



Ennis Roberts Fischer SCHOOL LAW REVIEW



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Anonymous Tip May Lead to Reasonable Suspicion for Search

People v. Perreault, 781 NW2d 796 (May 21, 2010).

The Supreme Court of Michigan recently held that an anonymous tip to police could provide the reasonable suspicion required for searches conducted by administrators on school property.

In April, 2008 an anonymous tipster called a local tip hotline to report marijuana trafficking at Traverse City Central High School. The tipster provided detailed information regarding four "big dealers", one of whom was the defendant. The tipster said that defendant sold marijuana from school, his truck, and East Bay Park in Traverse City.

The tip was relayed to the school's liaison officer, Officer Warsecke, who told Principal VanderMolen about the tip. Mr. VanderMolen then searched defendant's car. Defendant did not consent to the search but was present when a bag of marijuana was found.

Defendant was convicted of drug trafficking but the Court of Appeals reversed, holding the search unconstitutional.

On appeal the Supreme Court disagreed and relied on the Court of Appeal's dissenting opinion.

The dissent first noted that reasonable suspicion, is the standard required to search a student's person or property on school grounds. This standard requires articulable reasons and a particular, objective basis for suspecting the person of a crime.

The opinion next discussed anonymous tips. Alone, anonymous tips do not rise to reasonable suspicion. They must be considered within the totality of the circumstances to establish that the tip is reliable. The tipster said he had seen defendant sell marijuana out of his S-10 truck. He described the four "big dealers" in enough detail, later verified, to suggest he was reliable.

Reasonable suspicion arose from that information along with other facts Mr. VanderMolen knew about defendant. He knew he drove a truck from a reckless driving incident and that defendant appeared to be associated with drug-related problems in junior high. Finally, Mr. Vander-

Molen could see a plastic bag in the truck, although could not tell what was in it. These facts met the totality of the circumstances test. The Supreme Court held the search was lawful, and reinstated defendant's conviction.

How This Affects Your District:

Districts should first be aware of the reasonable suspicion standard. Administrators must have more than a "hunch" to search. They need to be able to articulate reasons for their suspicion on a particularized, objective basis. This standard applies to all searches at school.

If administrators receive an anonymous tip, it must be considered along with the totality of the circumstances to be reliable. This may include confirming the tipster's information or considering what administrators already know about a suspect.

Administrators can also avoid some challenges to searches by establishing a policy stating that students implicitly consent to searches by choosing to park on school grounds.

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

Nebraska Allows Question of District Liability to Proceed to Trial

A.W. v. Lancaster County School District, 784 N.W.2d 907 (Neb. July 16, 2010).

The Supreme Court of Nebraska recently held that a jury, not a judge, must decide whether Lancaster County School District in Lincoln Nebraska negligently handled the presence of an intruder who sexually assaulted a kindergarten student in the bathroom.

In 2005 Joseph Siems walked into Arnold Elementary School through the main entrance. The main entrance is near the school office. Usually office staff are responsible for identifying visitors and making sure they sign in. When Siems entered, however, two secretaries were out of the office and the third was busy making photocopies.

Shortly after entering the school, Siems was spotted by Olson, a teacher, who asked if she could help him find anything. When he walked by and ignored her, she immediately went to the office to find out if anyone matching his description had signed in.

Two other teachers, Long and Peters, then saw Siems and asked if they could help him. He ignored their first inquiry, then stated that he needed to use the restroom after he was asked a second time. Long pointed him to a restroom she knew was empty and told him to go to the office when he was done. Peters saw Siems go into the restroom, but no one kept track of him after he had entered.

Next, Siems apparently went into a different restroom where he sexually assaulted C.B., a kindergarten. C.B. reported to his teacher that a "bad man" was in the restroom. He then relayed that Siems had lowered his pants and

performed oral sex on him for a short time.

Simultaneously, Olson confirmed that Siems had not signed in. She asked a secretary to find the administrator on duty, Shannon Mitchell. Mitchell found Siems in a bathroom stall. No one else was in the bathroom and Mitchell stopped other children from entering. C.B.'s teacher then found Mitchell on her way to the bathroom and they then initiated a "Code Red" lockdown and called 911. Siems was detained by a custodian and another administrator before police arrested him.

When this case reached the Nebraska Supreme Court, summary judgment had been granted in favor of the school district. The Supreme Court reversed that decision.

The Supreme Court first noted that both parties agreed the District has a duty to protect its students. The parties disagreed as to whether that duty had negligently been breached. The Court concluded that the lower courts should not have decided whether the attack was foreseeable, which essentially decided whether the school was negligent.

