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Supreme Court Upholds Teacher Termination in Religious Symbols Case

***Freshwater v. Mt. Vernon City School Dist. Bd. Of Edn.*, 2013-Ohio-5000 (November 19,2013).**

On November 19, 2013, the Ohio Supreme Court concluded that, pursuant to R.C. 3319.16, acts of insubordination constitute "good and just cause" to terminate a teacher's contract as long as the underlying rules or directives violated were themselves reasonable and valid.

John Freshwater was an eighth grade science teacher at the Mount Vernon City School District. As early as 1994, Freshwater began to interject religious principles into his classroom instruction. Specifically, he supplemented school curriculum with religious handouts, showed videos on creationism and intelligent design, displayed religious materials in the classroom, made statements about the Bible, and awarded extra credit to students who attended religiously-based seminars that were critical of evolution. Although district administration occasionally directed Freshwater not to incorporate religious materials or teachings into his instruction, he generally received positive evaluations during the twenty-one years he taught in the district. His students also usually received the highest scores on state achievement tests.

In 2003, the Board of Education rejected Freshwater's proposal to amend the district's science curriculum by incorporating material that criticized the theory of evolution. However, Freshwater ignored the Board's decision and continued to teach certain topics in accordance with his religious beliefs. A few years later, the district's superintendent issued a written directive to Freshwater that he must delete all supplemental materials which were not scientifically accepted. Again, Freshwater chose not to comply with the directive.

Matters came to a head in the fall of 2007, when parents complained Freshwater used an electrical instrument to burn what appeared to be the sign of the cross into their son's arm. Freshwater confirmed he used the instrument to mark the student, but denied the mark was intended to be a cross. The district responded by sending Freshwater a letter stating he could not use classroom instruments to shock students.

The following spring, Freshwater met with the school principal again to discuss issues related to his religious instruction. At the conclusion of the meeting, he received written orders in clear and unequivocal terms that he could not display religious materials in the classroom. Freshwater was specifically directed to remove the Bible displayed on his desk and a poster of the Ten Commandments that hung on his door. The written notice also stated "[u]nless a particular discussion about religion or religious decorations or symbols is part of a Board-approved curriculum, you may not engage in religious discussions with students while at school or keep religious materials displayed in the classroom."

Freshwater refused to comply with the order despite several follow-up requests. Meanwhile, the parents of the student who was shocked in class sent a demand letter and filed suit against the district. In response, the district hired an outside investigator to observe Freshwater's classes. The investigator reported that Freshwater taught creationism and intelligent design in class, discussed various other religious subjects, distributed religious materials, and made statements such as "science is wrong because the Bible states that homosexuality is a sin." The investigator also discovered that Freshwater gave extra credit to stu-

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Supreme Court Upholds Teacher Termination in Religious Symbols Case, Cont.

dents who viewed a movie on intelligent design.

Eventually by the end of the 2007-2008 school year, the Board decided to terminate Freshwater's teaching contract pursuant to ORC 3319.16. At the public hearing, a referee addressed four specific grounds for termination set forth in the board's resolution: (1) the burn incident, (2) Freshwater's failure to adhere to curriculum, (3) Freshwater's role in the Fellowship of Christian Athletes organization, and (4) his disobedience of orders. The referee concluded that claims (2) and (4) constituted just cause grounds for termination.

Freshwater appealed the decision to court. Both the Court of Common Pleas and the Court of Appeals for Knox County upheld termination, and the Ohio Supreme Court granted review of the matter. The Court's decision in the case was limited to whether the district met the just cause standard mandated by R.C. 3319.16. The Court provided only a cursory review of constitutional issues regarding Freedom of Religion and the Establishment Clause. Therefore, the Court did not provide any substantial guidance to school boards or teachers as to the constitutionality of teaching or displaying religious materials in a public school setting.

The Supreme Court ultimately held that in this case, Freshwater's repeated acts of insubordination alone constituted "good and just cause." The Court focused on Freshwater's persistent disobedience and refusal to comply with administrative directives, and specifically on his refusal to remove religiously-oriented materials from class. According to the Court, "good and just cause" under ORC 3319.16 includes insubordination, which is defined as a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by a school board or by an administrative superior.

The letter from Freshwater's principal made clear that he could not "engage in any activity that promotes or denigrates a particular religion or religious beliefs while on board property, during any school activity" or while teaching, as mandated by Board policy and the law. The Court concluded that the district's orders were both reasonable and valid, and further that Freshwater willfully refused to comply with the directives. The Court summarized their findings by stating that "Freshwater [was] fully entitled to an ardent faith in Jesus Christ and to interpret Biblical passages according to his faith, but he was not entitled to ignore direct, lawful edicts of his superior while in the workplace."

