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School Law Review

MAY 2019

SCOTUS to Decide Transgender and Sexual Orientation Protection in Title VII

The Supreme Court of the United States (SCOTUS) has agreed to hear a trio of cases involving alleged sexual discrimination. This present consideration will allow the Court to determine if Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination on the basis of sexual orientation or an individual's transgender or transitioning status. The issue revolves around Title VII's definition of "sex" and whether or not that encompasses sexual orientation and/or gender identity, an issue hotly debated in judicial and administrative forums. Specifically, the Equal Employment Opportunity Commission (EEOC) and the U.S Court of Appeals for the Second and Seventh Circuits have determined that the definition of "sex" does encompass sexual orientation. Conversely, the U.S. Court of Appeals for the Eleventh District has held that is does not prohibit discrimination based on sexual orientation. The SCOTUS's grant of certiorari signals that the Court is prepared to extensively address the issue during its next term beginning in October.

The involved cases are *Altitude Express v. Zarda* from the Second Circuit, *Bostock v. Clayton County, Georgia,* from the Eleventh Circuit and *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C* from the Sixth Circuit, whose jurisdiction includes Ohio. The SCOTUS has consolidated *Zarda* and *Bostock* because they involved a common question of law/fact.

The *Bostock* case involves a gay man who worked for child welfare services in the Juvenile Court of Clayton County, Georgia. After it was discovered that he played in a gay softball league, he claims that court administrators conducted an audit of him that led to the discovery of poor handling of county funds. Bostock was fired and now contends that the audit was merely pretext for dismissing him because of his sexual orientation.

The *Altitude Express* case involves Donald Zarda who worked for the New York state skydiving company Altitude Express. He was fired from the company and alleged sexual discrimination on the basis of his sexual orientation. He has since died, but his estate has carried on the law suit. His estate lost the Title VII claim in the federal district court, but the U.S. Court of Appeals for the Second Circuit held that sexual orientation is sexual discrimination because it is a basic function of sex.

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The *R.G. & G.R. Harris Funeral Homes* case involves an employee who was biologically born male and was formerly known as William Stephens. While working for R.G. & G.R. Harris Funeral homes the employee realized her gender dysmorphia and assumed the identity of Aimee Stephens. As part of her transition, Stephens refused to adhere to the funeral home's strict, gender-specific dress code. As a result, her employment was terminated.

On her behalf, the EEOC sued the funeral home and lost in a Federal District Court level, but won in the 6th Circuit Court of Appeals, thus creating the only federal appeals court decision on this specific issue. Although no dates have been set before the SCOTUS, it is expected that oral arguments will be heard on these cases as early as the fall of 2019 with a decision as early as summer of 2020.

What this means for your district

As we await the decisions of the justices, employers should take a proactive approach to Title VII and keep in mind legislation that will potentially become effective in your districts. In any case, districts should take the broadest approach to workplace protections for sexual discrimination. Consider reviewing policies and procedures that are currently in place to ensure these protections are addressed.

Sick Leave Donation Program Analyzed by AG

The Ohio Attorney General has released a formal opinion finding that the board of education of a joint vocational school district (JVS) has no authority to establish a sick leave donation program for non-teaching employees of the district who are not members of a collective bargaining unit.

The prosecutor explained the donation program to the Attorney General as follows:

"The sick leave donation program would allow non-teaching employees to donate unused sick leave accrued by those employees into a bank for the use of eligible employees. Upon application and approval, unused sick leave in the bank would be accessible to an eligible employee, meaning that an employee with a serious illness could exhaust his or her accrued sick leave and then access the donated sick leave in the bank, all accrued by other joint vocational school non-teaching employees. The board of education itself would not provide any additional sick leave. The donation program would consist only of donated leave accrued by other non-teaching employees. Nor would there be any cash payment or any other incentive to any employee to compensate them for donating the sick time to the donation program."

The Attorney General reasoned that as political subdivisions of the state, school districts are creatures of statute and can only act as expressly authorized or as may be necessarily implied to carry out such express grants of authority. Sick leave is a benefit school boards are permitted to provide their employees by statute (R.C. 3319.141). That statute provides that employees may use sick leave for their own personal illness or for illness of a family member. Because the statute limits the purposes for which sick leave can be used, a school board has no authority to permit sick leave to be used for another purpose, i.e., for the illness of another person who is not a family member.

The opinion, of course, does not apply to employees who are members of a collective bargaining unit who have negotiated the establishment of a sick leave donation program through collective bargaining. This is because, generally, collective bargaining agreements can supersede the requirements of statute, except where prohibited by law.

Districts should be cautious in permitting sick leave donation outside of the confines of a collective bargaining agreement. This opinion could be used as a basis for a finding for recovery for sick leave that is improperly paid to an employee under an unlawful donation program.

