

**RELATED
AREAS OF PRACTICE**

Education Law
Special Education

Sacramento

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Tel: 916.321.4500

Bakersfield

5080 California Ave., Suite 250
Bakersfield, CA 93309
Tel: 661.864.3800

Roseville

2390 Professional Drive
Roseville, CA 95661
Tel: 916.321.4200

San Luis Obispo

1432 Higuera Street
San Luis Obispo, CA 93401
Tel: 805.786.4302

Walnut Creek

1350 Treat Boulevard, Suite 105
Walnut Creek, CA 94597
Tel: 925.395.2380

WWW.KMTG.COM

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

Nonreelected Teacher's Complaints About the Special Education Services Did Not Rise to the Level of Protected Disclosure

In *Conn v. Western Placer Unified School District*, (--- Cal.Rptr.3d ----, Cal.App. 3 Dist., July 20, 2010), the Third District Court of Appeal considered whether a non-reelected probationary teacher stated a whistleblower claim against a school district and several of its employees for interfering with her right to disclose evidence of improper conduct. The court of appeal held that although some of the supervisory employees were not exempt from liability, the teacher's disagreements about the provision of special education services did not rise to the level of protected disclosure under Education Code section 44113.

Facts

Christina Conn was hired by Western Placer Unified School District ("District") in 2003 to teach first grade at Carlin C. Coppin Elementary School ("School"). Early in the 2003-2004 school year, Conn complained about a child in her class with severe behavioral issues. In November 2003, Conn challenged the findings of the speech and language pathologist in regard to another one of her students. The School's principal informed Conn that the pathologist and/or the reading specialist complained that Conn was abrasive, rude, and confrontational during a meeting.

During the 2003-2004 school year, issues arose regarding District's provision of special education services to Conn's son. The Director of Special Education reported that she had an argument with Conn about the provision of services to Conn's son. The Assistant Superintendent stated that Conn was "very, very angry and emotional" during their conversation about Conn's interactions with Murphy. The problems continued throughout the year in regard to their interactions about Conn's students and Conn's son.

Conn continued to teach at the School for the 2004-2005 school year. At some point, the principal advised Conn that her colleagues were

What This Means To You:

This case does raise concern for school district employees who could be deemed "supervisors." The court of appeal distinguished the managerial employee exemption for immunity from whistleblower claims under Education Code section 44113 and stated that management employees who are acting in a supervisory role are not protected by the managerial exception. All district employees who could potentially be deemed to be acting in a supervisory role should be on notice that they may not be immune from suit regarding whistleblower claims under Education Code section 44113.

complaining about her cell phone usage. Another time, the principal admonished Conn for leaving school grounds during the school day without his permission.

The Director of Personnel informed the Superintendent that he intended to recommend to the school board that it not reelect Conn. Conn was informed on February 24, 2005, that she would not be reelected the following school year. The Director of Personnel refused to give Conn an answer as to why she was not being reelected. The school board voted to accept the recommendation of the Director of Personnel not to reelect Conn.

Conn brought a lawsuit against the District and supervisory employees alleging that the defendants interfered with her right to make protected disclosures. The trial court found in favor of District and its employees.

Decision

The court of appeal affirmed the judgment of the trial court. But, contrary to the lower court's holding, the court of appeal found

**RELATED
AREAS OF PRACTICE**

Education Law
Special Education

Sacramento

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Tel: 916.321.4500

Bakersfield

5080 California Ave., Suite 250
Bakersfield, CA 93309
Tel: 661.864.3800

Roseville

2390 Professional Drive
Roseville, CA 95661
Tel: 916.321.4200

San Luis Obispo

1432 Higuera Street
San Luis Obispo, CA 93401
Tel: 805.786.4302

Walnut Creek

1350 Treat Boulevard, Suite 105
Walnut Creek, CA 94597
Tel: 925.395.2380

WWW.KMTG.COM

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

certain supervisors were not exempt from liability pursuant to the Reporting by School Employees of Improper Governmental Activities Act ("Act,") in Education Code section 44113. However, the court of appeal concluded Conn could not state a whistleblower claim under the Act "because the matters Conn sought to disclose did not constitute 'improper governmental activities' . . . they did not constitute 'protected disclosures' . . . subject to protection under the Act."

The Act provides the following at Education Code section 44113: "[A]n *employee* may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.'" For the purposes of the Act, the term "employee" is one who meets the definition of a public school employee pursuant to Government Code section 3540.1. Section 3540.1 defines a public school employee as a person employed by a public school employer except persons who are elected or appointed by the Governor, "management employees, and confidential employees." A management employee is defined under section 3540.1 as "any employee in a position having significant responsibilities for formulating district policies or administrating district programs." However, management employees are not precluded from also acting as supervisory employees.

A supervisory employee is defined by section 3540.1 as "'any employee *regardless of job description,*' having authority over specified personnel actions." A supervisory employee is not exempt from section 3540.1's definition of employee and is therefore not exempt from liability pursuant to Education Code section 44113. Thus, District employees with supervisory contracts over Conn could potentially be liable.

The court of appeal further held that violators of Education Code section 44113 are not entitled to immunity under Government Code section 820.2 for discretionary acts. Section

820.2 provides, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The court noted, "'core statutory objectives' would be obviated by a conclusion that cover-up efforts by public employees are eligible for immunity."

However, the court of appeal affirmed the trial court judgment in favor of District and its employees because Conn's complaints about special education services "do not rise to the level of protected disclosures under the Act." "The intent of the Act is to encourage school employees and other persons to disclose improper governmental activities." "Improper governmental activity" is defined as "activity by a public school agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment," that either "violates a state or federal law or regulation . . . [or] is economically wasteful or involves gross misconduct, incompetency, or inefficiency." Examples of violations of law include, but are "not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty."

The court of appeal determined Conn's advocacy for, or complaints about, special education services did not disclose any improper governmental activity. Conn's advocacy on behalf of her special needs students and her child was not in and of itself a protected disclosure. Instead, "Conn's complaints were akin to internal personnel or administrative disclosures that were, at their core, disagreements about the provision of special education services to several children, including her own." Thus, the complaints did not rise to the level of protected disclosures within the meaning of the Act.

Questions

If you have any questions concerning the

**RELATED
AREAS OF PRACTICE**

Education Law
Special Education

content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

Diana D. Halpenny or Christian M. Keiner |
916.321.4500

Sacramento

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Tel: 916.321.4500

Bakersfield

5080 California Ave., Suite 250
Bakersfield, CA 93309
Tel: 661.864.3800

Roseville

2390 Professional Drive
Roseville, CA 95661
Tel: 916.321.4200

San Luis Obispo

1432 Higuera Street
San Luis Obispo, CA 93401
Tel: 805.786.4302

Walnut Creek

1350 Treat Boulevard, Suite 105
Walnut Creek, CA 94597
Tel: 925.395.2380

WWW.KMTG.COM

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.