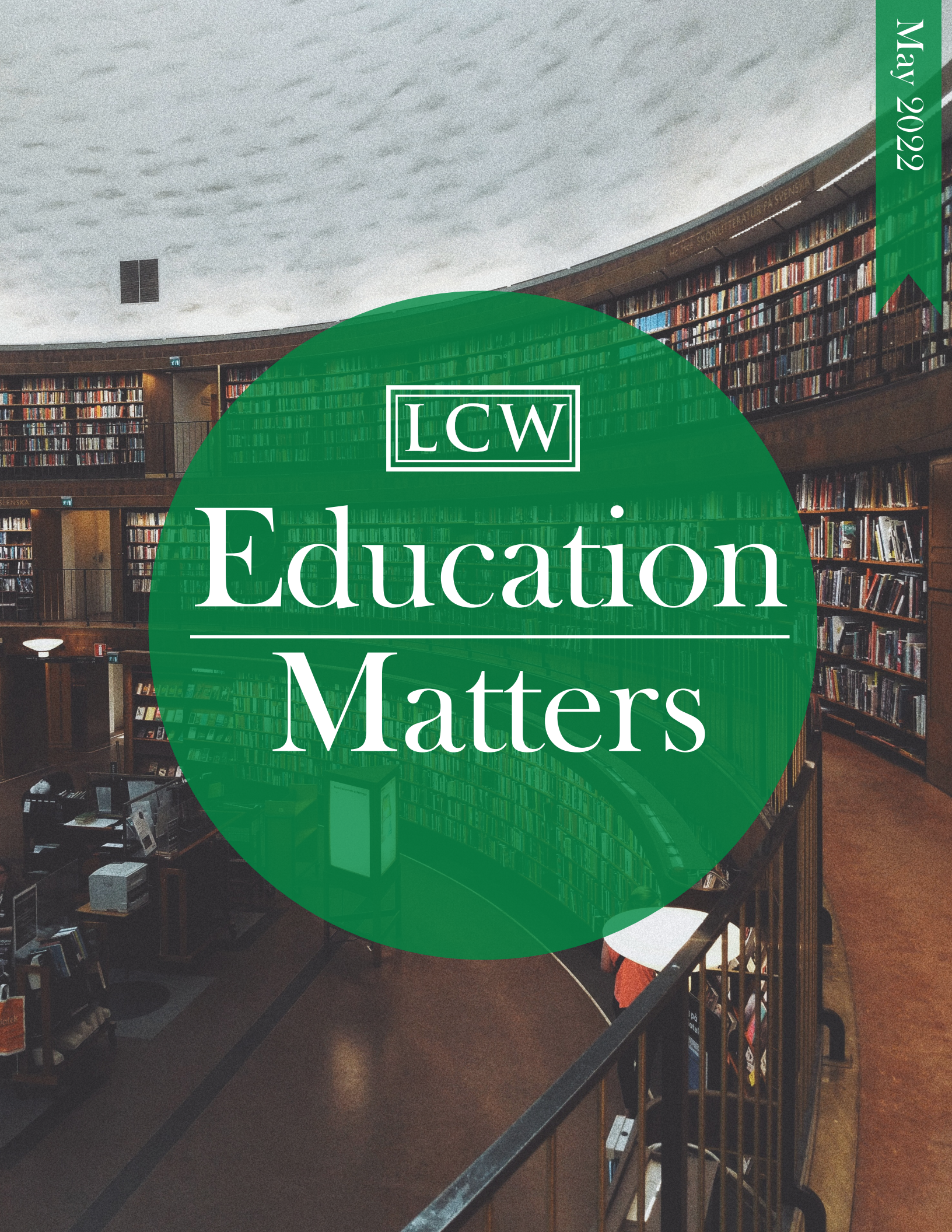

May 2022

LCW

Education Matters

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NEGLIGENCE

School District Did Not Have Duty to Monitor All Recordings Between Teacher and Student Where Sexual Misconduct Was Not Foreseeable.

