

## Court Finds Supervisory Employees Subject to Improper Governmental Activities Act

The Reporting by School Employees of Improper Governmental Activities Act (the "Reporting Act") protects school employees and other persons from retaliation for disclosing improper governmental activities. (Ed. Code §§ 44110-44114.) In the recent decision *Hartnett v. Crosier* (Apr. 26, 2012) \_\_ Cal.App.4th \_\_, 2012 WL 1434900, the California Court of Appeal applied and explained the Reporting Act in a case involving a claim by one management employee against several other management employees.

Plaintiff Rodger Hartnett was a former claims coordinator employed in the Risk Management Department of the San Diego County Office of Education ("Education Office"). Hartnett alleged that, during his employment, he disclosed that several Education Office employees had referred the Education Office's legal business to friends and family members in exchange for gifts, gratuities, discounted legal services, and other considerations. The Education Office later discharged Hartnett for incompetency, insubordination, and dishonesty, but Hartnett claimed that his discharge was in retaliation for disclosing the improper government activities.

Hartnett sued the defendants, his former Education Office colleagues, alleging that they retaliated against him in violation of section 44113, subdivision (a), of the Reporting Act and seeking punitive damages and attorneys fees under section 44114, subdivision (c), of the Act. Hartnett lost at the trial court level. On appeal, the court held that Hartnett was protected from retaliation under section 44113 of the Reporting Act, but that he was not entitled to punitive damages and attorney fees under section 44114.

Section 44113, subdivision (a), prohibits "an employee" from using his or her official position to retaliate against "any person" to deter the person from making a disclosure protected by the Act. Hartnett clearly qualified as a "person" under a definition given in the Reporting Act. (Ed. Code § 44112(d).) However, the defendants claimed that section 44113, subdivision (a), did not apply to them because they were not "employees."

Under section 44113, subdivision (a), an employee is a "public school employee" as defined in the Educational Employment Relations Act (Gov. Code § 3540.1(j)). The EERA defines a "public school employee" as a "person employed by a public school employer *except* persons elected by popular vote, persons appointed by the Governor of this state, *management employees*, and confidential employees." The EERA defines a "management employee" as an employee with "significant responsibilities for formulating district policies or administering district programs." (Gov. Code § 3540.1(g).)

Relying upon a recent case, *Conn v. Western Placer Unified School District* (2010) 186 Cal.App.4th 1163, the court held that section 44113 will prohibit management employees from taking

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retaliatory action if they were acting in a supervisory capacity when engaged in the alleged retaliation. The court justified its holding on the basis that supervisory employees are not excluded from the EERA's definition of a "public school employee" (Gov. Code § 3540.1(m)), and that the defendants' interpretation of section 44113 "would exempt from liability those most likely and able to retaliate against public school employees making protected disclosures."

Notwithstanding the court's holding that Hartnett could sue Education Office management employees under section 44113 of the Reporting Act, the Court also determined that he could not seek punitive damages and attorney fees in a lawsuit under the Act.

Section 44114, subdivision (c), imposes liability for punitive damages and attorneys fees on a person who intentionally retaliates against a "public school employee" for making a protected disclosure. Because Hartnett was a management employee (who is excluded from the EERA's definition of a "public school employee") when subjected to the alleged retaliation, the court held that Hartnett could not seek punitive damages or attorney fees under section 44114, subdivision (c).

As a result of the *Hartnett* decision, school districts should be aware that management employees are not exempt from liability under the Reporting Act when they are act in a supervisory capacity. We recommend that school districts confer with legal counsel during any evaluation of retaliation claims under the Reporting Act.

If you have any questions about this decision, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#) or follow Lozano Smith on [Facebook](#).

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