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May 2011

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Third Circuit Upholds Verdict on Right to Petition

***Guarnieri v. Duryea Borough*, 08-3949 (3rd Cir. 2010).**

The Third Circuit recently upheld a jury verdict that Duryea Borough violated former Chief of Police Guarnieri's First Amendment right to petition. The Supreme Court granted certiorari and heard oral arguments on March 22, 2011.

Guarnieri was fired from his position as Chief of Police in February 2003 but was later reinstated after winning a grievance. Duryea's Council then issued "directives" to Guarnieri his first day back on the job outlining things he must and could not do. An arbitrator ordered the city to modify or strike some of the directives.

Guarnieri later filed suit claiming that the directives were unconstitutional retaliation for having won his grievance which violated his First Amendment right to Petition. The jury found for Guarnieri. Defendants appealed arguing, 1) the First Amendment did not protect government employees from retaliation from filing petitions unless the petitions are of public concern; 2) Guarnieri's petitioning was not protected because it was performed with official duties; 3) defendants should have had qualified immunity because the law was not clearly established; and 4) the evidence was insufficient to support defendants' liability.

The Third Circuit first stated that a public employee who has filed a petition is protected under the Petition Clause from retaliation, even if it is a private concern. Although it noted that other circuits disagree, the Court refused to deviate from precedent.

Next, the Court addressed the sufficiency of the evidence. It did not agree that evidence suggesting retaliation was too tenuous. It also refused to overturn the jury verdict that the retaliation would have deterred an ordinary person from exercising First Amendment rights.

The Third Circuit next discussed the claim for a new trial. Defendants' alleged that a new trial should be granted because parts of the 2005 arbitrator's report were not permitted to be entered into evidence. It did not, however, find any error in the trial court's determination that the sections were hearsay, and other arguments were unconvincing.

Finally, the Court agreed with plaintiffs that the District Court should not have reduced attorney fees. However, the Court did strike punitive damages since the defendants were not reckless or callously indifferent.

How This Affects Your District:

This case provides an example of the right to petition. Districts should be aware that public employees have a right to petition and file grievances. Employees even enjoy protection from retaliation.

However, the Federal Court of Appeals for the Sixth Circuit, which governs Ohio, differs slightly from the Third Circuit on this issue. The Sixth Circuit does not extend the right to be free from retaliation for petitions on private concerns. The Sixth Circuit recently commented on this issue in *Holzemer v. City of Memphis* and stated that employees must show that the petition regarded a public concern.

Court Grants Immunity and Allows Coach's Consent to Search Students

***Lopera v. Town of Coventry*, 09-2386 (April 1, 2011).**

The First Circuit recently granted immunity to police officers in a Fourth Amendment suit. The officers searched members of a soccer team after allegations that the players stole items from the home team's locker room.

In September 2006, the Central Falls High School soccer team traveled to Coventry, Rhode Island to play a soccer match against Coventry High School. Before the game, a security guard escorted the Central Falls players to the Coventry locker room to use the restroom.

During the game, the Coventry players allegedly used racial slurs towards the Central Falls players. Central Falls is a diverse school and all of the soccer players were Spanish-speaking Hispanic players. The Coventry team, on the other hand, was predominantly non-Hispanic and white.

After the game, the players were walking toward their bus when a group of Coventry students and parents formed around them and accused the Central Falls players of stealing IPods and cell phones when they went into the Coventry locker room. After the situation began to escalate, Central Falls' Coach Marchand searched his players' bags, knowing they had not stolen anything. None of the allegedly stolen items were found.

After the first search, the crowd swelled to fifty or sixty students and adults. They were yelling at the players and using racial slurs. At this point, the Coventry police arrived and surrounded the bus. The police discussed the situation with the Coventry Athletic Director and Coach Marchand.

The police then asked Coach Marchand if they could search the players. He consented because he did not see another way to handle the situation. The officers were not coercive and reprimanded unruly members of the crowd. The police did not find any of the missing items and finally escorted the bus out of town.