Daniel Schafer was a high school teacher in the Anderson Union High School District. Doe was a 17-year-old high school student at the District. Schafer had been a teacher at the District since 2012 whom the District vetted through education and law enforcement agencies, and trained on sexual harassment and child abuse. When the District hired Schafer, there were no facts, reports, or rumors that Schafer had engaged in any improper relationship with students.

Doe and Schafer's relationship began with hand-holding and texting in the classroom. Eventually, Schafer engaged in sexual activity with Doe over a period of three months in the classroom and at Schafer's home. Doe told her best friend about their relationship, whose mother then notified the District. The District immediately investigated, obtained Schafer's resignation, and notified Doe's parents and law enforcement.

The District maintained outside security cameras at the high school, including a camera that recorded video of the doors to Schafer's classroom. The District saved footage from the cameras for 14 days before it automatically erased. The District's policy was to review the footage only if the District learned of an incident that may have been caught on video. The District also maintained an alarm system that covered the main building and Schafer's classroom. Each employee, including Schafer, had a code to deactivate the alarm. However, the District had not requested data from the alarm company on when alarms were deactivated or by whom. Teachers had unrestricted access to the high school campus, but prior to the report of the relationship between Schafer and Doe, there had been no issues with teacher access.

Doe sued the District for negligent hiring and negligent supervision. Doe did not have evidence to support the negligent hiring cause of action, so the trial court focused on the negligent supervision cause of action. To prove negligent supervision, Doe had to show not only that Schafer posed a risk of harm, but also that the risk was foreseeable, i.e., that the District knew or should have known of the risk that Schafer posed. The trial court found in favor of the District and found there was no evidence that the District knew or should have known that Schafer posed a risk of harm to students.

Doe appealed the trial court's decision, contending that summary judgment was improperly granted because the District had a duty to supervise and monitor Schafer and Doe, and the adequacy of a duty to supervise and monitor is a question of fact for the jury.

The California Court of Appeals for the Third District disagreed, and found the District's duty of supervision was limited to the risks of harm that were reasonably foreseeable, i.e., that were known to the District or that reasonably should have been known to the District. The Court of Appeal concluded the District had no duty to review alarm data and video recordings for the purpose of constantly monitoring all teachers, students, and campus visitors, and no duty specifically relating to Schafer and Doe. Here, the District did not know that Schafer would sexually assault Doe, and it had no information that would support a conclusion that it should have known.

Jane Doe v. Anderson Union High School District (2022) No. C093099.

REHABILITATION ACT– AFFORDABLE CARE ACT

Supreme Court Holds Damages For Emotional Distress Are Not Recoverable In Private Actions Brought To Enforce The Rehabilitation Act And Affordable Care Act.

Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller (Premier Rehab) to treat her back pain. Cummings asked Premier Rehab to provide an American Sign Language interpreter at her appointments. Premier Rehab declined her request and told Cummings that the therapist could communicate with her through other means, such as using written notes, lip reading, gesturing; or Cummings could provide her own ASL interpreter. Cummings sued Premier Rehab seeking damages and other relief, alleging that its failure to provide her with an ASL interpreter constituted discrimination under the Rehabilitation Act of 1973, and the Affordable Care Act. Premier Rehab is subject to these statutes because it receives federal monetary reimbursement through Medicare and Medicaid for its services.

The trial court dismissed Cummings' complaint. It concluded that the only compensable injuries allegedly caused by Premier Rehab were emotional in nature, and that damages for emotional harm are not recoverable in private actions brought to enforce the statutes Cummings relied on.

The Fifth Circuit Court of Appeals agreed with the trial court. It held that emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act. Cummings appealed.

On appeal, the United States Supreme Court addressed whether emotional distress damages are available under Title VII of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and Affordable Care Act. The Supreme Court found that emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act or the Affordable Care Act.

