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All Things Considered:
A Look at Important School Law Cases from 2011

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First Amendment Cases - Free Speech, Association & Religion

A. ***Employee Cases* – High School Teacher Does Not Have a First Amendment Right to Make In-Class Curricular Decisions – *Evans-Marshall v. Board of Educ. Of the Tipp City Exempted Village Sch. Dist.***, 624 F.3d 332 (6th Cir. 2010).

1. A high school teacher was the subject of parent complaints to the board about books she assigned to her students, as well as certain teaching methodologies she exhibited. The teacher was instructed by the principal that any material that contained graphic violence, sexual themes, and the like should be discussed with her chair prior to being assigned. She responded that none of the books had any inappropriate themes, and that each book was approved by the board.

2. Following a series of negative performance evaluations, the teacher was recommended for non-renewal. The board approved the recommendation. The teacher sued the board and individual officials, alleging retaliation for exercising her free speech right to select class material. The district court denied the board's motion to dismiss the suit, and in 2005 the Sixth Circuit affirmed. It concluded she stated a valid retaliation claim for exercising her First Amendment right to free speech and remanded the case for further discovery. On remand, the district court found the teacher had failed to establish a causal link between the speech in question and her dismissal.

3. Upon review, the appellate court affirmed the lower court's judgment, but on different grounds. It concluded the teacher could not overcome the hurdle presented by the U.S. Supreme Court's ruling in *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006), that a public employee asserting a First Amendment retaliation claim based on the exercise of free speech must show that it was not made "pursuant to [the employee's] official duties." The court determined this case presented two competing interests – a teacher's First Amendment right to choose her own reading assignment and how to teach such assignments versus a school board's apparent authority to have the final determination over what is taught.

4. To resolve this conflict, the court followed *Garcetti*, asserting the teacher must prove the following three elements for a retaliation claim: 1) the employee's speech must involve a matter of public concern; 2) the interests of the employee, as a citizen, in commenting upon matters of public concern, must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees;" and 3) the employee's speech must not be made pursuant to her official duties. The court found that the teacher passed the first two elements, but could not overcome the third. In fact, the teacher herself admitted that "she made her curricular and pedagogical choices in connection with her official duties as a teacher."

5. The court also stressed that under Ohio law, only local school boards have the responsibility for curriculum and accountability measures that allow the public to have control over their children's education and that the government maintains control over this duty by maintaining control over the teacher's job.

► ***Other Significant Employee First Amendment Cases***

School District Does Not Violate the Constitution for Ordering a Teacher to Remove a Religious Display From His Classroom – *Johnson v. Poway Unified School District, et al.*, 2011 U.S. App. LEXIS 18882 (9th Cir. 2011).

Seventh Circuit Upholds the Firing of a Teacher Union Activist for Viewing Pornographic Material in Violation of School Policy – ***Zellner v. Herrick***, 639 F.3d 371 (7th Cir. 2011).

B. ***Student Cases*** – **School District Cannot Discipline a Student for the Creation at Home and Publication at School of a Fake Webpage for a Principal – *J.S. v. Blue Mountain School District***, 2011 U.S. App. LEXIS 11947 (3rd Cir. 2011) and ***Layshock v. Hermitage School District***, 2011 U.S. App. LEXIS 11994 (3rd Cir. 2011).

1. The Third Circuit resolved a conflict between two different three-judge panels of the court from two separate cases. In *Layshock v. Hermitage School District*, a student used his grandmother's computer to create a fake webpage that appeared to belong to a principal. The only school resource used was the principal's picture from the school's website, which the student copied and inserted into the fake webpage. The student displayed the webpage for students at school. The three-judge panel that originally heard the case decided the school district could not discipline the student because the display of the webpage in class did not cause a substantial disruption of the school environment.

2. A different three-judge panel reached the opposite result based on similar facts in the original *J.S. v. Blue Mountain School District* case, holding that the district could discipline the student. The court, however, did not allow the discipline because the student's publication of the website caused a substantial disruption in the school environment. Instead, the panel allowed the discipline because it found that school officials had a reasonable fear of potential future disruption if publication of the fake website went unchecked. The court vacated both opinions and ordered the cases reargued to the entire court.

