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School Law Review

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Inside This Issue:

Supreme Court Rules in Favor of Employers

***Univ. of Texas Sw. Med. Ctr. v. Nassar*, 12-484, 2013 WL 3155234 (U.S. June 24, 2013).**

On Monday, June 24, 2013, the U.S. Supreme Court ruled on two cases involving Title VII harassment claims. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, sex, religion, or national origin. In the case of *Vance v. Ball State University,* the Supreme Court addressed the definition of a "supervisor" as it relates to Title VII harassment claims. In *University of Texas Southwestern Medical Center v. Nassar,* the Court addressed the appropriate standard to determine whether an employer engaged in retaliatory actions against an employee.

In *Vance,* an African-American employee of Ball State claimed that she had been racially harassed by a co-worker, causing a hostile work environment. She claimed that the co-worker was her supervisor, and as such, the university should be held to a higher standard to avoid liability. Under this higher standard, the university would be liable unless it could prove that (1) it used reasonable care to prevent the harassment, and (2) the employee was unreasonable in not taking advantage of the opportunities provided by the employer. On the other hand, if the co-worker was not a supervisor, as argued by the university, the university would only be liable if found to be negligent.

The Court held that a co-worker is a supervisor under Title VII only if the co-worker is given the authority by the employer to engage in "tangible employment actions" against the employee. Tangible employment actions include actions such as hiring, firing, reassigning different responsibilities, changing employment benefits, and promoting/failing to promote. The Court found that the co-worker in this case was not a "supervisor" of the complainant because the co-worker did not have the authority to engage in tangible employment actions against the employee.

In *Nassar,* a physician of Middle Eastern descent claimed that the University of Texas Southwestern Medical Center violated Title VII when (1) his supervisor allegedly discharged his employment as faculty for the university due to racial and religious discrimination and then (2) another supervisor retaliated against him because of his complaint regarding the alleged discrimination by preventing him from being hired at a local hospital. The physician argued that the motive of retaliation need only be a motivating factor of the employer's actions, allowing his claim only if other legal factors played a part in the employer's actions. The Court ruled that an employer's actions must be more than partially motivated by retaliation and must meet the higher standard of "but-for" cause: "But-for" the wrongful action (retaliation), the consequence (loss of job) would not have occurred. Therefore, the retaliation must be the reason that the employer acted.

How This Affects Your District:

Both of these cases help to clear up previously murky waters regarding claims for discrimination and retaliation under Title VII. Although the Court's ruling strengthens the defense of employers against discrimination claims, it remains important that district administrators use reasonable care to prevent harassment within the work force.

Bill Amends 3rd Grade Reading Guarantee Legislation

Senate Bill 21

Recent legislation revises the requirements for reading teachers under the 3rd Grade Reading Guarantee and declares an emergency. Senate Bill 21 was signed by the governor on June 4th.

Unless exempt, students who do not pass the 3rd grade reading achievement assessment, at least at the equivalent level, will be retained. Students that are exempt from the requirement are those

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Bill Amends 3rd Grade Reading Guarantee Legislation, Cont.

with significant cognitive disabilities, those with other disabilities as approved by the Ohio Department of Education ("ODE") on a case-by-case basis, and ESL students who have either been enrolled in US schools or who have had instruction in an English as a second language program for less than three years. The less than three years basis for ESL students was changed from the two years under previous law. Pertaining to students, the bill also closes the loophole allowing a student to avoid being retained by skipping the test.

Under current law, a student retained or with a reading improvement monitoring plan must be assigned a teacher with actively engaged reading instruction experience for the previous three years, as well as who meets one or more other criteria. The revised 3rd Grade Reading Guarantee makes changes, and instead requires teachers to have one year of teaching experience. However, the new legislation provides exceptions for teachers with less than one year of experience if they meet any of the other requirements and if that teacher is assigned a teacher mentor that has the required experience and qualifications, allowing them to provide reading guarantee services.

Senate Bill 21 makes other changes in the criteria for qualifying as a teacher to provide services under the 3rd Grade Reading Guarantee. A teacher is no longer required to show evidence of a credential earned from a list of scientifically research-based reading instruction programs approved by ODE in order to provide reading guarantee services. Also, Senate Bill 21 modifies the "above value added" criterion so that a teacher who was rated "above expected value-added" in reading instruction for the most recent consecutive two years may provide reading guarantee services. It also additionally qualifies teachers who were rated "most effective" for reading instruction for the previous two years based on student growth measure assessments for student assessments approved by the State Board for teacher evaluations. In addition, Senate Bill 21 qualifies (1) teachers with alternative credentials, (2) teachers who pass the scientifically research-based reading instruction test, (3) teachers who hold a reading endorsement and pass the corresponding assessment for the endorsement only "as applicable" at the time of receiving the endorsement, (4) others holding a master's degree with a major in reading, and (5) speech-language pathologists.

