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School Law Review

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A Case of Protected Political Speech

A federal court in Tennessee has allowed a case to continue against a local government on a Section 1983 claim regarding an employee's termination in retaliation of protected political speech. The terminated worker, Jim Henry, had worked for the Roane County (Tennessee) Highway Department for more than 30 years. When the county road superintendent ran for re-election, Henry openly supported another candidate for the position. Henry was terminated in April 2016 for his "constant disruptive influence" on the department's employees.

In December 2016 Henry filed a lawsuit against the Highway Department, alleging that he had supported the opposing candidate during his private and personal time and that he was terminated due to his political beliefs and political affiliation, in violation of 42 U.S.C. § 1983.

The Highway Department filed a motion for summary judgment, arguing that no violation occurred because Henry's speech was not protected under the First Amendment, that Henry's affiliation with the opposing candidate was not a factor in Henry's termination, and that Henry would have been terminated even without his affiliation with the opposing candidate.

To survive a motion for summary judgment, Henry would have to demonstrate specific facts that show a genuine issue exists for trial. In this type of case, Henry's complaint would have to show three elements: (1) he engaged in constitutionally protected speech or conduct, (2) an adverse action was taken against him, and (3) the adverse action was motivated, at least in part, by the protected speech. If he can demonstrate these elements, the burden shifts to his employer to demonstrate that the same decision would have been made absent his protected speech or conduct. The Highway Department contested that Henry's activities were constitutionally protected and that the cause of his termination was the protected activity. Further, the department argued that Henry would have been terminated even if he had not engaged in the protected conduct.

For a public employee to successfully allege protected speech in such a circumstance, the employee's speech or conduct must be made as a private citizen and not pursuant to his or her official duties. Henry allegedly told co-workers that they should vote for the opposing candidate and that if this candidate was elected, Henry would be promoted to foreman. Furthermore, he made these statements during work hours. Therefore, the Highway Department argued that Henry's speech was not protected. However, the court noted that "speaking during work

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hours and speaking pursuant to one's official duties are distinct issues," and "merely speaking during work hours does not make speech unprotected." Additionally, some of Henry's objectionable speech took place during lunchtime or breaks. The court concluded that Henry's speech touched on a matter of public concern and that the Highway Department did not show that its interest in operating efficiently outweighed Henry's free speech interest.

The court also found that genuine issues of material fact existed, which should be left to a jury to decide. For example, the county road superintendent testified that three employees complained to him about Henry, which led to his terminating Henry; however, those three employees testified that they did not speak with the superintendent until after Henry was fired.

Regarding the third element, which requires a connection between the protected activity and the adverse action, the Highway Department argued that Henry's political affiliation with the opposing candidate was not a substantial factor in his termination and that no adverse action was taken against Henry until his actions disrupted the workforce and negatively affected the department's operations. On the other hand, Henry argued that every reason offered for his termination was directly related to his protected speech and conduct and his support of the opposing candidate. Additionally, he was terminated within two months of making known his support for the opposing candidate. A two-month lapse of time is short enough to meet the low threshold showing the connection between the protected activity and the adverse action.

What This Means to Your District

Public employees are often members of the communities in which they work and may receive protection from the First Amendment if they engage in public discourse about the employer, even if that discourse is negative. Courts will look at the content and context of speech to determine if an unpopular view must be tolerated. An employer must be able to demonstrate that any negative action taken after an employee engages in protected speech is unrelated to that speech.

– *Henry v. Roane Cty.*, E.D.Tenn. No. 3:16-CV-689, 2018 U.S. Dist. LEXIS 89025 (May 29, 2018).

Graduation Requirements and the Lame Duck

The Ohio Board of Education met on Tuesday, October 16, and discussed changes to graduation requirements beginning with the class of 2022. The discussion included possible emergency changes for students who are expected to graduate before 2022.

The current requirements allow for three different graduation pathways: (1) minimum points on end-of-course tests, (2) remediation-free scores on ACT or SAT tests, (3) a passing score on the WorkKeys exam along with job credentials. In each of these options, students must pass tests to graduate. The state board's present discussion includes a variety of ways that students may earn a diploma – not just by passing tests.