The Supreme Court noted that the Rehabilitation Act and Affordable Care Act were passed pursuant to the Spending Clause of the Constitution, under which Congress has broad power to set the terms on which it disburses federal funds, such as prohibiting recipients from discrimination on the basis of disability. The Supreme Court stated that "whether a remedy qualifies as appropriate relief must be informed by the way the Spending Clause statutes operate: by conditioning an offer of federal funding on a promise by the recipient not to discriminate in what amounts essentially to a contract between the government and the recipient of funds." The Supreme Court analogized the Spending Clause legislation with an implied private right of action under a contractual relationship, and concluded that a "particular remedy is thus appropriate relief in a private Spending Clause action only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." Where a statute contains no express remedies, the Supreme Court held that recovery is limited to other types of remedies that are traditionally available under a breach of contract. The Supreme Court acknowledged "it is hornbook law that emotional distress is generally not compensable in contract." Accordingly, the Supreme Court held emotional distress damages are unavailable under the Rehabilitation Act and Affordable Care Act.

Cummings v. Premier Rehab Keller, PLLC (2022) 596 U.S. ____.

Upcoming Webinar!

Self-Auditing Regular Rate Compliance

June 9, 2022
10:00 - 11:00am

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 CBAs 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!

FIRST AMENDMENT

Ninth Circuit Reviews Framework Used To Review Speech Restrictions On Elected Officials.

Brian Boquist was an Oregon minority party state senator. After members of the minority party participated in a walkout to prevent a legislative quorum, members of the majority threatened to send the state police to arrest the minority members and bring them back to the Capitol. Boquist made statements on the state senate floor and to reporters that the majority believed to be threatening. Boquist's told the Senate President: "Mr. President, and if you send that state police to get me, Hell's coming to visit you personally." During the walkout, Boquist said that State police should "send bachelors and come heavily armed." The majority believed that Boquist's language was threatening. In response, the majority ordered Boquist not to enter the state capitol without giving 12 hours' notice. Boquist filed a First Amendment retaliation claim against majority party state senators for allegedly retaliating against him for engaging in protected speech. The trial court dismissed Boquist's lawsuit, and he appealed.

The Ninth Circuit concluded that Boquist adequately alleged that he engaged in constitutionally protected speech and was subject to a materially adverse retaliatory action on account of that speech. The Ninth Circuit held that the framework used to review speech restrictions on government employees should not be employed to review speech restrictions on elected officials. An elected official raising a First Amendment retaliation claim has the initial burden of pleading and proving that: (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.

Upon such a showing, the burden shifts to the official to demonstrate that even without the motivation to retaliate, the official would have taken the action complained of. The Ninth Circuit additionally explained that the framework that applies to evaluating speech restrictions that the government imposes on its employees is not applicable to evaluating restrictions on the speech of elected officials. Nor does the balancing test set forth in *Pickering v. Board of Education of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564 (1968), apply to an elected official's claim of First Amendment retaliation by the official's elected peers.

Applying this framework, the Ninth Circuit held that there was no doubt that Boquist's complaint raised a plausible inference that he was engaging in protected speech, and that even a statement that threatens violence may not be a true threat if the context shows it to be emotionally charged rhetoric or political opposition. The Ninth Circuit also found that Boquist satisfied the second prong of the test because his complaint plausibly alleged that the 12-hour notice rule was a materially adverse action.

Boquist v. Courtney (2022) 9th Cir. No. 20-35080.

LCW

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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- Increase marketability and ability to compete in the job market
- Increase professional credibility

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- Encourage and improve job performance
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- Use as an aid for retention and recruitment

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RETIREMENT

Retirees Did Not Prove An Implied Contract For The County To Pay Retiree Health Premiums At The Same Rate As Current Employees.

