

Quarterly Update

EMPLOYMENT LITIGATION CASE STUDY PROBATIONARY EMPLOYEES

Employment litigation in the State of California can be a slippery slope for school districts. Because school districts are public entities, they are subject to the enforcement of administrative agencies such as the Federal U.S. Equal Employment Opportunity Commission (EEOC) and the California State Agency, Department of Civil Rights (DCR). DCR was formerly known as the Department of Fair Employment & Housing Agency (“FEHA”).

Both of these government agencies will receive and investigate administrative complaints filed by past and present school employees alleging that they have been terminated, harassed, retaliated or discriminated against on the basis of their status as **a member of a protected class**. An example of a “protected class” of employees includes, but is not limited to, race, ethnicity, gender, color, religion, sexual orientation, pregnancy, age (40 or older), or a physically disabled person.

In education there are probationary periods for employees, both classified and certificated. There is a common understanding in Human Resource departments that a probationary employee can be dismissed from employment without cause. The practice of releasing a probationary worker, or non-tenured teacher without having to undergo a disciplinary process is a common and acceptable practice. This practice, however, does not come without risk. On occasion, a discharged employee that was probationary, will turn around and file a complaint with EEOC or DCR after separation, alleging that they were discharged or terminated because of their status as a member of a protected class. When this happens, school districts are placed in the uncomfortable position of having to defend their decision, and demonstrate that the decision was made absent of any retaliatory or discriminatory motive.

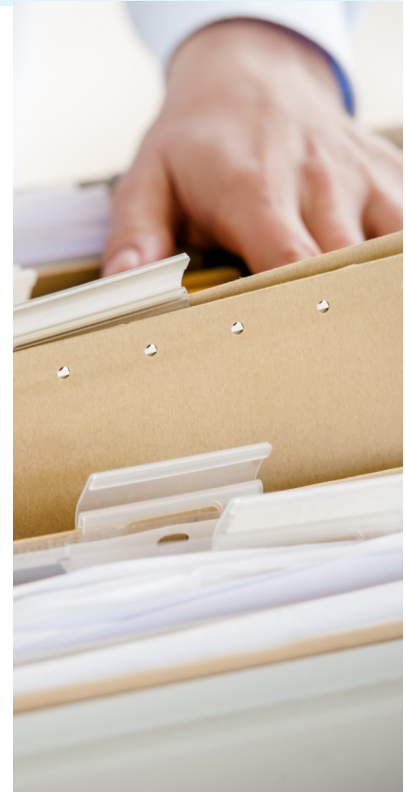
Below is a case study offered to illustrate an example of what can happen in these situations.

DESCRIPTION OF EVENTS

A plaintiff in a school district employment lawsuit had been hired by a member school district as a permanent groundskeeper. He was terminated prior to the completion of his probationary period. The plaintiff contends that one month before his termination, he was provided a formal performance evaluation whereby he scored exceptional. He also reported that he received favorable comments and feedback from his evaluator.

The plaintiff in this case was a male in his sixties. He was receiving counseling with

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PROPERTY & LIABILITY DIVISION

Mailing:
P.O. Box 1847
Bakersfield, CA 93303
Physical:
2000 K Street
Bakersfield, CA 93301
Phone: 661-636-4495

Newsletter Editor: Kerri Jones

SISC Property Appraisals

SISC has contracted with Centurisk (formerly AssetWorks Risk Management) to provide property appraisal services for our member districts.

These services include onsite inspections and valuation of buildings with a value of \$1 million and greater.

These inspections will be scheduled in a 5-year cycle. The first 14 school districts were evaluated in the 2023-24 school year. Districts selected for the 2024-25 school year will be contacted by Centurisk directly to schedule your appraisal in advance of the site visit. Please arrange for access to all properties during the site visit. Thank you in advance for accommodating this important project.

If you have any questions or concerns, please contact Randye Rogers, SISC Safety & Loss Control Specialist at rarogers@siscschools.org

CHEERLEADING

Cheerleading has become a “sport” of its own and some students are eager to participate in this activity and to press the limits of physical ability, as well as gravity in performing stunts.

Most cheerleading injuries happen during exercises like pyramids, tosses, and gymnastic moves. There have been many injuries resulting from cheerleading accidents including broken bones, sprains and strains, especially in the legs, ankles, and feet.

The incidence of concussions and closed head injuries and hospital admissions has gone up. Most concussions happen during practice. Almost half of the reported concussions happen when the cheerleader does not have a spotter.

Because skill level and physical ability varies dramatically by age, it is imperative that age-appropriate programs are implemented.