How this Affects Your District:

The Supreme Court's decision confirmed that insubordination alone may constitute just cause *as long as* the rule or directive is reasonable, and the employee willfully or intentionally refused to comply. However, it is important to note that the standard for just cause itself has not been lessened by the Court's decision, and districts should be cautious to interpret the case otherwise.

Further, even though the Ohio Supreme Court did not address whether Freshwater's actions violated the Establishment Clause of the U.S. Constitution to any great degree, school districts should be ever mindful of possible Establishment Clause infringements. The U.S. Supreme Court has interpreted the Establishment Clause to strictly forbid any law or act undertaken by a public entity that furthers religion, or attempts to disapprove of a particular religion or religion in general. The U.S. Supreme Court and lower courts repeatedly emphasize that a public entity must remain neutral on the subject of religion.

In this case, the extent to which Freshwater incorporated religious beliefs and displays into his classroom and instruction very likely constituted an Establishment Clause violation. Because of the many legal implications of such violations, we highly recommend that you contact legal counsel for advice on any issue that involves religion in schools.

Informational Picketing Does Not Require a Ten-Day Notice

***Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 2013-Ohio-4654 (October 23, 2013).**

R.C. 4117.11(B)(8) states that it is an unfair labor practice to "[e]ngage in any picketing, striking or *other concerted refusal to work*" without providing written notice at least ten days prior to the action. On October 23, 2013, the Supreme Court of Ohio ruled that the statute does not apply to picketing which is merely informational in nature.

In this case, the Mahoning Education Association of Developmental Disabilities (MEADD) and the Mahoning County Board of Developmental Disabilities (MCBDD) had recently begun contract negotiations for a successor collective bargaining agreement. On November 5, 2007, MCBDD held a board meeting. Immediately before the meeting, union representatives peacefully picketed outside of the building to express the group's desire for a fair contract as well as dissatisfaction with the progress of the negotiation. Both messages related directly to the successor contract negotiations currently taking place. The union did not notify MCBDD or the State Employee Relations Board (SERB) prior to the picketing. They also did not engage in a strike or give written notice of

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Informational Picketing Does Not Require a Ten-Day Notice, Cont.

intent to do so.

Later that month, MCBDD filed an unfair-labor-practice charge with SERB alleging that the notice requirements of R.C. 4117.11(B)(8) had been violated by the union. SERB agreed with MCBDD. Subsequently, the union appealed to the Mahoning County Common Pleas Court, arguing that the statute was unconstitutional because it served as a content-based restriction on the union's speech and must, therefore, be narrowly tailored to regulate a compelling state interest. The common pleas court disagreed with the union, and affirmed SERB's decision.

The Seventh District Court of Appeals took a different view on the facts and determined that the notice requirement in the statute was unconstitutional. MCBDD and SERB appealed to the Supreme Court.

The Supreme Court held that that statute was improperly applied to informational labor picketing activity, and failure to give notice of such caliber of activity does not constitute an unfair labor practice.

To come to such conclusion, the Court considered the plain language of the statute in order to ascertain the legislature's intent. The Court found that in the context of the statute reading "picketing, striking, or *other concerted refusal to work*" it appears clear that picketing that is merely informational in nature was not intended to be included. The Court concluded that the phrase "other concerted refusal to work" would not have been used unless the other two activities are also concerted refusals to work. In addition, the Court strengthened its point by adding that, had legislature intended the notice requirement to cover general informational labor picketing as well as that related to work stoppage, it would have omitted the word "other."

Therefore, because the picketing in the current case was unrelated to a concerted refusal to work, the statute did not apply, and the union had not committed an unfair labor practice.

How this Affects Your District:

As an Ohio Supreme Court case, the decision sets forth a standard for future picketing in Ohio. Picketing is not always conduct associated with protests during a strike or work stoppage. Sometimes picketing is merely an activity that enables individuals to express concern for or discontent with current affairs. The signs used by the picketers in the case read "Settle Now," "MEADD Deserves a Fair Contract," and "Tell Superintendent [...] to Give Us a Fair Deal." They were therefore considered informational labor picketing and unrelated to a concerted refusal to work. If picketing takes place before a contract negotiation within your district without any notice given, it is important to first distinguish the purpose of the message. If the message is unrelated to a strike or work stoppage, SERB may conclude based on this case that the acts do not constitute a ULP.

