WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

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A brief summary of legal developments relevant to Washington public school districts from the previous calendar month.

United States Supreme Court

Equal Protection

Students for Fair Admissions Inc. v. President and Fellows of Harvard College
Nos. 20-1199; 21-707 (6/29/23)

The United States Supreme Court held that race-conscious admissions programs used by the University of North Carolina (UNC) and Harvard College violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which prohibits government-imposed discrimination on the basis of race. Both Harvard College and UNC have highly selective application processes in which applicants are screened for a variety of criteria, including grades, standardized test scores, extracurricular activities, athletics, school support, and other "personal" factors. Both universities allow the admissions committee to take an applicant's race into account when choosing their admitted class. At Harvard, the goal of its admissions process is to ensure the university does not have "a dramatic drop-off" in minority admissions from the prior class, and "race is a determinative tip for" a percentage "of all admitted African American and Hispanic applicants." At UNC, application readers are required to consider an applicant's race and ethnicity as one factor in their review, and underrepresented minority students were more likely to score higher on the "personal ratings" criteria than white and Asian American applicants. In 2014, Students for Fair Admissions (SFFA), a nonprofit entity founded that same year "to defend human and civil rights secured by law," filed separate lawsuits challenging the admissions programs of Harvard and UNC under the Equal Protection Clause of the Fourteenth Amendment. The district courts in both cases held bench trials to evaluate SFFA's claims, and following the trials, the courts concluded that the admissions programs complied with prior U.S. Supreme Court precedent governing use of race in college admissions. SFFA appealed the federal court's determination in the Harvard case, and the First Circuit Court of Appeals affirmed. The U.S. Supreme Court granted review of both cases and reversed the decisions of the lower courts, holding that the admissions programs used by both universities violated the Equal Protection Clause because their admissions decisions allowed students to "obtain preferences on the basis of race alone," which amounted to impermissible racial stereotyping. Reviewing the Court's prior decisions interpreting the Equal Protection Clause—including its landmark opinions striking down racial segregation in schools, businesses, transportation, and juries—the Court held that the

"entire point" of the Equal Protection Clause is to bar treating someone differently because of their skin color. Because the programs treated applicants differently based on their race, the Court held that the admissions policies must survive strict scrutiny to be constitutional, which requires the universities to show that the racial classification is used to further compelling governmental interests, and that the use of race is narrowly tailored to achieve that interest. The Court held that the universities' interests here did not meet that strict scrutiny test, reasoning that the universities' stated interests of "better educating students through diversity" and "training future leaders" were not sufficiently coherent or measurable to permit meaningful review, and the programs lacked meaningful end points. The Court further held that race-conscious admissions programs in which some students may obtain preferences on the basis of race alone amounted to impermissible stereotyping because it "rests on the pernicious stereotype" that a student's race in and of itself says something about who that student is and what they can offer. The Court rejected the universities' argument that race-conscious admissions programs were analogous to viewing applicants differently based on other characteristics and life experiences, such as whether the applicant is from the city or suburbs or plays the violin, because race is a "forbidden classification" that "measures the dignity and worth of a person by ancestry" instead of by "merit and essential qualities." Finally, the Court noted that universities could still consider as part of their admissions process an applicant's discussion of how race impacted their life, including "through discrimination, inspiration, or otherwise." Justice Sotomayor wrote a dissent emphasizing that the limited use of race by colleges and universities "has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses," thereby advancing the Constitution's guarantee of equality. Justice Jackson wrote a dissent in which she argued that society has never been colorblind and criticized the majority for failing to acknowledge "the well-documented intergenerational transmission of inequality that still plagues our citizenry."

Religious Accommodation

Groff v. DeJoy
No. 22-174 (6/29/23)