In 1993, the Board of Supervisors of San Benito County contracted with the California Public Employee's Retirement System (CalPERS) to provide health insurance benefits to County employees and retirees through the Public Employees' Medical Hospital Care Act (PEMHCA). The Board executed this contract through a County resolution. This resolution required the County to pay retiree health insurance benefits at the same contribution rate it paid to active employees. However, nothing in the resolution prohibited the County from changing its contribution.

Until 2014, the County's health insurance contributions for active employees were stated in the collectively bargained Memoranda of Understanding. The County's contributions covered the full premium cost (100%) of certain CalPERS' plans for "employee only" (individual) coverage.

In 2014, the Board adopted resolutions to decrease the County's contributions for active employees and retirees to amounts to less than the lowest cost CalPERS plan. As of January 1, 2015, employees and non-Medicare retirees had to start paying out-of-pocket for health insurance and no longer had the option to select a no-cost, County-paid individual plan. In December 2016, the Board voted to exit PEMCHA and began providing health insurance benefits as of 2017 under contract with the California State Association of Counties Excess Insurance Authority (CSAC-EIA).

Normandy Rose and Margaret Riopel, both County retirees, claimed that when they were hired, they were told that the County would cover 100% of the cost of an individual health insurance plan throughout employment and retirement.

They sued the County for breaching an implied contract for the County to provide them a "100 percent paid individual plan." The retirees alleged that the County violated its contractual promise "when it failed to provide a contribution rate equal to an individual plan."

The trial court found that the County had an implied contract with its employees promising that, in exchange for working at lower wages, upon retirement the County would pay their health benefits at the same rate as active employees. However, the trial court also found that the retirees' claim to fully-paid coverage "was based upon a misunderstanding" stemming from the fact that in 1993 the County did cover 100% of employee contributions.

The trial court made these findings based upon its interpretation of an analytical framework the California Supreme Court established in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171. In *Retired Employees*, the Court considered whether a California county can form an implied contract with county employees that would confer a vested contractual right to lifetime retiree health benefits. The Supreme Court held that there is a legal presumption against the creation of a vested contractual right from a resolution or statutory scheme. But, that legal presumption could be overcome by the statutory language or circumstances accompanying the governing body's passage of the benefit that clearly expressed "a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." (*Retired Employees*, supra, 52 Cal.4th at p. 1187.) The intent to make a contract need not be express, but it must be "clear" based on "the statutory language or circumstances accompanying its passage."

The California Court of Appeal considered all evidence offered regarding the language of the County's resolution and the circumstances surrounding the passage of the resolution. This evidence included the relevant resolutions and related legislative record (including staff reports, meeting minutes, and testimony which related to or described circumstances informing the Board's decisions), and the County's conduct in providing the health insurance benefits.

The Court of Appeal found that the resolutions and legislative record did not contain a clear and express intent to create an implied contract. The Court then

considered the County's conduct over the 21 years at issue. The retirees contended that the County's conduct to contribute 100% of the cost of their insurance plans for so long, implied that the County intended to be contractually bound to do so indefinitely. The Court of Appeal disagreed, finding that the County's long-term conduct simply did not rise to the level of clear intent required, particularly because during that time the County was simply following PEMCHA's "equal contribution" requirements. The Court of Appeal overturned the trial court and held that the retirees had no contractually-vested right to receive the same health insurance premium contributions as the County provides its active, unrepresented employees.

Rose and Riopel v. County of San Benito (2022) WL 1154621.

NOTE:

This case illustrates how the wording of a local agency's resolutions related to retirement benefits may create implied contracts with the agency's employees. Unless the wording of the resolution or the circumstances surrounding the resolution clearly expresses an intent to create an implied contract, however, the law will presume that there is no implied contract.

NEW TO THE FIRM!

Ashley Sykora is an associate in our Los Angeles office where she advises clients on labor and employment law matters. She previously served as a law clerk at the California Office of the Attorney General.

