E|R|F

Ennis Roberts Fischer

School Law Review

April 2011

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

Inside This Issue:

Clause Barring Charter School Against Public Policy

***Board of Education of the City School District of the City of Cincinnati v. Conners*, 2011-Ohio-1084 (March 11, 2011).**

Ohio's First District Court of Appeals in Hamilton County recently held that a clause precluding property from being used for school purposes violated Ohio's public policy. The Defendants may now establish the Cincinnati property as a charter school.

In 2009 Cincinnati Public Schools offered the former Roosevelt School on Tremont Street for public auction. All the marketing materials, purchase and sale agreements and deeds made note of a restriction which prohibited the property from being used for school purposes. The Connerses purchased the former Roosevelt School for $30,000 on June 30, 2009.

In October 2009, Cincinnati's zoning office approved the property to reopen as a charter school. When Cincinnati Public Schools received a letter from the Buckeye Institute for Public Policy Solutions informing it of the Conners' purposes, it sued. Cincinnati Public Schools sought a declaratory judgment and injunctive relief that the deed restriction was valid and enjoining the Connerses from opening a school on the property. The trial court found for the Connerses.

On appeal, Cincinnati Public Schools argued that the trial court interfered with its right to contract. The Court of Appeals agreed that Cincinnati Public Schools does have a right to contract under R.C. 3317.17. However, this right is not absolute. The Court also pointed out that if contract terms are contrary to public policy, they are void.

The Court next defined public policy. Public policy is a "principal of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good." Contracts that are against public policy are not enforceable.

In this case, the Court found that the deed restriction did violate public policy. In fact, it directly contradicts R.C. 3313.41(G)(1) which provides that if a district disposes of property suitable for classroom space, it must first offer the property to governing authorities for the purpose of starting a community school.

Contrary to Cincinnati Public Schools' arguments, the Court found that the statute indicates clear policy regarding sales of school property. Cincinnati Public Schools claimed that since other Ohio law regulates community schools, this showed that Ohio public policy does not clearly side with community schools. The Court reasoned, however, that regulation does not negate the other statute in favor of community schools. As a result, the restriction on the deed violated public policy, and that clause of the contract was not enforceable.

How This Affects your District:

This case is significant since it points out an important doctrine and law relevant to contracts to sell school district property. First, districts are explicitly told that any contractual clause precluding a buyer of district property from using the land and build-

(Continued on page 2)

Clause Barring Charter School Against Public Policy, Cont.

ings for school purposes will not be upheld.

This case also confirms Ohio public policy supporting community schools. Court refusal to uphold a clause such as the one CPS tried to enforce does not interfere with a school district's right to contract. In addition, districts should be aware that when they do decide to dispose of property, they must first offer to sell the property to entities that might use it for community schools purposes.

District Court Upholds Interference but Not Retaliation in FMLA Case

***Terwilliger v. Howard Memorial Hospital*, 09-CV-4055 (W.D.Ark January 27, 2011).**

The Western District of Arkansas recently denied summary judgment for a plaintiff's claim that her employer had interfered with her right to FMLA leave. However, the court did grant summary judgment to the defendant for plaintiff's retaliation claim.

Terwilliger worked for defendant Howard Memorial Hospital (Howard Memorial) as a housekeeper. She had a master key and was assigned to clean certain areas of the hospital during her shift. In 2008 Terwilliger applied for and received approval Family Medical Leave Act (FMLA) leave to have back surgery. She had surgery on January 29, 2009, was released without restrictions on February 12, and went back to work on February 16.

While Terwilliger took FMLA leave her supervisor, Kim Howard, called every week to ask when she would return to work. Feeling pressured, Terwilliger asked if her job was in danger. Howard responded that she should return to work as soon as possible.

In October and November 2008 other employees had money stolen from desks and/or lockers. Terwilliger was suspected of the theft since no money was stolen on days she was not at work. As a result, in December Howard Memorial placed a video camera on the desk of an employee whose money had been stolen. Another employee was taped stealing.

In March, Terwilliger was taped in the same office before her shift began on a day she was not scheduled to clean it. It is contested as to whether she was pulling out a trash can or opening a drawer; however, both parties agree that nothing was taken. Howard Memorial fired Terwilliger for theft three days later.

The Court began its analysis by identifying that plaintiff claimed first, that Howard Memorial had interfered with her substantive rights under the FMLA, and second, that Howard Memorial discriminated against her for exercising FMLA rights.