The United States Supreme Court unanimously heightened the standard for denying an employee's religious accommodation request as an "undue hardship" under Title VII of the Civil Rights Act of 1964 (Title VII), overturning the previous "*de minimis* cost" standard that had previously been used by federal courts. Gerald Groff is an Evangelical Christian who holds the religious belief that Sunday should be devoted for worship, not "secular labor" or the transportation of consumer goods. In 2012, Groff began working for the United States Postal Services (USPS) as a Rural Carrier Associate, a position in which he assisted regular carriers with delivery of mail. In 2013, USPS began delivering packages for Amazon, which required certain carriers to work on Sundays. USPS negotiated a Memorandum of Understanding (MOU) with the impacted letter carriers' union, which specified the order in which USPS employees would be required to deliver packages on Sunday, and which resulted in Groff being assigned Sunday deliveries. In response, Groff transferred to a small rural USPS station that did not make Sunday deliveries, but in March 2017, that station also began making deliveries for Amazon on Sundays. Groff refused to work on Sundays due to his religious beliefs, and USPS redistributed Groff's Sunday work to other carriers and to the postmaster, whose job usually does not involve delivering mail. USPS also progressively disciplined Groff for his failure to work on Sundays, prompting Groff to resign in 2019. Shortly after resigning, Groff filed a lawsuit under Title VII, alleging that USPS could have

accommodated his religious beliefs without experiencing an undue hardship on its business. The district court dismissed Groff's lawsuit on summary judgment, and the Third Circuit Court of Appeals affirmed, holding that it was required to follow prior precedent interpreting an "undue hardship" under Title VII as requiring the employer "to bear more than a *de minimis* cost." The Third Circuit held that exempting Groff from the Sunday work had disrupted the workplace and diminished employee morale, which was more than a *de minimis* cost to USPS, and as a result, it dismissed his case. Groff appealed, and the United States Supreme Court reversed, holding that the "*de minimis* cost" standard applied by federal courts for the past 50 years was not a correct reading of the Court's decision in *Trans World Airlines, Inc. v. Hardison*. The Court reasoned that although the *Hardison* opinion used the language "*de minimis* cost" when discussing the meaning of "undue hardship" under Title VII, it also contained the conflicting word "substantial" in the opinion. The Court held that it was error to read *Hardison* as creating an undue hardship standard of "more than a *de minimis* cost," and that under any definition, a hardship "is more severe than a mere burden." The Court then adopted a new standard under which in order to be excused from accommodating an employee's religious belief, an employer must show the burden of granting the accommodation would result in "substantial increased costs in relation to the conduct of its particular business." Because the Third Circuit had analyzed Groff's case under the prior "*de minimis* cost" standard, the Court reversed and remanded for the lower court to consider Groff's claims under the new "substantial increased costs" test. Justice Sotomayor concurred in the result, but she wrote separately to emphasize that a hardship on other employees could in some circumstances result in hardship to the business under the new standard articulated by the Court.

Ninth Circuit Court of Appeals

Title IX

Grabowski v. Arizona Board of Regents
No. 22-15714 (6/13/23)

The Ninth Circuit Court of Appeals held that harassment on the basis of perceived sexual orientation is a form of sex-based discrimination under Title IX of the Education Amendments of 1972 (Title IX). Michael Grabowski was a first-year student athlete at the University of Arizona in 2017. According to Grabowski, his teammates called him homophobic slurs on a daily basis, and on one occasion posted an obscene, homophobic video about him in the team's public chat group. Grabowski reported his teammates' bullying to his coach, who dismissed the concerns as a need for Grabowski to "adjust." According to Grabowski, after reporting his teammates' bullying, his coaches told him that he did not fit in with the team atmosphere, called him a "white racist," and eventually dismissed Grabowski from the team. Grabowski then filed a lawsuit in federal court against the University and his coaches, alleging that they were deliberately indifferent to his teammates' harassment in violation of Title IX. Grabowski also alleged that the University had retaliated against him for reporting the harassment by dismissing him from the team. The district court dismissed the complaint, finding in part that Grabowski had failed to allege he engaged in protected activity, a required element to establish a Title IX retaliation claim. Relying on U.S. Supreme Court precedent interpreting Title VII of the Civil Rights Act of 1964, the Ninth Circuit held that harassment based on perceived sexual orientation was a type of sex-based discrimination because it was motivated by the core belief that people should conform to traditional sex stereotypes. As a result, the Court held that discrimination based on perceived sexual orientation was actionable under Title IX and that an educational institution could

be held liable for a claim of student-on-student harassment if the educational institution had substantial control over the harasser and the context of the harassment, was on notice, acted with deliberate indifference in response, and the harassment was so severe it deprived the student of access to educational opportunities. Although Grabowski's complaint adequately alleged severe sex-based harassment, the Court held that Grabowski's complaint had not adequately alleged a deprivation of educational opportunity. As a result, the Court affirmed dismissal of the harassment claim but remanded to the district court to reconsider Grabowski's request to amend his complaint to add facts showing a deprivation of Grabowski's educational opportunity. Finally, the Court reversed dismissal of Grabowski's retaliation claim, holding that he had sufficiently alleged he engaged in protected activity when he reported the sex-based bullying and was allegedly subjected to adverse action when the University dismissed him from the team.