The Court discussed that judges should only decide legal issues while questions of fact are left to the jury. Consulting other courts and suggested legal rules, the Court determined that foreseeability is a factual issue. The jury should have been allowed to assess the foreseeable risk a student would be sexually assaulted during school by considering multiple factors such as neighborhood safety.

Foreseeability helps determine whether the duty to keep C.B. safe was breached and whether the

school was negligent. Since the lower court had decided this issue and granted summary judgment, the Court reversed the decision and sent the case back to the lower court so the issue could be posed to a jury. The jury would decide if the school acted appropriately.

The Court found little merit to plaintiff's second claim that the district's safety and security plan did not comply with state regulations. It noted that state regulations do not expand liability beyond the school's usual duty of reasonable care. The Court did conclude, however, that the regulations may be allowed as evidence of a specific standard of care which the school may have breached.

How this Affects Your District:

Districts do have a duty to ensure their students are safe. Each school should have specific procedures designed to protect students from intruders and other dangerous situations. Federal and state laws and regulations may dictate what types of protocol are required and how they should be written. An appropriate and legally sound policy should be developed with input from multiple sources including law enforcement.

However, schools are not liable for injuries unless school officials do not respond reasonably to a dangerous situation. To prevent an accident and also liability if a situation occurs, districts should ensure their protocol is clear. Teachers and other staff should be trained in exactly what to do. Training should be periodically reviewed so staff do not forget what is required of them. Conveying what type of situations a protocol is designed to prevent may also help teachers to act accordingly when a school is threatened.

Employee Terminated Before Rehabilitation was Available Loses on State Claims

Doe v. Ronan, et al., Slip Opinion No. 2010-Ohio-5072 (Ohio October 26, 2010).

The Ohio Supreme Court recently decided a question of state law for the United States Federal Court for the Southern District of Ohio. The Supreme Court held that obligations within employment contracts between an administrative employee and certain school districts are not impaired by Ohio law that excludes non-rehabilitated felons from school district employment. The Court also held that the law is not retroactive.

In 1976, Doe was convicted of drug trafficking and served three years in jail. After his release, Doe earned a college education, became a licensed social worker, and became certified as a chemical dependency counselor. His conviction was expunged in 1997 and he was employed by Cincinnati Public Schools (CPS) as a drug-free-school specialist the same year.

In 2002, Doe began an administrative position. His only contact with children was at hearings where their guardians were also present.

2007's House Bill 190 extended a background check requirement to administrative employees. It previously was only required for licensed and certified school-district employees. The list of offenses precluding employment for a school district include drug-trafficking so this restriction was also applied to administrative employees. No rehabilitation was applicable to drug-trafficking offenses at that time.

In 2008, Doe signed a contract for a hearing officer position. The contract was subject to confirmation of state certification. During a

background check for the position, CPS discovered Doe's prior conviction and dismissed him.

In 2009, ODE wrote regulations allowing rehabilitation of drug-trafficking offenses over ten years old. This allowed those employees to keep or obtain jobs with school districts.

Unfortunately, Doe's contract was written in 2008, after the new laws requiring his background check became effective, but before rehabilitation was available. Filing suit, Doe argued that his termination violated his employment contract and that the law resulting from House Bill 190 was unconstitutionally retroactive.

To determine whether the new statute unconstitutionally impairs a contract, the Supreme Court utilized a two-part test. The Court should first determine whether the law is a substantial impairment of a contractual relationship. If so, the Court must decide whether the law is reasonable and needed for an important public purpose.

In addressing the first question, the Court noted that when an employee and a school district enter into a contract pursuant to the law, the statutes are implied terms and conditions incorporated into the contract. Thus, since Doe's contract was entered into in 2008 after House Bill 190 was law, it was subject to state certification which includes a background check.

In addition, Doe's employment was conditioned upon his background check, which he did not pass. Thus CPS was not obligated to perform the contract. The contract never became binding.

Doe next argued that his contract was a continuing contract as a

nonteaching employee pursuant to O.R.C. 3319.081. The Court disagreed with this position. It stated that the continuing contracts provided for under that statute do not apply to school districts like CPS, which are governed by a different group of laws. Thus, Doe and CPS could not have entered into a continuing contract.

Doe's third argument claimed that the 2009 administrative rules allowing for rehabilitation impaired his employment contract. He claimed that if ODE had acted more quickly in establishing the regulations allowing rehabilitation for non-licensed employees with previous drug-trafficking convictions, he could have shown rehabilitation and CPS may have maintained his employment.