Legislation to Watch

H.B. 264

On September 9, 2013, House Bill 264 (HB 264) was introduced to the Ohio House. H.B. 264 expands the care and services provided for students with diabetes. The bill sets forth a number of provisions that schools must adhere to. First, schools must provide "appropriate and needed diabetes care," and defines that care to include checking and recording blood glucose/ketone levels, administering glucagon, insulin, emergency treatments or oral diabetes medication, and tracking meal and snack schedules to calculate proper dosage.

In addition, the bill states a school nurse or an employee trained in diabetes care must be available and on-site before, after, and during the school day and during all school-sponsored activities to provide care for each student with diabetes. Here, the school's responsibility was statutorily expanded to include all "school-sponsored activities." "School-sponsored activities" include, "school sponsored before and after school care programs, field trips, extended off-site excursions, extracurricular activities, and busing to and from these activities."

Additionally, the bill requires a district to provide an "adequate number" of school employees trained to provide diabetes care at each school attended by any student with diabetes. Principals must also send a written notice to employees requesting volunteers if a building does not have an adequate number of trained caregivers. The school nurse or approved health care professional shall promptly provide all necessary follow-up training and supervision to employees who receive training for diabetes care. Staff cannot be disciplined for refusing to volunteer, and a district cannot discourage an employee from agreeing to provide diabetes care.

Another provision of the bill requires that, subsequent to a parent or student request, a student must be provided access to a private area in order to perform diabetes care tasks, or alternatively must be allowed to perform diabetes care tasks in "the classroom, in any area of the school or school grounds, and at any school-related activity." The student must be allowed to carry all necessary supplies on the student's self at all times.

Lastly, all school employees who supervise a child with diabetes during some portion of the school day,

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Legislation to Watch, Cont.

and bus drivers responsible for transportation of a student with diabetes, must be trained in the recognition of hypoglycemia and hyperglycemia. Each must be educated on the actions to take in response to emergency situations.

H.B. 296

An additional bill was introduced to the Ohio House on October 10, 2013. House Bill 296 (H.B. 296) would authorize schools to stock epinephrine auto-injectors (epi-pens). Specifically, the bill permits (but does not require) (1) schools to stock epi-pens without a license for emergencies, (2) drug manufacturers to donate epi-pens, and (3) schools to receive donations for purchasing epi-pens. In addition, the bill includes provisions providing civil immunity for schools and school employees.

H.B. 334

House Bill 334 (HB 334) was introduced to the Ohio House on November 6, 2013. If passed, HB 334 would authorize the superintendent of schools to expel a student for actions that "pose imminent and severe endangerment to the health and safety" of other students or school staff. Under these new provisions, students could be expelled for up to 180 days, with the option of extended expulsions based on the student's rehabilitation.

Under current law, a superintendent may expel a student for bringing a firearm to school, possessing a firearm or weapon at school or at a school activity, making a bomb threat, or for committing certain criminal acts at school or a school activity. This legislation would amend current law to allow school boards to implement a policy authorizing the superintendent to expel students for imminent threats of harm that have not yet occurred.

Some key features of the bill include a focus on the mental health of the student, the ability of the superintendent to return a student to school at an earlier date if the student can show rehabilitation, and a plan to continue to education the student during the expulsion period. Additionally, each school board may choose whether to adopt a policy that authorizes the new expulsion provisions.

Was that Email Evidence of Predetermination Under IDEA?

***S.P. by Penalosa v. Scottsdale Unified Sch. Dist.*, No. 48, 113 LRP 42296 (D. Ariz. 10/17/13).**

In a case before a federal district court in Arizona, the court determined that a school district's prior approval of an educational placement did not rise to the level of predetermination. Under IDEA, denying a parent's right to participate in the IEP process can deny the student of a free appropriate public education (FAPE). Specifically, predetermination occurs when a district determines a child's placement before the IEP meeting, including when an IEP team refuses to consider other alternatives. Because predetermination denies parents their right to meaningfully participate in the IEP process, predetermination of a child's placement is considered a violation of IDEA.

In this case, the dispute began when parents of a 1st grader with a learning disability and speech language impairment requested a private school placement for their child at district expense. When the district refused to provide the private school placement, the parents argued that the district had predetermined the child's placement prior to the IEP meeting. An email between district employees provided evidence that the district's placement team, without the parents, had "approved" placement in a district program prior to the IEP team meeting with the child's parents. Despite the district's preapproval of a placement option for the student, the court concluded that the district had not predetermined the child's placement. Specifically, the court looked to the facts that the district held two IEP meetings in the month of August, the district took into consideration the results and recommendations from private testing, the district considered various placement options within the district as well as the parent's requested private school placement, a team member with authority to approve funds for a private school placement was at the 2nd IEP meeting, the district made arrangements for the parents to visit two placement options within the district, and the IEP team met for two hours to discuss the IEP and placement options. Based on evidence that the district considered the parents' request and all possible placement options, the court held that prior approval of the district's proposed placement was not predetermination.