USA Cheer has given safety rules. A safe program has direct adult supervision, correct conditioning, skills training, and warm-up exercises. Coaches should be trained in risk management, as well as basic first aid and CPR/AED training. Concussion protocols should always be followed. Athletes, coaches, and parents should be trained in athlete protection. This includes understanding, preventing, recognizing, and reporting abuse such as bullying, hazing, physical and emotional misconduct, and sexual abuse.

These are some general guidelines for cheerleaders:

- Cheerleaders should have a health exam, including a complete health history.
- A qualified and knowledgeable coach must be on hand.
- Practice sessions should be supervised, and held in a safe and appropriate place.
- Individual and squad ability levels should be carefully evaluated. Only stunts that are right for those levels should be planned and done.
- Participants should have good training in tumbling.
- Mandatory professional training in correct spotting methods must be held.
- Participants should be part of a conditioning and strength-building program.
- No jewelry should be worn.
- Structured stretching exercises and flexibility and warm-up routines should be held before and after practice sessions, game activities, competitions, and pep rallies.
- Only the right surfaces should be used for tumbling, stunts, pyramids, and jumps.
- Cheerleaders' skills should be evaluated based on accepted teaching standards. Correct spotting should be used until all cheerleaders have mastered the skills.
- Hard and unbending supports or rough edges or surfaces must be correctly covered.
- Proper athletic clothing and shoes must be worn.
- Props, like signs, should be made of solid material with no sharp edges or corners.
- All signs should be gently tossed or kept under control.

Parents/guardians of students participating in cheerleading activities should have a sports participation form on file with the district. The form should include language regarding assumption of risk, and health insurance coverage.

Even when following the USA Cheer guidelines, there is still inherent risk involved in cheerleading activities. All cheerleading gymnastics, including tumbling should be carefully reviewed and supervised by a qualified adult advisor or coach. For additional information visit the USA Cheer website at usacheer.org.

INTRODUCING LILIA MORENTIN

In 2005 Lilia Morentin was a reservist in the U.S. Navy stationed in El Salvador. While she enjoyed her active duty for Special Work orders, she began looking for a new opportunity, when she returned to the States. That is when she heard about a job opportunity that piqued her interest at the Kern County Superintendent of Schools Office (KSCSOS). Morentin started with KCSOS one week after being released from active duty. In 2007, a position for growth, and use of her knowledge and experience, again got her interest. This position was for Administrative Secretary for the SISC Property and Liability division.

In this position, Morentin provides a wide range of administrative tasks in support of the Director and Claims Adjusters. Morentin is very familiar with all 156 member districts located in 19 different counties. She is responsible for insurance verification/certificates of insurance. This requires her to review contracts, agreements, Memorandums of Understanding and Facilities Use Agreement, all which require an eye for details. She also coordinates services for special coverage programs such as Special Education Voluntary Coverage Programs (SEVCP) and School Connected Organization program options. Morentin compiles statical data and reports through a custom-made data management storage program she created herself, which increases efficiency and streamline processes. This Microsoft Access database program is tailored to track key information for the 156 member districts, SISC defense counsel members and various city and county agency contacts. Morentin also maintains a detailed listing of district property deductible information and key information for the Property and Liability division.

If you have called the office, it is likely you have spoken with Morentin at some point. While Morentin has worked for SISC for 17 years, she still has a love for the Navy and has volunteered with veteran's connected organizations. She is also a talented knitter and has won several ribbons at the Kern County Fair.



Property & Liability Division

Robert Kretzmer, Director
661-636-4709

Tyrone Taylor, Coordinator
661-636-4601

Lilia Morentin, Administrative Secretary
661-636-4495

Ryan Bourget, Adjuster
661-636-4606

Hilda Hankins, Adjuster
661-636-4694

Lisa Pitstick, Adjuster
661-636-4761

Jahna Lewis,
Claims Assistant
661-636-4871

Micaelle Morales,
Claims Assistant
661-636-4786

Shelby Gonzales,
Safety & Loss Control
661-636-4604

Kerri Jones,
Safety & Loss Control
661-636-4376

Randy Rogers,
Safety & Loss Control
661-636-4607

Debbie Jackson,
Student Insurance
661-636-4206

Elsa Lara,
Student Insurance
661-636-4736

Sabrina Moten,
Student Insurance
661-636-4414

Preventing Heat Illness

As the summer months unfold it is important to be aware of how to prevent the different types of heat illness and your responsibilities as an employer. The California Department of Industrial Relations website has resource to help you understand your responsibilities.

Protecting student health during times of high heat is also important. Many districts may be offering summer programs or begin the 2024-25 school year during high heat months. In addition, sports teams begin practicing for upcoming sports seasons. The California High School Coaching Education and Training program requires heat illness training every two years. The California Department of Public Health has guidance for schools on sports and strenuous activity during extreme heat on their website.

Below are website links for more detailed information.

