Case law update 2013

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Breakdown

- What is going on in 2013?
- Walk away smarter.
- 3 lawyers, one update.
- Let's get started!

Case 1: McBurney v Young, 133 S. Ct. 1709, 189 L. Ed. 2d 758

- U.S. Supreme Court case about Virginia's public records law.
- Out of state requester asked for public records, was denied. Sued under Privileges and Immunities, commerce clause.
- Sought declaratory and injunctive relief- trial court granted summary judgment , appeals court affirmed, appealed to U.S. Supreme Court.
- Conflict between 3rd and 4th Circuit Court of Appeals, S.Ct. granted certiorari to resolve conflict.

HELD, no violation of the Privileges and Immunities clause or dormant commerce clause. Why?

Holding

- Not a violation of P&I clause; protects only fundamental rights. " The right of access to public information is not a fundamental privilege or immunity of citizenship."
  - **Right to earn a living in chosen profession**. The VA FOIA does not have a protectionist aim; noncitizens do not have a need to obtain an accounting from their public officials. Citizens foot the bill for underlying costs of recordkeeping. Effect on profit is incidental.
  - **Argument that it affects right to own and transfer property by restricting info**: Records available for inspection at clerk's office and sometimes online; the statute was not a burden to this privilege of citizenship.
  - **Burden on access to public proceedings (courts and public info)**: nonresident access on terms that are reasonable and adequate even if not the same as rights given to resident citizens. Right of access to public info not protected by the P&I clause.

Holding

- "The Constitution does not guarantee the existence of FOIA laws." Also no right at common law.
  - **No violation of the dormant Commerce Clause.** Why? Because the VA FOIA doesn't prohibit access to an interstate market. In fact, there is no market b'c state is creator and sole manufacturer. "State does not violate CC when having created a market through a state program, it 'limits benefits generated by that state program to those who fund the state treasury and whom the State was created to serve."
  - **Burden on access to public proceedings**: nonresident access on terms that are reasonable and adequate even if not the same as rights given to resident citizens.

Food for thought

- Other states that have FOIA statutes that are limited to citizens: Alabama, Arkansas, Missouri, Tennessee, Delaware, New Hampshire, New Jersey.

Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd., Slip Op. No. 2013-Ohio-4654.

- Decided 10/23/13
- Picketing occurred in 2007 at a board meeting without 10 day strike notice.
- SERB held union violated 4117.11(B)(8)
- Common Pleas court upheld SERB.

- 7th Dist (Mahoning) Ct. App. held statute unconstitutional. Violation of 1st Amendment free speech to require union picketers to give 10 day notice of strike.
- Ohio Supreme Court affirmed judgment, but NOT on constitutionality : plain language statutory interpretation.

Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd., Slip . No. 2013-Ohio-4654

- Ohio S. Ct. holds that where the picketing is informational and not related to a work stoppage, strike or refusal to work, the picketing at issue was not subject to statute/notice requirement, and was not an unfair labor practice.
- Ct. found no legislative intent to apply the statute to union informational picketing.
- Court engaged in sentence analysis of the statute and the phrase "engage in any picketing, striking, or other concerted refusal to work." Legislature intended the notice requirement to apply only to a specific type of picketing, i.e., picketing related to a work stoppage. Takeaways?

Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd., Slip . No. 2013-Ohio-4654

- Takeaways?
- Ohio Supreme Court avoided the constitutional question.
- Picketing notice under the statute appears to be more limited than we might have applied in the past.
- Surely unions will be aware of the decision, so be prepared with a response plan if informational picketing occurs.