To prove interference, Terwilliger had to show that Howard Memorial denied her benefits she was entitled to under the FMLA. In this case, Terwilliger asserted that she was discouraged from using her full FMLA leave because of Howard's weekly phone calls asking when she would return to work. When Terwilliger asked if her job was at risk, Howard simply told her to return to work as soon as possible. Another employee discouraged her from taking FMLA leave by telling Terwilliger not to tell anyone that he had informed her of her rights regarding the leave.

Despite Howard Memorial's argument that Terwilliger could not claim interference when she returned to work after a doctor released her to, the Court found that a jury could determine that the defendants interfered with Terwilliger's rights regarding FMLA by discouraging her from exercising her rights. This was enough to deny summary judgment.

The Court next addressed the retaliation claim. If there is no direct evidence of retaliation, burden shifting in the McDonnell Douglas framework occurs. In this case, Terwilliger had to show that she engaged in an activity protected by FMLA, that she suffered adverse employment action, and that there was a causal connection between the two. The burden then switched and Howard Memorial was required to show a legitimate, nondiscriminatory reason for the adverse action. The Court found the burden was met so Terwilliger had to show evidence creating an issue of fact as to whether the defendant's reason is pretext.

No one disputed that Terwilliger established a prima facie case, satisfying the first burden. The burden then switched to Howard Memorial to show a nondiscriminatory reason for its action. The Court found that Howard Memorial's reason, suspicion of theft, met that burden. However, when the burden shifted back to Terwilliger, the Court found she could not show that Howard Memorial's reason was pretext.

In deciding that Terwilliger could not show Howard Memorial's reason for firing her was pretext, the Court began by addressing

(Continued on page 3)

District Court Upholds Interference but Not Retaliation in FMLA Case, Cont.

Terwilliger's claims that Howard Memorial changed its explanation. Terwilliger pointed out that Howard Memorial first said she was terminated because of theft, but then changed the reason to suspicion of theft.

However, the Court noted evidence that showed Howard Memorial believed Terwilliger would have stolen if someone had not already: she was not assigned to clean that particular desk that day, and she cleaned the desk before she clocked in for work. The Court found that there was evidence that Howard Memorial honestly believed Terwilliger had attempted to steal, which suggested their reason for termination was not pretext.

Terwilliger next argued that Howard Memorial's reason for terminating her had no basis. However, the Court found that proving theft was not required. The issue was whether Howard Memorial's reason for terminating her was pretext. Again, the Court articulated that Howard Memorial had shown an honest belief that Terwilliger had tried to steal. Thus, their reason was not pretext and the retaliation claim failed.

How This Affects Your District:

Although this case is not controlling in Ohio's federal courts, it outlines interference and retaliation claims under the Family Medical Leave Act. This warns employers what behavior interferes with an employee's rights under the FMLA and when termination is acceptable after an employee has taken FMLA leave.

Although the Court did not actually determine whether interference occurred, it did recognize that if an employee feels she must return to work to keep her job, the employer may have violated that employee's rights.

Second, if an employee has recently taken FMLA leave, the employer must be very careful to make sure it does not act in a way that could be considered retaliation. Districts should have good and well-documented reasons for adverse employment actions. The reasons must not in any way be related to the employee's FMLA leave.

USSC Expands Employer Liability Under USERRA

***Staub v. Proctor Hospital*, No. 09-400 (U.S. March 1, 2011).**

The United States Supreme Court recently found that discriminatory actions by supervisors that influenced another's decision to terminate an employee could result in employer liability for discrimination claims under the Uniformed Services Employment and Reemployment Rights Act.

Vincent Staub was employed at Proctor Hospital (Proctor) as an angiography technician until his termination in 2004. During his employment his immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were openly hostile to Staub's military obligations as a member of the United States Army Reserve. Mulally scheduled Staub for extra shifts so he could "pay the department back for everyone else having to bend over backwards to cover his schedule for the Reserves". She also complained to co-workers about Staub and evidence showed she was out to have him fired. Korenchuk referred to the obligations as "a bunch of smoking and joking and a waste of taxpayer money." Korenchuk also knew that Mulally was out to get Staub.

Staub received a "Corrective Action" in January 2004 for allegedly failing to stay in his work area when he was not with a patient. It is not clear whether this was a legitimate company policy. From then on, he had to report to Mulally or Korenchuk when he did not have patients and his angio cases were completed.

In April 2004, Korenchuk informed Linda Buck, Vice President of Human Resources, that Staub was away from his desk in violation of the "Corrective Action". Staub maintains he left Korenchuk a voicemail informing him he was leaving his desk. Buck then fired Staub relying on Korenchuk's accusation and Staub's personnel file. Staub sued under USERRA claiming that he was terminated as a result of hostility towards his military obligations.