As a result of their experience, members of the Central Falls soccer team filed suit in April 2008 against the Town of Coventry and several individual Coventry police officers. They sued under Rhode Island state law and § 1983 asserting their right to be free from unreasonable search and seizure and rights to due process and equal protection were violated. The First Circuit concentrated only on whether the individual officers had qualified immunity from the Fourth Amendment and state privacy law claims, and on whether there were facts to support the claim that the officers were impermissibly racially motivated.

Immunity is granted unless a government official's conduct violates established statutory or constitutional rights that a reasonable person would have known. Therefore, the test asks, 1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and 2) if so, whether the right was clearly established at the time of the defendant's alleged violation.

In addition, the Court stated that immunity is called for if a reasonable officer could have believed his conduct was lawful. The test is objective and does not look at the defendant's subjective beliefs but those of a reasonable officer.

After outlining the appropriate test, the First Circuit applied it to this case. It found that a reasonable officer could have believed Coach Marchand had the authority to consent to a search of the students because he stood *in loco parentis* to the players on the trip. In addition, Coach Marchand's consent was valid because the officers did not coerce him. A reasonable officer could find that the crowd persuaded Coach Marchand's consent, not any of the officers. The officers asked to search, not commanded. According to the Court, Coach Marchand faced a difficult choice, but he was not coerced. The fact that the police surrounded the bus, did not dispel the crowd, and that the crowd scared Coach Marchand did not persuade the Court otherwise.

The Court next moved to the Equal Protection and state racial discrimination claims. The test for this analysis asks, 1) whether the appellant was treated differently than others similarly situated; and 2) whether such difference was based on an impermissible consideration, such as race. The defendant must have actually continued on a course of action in part because of its negative affects on the protected group.

The Court found that the plaintiffs did not show a violation of the equal protection clause because they did not clearly establish that the acts effectuated the discriminatory intent of the crowd. The Court found that not all reasonable officers would have believed that the search resulted in differential treatment. There was no evidence that the officers had any racial bias and they acted politely and reprimanded the crowd. This analysis also applied to the state claim. As a result of these analyses, the officers

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Court Grants Immunity and Allows Coach's Consent to Search Students, cont.

were protected with qualified immunity.

How This Affects Your District:

This case is a unique example of when immunity is granted to public employees and is helpful because the First Circuit clearly lays out the test.

School employees should first make sure they act within their employment, and second, try not to violate a constitutional right. If an employee takes these precautions and is sued, the plaintiff must prove that a public employee clearly would have understood that he or she must refrain from the action. When precautions are taken, this will be harder to prove.

As a result, when a public employee acts, or does not act, he or she should make sure they do so without bias and according to their employment position. Various situations can arise in school districts where others feel their rights have been violated; thus, it is important for staff and administration to consider their actions and act in a way that will help a court find the employee is immune from liability.

Also, this case, while not precedent, suggests that a district employee may consent to a search of students. With field trips, sporting events, and other activities taking place, it is important for district employees to understand their rights when they stand *in loco parentis* to students.

Court Determines Home Placement Provides FAPE

***Sumter v. Hefferman*, No. 09-1921 (April 27, 2011).**

The United States Court of Appeals for the Fourth Circuit held recently that a special education student's home placement was appropriate. Evidence suggested the child was receiving an adequate education despite the fact that it may not have been the least restrictive environment.

T.H. was a middle school student in Sumter School District until 2006. He has severe autism as he is functionally non-verbal and very sensitive to noise. T.H. did not do well during the 2005-2006 school year. He received 7.5-10 hours of the applied behavioral analysis ("ABA") therapy required in his IEP. He began to exhibit damaging self-stimulating behavior such as biting, and wiping his nose and face so much they bled.

In 2006 a new teacher, Cassandra Painter, came to the school first as an aide, then as T.H.'s lead teacher. Painter was trained in ABA therapy and T.H. thrived under her teaching. After awhile he was able to sit and work for twenty minutes at a time, rather than only seconds. In August 2006, Painter left for another school. Under the new teacher, Sharon James, T.H. regressed to his previous point again demonstrating self-abuse and an aversion to teaching. In September 2006, T.H.'s parents removed him from the school and began providing ABA therapy 30 hours per week at home. They then initiated due process proceedings alleging that the school district did not provide T.H. with FAPE as required by the IDEA. The school district appealed.

