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School District Liable for Sex Harassment Despite Prompt Response

Even where a School District promptly responds to sexual harassment in the workplace, it may still be liable if it does not take sufficient punitive action against the offender. In the recent Federal Court case of *Engel v. Rapid City School District*, the Eighth Circuit Court of Appeals held that a School District's attempt at corrective action was negligent and ineffective, thus making the School District liable for sexual harassment. In this case, after a worker complained of another co-worker harassing her, making sexual remarks, and asking for sexual favors, and the School District promptly investigated the matter, and a five member investigative panel found inappropriate behavior by the employee, it was alleged to have committed sexual harassment.

The School District gave corrective action in the first instance by suspending the employee without pay and warning the employee that any future complaints of harassment would result in immediate termination.

However, following the return to work after the suspension, the victim of sexual harassment claimed that the male co-worker continued the harassment by looking her "up and down" and "undressing her with his eyes." The School District did not terminate the individual, but proceeded with another suspension, allowing the harasser to return to work. Eventually the victim claimed that by continuing to have the male co-worker have contact with her, she cried every night because of stress at work and eventually resigned her employment. In her sexual harassment suit, she alleged that the School District's response to the sexual harassment was inadequate.

The Federal Court noted that the School District's initial response was "prompt, reasonably comprehensive in scope, and stern in its warnings." The Court held that the first response of the School District was entirely appropriate.

However, the Federal Court found that the School District was negligent by not proceeding with a termination of employment when the sexual harassment reoccurred. The Court found that the "School District's decision to respond to the continued harassment by decreasing, rather than increasing, its threatened sanctions, may reasonably be viewed as contributing to a negligent response." The Court noted that after the first discipline, it threatened to fire the male harasser if it received one more complaint about him, but the School District did not follow through on this promise. The Court noted that this backtracking by the School District may have emboldened the harasser, thereby contributing to his continued harassment of the victim.

The Court also found that the School District was negligent in failing to transfer the harasser to a different work location after the victim reported that she was uncomfortable with the continuing contact with the harasser.

This decision demonstrates the fact that School Districts must take sufficient disciplinary action when confronted with a sexual harassment case. Just as in this case, a School District need not initially fire an

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Paying Girls' Softball Coach Less than Boys' Baseball Coach Gives Rise to Equal Pay Act Claim

When a School District pays a girls' softball coach less than a boys' baseball coach, even though the baseball team plays more games and the baseball games tend to run longer than softball games, the District can be liable for an Equal Pay Act violation. In the case of *Hankinson v. Thomas County School System*, the Eleventh Circuit found that a claim could be made under the Equal Pay Act when the girls' softball coach was paid less than the boys' baseball coach, since "the Employer was paying employees of opposite genders different wages for equal work for jobs which required equal skill, effort and responsibility."

Importantly, the Court found that the jobs need only be "substantially similar" and when comparing them, the Court will focus solely on the primary duties of each job, not duties that are incidental or insubstantial.

The Court conceded that there are differences between the softball and baseball teams, such as the baseball team playing more games and the baseball games running longer than the softball games. But, the Court noted that the baseball coach had more qualified assistants than the female softball coach, which could offset these differences.

The Court found that these two coaching positions were substantially similar, and the burden was on the School District to prove that the pay differential could be justified on a differential based on any factor other than sex.

This case demonstrates the need for School Districts to evaluate coaching positions with similar duties applying to different genders. Although School Districts typically pay positions such as boys' and girls' basketball coaches the same, often Districts do not pay baseball and softball coaches on the same levels. School Districts should do an analysis of all extracurricular and coaching positions to make sure there are no differentials in coaching salaries or extracurricular salaries based upon gender.

Federal Courts Address Distribution of Religious Literature By Students

The Texas Federal Courts have addressed the distribution of religious literature by students involving the Plano, Texas, School District. The Federal Court has ruled that elementary students are permitted to hand out church pamphlets and other religious materials to other students during lunchtime. The Plano, Texas, School District has appealed this decision on the basis that permitting the distribution of this literature will disrupt elementary cafeteria. The School District has maintained that given the short nature of the cafeteria lunch period, permitting such distribution of literature will be a distraction to the students, taking away from their right to enjoy their lunch period.

