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School Law Review

May 2021

Court Rejects Appeal of Industrial Commission Denying an application for Permanent Total Disability

The Tenth Appellate District (Franklin County) refused to overturn a decision of the Ohio Industrial Commission denying an injured workers application for permanent total disability benefits because the decision was based on "some evidence" to support it, and the Commission is entitled to deference by the courts.

In 1998, the injured worker at issue suffered a closed fracture of his right radius while working as a cabinet maker and the claim was additionally allowed for carpal tunnel syndrome. After leaving his job as a cabinet maker, the injured worker was employed as a manicurist intermittently for fifteen years. The injured worker continued to have problems with his wrist and filed a claim for benefits related to his now eighteen-year-old wrist injury. He was determined to be temporarily disabled from working in 2016 and was granted wage replacement benefits. Benefits were terminated at the end of July in 2017 because he was found to have reached maximum medical improvement. He filed for permanent total disability benefits (PTD).

PTD is defined as the injured worker's inability to perform sustained, paid employment due to an approved work-related injury. PTD benefits pay the injured worker for impairment of their earning capacity. PTD compensation is payable for life. In making a PTD determination, the Industrial Commission hearing officer must consider both medical factors relating to the injured workers level of physical impairment as well as non-medical factors related to the workers ability to re-enter the workforce in some capacity such as, age, work history, transferable skills, education and trainability, among other relevant factors.

The injured worker's claim was supported by reports from physicians and vocational experts reporting that he was not a good candidate for further job training due to his limited education, limited English proficiency, and lack of computer skills or other transferable skills. His medical restrictions did not allow for physical work. The Bureau had the injured worker examined by a physician who opined that he could perform sedentary work. The hearing officer adopted the opinion of the Bureau's physician, citing that he could do

light duty or sedentary work such as a manicurist, but he could not return to his position as a cabinet maker or perform other physical work. The hearing officer also examined the other factors of age, skills, education and English proficiency and found that on balance, he was still capable of sustained employment.

The trial court upheld the Commission's decision, because of the high standard for such appeals. Even if there is conflicting evidence in the record, so long as the hearing officer reasonably relied on some evidence in the record to support the conclusions of the decision, it will be upheld. The hearing officer does not have to except the opinions of all experts nor give conclusive weight to a particular medical or vocational report.

What this means for your district?

Though the case is not groundbreaking in any way it does teach us two things: 1. Appeals can be difficult because the standard to overturn a hearing officer's determination regarding PTD is high and the hearing officer is entitled to deference in deciding these matters. 2. Because appeals are difficult, you need to mount a good defense at the administrative level. You need to present a fact-based narrative regarding the employee's ability to have some level of sustained employment and you need to be able to present evidence regarding the typical factors hearing officers consider in making these decisions.

Le v. Ohio Indus. Comm., 2021-Ohio-1169

Is Remote Learning on the Way Out?

As school districts begin to wrap up this school year and make plans for the next, questions have recently arisen about a school district's ability to offer remote learning as an option for students next year. These questions were triggered in part by a notice issued on April 1st by the Ohio Department of Education titled "Remote Learning Pathway Considerations 2021-2022." The notice recognized that the Ohio legislature provided flexibility for this year because of the pandemic but appears to infer that a future act of the legislature is required to continue similar remote learning options next year and beyond.
The notice also provided a summary of "remote learning approaches" that are available even absent legislative action. These include the following.

- **Alternative schools**. R.C. §3313.533 grants boards of education with the authority to create alternative schools through passage of a resolution. Alternative schools may serve students "*who are on suspension, who are having truancy problems, who are experiencing academic failure, who have a history of class disruption, who are exhibiting other academic or behavioral problems specified in the resolution, or who have been discharged or released from the custody of the department of youth services*." ODE indicates that careful consideration must be made when incorporating remote learning components of an alternative school, but doesn't appear to conclude that they are prohibited.

- **Blended Learning Programs**. Both community schools and traditional public schools are authorized to offer blended learning programs, although the rules vary between the two types of organizations. A school district must submit an application to offer a blended learning program, which must include both in person and remote learning components. ODE takes a clear position

that blended learning cannot be fully remote or fully in person. School districts offering blended learning are required to establish policies and procedures as outlined in OAC 3301-35-03. It is important to note that school districts are released from school year hourly requirements under R.C. 3313.48 with these programs. Additional information about blended learning is available on ODE's website.