Ariana Fil is an associate in our San Francisco office where she advises clients on labor, employment and education law matters.

Hadara R. Stanton is experienced litigator based in LCW's San Francisco office. She has more than fifteen years of experience serving as a Deputy Attorney General in the California General's Office prior to joining LCW.

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.

- LCW San Diego Associate Attorney Madison Tanner ran the Boston Marathon this month and finished the race in two hours and fifty-six minutes! This means that she ran one of the nation's hardest marathon courses at a pace of 6:45 per mile. Congratulations Madison!
- Under California law, overtime pay is required for hours worked over eight in a day, but California public agencies are generally exempt from this requirement. The U.S. Fair Labor Standards Act (which does apply to public agencies) provides an overtime threshold of 40 hours per week for most non-exempt employees.
- Local agencies that serve a substantial number of non-English-speaking people must employ a sufficient number of qualified bilingual persons in public contact positions or as interpreters to assist those in such positions, to ensure information and services are provided in the language of the non-English-speaking person. The local agency determines what constitutes a substantial number of non-English-speaking people and a sufficient number of qualified bilingual persons. (Government Code Section 7293.)

RETALIATION

Employee's Performance Evaluations Proved That The Reasons For Terminating Him Were Pretextual.

Arnold Scheer was terminated from his position as Chief Administrative Officer (CAO) at the UCLA Department of Pathology and Laboratory Medicine in June 2016. Scheer had worked at the University since 2004.

Scheer sued the University. He alleged he was wrongfully terminated in retaliation for whistleblowing. Scheer stated that he observed violations of safety procedures and mismanagement that resulted in lost and mislabeled specimens. The University moved for summary judgment.

When an employee alleges retaliation or discrimination, courts apply the *McDonnell Douglas* burden-shifting framework to analyze the claim. Under the framework, the employee must first establish a *prima facie* case of unlawful discrimination or retaliation. Next, the employer must articulate a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is only a pretext for discrimination or retaliation.

The trial court held that under the *McDonnell Douglas* framework, Scheer had established a prima facie case of retaliation. The court also held that the University had articulated the following legitimate reasons for terminating Scheer in the Notice of Intent to Terminate (NOI): "poor performance and conduct", and specifically that he: 1) had an overly aggressive attitude concerning certain negotiations; 2) had a harsh and disruptive style at meetings; 3) had become increasingly ineffective as CAO; (4) lacked enthusiasm; and 5) was not an effective leader.

Therefore, the burden shifted back to Scheer to demonstrate that the University's proffered legitimate reasons were only a pretext for retaliation. Scheer argued that throughout his tenure at UCLA, he received accolades, positive feedback, promotions, and additional assignments and responsibilities from upper management. Each year he received a maximum merit increase in salary and near maximum incentive awards. Sheer argued: "*Indeed, the reviews and evaluations … clearly indicate that his work and performance were exemplary during that time frame.* Notably, [he] was consistently … given additional responsibilities and oversight until the date of his termination [emphasis added]."

The trial court found that despite these arguments, there was no triable issue of fact because the performance evaluations took the form of checklists relating to completion of individual tasks, rather than subjective evaluations of the quality of his work or his style and manner in completing those tasks. The trial court granted summary judgment for the University.

Scheer appealed. On appeal, the significant issue was whether Scheer had established that the claimed reason for his termination was a pretext. Scheer made the same arguments as he did at the trial court.

The California Court of Appeal examined the NOI, and found the University's alleged reasons for Scheer's termination to be disputable.

First, despite the NOI stating that Scheer had become a problematic presence within the department, Scheer's direct supervisor disagreed with that characterization.

Second, the NOI claimed that, in 2015, the University had removed certain responsibilities from Scheer because of a past personal interaction. However, Scheer's declaration stated that he was never advised of this action and that Scheer's fiscal year 2015 objectives were centered towards those responsibilities, indicating that he still held them in 2015.

