. Schools within the Claremont Unified School District frequented Riley's Farms for field trips for many years.

In 2018, Riley made several controversial Twitter posts to comment on a range of social and political topics. Certain parents discovered these posts and complained to the School Board. The School Board severed its business relationship with Riley's Farms.

Thereafter, Riley's Farms sued for retaliation and an injunction of the alleged School Board policy which prohibited district schools from contracting with Riley's Farms for field trip services.

The U.S. District Court granted summary judgment for the School Board, so Riley's Farms appealed to the Ninth Circuit. Courts follow many steps to resolve cases that involve the First Amendment and other Constitutional rights. First, the Ninth Circuit had to analyze the retaliation claim. Second, it needed to decide whether the doctrine of qualified immunity shielded the School Board from liability for damages.

In analyzing the retaliation claim, the Ninth Circuit held that the *Pickering v. Board of Education* framework applied to the relationship between Riley's Farm and the School Board. The *Pickering* framework is a legal test that is traditionally used to analyze a government employee's claim that the government employer has retaliated against the employee in violation of the employee's First Amendment rights.

This framework has been extended to apply to claims of retaliation between the government and a government contractor. Courts have reasoned that government contractors who claim retaliation are in an equivalent position and standing as government employees. More recently, the *Pickering* framework has been even further extended to apply to the relationship between a government employer and a private company performing government services. Because Riley's Farms is a private company performing government services (field trip services for a public agency), the Ninth Circuit concluded that the Pickering framework applied.

The *Pickering* framework has two steps. First, the employee or private company performing government services must establish a *prima facie* case of retaliation. Then, the burden then shifts to the government to demonstrate either that: 1) its legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption outweigh the First Amendment interests; or 2) it would have taken the same actions in the absence of the First Amendment conduct. The government is often able to demonstrate either of these options.

In this case, however, the Ninth Circuit held that the School Board did not meet its burden. After Riley's Farms was able to show a *prima facie* case of retaliation, the School Board tried to show that Riley's comments would create disruptions in the school workplace and school curriculum design. The School Board provided evidence of only two complaints from parents. In addition, two other facts let the Ninth Circuit to hold that the School Board had not met its burden: 1) no parents had threatened to remove their children from the school; and 2) Riley's speech occurred on his personal time on his personal Twitter account.

Despite the Ninth Circuit's finding that the School Board had unlawfully retaliated against Riley's Farm, the Court also held that the School Board was entitled to qualified immunity. Qualified immunity shields public officials from liability unless the person suing can establish that there was a violation of a U.S. Constitutional right that was clearly established at the time of the officials' misconduct.

In this instance, the Ninth Circuit held that, at the time of the School Board's conduct, it was not clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints. As such, the School Board was entitled to qualified immunity.

Thus, even though Riley's Farms hurdled the *Pickering* framework and established that they were retaliated against in violation of its First Amendment, the doctrine of qualified immunity prevented the School Board from paying damages.

Riley's Am. Heritage Farms, et al v. Elsasser, and Claremont Unified School District et al (2022) WL 804108.

NOTE:

This case is an important reminder for public entities that they cannot regulate an employee's off duty time except in rare instances when there is a strong nexus between the on and off duty conduct. Public entities should also be mindful that a government contractor or even a private company performing government services can have Free Speech rights in certain cases.

Board Member Did Not Have First Amendment Claim Arising Out Of Board's Verbal Censure Against Him.

In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System (HCC). Wilson often disagreed with the Board about the direction and best interests of HCC, and he brought multiple lawsuits challenging the Board's actions. These disagreements led the Board to reprimand Wilson publicly. Wilson also charged the Board in various media outlets with violating its bylaws and ethical rules. At a 2018 Board meeting, the Board adopted a public resolution "censuring" Wilson. The resolution stated that Wilson's conduct was not consistent with the best interests of HCC and "not only inappropriate, but reprehensible."

The Board also imposed penalties on Wilson, including that Wilson was ineligible for election to Board officer positions for the 2018 calendar year, that he was ineligible for reimbursement for any HCC related travel, and that his future requests to access funds in his Board account for community affairs would require Board approval.

