WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

January 2022

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

PFR Announcements

2022 Bargaining Skills Workshop

January 21, 24, or 27, 2022

Porter Foster Rorick is once again partnering with the Washington School Personnel Association (WSPA) to present our annual one-day workshop on collective bargaining skills. This popular workshop focuses on basic skills and knowledge for all successful bargainers, but particularly those who may be sitting on a management bargaining team for the first time. The content includes the legal rules for collective bargaining, as well as the behavioral and strategic skills which help bargaining teams satisfy school district interests and reach agreements with unions. The workshop will be held in person in downtown Seattle at the Two Union Square Conference Center. There are three dates to choose from: January 21, 24, or 27. The cost is $295 for WSPA members; $395 for non-members; and $100 off for school districts who send a team of four or more. Information about the agenda, hotels and registration are available at www.wspa.net. If you have any questions, please feel free to call us at (206) 622-0203 or reply to info@pfrwa.com.

Ninth Circuit Court of Appeals

Civil Rights Act

Herrera v. Los Angeles Unified School District
No. 20-55054 (12/01/21)

The Ninth Circuit Court of Appeals held that the parents of an autistic student who drowned on a school field trip failed to show that a school aide acted with deliberate indifference, as necessary to recover damages under the Civil Rights Act (§ 1983). In June 2014, Erick Ortiz, an autistic high school student, attended an end-of-year party at a local park. Ortiz told the school aide on the field trip that he was going to the park's swimming pool, which was monitored by three lifeguards. The school aide watched Ortiz from a designated observation area, as required by the pool rules. The aide saw Ortiz exit the pool and enter the locker room area. At that point, the aide left the observation deck and waited for Ortiz at the locker room exit. Approximately five minutes later, the aide began to search for Ortiz, and discovered that he had returned to the pool area and drowned. Ortiz's parents brought several claims against the school district, including a claim that the district deprived them of their constitutional rights under § 1983 by failing to protect their son. The district court granted summary judgment in favor of the school district on all claims. On appeal, the Ninth Circuit addressed the parents' § 1983 claim, and

held that the parents were required to show that the district acted with deliberate indifference—meaning that that the district recognized an unreasonable risk to Ortiz and intentionally exposed him to that risk without regard for the consequences—in order to state a cause of action under § 1983. Because there was no evidence that the school aide knew Ortiz had reentered the pool area—and therefore no evidence the aide intentionally exposed Ortiz to immediate danger—the Court affirmed summary judgment dismissal of the parents' § 1983 claims.

Washington Supreme Court

Private Sector Strikes

Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174
No. 99319-0 (12/16/21)

The Washington Supreme Court held that the National Labor Relations Act (NLRA) preempted a private employer's tort claims against its truck drivers' union because the property destruction occurred incidental to a lawful work stoppage. Glacier Northwest, Inc. employs approximately 80 to 90 truck drivers who deliver ready-mix concrete to Washington businesses. In 2017, Glacier was negotiating a new collective bargaining agreement with its truck drivers' union, Teamsters Local Union No. 174. During those negotiations, the drivers went on strike by stopping work in the early morning hours when concrete had already been loaded onto the trucks. As a result, the concrete was left to harden in the trucks, and Glacier had to take mitigation measures, including paying to break it up and haul it offsite before it could completely harden and destroy the trucks. Additionally, despite the union's assurances that drivers would complete a scheduled mat pour job, more than half of the scheduled drivers did not report for work, resulting in economic losses of approximately $100,000. Glacier filed a complaint for damages stemming from the work stoppage, including claims of negligent misrepresentation, trespass to chattels, and conspiracy to destroy its concrete. Shortly thereafter, the union filed a complaint with the National Labor Relations Board, alleging that Glacier committed an unfair labor practice by retaliating against union members for participating in the strike. The Washington Supreme Court held that Glacier's strike-based claims should have been dismissed because the conduct at issue was arguably protected under section 7 of the NLRA, which protects concerted activities in collective bargaining. Because the work stoppage was protected by the NLRA, and the property destruction which was incidental to the work stoppage was arguably protected under the NLRA, the Court held that the NLRA preempted Glacier's state tort claims.

