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Supreme Court Allows Third Party Title VII Claims

***Thompson v. North American Stainless, LP*, 562 U.S. (January 24, 2011).**

In 2003 Eric Thompson and his fiancé Miriam Regalado were both employees at North American Stainless (NAS). In February NAS fired Thompson three weeks after it found out Miriam had filed an EEOC claim for sex discrimination. As a result, Thompson filed his own charge with the EEOC. After it was obvious the parties could not settle, Thompson filed suit claiming NAS fired him to retaliate against Regalado. The District Court and the Sixth Circuit found for NAS.

The Supreme Court first reviewed that Title VII prohibits employers from discriminating against its employees because of a Title VII charge brought against it.

The Court first decided that NAS' termination of Thompson was unlawful retaliation. It was obvious to the Court that a the standard was met: a reasonable worker would be dissuaded from protected activity if she knew her fiancé would be fired.

NAS's argued that allowing this would lead to confusion as to what relationships are entitled to protection. The Court understood the point, but did not think it was worth ruling that third-party reprisals do not violate Title VII.

The Court next determined that Thompson had a cause of action. First, Title VII's requirement that the action be brought by a person claiming to be aggrieved is not the same as Article III standing to bring suit and Thompson's claim met minimum standing requirements. Thus, the term "aggrieved" in Title VII should be construed more narrowly than the boundaries of Article III standing.

NAS then argued that "person aggrieved" should only refer to the person who engaged in the protected activity (Regalado). The Court declined to use this narrow meaning however, because it had no basis in text or practice and it would contradict precedent.

Instead, the Court adopted a zone of interest approach. "The plaintiff may not sue unless he 'falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for the complaint.'" It thus held, that the term "aggrieved" in Title VII incorporates the zone of interest test, which enables any plaintiff with an interest arguably sought to be protected by the statutes to make a claim.

In applying this test, the Supreme Court held that Thompson was within the zone of interest and could bring a claim. Thompson was not an accidental victim of retaliation and hurting him was the unlawful act.

How This Affects Your District:

This case is especially important because it expands standing to sue under Title VII. It is now broader than Article III standing which governs many cases. When an employee brings a Title VII complaint against an employer, that employer cannot retaliate against the complainant. It also cannot retaliate against a third party that is close to the complainant. Third parties now may have standing to sue.

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Supreme Court Allows Third Party Title VII Claims, Cont.

The Supreme Court did not outline what relationships are close enough to ensure the third party has standing. From this case, we know that fiancés, and it follows spouses, have standing to sue in this situation. Other immediate family members may also have standing. It is less clear whether girlfriends, boyfriends, or more distant family members may would be permitted to bring a claim.

Appellate Court Upholds Complaint Alleging Defendants Not Immune

***Michael Boske, et al v. Massillon City School District*, et al, 2011-Ohio-580 (Feb. 7, 2011).**

The Court of Appeals of Ohio for the Fifth District recently held that Massillon City School District employees do not have immunity from various charges resulting from a student's relationship with a teacher. The Court did uphold dismissal of the claims alleging failure to report child abuse.

In 2007 Jane Doe was enrolled in defendant school district. Both of Jane's parents met individually with the district principal, Andaloro, and school principal, McPherson, to inform them that Jane had developed an interest or attraction to older men. They asked the administrators to contact them if they noticed such problems arising at school.

After this request, Jane began having a relationship with Frank Page, a teacher at her school whose classroom was directly across from the principal's office. Jane was not in Page's class. Between February and May 2007 Jane would visit Page's class every day where he would shut the door and lock it. The two would then hug, kiss and touch each other.

In late February or early March, counselor Joi Lecavits and Andaloro met with Jane to ask her about rumors that she spent the night with Page and was pregnant with his child. Administrators also questioned Page on multiple occasions and told him to stay away from Jane. However, no one made any other investigations or notified authorities.

On May 29, the police called Jane's father to report that Jane had been missing from school for thirty five minutes. When Jane's parents got to school to meet with administrators they found out that Jane had been in Page's classroom and surveillance had taped Jane in Page's room six times over two weeks.

As a result of these incidents, Jane's parents brought five causes of action against numerous defendants. They brought claims alleging: failure to report child abuse, intentional infliction of emotional distress, reckless retention of Page, reckless supervision of Page, and punitive damages.

The trial court dismissed claims against Massillon City School District and the Board of Education and its individual board members. They were not parties in the appeal.

