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Inside This Issue:

Title IX Athletics

Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843 (2014).

A court in California concluded that a school district violated Title IX when it failed to provide equal participation opportunities, treatment, and benefits to female athletes and then retaliated against those athletes after complaints were made regarding the unequal treatment. In 2007, girls softball players sued Castle Park High School in Chula Vista, California, claiming that they had inferior facilities and less opportunities to play than male student-athletes. Title IX of the Education Amendments of 1972 is an antidiscrimination law which requires that school districts provide "equal athletic opportunity for members of both sexes." Equal opportunity is determined by evaluating "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."

Unequal Participation Opportunities:

First, the court in this case found that the school district failed to provide equal participation opportunities to the female athletes. On a summary judgment motion, the court addressed whether the number of participation opportunities offered to female athletes was substantially proportionate to the participation opportunities offered to male athletes.

To determine whether a school district is providing equal participation opportunities, the court used the following tests. First, the number of participation opportunities is determined by counting actual athletes, not "unfilled slots" on the teams or the number of teams offered to females. Then the number of actual athletes is compared to the actual enrollment of female students to determine if the numbers are substantially proportionate. If the difference in the number of female athletes and female enrollment is less than the number of students needed to "sustain a viable team," then participation opportunities are substantially proportionate.

In this case, females comprised 45.4-49.6% of the student body enrollment, but only 33.4-40.8% of the athletes over the last 10 years. During one of the years at issue in this lawsuit, the difference in enrollment and participation was 6.7%, which was equivalent to 47 female students. Under the standard above, 47 students can sustain at least one viable team; therefore, the district failed to provide the female athletes substantially proportionate participation opportunities.

Under the next test, a school district can still overcome the substantial proportionality issue if it can prove (1) that it has a "history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes" or (2) that the "interests and abilities of female students have been fully and effectively accommodated by the present program." Again, the determination of whether the district has a history of expanding program opportunities is based on the number of female athletes, not the number of teams. If a district does not overcome substantial proportionality by showing a history of program expansion, a court will typically still take into consideration whether the gender difference in athletics is due to a district's failure to accommodate female athletic interests and abilities or merely a lack of interest in athletics by female students.

In this case, because the number of female athletes over the last 10 years did not show an upward

(Continued on page 2)

Title IX Athletics, Cont.

trend, but instead showed a pattern of ups and downs, the district did not overcome the substantial proportionality issue. Although the district argued that that the proportionality was due to lack of interest by female athletes, the facts weighed against the district's argument. The district failed to survey students regarding their interests in any particular sports. Also, the female field hockey team was cut, not because of lack of interest by female athletes, but because the district could not find a coach for the team. Based on these facts, the school district failed to show that the interests and abilities of the female students were being fully accommodated. Therefore, the court concluded that the district failed to provide the female athletes substantially proportionate participation opportunities and provided summary judgment in favor of the female athletes.

Unequal Treatment & Benefits:

After concluding the trial, the court found that the school district failed to provide equal treatment and benefits to the female athletes. The district failed to provide equal treatment and benefits in the areas of training, equipment, fundraising, recruiting, and scheduling to name a few. For example, the facts showed that that female coaches were overworked. The female sports received less publicity for sporting events than male sports. Additionally, the practice and competition facilities were inferior. Therefore, the school district violated Title IX by failing to provide equal treatment and benefits.

Retaliation:

Lastly, the court ruled that the district retaliated against the female athletes. Retaliation occurs when (1) the plaintiffs engage in a protected activity, (2) the plaintiffs suffer adverse actions, and (3) there is causal link between the protected activity and the adverse actions. In this case, the female athletes engaged in protected activity when two fathers of the athletes complained to school administrators about the unequal treatment of the female athletic programs. Under the second prong, the facts supported the following adverse actions: the female softball coach was fired, the coach was replaced by a less experienced coach, the assistant coaches were released from their duties with the softball team, the team's annual awards banquet was cancelled, parents were not allowed to volunteer with the team, and the team was prohibited from participating in a tournament attended by college recruiters. Under the last prong, the causal connection between these protected activities and adverse actions is inferred from the circumstantial evidence, specifically the proximity in time. The facts showed that the softball coach was fired in July after the female athletes had engaged in protected activity in May and July. Also, the spring awards banquet was cancelled following the athletes protected activity in April.