Washington Court of Appeals

Public Records Act

Energy Policy Advocates v. Attorney General
No. 55187-0-II (11/30/21) (unpublished)

The Washington State Court of Appeals held that the Attorney General's Office (AGO) properly redacted litigation-related emails and memoranda as attorney work product under the "controversy exception" of the Public Records Act (PRA). Energy Policy Advocates (EPA) submitted a PRA request to the AGO for specified documents, including internal emails and litigation memos analyzing various laws and assessing the strengths and weaknesses of potential litigation. The AGO disclosed 74 pages with redactions to the litigation-related materials, as well as a redaction log identifying those materials as privileged attorney work product. The EPA filed a PRA lawsuit, alleging that the AGO had improperly redacted the documents. Following in-camera review, the trial court ruled that the documents were properly withheld as attorney work product. On appeal, the

Court of Appeals similarly conducted an in-camera review of the documents, and also concluded that the emails and memoranda discussed litigation-related technical, factual, and regulatory issues, and contained analysis of the strengths and weaknesses of reasonably anticipated litigation. As a result, the Court held that the documents constituted attorney work product and were properly withheld under the "controversy exception" of the PRA.

Discovery; Video Retention

J.K. v. Bellevue School District
No. 81234-3-I (12/06/21)

The Washington State Court of Appeals held that the Bellevue School District committed sanctionable discovery violations when it failed to preserve potentially relevant video footage and failed to comply with the trial court's orders in a tort claim brought by a former student. In 2017, student J.K. reported that another district student had repeatedly sexually abused him at school and bullied him on the school bus. The district investigated the allegations, found J.K. credible, notified law enforcement, and emergency expelled the other student. During that school year, the district had seven surveillance cameras outside the school building, one camera inside the building, and a camera installed on the school bus. The camera systems retained footage for approximately 30 days and then automatically overwrote old footage to free up storage capacity. Following J.K.'s allegations, the school principal asked the district's technology department to install software on his computer to review footage related to a "student safety issue." However, the district did not take any steps to preserve any of the relevant video footage. In June 2017, the district received a tort claim form and litigation hold letter from J.K., as well as an internal litigation hold letter from its general counsel instructing the district to preserve video footage from the school and buses from December 2016 onward. The district did not take any steps to preserve the footage, and all footage related to that timeframe was overwritten. J.K. filed a tort complaint in superior court and served the district with a discovery request seeking video recordings related to the incidents. The district responded by stating that there were no responsive videos and instead produced video footage created after J.K. stopped attending school in the district. The trial court ordered the district to identify and produce all requested videos to J.K., but the district did not comply. J.K. then sent another discovery request, asking the district to identify persons with information about the missing video footage, and the district failed to provide any response by the discovery deadline. The trial court determined that the district had repeatedly violated discovery rules and the court's discovery orders, and as a result granted default judgment on liability. The Court of Appeals affirmed, reasoning that the district had an obligation under the Local Government Common Records Retention Schedule to preserve video footage subject to reasonably anticipated litigation. Given the nature of the allegations, the receipt of the tort claim form, and the litigation hold letter from its general counsel, the Court held that the district engaged in a spoliation discovery violation by not taking any steps to preserve the footage. The Court further held that entering a default judgment on liability was not too harsh because the district had engaged in a combination of spoliation and violations of discovery rules when it failed to timely respond to J.K.'s discovery requests or comply with the court's discovery orders.

Employment Discrimination

Nolan v. Tekoa Operations, LLC
No. 37904-3-III (12/07/21) (unpublished)

The Washington State Court of Appeals reversed summary judgment dismissal of an employee's discrimination claim, holding that a disputed issue of material fact remained as to whether the employee was terminated for leaving work early due to her disability. Lisa Nolan worked as a

licensed practical nurse for a nursing home operated by Tekoa Operations, LLC. Nolan suffered from several disabling medical conditions that caused difficulty breathing. As a reasonable accommodation, Nolan's employer allowed her to take short breaks as needed to catch her breath. In November 2017, Nolan noticed a reduced pay in her paycheck, and according to Nolan, was told by her employer that the reduced pay was due to her periodic breaks at work. Nolan met with her employer on November 10 to discuss multiple issues, including her reduced pay. The meeting grew acrimonious, and it resulted in Nolan abruptly leaving due to her increased blood pressure and fear of experiencing a resulting stroke or aneurism. Nolan returned to work shortly after storming out of the meeting, at which point, her supervisor directed Nolan to leave work for the day due to her physical condition. Approximately three days later, Nolan was informed that she had been terminated for abandoning her work shift. Following her termination, Nolan filed for Social Security Disability Insurance (SSDI) benefits, and in her application, stated that she was unable to work due to a disabling condition. Nolan filed suit against her employer, alleging multiple causes of action, including disability discrimination in violation of Washington's Law Against Discrimination (WLAD). The Court of Appeals held that a question of fact remained as to whether the employer reduced Nolan's pay and terminated her employment because of her disability, which precluded summary judgment in the employer's favor. The Court rejected the employer's argument that Nolan's application for SSDI benefits estopped her from asserting in her disability discrimination suit that she could perform the essential functions of her job as a nurse. Relying on federal precedent, the Court reasoned that the definition of disability for purposes of the Social Security Act differed from the definition under the WLAD, and therefore, a statement that Nolan was disabled for purposes of SSDI did not preclude her from asserting that she could work with accommodations and be considered qualified under the WLAD.