The court made clear that a preformed opinion was not necessarily the same thing as an unlawful predetermination. IDEA allows districts to prepare for IEP meetings, including preparing reports, coming with pre-formed opinions, and preparing a proposal to a parent's request, as long as the district is willing to consider the requests of parents and allow parents to make suggestions or objections to the district's proposed placement. The intent of the district is important, as the district must maintain an open-mind to consider parent requests.

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Was that Email Evidence of Predetermination Under IDEA?, Cont.

How this Affects Your District:

1. Remember that district teams can meet in advance of IEP team meetings to discuss the best placement options to meet a student's needs, as long as the district presents the various placement options to the parent and considers the parents requests and objections.

2. Take care to void any language or presentation that comes across as a "take it or leave it" placement.

3. Remember, you don't have to give in to a parent's request. You only have to consider them and provide the parent a chance to be heard.

4. Remind staff to use caution with emails. Anything written in an email can be used as evidence to try to prove the district predetermined a student's placement.

5. When there is a dispute with parents, be sure to keep documentation regarding the team's efforts to consider all options for a student's placement (e.g., IEP team notes, notes from conversations with parents). In this case, the parents did not file due process until almost two years after the parents unilaterally placed the child in a private school.

Supreme Court Asked to Review Constitutionality of "I ♥ boobies" Bracelet Bans

A Pennsylvania school district approved filing a petition with the United States Supreme Court on October 29, 2013 so that the Court can review the constitutionality on districts' bans of "I ♥ boobies" cancer awareness bracelets.

Should the U.S. Supreme Court grant review of the case, it is likely that a new standard of speech regulation in schools could be established to supplement the legal standards established in the landmark cases *Tinker* and *Fraser*. Such determination will govern all school districts in the country, and would be an important legal development that will directly impact schools in Ohio. We will continue to monitor the situation and will keep you apprised of developments in the case.

Employer Options with Flexible Spending Accounts

The U.S. Department of Treasury and the IRS have amended the "Use-or-Lose" rule regarding flexible spending accounts (FSAs) to allow for a new carryover provision. Previously, if an employee failed to use all the funds in an FSA by the end of the year, the funds were forfeited, unless the employer had opted to participate in the 2 ½ month grace period. Under the new provisions, employers may chose to participate in a carryover provision, which would allow employees to carryover up to $500 in unused funds from a health care FSA into the following plan year. Additionally, the law allows for the provision to apply retroactively for the 2013 plan year, meaning that unused funds of up to $500 at the end of the 2013 plan year may be carried over to the 2014 plan year. For example, if an employee has $350 remaining in the FSA at the end of the 2013 plan year, the new carryover provision would allow the employee to use the $350 carried over funds for medical expenses through the 2014 plan year so long as their employer adopts the carry over.

Under the new provision, carried over funds may be used for applicable medical expenses. Carried over funds cannot be cashed out or used for other taxable or non-taxable benefits. Employers may elect to specify that reimbursements are first paid out from the current year's funds before paying out from the carried over funds. The carryover provision does not change the maximum payroll reduction limit for the plan year ($2,500 for 2014). Additionally, the carryover provision does not change the allowance of a run-out period, in which expenses from the prior year may be reimbursed from the prior year's funds during a run-out period at the beginning of the current year.

Employers may choose to participate in the new carryover provision, provide a grace period of 2 ½ months, or neither. Employers cannot choose to participate in both the carryover provision and the grace period. In making this determination, employers should keep in mind the benefits of each option. The grace period only provides an addition 2 ½ months for spending unused funds, but there is no cap to the amount of funds that can be used during the grace period. On the other hand, the carryover provision allows a full year to spend unused funds, but the carryover amount is capped at a maximum of $500.

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Employer Options with Flexible Spending Accounts, Cont.

If the employer chooses to participate in the carryover provision, this provision must be applied equally to all employees. In addition to allowing up to a $500 carryover, an employer may instead choose to specify a lower carry over amount.

There are potential benefits to consider regarding the new carryover provision. Employees gain increased flexibility for filing claims, providing more leeway for unexpected medical expenses. The increased flexibility may encourage more employees to participate in FSA plans. Additionally, providing flexibility may help cut back on wasteful end of the year FSA spending due to fear of forfeiture.