Third, the NOI criticized Scheer as being overly aggressive in negotiations on behalf of the University. In response, Scheer pointed to an email, which specifically congratulated him for achieving a good result for the University at the negotiating table.

Finally, the NOI criticized Scheer's involvement in the opening of a new lab in China, saying he never followed through on opening the lab. However, Scheer's performance evaluation specifically stated that he had achieved 100% of his goal of opening a "joint venture with CTI in Shanghai, China, and taking on new sites and testing."

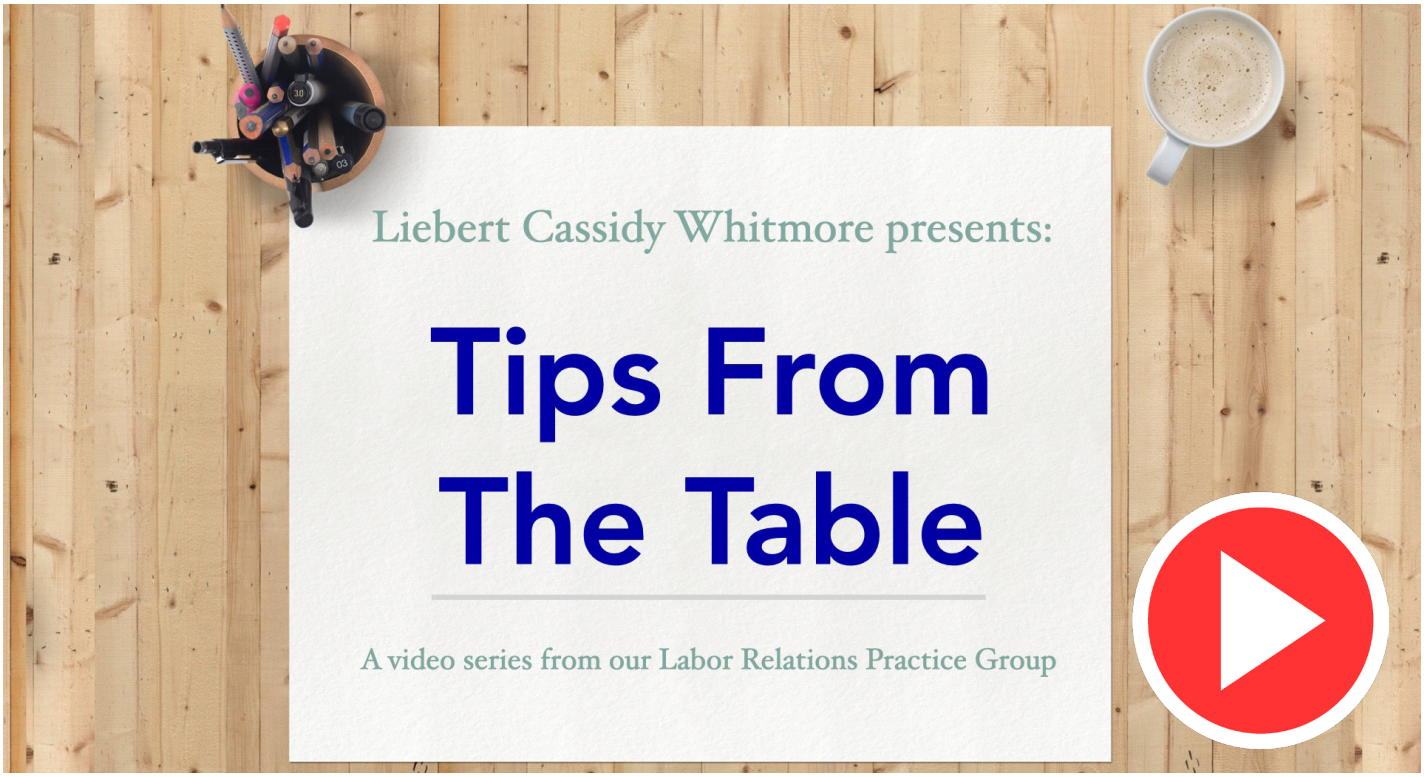
In sum, the Court of Appeal agreed with Scheer's arguments, stating that "Scheer… showed that he unfailingly received excellent evaluations over a 12-year period, and no one ever advised him of any shortcomings or deficiencies".

