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Supreme Court Upholds Disclosure of Email Correspondence Between School Board Members

The Supreme Court of Pennsylvania, by refusing to reconsider the decision of the Commonwealth Court in the *Easton Area School District* case, has upheld the ruling of the Commonwealth Court mandating the disclosure of email correspondence between School Board members.

Importantly, under the *Easton* case, the communications between the School Board members were done through School District email addresses that were transmitted through the School District's server. The School District had argued that because an individual School Board member does not have the authority to transact business or act on behalf of the entire School Board, emails sent from an individual School Board member's official email address could not be considered a record under the Right to Know Law.

However, the Court rejected that argument and noted that although many of the requested emails could have reflected pre-decisional deliberations that would fall under the Right to Know exemption, the School District did not raise that argument on appeal.

In addition, the Commonwealth Court has held on the *Easton* case that the Right to Know request was reasonable in scope since it only requested email correspondence for a 30-day time frame, and only requested the email correspondence between the School Board members.

The important distinction in this case is the fact that the email transmissions were done on School District email addresses, and not the individual email addresses of the School Board members. The Commonwealth Court had indicated that if the email transmissions had been done on individual School Board member home accounts, the decision would not have been the same.

The lesson learned from this case is for School Districts to never provide School District email accounts and addresses for School Board members that could be transmitted through the School District servers.

Inside …

Sexual Harassment Ruled Public Policy Violation by Pennsylvania Supreme Court

The Pennsylvania Supreme Court has affirmed the overturning of an Arbitration Award which invalidated a termination of employment for sexual harassment in the workplace. Importantly, the Pennsylvania Supreme Court, although acknowledging the limited right of appeal of an Arbitration Decision, noted that sexual harassment in the workplace in Pennsylvania is a "public policy violation," which would qualify for the limited basis for overturning an Arbitrator's Decision.

In the *Philadelphia Housing Authority* case decided in August of this year, the Pennsylvania Supreme Court rejected an Arbitrator's Award which reduced a termination of employment to a written warning for a violation of a sexual harassment policy with the Employer. The Supreme Court of Pennsylvania noted that an Employer is empowered to implement a zero tolerance policy for sexual harassment. The Court noted that the Commonwealth of Pennsylvania as well as the Federal government has noted that sexual harassment is such a serious matter that warrants its qualification as a public policy violation.

Further, the Court noted that if it were to approve the Arbitrator's Award finding of no just cause for termination of employment and ordering reinstatement of back pay, it would essentially be holding that the Employer had no recourse from a finding of overt acts of sexual harassment.

The Pennsylvania Supreme Court indicated that it was not stating that termination was required in all instances of the finding of sexual harassment. However, the Court noted that when the acts of sexual harassment were egregious and the Employer has a zero tolerance policy for sexual harassment, an Arbitrator is without authority to overturn a decision for termination of employment.

From a practical standpoint, this decision of the Supreme Court of Pennsylvania empowers School Districts to take sufficient punitive action with a finding of sexual harassment, such as a termination of employment, without the fear that the Arbitrator will reduce the penalty upon the filing of a grievance by the Union.

Pennsylvania Legislature Changes Furlough Law

The Legislature of Pennsylvania this summer amended the School Code under Section 1124(a)(2) regarding a furlough for the curtailment or alteration of an educational program. The Legislature changed the law by providing that there is no longer a need for the Secretary of Education to approve a School District's curtailment or alteration of an educational program. In fact, even a provision in an existing collective bargaining agreement which would require approval by the Secretary of Education would not be given effect.

Under the amendment to this Law (Act 82 of 2012), when a School District alters or curtails a program, it simply needs to provide notice to the Secretary of Education. The Department of Education is required to post all notifications of curtailments and alterations on its website.

Although at first glance it may seem that this amendment to the Law would be an advantage to School Districts, we believe it could cause more challenges under a decision of the School District to alter or curtail an educational program. Since the Department of Education was approving most alteration or curtailment of educational program requests, it provided the School Districts for a good

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Commonwealth Court Orders Transportation to Child's Private School in Joint Custody Arrangement

The Commonwealth Court has just decided in September in the case of *Wyland v. West Shore School District* that a School District has an obligation to provide transportation services for a child's attendance at a private school even though the ex-wife's School District residence was considered the primary residence.

In this case, the parents had a joint legal and physical custody arrangement with a 50/50 arrangement for custody. The mother lived in the Cumberland Valley School District and the children attended a private school located in the West Shore School District. Significantly, the children stayed with their mother three days a week, and their father two days a week. The West Shore School District contended on their PDE's "single residency rule," there could only be one district of primary residence and that Cumberland Valley School District was the District of primary residence since the children resided with the mother three days per week.

The Commonwealth Court refused the father's injunction request regarding transportation of the students and found that "a student need only live in the school district to trigger a district's duty to transport the student." The Commonwealth Court went so far as to note that the "single residency rule" of the Pennsylvania Department of Education was not supported by the law and held that the children in this case actually resided in two different school districts.

Further, the Commonwealth Court found that the children in this matter had "two factual residences because the parents had 50/50 custody." Under the decision of the Court, transportation eligibility under Section 1361 of the Code is not restricted to only those students with a primary residence in the District, and a District cannot rely on PDE's single residency rule for transportation purposes.