State ex. rel Quolke v. Strongsville City Sch. Dist., 8th Dist. Ct. App., 2013-Ohio-4481

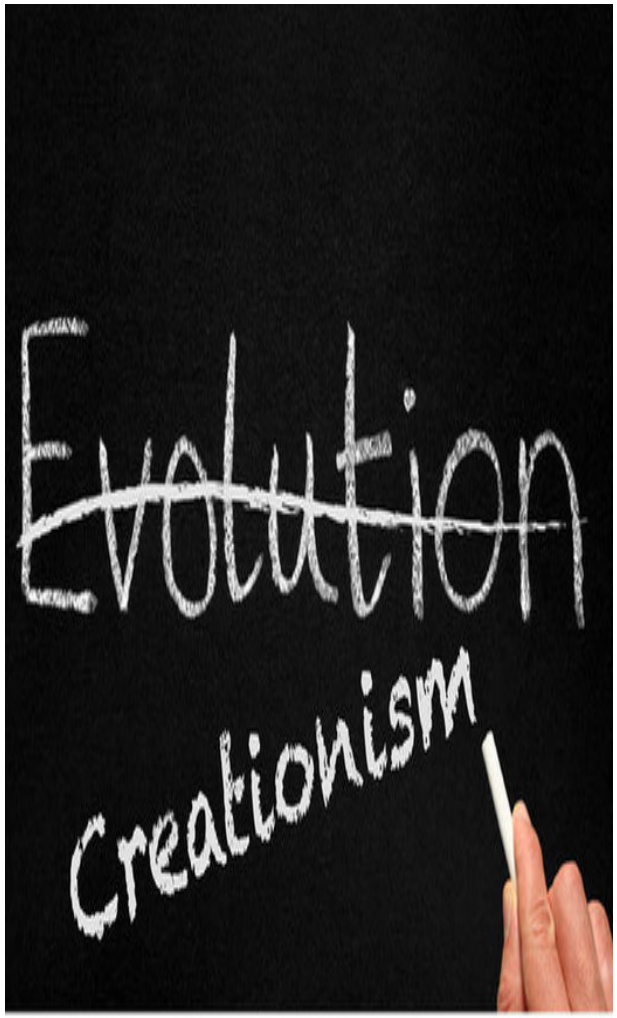
- August 21st decision
- Strongsville was sued by a requestor seeking the names, home addresses, and home and cell phone numbers, employee ID numbers, all payroll info on days worked, compensation paid, and any and all salary benefits of the replacement workers during the strike in Strongsville City.
- Court of Appeals issued writ of mandamus, ordered release of the names of the replacement teachers. District failed to prove the records sought fall within the exception for records the release of which is prohibited by state or federal law based on privacy and personal safety interests.

State ex. rel Quolke v. Strongsville City Sch. Dist., 8th Dist. Ct. App., 2013-Ohio-4481

- Noted: narrow decision issued several months after the strike.
- Issue of whether constitutional right to privacy and personal safety would be a state or federal law prohibiting release of records.
- Statutory damages claim was denied.
- Request for attorney fees ordered to be briefed further.
- District is appealing this ruling to the Ohio Supreme Court.
- Stay tuned.

Looking Ahead

- Freshwater v. Mt. Vernon City Sch. Dist.
  - Constitutional challenge to school board policy barring teaching of creationism
  - 1st Amendment free speech and freedom of religion
  - Referee recommended termination, board adopted referee report.
  - Knox Cty. C.P. upheld termination
  - 5th Dist Ct. App. upheld termination
  - Ohio S. Ct. accepted case



Next up!

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Case law update

- Case Law Update: What you should know
  - *O'Brien v. State Operated Sch. Dist. of the City of Patterson*
  - *G.C. v. Owensboro Public Schools*
  - *McCoy v. Board of Education of Columbus City Schools*
  - *North Baltimore Local Schools v. Todd*
  - *Martins Ferry City School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emps.*

O'Brien v. State Operated Sch. Dist. of the City of Patterson

- In December 2010, O'Brien was assigned to teach first grade at a school comprised entirely of minority students.
- During the school year, O'Brien posted two statements on Facebook.
  - The first stated, "I'm not a teacher. I'm a warden for future criminals!" The second statement read, "They had a scared straight program in school—why couldn't [I] bring [first] graders?"
- The teacher was suspended her with pay, pending a complete investigation.
  - There was a substantial disturbance at the school in response to her comments.

O'Brien v. State Operated Sch. Dist. of the City of Patterson

- The ALJ issued an initial decision determining that the postings were "a personal expression" of job dissatisfaction and not addressing a matter of public concern, as well as a disruption to school matters and operation.
  - Therefore, her employment was terminated.