The state board discussed alternatives that would require students to demonstrate skills in five areas: English, math, technology, other academic subjects, and leadership and social development. While testing remains one of the options for demonstrating their graduation readiness, alternative possibilities include meeting a minimum required GPA, completing a "culminating student experience" project, and others.

In the meantime, requirements for the current senior class remain in limbo, in spite of a move to extend the two additional pathways granted to the class of 2018 for another few years. The state board and legislature are working to find common ground on this issue. The state board recommended that these two additional pathways continue, and as a result, House Bill 630 was introduced based upon this recommendation. Although the legislature has not yet advanced the bill, at least one representative has indicated that parts of a different bill on school report cards might end up in HB 630 before the final two months of the current General Assembly.

On the other hand, if the General Assembly does not act during the lame duck session, the state board must take matters into its own hands. One board member proposed a reduced number of points required for state tests, a possible solution that is within the board's authority and does not require legislative action.

Virginia District Leaves Transgender Student Out during Safety Drill

Where the District Went Wrong

During a lockdown drill, teachers at a middle school in Virginia prevented a transgender student from accessing the school's locker rooms. The news reported that teachers "were debating which locker room would be appropriate" for the student, who identifies as a girl. During this debate, she was asked to sit alone on the bleachers outside of the locker rooms.

To make matters worse, the incident was posted on social media via a Facebook group called Equality Stafford. The group called for a protest at an upcoming school board meeting. Since the incident occurred, the district's new superintendent has requested a review of safety protocols and procedures to ensure that all children are treated with dignity and respect.

What Schools Should Do Instead

School districts should ensure that their safety protocols and procedures not only allow for the safety and protection of each student but also consider the unique needs of its students. School safety plans are different from district policies on student use of restrooms or locker rooms. A lockdown drill necessitates providing for the safety and protection of all students during an emergency situation. Gender identity should not prevent a student from accessing a place of safety and protection. This situation may have been avoided if the district had engaged in conversation about this student's needs in advance.

Employee Wrongfully Terminated after Workplace Injury Results in Disability

In a disability discrimination case, the Sixth Circuit Court of Appeals found that an employee was wrongfully terminated following an on-the-job injury that led to a permanent disability. Because of doctor-imposed work restrictions, the employer concluded that the employee was no longer able to perform the essential functions of his job; however, most of the evidence showed that the employee was able to perform his job through the use of accommodations that were already available in the workplace.

Tony Gunter was employed as a press assistant at Bemis Company. In early 2013, he sustained a shoulder injury while working, which led to surgery and later doctor-imposed restrictions when he returned to light-duty work in an alternate position. A few months later, in December of 2013, he returned to his press assistant position, but he was restricted in reaching with his right arm and in performing any overhead work. After his return to work, a functional capacity evaluation determined that Gunter could perform jobs with *light* physical demands. However, the job description for his position required him to perform *medium* physical demands. The evaluation ultimately concluded that Gunter could not satisfy the "strength/lifting/carrying or right upper extremity positional demands of his job."

Gunter continued working with a light-duty restriction while doctors reviewed the report. In June of 2014, doctors authorized him to return to regular duty but with the same restrictions. Gunter still was unable to work overhead with his right arm and had trouble meeting some of the lifting requirements. In July 2014, Bemis placed Gunter on paid leave and informed him that they could no longer accommodate his work restrictions. Gunter remained on paid leave until he was terminated in November 2014. Gunter then sued in federal district court, claiming that Bemis had violated the Americans with Disabilities Act (ADA). The jury returned a verdict for Gunter, finding that Bemis had

fired him because of his disability and failed to accommodate his disability. Gunter was awarded back pay, front pay, and compensatory damages.

The employer then appealed to the Sixth Circuit Court of Appeals. At issue in the appeal was whether Gunter could perform the essential functions of his job. Under the ADA, an employer may not discriminate against a "qualified individual" because of his disability. 42 U.S.C. § 12112(a). A qualified individual is one who can perform the *essential functions* of the job with or without reasonable accommodation. Id. § 12111(8).