Washington Supreme Court

Washington Family Care Act

Alaska Airlines, Inc. v. Department of Labor and Industries
No. 100485-1 (6/29/23)

The Washington Supreme Court held that the Washington Family Care Act (WFCA)—which gives employees a legal right to use any type of earned time off to care for sick family members—does not displace provisions in a collective bargaining agreement (CBA) governing the use of paid leave, including advanced scheduling requirements. Laura Masserant worked as a flight attendant for Alaska Airlines, and her applicable CBA required her to schedule her earned vacation days in advance in accordance with a seniority bid schedule. Under the terms of the CBA, flight attendants were assigned disciplinary points for every unplanned absence, including when they called in absent for a nonqualifying emergency, which the company referred to as an "emergency drop." In May 2011, Masserant's son developed bronchitis when she was scheduled for several days of flying. Masserant did not have sufficient sick leave to cover the time needed to care for her son, so she requested to use her remaining vacation time to cover the absences, citing the WFCA, which allows employees to use any earned form of leave for family-care purposes. Alaska Airlines denied the request, treated Masserant's absence as an "emergency drop," and imposed disciplinary points in accordance with its attendance control program. Masserant filed a complaint with the Washington Department of Labor and Industries (L&I), alleging that Alaska Airlines had prohibited her from using her vacation time to care for her sick child in violation of the WFCA. L&I investigated the complaint, found a violation, and issued a $200 infraction. The airline appealed the infraction to the Office of Administrative Hearings, and the presiding administrative law judge affirmed L&I's notice of infraction and $200 penalty. Alaska Airlines appealed the decision to the L&I director, who affirmed, and then Alaska Airlines appealed to the superior court, which reversed the order and dismissed the infraction. The Washington Supreme Court accepted direct review, and the Court held that the plain language of the WFCA required employees taking leave under the WFCA to comply with the terms of a CBA specific to the type of leave being used, except for the narrow exception of terms relating to the choice of leave. The Court interpreted this language to mean that in order to use leave under the WFCA, an employee must comply with all employer rules regarding the use of the applicable type of earned leave, except for the substantive reason for using the applicable leave. As a result, the Court held that although Masserant was entitled under the WFCA to use vacation leave for family-care purposes, in doing so she was required to comply with the

provision of the CBA requiring her to schedule the applicable type of earned leave—vacation—in advance. The Court rejected L&I's argument that the Court should defer to its interpretation of the statutory language, noting that the extent to which the courts give deference to administrative agencies' interpretations of statutes is "a matter of ongoing debate," and even if it were not, any deference to L&I should be limited because it had changed its interpretation of the statute during the course of this litigation. The Court noted that in a 2009 guidance document, L&I had taken the same position as Alaska Airlines in interpreting the choice of leave provision of the WFCA and had expressly stated that provisions of CBAs governing the accumulation and use of leave, including advance scheduling of vacation, may still be applied. As a result, the Court affirmed the decision of the superior court dismissing the infraction. Justice Montoya-Lewis, joined by three other justices, dissented and criticized the majority for reading the WFCA in a "highly technical" manner when the purpose of the WFCA is to ensure that employees can care for their families without facing repercussions in their employment.

Washington Court of Appeals

Public Records Act

Does v. Seattle Police Department
No. 83700-1-I (6/26/23)