- Subsequently, the Court determined that the First Amendment did not protect the teacher's postings.
  - The Court balanced the employee's interest "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

O'Brien v. State Operated Sch. Dist. of the City of Patterson

- The comments were not of public interest or concern—instead, they were driven by her dissatisfaction with her job and some students' conduct

- **How this Affects School Districts and Practitioners:**

  - This case serves as a reminder that First Amendment protections do not always apply to an employee's speech.

  - Speech that is on a personal matter, or that is disruptive to the educational mission of a school, may not be given First Amendment protection.

G.C. v. Owensboro Public Schools

- Student was using his cell phone during class in violation of school rules.
- His teacher confiscated the phone.
  - The student had a history of drug use and suicidal ideation.
- Assistant principal conducted a limited search of the phone.
- Found no evidence of wrongdoing or any indication that the student was a threat to himself or others.
  - Nevertheless, the district revoked the student's out-of-district enrollment status.

G.C. v. Owensboro Public Schools

- The student sued the school district for violation of his Fourth Amendment rights.
  - The Court ruled in favor of the student and stated that the use of a cell phone on school grounds "does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction."
- Question of "Reasonableness"
  - (1) the search must be justified at its inception; and
  - (2) the manner in which the search is conducted must be reasonably related in scope to the circumstances which justified the search.

G.C. v. Owensboro Public Schools

- **How this Affects School Districts and Practitioners:**

  - Example: If an administrator sees a student texting in class and has reasonable suspicion to believe that the student is engaging in a drug deal, the administrator can look through the recent text messages. However, absent any additional information, the administrator most likely is not justified in searching the student's photo album.

  - When a search is justified at its inception, it must also be limited in scope. Therefore, if an administrator reasonably believes he or she will find evidence of wrongdoing, the administrator may only look at the data on the phone that will contain that information.

McCoy v. Board of Education of Columbus City Schools

- A teacher was reported numerous times to have touched students inappropriately in his classroom over a six year period
- Each time these incidents were reported to district administrators an investigation was conducted, resulting in the administrators meeting with the teacher and giving him written directions to refrain from touching students.
- In 2005, a student reported that the teacher had touched her and another student, calling them to the desk and touching their genitals.
  - The teacher was charged with gross sexual imposition.

McCoy v. Board of Education of Columbus City Schools

- The Court stated that the district must have had actual notice of the sexual behavior in order to support a finding of deliberate indifference.

- While the prior instances of physical contact could indicate that something else was going on, they did not give the district notice of the teacher's sexual abuse of the students.

- By conducting investigations after each occurrence, the District was said to have reacted reasonably—the Court refused to hold the District Liable.

McCoy v. Board of Education of Columbus City Schools

- **How this Affects School Districts and Practitioners:**

  - This case shows that districts can only be held liable for the sexual abuse of students if they are deliberately indifferent to the abuse.

  - When districts become aware of a teacher touching students inappropriately, a procedure should be in place for investigating these allegations and disciplining teachers who engage in these behaviors.

North Baltimore Local Schools v. Todd

- A school originally filed a small claims action against a parent for unpaid school fees.

  - Among these fees were the cost of workbooks, class fees, assignment notebooks, activity fees, and progress books.

  - Relying on R.C. § 3313.642(A), the magistrate determined that the establishment of the types of fees involved was permitted and granted judgment to the school board.

North Baltimore Local Schools v. Todd

- The Court ruled that the student could indeed be charged the specified school fees.

  - The Court stated that, despite the broad language used in other statutes referring to free public education, R.C. 3313.642 provides a contrary, specific, authority for these fees.

    - In addition, when two statutes are in conflict, they must be construed so that the specific statute controls over the general statute.

North Baltimore Local Schools v. Todd

- **How this Affects School Districts and Practitioners:**
  - It is important to know what materials Ohio schools are required to provide to students free of charge, those which schools are allowed to charge fees for, and the means by which such fees may be waived.
  - In addition, the definitions of fee exempt materials must be narrowly construed to align with the proper statute and must not be taken out of context.