- **Credit Flexibility**. Each board of education is required to have policies in place which permit individual students in grades seven through twelve with a way to earn high school credit in a non-traditional way. Programs may be customized based on the student's needs, and can include things like distance learning, online learning, independent study and work experience. If a student wishes to explore credit flexibility options, he/she works with their district to craft a plan. The plan serves as a record of the established program and agreements among the student, district and the student's parents. ODE offers additional guidance online about credit recovery.

- **Innovative Education Pilot Program**. Beginning in November 2020, ODE offers a pilot program governed by OAC 3301-46-01 which permits ODE, upon application by a school district, to waive parts of state law or regulations that serve as a barrier to innovative, non-traditional education. This pilot is designed to enable schools to explore more experimental learning programs that are developed based on an identified need and seek continuous improvement in student achievement or student growth. Schools must complete an application and obtain approval from ODE for any waivers each year. By including this in its recent guidance, ODE seems to be supportive of schools using remote learning under this program. You can access ODE's summary and the application on ODE's website. The deadline to apply was April 28, 2021.

ODE included a chart to help districts compare the available options. At the end of its guidance, ODE recommends that districts seek advice from legal counsel before finalizing any remote learning programs. If incorporating some elements of your remote education platform is part of your considerations for 2021-21, it is a good idea to ensure that currently-permissible structures match your plans.

Also keep in mind that the legislature may extend authority to use remote learning programs or create additional options- either temporarily or permanently. However, as of the date of this article, no formal proposals have been made in the legislature to accomplish this.

Special Education Spotlight: Navigating Remote Learning for Special Education Students

Based on discussions with clients at Ennis Britton's Special Education Coffee Chats, there are some parents who would like remote learning to continue next year, notwithstanding the question of whether state law will even permit such programs. Whether to allow special education students to utilize these programs is complicated. Considerations for the IEP team include whether remote learning is the least restrictive environment for a particular student, whether the services required by the IEP may be delivered remotely and how that should occur, as well as whether remote learning has been effective for that student over the past year.

Other considerations include the "why" of remote learning: what are the reasons it is being considered? Underlying all these considerations is the question of whether a remote learning plan will provide FAPE for that student. In reaching a determination, it is appropriate to consider how effective student engagement and progress towards IEP goals has been if the student already has been receiving instruction and services via remote learning. There are certainly students who elected remote learning this year who did not regularly attend services or complete coursework, only to fall farther behind or in some cases miss an entire year of instruction.

Making the determination of whether remote learning continues to be appropriate requires consideration of all these factors on an individual basis. Determinations that the plan provides FAPE and is the LRE are required steps in the formulation of the plan. Additionally, plan to review of all the services, accommodations, and modifications to adjust to remote learning.

If we have learned one thing about remote learning and educating students with disabilities in 2020-21, it is that full consideration of technology needs and resources available to the student and the student's ability to access that technology must be made. This consideration must include whether students and their parents/guardians/caregivers are able to consistently use the technology to access services and supports. Review of progress monitoring reports and student engagement over the past year is appropriate. For example, a student who has not consistently accessed technology, and for whom outreach and engagement efforts have been unsuccessful or partially successful, may lend itself to a determination that continuing remote learning is not the appropriate placement for that student going forward.

What happens when a parent wants remote learning to continue, but the school district does not think the student has been successful with it or does not think it is the right program for the student? Based on a student's individual needs, an IEP team may determine that a remote learning plan does not offer FAPE and/or is an improperly restrictive placement. If a student has been on remote learning and the parent wants that to continue, it is possible that a remote learning placement is the stay-put placement while the dispute resolution process occurs. If there is disagreement, it may be helpful to fully explore the issue as a team by discussing and documenting appropriate accommodations before determining remote learning is not the right placement. Consider developing criteria that would indicate success in the remote learning program, and elicit and document meaningful parental participation. This might include incorporation of attendance requirements and other participation requirements in remote learning program handbooks.

Decisions made regarding access to remote learning for special education students should be the same as for typical students. For example, if a typical student was not successful in engaging with remote learning, would that student be permitted to re-enroll in the remote learning program? If there is a difference in decision-making for typical and disabled students, ensure that the reasons are not based on the student's disability status.

