WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

December 2021

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 is being held in person in downtown Seattle at the Two Union Square Conference Center to allow us to spread out and keep class sizes small. In order to accommodate your busy schedules, there are three different dates you could choose to attend: 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. Lunch and refreshments are included. 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

Title VII; Employment Discrimination

Fried v. Wynn Las Vegas, LLC
No. 20-15710 (11/18/21)

The Ninth Circuit Court of Appeals held that an employer's response to a customer's offensive conduct toward an employee can establish a hostile work environment claim under Title VII of the Civil Rights Act of 1964. Vincent Fried worked as a manicurist at a salon in the Wynn Hotel in Las Vegas, Nevada. On one occasion in June 2017, Fried was assigned to provide a pedicure to a customer. During the service, the customer sexually propositioned Fried, and Fried immediately informed his supervisor that he did not feel comfortable continuing to interact with the customer. Fried's supervisor directed him to finish the service and "get it over with." A week following the incident, Fried's coworkers told him that he should not be upset and to take the customer's proposition as a compliment. Fried filed a lawsuit against Wynn, alleging in part that Wynn had created a hostile work environment under Title VII through its response to Fried's report that a customer had sexually propositioned

him. The district court granted summary judgment in favor of Wynn, holding that this one incident was insufficient to support a hostile work environment claim. The Ninth Circuit disagreed, reasoning that several circuits have recognized that an employer's response to a third party's unwelcome sexual advances toward an employee may establish a hostile work environment. The Court held that the proper focus in assessing Fried's claim was his employer's response to the customer and coworker's conduct. Because Wynn failed to take immediate corrective action—and instead directed Fried to return to the customer and complete the service—the Court held that a reasonable jury could conclude this response was sufficiently severe or pervasive to alter the conditions of employment, as required to establish a hostile work environment claim.

IDEA

D.D. v. Los Angeles Unified School District
No. 1955810 (11/19/21)

Sitting en banc, the Ninth Circuit Court of Appeals overruled prior Ninth Circuit precedent and held that a student's complaint alleging denial of "access" to his education under the Americans with Disabilities Act (ADA) was subject to the exhaustion requirement of the Individuals with Disabilities Education Act (IDEA). Student D.D. first qualified for special education services under the category of emotional disturbance when he was in kindergarten. D.D.'s disability-related behaviors included impulsivity, elopement, and physical aggression. D.D.'s mother made multiple requests for the school district to provide D.D. a one-to-one classroom aide, all of which the district denied. During his first-grade year, D.D.'s behaviors escalated, and staff routinely called D.D.'s mother to pick him up from school early due to his disruptive behaviors. District staff gave D.D.'s mother "an ultimatum" that she either pick D.D. up from school or have a family member serve as his one-to-one classroom aide. In response, D.D.'s mother's partner quit his job so that he could accompany D.D. to school on a near daily basis. Following a particularly serious incident in the second-grade, D.D.'s mother withdrew him from school. D.D. then filed a due process hearing request with the California Office of Administrative Hearings, alleging that the district's failure to provide a one-to-one aide or behavioral implementation services was a denial of FAPE. After mediation, D.D. settled his IDEA claims against the district. D.D. then filed an amended complaint in federal court, alleging that the district had violated the ADA by failing to provide him nondiscriminatory access to his education when it failed to provide a one-to-one aide and subjected him to an unsafe school environment. The district court dismissed D.D.'s complaint without prejudice for failure to exhaust the IDEA process. D.D. appealed, and a divided panel of the Ninth Circuit reversed, with the majority opinion framing D.D.'s complaint as a challenge to the denial of "access" to his education, which it held rendered the IDEA's exhaustion requirement inapplicable. A majority of the active judges of the Ninth Circuit voted to vacate the panel opinion and rehear the case en banc. The en banc court was also divided, with the majority holding that the crux of D.D.'s complaint concerned the district's failure to provide accommodations and supportive services that are core components of a FAPE under the IDEA, and therefore exhaustion was required. The majority further rejected D.D.'s argument that he need not exhaust his administrative remedies because he sought damages for emotional distress, a type of relief not available under the IDEA. Because D.D. conceded on appeal that he had not exhausted his administrative remedies, the majority declined to address the question of whether settlement after IDEA-prescribed mediation amounts to exhaustion.

Washington Court of Appeals

Discrimination

Steven v. Federal Way School District
No. 82042-7-I (11/01/21) (unpublished)

The Washington State Court of Appeals affirmed summary judgment dismissal of a parent's discrimination claim against the Federal Way School District, holding that the parent failed to allege specific facts supporting a prima facie case of discrimination. Paula Steven's son was a student in the District between 2016 and 2018. During that time, Steven sent letters to District administrators asserting that the District had treated her son different from "non-Black students" at school. Steven filed a lawsuit against the District under the Washington Law Against Discrimination, alleging that her son had been subjected to discriminatory attendance recording practices, which had generated "chronic" truancy letters and mandatory attendance conferences. The trial court dismissed Steven's claims, concluding that Steven failed to assert any specific facts showing that her son was treated different from other students, or that Steven was treated different from other parents. The Court of Appeals affirmed, noting that the only support for Steven's claims in the record were her conclusory allegations of disparate treatment and references to documents that were never provided to the trial court. Because Steven's assertions were solely based upon vague assertions and speculation, the Court held that she failed to establish a prima facie case of discrimination and affirmed dismissal of her claims.