Student Dress Code Violates the First Amendment

A Federal District Judge recently ruled that a charter school dress code policy which required girls to wear skirts and prohibited girls from wearing pants or shorts, violates the equal protection clause of the U.S. Constitution. Many challenges in the past have rested on First Amendment grounds regarding freedom of expression. However, this case was brought on a theory of gender discrimination.

The Plaintiffs argued that the girls suffered tangible disadvantages due to the policy. The court found that the Plaintiffs established that "the girls are subject to a specific clothing requirement that renders them unable to play as freely during recess, requires them to sit in an uncomfortable manner in the classroom, causes them to be overly focused on how they are sitting, distracts them from learning, and subjects them to cold temperatures on their legs."

The Defendant, the Charter Day School, argued the dress code was designed to garner mutual respect between the boys and the girls, particularly in that the skirts represented visual cues to promote respect between the two sexes. Striking down the policy, the school argued, would remove those visual cues and hinder a sense of respect for the opposite sex. The Court noted that even if these were legitimate interests of the state, the school failed to show how the policy advanced such interests.

The Court further noted that school dress code policies have been upheld by numerous courts and that the state does have legitimate interests in the grooming and dress of students attending schools supported by the state. However, these interests must be addressed in a uniform, gender-neutral way that does not penalize a student simply for being one sex or the other.

Special Education Spotlight: Judge Vacates the Education Department's Decision to Delay

On March 7, 2019, U.S. District Court Judge Tanya S. Chutkan vacated the U.S. Education Department's decision to delay compliance with a 2016 regulation that required states to adopt a standard methodology approach to calculate significant disproportionality of racial and ethnic disparities in special education.

The Education Department (ED) delayed compliance with the regulations just before July 1, 2018 when they were supposed to take effect. The ED moved the compliance date to July 1, 2020, as Education Secretary Betsy DeVos raised doubts that the standard for calculating disproportionality was the best option. Concerns were also expressed that the new regulation would unintentionally create quotas and limit special education enrollments, further claiming that children would be denied the right to the appropriate education services simply because of the color of their skin.

Judge Chutkan determined that the ED's decision to delay was illegal and violates the Administrative Procedure Act that governs how federal agencies can propose and establish regulations. In her decision the Judge noted that the ED failed to give a reasonable explanation for its decision to delay and failed to consider the cost implications of doing so, especially in light of the fact that states and districts already began to prepare for the regulation change that involved monetary costs and also cost to the students and their families.

Judge Chutkan found other inconsistencies in the ED's argument. One, she noted, was in the option to use the standard methodology to measure and report significant disproportionality while the delay was in place. She said that while the government said they expressed concern about using this methodology, states were not prohibited from using it. Another inconsistency was in the ED's concerns about creating quotas. She noted that back in 2016 when the regulation was put into place, the ED already thoroughly examined concerns facing quotas in special

education. The ED did not give an explanation as to why it changed its position on the effectiveness of the safeguards.

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.

- **May 7:** Primary election day (RC 3501.01)
- **May 8**: 90-day deadline for local questions and issues for the August 6th special election (RC 3501.01; .02)
- **May 15**: Deadline for certain board members and all administrators to file financial disclosure forms with the Ohio Ethics Commission (RC 102.02)
- **June 1**: Deadline to take action on and give written notice of intent not to reemploy nonteaching employees (RC 4141.29(I)(1)(f)); Deadline to take action on and give written notice of intent not to reemploy teachers (RC 3319.11(D)); Deadline to take action to nonrenewal contracts of administrators other than superintendent and treasurer (RC 3319.02)
- **June 30**: Statutory end of 2018–2019 school year (RC 3313.62); End of third ADM reporting period (RC 3317.03(A))
- **July 1**: Deadline for board to notify teaching and nonteaching employees of succeeding year salaries (RC 3319.12, 3319.082); Treasurer must certify available revenue in funds to county auditor (RC 5705.36(A)(1))
- **August 6**: Special election (RC 3501.01; .32)

Upcoming Presentations

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

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 Kayla via email or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

May 7: 2019 OAEP Spring Conference
99 Problems: Tuition and Custody

Presented by Hollie Reedy

May 20: BASA, OSBA & NEOLA Seminar
Social Media: the Good, Bad & Ugly
Presented by John Britton

June 7: 42nd Annual OCSBA School Attorney Workshop
Protect and Serve in Not Enough: SROs in Schools
Presented by Hollie Reedy and Giselle Spencer

June 18-19: OACTS Summer Conference
Special Education Update for CTCs; Legal Update for CTCs
Presented by Pam Leist

June 18: Mercer County Legal Update
Education Law Update
Presented by Ryan LaFlamme

June 28: OSBA Sports Law Workshop
Top Legal Issues Impacting Athletic Programs
Presented by Bill Deters and Pam Leist

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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 Kayla 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
- 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
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

Team Members:
Megan Bair
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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