Martins Ferry City School Dist. Bd. of Edn. v. OAPSE

- Martins Ferry City School District Board of Education ("Board") and Ohio Association of Public School Employees ("OAPSE") have been parties to a number of collective bargaining agreements (CBAs).
- When the Board entered a state of financial distress, a CBA was established that determined:
  - There would be no wage increase in year 1, wage reopeners at the beginning of the subsequent school years, and a grievance procedure.
- The wage reopener was not utilized and the Board determined that it would institute a 5% uniform salary reduction, and that all salary indexes would be frozen.
  - OAPSE filed two grievances challenging the reduction as a violation of the current CBA.

Martins Ferry City School Dist. Bd. of Edn. v. OAPSE

- The arbitrator's opinion sustained the grievance and forbid the Board from implementing the 5% wage reduction.

- The arbitrator found that changes of this type must be collectively bargained.

- The Board sought an order from the trial court to vacate the arbitration award, arguing that, pursuant to ORC 2711.13, the arbitrator had exceeded her powers

- The trial court agreed, and vacated the arbitration award.

Martins Ferry City School Dist. Bd. of Edn. v. OAPSE

- On appeal, it was determined that the trial court was without the authority to substitute its own judgment for that of the arbitrator when it vacated the arbitration award.
- The arbitrator's award drew its essence from the CBA, and the CBA was deemed to encompass the complete intent of the parties to preempt statutory provisions relative to wages.
  - Because the interpretation was reasonable, the trial court erred and did not have the authority to reverse the arbitration award.

Martins Ferry City School Dist. Bd. of Edn. v. OAPSE

- **How this Affects School Districts and Practitioners:**
  - Ohio's Collective Bargaining Laws require employers to negotiate matters pertaining to wages or benefits with public employee unions.
  - Boards of Education whose employees are represented by unions do not possess statutory authority to implement a unilateral uniform wage reduction because Chapter 4117 of the Revised Code prevails over any and all other conflicting laws, including the statutes addressing uniform wage reduction.
  - Thus, districts must note that they may not conduct reductions in pay without negotiating with the public employee unions first.

Questions?

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Univ. of Southwestern Texas v. Nassar

- Nassar, a doctor of Middle Eastern descent, was employed as hospital physician and university faculty member
- He resigned his teaching position in July 2006
  - He claimed that racial and religious harassment by his supervisor at the university was the reason for resignation
- Nassar filed both a status based discrimination and a retaliation claim under Title VII against the university alleging he was constructively discharged when the employer retaliated against him for reporting his supervisor's harassing conduct

Univ. of Southwestern Texas v. Nassar

- The Fifth Circuit vacated the discrimination claim but affirmed the retaliation claim on grounds that plaintiff was only required to show that retaliation was a motivating factor in the adverse employment action
- The "motivating factor" test applies to discrimination claims under Title VII
  - The issue for the Supreme Court in *Nassar* was whether that standard also applied to retaliation claims

Univ. of Southwestern Texas v. Nassar

On appeal, the Supreme Court vacated the Fifth Circuit decision and held that retaliation claims need to meet a heightened "but for" causation standard

- The plain language of the statute only addresses status-based discrimination and is silent on retaliation claims
- Using the "motivating factor" test would be inconsistent with Congressional intent because Congress inserted that provision in the status-based discrimination section but not the retaliation section
- ***Bottom line - Employee retaliation claims filed under Title VII of the Civil Rights Act of 1964 must be proved according to the more onerous traditional principles of but-for causation***

Hykes v. BOE Bellevue Sch. Dist.

- Hykes was hired as an assistant to the superintendent, but was suspended without pay less than a year later pending termination proceeding for violating several Board harassment policies
- Hykes allegedly:
  - used the term “mother f**ker” when describing his boss or other employees
  - approached female employees asking them to participate in a wet t-shirt contest
  - showed female employees provocative pictures of his girlfriend, and
  - described massaging the breasts of a female masseuse
- The referee recommended termination and the Board agreed

Hykes v. BOE Bellevue Sch. Dist.