The appeal centered on whether the parents' complaint was sufficient to sustain a claim. The defendants alleged that the complaint only contained generic labels and legal conclusions and the trial court should have sustained their motion for judgment on the pleadings. The Court first outlined the standard for a complaint. It referred to *Bell Atlantic Corporation v. Twombly*, a United State Supreme Court case that held plaintiffs can overcome a motion to dismiss if there is a set of facts consistent with the complaint that would allow recovery. The claims in the complaint must be plausible. Another Supreme Court case, *Ashcroft v. Iqbal*, expanded upon this by holding that the complaint must contain more than a mere allegation, but does not require a detailed factual allegation.

Next, the Court of Appeals addressed the sufficiency of the plaintiffs claim that the school administrators and staff were excluded from immunity. Ohio statute § 2744.03 grants liability for personal injury cases unless: 1) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; 2) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or 3) civil liability is expressly imposed upon the employee by a section of the Revised Code. Generally, school employees are only liable if they show a wanton, reckless, or malicious act or an act done in bad faith. The Court found that the parents sufficiently alleged the individual employee defendants were wanton and reckless. There were enough facts that, if proven, would bar immunity for the defendants.

The next issue was whether the trial court erred when it found that the plaintiffs did not have a cause of action against any of the defendants for failing to report child abuse. The trial court found that O.R.C. § 2151.281 does not impose civil liability on people who are required to report abuse. However, a new law, R.C. § 2151.421, does. The Court affirmed the trial court's de-

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Appellate Court Upholds Complaint Alleging Defendants Not Immune, Cont.

cision since the new law was not effective until April 7, 2009, after the incidences in this case. The statute cannot be applied retroactively; thus, the law in effect at the time of the incidents did not provide for civil liability when a person usually required by statute to report abuse or neglect.

How This Affects Your District:

This case is significant because it addresses various Ohio laws teachers should be aware of. First, school employees should be aware of how they can qualify for immunity and what sort of acts will exempt them. Administrators, teachers, and staff cannot necessarily count on the fact that immunity will protect them from civil liability in all circumstances. Employees need to be aware of the three exemptions listed in this case: acts outside the scope of employment; bad faith, malicious, wanton or reckless acts or omissions; and statutorily imposed liability.

Boske also raises awareness of the new consequences school employees may face if they fail to report child abuse. This case does not make a statement as to whether the administrators and staff would have been civilly liable had the statute been retroactive. Regardless, it is important to note that civil liability can now be imposed.

Court Strikes Down Drug Testing Policy, But Approves Random Testing

Smith City Education Association v. Smith County Board of Education, No. 2:08-0076 (M.D.Tenn Feb. 14, 2011).

The Middle District of Tennessee recently held that a school district's random employee drug testing policy was unconstitutional. However, the policy violated teachers' rights because it did not provide proper notice and was implemented unreasonably.

Smith County Board of Education implemented a drug testing policy because they wanted to stop a potential drug problem among Smith County teachers. The school board believed any policy needed to be random to have a deterrent effect. The first version of the policy was approved in 2004. The 2004 policy, drafted by district counsel, applied to all employees including board members and provided for testing during the application process, with reasonable suspicion, as a routine check for fitness for duty, as a follow-up, and after an accident. The policy stated that it tested for five drugs: alcohol, amphetamines, cannabinoids, cocaine, phencyclidine, opiates, and any other illegal substance. It also provided for employee training but did not provide for random drug-testing.

After it came to the board's attention that the 2004 policy did not contain language authorizing random drug testing, a 2007 version was approved. The 2007 version differed from the previous version, in that it provided for random drug testing of at least 10% of employees per year.

Fortier Substance Abuse Testing, Inc. implemented the drug testing program for Smith County and the district deferred to Fortier's expertise. The testing program tested for nine different categories of drugs. The drugs named in the policy and benzodiazepines, barbiturates, propoxyphene, and methadone. These categories include some commonly proscribed medications. The nine-panel test also did not provide for cut-offs so any level of a drug could result in a positive test.

Fortier provides training to employees on the drug testing. However, the training did not state the testing was random (in fact many slides said random testing was not required), did not say which drug categories were tested, and did not say which medications could lead to a positive result. Dr. Woodall, the MRO for the testing, did confirm medications with an employee when he or she had a positive test to rule out prescriptions.

The actual testing procedure was also intrusive and intimidating. Teachers were intimidated by the superintendent's presence in the building when drug testing occurred. In addition, some test samples were split in front of other employee's and at times, there were other employees in the room drinking water until they could provide a test sample.