Wilson filed a lawsuit challenging the Board's actions under 42 U.S.C. § 1983 alleging, among other things, that the Board's censure violated his First Amendment rights. Wilson sought injunctive and declaratory relief, as well as damages for mental anguish, punitive damages, and attorney's fees. HCC moved to dismiss Wilson's complaint. The trial court granted HCC's motion to dismiss, concluding that Wilson lacked standing to bring his claim. On appeal, the Fifth Circuit Court of Appeals reversed the trial court, holding that Wilson had standing and that his complaint stated a viable First Amendment claim. In response, the HCC filed a petition to the United States Supreme Court asking to review the Fifth Circuit's judgment that Wilson may pursue a First Amendment claim based on a purely verbal censure.

The issue before the United States Supreme Court was whether the Board's censure offended Wilson's First Amendment right to free speech. Under Court precedent, a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an "adverse action" in response to his speech that "would not have been taken absent the retaliatory motive."

The Supreme Court reversed the Fifth Circuit's judgment and held that Wilson did not have a First Amendment claim arising from the Board's verbal censure. The Supreme Court stated that Wilson was an elected official, and elected representatives are expected to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. The Supreme Court found that the censure did not prevent Wilson from doing his job, nor did it deny him any privilege of office. Therefore, the Board's censure did not qualify as a materially adverse action capable of deterring Wilson from exercising his own right to speak.

Houston Community College System v. David Wilson (2022) 142 S. Ct. 1253.

Welcome To LCW!

We are pleased to announce that James E. "Jeb" Brown and Matt Doyle have joined our team!

Jeb Brown has joined our Los Angeles office as Senior Counsel, effective January 3, 2022. Jeb, a Riverside, Calif. native, most recently served as Riverside County's Chief Assistant County Counsel where he supervised more than 30 attorneys representing multiple County departments —including the Probation, Fire and Sheriff's Departments.

"We are elated that Jeb is joining LCW. His expertise in litigation and extensive background counseling public safety agencies mesh particularly well with our firm's long-standing history serving public agencies—including cities, counties and law enforcement agencies," said LCW Managing Partner J. Scott Tiedemann. "Collectively, we are all excited to welcome Jeb to the firm and look forward to great collaboration and the continued service of these important clients."

Matt Doyle has joined our Los Angeles office as Senior Consultant, effective March 16, 2022. Matt most recently served as the City of Glendale's Director of Human Resources where he oversaw a comprehensive human resources operation consisting of labor and employee relations, recruitment and selection, classification and compensation, benefits, training, health services and workers' compensation.

"Matt's extensive public sector experience make him an ideal fit for LCW. We are thrilled that Matt is joining us and are all excited to welcome him to the firm," said LCW Managing Partner J. Scott Tiedemann. "We look forward to his contributions to our Labor Relations and Management Training practices and know that his experience in all facets of public sector Human Resources Management will be a huge benefit to our clients across the state."

School District And Employees Were Not Immune From Liability Under Government Code Section 855.6 After Student Shoots Another Student.

On January 10, 2013, a Taft Union High School student Bryan O. shot a fellow student, Bowe Cleveland, in the stomach with a shotgun during their first period science class. In March 2011, Bryan was involved in a fight with several classmates during a physical education class. Additionally, during a school field trip to Universal Studios, two chaperones on the trip overheard Bryan telling four other classmates that he thought about shooting someone at the school that picked on him. Bryan also described bringing gasoline to the school and blowing up the auditorium. Both of the chaperones prepared incident reports describing Bryan's conversation with his classmates. Students also completed incident reports about what happened during the bus ride.

On the Monday following the field trip, the chaperone met with assistant principal Rona Angelo about what she had overheard, and expressed her concern for the safety of students and staff. Angelo then initiated a threat assessment and gathered a threat assessment team to address these incident reports. As part of the threat assessment, Angelo met with the school's psychologist Mark Shoffner. Shoffner's role in the threat assessment was to consider the mental health information available and meet with the student to determine what the student's intent was, and whether the student understood why others might have been scared by what the student said or did.

In April 2013, Cleveland filed a personal injury complaint against the District, its superintendent, principal, and assistant principal (the District). The complaint alleged causes of action for general negligence and negligent infliction of emotional distress. The District argued that it was immune from Cleveland's claim based on government immunity pursuant to Government Code Sections 820.2 and 855.2. Section 855.2 provides that neither a public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination.

