LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION MATTERS

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges.

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LCW NEWS

ANTITRUST

Real Estate Listing Company Adequately Alleged That Rival Listing Company Engaged In Illegal Anticompetitive Conduct.

Most real estate agents pay monthly fees to access multiple listing services (MLSs), which are databases of homes for sale in certain geographic areas. Most MLSs are owned and controlled by members of the National Association of Realtors (NAR), a trade association to which the vast majority of residential real estate agents belong. Most sellers prefer to list their homes on NAR-affiliated MLSs to reach the widest range of buyers. Some sellers prefer not to do so because they do not want to share details about their home with an entire MLS. Listings that are not shared on a NAR-affiliated MLS are sometimes called "pocket listings."

A group of real estate agents created PLS, which was a database similar to an MLS but allowed sellers to choose how much information to share, including listings anywhere in the United States instead of a particular geographic region. PLS was open to any agents, and charged less than MLSs.

Even before PLS was launched, NAR grew concerned with the growth of pocket listings. Two years after PLS launched, an advisory board at NAR voted to recommend that NAR adopt a policy that would require agents posting listings on competing services to also post those listings on the appropriate MLS. Regional MLSs adopted policies consistent with the advisory board's recommendation and a number of NAR-affiliated MLSs discussed the competitive threat of pocket listings at a conference.

A month later, NAR adopted the Clear Cooperation Policy (Policy) which requires that listing brokers must submit listings to the MLS, and agents who did not comply would face severe penalties, including several-thousand dollar fines, or suspension from or termination of their access to the MLS. NAR-affiliated MLSs admitted that the purpose of the Policy was to maintain market dominance and specifically exclude PLS. After the Policy was adopted, listings were removed from PLS and submitted to NAR-affiliated MLSs. Agent participation in PLS also declined.

PLS filed suit against NAR, alleging that the Policy was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and of California antitrust laws. PLS also sought treble damages for lost profits and a permanent injunction prohibiting NAR from enforcing the Policy. NAR filed a motion to dismiss the lawsuit. The trial court granted the motion to dismiss because PLS did not allege antitrust injury and denied PLS the ability to amend its complaint. PLS appealed.

The Ninth Circuit Court of Appeals held that the trial court erred in granting the motion to dismiss. Under the Sherman Act, private parties can assert a claim when the claimed injury flows from acts harmful to consumers. The Ninth Circuit held that the trial court erroneously required PLS to allege that the Policy directly harmed the "ultimate consumers" - which the trial court identified as the home buyers and sellers - to allege antitrust injury. The Court reasoned that consumer

is not limited to "ultimate consumer" - businesses that use a product or service as an input to provide another product or service can be "consumers" for antitrust purposes.

The Ninth Circuit then analyzed whether PLS adequately alleged a Sherman Act violation. To allege an antitrust injury, a plaintiff must allege (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. The Supreme Court of the United States has interpreted the Sherman Act to prohibit "unreasonable restraints of trade." Most claims of unreasonable restraints of trade require courts to conduct a market analysis to assess the restraint's actual effect on competition. A group boycott, which is a concerted attempt by a group of competitors to protect themselves from nongroup members, is generally a per se unreasonable restraint of trade and therefore, does not require a market analysis.

The Ninth Circuit held that PLS adequately alleged a Sherman Act violation because the Policy is a classic group boycott. The Policy was enacted for the express purpose of preventing PLS, a new entrant to the real estate market after decades of little to no competition, from competing with the MLSs. The Policy impaired PLS's ability to compete against MLSs in the market for sellers' listings because it required the vast majority of PLS suppliers (sellers' agents who are members of a NAR-affiliated MLS) to supply to PLS's dominant competitors (NAR-affiliated MLSs). Regardless of what PLS could do - e.g., charging less to list properties - agents who belong to NAR-affiliated MLS may not list on PLS without also listing on an MLS. Essentially, the Policy eliminates competition for most sellers' agents' listings between NAR-affiliated MLSs and rival services.

The Ninth Circuit also held that PLS adequately alleged an antitrust injury. The Court explained that the Sherman Act prohibits group boycotts because they are designed to drive existing competitors out of the market or prevent new competitors from entering, leaving consumers with fewer choices, higher prices, and lower-quality products. The Ninth Circuit held that PLS alleges that is what happened with the Policy - the Policy prevented PLS from entering the market and made it virtually impossible for new competitors to enter, leaving agents with fewer choices, high prices, and lower quality products. Therefore, PLS adequately alleged an antitrust injury.

Ultimately, the Ninth Circuit found in favor of PLS and reversed the trial court's motion to dismiss.

PLS.Com, LLC v. Nat'l Ass'n of Realtors (9th Cir. 2022) 32 F.4th 824.

Note:

Antitrust laws are intended to promote maximum competition in the private sector. Antitrust issues for private K-12 schools, colleges, and universities can arise in many circumstances, such as agreements to fix compensation provided to employee recruits, joint recruiting schedules, joint establishment of financial aid methodologies and joint admissions protocols, agreements to set tuition prices, and group boycotts of ranking organizations. We would remind schools to be careful to ensure that their collegial collaboration with other schools does not cross the line into an unlawful violation of antitrust laws.