Department of Industrial Relations <https://www.dir.ca.gov/dosh/heatillnessinfo.html>

California Interscholastic Federation (CIF) https://www.cifstate.org/sports-medicine/heat_illness/index

California Department of Public Health <https://www.cdph.ca.gov/Programs/EPO/Pages/Extreme%20Heat%20Pages/extreme-heat-guidance-for-schools.aspx>

STUDENT ATHLETE INSURANCE

High School football is a physically demanding sport that involves physical contact and therefore carries the potential for injuries such as concussions, sprains, and fractures. Fortunately, SISC is pleased to continue to offer Tackle Football Coverage for the 2024-2025 season. As always, we strive to provide competitive rates along with exceptional coverage to address the specific needs and risks associated with high school football.

According to Education Code section 32221, every school district in California must provide insurance coverage for medical and hospital expenses to every member of an athletic team. While the basic Student Insurance coverage provided by SISC meets this criteria, coverage for contact sports such as tackle football are excluded. SISC does offer Tackle Football coverage options for individual athletes for purchase. The Tackle Football coverage covers accidental injuries during supervised practices or regularly scheduled high school football games. This policy is available to all athletes, even those with other medical insurance.

The SISC Tackle Football coverage is effective from the moment the payment is received by the school site or SISC's office from the athlete, until the end of the school year. Brochures containing the application and coverage information are available on the SISC website or can be mailed to designated school personnel upon request. The benefits of the SISC Tackle Football Program include a \$15,000 benefit (paid according to the schedule of benefits) and an annual premium of \$60.00.

Tackle football is considered a high-risk concussion sport. As a result, we take additional measures by providing a Concussion Coverage program at no extra cost to our member districts.

SISC has established a partnership with the HeadStrong Concussion Insurance Program, which aims to provide comprehensive coverage for student athletes involved in high school interscholastic sports. The primary objective of the insurance program is to safeguard student athletes from the potentially substantial costs associated with concussion treatment and necessary neurological follow-up following a suspected concussion. All high school athletes participating in interscholastic sports are automatically enrolled and covered under the HeadStrong Concussion Insurance Program, which provides benefits of up to \$25,000.00. It's important to note that the HeadStrong policy becomes operational after the regular Student Accident Insurance benefits have been exhausted, or alternatively, after the benefits under the SISC Tackle Football coverage have been utilized. HeadStrong is secondary/excess coverage and becomes primary if no other primary insurance is available.

If your district staff has additional questions or concerns, please contact Elsa Lara with the Student Insurance department, at 661-636-4736. Our brochure is available on the forms page of our website at <https://sisc.kern.org/pl/>

LITIGATION CASE STUDY (CONTINUED FROM PAGE 1)

the Department of Veteran Affairs (VA) for a medical condition unrelated to his work for the district. As part of his treatment, it was recommended that he participate once per week in group therapy sessions for a twelve-week period. The sessions were offered virtually, i.e., Zoom, and were to take place from 9:00AM to 10:30AM during the employee's work day. The plaintiff claims that he immediately notified his supervisor and sought leave time from work to attend those weekly sessions and participate virtually from his job site location.

The plaintiff reports that his request for leave time to attend those therapy sessions was denied. Shortly thereafter, he claims that he was invited to attend a meeting by the Director of Human Resources where he was informed that he was being released from the district due to his failure to satisfactorily pass the probationary period.

Because the plaintiff was discharged prior to the completion of his probationary period, he was discharged without cause nor explanation. In response, the terminated employee filed a complaint with DFEH stating that he was retaliated and discriminated against as a member of a protected class. He qualified as a member of a protected class as an employee over the age of 40 and having a diagnosed disability.

SCHOOL DISTRICT VERSION

The school district explained that they were unaware that the employee's weekly meetings were for a medical purpose. They claim that they misunderstood his request as being meetings for his military service. The district claims that had they known he was wanting time off for a medical reason, they would have engaged him and participated in an "interactive process" to see if they could accommodate his request.

LIABILITY ANALYSIS

Liability in this case was troublesome. The plaintiff made a great witness on his own behalf. He was an older-gentlemen and a military veteran. The plaintiff was going to testify that he told his supervisor that the meetings were recommended by a physician at the VA. Had the district engaged the employee in the "interactive process", they could have requested a doctor's note or verification as to the purpose for the time off he was requesting. The district did not have any documentation to provide as evidence that they had taken the time to meet with him and engage him in "an interactive process" to try to accommodate his request. The lack of such evidence would have bolstered the plaintiff's claim before a jury that he had been mistreated or discriminated against.