Bemis claimed that Gunter's functional capacity evaluation and doctor's reports precluded him from satisfying the company's job requirements of a press assistant. The court explained that a doctor's restrictions do not dictate the essential functions of the job. The court also noted that while an employer's job description does provide evidence of the essential functions of a job, this is not dispositive. *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014). Although Bemis had used precise wording in the job description for the press assistant position, evidence was presented that these requirements were not essential and that the other employees and even the company itself did not deem them to be essential.

Gunter could meet the heavy lifting requirements one-third of the time. Gunter learned to do activities with his left arm, and evidence showed that press assistants do not need to do overhead work. Additionally, employees could use lifting equipment to assist in lifting many objects, as well as ladders for equipment that needed to be lifted higher than employees could lift unassisted, for workers such as Gunter who could not lift objects above their waist.

Gunter also presented evidence that employees often asked co-workers to help lift heavier equipment when needed, and Gunter helped smaller employees to carry heavier equipment. Bemis countered that Gunter could not establish his qualifications for the job based on the assistance of other employees to help lift heavy equipment. The court agreed that employers need not "accommodate individuals by shifting an essential job function onto others." *Hoskins v. Oakland Cty. Sheriff's Dep't.*, 227 F.3d 719, 729 (6th Cir. 2000). However, this argument assumes that these tasks are essential functions that a single employee must be able to handle. Because press workers often ask co-workers to assist with heavy lifting, the court remanded this question back to the district court to hear and decide, based on input from the Sixth Circuit.

What This Decision Means for Your District

Employers have an obligation to diligently explore whether reasonable accommodations are necessary for an employee to perform the essential functions of his or her job. The essential functions of a job are not limited strictly to a job description but may also be demonstrated in the necessary elements associated with completing the actual tasks at hand. Employers must know and understand the essential functions of a job in order to determine what reasonable accommodations, if any, may be provided to an employee.

– *Gunter v. Bemis Company, Inc.*, Nos. 17-6144/6185, 2018 WL 4997777 (6th Cir. 2018).

Special Education Spotlight: Service Animals in Schools

In October, a flight from Charlotte to Cleveland was delayed when a woman carrying what she characterized as an emotional support animal refused to deboard the aircraft. Although the airline permits air travel for emotional support animals, the passenger failed to tell employees that her support animal was a squirrel. The airline does not allow rodents of any kind – including squirrels – aboard their aircraft, so the passenger was asked to deplane prior to takeoff. When the woman refused to deboard the aircraft, all other passengers were forced to do so until the woman and the squirrel could be removed from the plane.

Would an Ohio public school district be required to permit the squirrel to accompany an individual onto school property? The answer to this question is no, because the animal does not meet the definition of a service animal under state or federal law.

Although public school districts are not regulated by the same rules as airlines, they are generally required to permit service animals to accompany individuals with disabilities on school premises and at school-related functions. Emotional support animals may be treated differently as discussed below. It is important for school district staff to know how state and federal law define the term *service animal* and also understand when an animal may and may not accompany an individual.

What is a service animal under the law?

Under federal law, a service animal is defined as a dog that is trained to do work or perform tasks for the benefit of an individual with a disability. Although the definition restricts the meaning of "service animal" to only a dog, federal law also permits a miniature horse to accompany an individual with disabilities under limited circumstances.

To determine whether a miniature horse must be permitted to accompany an individual with a disability, a public entity may consider four factors:

- The type, size, and weight of the horse and whether the facility can accommodate based on these factors
- Whether the handler has sufficient control of the horse
- Whether the horse is housebroken
- Whether the presence of the horse compromises legitimate safety requirements that are necessary for safe operations

It is important to note that an emotional support animal is not defined as a service animal under federal law. Emotional support animals provide comfort by being with a person rather than being trained to perform a specific task for an individual with a disability. Therefore, a public entity may not be required to treat an emotional support animal in the same fashion.

Also understand that other species of animals, whether wild or domestic, trained or untrained, are not defined as service animals either.