Sex Discrimination

Crabtree v. Jefferson Health Care
No. 54951-4-II (12/14/21)

The Washington State Court of Appeals held that a former healthcare employee presented sufficient evidence that her employer's reasons for terminating her were a pretext for sex discrimination to survive a summary judgment motion. Jillian Crabtree was the manager of patient access services for Jefferson Healthcare. Crabtree received her first performance evaluation in November 2018, and it noted she was meeting expectations in most categories. In December 2018, Crabtree informed one of her supervisors that she was pregnant, to which the supervisor expressed concern that the office would be short-staffed due to another staff member also going on maternity leave around the same time. Crabtree then informed her direct supervisor of her pregnancy, and that supervisor asked Crabtree if she would be interested in returning to a lesser role following her maternity leave. In February 2019, Crabtree met with human resources to discuss her leave options, and the day after that meeting, she was placed on a performance improvement plan (PIP). The PIP identified three goals for Crabtree to work toward in 30 days, and Crabtree's supervisor stated that she only needed to make a good faith effort toward those goals to comply with the PIP. Nonetheless, prior to the PIP completion date, Jefferson Healthcare terminated Crabtree, citing its belief that Crabtree would not be able to complete or make significant progress on her PIP by the deadline. Crabtree filed a lawsuit against Jefferson Healthcare, alleging that she was terminated because of her pregnancy in violation of the Washington Law Against Discrimination. The Court of Appeals held that Crabtree had presented sufficient evidence that Jefferson County's alleged

nondiscriminatory reason for terminating her—the lack of progress toward her PIP—was a pretext for discrimination, such that summary judgment dismissal of her sex discrimination claims was improper. The Court acknowledged that an employee's assertion of good performance in the face of an employer's assertion of poor performance does not give rise to a reasonable inference of discrimination. However, the Court reasoned that Crabtree had presented circumstantial evidence of pretext based upon her supervisor's statement that she only needed to make progress on the PIP goals coupled with Crabtree's documented progress toward completing the PIP goals. The Court further held that Crabtree had presented sufficient evidence that her pregnancy was a substantially motivating factor for her termination based in part upon her supervisor's remark that the office would be short-staffed while Crabtree was on maternity leave, as well as her supervisor's request that Crabtree return to a lesser position when she returned.

Public Records Act

Baxter v. Western Washington University
No. 82418-0-I (12/27/21)

The Washington State Court of Appeals held that the unredacted "final results" of disciplinary proceedings involving postsecondary students are not exempt from disclosure under the "student file" or "other statute" exemptions of the Public Records Act (PRA). In 2018, journalists requested the "final results" of disciplinary proceedings where Western Washington University had determined that a student was responsible for a crime of violence or a nonforcible sexual offense in the last five years. The university initially believed that the students' names were exempt from disclosure under the "student file" exemption of the PRA, but then later determined that the names were subject to disclosure. The university notified the impacted students that it intended to disclose the responsive records unredacted, and seven of the students sought injunctive relief to bar the release of their names. The trial court denied the students' motion for injunctive relief, reasoning that the students had failed to show that their names were exempt from disclosure under either the PRA or the Family Educational Rights and Privacy Act of 1974 (FERPA). The Court of Appeals affirmed, holding that the "student file" exemption of the PRA only barred the release of personal information contained in files maintained for elementary or secondary public-school students, but did not extend to students attending postsecondary educational institutions. The Court reasoned that the legislature had long recognized a divide between higher education and common school provisions, and it noted that other Washington statutes defining public schools specifically excluded colleges and universities. The Court further held that the students could not rely on FERPA to protect their names from disclosure because FERPA explicitly allows for the disclosure of the "final results" of disciplinary proceedings where a postsecondary institution has determined that a student committed a crime of violence or nonforcible sex offense in violation of the institution's rules or policies.