Here the Court noted that Doe was very qualified for his job and a model citizen since his release from jail. However, the Court stated that the 2009 rehabilitation regulations were not required of ODE. Thus, the fact that they were not established until 2009 while House Bill 190 was passed in 2007 does not matter. The Court held that the background-check statutes and regulations did not impair his contractual relationship.

Doe's final argument claimed that the background-check law is unconstitutionally retroactive. The Ohio Constitution prohibits the general assembly from passing retroactive laws. Doe reasoned that since the statute applies to a prior conviction that pre-dates employment, it is unconstitutional.

The Supreme Court disagreed. It found that the law simply imposes a new restriction. It is not retroactive since it does not terminate a person on their initial hire date and

Employee Terminated Before Rehabilitation was Available Loses on State Claims

eliminate the employee's benefits and income earned since then. Finally, even if the Court had found the law to be retroactive, it already found that the statute does not impair a right to employment.

How this Affects Your District:

This case effectively holds that former employees and potential employees under contract who had situations similar to Doe's were treated appropriately under the

statutes and regulations at the time. It is unfortunate they fell into a gap where their termination was required. However, the Supreme Court could find no wrongdoing by CPS under any of Doe's claims. There was simply no legal remedy.

This case is extremely important to districts who may be facing a similar lawsuit. If another plaintiff has raised similar claims, the district may be able to use this case to encourage settlement.

In addition, districts should be aware they that have a choice as to whether they hire employees who have been rehabilitated. Employees like Doe, who have overcome convictions to become very effective and valuable employees may be kept despite their history. On the other hand, this is never necessary. School districts still have a duty to keep their students safe from harm.

No Constitutional Right for Non-Custodial Parents to Visit Children at School

Schmidt v. Des Moines Public Schools, No. 4:08-CV-477 (S.D. Iowa September 23, 2010).

The Federal Court for the Southern District of Iowa recently decided that a non-custodial parent's rights to due process and equal protection were not violated when the school district would not allow her to see her children during school hours.

Lisa, the Plaintiff, and Michael Schmidt are divorced. Pursuant to their divorce decree, they share joint legal custody of their three children and Michael has physical custody. The terms of Lisa's visitation rights were in the decree.

On several occasions Lisa attempted to visit her children at school. She also tried to pick them up early and obtain their school work. Des Moines Public Schools (DMPS) did not allow any of this as its policy on the rights of custodial and non-custodial parents prohibited it from straying from the terms of the parents' divorce decree. After Lisa's attempts continued, DMPS attorney Elizabeth Nigut sent an email to the children's schools stating first, that if Lisa wished to see her children beyond what visitation is specified in the vacation and

holiday schedule set forth in the divorce decree, that visitation must be mutually agreed to by Michael Schmidt. Second, the letter stated that if Lisa showed up at school when she was not expected, staff must call Michael and he must agree to the visitation before Lisa could see her children. After her many attempts to visit her children, Lisa finally sued.

The Court first tackled Lisa's substantive due process claim that she was deprived of "her fundamental right to direct the education of her children and/or her fundamental right to direct the care, custody and control of her children." In resolving the issue the Court asked: 1) whether Lisa was denied a protected liberty interest, and 2) if the school's conduct shocked the conscience.

The Court found that although Lisa does have a right to bring up her children as she chooses, she does not have a right to visit her children at school. Even if she did, the school's action did not shock the conscience.

Finally, the Court found that DMPS did not violate Lisa's rights when it failed to provide her with her children's educational records. She was not unconditionally denied

the records and the school again did not shock the conscious.

Lastly, the Court threw out all other claims. The federal procedural due process claim, and both state due process claims, were disposed of because Lisa was not deprived of a liberty interest. Since Lisa could not show she was treated differently than a married parent without physical custody rights and limited visitation, her equal protection claims also failed.

How This Affects Your District:

While not binding on Ohio Courts, this case is helpful to districts in that it supports their decisions to abide by custody agreements. It also suggests there generally is no right to visit children at school.

Districts should draft policies regarding custodial and non-custodial parents' ability to visit school during the day as DMPS had. Restricting parents' visitation rights can be very confrontational. A policy is helpful to provide school staff with support for their position while also informing them of action to take when faced with an angry parent.

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

To schedule a speech or seminar for your district, contact us today!

Administrator's Academy Dates at Great Oaks Instructional Resource Center

January 20th, 2011– *Gear Up for Negotiations*

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

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

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