Andrews & Beard was involved in a similar case last year for a Pennsylvania School District when litigation was filed in Federal Court concerning the distribution of anti-abortion literature in the classroom, in the hallways, and in the cafeteria.

The case was settled on the basis that the District would not permit any "educational disruption" by the distribution of literature, and the settlement was achieved whereby the District was able to maintain its right to review the material prior to distribution, and prohibit the distribution of literature in the classroom and the hallways. Students were permitted to distribute the literature before and after school and in a limited manner in the lunchroom.

The key to these cases is the District's right to prevent "educational disruption" with the distribution of literature, and maintain the integrity of the classroom setting. However, the law in this area is in a state of flux, and the Plano, Texas decision on appeal may give further guidance in this area of the law.

Instructional Assistant Found Under Influence of Drugs In School Has Reduction of Discipline Affirmed

The Supreme Court of Pennsylvania in the case of *Westmoreland Intermediate Unit #7* has affirmed an Arbitrator's Decision which reduced the termination of employment to a suspension of employment for an Instructional Assistant found under the influence of drugs in the school setting.

In this case, the classroom assistant in an emotional support classroom was missing from her classroom and found in the restroom with the door locked, partially nude, and suffering from an overdose due to a Fentanyl patch. The employee ultimately entered into a plea agreement on a charge of possession of a controlled substance and was placed on a probationary program whereby the charges would be dismissed after serving a period of probation.

After conducting its own independent investigation, the Intermediate Unit terminated this employee, and the Educational Support Personnel Association proceeded to arbitration. The Arbitrator reduced the termination to a suspension with a Last Chance Agreement based on the fact that this was the only negative incident of conduct in the employee's 23 years of employment and when "viewed in a rational, detached, and dispassionate manner, would not violate the morals of the community."

On appeal to the Commonwealth Court, the Commonwealth Court reversed the decision of the Arbitrator, and decided the case based upon the fact that the Arbitrator's decision violated the "core function" test. Under the "core function" test, the Arbitrator's Award could be overturned when the conduct violates a "core function" of the individual's employment with the School District.

Importantly, the Supreme Court, in reversing the Commonwealth Court and upholding the Arbitrator's decision, discarded the "core function" test, and found that an Arbitrator's Award can only be overturned when it violates "public policy." The Court went so far as to state that such a "public policy" must be shown to be "well-defined, dominant, and ascertained by reference to the laws and legal precedents, not from mere general considerations of supposed public interests."

Further, the Supreme Court went on to uphold the Arbitrator's decision in this case, noting that he found the conduct of the employee to be a "foolish mistake." The Supreme Court found that the Arbitrator's decision was rationally derived from the agreement and should be upheld.

This decision is extremely significant to School Districts in the processing of discipline against employees. Under this decision, it will be extremely difficult to overturn an Arbitrator's decision. The "public policy" exception to overturning the Arbitrator's Award will be very narrowly construed. Thus, any School District or Intermediate Unit must use all of their best and diligent efforts to be successful at the arbitration decision. Further, in order to establish the public policy exception, it will be imperative that School Districts have transcripts from their arbitration hearings if they want to have any chance at overturning an Arbitrator's decision.

Sex Harassment

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individual for sexual harassment if it is not so severe as to warrant immediate termination. However, once initial discipline has been given, if the harassment continues a District must take sufficient disciplinary action, including the possibility of termination.

In addition, this case demonstrates the principle that a School District should transfer the alleged harasser to avoid contact between the alleged harasser and the victim. The School District should never transfer the victim, but, rather, should move the harasser to avoid further liability.

EEOC Approves Cutoff of Retiree Health Benefits at Medicare Age

On December 26th, the Equal Employment Opportunity Commission issued a final rule creating an exemption to the Age Discrimination in Employment Act actions to permit Employer-sponsored retiree health benefits to be altered, reduced, or eliminated when the recipient becomes eligible for Medicare or comparable state health benefit programs.

The EEOC indicated that it issued this rule, departing from its past policy, to avoid the elimination or erosion of Employer-provided retiree health benefits that resulted from the EEOC's prior policy. Under that prior policy of the EEOC, an Employer that chose to provide retiree health benefits had to prove either that the benefits available to the Medicare-eligible retirees were the same as those provided to retirees not yet eligible for Medicare, or that the Employer was expending the same costs for both groups of retirees.