The Court of Appeal concluded that the University's stated reasons in the NOI were untrue and were a pretext for retaliation. The Court therefore overturned the granting of summary judgment and remanded the case back to the trial court.

Scheer v. UC Regents, 76 Cal.App.5th 904 (2022).

NOTE:

This case is a cautionary tale for employers. Any adverse action an employer takes must be consistent with the documentation in the personnel file about the employee's performance. Employers must take the time to prepare accurate performance evaluations, regardless of the format of the evaluation.



County Could Withhold Names Of Those Arrested Eleven Months Prior.

On February 15, 2021, Alisha Kinney asked the County of Kern for "the names of every individual arrested for DUI by the Kern County Sheriff's Department from March 1, 2020 through April 1, 2020." Kinney made this request pursuant to the California Public Records Act (CPRA).

The County responded by disclosing a report that documented the three DUI arrests the Kern County Sheriff's Department made during the timeframe Kinney specified. But, the County redacted the names of the three arrestees from the report. The report did list a case number, date and time of arrest, the offense, the offense statute, and the case status for each arrest.

Kinney asked the trial court to compel the County to produce the arrestee's names. The trial court declined and Kinney appealed. Kinney argued that she was entitled to the names of the arrested individuals because of Government Code 6254(f)(1), which states:

> "Notwithstanding any other provision of this subdivision, state and local law enforcement agencies *shall make public the following information*, . . . :
>
> (1) *The full name and occupation of every individual arrested by the agency*, ..." (emphasis added)

In response, the County argued that the holding in *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, allowed it to withhold records that do not pertain to contemporaneous police activity. The County relied on the following language from *Kusar*: "the records to be disclosed under section 6254, subdivision (f)(1) and (2), are limited to current information and records . . . which pertain to contemporaneous police activity." Implicit in the County's argument was that the 11-month old records Kinney wanted could not possibly pertain to "contemporaneous police activity."

The California Court of Appeal examined the rationale behind the *Kusar* holding and the legislative intent of Government Code Section 6254(f). The Court found that Section 6254(f) was designed to ensure that secret arrests of citizens and clandestine police activity were curtailed. The Court said the legislature wanted to allow public access to information about recent arrests to guarantee that individuals would not be detained in secret. It was for that reason that the *Kusar* case held that "records" under Section 6254(f) are "limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity."

The Court of Appeal concluded that, because the requested records were 11 months old, they were not current information nor did they pertain to contemporaneous activity. The arrestees' names were not disclosable under the CPRA, and the Court rejected Kinney's appeal.

Kinney v. Superior Court of Kern County, et al, 2022 WL 1043448.

NOTE:

This case is a reminder to educational entities that, despite the broad language of the CPRA, some information can be withheld. The courts have interpreted Government Code Section 6254(f)(1) to allow agencies to withhold records that do not pertain to contemporaneous police activity. Each CPRA request must be analyzed to determine whether the requested records fit the contemporaneousness requirement.

FIRM VICTORIES

Superior Court Upholds Personnel Appeals Board's Decision To Terminate Police Officer.

LCW Managing Partner Scott Tiedemann and Senior Counsel Stefanie Vaudreuil convinced the superior court to uphold a city personnel appeals board's decision to terminate a police officer. Previously, LCW persuaded the city's personnel appeals board to uphold the termination of this officer for multiple offenses, including dishonesty, and making derogatory, discourteous, and profane remarks to a suspect who the officer had detained and arrested.