The Supreme Court had to determine whether animosity toward Staub's military service was a "motivating factor in the employer's action" when the person who made the decision was not biased, but was influenced by other supervisors who were. The Court first considered tort law. Intentional torts require the actor to have intended the consequences of an act, not only the act itself. The Court found that if a supervisor's discriminatory report influences an employee's termination, and the supervisor intended him to be fired, then the employer could be liable.

(Continued on page 4)

USSC Expands Employer Liability Under USERRA, Cont.

When deciding this, the Supreme Court rejected Proctor's argument that an employer can only be liable under USERRA if the employee who actually made the adverse employment decision acted with discriminatory animus. It found that approach unreasonable since various employees are often responsible for other employee's rewards, punishment, or dismissal. For example, the ultimate decision maker considers supervisors' performance assessments.

The Court also found that the individual decision maker's judgment does not always negate the supervisor's intention for adverse action. If the supervisor's bias is a causal factor in the adverse employment action, the employer could be liable.

In this case, Mulally and Korenchuk acted within the scope of their employment when their actions caused Staub's adverse employment action. There was also evidence their actions were the result of hostility toward Staub's military obligations. As a result, the Supreme Court found that a reasonable jury could determine that the supervisors intended to cause Staub's termination.

The Supreme Court ultimately reversed the Seventh Circuit's determination for Proctor and remanded the case back to the Circuit Court to determine whether incorrect jury instructions were harmless.

How This Affects Your District:

As a result of this case, school districts are wise to make sure supervisors are not acting with animus toward employees with military obligations. The Supreme Court found that employers can be liable under USERRA if: 1) there is some sort of adverse employment action; 2) a supervisor acts in a discriminatory manner; 3) the supervisor acted with an intention to cause adverse employment action; and 4) the act is a proximate cause of the adverse employment action (i.e. it may not be the direct cause).

To avoid liability, districts should make sure to thoroughly investigate claims of anti-military sentiment that may have affected employment action. Thorough investigations and careful decision-making can prevent district liability. Consulting an attorney can help ensure that employment actions are within the law.

Governor Likely to End Mandatory All-Day Kindergarten

House Bill 30

The Ohio General Assembly recently passed House Bill 30, which will make all-day kindergarten optional for school districts. Governor Kasich signed the law on March 30, 2011.

The House of Representatives passed House Bill 30 on February 16 and the Senate voted for the bill on March 15. Since the Governor signed the bill on March 30, the new bill becomes law three months later on June 29, 2011. The law will reverse former Governor Ted Strickland's legislation making all-day kindergarten mandatory. The former governor passed the previous law in an effort for educational reform. However, many school districts sought waivers for all-day kindergarten because of the significant extra cost it requires.

The first change resulting from House Bill 30 will allow some districts to charge for all-day kindergarten. If a school district did not receive poverty-based assistance for all-day kindergarten in 2009 they may charge tuition. However, tuition must be calculated per-person according to a sliding scale based on income.

House Bill 30 also allows school districts to determine what times kindergarten classes are offered in addition to the length of the kindergarteners' school day. Children attending kindergarten in any school district will not be required to stay longer than the half-day kindergarten hours. In addition, if a district offers all-day kindergarten, it must ensure it can accommodate parents who elect for the more traditional option.

How This Affects Your District:

Many school districts are financially unable to comply with Ohio's mandatory all-day kindergarten requirement and applied for waivers under the old requirements. Under House Bill 30, districts will no longer be subject to this requirement and may provide kindergarten classes as it makes sense in their district.

Other schools already provided all-day kindergarten before it was mandatory or implemented all-day kindergarten as a result of the former law. The new bill will not preclude these districts from providing extended kindergarten once the bill become effective. However, if a district only had all-day kindergarten, it will need to begin a traditional, half-day option.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

Jeremy Neff
At Brown County on April 18, 2011
Cyber-Law

Bill Deters
At FMCS Mediator/Arbitrator Symposium on May 12-13, 2011
Employment Issues Arising from Social Networking Sites

Bill Deters
At OSBA's Cyberlaw Technology and the Law Seminar on May 17, 2011
Acceptable-Use Policies and Today's Technology

Bill Deters and Bronston McCord
April 7th, 2011— *Senate Bill 5 Webinar*

Administrator's Academy Dates at Great Oaks Instructional Resource Center

April 7th, 2011 – *Media and Public Relations*

June 21st, 2011 – *Student Education and Discipline*

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

Pamela A. Leist
pleist@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com

Erin Wessendorf-Wortman
ewwortman@erflegal.com