3. In the second round of *J.S. v. Blue Mountain*, the court (by an 8 to 6 vote) determined that the district could not discipline the student. The majority agreed that a district did not need to wait to discipline a student until speech actually caused a substantial disruption to the school environment, and that a district could

discipline a student based on a "reasonable forecast that a substantial disruption or material interference [with the educational environment] will occur." The majority, however, concluded that the district's fear of future disruption was merely an "undifferentiated fear or apprehension of [potential] disturbance," not a "reasonable forecast" of potential disruption.

4. In the new decision in *Layshock*, the court again held that the district could not discipline the student. The school district conceded the publication of the fake webpage did not cause substantial disruption of the school environment or cause it to reasonably foresee such a disruption. The school stated it had disciplined the student solely for *creating* the webpage, which happened at home.

► ***Other Significant Student First Amendment Cases***

School May Discipline a Student for Creating from Home a Derogatory Webpage Discussion Group Targeting a Fellow Student – ***Kowalski v. Berkeley County Schools***, 2011 U.S. App. LEXIS 15419 (4th Cir. 2011).

School Board May Prohibit Display of the Confederate Flag When There is a History of Disruption of the Educational Environment Associated with Such Display – *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010) (Appeal denied on 10/11/11).

School District May Ban the Publication of a Sexually-Explicit Cartoon Contained in Student Newspaper, ***R.O. v. Ithaca City Sch. Dist.***, 2011 U.S. App. LEXIS 9995 (2d Cir., May 2011) (Appeal denied on 10/11/11).

School Board May Not Prohibit Students from Wearing T-Shirts with an Anti-Homosexual Message – *Heidi Zamecnik, et al. v. Indian Prairie School District #204, et al.*, 2011 U.S. App. LEXIS 3874 (7th Cir. 2011).

Qualified Immunity Protects School Officials Who Make a Reasonable Mistake About Their Ability to Suppress On-Campus Speech – ***Doninger v. Niehoff***, 2011 U.S. App. LEXIS 8441 (2nd Cir. 2011).

Fourth & Fourteenth Amendment Cases – Due Process/Equal Protection

A. ***Employee Cases* – Random Suspicionless Drug Testing of Teachers Violated the Fourth Amendment --*Smith County Education Association, et al. v. Smith County Board of Education***, 2011 U.S. Dist. LEXIS 14681 (M.D. Tenn. 2011).

1. Over a seven-year period two teachers employed by the school district were arrested for drug-related charges. After the second incident in 2004, the board decided to implement a drug policy that would test teachers for the use of illegal

drugs (as a result of the two incidents involving the teachers, and because the community-at-large was starting to suffer from an increase in drug use). The board presented the policy during an August 2004 meeting, and the final version of the policy permitted random testing. The drug tests searched for five specific types of narcotics and certain types of prescription drugs. At issue was the lack of reasoning as to why these narcotics were being screened for, and the purpose of searching for other prescription drugs.

2. Due to the random nature of the selection process, some teachers were subject to drug tests more than others. The selection process used all of the teachers' names each time testing was to be conducted. Teachers who allegedly felt intimidated and/or stressed by this process filed suit challenging the search under the U.S. Constitution.

3. The court found that deterring illegal drug use, including the unlawful use of prescription drugs, is a reasonable and appropriate objective of the board and it was supported by the record. The court, however, found that a policy enacted to address unlawful drug use, whether illegal or prescription drugs, must give constitutionally adequate notice and must be implemented with due regard to the privacy rights of the teachers. Otherwise, the policy is illegal.

4. Here, the policies adopted by the school board were not clear in wording or in implementation. The teachers were searched in violation of their Fourth Amendment rights. The court did not hold that the drug testing policy is unconstitutional. Rather, the court held that random drug testing would comply with the Fourth Amendment if the unconstitutional aspects of the board's policy and its implementation were cured.

B. ***Student Cases*** **– Absent an Affirmative Act to Increase the Risk of Harm, There is No Constitutional Right to Protection From Bullying –** ***Mohat v. Mentor Ex. Vil. Sch. Dist.***, 2011 U.S. Dist. LEXIS 58319 (N.D. Ohio 2011).