The Washington Court of Appeals held that the identities of police officers who attended the "Stop the Steal" rally in Washington, D.C. on January 6, 2021, were exempt from disclosure under the Public Records Act (PRA) because disclosure of their identities would violate the officers' constitutional right to privacy in their political beliefs and associations. The Does are current or former Seattle police officers who attended former President Trump's "Stop the Steal" rally on January 6, 2021, an event that precipitated an insurrection at the United States Capitol, interfered with the certification of the presidential election results, and forced members of Congress to flee for their safety. The Does received complaints from the Seattle Police Department's (SPD) Office of Public Accountability (OPA), alleging that they may have violated the law or SPD policies while attending the rally. OPA investigated the complaints, and as part of that investigation, required the Does to answer questions regarding their political beliefs and associations, including whether they were "affiliated with any political groups," and their reaction to the content of the rally. The SPD later received multiple public records requests seeking disclosure of investigatory records pertaining to the police officers who participated in the events of January 6. The Does filed a complaint for injunctive relief in superior court, seeking an order prohibiting the release of their names and other identifying information within the requested records. The superior court denied the motion, ruling that the Does did not have a protected privacy interest in their identities, in part because of the public nature of the political rally they had attended. After the superior court issued its ruling, the OPA determined that the allegations that the Does had violated the law or SPD policies were not substantiated. The Does appealed the superior court's order, and the Washington Court of Appeals reversed. The Court held that the Does had a privacy right in their individual political beliefs and associations protected by the First Amendment of the U.S. Constitution. As a result, the Court held that the SPD needed to demonstrate a "compelling state interest" in order to infringe on the officers' constitutional right to anonymity in their political beliefs and associations. The Court held that such "compelling" interest was not met here, particularly because the allegations that the officers violated the law or SPD policies by attending the rally were unsubstantiated. Finally, the Court rejected the argument that the Does had

surrendered their right to political anonymity by attending a public rally, holding that there was sufficient evidence disclosure of the Does' identities would have a "chilling effect" on their exercise of political speech, noting that in the Seattle community, Donald Trump only received eight percent of the vote. As a result, the Court held that the Does' names and personal identifying information must be redacted from the investigation files prior to disclosure, and it reversed and remanded to the superior court for further proceedings. Finally, the Court held that because the exemption of the Does' identities stems from the Constitution rather than a statutory exemption, the Does did not need to satisfy the PRA's normal requirement that an injunction will only issue when disclosure "would clearly not be in the public interest and would substantially and irreparably damage vital government functions."

Discrimination

Wilson v. Archdiocesan Housing Authority
No. 84372-9-I (6/20/23) (unpublished)

The Washington Court of Appeals held that a supervisor's unsolicited sexual commentary—coupled with unwanted touching of a sexual body part and changes to an employee's work environment—could give rise to a hostile work environment claim under the Washington Law Against Discrimination (WLAD). Audra Wilson began working as a case manager for the Archdiocesan Housing Authority (AHA) in December 2018, after being recruited by her friend Sharonda Duncan. Prior to working together, Duncan routinely made sexual comments toward Wilson, including describing sexual acts she wanted to perform on Wilson. While working at AHA, Duncan was Wilson's supervisor, and according to Wilson, on one occasion, Duncan "grabbed" her buttock with one hand while at work. In response, Wilson told Duncan to never touch her again and ran out of the room upset. According to Wilson, following the groping incident, Duncan failed to provide her with any supervisory support and prohibited her from attending trainings on client management and administration. At one staff meeting, Wilson alleged that Duncan had publicly "attacked" her, saying that Wilson did not "know her job" and did not "known what she was talking about." Wilson left the meeting in tears and verbally resigned. Wilson was called back into the meeting, at which point she immediately withdrew her verbal resignation. Wilson emailed a supervisory staff member at AHA that she wished to continue her position and only verbally resigned "under distress" because of Duncan's behavior at that meeting. Three months later, AHA sent Wilson a letter stating that it had accepted her verbal resignation and she was no longer employed with AHA. Wilson filed a lawsuit against AHA, alleging in part that she was subjected to a hostile work environment and retaliation in violation of the WLAD. The trial court dismissed the claims on summary judgment, ruling that one incident of groping was not "sufficiently pervasive" to create an abusive work environment. The trial court also dismissed Wilson's retaliation claim, finding that there was no evidence of a causal link between activity protected by the WLAD and AHA's alleged adverse action, constructive discharge. The Court of Appeals reversed, holding that Wilson presented sufficient evidence for a jury to find that she was subjected to unwelcome sex-based harassment that affected the terms and conditions of her employment, as necessary to prove a hostile work environment claim under the WLAD. The Court held that a single incident of sexual groping could support a claim of hostile work environment if severe enough to alter the work environment, and here, Wilson presented evidence that her supervisor treated her less favorably following the incident by excluding her from trainings and berating her in front of her colleagues. The Court further held that Wilson had engaged in protected activity when she told Duncan not to touch her

again after the groping incident, and that Wilson had presented sufficient evidence of adverse employment action based on the change in her working conditions that led to her verbal resignation. As a result, the Court reversed dismissal of the case and remanded it to the trial court for further proceedings.

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