- Hykes appealed alleging:
  - the Board did not consider his employment record,
  - The Board did not give him an opportunity to change his conduct, and
  - the evidence did not show a violation of Board policy
- The court determined that a teacher's employment record does not always need to be taken into account

    Hykes had only one year of employment and he repeatedly used profanity and made sexually charged comments, in contrast to other cases where teachers with glowing records were terminated for a one-time incident

  - Even so, the record shows the Board did consider Hykes's employment record prior to making its decision

Hykes v. BOE Bellevue Sch. Dist.

- Ohio law does not require boards to provide teachers with an opportunity to correct behavior prior to termination
  - While this opportunity may be advisable in some situations, a Board must be permitted to expeditiously remove an employee who creates a hostile work environment, as Hykes allegedly did
- The Board provided sufficient facts to establish Hykes violated the two Board policies specified in the termination notice
- ***Bottom line – Boards may be given more flexibility to discharge newer employees where evidence exists to support that the employee created a hostile work environment***

K.M. v. Tustin Unified Sch. Dist. 2013 WL 3988677 (9th Cir. 2013)

- The court consolidated two cases involving similar facts and claims where hearing impaired students sought to have the school provide a Communication Access Realtime Translation (CART) in the classroom
- In both cases, the district denied the request for a CART but provided other accommodations
- Students filed claims under the IDEIA, Section 504, and the ADA
- The lower court granted summary judgment for the district holding that the district complied with the IDEIA and thus satisfied both 504 and the ADA

K.M. v. Tustin Unified Sch. Dist.

- The 9th Circuit disagreed and held that compliance with IDEIA does not foreclose an ADA claim
- While IDEIA requires students to be provided a meaningful educational benefit, ADA imposes an "effective communications" obligation on public entities
  - In some circumstances, a school may be required under the ADA to provide services to hearing-disabled children that are different from the services required by the IDEIA

- Court's rationale
  - ADA's effective communication regulation requires that the public agency "give *primary* consideration to the *requests* of the individual with a disability"
  - Title II of the ADA allows public entity to raise defenses which are not available under the IDEIA

- Fundamental alteration
- Undue hardship

- ADA's effective communication regulation requires public schools to communicate "as effective[ly]" and to provide "auxiliary aids . . . Necessary to afford . . . an *equal opportunity* to participate in and enjoy the benefits of"

- ***Bottom line – for hearing impaired students, you need to give primary consideration to the student's request and providing an equally effective accommodation may not suffice in all circumstances***

Shively v. Green Local School Dist.

- Plaintiffs filed suit alleging failure to respond to gender and religion-based bullying of their daughter, T.S., in violation of Title IX and the 14th Amendment
- Allegedly, verbal and physical harassment went on for years
  - T.S. allegedly told to "rot in hell", called "dirty Jew", "Hitler", and "whore"
  - T.S. allegedly was spit on, tripped, shoved, kicked, including one assault that put her on crutches
  - Students created a Facebook page calling T.S. a whore who needs to go back to 8th grade, and two students placed her on a "kill list"

Hupp v. Switzerland of Ohio Local School Dist. , 912 F. Supp.2d 572

- Parents of an elementary school student with ADHD and Asperger's Syndrome filed a due process complaint
- Complaint alleged a denial of FAPE because the District provided a classroom aide rather than a one-on-one aide
- Some of the student's medical providers recommended a one-on-one aide.
  - They testified at due process hearing that the student "would benefit" from such an aide

Hupp v. Switzerland of Ohio Local School Dist. , 912 F. Supp.2d 572

- The court rejected this argument because the standard is whether such an aide was necessary, not beneficial
- The court found that the one-on-one aide was not necessary
  - The IEP team, based upon classroom observation of the student, determined that a full-time dedicated one-on-one aide would deflect from the goal of promoting independence for the student.

Hupp v. Switzerland of Ohio Local School Dist. , 912 F. Supp.2d 572

- According to the court, nothing in the IDEIA requires the team to adopt the recommendations of a student's private doctor
  - The failure to do so does not automatically constitute a serious deficiency in the IEP
  - Instead, the team must consider the recommendation

Bottom line – this case is a reminder that a doctor's recommendation, alone, is not given any greater weight than that of other IEP team members.

Questions? Thank you!

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