In addition, the recently passed legislation requires the State Board of Education to adopt reading competencies with which all reading educator licenses, alternative credentials and training, and reading endorsement programs at higher educational institutions eventually must be aligned. Not later than July 1, 2016, the Chancellor of the Board of Regents must revise the requirements for these reading endorsement programs offered by institutions of higher education to align with reading competencies adopted by the State Board. Beginning in July 2017, all applicants for an educator's license for grades pre-K through 9th must pass an exam aligned with the required reading competencies.

ODE is required to provide guidance to districts. One or more ODE staff members must be designated to districts and schools to assist in the implementation of the revised 3rd grade guarantee and reading instruction and achievement. A district that fails to meet the specified level of achievement on reading-related measures is required to then submit a reading improvement plan to ODE and operate under the plan until the criteria therein are met. The district must also develop and submit a plan if it cannot furnish the number of teachers needed to satisfy one or more of the criteria. The plan must indicate the criteria used to determine the teachers who will provide reading guarantee services that year, as well as how the district will find teachers to meet the requirements for the following school year and beyond.

In addition, ODE must collect, analyze and publish a study of diagnostic assessments to the State Board, the Governor, and the General Assembly not later than March 31. It should showcase the progress of public school students and of districts and community schools in regard to reading achievement.

The altered requirements passed in Senate Bill 21 allow schools and educators to meet the staffing standards that were previously nearly impossible to meet.

How This Affects Your District:

Special attention should be given to the changed requirements. The new legislation gives districts more flexibility in regards to staffing teachers who provide reading guarantee services. If your district cannot meet the requirements, the new legislation now allows you to submit and operate under alternative staffing plans for up to three school years while working to remedy the situation in compliance with the Senate Bill 21. Further, the legislation lowers the requirements to qualify more teachers, making it easier to meet the staffing plan requirements. In addition, the legislation recognizes the need to continue to have educators with other specialized credentials available to assist special needs students. Therefore, the list of qualified teachers and personnel should be reassessed and staff assigned accordingly.

School Fees

***North Baltimore Local Schools v. Todd*, 2013-Ohio-2599 (June 2013).**

In this case, a school originally filed a small claims action against a parent for unpaid school fees incurred between 2004 and 2009, which totaled $226. Among these fees were the cost of workbooks, class fees, assignment notebooks, activity fees, and progress books. The magistrate determined that fees were established in open session at the beginning of each school year. He also noted that the board had provided a procedure for waiver of the fees in cases where students were eligible for the federal free lunch. Alt-

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School Fees, Cont.

hough the parent submitted a paystub to claim eligibility for his son, the magistrate found that a single paystub did not sufficiently establish that the student was eligible for the entire unpaid period. Relying on R.C. § 3313.642(A), the magistrate determined that the establishment of the types of fees involved was permitted and granted judgment to the school board.

The magistrate's decision was adopted by the trial court. He argued that the trial court erred in interpreting the statutory law applicable to school fees.

R.C. 3313.48 requires that a board of education shall provide free education, and R.C. 3329.06 requires that a board furnish textbooks and electronic textbooks free of charge. The Court stated that, despite the broad language used in these statutes, R.C. 3313.642 provides a contrary, specific, authority. R.C. 3313.642(A) states that a board of education is not required to furnish, free of charge, materials used in the course of instruction, and R.C. 3313.642 (C) speaks to the authority of creating a schedule of fees for materials used in a course of instruction. The Court stated that when two statutes are in conflict, they must be construed so that the specific statute controls over the general statute, pursuant to statutory and case law. The Court also noted that the Ohio Supreme Court had also provided the same interpretation of these statutes.

In addition, the Court rejected the parent's claim that the term "textbook" should be read broadly to include some of the materials that accrued school fees. The Court stated that when a term is explicitly defined for the purposes of the section and limited by the definition, it cannot be construed to define the term as used in other statutory provisions. Therefore, the definition of "textbook" in other statutes could not be used to define "textbook" in R.C. 3313.642.