Although this provided a prima facie case for retaliation, the school district could still have overcome this claim if it could have proven a legitimate reason for the adverse actions. Although the district attempted to provide nonretalitory reasons for firing the softball coach, the court held that its arguments were not credible and served only as a pretext. For example, the school district argued that it fired the softball coach because he was not a certified teacher, but this argument failed because at the time the coach was fired, there was not a certified teacher available to replace him. The district also argued that the coach was fired because he played an ineligible student, but the court did not find this reason credible because the coach was not reprimanded for the incident, the incident occurred over a year before he was fired, and ultimately, it was the school administrators' responsibility, not the coach's, to determine eligibility. Lastly, an unauthorized parent assisted with a summer softball team, but the court did not find this to be a credible reason to fire the coach because he was not even present when the incident occurred, he prohibited the parent from coaching once he learned of the parent's ineligibility to coach, and the summer softball team was not conducted by the school district.

On review, the 9th Circuit Court of Appeals affirmed the lower court's ruling against the school district on all counts. Thus, a permanent injunction against the school district was upheld.

How this Affects Your District:

This case is a reminder of a school district's obligations under Title IX related to equal athletic opportunities. It is important for school districts to determine whether they are providing substantially proportionate athletic opportunities for male and female athletes using the analysis above. If the opportunities are not substantially equal, the district should immediately take action to increase female athletic participation. If increased participation does not occur, the district should ensure that lack of participation is due to lack of interest, not other factors such as the district's failure to provide coaches or opportunities.

Workers' Compensation and the Dual Intent Doctrine

In October, the Ohio Supreme Court addressed how employers and the Ohio Bureau of Workers' Compensation should hand situations when an employee is injured while traveling for both business and personal reasons. *Friebel v. Visiting Nurse Assn. of Mid-Ohio*, Slip Opinion No. 2014-Ohio-4531.

In this case, a nurse, Friebel traveled to her patients' homes in order to provide in-home health care services. On the way to the home of her first patient of the day, Friebel

Workers' Compensation and the Dual Intent Doctrine, Cont.

decided to drive her daughter and son and two family friends to the mall. However, before Friebel and her passengers reached the mall, they were rear-ended. Friebel then complained of a neck sprain and requested workers' compensation. The administrator for the Bureau of Workers' Compensation originally allowed Friebel's claim. Friebel's employer appealed and a district hearing officer for the Industrial Commission vacated the administrator's allowance of the claim and denied the claim, finding that Friebel was not within the course and scope of her employment at the time of the incident.

Outside of Ohio, courts have applied the doctrine of dual intent for instances when employees travel both for work and for personal reasons which courts have stated applies only to travel **for** work, and not to and from work. *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 120, 689 N.E.2d 917 (1998). The difficulty in these cases arises when the employee goes on a personal errand during work travel. Under the doctrine of dual intent, if the employer creates the need for travel, then the employee is within the course of employment and the employer may be liable. If, however, the personal errand would have taken place regardless of the work reason for travel, then the employee is not within the course of employment and the employer will not be liable for injuries sustained by the employee.

Ohio courts have previously rejected the doctrine of dual intent. In *Friebel*, the Ohio Supreme Court further rejected the doctrine of dual intent by adding that workers' compensation benefits are only available to the employee if their injury occurs in the course of, and arising from, the employment, even when work creates the necessity for travel.