State laws may also apply to service animals. Ohio further classifies dogs into four groups (R.C. 955.011):

- Assistance dog – a guide dog, hearing dog, or service dog that has been trained by a nonprofit special agency
- Guide dog – a dog that has been trained or is in training to assist a blind person
- Hearing dog – a dog that has been trained or is in training to assist a deaf or hearing-impaired person
- Service dog – a dog that has been trained or is in training to assist a mobility-impaired person

When may a school district exclude a service animal?

A school district may exclude a service animal in a few circumstances. For instance, if the presence of the animal would require the district to modify policies, practices, or procedures in a way that would "fundamentally alter" the district's services, programs, or activities, it may be excluded. This is a very high threshold to meet. A district may also be able to exclude animals that present legitimate safety concerns, are not housebroken, or do not remain under effective control of the handler.

What about individuals who might be allergic to the service animal?

A school district is expected to carefully consider the risks to all parties involved, including those with a service animal and those who are allergic to one. A district should thoroughly explore ways to reasonably accommodate the needs of all individuals involved before it considers excluding a service animal because of an allergy.

Can a district restrict the animal's access to certain areas?

Generally, a service animal must be permitted to accompany an individual in all areas where the public is permitted to go. This includes access to facilities and to all school-sponsored activities and events, even if they occur after hours, unless a legitimate reason for a restriction or exclusion applies (see above).

A school district's obligation to permit service animals applies not only to students but also to parents and visitors. Generally, public entities must allow individuals with disabilities to be accompanied by service animals in all areas that are open to the public. Contact Ennis Britton if you have questions about service animals in your school facilities and programs.

Firm News: Capital Conference Reception

You are cordially invited to attend Ennis Britton's reception at the OSBA Capital Conference to celebrate another successful year!

Monday, November 12, 2018
4:00 p.m. to 6:00 p.m.
Hyatt Regency Columbus
Franklin Rooms A–C

Please R.S.V.P. to Barbara A. Billow
bbillow@ennisbritton.com

All Capital Conference attendees are welcome to attend.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **November 1** – Deadline for classroom teachers to develop online classroom lessons ("blizzard bags") to make up hours for which it is necessary to close schools (RC 3313.482)
- **November 6** – General election day (RC 3501.01)
- **December 31** – Deadline for treasurer to canvass the board to establish a date of the organizational meeting (RC 3313.14)

Upcoming Presentations

SAVE THE DATE!
2018–2019 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

December 6, 2018: Employment Law Update
Stay up-to-date on important issues and changes with FMLA, ADA, employee leave, and other employment-related topics.

April 18, 2019: Student Privacy
Keep current on FERPA, CIPA, COPPA, and other federal and state laws that impact student – and staff – privacy issues in your district.

July 11, 2019: 2018–2019 Education Law Year in Review

Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton's Administrator's Academy Seminar Series, these presentations will be now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our website or contact Nancy via email or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

November 11–13: OSBA Capital Conference

Sunday, 2:30 p.m.

John Britton – "Regulating Off-Campus Speech"

Monday, 10:30 a.m.

Ryan LaFlamme, Hollie Reedy, Giselle Spencer & Keith Countryman – "Threat Assessment and Response"
Pamela Leist, Nancy Mulvey & Ed Theroux – "Special Education Primer for CTCs"
William Deters & Jenni Logan – "Build a Bionic Salary Schedule"

Monday, 1:00 p.m.

John Britton – "Teacher Evaluation Changes: OTES Update"

Tuesday, 10:30 a.m.

Jeremy Neff, Erin Wessendorf-Wortman & Sara Gehring – "How Did We Get Here? Special Ed Fights"

December 4: Brown County ESC & Southern Ohio ESC

– Ryan LaFlamme and Hollie Reedy

December 7: Southwest Ohio Personnel Administrators

– William Deters

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Want to stay up-to-date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

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, contact Nancy via email or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

Team Members
Ryan LaFlamme
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

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John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance
Taxes • School Levies • Bonds • Board of Revision

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