1. This case arises from the suicide of a 17-year-old high school student, whose parents alleged was regularly bullied and harassed at school. The parents further alleged that despite knowing of the bullying and harassment, the district and its administrators did nothing about it. The student's suicide occurred on March 27, 2007. On March 26, 2009, the student's parents, individually and purportedly on behalf of the estate of their son, filed suit in federal court alleging that they were deprived of their parental rights without due process, were deprived of their right to companionship, that the school deprived their son of his life in violation of Section 1983, that the district violated Title IX, that the district was negligent or grossly negligent, and that the district's and administrator's acts or failures to act were wanton, reckless, and malicious. No estate, however, had been opened, until

defendants raised the defense of lack of capacity. The parents opened an estate eventually, but well after the statute of limitations expired. The court dismissed the estate's claims as untimely.

2. Thus, the court was only able to address the remaining claims of the parents. In analyzing the parents' procedural and substantive due process claims, enforceable through Section 1983, the court recognized that the right to familial association is a liberty interest under the due process clause. The court found, however, that nothing in the language of the due process clause requires the government to protect the life, liberty, or property of its citizens from the acts or invasions of private actors. Thus, unless one of two exceptions is present, it is not a constitutional violation for a state actor to fail to rescue those in need. The two exceptions are as follows: 1) where the state has custody of the person in need or some other special relationship exists that heightens the state's responsibility for that particular citizen; or 2) when a state actor acts affirmatively to create or greatly increase the risk of harm to a citizen. Here, the parents failed to allege that the student was in state custody or that any special relationship existed. In addition, the court noted that while it is reasonable for parents to expect that a school will do its best to protect their children while under their supervision, "the law does not elevate this expectation to a constitutional guarantee." Thus, the first exception was found not to apply.

3. In analyzing the second exception, whether a "state-created danger" existed, the court recognized that the complaint alleged a failure to act as opposed to an affirmative action. Specifically, the allegation was that the school failed to intercede when other students bullied Eric, and that this failure contributed to or caused his decision to commit suicide. In rejecting the existence of the second exception, the court relied on both U.S. Supreme Court and Sixth Circuit precedent holding that a failure to act, even with knowledge that a risk of harm may exist without state intervention, is not enough to impose liability under the Fourteenth Amendment. Finding that the school had no constitutional duty to act to protect the student from harm imposed by other students and no constitutional duty to act to prevent the ultimate harm he imposed upon himself, the court rejected the parents' Fourteenth Amendment claim. Because this claim failed, and no constitutional right was violated, parents' section 1983 claim also failed. The court also found no liability under a 1983 "inaction" claim.

4. The court reasoned that to state a municipal liability claim for inaction the parents would have to show: (1) a clear and persistent pattern of violating a constitutional right; (2) notice or constructive notice to the School Board; (3) the Board's tacit approval of the unconstitutional conduct amounting to an official policy of inaction; and, (4) that the Board's custom was the "moving force" or a direct causal link in the constitutional deprivation. Here, although there were

allegations that one teacher was aware of the bullying, there was no allegation that the Board had been notified that this was occurring, or that they would have condoned the teacher's alleged disregard for the situation.

5. Because the parents could not bring their own claim under Title IX, there was no need for the court to analyze this claim. Having dismissed all federal claims in favor of defendants, the court declined to maintain supplemental jurisdiction over the state-law claims of negligence and/or gross negligence, malice, bad faith, and wanton and reckless conduct.

► ***Other Significant Student Fourth & Fourteenth Amendment Cases***

District's Prompt Responses to Bullying Results in Dismissal of Constitutional Claims – *Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.,* 2011 U.S. Dist. LEXIS 81953 (S.D. Ohio 2011).

School District Not Liable for Swim Club Coach Videotaping Student Changing Clothes – *Taflinger v. Hindson, et al.*, Case No. 1:09-CV-00771-TWP-DML, 2011 U.S. Dist. LEXIS 8153 (S.D. Ind. 2011).

Gender Non-Conformity Harassment Can Create District Liability – *Anoai v. Milford Ex. Vil. Sch. Dist.*, 2011 U.S. Dist. LEXIS 1159 (S.D. Ohio 2011).