Public Records Act

O'Connor v. Lewis County
No. 55111-0-II (11/09/21) (unpublished)

The Washington State Court of Appeals held that a Public Records Act (PRA) lawsuit against Lewis County should have been dismissed as premature because the County was continuing to look for and provide responsive records. In connection with a tort claim he had filed against the County, Jerrie O'Connor submitted a PRA request, seeking all billing records received or made by the County's legal counsel. The County notified O'Connor that it would be providing responsive records in installments, and it disclosed the first installment of responsive records on September 24. At that time, the County informed O'Connor that it would continue to locate additional responsive records and anticipated it would provide a status update and a cost estimate for additional records on or before October 22. O'Connor filed a PRA lawsuit on October 3, alleging that the County had denied him access to the requested records. The County moved for summary judgment dismissal of O'Connor's denial of access claim, arguing that it had not yet taken final action on O'Connor's request. Before the County's motion was heard, the County released a second installment of records on November 18, and it released the third and final installment on December 18. The trial court denied the County's motion for summary judgment in January 2020, concluding that the December installment constituted a denial of access by means of delay. The Court of Appeals disagreed, reasoning that at the time O'Connor filed his denial of access claim, the County had explicitly informed him that it was continuing to search for additional records and would provide either a status update or cost estimate at a later date. The Court held that requestors cannot initiate a denial of access lawsuit until their records request has been denied and closed. Because the County was continuing to respond to O'Connor's records request at the time he filed the PRA lawsuit, the Court held that O'Connor's denial of access claim was premature and should have been dismissed on summary judgment.

Public Records Act

Energy Policy Advocates v. Office of the Att'y Gen.
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 certain documents encompassing internal emails and litigation memos analyzing various laws, regulations, and assessments of 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 memorandum 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.

PERC

Refusal to Bargain

City of Cashmere
Decision 13429 (11/04/21)

A PERC Examiner held that the City of Cashmere did not commit an unfair labor practice by refusing to bargain over its decision to install a new timekeeping system because that decision was not a mandatory subject of bargaining. In August 2020, the City decided to install a new timekeeping system that used facial recognition technology to more efficiently track time for the field employees of its wastewater treatment plant. Field employees previously did not keep an exact log of hours worked, and instead recorded hours associated with specific projects on handwritten cards. After learning of the City's plans, the union demanded to bargain over the decision to implement any new timekeeping measures. In response, the City asserted that its decision was a management right, which did not necessitate negotiating with the union. The Examiner weighed the employees' interest in wages, hours, and working conditions against the City's interest in entrepreneurial control, and determined that the balance tipped more heavily toward the employer. The Examiner held that such decision falls under the realm of entrepreneurial control unless the union can show the technological change impacted a working condition. Because the union did not present any evidence as to what detailed employee information would be collected through this new timekeeping process, or how the new method might impact the employees' privacy interests, the Examiner held that the union did not meet its burden to show sufficient impact on working conditions for the decision to be a mandatory subject of bargaining.

Refusal to Bargain

City of Lakewood
Decision 13044-4 (11/15/21)

A PERC examiner concluded that the City of Lakewood committed a refusal to bargain unfair labor practice (ULP) by refusing to communicate exclusively with its police union's designated bargaining representative, but did not commit an interference ULP by informally discussing with a represented employee whether the union would be pursuing a grievance based on the employee's promotion. During a period of internal discord within the union, the union president, Jeremy

Vahle, was subject to a recall petition, the outcome of which was unclear and subject to internal legal dispute. As the union sought independent legal advice, Vahle agreed that he would maintain the title of union president, but not make any presidential decisions. Nonetheless, in March 2019, Vahle informed the employer that he was the official representative for the union, and he instructed the employer to direct any labor relations matters exclusively to him, not the entire executive board. The employer opposed this request, and it informed Vahle that it would continue to follow its longstanding practice of directing all regular communications to the entire executive board. Additionally, at some point in 2018, the employer promoted one of its represented officers to the rank of detective. Vahle believed that this promotion violated a provision of the parties' collective bargaining agreement, and he indicated to the employer that the union may file a grievance related to the promotion. This grievance was never filed, and sometime after the grievance timeline had elapsed, the City's Assistant Chief had a passing conversation with the promoted employee in which he informed the employee that the union was not pursuing a grievance based on the promotion. The union filed an unfair labor practice complaint based in part on the employer's continued communications with the entire executive board following Vahle's request, as well as the conversation between the Assistant Chief and promoted employee regarding a potential grievance. The Examiner determined that the employer had refused to bargain with the union's designated representative when it continued to include the executive board on further email correspondence. The Examiner rejected the employer's argument that it could abide by past practice, reasoning that the union was free to alter its prior designation regarding labor relationships communications at its discretion. The Examiner further rejected the employer's argument that it could interfere with union business by attempting to protect the board from a potentially rogue officer. Finally, given that neither the Assistant Chief nor employee could remember any specific details of their conversation, the Examiner concluded that there was insufficient evidence to find that this exchange rose to the level of a threat of reprisal or force or promise of benefit, associated with union activity, as necessary to find an interference ULP.