Cleveland argued that the District is not subject to government immunity under Section 855.2. Section 855.2 only applied to physical and mental examinations, and did not extend to many of the acts and omissions of the threat assessment team, such as the failure of members to share information. The trial court found, among other things, there was a range of things not covered by the immunity that the District could have done that the jury might find breached the standard of care.

The jury found that the District's employees 54 percent responsible for Cleveland's injuries and held the District vicariously liable for about $2 million based on its employees' negligence. In August 2019, the District moved for a judgment notwithstanding the jury's verdict, asserting that all members of the threat assessment team were shielded from liability based on Section 855.6 immunity. The trial court denied the District's motion, and the District appealed.

The Fifth Circuit affirmed the trial court's judgment. The Fifth Circuit concluded that Section 855.6 immunity did not cover all the District's employees' negligence, and substantial evidence supported the jury's findings that District's failure to report certain information, such as a conversation about employees feeling afraid of the shooter and having escape plans, was a substantial factor in causing Cleveland's injuries.

Specifically, the Fifth Circuit found that the District's employees breached their duty of care because (1) the threat assessment was not carried out by the team collectively; (2) the school resource officer (i.e., the law enforcement officer assigned to the school) should have been a core member of the team; (3) the threat assessment team failed to communicate amongst themselves about Bryan; (4) the threat assessment team failed to adequately communicate with Bryan's parent; (5) the threat assessment team failed to recommend counseling to Bryan's parent as an intervention technique; and (6) the threat assessment team did not continue to collectively monitor Bryan and reassess the safety plan. These acts and omissions fell outside the immunity provided for mental examinations.

Therefore, the Fifth Circuit concluded that a jury could rationally find that the District employees' negligence to report information and communication failures was a substantial factor in the District's failure to prevent the shooting.

Cleveland v. Taft Union High School District (2022) 76 Cal. App. 5th 776.

Is your agency properly including the necessary forms of compensation in its regular rate of pay calculation? Do you know steps you can take now to ensure that you are calculating overtime consistent with the regular rate of pay? From reviewing MOUs to identifying "red flags" to determining whether you are paying in excess of the requirements of the FLSA, please join us for this one-hour webinar to learn about ways your agency can self-audit its regular rate compliance. This webinar will provide practical guidance to help you assess your regular rate compliance and to make adjustments if necessary to avoid a legal challenge.

Who Should Attend:
Supervisors, Managers, Department Heads, Human Resources Staff, Agency Negotiators, Finance/Payroll and IT staff responsible for ensuring compliance with the FLSA.

Register here!

ASSUMPTION OF RISK

School District's Waiver Of Liability And Assumption Of Risk Agreement Barred Student Athlete's Personal Injury Lawsuit Against District.

In August 2015, Plaintiff Nicholas Brown (Nick) was a sophomore at Union Mine High School and a member of the junior varsity football team. Union Mine is a high school within the El Dorado Union High School District (District). Prior to the school year, every student who wished to participate in school athletics had to read, review, and sign an athletic handbook, which included a release of liability and assumption of risk agreement. The handbook also included a concussion/head injury information sheet for parents. Prior to the start of the 2015-2016 football season, Nick and his father signed this agreement. Subsequently, Nick filed a lawsuit against the District after he suffered a traumatic brain injury during a football game.

The District argued that the release Nick and his father signed prior to the start of the football season bars Nick's action against the District due to their express assumption of the risks involved in playing football. Nick argued that the release did not cover the District and his coaches' actions or inactions because it did not reference the "potential for harm by coaches." The trial court found in favor of the District, and Nick appealed the trial court's decision. The California Court of Appeal for the Third District agreed with the trial court's decision.

The Court of Appeal held that the release Nick and his father signed was a valid express release of liability and assumption of risk that covered both Nick's injury and the actions of the District's employees, and Nick could not establish that the District or its employees acted with gross negligence. The release stated that if Nick were to be "hurt, injured, or even die," Nick and his parents would not make a claim against or sue the District, its trustees, officers, employees, and agents, or expect them to be responsible or pay for any damages. It acknowledged that "injuries might arise from…the actual or alleged failure by district employees, agents, or volunteers to adequately coach, train, instruct, or supervise," and, "undiagnosed, improperly diagnosed, untreated, improperly treated, or untimely treated actual or potential injuries." The signatories then "willingly assume[d] all risks and hazards of potential injury, paralysis, and death in the school-related activity/ies." The Court of Appeal found that in signing the release, Nick and his father agreed to assume the risk of injuries caused by District employees' in coaching and supervising Nick while he played football, and in treating him for those injuries. Additionally, upheld the release of the District and any of its employees from any liability associated with their possible negligence in coaching Nick and/or treating him for injuries. Moreover, the Court of Appeal found that the District was not grossly negligent in informing students about the risks of head injuries in football, monitoring Nick during the game, providing him with medical care at the game.