How This Affects Your District:

It is important to know what materials Ohio schools are required to provide to students free of charge, those which schools are allowed to charge fees for, and the means by which such fees may be waived. In addition, the definitions of fee exempt materials must be narrowly construed to align with the proper statute and must not be taken out of context. Therefore, if certain school supplies are not classified by statute as "free education" or "textbooks," and the fees for the supplies are unpaid, schools may bring a claim for the unpaid amount.

Searching Automobile on Public Street Deemed a Violation of Student's Privacy

***J.P. v. Millard Pub. Schs.*, S-11-777 (Neb. 2013).**

A suspension and offenses were expunged from a student's record after the student was disciplined by a board of education for drug paraphernalia discovered in his truck parked off of school grounds.

Without permission, and in violation of school policy, a student left the school's campus to get a sweatshirt and wallet from his truck, which was parked on a public street. When he returned, the school authorities became suspicious, directed him to empty his pockets and searched his backpack. No contrabands were discovered during the search. Against the student's objections, a search was conducted of the student's truck that uncovered drug paraphernalia. A suspension of nineteen days was issued and upheld by the school board of education.

The hearing officer ruled that the search taking place off campus was justified because of the vehicle's proximity to the school and based on the school's obligation to protect the learning environment. The student served the suspension, but appealed the determination to court.

The district court found that the search of the truck violated the Fourth Amendment because the assistant principal lacked probable cause to expand the search to the truck, and reversed the decision of the board, ordering that all discipline be expunged from the student's school record. On appeal, the Nebraska Supreme Court agreed that the search had violated the student's right to be free from unreasonable search and seizure.

The Fourth Amendment prohibition against unreasonable search and seizure applies to searches conducted by public school officials. The court explained that students have a legitimate expectation of privacy, and that the school officials lacked the authority to conduct the search. The Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), established a well accepted principal that all school searches must be justified at their inception and reasonable in their scope.

The search in this case was not justified at its inception. In examining legal precedent, the court determined that there was no recognized right for a school to conduct off-campus searches of student's persons or property which are unrelated to school-sponsored activities. The court also deemed the district's argument that driving to and from school was a school-sponsored activity as too broad. In addition, the court rejected the school officials' claim that their authority encompassed any action that had a nexus to enforcing good order on school grounds because it would lead to confusing inquiries of whether or not the student's off-campus conduct was sufficiently connected to the preservation of school order. Therefore, the vehicle search and intrusion into the student's privacy was not justified. There was no link between the student's behavior and the drug paraphernalia that would cause school officials to reasonably suspect that the student possessed the contraband near school grounds.

How This Affects Your District:

This case serves as a reminder that special attention must be paid to make sure reasonable suspicion or a link is found before a search of a stu-

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Searching Automobile on Public Street Deemed a Violation of Student's Privacy, Cont.

dent or his property is performed. A search cannot stem from merely an intuition or hunch. In addition to the off-campus conduct discussed in this case, districts must observe that reasonable suspicion is also required if the automobile is parked on campus or on district-leased property.

Ohio Supreme Court Rules Mental Condition Must be Caused by Physical Injury in Order to be Compensable Under the Workers' Compensation System

***Armstrong v. John R. Jurgensen Co.*, Slip Opinion No. 2013-Ohio-2237.**

In a decision released June 4, 2013, the Ohio Supreme Court affirmed that in order for a mental condition to be compensable under the Ohio workers' compensation system, compensable physical injury sustained by the claimant must cause the mental condition.

In this case an employee was involved in a motor-vehicle accident while operating a one-ton dump truck in the performance of his job duties. The employee's truck was struck from behind by another vehicle resulting in the death of the driver. After being transported to the emergency room, the employee was treated for physical injuries and released. The other driver died.

Armstrong filed a workers' compensation claim for his physical injuries, and his claim was allowed for the following injuries: cervical strain, thoracic strain, and lumbar strain. He subsequently requested an additional allowance for post traumatic stress disorder ("PTSD"). A staff hearing officer allowed the employee's additional claim, finding his PTSD compensable because it was causally related to his industrial injury and his previously recognized physical conditions. The employer appealed the hearing officer's decision. The parties did not dispute that the employee actually had the condition of PTSD; the dispute was over what caused it. Injured workers have the burden of proof to show that their injuries are causally related to the performance of their work duties.