This decision can only increase the potential for transportation costs for Districts, given the significant number of joint custody arrangements between divorced parents throughout the Commonwealth.

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basis to reject a challenge in a grievance to a furlough for such a reason. Without the approval of the Department of Education in place, it is more likely that an Education Association could have a challenge to the decision for alteration or curtailment of the Program.

It must also be emphasized that under the Statute, 1124(a)(2), the Statute requires that this action for alteration or curtailment of the program be recommended by the Superintendent with concurrence of the Board of School Directors and should show a substantial decline in class or course enrollment or to conform to standards of organization.

As a result, School Districts can expect that there may be more challenges to furlough decisions under Section 1124(a)(2) in light of this legislative change. There have been no changes to the other provisions providing for the furlough of employees under Section 1124(a)(1) or 1124(a)(3). The provisions for Section 1124(a)(1) for substantial decline in enrollment or under Section 1124(a)(3) for furloughs due to closing of schools have been untouched.

School District Must Engage in Interactive Process When Employee Alleges Illness or Disability

The Federal Court in Pennsylvania has once again affirmed the strong obligation of Employers to engage in the "interactive process" whenever an employee even mentions a disability related to discipline in the employment process. In a decision decided in July, *Thomas v. Bala Nursing Retirement Center,* the Federal Court for the Eastern District found a valid claim under the Americans With Disabilities Act and the Family and Medical Leave Act where an employee challenged a termination of employment due to repeated tardiness to work. The employee asserted that she was anemic and informed her Employer of this fact. The employee filed the claim under the ADA alleging that her Employer failed to accommodate her disability and had retaliated against her.

The Court ruled in favor of the employee finding that the Employer's termination of employment for tardiness could be a pretext for discrimination based on the employee's testimony alone that she had informed her supervisor that she was tardy due to anemia. The Employer had denied that such a notification had even occurred.

Importantly, the Court stressed the fact that there had not been any "interactive process meeting." The Federal District Court held in this case that the employee's act of allegedly telling her supervisors about her anemic condition in stating that it was causing her to be late to work on numerous occasions may have been sufficient to put the Employer on notice of the employee's need for accommodation.

In this case, the employee had not even requested any specific accommodation. However, the Court still found that the Employer had an obligation to hold an interactive process meeting to determine if an accommodation could have been made.

In addition, the Court upheld the FMLA claim despite the fact that the employee had never specifically requested FMLA leave or sought such leave in writing. The Court found that based solely on the employee's own testimony, the employee had conveyed reasonably adequate information to put the Employer on notice about possible eligibility for an FMLA leave. Therefore, the Court found there was a valid FMLA retaliation claim.

This case shows the need for Employers to hold "interactive process meetings" upon being notified of a disability by an employee. These interactive process meetings should take place with at least two members of the management of the School District, and there should be documentation of the discussions at this interactive process meeting. The School District does not need to provide accommodations requested by the employee, but the Courts are very strict in requiring this interactive process to occur. The failure to conduct such interactive process meetings can lead to an adverse ADA decision, just as in this case.

EEOC Addresses Employer's Use of Arrest and Conviction Records

The EEOC has issued an Enforcement Guidance on Employer use of arrest and conviction records in employment decision under Title VII. The EEOC, in this Guidance Memorandum, cautions Employers on the fact that the use of arrest and conviction records in employment decisions could be the basis of a discrimination claim, in light of the adverse impact on various protected classes with arrest and conviction records.

However, School Districts must also balance this Guidance with Section 111 of the School Code, which provides that schools are prohibited from employing any person who has been convicted of certain crimes. It should be noted that in its Guidance, the EEOC provides that Title VII preempts state and local laws if they permit the doing of any act that would constitute an unlawful employment practice under Title VII. Consequently, an exclusionary policy of an Employer would not shield the Employer from Title VII liability under this Employment Guidance Memorandum of the EEOC if the policy or practice is not job related or consistent with business necessity.

We generally recommend that School Districts maintain a strict adherence to Section 111 of the School Code. However, particularly with hiring decisions, if the crime may not be covered by Section 111 of the School Code, School Districts must keep in mind the EEOC's position on arrest and conviction records generally.

Third Circuit to Decide School District's Ban on "I ♥ Boobies" Bracelets

The Middle School at the Easton Area School District had issued a ban on "I ♥ Boobies" bracelets. The Federal District Court for the Eastern District had ruled that the ban on the bracelets violated a student's First Amendment Free Speech rights.

The Easton Area School District has appealed this case to the Third Circuit asking the Third Circuit Court to overturn the decision of the District Court and reinstate the ban on these bracelets.

In the arguments before the Third Circuit, the attorney for the School District argued that the decision on whether to ban slogans like "I ♥ Boobies" should be made by School District officials and not Judges.

On the other hand, the attorney for the students argued that the intent and context of this message (intending to promote breast cancer awareness), must be taken into consideration. The students have taken the position that the bracelets were a matter of public concern and thus involved First Amendment Free Speech rights.

The Third Circuit Court of Appeals has acknowledged the importance of this decision in listing this argument for *en banc* argument before the entire Court and we should all look for this decision from the Third Circuit in the near future.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 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; and 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 Dr. Lawrence Wess at ljw@psu.edu.

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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