The Court's holding in *Friebel* mirrors the workers' compensation statute, which requires that the injury occur "in the course of, and arising out of, the injured employee's employment." R.C. 4123.01(C). The Ohio Supreme Court has recognized that both prongs of this statue must be met in order for the injury to be compensable. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 277, 551 N.E.2d 1271 (1990). Additionally, rather than apply a blanket rule, such as the doctrine of dual intent, Ohio courts analyze the facts and circumstances of each case using the "in the course of" and "arising out of" tests to determine workers' compensation coverage for situations involving employee travel for work and personal reasons.

The recent *Friebel* decision explicitly sets forth two factors to help determine whether each of these prongs has been satisfied:

1. Whether the time, place and circumstances of the injury demonstrate that it occurred in the course of the employment, and

2. Whether under the totality of the circumstances, there is sufficient causal connection between the injury and the employment to establish that the injury arose of the employment.

Workers' compensation claims are fact-specific and the Court's opinion urges other courts to weigh the totality of the facts and circumstances surrounding the accident with the following factors:

1. The proximity of the scene of the accident to the place of employment

2. The degree of control the employer had over the scene of the accident, and

3. The benefit the employer received from the injured employee's presence at the scene of the accident.

Lord v. Daugherty, 66 Ohio St.2d 441, 423 N.E.2d 96 (1981) syllabus.

While the facts of the *Friebel* case are still in dispute and were sent back to the trial court on remand, the *Friebel* case indicates that the dual intent doctrine is not applicable in Ohio, which should assuage employer concern over employee travel.

Tips for the Use of Social Media in Employment Disputes

As social media becomes more and more prevalent in our society, social media evidence becomes more critical in employment cases.

For example, employers have relied upon some of the following information to support employment decisions, such as termination:

- Employers have used photos and posts on social media (e.g., employees out drinking, hanging out on a boat on vacation, on skis in the snow, renovating a house) as evidence in determining the employees' activity level and actual injuries in cases where the employee was claiming injury/disability/medical leave —Jaszczyszyn v. Advantage Health Physician Network (6th Cir. Nov. 7, 2012), Lineberry v. Richards (E.D. Mich. Feb. 5, 2013), and Richards v. Hertz Corp. (N.Y. App. Div. 2010).

- An employer used comments made on Facebook as evidence of an employee's ability to inform the employer of her pregnancy related absences, despite the fact that she was in the hospital—Tabani v. IMS Assocs (D. Nev. Feb. 14, 2013).

- An employer used comments

(Continued on page 4)

Tips for the Use of Social Media in Employment Disputes, Cont.

made on Facebook as evidence of an employee's ability to access the internet and the employer's sexual harassment policy establishing the procedure for reporting sexual harassment—Odam v. Fred's Stores of Tennessee (M.D. Ga. Dec. 11, 2013).

- An employer used sexual comments made by an employee on her Facebook page as evidence that employee was not offended by conversations at work—Targonski v. City of Oak Ridge (E.D. Tenn. July 18, 2012).

- Many school districts have also used comments made by teachers on social media, which either disrupt school activities or are unbecoming of a teacher and are private speech (not on issues of public concern), for disciplinary purposes.

However, sometimes evidence of an employer's use of social media to obtain information on an employee may be used against the employer, such as the following:

- A court held that an employment candidate's college graduation year, which was posed on a LinkedIn profile, was enough evidence of an employer's potential knowledge of the employment candidate's age to allow a claim for age discrimination to proceed—*Neiman v. Grange Mutual Casualty Co.* (C.D. III April 26, 2011).

- A court held that a complaint of sexual harassment on Facebook was enough evidence to put an employer on notice about a hostile work environment—Mercy Debord v. Mercy Health Sys. (10th Cir., Nov. 26, 2013).

Sometimes an innocent Internet search can reveal unintended information. For example, in hiring situations, an employer may stumble across the applicant's religious affiliation, race, or age. Knowledge that the applicant is in a protected class can make it more difficult for an employer to defend a claim of discrimination. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from discriminating against a person due to the risk of acquiring a genetic condition. In addition, employers are prohibited from requesting genetic information from an individual or the individual's family member (with limited exceptions). An internet search that reveals genetic information can be considered a "request." This can be as simple as finding out that an applicant has a family history of cancer and is therefore at risk of developing cancer in the future. There are exceptions for information obtained through authorization or information that is publically and commercially available, but a site with limited access, such as a social media page with privacy settings, is not considered "publicly" available.