Disability Discrimination

Mitchell v. King County
No. 82347-7-I (12/27/21) (unpublished)

The Washington State Court of Appeals held that an employer is not required to keep an employee's job position open indefinitely as a reasonable accommodation under the Washington Law Against Discrimination (WLAD). Aaron Mitchell worked as a preventative maintenance specialist for King County. In 2018, Mitchell sustained three on-the-job injuries which resulted in him being unable to work for approximately eight months. Mitchell first utilized his available medical leave, and once that was exhausted, he was granted additional unpaid leave as an accommodation through December 31, 2018. Mitchell did not return to work

after December 31, and instead, on January 1, 2019, notified his employer that he was seeking further treatment for his physical and mental health. Mitchell later provided a letter from a licensed mental health counselor stating that he had an intake appointment scheduled for February 21, 2019. Based on this information, King County extended Mitchell's unpaid leave of absence until March 1, 2019. Mitchell was later diagnosed with posttraumatic stress disorder. In March 2019, Mitchell's chiropractor completed a medical questionnaire, informing King County that Mitchell's job was too physically demanding for him, and that he would likely require new job training and placement. Despite repeated inquiries, neither Mitchell nor his medical providers provided an anticipated return to work date. Following receipt of the completed medical questionnaire, King County informed Mitchell that it could not accommodate an indefinite leave of absence and proposed a non-disciplinary medical separation from employment. King County also reviewed Mitchell's transferable skills and medical restrictions, and determined that there were no open positions for which Mitchell would be qualified. Following a Loudermill hearing, King County informed Mitchell in May 2019 that he had been medically separated from employment, and that he was eligible to participate in King County's reassignment program which would give him priority placement into job vacancies for which he was qualified. Mitchell did not access the reassignment program. Instead, he filed a complaint in superior court, alleging that King County had failed to accommodate his disability in violation of the WLAD. The Court of Appeals affirmed summary judgment dismissal of the WLAD claims, holding that Mitchell failed to show he was qualified to perform the essential functions of his job, an element necessary to establish a prima facie case of discrimination. The Court reasoned that job attendance was an essential function of Mitchell's job, and King County was not required to keep Mitchell's job position open for an indefinite period of time in order to accommodate his health conditions.

PERC

Discrimination; Interference

Seattle School District
Decision 13443 (12/03/21)

A PERC Examiner held that the Seattle School District did not unlawfully discriminate against a high school counselor when it gave her a "Basic" rating on her 2018-19 summative evaluation. The PERC Examiner further held that the District did not commit an unfair labor practice (ULP) when it continued to bargain with the Seattle Education Association after the union membership had ratified a tentative agreement (TA). Colette Swenson began working as a full-time high school counselor during the 2015-16 school year. Swenson's overall performance was scored "Basic" on her annual summative evaluations for the 2016-17, 2017-18, and 2018-19 school years. Swenson disagreed that her performance deficiencies were significant, and believed that her evaluator had ulterior motives for giving her a Basic rating. During the 2018-19 school year, Swenson filed a grievance challenging her 2017-18 evaluation, as well as Harassment, Intimidation, and Bullying (HIB) and ULP complaints. During the processing of Swenson's grievance, the parties discovered that the final version of the 2018-19 collective bargaining agreement contained differences from the TA ratified by the union in 2018, including omitted language providing support for employees who received a Basic rating. These discrepancies were not intentional, but rather resulted from an oversight in the final editing process during which the District and union worked together to incorporate the TA into a complete bargaining agreement. The District nevertheless provided Swenson with the supports

she would have received under the TA. The parties began bargaining for a successor agreement in spring 2019, and they reached a tentative agreement in August 2019 for the years 2019-22. During the bargaining process, neither the union nor District raised the previous discrepancy in the evaluation language, and the new TA did not restore the omitted language. After the 2019-22 TA was ratified by the union membership, representatives from the District and union again worked together to incorporate the TA into the final version of the new contract. During this finalization process, the District noted the prior discrepancy in the evaluation language, and the parties ultimately agreed to include evaluation support language similar to the language ratified in the 2018-19 TA, which had not been included in the 2019-22 TA. Swenson filed an amended ULP complaint in 2019, alleging that the District had discriminated against her for filing a grievance, an HIB complaint, and a prior ULP when it again gave her a Basic score on her 2018-19 summative evaluation. Swenson also alleged that the District committed an interference ULP when it continued to bargain with the union after the 2019-22 contract had been ratified by the union membership by adding in evaluation support language intended to address the supports which were inadvertently omitted from the 2018-19 contract. The Examiner held that Swenson failed to show a causal connection between her Basic performance evaluation for the 2018-19 school year and either her grievance or prior ULP complaint. Swenson had received Basic performance evaluation scores for the two years prior to her filing the grievance, HIB complaint, and ULP complaints. The Examiner further rejected Swenson's claim that the District interfered with protected union rights by continuing to bargain with the union post-ratification given that employees do not have a protected statutory right to ratify contracts, and the employees were not specifically aware that the evaluation support language had been omitted. As such, the Examiner concluded that no reasonable employee would have perceived the continued bargaining as a threat of reprisal or promise of benefit associated with protected activity.

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This information is intended for educational purposes only and not as legal advice regarding any specific set of facts. Feel free to contact any of the attorneys at Porter Foster Rorick with questions about these or other legal developments relevant to Washington public schools.

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