DAMAGES

The plaintiff made a loss of earnings claim of roughly \$4,000 per month for the 25 months he was out of work following his discharge. His lost earnings totaled roughly \$100,000. The plaintiff also claimed emotional distress stemming from his separation from the district. Because the claim was filed under the Fair Employment and Housing Statutes, the plaintiff would have been entitled to recover his attorney fees and legal costs incurred if they proved their case to a jury. Plaintiff attorney fees in these types of cases can easily reach the mid six figure range in the area of \$500,000 to \$600,000. The trial judge makes the decision as to how much is awarded to the plaintiff attorney that wins a discrimination case involving Fair Employment and Housing statutes.

THE SETTLEMENT

Because of the financial exposure at risk and the unfavorable set of facts, SISC and the member school district participated in private mediation. The plaintiff's opening demand was 1.3 million dollars. At the conclusion of the negotiation process, we were able to reach a settlement for less than \$500,000 dollars. Because the claim included claims for "backpay" and

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SISC Podcasts

As you may be aware, SISC has podcasts available on our website. Director Robert Krezmer interviews a number of people in the education arena or public sector.

Three new podcasts were recently posted:

- ◆ The Politics of Education: A conversation with Carlos Rojas, Chief Governmental Relations Officer for the Kern County Superintendent of Schools
- ◆ The Wheels on the Bus Go Round and Round: A Conversation with James McClelland, Director of Transportation for the Kern County Superintendent of Schools
- ◆ Taking Care of Business: A conversation with Michael Fine, CEO of Fiscal Crisis & Management Assistance team (FCMAT)

Maintaining District Contacts

Communicating with our member districts is a top priority for SISC. Communicating items such as coverage summary memos; Memorandums of Coverage (MOC); insurance and school industry updates and memos; and information of training opportunities are types of information important to share with our members. In that effort, we strive to maintain current contact information for our district administrative contacts.

If you have changes in administrative staffing, e-mail addresses, phone numbers or mailing addresses for your district, please e-mail Lilia Beck, Administrative Secretary at libeck@siscschools.org

FROM THE DIRECTOR

SISC Property & Liability has always believed in the value of training for our member districts. One of the principal platforms we encourage our members to use is Get Safety Trained (GST).

Members can go to <https://sisc.kern.org/getsafetytrained/> to see a listing of available trainings. This service is available to all members at no additional cost. The courses are well-written and pertinent to the types of exposures our members face day-in and day-out.

Two specific courses cross my mind as we all prepare for the 2024-2025 academic year. The first course is on *K-12 Coaching Principles*. While many of the GST courses take a common-sense approach to the curriculum, they also serve as a good reminder as to the basic safety considerations for each topic. The K-12 Coaching Principles course reminds us that athletics requires a higher degree of attention to safety than many of our other endeavors with students. Something as basic as making sure the field, course or track is level and free of debris and safe each time it is used. Over the years, SISC has seen multiple claims where injury has resulted from a lack of a safety check. Each school site should have a form that documents the date, place and time that the safety check was done and by whom. This is particularly important with respect to any outdoor activities where the playing surface is subject to the elements. This form also helps put the district in a good position to defend any future claim alleging the district was negligent for failing to conduct an inspection. This is just one example of how a training reminder can improve our awareness for safety.

The second course is *Staff and Student Relationships*. We live in an age where we have seen a significant increase in the number of claims resulting from alleged inappropriate staff and student relationships. This course reminds us all of the importance of maintaining appropriate boundaries. For example, telling sexual jokes or stories, finding ways to be alone with a student, and giving personal gifts to students are practices that should be stopped immediately should they come to the attention of administration or coworkers. Over the years, SISC investigations of sexual harassment and sexual abuse claims involving children have frequently uncovered these practices as precursors to some of our more egregious claims related to childhood sexual abuse.

I encourage you to review the GST course list and to take any course you may find beneficial. The two mentioned above are timely as we prepare for what we hope will be an exciting and successful academic year. For questions on this case study, contact Ty Taylor, Coordinator.

LITIGATION CASE STUDY (CONTINUED FROM PAGE 5)

intentional acts, claims that are not covered by school district risk pools such as SISC, the member school district had to contribute and fund half of the settlement monies.

MEASURE TWICE, BEFORE CUTTING ONCE

The old adage “measure twice and cut once” should definitely apply when dismissing and discharging both probationary employees and non-tenured teachers. Human resource professionals should ask the question, is this person a member of a protected class of employees? If the answer is yes, the next question should be, do we have the documentation to demonstrate that this employee was let go for a non-discriminatory reason? Does the district have the documentation to withstand and disprove such claims by the departed employee? When a district is accused of discrimination, harassment or retaliation by a former employee, the district’s performance evaluations, their conference summaries and other meaningful documentation, aka “evidence” to support your position will be crucial to the defense. Without such evidence, the district could find itself in both an unfavorable and costly position.