The expert for the employer argued that the employee's PTSD was caused by "the mental observation of the severity of the injury, the fatality, [and] the fact that it could have been life threatening to him at some point." The expert further argued that the employee would have suffered PTSD regardless of his physical injuries. The trial court as well as the appeals court, sided with the employer, and the employee appealed to the Ohio Supreme Court.

R.C. 4123.01(C) defines "injury" for purposes of workers' compensation. Psychiatric conditions are excluded from the general definition of "injury," "except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant."

The Court recognized that no Ohio appellate court has ever recognized a workers' compensation claim for mental injury or mental disease caused solely by job-related stress which is unaccompanied by physical injury or occupational disease. Accordingly the Court was not willing to broaden what it called unambiguous language in the statute.

How This Affects Your District:

For a mental injury to be compensable, it must arise from a compensable physical injury. Mental conditions standing alone are not sufficient. Nor are mental conditions which occur contemporaneously with a physical injury, but are not caused by the physical injury

Indifference to Harassment Propels 504 Case to Trial

Moore ex rel. Estate of A.M. v. Chilton County Bd. of Educ., 60 IDELR 274 (M.S. Ala. 2013).

A complaint was filed by the parents of a high school student with a growth disorder who jumped to her death in 2010. The complaint alleged that the student was bullied so severely, and that school employees were so "indifferent" to the situation, that it caused her to take her own life. In addition, the complaint alleges that the student was particularly vulnerable and targeted by other students because she was overweight and had Blount's Disease, a growth disorder that causes the lower leg to angle inward and give the person a bowlegged appearance.

The lawsuit states that "the bullying was constant; it was brutal; it came from students of all types, colors and sizes. In legal parlance, it was severe and pervasive, and could not fail to be noticed." The student was harassed on a daily basis by being pushed around, called cruel names, and even locked in a closet. In addition, she was subjected to "pig races," a game played on school buses where a male chases and catches a girl that is "ugly and fat" and kisses her in front of laughing or mocking students. In one instance, the student's pants and underwear were stripped down in front of a group of jeering peers.

Under Section 504, a district is required to respond to bullying if it stems from the student's disability. In this case, the student was harassed because of her bowlegged appearance due to a growth disorder, and because she was overweight as a result of an eating disorder.

The student's parents were found to have stated a plausible claim that the district violated her Section 504 and Title II rights. In addition, the U.S. District Court determined that the claim contained sufficient allegations that the district was deliberately indifferent to the harassment the student sustained.

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Indifference to Harassment Propels 504 Case to Trial, Cont.

The court applied a test articulated in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (U.S. 1999), and dictated that the parents would have to show (1) the student had a disability, (2) the harassment was based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered or created an abusive educational environment, (4) the district was aware of the harassment, and (5) the district was deliberately indifferent to the harassment.

The court addressed the fourth and the fifth factors due to the district's assumption of the first three. The parents were found to have adequately alleged that the district knew about the harassment by stating that the student had complained about it; administrators, teachers, and other school employees had witnessed it firsthand; and the encounters often occurred in plain view. Next, deliberate indifference was deemed sufficiently alleged when the parents contended that the district did nothing to stop the harassment, but instead accused the student of having a "bad attitude" when she complained. Therefore, the district failed to convince the court to dismiss the lawsuit alleging that school employees discriminated against a victim of bullying that was based on the student's disabilities.

How This Affects Your District:

Under Section 504, a school must address harassment due to a student's disability when the school knows or reasonably should have known of the harassment. The standard does not apply to just what school employees see, but also what they should be seeing and attending to if they are properly performing their duties. Therefore, faculty should be encouraged to be observant to any signs of harassment and to properly report them, pursuant to the school's policy. When a student is teased, threatened, or humiliated in front of his peers because of his disability, that behavior amounts to harassment under Section 504 when a hostile environment that alters, interferes with, or denies a student's participation in the educational environment results. The district may also be liable under Title II. Therefore, conforming to the school's policy on reporting and monitoring harassment is important in order to avoid both harm to students and potential liability.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

July 11th, 2013—*Education Law Legal Updates 2012-2013 Webinar*

Other Upcoming Presentations

Jeremy Neff and Erin Wessendorf-Wortman
August 1, 2013
Northwest Ohio ESC Administrators' Conference

Erin Wessendorf-Wortman
August 8, 2013
Ashtabula County ESC Treasurers' Presentation

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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