The EEOC noted that labor unions, benefits experts, and public and private sector employers all agreed that the EEOC's prior policy had a deleterious effect on Employer-sponsored retiree health benefits.

The EEOC stated that "although employers are under no legal obligation to offer retiree health benefits, some employers choose to do so, and thereby provide retirees with access to affordable health coverage at a time when private health insurance otherwise might be cost prohibitive." Therefore, the EEOC concluded that it did not want a potential age discrimination action to provide a disincentive for Employers to offer these valuable health insurance benefits to retirees. The EEOC stated that it was not persuaded that its rule was inconsistent with the primary purposes of the Age Discrimination in Employment Act. The EEOC noted that this final rule was addressing a problem confronting older Americans, and found that without such a rule, many Employers would reduce the overall level of health benefits they offer to retirees or cease providing such benefits all together, leaving many retirees without access to affordable health coverage.

Previously, School Districts were required under a prior Third Circuit decision in an Erie County case to avoid having language that would cut off the offering of retiree health insurance benefits at Medicare age. Now, under this EEOC regulation, School Districts are safe in providing a cutoff to retiree health insurance benefits at the time of Medicare eligibility.

IRS Issues Sample 403(b) Language

Under the Internal Revenue Service regulations for 403(b) retirement plans applicable to School Districts, School Districts must have a written plan by 2009 describing how responsibilities are allocated between the Employer and employee, the entity offering investment options, and any other party involved.

However, the IRS has now issued a revenue procedure that provides model plan language that School Districts may use either to adopt or amend their written Section 403(b) retirement plans to comply with the final 403(b) regulations of the IRS. The model language is intended for a basic plan under which contributions are limited to pre-tax elective deferrals.

By adopting the entire model language as its written plan, a School District will have the same assurance as it would by obtaining a private letter ruling from the IRS, and thus will be in full compliance with the IRS regulations.

Teacher Terminated for Religious Conduct Has No Title VII Claim

A teacher who threw out school materials concerning contraceptives and prayed with her students did not have a claim for religious discrimination under Title VII of the Civil Rights Act, according to the recent Seventh Circuit decision in *Grossman v. South Shore School District*.

In this case, the public school Guidance Counselor, Grossman, learned that the school was using literature instructing students on the use of condoms. Without consulting her supervisors, she proceeded to throw out the literature and placed an order to replace the pamphlets with those advocating sexual abstinence. Further, when students approached her for guidance about personal problems, she responded by asking them to join her in prayer, which the students proceeded to do.

When the School District terminated Grossman, she responded with an employment discrimination lawsuit, alleging religious discrimination. The Guidance Counselor alleged that during a meeting with School representatives, the Superintendent had made remarks to her about "too much religion" and "philosophical differences" about birth control and abstinence.

The Court found in favor of the School District and did not find evidence of religious discrimination. In fact, the Court pointed to the fact that supervisors in the School were Christians, and with 838 churches within 40 miles of the School District, it can hardly be said to be a region hostile to Christianity.

The Court noted that Grossman might have had a case if she could have shown that her religious conduct was at issue with the District and that the School officials terminated her because of her beliefs. However, the Court found that the only religious beliefs that the Plaintiff's conduct signaled were that teenage sex is bad and that prayer is efficacious.

Although the School Guidance Counselor argued that her advocacy of abstinence and disapproval of contraception identified her as an Evangelical Christian, the Court stated that this argument was "strange" because most other Christian sects "disapproved of non-marital sex." Thus, the Court held that she failed to show that a School official's comments about her beliefs represented part of the theological debate with her and found that the comments were more related to her approach to the problem of teen pregnancy, not her religious views.

Consequently, this decision gives support for a District to discipline a teacher or guidance counselor's attempts to impose his or her own views on sensitive issues upon the students. This decision demonstrates that the espousing of one's personal view on controversial issues will not be protected as merely being religious views of the individual involved.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 school districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the school district.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes:

- Negotiation of teacher and support staff contracts
- Employment Discrimination
- Special Education Litigation
- Veterans' Preference Litigation
- Teacher and student discipline hearings
- Leaders in Timed Mediation contract negotiations

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director, Paul T. Begley, at 814-863-1838.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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