The DA filed criminal charges against the officer for filing a false police report about the arrest and detention, but the officer was acquitted.

The officer then asked the superior court to reverse the personnel appeals board's decision that upheld his termination. However, both the notice of intent to terminate and notice of termination that officer received stated that any one of the several charges against the officer would support his termination. The court noted that if the weight of the evidence supported any one of the charges, then the court could only overturn the termination if that level of penalty was an abuse of the city's discretion. The court found that at least three of the disciplinary charges were indeed supported by the weight of the evidence, and that applying the penalty of termination was within the city's discretion.

Following oral argument, the court published its final order upholding the termination. The final order added additional grounds for upholding the termination that were based on points LCW raised at oral argument.

NOTE:

Not only did the officer's disciplinary notices state that each individual charge was sufficient to support termination, but the Chief persuasively testified as to this point. The court also heard LCW make this point in oral argument and included this point in its decision.

Court Upholds Lawfulness Of Governor's Order Extending POBR Statute Of Limitations During Pandemic.

LCW Partner Geoff Sheldon and Senior Counsel Dave Urban successfully advocated on behalf of the Los Angeles County Sheriff's Department for the lawfulness of the Governor's order, issued in the midst of the coronavirus pandemic, to extend the POBR's one-year statute of limitations. The California Department of Justice represented the Governor in the case. The Association of Los Angeles Deputy Sheriffs (ALADS) brought the case.

Under attack in the case was the Governor's March 2020 Executive Order N-40-20. Among other things, that Order provided that the one-year deadline, specified in Government Code section 3304(d), for completing investigations of alleged misconduct by public safety officers, was extended by 60 days. In enacting this Order, the Governor explained that, "under the provisions of [the California Emergency Services Act (CESA)] …, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic."

ALADS filed a writ petition in the superior court seeking an order that the Governor's action to toll the POBR statute of limitations for 60 days was unconstitutional. ALADS also sought to enjoin the Los Angeles County Sheriff's Department from relying on the Governor's Executive Order.

The court denied the union's petition. The Governor issued the Order pursuant to the CESA emergency powers. Because the Governor had issued a state of emergency, CESA offered the Governor broad discretion to issue orders necessary to carry out the purposes of the Act, including the extension of this POBR statute of limitations. As a result, all disciplinary actions that relied upon the extension remained.

NOTE:

We are proud that LCW was able to assist police and sheriff's departments throughout the state that had relied upon the extension of this POBR statute of limitations to pursue needed disciplinary actions.

Events & Training

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

Consortium

Seminars

Webinars

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

I understand that Cal/OSHA just updated the Emergency Temporary Standards (ETS), which in turn impacts my agency's COVID-19 Prevention Plan. What are the new obligations for excluding employees, who contract COVID-19, from the workplace?

Answer

You are correct, Cal/OSHA readopted and amended the ETS on April 21, 2022. Now, employees who contract COVID-19 are subject to one of two criteria, depending on whether their symptoms are resolving (improving) or not.

For an employee who never developed symptoms or whose symptoms are resolving, the amended ETS require that the employee satisfy the following criteria to return to work:

1. Five days have passed from the date that symptoms began or, if no symptoms developed, from the date of the first positive COVID-19 test, and at least 24 hours have passed since the employee's fever, if any, has resolved without the use of fever reducing medications; and
2. Either (a) the employee produces a negative COVID-19 test from a specimen collected no earlier than the fifth day following the first positive test, or (b) the employee has waited 10 days from the first presentation of COVID-19 symptoms or, if the employee did not develop symptoms, from the date of the first positive COVID-19 test.

For an employee whose symptoms are not resolving, the amended ETS require that the employee satisfy the following criteria to return to work:

1. At least 24 hours have passed since a fever has resolved without the use of fever reducing medications; and
2. Either (a) the employee's symptoms are resolving, or (b) the employee has waited 10 days from the first presentation of COVID-19 symptoms.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