STUDENTS

NEGLIGENCE

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

In August 2015, 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 agreed with the trial court.

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, the Court of Appeal 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. The Court 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 Dist. (2022) 76 Cal. App. 5th 1005.

Note:

Private colleges, universities, and K-12 schools need to ensure that a waiver sufficiently communicates to students and their parents (if the student is under 18) the known potential risks of participating in extracurricular activities. Here, the Court held that the student and his parents knowingly assumed all the risks of playing football because it was common knowledge that tackle football could cause severe traumatic brain injury. Additionally, the District provided the student's parents with additional paperwork, including in the school handbook, that discussed the possibility of concussions and other head injuries.

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 analyzed 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, arguing that the District had a duty to supervise and monitor Schafer and Doe.

The Court of Appeal 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 Shafer would sexually assault Doe, and it had no information that would support a conclusion that it should have known.

The Court of Appeal also rejected Doe's argument that sexual abuse between school employees in general is foreseeable. The Court noted that the state

Supreme Court has rejected the proposition that sexual misconduct is foreseeable any time a minor and an adult are alone together in a room. Here, the District did not know Schafer would have sex with Doe, and had no information to support a conclusion that it should have known. Accordingly, imposing a duty on the District to review alarm data and video recordings would be unreasonable.

Jane Doe v. Anderson Union High School District, 2022 WL 1404140.

Note:

While this case arose at a public school, private colleges, universities, and K-12 schools also have a duty to take reasonable measures to protect students from foreseeable harm. For K-12 schools, reasonable steps may include things such as employee/student boundaries policies that prohibit employees from communicating with students through methods other than school-sponsored email addresses or school-sponsored electronic messaging, prohibit employees from being alone with students in closed classrooms, and prohibit employees from hugging or having other physical contact with students.

EMPLOYEES

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. Regents of Univ. of California (2022) 76 Cal.App.5th 904.

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 and timely performance evaluations, regardless of the format of the evaluation.

DID YOU KNOW…?

Each month, LCW provides quick legal tidbits with valuable information on various topics important to private K-12 schools, colleges, and universities in California:

- On January 1, 2023, California's minimum wage will increase to $15.50/hour. Employers of all size will be required to raise their base salaries based on the state's projection that the consumer price index will have risen by 7.6% over the last two years. A 2016 law requires that any inflation growth above 7% between the 2021 and 2022 fiscal years triggers a requirement that the minimum wage also increase at a faster rate. The minimum salary for most exempt employees in California will also increase to $64,480 annually, effective January 1, 2023.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

MAY

□ Complete hiring of new employees for next school year.

□ Complete hiring for any summer programs.

□ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g., janitorial services if applicable).

- Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:
  - School and classroom janitorial.
  - School site administrative.
  - School site grounds and landscape maintenance.
  - Pupil transportation.
  - School site food-related.
- A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
  - That there is a physical barrier at the worksite to limit contact with pupils
  - That there is continual supervision and monitoring of all employees of that entity, which may include either:
    - Surveillance of employees of the entity by School personnel; or
    - Supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted

of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code Section 33192). (See Education Code Section 33193).

□ If conducting end of school year fundraising through raffles:

- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code Section 320.5.
- In order to comply with Penal Code Section 320.5, raffles must meet all of the following requirements:
  - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
  - Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
  - At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:

- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
  - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
  - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.
    - Ex: If a business donates to the school for the auction items from its inventory that it sells directly, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

JUNE

Conduct exit interviews:

Conduct at the end of the school year for employees who are leaving (whether voluntarily or not). These interviews can be used to improve the organization and can help defend a lawsuit if a disgruntled employee decides to sue.

MID-JUNE THROUGH END OF JULY

□ Update Employee and Student/Parent Handbooks:

- The handbooks should be reviewed at the end of the school year to confirm that the policies are legally compliant, consistent with the employment agreements and enrollment agreements that were executed, and current with the latest best practice recommendations. The school should also add any new policies that it would like to implement upon reflection from the prior school year and to prepare for the upcoming school year.

□ Conduct review of the school's Bylaws (does not necessarily need to be done every year).

□ Review of insurance benefit plans:

- Review the school's insurance plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.
  - Workers Compensation Insurance plans generally expire on July 1.
  - Other insurance policies generally expire between July 1 and December 1.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

Question: I understand that Cal/OSHA just updated the Emergency Temporary Standards (ETS). 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.

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 our 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.

UPCOMING WEBINAR!

Religious Schools and the Law: A Conversation with Pepperdine University Professor Michael (Avi) Helfand

June 13, 2022
10:00am - 11:00am

Visit our website for more information.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Seminars/Webinars

June 13 **"Religious Schools and the Law: A Conversation with Pepperdine University Professor Michael (Avi) Helfand"**

Liebert Cassidy Whitmore | Webinar | Michael Blacher & Michael A. Helfand

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