There Exists no Constitutional Right to Unfettered Access to School Property: Father's Inability to Pick Children Up from School was not in Violation of His Right to Direct Children's Education – ***Cwik v. Dillon***, 2010 U.S. Dist. LEXIS 140877 (S.D. Ohio 2010).

Employment Discrimination

A. Applicant Fails to Prove Discrimination Where No Causal Connection is Shown Between Prior Lawsuit and the Hiring Decision – *Tyler v. University of Arkansas Bd. of Trustees*, 628 F.3d 980 (8th Cir. 2011).

1. In 2004, an African American assistant dean for diversity suit against a university alleging race discrimination in the wage policy and retaliation for his challenge to the policy. The suit was settled in 2005. The agreement discussed the university's plans to create a campus-wide office of diversity, supervised by a single director. When the job was posted in late 2006, the assistant dean applied. The selection committee noted that employee was apathetic during the interview and that his job performance as assistant dean had been dismal. In 2007, the committee did not hire the assistant dean for the director position, but hired a

female. The assistant dean sued the university for retaliation and gender discrimination.

2. The district court granted summary judgment in favor of the university. On appeal, the Eighth Circuit affirmed the decision, and found that the assistant dean failed to exhaust his administrative remedies in regard to his sex discrimination claim and that the temporal proximity between the lawsuit in 2005 and his denial of the position was too great. Also, there was no other evidence of discrimination.

3. The associate dean also attempted to assert a § 1983 gender discrimination claim, which is reviewed under the same standards as a Title VII sex discrimination claim, but the court found it suffered the same infirmities as his claim of retaliation.

► ***Other Significant Employment Discrimination Cases***

Evidence Insufficient to Support Administrator's "Reverse Discrimination" Claim – *Mieczkowski v. York City Sch. Dist.*, 2011 U.S. App. LEXIS 3307 (3rd Cir. 2011).

U.S. Supreme Court Recognizes the "Cat's Paw" Theory of Liability: Employer Held Liable for Anti-Military Sentiments of Supervisors Who Caused, But Did Not Make Final Employment Decision – ***Staub v. Proctor Hospital***, 131 S. Ct. 1186 (2011).

Immunity/Liability

A. School Principals May Be Liable for Reckless Supervision of a Teacher Who Engages in Sexual Conduct With a Student at School – *Boske v. Massillon City School District, et al.*, 2011 Ohio App. LEXIS 500 (Fifth Appellate District).

1. The mother of an eighth grade student filed suit against the school board, superintendent, two principals and a guidance counselor alleging that the student's teacher had engaged in sexual conduct with her at school, and that the board and administrators failed to properly supervise the teacher. Specifically, the mother claimed she and her husband met with the principals about their daughter's attraction to older men, and asked the principals to contact them if they noticed any problems. The mother also claimed that after hearing rumors about misconduct between the student and a teacher, a guidance counselor met with the student, and the principals instructed the teacher to stay away from the student. It was also alleged that between February 2007 through May 2007, the student would visit the teacher in his classroom each day (even though he was not her teacher), and they would engage in extensive hugging, kissing and caressing, and

that school surveillance cameras showed the student in the teacher's classroom on six occasions during a period of two weeks.

2. The mother brought a number of causes of action against the board and individuals alleging, among other things, failure to report child abuse and reckless supervision of the teacher. After filing a motion for judgment on the pleadings, the board was dismissed from the suit. Although the trial court granted the individuals judgment on the failure to report child abuse claim, the court found that the complaint alleged sufficient facts, which, if proven, would exclude the individuals from immunity. The court of appeals affirmed the decision, in part.

3. Specifically, the court of appeals held that the trial court properly refused to apply a new version of R.C. § 2151.281(B) that went into effect after the events at issue. Although the new version of R.C. § 2151.281(B) provided for civil liability for failing to report suspected child abuse, the version in effect at the time of the alleged misconduct did not.