The school district raised two issues on appeal: first, that the district court erred by holding that the school district did not provide FAPE during 2005-2006 and that the court failed to recognize that the problems were remedied. Second, the school district argued that the district court should have found T.H.'s home placement was inappropriate for his "stay put" placement.

The Court agreed with the school district that an IEP does not have to be performed perfectly to confer FAPE. However, a material or significant portion of the IEP must be provided. The Court disagreed that the school district had materially or significantly performed on the IEP.

First, evidence suggested the 2005-2006 school year was difficult, T.H. learned little, and he acted out. This, along with the determination that the state review officer and the district court had properly considered lower opinions, led the Court to conclude that there was no clear error in the district court's opinion.

The Court next determined whether the school district was ca-

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Court Determines Home Placement Provides FAPE, cont.

pable of providing FAPE after December 6, 2006. The Court assumed that the school district's later capability to properly implement the IEP was relevant to the remedial question. However, it could not find that the district court erred in determining otherwise. There was no indication that the school district did more than talk to consultants. No one had actually provided services.

Finally, the Court considered whether the home placement was appropriate and could serve as the "stay put" placement. The "stay put" provision requires that the child remain in his or her current educational setting during proceedings. Under the IDEA, placements should also be in the least restrictive environment to the maximum extent possible. The Court agreed with the district court that the parents do not necessarily need to meet the least restrictive environment and found a parental placement can be appropriate even if it is not in the least restrictive environment.

Applying this law, the Court found that T.H.'s parents were aware he needed interaction with other children. They and his ABA therapist regularly took T.H. out for social interactions. There was also no evidence that the district court improperly considered the evidence. These facts were also sufficient to support the determination that the home placement was appropriate. There was no clear error.

How This Affects Your District:

Sumter v. Heffernan is an interesting case because home placements are unusual and because it addresses whether they are appropriate despite the fact that they may not be the least restrictive environment. The Fourth Circuit determined that the least restrictive environment is not necessary, but preferable. This case indicates that if an effort is made to make the home placement less restrictive, it is acceptable. However, as the home placement was not necessarily permanent here, this case does not answer whether a permanent home placement would be acceptable.

Legislative Update

Federal

IDEA Fairness Restoration Act

- Introduced by Senators Tom Harkin, Barbara Mikulski, and Bernie Sanders
  - On March 17 the Bill was referred to the Committee on Health, Education, Labor, and Pensions where it remains.
- Introduced in the House by Representatives by Representatives Chris Van Hollen and Pete Sessions
  - On March 17 the Bill was sent to the House Committee on Education and the Workforce
  - It was sent to the Subcommittee on Early Childhood, Elementary and Secondary Education on April 4
- Allows parents to recover expert witness fees in due process hearings and litigation under the IDEA
- The legislation also includes costs for tests or evaluations for the parents' case, in IDEA's definition of attorney fees
- It would override *Arlington Central School District v. Murphy* in which the USSC ruled that parents cannot be reimbursed for expert witness fees incurred in due process proceedings.

Ohio

House Bill 202

- House Bill 202 was introduced in the House of Representatives on April 12 and is currently in the Committee on Health and Aging.
- The bill is sponsored by Representative Richard Hollington of the 98th District representing Geauga and part of Cuyahoga Counties.
- The Bill would "limit the retirement benefit of a re-employed retiree of a public retirement system and eliminate the deferred retirement option plan in the Ohio Police and Fire Pension Fund and State Highway Patrol Retirement System."
- The Bill still allows retirees to be publicly employed. However it changes the retirement benefits they can receive in their new position.
- If the retiree's new position pays more than $14,160 annually, the retiree must forfeit one dollar of retirement benefit of the new position for every two dollars he or she makes.

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

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

Administrator's Academy Dates at Great Oaks Instructional Resource Center

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

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