How this Affects Your District:

1. District's who offer flexible spending accounts will need to make a decision whether to participate in the new carryover provision before the end of the 2013 plan year for the provision to apply to any remaining funds at the end of the 2013 plan year.

2. If districts decide to participate in the carryover option, districts must amend the current plan on or before the last day of the plan year and provide notice to employees of the change.

3. Employers who currently offer the grace period for the 2013 year and decide to eliminate it in favor of the carryover for the 2013 year, must also consider ERISA implications. For questions regarding the implications on ERISA, please consult an ERF attorney.

Firm News

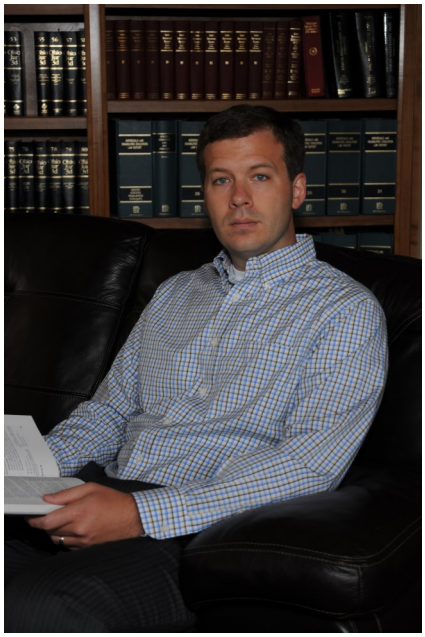
Ennis, Roberts & Fischer is pleased to announce that Gary T. Stedronsky will assume the position of Shareholder with the firm, effective January 1st, 2014.

Gary has been an integral part of the ERF Team since 2003, when he was hired to serve as the firm's law clerk. In 2005, Gary graduated from the University of Cincinnati College of Law and became an attorney with the firm. He has successfully represented and counseled public school districts and local municipalities on a wide range of issues, with an emphasis on employment matters, labor relations, property issues, public finance matters, property valuation, and tax incentives.

Gary is a member of the Ohio bar, and has been admitted to practice in the U.S. District Courts for both the Northern and Southern Districts of Ohio, as well as the United States Sixth Circuit Court of Appeals and the U.S. Bankruptcy Court for the Southern District of Ohio. He is also a frequent presenter on a variety of school law topics throughout the state.

Gary is very active in the education community, and generously donates his time and knowledge to a number of education-related organizations. Gary is a member of the Executive Committee of the Ohio Council of School Board Attorneys. He is also President of the Board of Directors for the Northern Kentucky Montessori Academy.

Gary is widely recognized in the legal profession for his professionalism and leadership as well. He was one of only 24 attorneys from across the state chosen to participate in the 2012 Ohio State Bar Association Leadership Academy. Gary is also a member of the Ohio State Bar Association, Cincinnati Bar Association, and the Ohio Municipal Attorneys Association.



Gary's ascension to Shareholder is not only a testament to his exceptional abilities as an attorney, but also the continued success of the firm and its commitment to excellence. Please join us in congratulating Gary on his new role at ERF!

Education Law Speeches/Seminars

2013-2014 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.

Levies and Bonds – December 5th, 2013
Presented by Gary Stedronsky and Brad Ruwe, Partner at Peck Shaffer & Williams LLP

Special Education Legal Update – March 6th, 2014
Presented by Bill Deters, Jeremy Neff and Erin Wessendorf-Wortman

OTES and OPES Trends and Hot Topics – June 12th, 2014
Presented by Bill Deters and Bronston McCord

Education Law Legal Updates 2013-2014 – July 10th, 2014 (Webinar ONLY, from 8:00 a.m. to 12:00 p.m.)

Other Upcoming Presentations

Pamela Leist
December 9th, 2013
School Law Legal Updates
Brown County ESC and Southern Ohio ESC

Check Out Our New Website!

ERF is pleased to announce the release of our newly redesigned website! The new website is built to provide user-friendly navigation with quick access to important school law resources as well as relevant information about the firm.

When entering the new site, be sure to look for our "Client Resources" page. Not only are you able to download archived copies of our *School Law Review* monthly newsletter, but users can also access a schedule of upcoming seminars and even register for ERF events.

You can view the new website at www.erflegal.com.

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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ERF Practice Teams

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Bronston McCord
Ryan LaFlamme
Gary Stedronsky

Workers' Compensation

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

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

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

Team Members:
Bill Deters
Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
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Gary Stedronsky
Jeremy Neff