Finally, given the experiences of this year, it may be a good idea to spend some time discussing contingency plans, so that the team will be able to pivot services and supports if something changes. These plans, which are temporary in nature, would be implemented if in-person services suddenly become remote services, or vice versa. These plans are not a substitute for an IEP team meeting to adjust services, accommodations and supports if circumstances change, but a bridge to prevent a denial of FAPE during that transition.

Due to the need to individualize decisions and the variety of district resources and programs, it is not possible to prescriptively outline in every case what considerations are appropriate for remote learning.

Work with your counsel when needed to ensure that potentially-problematic situations are proactively addressed. The post-pandemic litigation on the provision of special education services in schools has only just begun.

BWC Retaliation Case

The Sixth Appellate District Court of Appeals has rendered a decision denying an employee's claims of workers' compensation retaliation and disability discrimination, among some other related claims.

The employee at issue was a tool and die maker. He was injured while using a machine that had rotating parts which caught the glove he was wearing and mangled his right hand, resulting in an amputation of his middle and ring finger. The Employer contacted OSHA to begin an investigation and filed a workers' compensation claim on the employee's behalf. The employee was eventually released to full duty by his doctor and the employer reinstated him as a tool and die maker.

Employees were trained extensively not to use gloves while using rotating equipment and the employer investigated the employee's conduct in this regard and imposed a three-day suspension without pay. The employee admitted that he violated the policy and also executed an employee corrective action warning him that any further violations would result in his dismissal. The first day back from the suspension, the employee was witnessed wearing gloves while operating a rotating machine. The employee was reported to management and was terminated for violating the policy and the employee corrective action. The employee conceded that he had violated the corrective action.

The employee sued the employer for workers' compensation and disability discrimination as well as wrongful termination, an intentional tort related to maintenance of the equipment, and loss of consortium on behalf of his wife.

Ohio law provides that "no employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer."

Workers' compensation retaliation, like other discrimination and retaliation claims are subject to a burden-shifting analysis by the Court. The employee bears the burden to establish a "prima facie" case by showing that (1) the employee filed a workers' compensation claim, or instituted, pursued, or testified in a workers' compensation proceeding; (2) the employer discharged, demoted, reassigned, or took punitive action against the employer; and (3) a causal link exists between the employee's filing or pursuit of a workers' compensation claim and the adverse action by the employer.

If the employee can establish a prima facie case, the employer must show a legitimate, non-discriminatory reason for its action. If the employer meets this burden, it goes back to the employee to establish that the reasons provided by the employer are merely a pretext. To do so, the employee must be able to shoe that the reasons given by the employer (1) had no basis in fact; (2) did not actually motivate the discharge; or (3) was insufficient to motivate the discharge.

The Court rejected the employee's argument that because he was fired within 7 days of returning to work, it was sufficient to establish retaliatory motive. The Court reasoned that the firing and the employer's knowledge of the claim were not sufficiently close enough in time to establish that proximity alone constituted evidence of retaliatory intent. Moreover, the Court found that the act of returning to work is not protected activity.

The Court also rejected evidence that the employer had a hostile attitude towards the employee based on several off-color remarks that were made upon his return such as "I guess you are left-handed now." Such isolated comments, however, out of context, and in the absence of other evidence, are insufficient to establish a causal link between termination and the filing of a workers' compensation claim.

The Court also rejected the employee's argument that because the employer had failed to discipline other employees prior to his injury for wearing gloves, that its action to do so after the injury is evidence of a retaliatory motive. The Court found that the employee himself had not been disciplined for doing so prior to his injury and that he was unequivocally prohibited from doing so after his injury, before he was terminated for once again violating the policy.

The Court denied the employee's disability discrimination claim, which was made on similar factual allegations as the retaliation claim. However, here, the Court found that the employee was unable to establish a prima facie case of discrimination because he did not have a disability due to his two fingers being amputated. The Court found that the employee did not establish that the amputation caused him a substantial limitation of a major life activity. The Court recognized that he had some difficulty in adjusting to writing and other tasks with his right hand after the amputation, but he was still able to perform his work as a tool and die maker and could not establish that he was substantially limited in the performance of any major life tasks as compared to most people in the general population.

The Court also found that the employee could not have been regarded as having a disability by the employer because the employee lobbied to return to, and succeeded in securing, his former position of employment. Finally, the Court held that even if the employee could establish that he was disabled, there was insufficient evidence to find that he was terminated on account of his disability.