4. With respect to the remaining claims, the court of appeals found that the complaint failed to allege any acts or omissions on the part of the superintendent, and reversed the trial court's decision. The court of appeals, however, determined that plaintiffs alleged sufficient facts in their complaint that, if true, would exclude the principals and guidance counselor from immunity as it was alleged that they acted in a wanton or reckless manner when they failed to exercise supervision and control over the teacher.

► ***Other Significant Immunity/Liability Cases***

Judgment on the Pleadings are Not Warranted When Allegations of Willful, Wanton, or Reckless Conduct is Alleged in the Complaint – *DeMartino v. The Poland Local School District*, 2011 Ohio 1466, 2011 Ohio App. Lexis 1259.

Board Entitled to Immunity Against State Law Claims in Lawsuit Filed by Parents and Students alleging Bus Driver Bullied, Harassed, and Discriminated Against Students – *Y.S. v. Bd. of Educ. Of Mathews Local Sch. Dist., et al.*, N.D. Ohio No. 4:10CV1255 (2011).

R.C. § 2744.09(B) Does Not Abrogate the Immunity Afforded to Employees of a Political Subdivision – *Zumwalde v. Madeira and Indian Hill Joint Fire District*, 128 Ohio St. 3d 492 (2011).

A Condition is Not a "Defect" for Purposes of R.C. § 2744.02(B)(4) Unless it is a Perceivable Imperfection that Diminishes the Worth or Utility in an Object – *Hamrick v. Bryan City Sch. District*, 2011 Ohio 2572, 2011 Ohio App. Lexis 2176.

FMLA

A. FMLA Does Not Entitle Employees to Return From Leave With a Clean Desk and an Empty Inbox – *Kollstedt v. Princeton Cty Sch. Dist. Bd. of Educ.*, 2011 U.S. Dist. LEXIS 7404 (S.D. Ohio 2011).

1. Plaintiff took FMLA leave from August 3, 2007, through September 24, 2007. When she returned to work, she found that employee benefits payroll reconciliations had not been completed in her absence. Plaintiff claimed she had to work an additional 120 hours in January and February of 2008 to complete the tasks. She also claimed she did not receive additional compensation for the extra work. During this time, the board gave the employee a negative performance evaluation and notified her that her contract would be non-renewed.

2. One of the reasons for the employee's negative evaluation and non-renewal was that she consistently failed to reconcile payroll properly and effectively. The Board learned of the problems with plaintiff's reconciliation efforts when plaintiff was on FMLA leave. Until then, no one knew the gravity of the situation. The board even assigned employees to redo the reconciliations while plaintiff was on leave, but they were in such poor condition that no one could make sense of the reconciliations plaintiff finished before she took leave.

3. Plaintiff's employment contract as Payroll Supervisor was non-renewed, effective at the end of the 2007-2008 school year. The board non-renewed her because of her lack of interest in being a manager, for ongoing errors resulting in district-wide frustration and lack of trust that payroll would be completed accurately; her lack of management ability; and because "payroll as a whole had never been reconciled." Plaintiff then filed suit alleging, in part, that defendant interfered with her FMLA rights by "forcing her to complete work that should have been completed by [others] in her absence, forcing her to work overtime to complete such work, and negatively evaluating her, and ultimately terminating her for failing to complete such work." Defendant countered that plaintiff received all the benefits to which she was entitled under the FMLA, and she was reinstated to her position. Plaintiff argued that defendant interfered with her use of FMLA leave because it discouraged her from taking such leave by failing to make sure that all of her duties would be completed while she was gone.

4. Plaintiff's argument was rejected by the court. The record clearly showed that plaintiff's leave request was approved and that she was reinstated to the same job she held prior to her leave. Nothing in the record suggested that she was retaliated against for taking FMLA leave. Plaintiff also provided no support for her assertion that an employer must ensure that an employee's job duties must be performed by others in the employee's absence. Even if plaintiff's assertion had

support, there was ample evidence showing that defendant assigned three different employees to complete plaintiff's tasks, but plaintiff's reconciliation duties were too disorganized for anyone other than plaintiff to remedy.

► ***Other Significant FMLA Cases***

Employer's Decision to Terminate Employee Was Not Retaliation Under the FMLA Because Plaintiff Was Terminated Prior to Requesting FMLA Leave – *Carter v. Arbors East, Inc.*, 2011 U.S. Dist. LEXIS 46854 (S.D. Ohio May, 2011).