The Court first addressed constitutionality by finding that a compelled urine test from a government employee is a search for the purposes of the Fourth Amendment's prohibition on unreasonable searches and seizures. Although testing usually must be based on individual suspicion, the Supreme Court previously held that drug testing can be constitutional when it serves special government needs. There may be a special need when an employee holds a safety sensitive position.

The Court then relied on Sixth Circuit case, *Knox County Education Association v. Knox County Board of Education*, which found that teachers do hold a safety sensitive posi-

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Court Strikes Down Drug Testing Policy, But Approves Random Testing, Cont.

tion since they serve *in loco parentis* to children. The Sixth Circuit then balanced government interest with individual privacy interest and found that the potential harm to teachers in suspicionless drug testing was discounted because the testing was fairly unintrusive.

The District Court noted that Smith County had not provided any evidence its teachers were any different than Knox County teachers. As a result, Smith County teachers were also in safety sensitive positions and subject to suspicionless drug testing.

However, *Knox* did not discuss the issue of random drug testing, and the Court distinguished the case there. Even when there are special needs for the privacy intrusion in drug testing, a court must undertake a context-specific inquiry, examining competing private and public interests.

In balancing the interests of the parties to determine if the drug test was constitutional, the Court first concluded that deterring illegal drug use is a reasonable and appropriate interest for the school board. However, the policy failed, first, because it did not provide adequate notice. The board conducted random testing, but employees were shown slides indicating there would not be random testing. The policy called for testing of five types of drugs but nine were actually tested. Employees were also not informed that it was a urine test. The policy also should have stated standards and cut-offs used in the test.

The policy was also overly-intrusive. It did not inform employees of the testing process. They were, at times, in groups and samples were split in front of others. As a result of these flaws, the Court held that the school board demonstrated a need for a drug testing policy and for random testing, but the policy it adopted lacked notice, was unreasonably intrusive, and was unconstitutional.

How This Affects Your District:

This case is educational because it explains how district courts within the Sixth Circuit may interpret *Knox*. Schools governed by Sixth Circuit caselaw may be able to show the need for a random drug testing policy. However, districts must still be wary of how they draft drug testing policies. Districts must be as forthright as possible. Teachers should be informed of what is being tested, what levels of the types of drugs will result in a positive test, how the testing will be conducted, the level of privacy and the randomness of the test.

Ohio Supreme Court Affirms Sanctions in Public Records Case

***State ex rel. Bardwell v. Cuyahoga City Board of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073 (Oct. 26, 2010).**

For the first time, the Ohio Supreme Court imposed sanctions on a plaintiff in a public records case .

Bardwell requested a contract in a deal that had not been finalized from the Cuyahoga County Prosecutor. When the Prosecutor refused, claiming attorney-client privilege, Bardwell sued to compel based on evidence the attorney-client privilege had been broken. The Court of Appeals denied the writ and sanctioned Bardwell for $1,050.

The Ohio Supreme Court first discussed Civil Rule 11 which states when a court document is signed, the signatory asserts his belief that there is good ground to support the information. Violations of this standard can result in sanctions if they are willful or in bad faith; however, sanctions should be imposed with care.

Bardwell argued that there was no indication he acted in bad faith when he sued the prosecutor's office. However, the Court declined to reverse the appellate decision. It observed that Bardwell did not provide any exhibits at the hearing to defend himself. Since neither party requested a court reporter for the hearing, there was no testimonial evidence. Bardwell also did not address these arguments in his briefs. Contrarily, the Court of Appeals provided plenty of rationale for its decision. As a result, there was no indication of an abuse of discretion and the Court had to affirm.

How This Affects Your District:

Bardwell is significant because it is the first time the Ohio Supreme Court has affirmed sanctions against someone for abusing the privileges of public records law. Although the practice has now been affirmed, this is still unlikely to become common. The Supreme Court took care to note that sanctions should only be ordered in narrow circumstances. It is also possible that sanctions could have been avoided here with better lawyering. Although sanctions will likely continue to be uncommon, school districts may now feel they have the support of the Courts against citizens not using the public records process in good faith.

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

Bronston McCord
ERF Exclusive Webinar on March 10, 2011
Senate Bill 5: Collective Bargaining

Jeremy Neff
At Warren County ESC on March 23, 2011
Special Education and Student Discipline

Bronston McCord and Bill Deters
At Warren County ESC on March 23, 2011
Senate Bill 5 Workshop for Administrators and Board Members

Administrator's Academy Dates at Great Oaks Instructional Resource Center

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

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

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