How this Affects your District:

Employers should have a hiring process in place that provides protections for use of social media in the hiring process, such as the following:

- Make sure to document a legal disqualifying reason why an applicant was not hired;

- Don't let the person who ultimately makes the hiring decisions engage in any internet searching, so as to remove any knowledge of the candidate's protectable class from the person making decisions. If others conduct internet or social media searches, they can report any legally disqualifying information back to the person with authorization to hire;

- For anyone conducting social media searches, do not impersonate someone else (e.g., use a "fake" name, view information from someone else's account) to obtain access to a private social media account.

In addition to hiring precautions, school districts should exercise caution when using social media for disciplinary purposes. Although discipline may be allowable in some situations, in others, the employee's speech may be protected by the First Amendment. It is recommended that school districts have an acceptable use policy and a social mediation policy in place. Because each situation is very fact specific, please consult an ERF attorney with questions regarding a specific case .

Guidance from the U.S. Dept. of Education on Assessing LEP Students with Disabilities

In July of 2014, the U.S. Department of Education provided guidance on administering English Language proficiency exams to students with disabilities under the Individuals with Disabilities Education Act (IDEA). Titles I & III of the Elementary and Secondary Education Act of 1965 require public school districts to annually assess the English proficiency of all Limited English Proficient (LEP) students. IDEA requires that each student with a disability be included in general state assessments, including English proficiency assessments, and be provided with appropriate individualized accommodations pursuant to the student's Individualized Education Plan (IEP).

(Continued on page 5)

Guidance from the U.S. Dept. of Education on Assessing LEP Students with Disabilities, Cont.

Whether a student needs accommodations for state assessments is a decision for the IEP team to make. Any needed accommodations determined by the IEP team apply to the annual English proficiency assessment, which in Ohio is called the Ohio Test of English Language Acquisition (OTELA). Because any accommodations needed for the OTELA cannot be determined by persons outside of the IEP team, it is imperative to have someone knowledgeable about resources for LEP students, the student's language needs, and the OTELA.**

Because districts are required to annually assess all LEP students, the IEP team cannot determine that a LEP student with a disability does not have to take the OTELA. Instead, the IEP team must address the student's needs and the most appropriate accommodations to determine what the student knows and does not know.

One issue that has yet to be addressed by the Ohio Department of Education is the assessment of LEP students who qualify for alternate assessments. Although the U.S. Department of Education imposes an obligation upon each state to develop an alternate assessment for the English proficiency exam, Ohio has yet to develop such an assessment. This puts the IEP team at a difficult juncture. Because the district is obligated to provide the OTELA to all LEP students, it is recommended that students who qualify for alternate assessment be provided all applicable accommodations and that the administrator of the assessment discontinue testing when the student becomes frustrated. Additionally, the IEP team should document in the IEP all applicable accommodations offered to the student for the OTELA and include a statement that although the student qualifies for alternate assessment, the state has not provided an alternate assessment for the OTELA. Just remember to document, document, document!

6th Circuit Reverses Ohio District Court's Ruling on Same-Sex Marriage

The 6th Circuit Court of Appeals recently ruled on a same-sex marriage case which included the *Obergefell v. Kasich* case previously discussed in ERF's newsletter. As a reminder, in *Obergefell*, a federal judge in Ohio ruled that the state must recognize same-sex marriage performed legally in another state, at least in some instances. In *DeBoer*, the 6th Circuit reversed this holding, ultimately concluding that it is constitutional for a state to define marriage as a relationship between a male and female and to use that definition in deciding whether to recognize a marriage conducted in another state.