Alcoholism May Qualify as a Serious Health Condition Under the FMLA – *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011).

"Cat's Paw" Theory Applies to FMLA Claims: Court Denies Summary Judgment to Employer Where Factual Dispute Exists as to Whether Decision-Maker Relied Upon Biased Supervisor's Recommendation – *Blount v. The Ohio Bell Telephone Co.*, 2011 U.S. Dist. LEXIS 24372 (N.D. Ohio 2011).

Public Records

A. ***Public Records* – Ohio Supreme Court Holds That Only "Aggrieved" Individuals Can Recover Under Ohio's Public Records Act for Improper Records Destruction – *Rhodes v. City of New Philadelphia***, 2011-Ohio-3279.

1. An individual member of the public requested from the city all public recordings made by the police department for every day of the year from 1975 through 1995. The city, via the chief of police, advised the individual that the police department did not have any of the tapes requested or information that he was requesting.

2. In response, the individual filed a civil forfeiture complaint, alleging the city had unlawfully destroyed the recordings, in violation of R.C. § 149.351, and that he was entitled to $1,000 for each record destroyed. The individual admitted during a deposition that he wanted the records to investigate the city's records retention policies, not to actually review the recordings. The individual filed a motion for summary judgment, which was denied. A jury trial commenced, with the jury finding in favor of the city. The individual appealed.

3. The appeals court found that the individual was a person who was aggrieved by a violation of R.C. § 149.351. The appeals court explained that an aggrieved person is any member of the public who requests, and is denied, records. The purpose of the request, the court held, is not relevant. As a member of the public, the individual suing, therefore, became "aggrieved" when he was denied the statutory right to the public recordings.

4. The Supreme Court, however, reversed the appellate court's finding regarding who is "aggrieved" under R.C. § 149.351, holding that "a party is not aggrieved by the destruction of a record when the party's objective in requesting the record is not to obtain the record but to seek a forfeiture for the wrongful destruction of the record." The Court explained that, to recover under a R.C. § 149.351 civil forfeiture claim, the moving party must be "aggrieved" by the improper records disposal, although the statute does not define "aggrieved." The Court analyzed the "plain and ordinary" meaning of that term, explaining that it means being harmed by an infringement of legal rights. As such, the Court concluded that "the General Assembly did not intend to impose a forfeiture when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to prove the nonexistence of the records." The requester's goal, therefore, must be to access the public records. The Court explained that it is the public entity's burden to show that an individual is not "aggrieved," which the city showed in this case. The appellate court's decision was, therefore, reversed.

► ***Other Significant Public Records Cases***

No Violation of Public Records Act Where Public Records are Provided in a Reasonable Period of Time, Despite Noncompliance with Village's Own Policy – ***State ex rel. Andwan v. Village of Greenhills***, 191 Ohio App. 3d, 2010-Ohio-5962.

Teacher's Personal Emails that Were Relied Upon in Disciplinary Action Against Teacher Constitute Public Records – ***State ex rel. Bowman v. Jackson City School Dist.***, 2011-Ohio-2228.

Other Significant Ohio Cases

A. ***Student Discipline*** **– Court Overrules Three-Day Suspension of Student for Verbal Altercation** – ***Cisek v. Nordonia Hills Bd. of Edn.***, 2011-Ohio-1042.

B. ***Teacher Termination*** **– Court of Appeals Affirms Termination of Teacher for Just Cause and Denies Back Pay –** ***Elsass v. St. Marys City School District Bd. of Edn.,*** 2011-Ohio-1870.

C. ***Teacher Licensure*** **– State Board's Order to Revoke Teacher's License Upheld by Court of Appeals –** ***Carter v. Ohio State Bd. of Edn.,*** 2011-Ohio-2945.

D. ***FERPA*** **– Federal Court Refuses to Consider State Law in Requiring School to Release Education Records –** ***Smith v. Southwest Licking Sch. Dist. Bd. of Edn.***, 2010 U.S. Dist. LEXIS 109972 (S.D. Ohio 2010).