Brown v. El Dorado Union High School District (2022) No. C088204, 2022 WL 908883.

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LABOR RELATIONS CERTIFICATION PROGRAM

The LCW Labor Relations Certification Program is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. Participants may take one or all of the classes, in any order. Take all of the classes to earn your certificate and receive 6 hours of HRCI credit per course!

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1. May 19 & 26, 2022 - Trends & Topics at the Table
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FIRM VICTORIES

Hearing Officer Upholds Termination Of Peace Officer Who Threatened Violence Against Coworkers.

LCW Partner **Jennifer Rosner** and Associate **Ashley Sykora** recently prevailed in a peace officer termination appeal. The case concerned a male corporal who had an on-and-off affair with a female corporal while they were off-duty for approximately 10 years. The relationship had been volatile for years. The female corporal complained about the male corporal after he began threatening violence against her and another deputy in the department. The male corporal appeared to believe the female corporal was having an intimate relationship with the deputy. The male corporal was charged with violation of the department's policy against harassment and workplace violence, as well as conduct unbecoming of an officer.

The male corporal argued that his discipline was disparate treatment because the female corporal also harassed him and used derogatory and profane language in their communications, but only he was being disciplined. He also maintained that his vulgar statements were merely "hyperbole," and not actual threats.

The hearing officer found that the corporal's conduct clearly constituted threats and violated numerous department policies, including those prohibiting harassment and workplace violence. The hearing officer stated that "Even if it is unlikely that the Appellant [the male corporal] intended to carry out the threats…such threats constitute totally unacceptable conduct, for which discharge has been recognized as an appropriate penalty." The hearing officer also found that the male corporal did not submit any evidence that the department treated him disparately. Based on these findings, the hearing officer sustained the termination.

Note:

The hearing officer noted that even if disparate treatment had been found it would not have been a reason to deny the termination, absent evidence that the present investigation was fabricated, falsified, or otherwise tainted by grave deficiencies.

LCW Wins Dismissal Of Suspended Peace Officer's Appeal.

LCW Partner **Suzanne Solomon** and Senior Counsel **Dave Urban** won the dismissal of a suspended peace officer's appeal from the denial of the officer's writ petition.

In May 2019, Public Safety Officer David Meinhardt filed a petition for writ of administrative mandate, otherwise known as a writ petition. A writ petition is a tool that a person may use to request a court to review a decision of an administrative body, such as a City Council or Personnel Board. In this case, Officer Meinhardt wanted the trial court to overturn a 44-hour suspension the City of Sunnyvale Personnel Board decided to impose on him.

The trial court upheld the suspension and, on August 6, 2020, issued an order denying Officer Meinhardt's writ petition. This order was served on all parties. On August 14, 2020, Officer Meinhardt was served with the "Notice of Entry of Judgement or Order." Finally, on September 17, 2020, the trial court signed its final judgment. It is from this September 17 judgment that Officer Meinhardt filed his appeal on October 15, 2020.

California Rules of Court at Rule 8.104(a)(1)(A) and (B) says that appeals of writ petitions must be filed within 60 days of the date that either the Notice of Entry, or a file-endorsed copy of the judgment, is served on the party seeking to appeal. The Court of Appeal found in its published opinion that the August 6, 2020 order, which was served on all parties, was a final appealable judgment. Based on the August 6 date, the last possible date for Officer Meinhardt to timely appeal was October 5, 2020, 10 days before Officer Meinhardt filed his Notice of Appeal.

The California Court of Appeal further found that the August 14, 2020 service of the Notice of Entry of Judgment triggered a new 60-day timeline for filing a notice of appeal based on California Rules of Court at Rule 8.104(a)(1)(B). Sixty days from August 14, 2020 was October 13, 2020, two full days before Officer Meinhardt filed his appeal. Even under the later of the two dates, Officer Meinhardt's appeal was untimely and thus barred.