What this means for your District:

It is possible to terminate an employee for acts which lead to a workers' compensation claim. A termination does not end the claim itself, just the employment relationship. Termination should be supported by an articulable violation of policy or directive or you may risk losing the burden shifting analysis. Here, the employer did not have a perfect set of facts because there was a history of non-enforcement of the policy until after the injury and there were some snide remarks made to the employee about his injuries. However, because the employer provided training, complied with its legal requirements, and kept the discipline focused on the employee's violation of the policy and the corrective action, those little factual hiccups were not sufficient to establish a retaliatory or discriminatory motive behind the discipline action.

***Creveling v. Lakepark Industries, Inc.*, 2021-Ohio-764**

Court Dismisses Claims Against School Board and Bus Driver in Transportation Mix-up

From time to time, the bus driver misses a sleeping student in the back of the bus garage, or a student is mistakenly released to a bus, though other instructions were in place. These mistakes happen, and though serious, thankfully do not typically result in harm. This was the case in an appeal decided in April by the Second Appellate District (Clark County).

The parent in the case called the school one day to let them know she would be picking up her young children (ages three and five at the time) and later arrived a few minutes before the end of school day to pick them up. Upon arriving, the parent discovered that the student had been sent on a bus to the school's latchkey program. The parents' complaint alleged that twenty minutes later the bus arrived back at the elementary school with her children. The parents' complaint further alleged that she could not get "satisfactory answers" as to the children's whereabouts during the 20 minutes they were gone and also that upon returning with the children, the bus driver was belligerent and argued with the parent. The parents filed a 10-count complaint alleging negligent hiring, training, and/or supervision, against the school board and Educational Service Center; and negligent infliction of emotional distress and intentional infliction of emotional distress against the bus driver and other unnamed employees.

Both the Board of Education and the Service Center filed motions to dismiss on behalf of themselves and the employees. The Court did not look kindly upon the parents' complaint. First, the Court found that the defendants were immune from this kind of liability because the alleged harm occurred while carrying out a governmental function and the employee involved was acting within the course and scope of employment. Next, taking a look at the parents' claims on their merits, the court noted that the "buzz words" (phrases that are in the definition of the claims alleged) were in the complaint, but there was no substance behind them. For example, as you would typically read in these kinds of complaints, it was alleged that "defendant Lovato's behavior throughout this matter was extreme and outrageous, and shocking to the conscience." But the complaint does not actually allege any facts fitting that description. The Court was particularly dismissive of the parents' fourth claim for relief, which the Court characterized as reading "almost like Ms. Lovato [the bus driver] kidnapped the children. ""[Lovato] unlawfully enter[ed] the school and remov[ed] the children without * * * approval or knowledge of the Plaintiffs, and [left] the school premises with the children after being directly informed that the Plaintiff had arrived." The factual background of the complaint, however told a less dramatic version of the events, as described above.

The Court was also dismissive of the parents' attempt to use allegations against unnamed John and Jane Does to keep the case alive. The court recognized the distinction between a plaintiff not knowing the name of a defendant and not knowing the identity of a defendant. "[The rule] does not allow a plaintiff to set up a "straw man" to facilitate a fishing expedition, and that is what we had here."

The whole case reads like one long jurisprudential eye-roll.

Fortunately, the Court took the opportunity to cite to the hilariously corny and outdated but still applicable recital of the level of conduct necessary for infliction of emotional distress. It comes to us from the Restatement of Torts published in 1965. "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

The Court concluded that while the mother had reason to be upset over the mistake, the school acted quickly to resolve it and the level of conduct involved did not rise to the level of being "extreme and outrageous as to go beyond all bounds of decency."

What this Means for Your District

It does not seem likely that any answers would have been sufficiently satisfactory to the parents in this case, considering they actually filed a lawsuit based on these facts. Regardless, dispute resolution and de-escalation can go a long way in avoiding having to deal with lawsuits like this. Fortunately, if a lawsuit occurs, courts are showing their willingness to be dismissive of claims resting solely on buzz words with no substance behind them. To do otherwise would make one exclaim, Outrageous!