Refusal to Bargain

Spokane County
Decision 13435 (11/15/21)

A PERC Examiner held that Spokane County committed a refusal to bargain unfair labor practice (ULP) by conditioning its willingness to bargain on an agreement that the bargaining sessions be open to the public. In December 2018, the Board of County Commissioners of Spokane County passed a resolution requiring all collective bargaining contract negotiations to be conducted publicly. After the resolution passed, the County's chief negotiator sent copies of the resolution to the union representing County employees. In response, the union notified the County that it would be willing to identify dates for negotiations, but that the union did not agree with the resolution. The parties exchanged a series of emails regarding potential dates, and the County proposed a ground rule that negotiation sessions would be open to the public. The parties met five separate times to discuss ground rules. When the parties were unable to reach agreement, the union filed a request with PERC for mediation on the ground rules. The parties met multiple times with the assistance of a PERC mediator, but were unable to reach an agreement on ground rules. In December 2019, the union emailed the County its opening contract proposals, which the County did not respond to. The union then filed a separate request with PERC for contract mediation. The County objected to the union's request for mediation because actual contract negotiations had yet to take place. The

County argued that the union's request was "calculated sabotage" to good faith bargaining because it was attempting to force the County into closed contract mediation sessions. The parties continued to meet with the PERC mediator to discuss ground rules, but still no agreement was reached. The parties scheduled a Zoom bargaining session to be held in October 2020. The County sent the union an invitation to the Zoom meeting, which included a notice of open meeting in accordance with the resolution. The union did not participate in the scheduled Zoom meeting, and instead filed a ULP alleging that the County had failed to bargain in good faith by insisting that bargaining occur in public without the union's agreement. The Examiner held that the County had refused to bargain when it declined the union's attempts to engage in substantive bargaining—first by not responding to the union's written proposals, and second by declining to engage in mediated negotiations with PERC. Because ground rules—including whether bargaining sessions are open to the public—are nonmandatory subjects of bargaining, the Examiner held that the County committed a ULP by conditioning its willingness to bargain on agreement on a nonmandatory subject of bargaining.

Interference

Washington State Language Access Providers
Decisions 13355-A, 13437 (11/23/21)

A PERC examiner held that the Washington State Department of Labor and Industries (L&I) did not commit an interference unfair labor practice (ULP) by changing the way it scheduled appointments for its purchased language interpretation services while a representation petition was pending with PERC. L&I hires language access providers (LAPs) to provide interpretation services for injured workers and crime victims receiving benefits through the workers' compensation and crime victims' compensation programs. Prior to 2021, LAPs could choose to provide their interpretation work in several ways, including scheduling appointments through an agency who billed L&I for the services. In March 2018, the legislature passed a bill that established new contracting requirements for L&I, and precluded L&I's continued use of interpretation agencies or brokers. In accordance with the new requirements, in July 2019, L&I selected a scheduling organization to contract with, and it also notified the LAPs of its chosen scheduling system. However, implementation of the chosen system was delayed until April 2021 due to technical difficulties and the impact of the COVID-19 pandemic. As L&I worked through the difficulties delaying the system implementation, WA Interpreters filed a petition to represent a bargaining unit of the LAPs, triggering the requirement that L&I not make changes to mandatory subjects of bargaining until the petition had been resolved. Despite the filing of the petition, L&I decided to move forward with implementing the new system. WA Interpreters filed an interference ULP with PERC, alleging that L&I had improperly changed the status quo with respect to the wages, hours, and working conditions of the LAPs while a representation petition was pending by moving forward with the scheduling change. The Examiner dismissed WA Interpreters' complaint, reasoning that the scheduling change was part of the dynamic status quo that existed prior to the filing of the representation petition. Because L&I had decided to change the scheduling system—and notified the LAPs of the changes—well before WA Interpreters filed a representation petition, the Examiner held that L&I did not interfere with the LAPs bargaining rights by changing the scheduling system during the pendency of a representation petition.

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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.

Update Editors

Elizabeth Robertson
elizabeth@pfrwa.com

Jay Schulkin
jay@pfrwa.com

PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Chase Bonwell
Macaulay Dukes
Tevon Edwards
Cliff Foster

Olivia Hagel
Josh Halladay
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