Meinhardt v. City of Sunnyvale (Sunnyvale Department of Public Safety), 2022 WL 702912.

Note:

In the Court of Appeal's own words, this decision reiterates "the critical importance of determining whether a ruling on a petition for writ of mandate is a final judgment." LCW attorneys can help public agencies make these determinations and ensure timely compliance with legal deadlines.

NEW TO THE FIRM!

Nicholas (Nick) M. Grether is an associate in our Los Angeles office. Nick has devoted his legal career to providing labor and employment advice and representation to California's public employers. An experienced litigator, he has represented dozens of clients in arbitration, as well as in state and federal court, concerning alleged violations of employment laws.

Danny Ivanov Danny is an associate in LCW's Los Angeles office where he provides representation and counsel to clients in all matters pertaining to labor and employment law. He also provides support in litigation claims for discrimination, harassment, retaliation, and other employment matters.

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.

- California law prohibits employers from relying on salary history information of an applicant as a factor in determining: 1) whether to offer employment to an applicant; or 2) what salary to pay an applicant. (Labor Code Section 432.3.)
- After March 11, 2022, the California Department of Public Health (CDPH) no longer requires the use of face coverings in K-12 and childcare settings.
- California's $15 minimum wage law now applies to employers with 26 or more employees. However, in 2023 the law will apply to all employers regardless of size. Beyond 2023, the minimum wage rate will be adjusted annually for inflation based on the national consumer price index for urban wage earners and clerical workers. The minimum wage will never see a drop, but will not increase more than 3.5%.

A Trial Court Has Discretion To Deny Attorney's Fees Under The Public Records Act.

In the summer of 2017, Adrian Riskin submitted three California Public Records Act (CPRA) requests to the Downtown Los Angeles Property Owners Association. Ruskin requested copies of three categories of documents.

The Association would not agree to give Riskin all the documents he wanted, so Riskin petitioned the trial court to compel the Association to produce certain records.

The trial court ordered disclosure of part of a five -page document but otherwise denied Riskin the declaratory relief he wanted. Because Riskin won disclosure of part of a document, Riskin moved for an award of attorney's fees and costs.

Riskin relied on Government Code Section 6259(d), which states that "The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to [the CPRA]." The trial court interpreted the "shall award" language in this provision to mean that it must award attorney's fees and costs if a requester prevails in litigation.

The Association appealed the award of fees and costs. On appeal, the Court of Appeal considered two issues: (1) what does the word "prevail" mean in the CPRA context; and (2) whether the "minimal or insignificant" standard applies to this situation.

The "minimal or insignificant" standard is a relatively new, court-created doctrine. Courts have ruled that if a requester "prevailed" by winning disclosure of documents, but the document(s) that were disclosed were so minimal or insignificant as to justify a finding that the requester did not actually prevail, the requester is not entitled to fees and costs. This has become known as the "minimal or insignificant" standard.

The Court of Appeal first found that a person prevails in a CPRA case if the litigation results in a defendant-agency releasing a copy of a document it previously withheld. That is, the lawsuit must motivate the defendant-agency to produce the document(s).

The Court of Appeal also adopted the "minimal or insignificant" standard, and held that it applies if the requester obtains only partial relief under the CPRA. The Court of Appeal held that the trial court has discretion to decide whether a document's disclosure is so minimal or insignificant to justify a finding that the requester did not actually prevail. The Court of Appeal remanded the case back to the trial court so that the trial court could use its discretion to determine whether this partial-document disclosure was minimal or insignificant.

Riskin v. Downtown Los Angeles Property Owners Association, 2022 WL 805377.

Note:

This case gives public agencies the "minimal or insignificant" defense to a motion for fees and costs in CPRA cases if the requestor wins only partial relief. LCW attorneys can both help public agencies comply with the CPRA to avoid litigation, and to use this defense to reduce or eliminate CPRA fee and cost awards.

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

My agency just hired its 26th employee. We believe this means that the 2022 Supplemental Paid Sick Leave (SPSL) law applies to us. If so, must we retroactively give our employees 2022 SPSL if they took time off at any point before we were covered under SPSL laws?

Answer

You are correct that SPSL now applies to your agency. Per Labor Code Section 248.6(a)(3), SPSL applies to any employer who employs more than 25 employees, that is, 26 or more.