This ruling creates a split among federal appellate courts. The 4th, 7th, 9th, and 10th Circuits have ruled contrary to the 6th Circuit, striking down marriage bans in those states. Several other circuit courts have cases still pending on the issue of same-sex marriage. Although the U.S. Supreme Court chose not to take this issue up during its 2014-2015 term, the recent split in circuit court rulings will likely influence the Supreme Court's decision to accept appeals on this issue in its next term.

How this Affects your District:

At this time, Ohio does not recognize same-sex marriages under state law, but as discussed in ERF's January 2014 newsletter, benefits provided under federal law must recognize same-sex marriage. Because some benefits are based on the employee's state of residence, Ohio employers may encounter some benefit changes for an employee who lives in a surrounding state due to the recent recognition of same-sex marriage in Indiana, West Virginia, and Pennsylvania. For example, FMLA and social security benefits are determined by the employee's state of residence. See the January 2014 newsletter article for specific benefit determinations.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an ERF attorney.

Dec. 31—Treasurer deadline to canvass members of new Board to determine annual organizational meeting date, which must occur by Jan. 15th (RC 3313.14)

Dec. 31—Report to ODE the number of students with diabetes enrolled in the district during the previous school year & the number of errors due to administration of diabetes medication during the previous school year (RC 3313.7112)—**This is a new requirement established in recent diabetes legislation, HB 264. Although districts may not have systematically collected this data last year, this provision of law is currently in effect, and ODE will be requiring school districts to report last school year's data by this deadline. ODE has not yet released information regarding the reporting process, but school districts are advised to begin assembling this data.**

Dec. 31- Deadline to establish date for the Board to meet and organize (between Jan. 1-15) (RC 3313.14)

Jan. 1- Deadline to notify ESC of intent to terminate agreement for services effective June 30- Failure to notify the ESC by Jan. 1, 2015 results in a renewal of the agreement for the following two school years (RC 3313.843)

Jan. 15- Deadline for School Board to meet and organize (RC 3313.14)

Jan. 15- Deadline for Board to adopt tax budget for the upcoming fiscal year (RC 5705.28)

Jan. 15- Deadline for Treasurer to report to the superintendent of public instruction the names of each nonresident child attending the district over the previous six months, as well as the duration of attendance and district responsible (3313.64)

Jan. 20- Deadline for Board to submit fiscal tax-year budget to county auditor (RC 5705.30)

Jan. 20- Deadline to submit certification for May conversion levy to tax commissioner (RC 5705.219)

Jan. 26- Deadline to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02)

Jan. 30- Deadline to submit May conversion levy, emergency levy, and current operating expenses levy to the county auditor (RC 5705.194-.195, 5705.213, 5705.219)

Jan. 31- Deadline for ESC Boards to meet and organize (RC 3313.14)

Education Law Speeches/Seminars

SAVE THE DATE! 2014-2015 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

January 22 – Managing Workplace Injuries and Leaves of Absence
April 23 – Special Education Legal Update
July 16 – 2014-2015 School Law Year in Review

Other Upcoming Presentations:

Dec. 5—Special Education Laws Made Simple, National Business Institute (NBI), Toledo, OH
Presented by: William Deters & Jeremy Neff

Dec. 9—Clermont OTES Presentation
Presented by: Pam Leist

Dec. 9—SOESC/Brown County ESC Update
Presented by: Jeremy Neff

Feb. 5—SOESC/Brown Special Education Update
Presented by: Jeremy Neff

Feb. 9 (Columbus) & Feb. 10 (Dayton)—Ohio Special Education Law, National Business Institute (NBI)
Presented by: Jeremy Neff & Erin Wessendorf-Wortman

Feb. 21—Board Sunshine Laws
Presented by: The ERF Team

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Want to stay up-to-date about important topics in school law? Check out ERF's Education Law Blog at www.erflegal.com/education-law-blog.

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

Team Members:
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Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members:
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School Finance

Taxes, School Levies, Bonds, Board of Revision

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