Cline v. Tecumseh Local Bd. of Edn., 2021-Ohio-1329

Ennis Britton's 2020-21 Administrator's Academy Seminar Series

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We know that school districts face many challenges this year, and we are here to help! We are taking a different approach to the 2020-21 Administrator's Academy Seminar Series by offering five live interactive webinars rather than the typical that we have offered in the past. Our goal is to address a broader list of topics in a way that takes up less time from your busy day. The webinars will be presented in an interactive zoom webinar format. Attendees will have an opportunity to hear about hot topics from an Ennis Britton attorney, and will also have an opportunity to collaborate with colleagues and in smaller discussion groups. The webinars will take place from 11:00 a.m. to 12:00 p.m. on the following dates:

- October 22, 2020: Student Privacy Challenges
- December 10, 2020: Lame Duck Legislative Overview
- February 11, 2021: Managing Employee Leaves
- April 15, 2021: Shedding Light on Sunshine Laws
- July 15, 2021: 2020-2021 School Law Year in Review (from 10:00 a.m. to 12:00 p.m.)

Due to the change in format, these events may not be archived or recorded.

Registration

You must be registered to attend any of these events. You may register on our website or by contacting Hannah via email or phone at 614.705.1333. Attendees will be provided a certificate of attendance. Any administrators and board members from your district are invited to attend.

We hope you can join us!

About Our Administrator's Academy Seminar Series

At Ennis Britton, we believe our role is to provide key legal guidance to our clients before a problem arises. This way, clients can make informed decisions and avoid legal pitfalls. We created the Administrator's Academy to provide school district administrators and board members with the latest legal information to help them manage their districts in an efficient, effective, and proactive manner.

The Administrator's Academy consists of a series of presentations, each covering a specific topic or area of education law. Our experienced attorneys provide a legal overview as well as real-life examples to help administrators navigate and understand the complicated legal environment. Participants have the opportunity to ask questions and to hear different perspectives on topics pertinent to school management. The Administrator's Academy presentations are provided as a complimentary service to our clients and are free of charge. Ennis Britton will also work with LPDCs for the attainment of CEU credit.

Upcoming Presentations

Special Education Coffee Chats

The Ennis Britton Special Education Team invites you to join a series of facilitated conversations with student services personnel and Ennis Britton attorneys to discuss the COVID-19 educational impacts. We know that as educational leaders, you are great collaborators, and if there was ever a time for sharing your insights on how to serve students, it is now.

During the chats, our special education team of attorneys will provide a quick overview of hot topics – then turn things over to you and your colleagues across the state. We will help facilitate discussions and encourage you to take your conversations in the direction that best serves your students and school district.

This series has been offered since May. In light of the slowdown of new guidance and legislation we are moving to a monthly schedule. Just like you, we strive to be responsive to the changing situation with the pandemic and will revisit the scheduling and format of the Coffee Chats regularly.

If you are interested in joining us for this coffee chat, please contact our Legal Secretary, Hannah Reichle, at hreichle@ennisbritton.com to receive the Zoom conference link (it will be sent Thursday morning). If you have already signed up, you are on the list and do not need to sign up again. If you have changed positions, please forward this email to the appropriate people in your district. The general logistics are as follows:

- The next Zoom conference for the 2020-2021 school year is set for Thursday, May 6th starting at 9:00 AM. We aim to be done in less than an hour because we know you are very busy. Attendees will be placed in a virtual waiting room until the meeting begins. After brief introductions, you will be prompted to join a breakout room.
- The Zoom chat feature will be available throughout this session. You may send messages to all participants or send "private" messages to facilitators.
- Special Education Team members will be available by email or cell phone if you have follow-up questions.

We encourage you to continue sending us your suggestions for future chats! We're here to help you with the technical side of compliance, but we also want to make sure we are helping you with the bigger picture. If any professionals are up to the challenge of creatively solving problems and adjusting to ever-changing government directives, it is educators. We are inspired by your efforts and honored to be a part of your team. Thank you again!

Other Presentations

We are currently scheduling administrator retreats for the 2020-2021 school year (in person or via videoconference). Contact us soon if you would like to schedule a retreat for your administrators!

May 7: OASPA Conference – *Answers to Questions that Make Special Education Directors Scratch Their Heads*
Presented by Jeremy Neff and Erin Wessendorf-Wortman

May 13: Butler Co. ESC Superintendent Legal Update
Presented by Gary Stedronsky

Follow Us on Twitter: @EnnisBritton
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 Hannah via email or phone at 614-705-1333. 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
- Student Privacy

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
Robert J. McBride
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
Kyle Wheeler

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

Team Members:
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman
Kyle Wheeler

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

Team Members:
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