SPSL provides eight different qualifying reasons for accessing paid leave for COVID-19 related absences. SPSL is retroactive to January 1, 2022. Therefore, if an employee in your agency took another form of paid leave to cover for a COVID-19 related absence that would have otherwise qualified for SPSL under one of the eight reasons at any point between January 1, 2022, and the date SPSL became applicable to your agency, then the SPSL appears to allow the employee to request that the other form of paid leave be credited back to her, and her appropriate SPSL bank be debited instead. Upon receipt of such a request, a newly-covered employer also appears to be obligated to retroactively apply SPSL back to January 1.

LCW attorneys are well versed in SPSL obligations and are happy to help public employers ensure compliance. For more information, please consult this special bulletin on the topic.

Duty To Provide Safe Workplace Did Not Apply At Conduct At Off-Site, Private Residence.

In March 2017, three employees of Colonial Van & Storage (Colonial) and a business associate gathered at the private family residence of two married Colonial employees (Carol Holladay and Jim Willcoxson). While in the home, Holladay and Willcoxon's son, a war veteran with PTSD, opened fire with a handgun, killing Wilcoxson and injuring the remaining attendees. The injured employee (Dominguez) and injured business associate (Schindler) filed lawsuits against Colonial for personal injury damages via a negligence cause of action.

Colonial moved for summary judgment against the negligence claim because Colonial did not own, possess, or control the home where the shooting occurred. The trial court denied this summary judgment motion. Colonial appealed, and the California Court of Appeal overturned the trial court and granted summary judgment. The trial court held that Colonial had no duty to ensure that an off-site meeting place for coworkers and business associates -- like an employee's private residence -- is safe from third-party criminal conduct.

In a typical negligence claim, a person must prove that they were owed a duty of care; the person they are suing breached that duty of care; and that the breach directly and proximately caused harm to the person suing. This case focused on whether the employer, Colonial, owed a duty of care to the injured people.

California Labor Code Section 6400 gives an employer an affirmative duty to provide employees with a safe place to work. On the other hand, the Court of Appeal noted that a duty of care is not absolute. Generally, a person does not owe a duty to: protect others from the conduct of a third person; or warn those who may be endangered by third-party conduct. It is these competing principles that the Court of Appeal needed to balance and harmonize to decide this case.

The injured employee, Dominguez, and the injured business associate, Schindler, claimed that Colonial owed them a duty of care because Colonial controlled the home where the shooting occurred. Generally, a person's or entity's control over property is sufficient to create that duty of care. However, the Court of Appeal held that Colonial did not control the home in this case.

In reaching that determination, the Court of Appeal used a common legal definition of "control", which is the power to prevent, remedy, or guard against a dangerous condition. Absent ownership or possession, an entity can control a property in

WORKPLACE

the legal sense if it takes an overt action directed at the property to modify or improve it, beyond simple upkeep. Examples of overt actions include: building a fence around the property; or erecting a neon sign to illuminate it. The Court of Appeal found no evidence that Colonial had ever taken an overt action to modify or improve the property. Thus, Colonial did not control the property and could not possibly owe Dominguez and Schindler a duty of care.

Dominguez and Schindler also argued that because Holladay had often teleworked from the home on behalf of Colonial, Colonial controlled the home. The Court of Appeal disagreed, holding that deriving a commercial benefit from the use of a home does not create a duty to protect. In coming to this conclusion, the Court stated that if they sided with Dominguez and Schindler, "employers would have the onerous task of ensuring … employees maintained the safety of their private residences and the mental health of their fellow residents and invitees."

The Court also found that, because Colonial had no knowledge of the son's violent past and mental disorder, the son's eventual attack was entirely unforeseeable. So, not only did Colonial not owe Dominguez and Schindler a duty of care, but the attack was also unforeseeable, which further rendered the claim untenable.

In sum, this case makes it clear that so long as an employer does not own, possess, or take overt action directed towards a property to modify or improve it, an employer does not control such property, and therefore does not owe a duty of care to those present on the property. Further, if an employer has no knowledge of anything that would hint at a future liability or dangerous situation, then the harm is not foreseeable and cannot support a negligence claim.

Colonial Van & Storage v. Superior Court (Dominguez), 2022 WL 819115.

Note:

This case involved a private employer. The Governmental Tort Claims Act governs the liability of public agencies. To the extent that no specific governmental immunity applied, the principles in this case would also apply to public employers.


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