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.

Ninth Circuit Court of Appeals

Secondary Picketing

SEIU Local 87 v. NLRB
No. 19-70334 (4/28/21)

The Ninth Circuit Court of Appeals held that janitorial employees at an office building did not engage in unlawful secondary picketing. The property manager of a San Francisco office building hired Preferred Building Services for the building's janitorial services, and Preferred then obtained the services of a janitorial subcontractor to perform the janitorial services. The subcontractor's janitorial employees subsequently sought help from SEIU Local 87 in addressing concerns about low wages and poor working conditions. The janitorial employees and SEIU Local 87 members picketed outside of the office building carrying signs that identified Preferred as the target of their protest, and distributed leaflets containing language clarifying that they were employed by Preferred, protesting their wages and working conditions, and calling on the building's major tenant to pressure Preferred to listen to the employees' demands. The building's property manager then terminated its contract with Preferred, and then Preferred terminated its contract with the subcontractor. The subcontractor then fired four employees who had participated in the picketing, which led SEIU Local 87 to file a charge with the NLRB that Preferred and the subcontractor had engaged in unfair labor practices by discharging employees in retaliation for their picketing and union activity. An ALJ found that Preferred and the subcontractor, as joint employers, had threatened to discharge the employees in retaliation for their picketing and union activity, and ordered that the employees be reinstated with back pay. The NLRB reversed the ALJ, finding that the employees' protesting and union activity was intended to force neutral third parties like the building's tenants to take action that would give the employees leverage in their dispute with Preferred, thereby violating the NLRA's prohibition against secondary picketing. The Ninth Circuit Court of Appeals reversed, holding that the NLRB's finding of secondary (as opposed to primary) picketing was not supported by substantial evidence. The Court also held that the NLRB incorrectly determined that the picketing did not clearly disclose that the dispute was with Preferred despite evidence of signage and leaflet language that clearly identified Preferred as the employer and subject of the picketing. As a result, the Court remanded to the NLRB for further proceedings consistent with the Court's decision.

Washington Court of Appeals

Sex Discrimination

Becker v. Valley Medical Center (unpublished)
No. 80526-6-I (4/19/21)

The Washington State Court of Appeals held that a former employee's hostile work environment and constructive discharge claims were improperly dismissed on summary judgment since there were material issues of fact regarding the actions the employer took in response to complaints of harassment. Valley Medical Center (VMC) employee Fawn Becker complained to her clinic supervisor that her coworker Jose Gomez touched her, told dirty jokes, made sexually obscene gestures toward her, and played sexually suggestive music on his work computer. The human resources department concluded that Becker's allegations were unsubstantiated without either interviewing one of the three potential employee witnesses that Becker had identified or considering a prior investigation of another VMC worker's complaint of similar conduct by Gomez. The investigation of Becker's allegations resulted in VMC coaching Gomez to focus on his work and avoid jokes that could be interpreted as offensive. Becker learned of the result of the investigation when she returned from a leave of absence, and she then applied for a transfer to a different VMC clinic. VMC claimed that Becker had engaged in disruptive behaviors that made it difficult to transfer her. Becker then resigned, explaining that VMC had not properly handled her complaints and that Gomez continued to harass her once she returned from leave. Becker then sued VMC for sexual discrimination, harassment and hostile work environment under the Washington Law Against Discrimination, constructive discharge and discriminatory termination, and wrongful discharge in violation of public policy. The trial court granted summary judgment in favor of VMC, but the Court of Appeals reversed on Becker's hostile work environment and constructive discharge claims. The Court held that Becker raised a genuine issue of fact as to whether VMC took remedial action reasonably calculated to end harassing conduct of which VMC knew or should have known. The Court also held that the trial court erred in granting summary judgment dismissing Becker's constructive discharge claim since she provided evidence that, even after she complained about harassing conduct, VMC continued to allow a work environment where Gomez told inappropriate jokes, touched female co-workers, and made Becker feel uncomfortable.

PERC

Representation

Sequim School District
Decision 13337 (4/13/21)

PERC determined that four of five positions in a contested representation petition should be included in a bargaining unit. The District Employees Support Association (DESA) filed a petition seeking to represent all eligible unrepresented classified Sequim School District employees. The District stipulated to the appropriateness of the petitioned-for bargaining unit with the exception of five positions. The District argued that the Executive Assistant to the Superintendent and the Human Resources Specialist positions were confidential, and that the Directors of Transportation, Maintenance and Operations, and Technology were positions with supervisory responsibility over employees in the bargaining unit, and were thus not appropriate to include in the bargaining unit. PERC's Executive Director held that the Executive Assistant to the Superintendent was a confidential employee who must be excluded from DESA representation because the position provides clerical support to the Superintendent and the District's Board of

Directors and attends board meetings, executive sessions, and cabinet and leadership team meetings where sensitive personnel subjects such as collective bargaining strategy are discussed. Next, the Executive Director held that the Human Resources Specialist would be included in the bargaining unit because the occasional bargaining-related research previously performed by the position was not regular and ongoing, and because the position's ability to view certain personnel and labor relations files and responsibility to interpret and apply the collective bargaining agreements in maintaining personnel files did not constitute confidential tasks. The Executive Director then held that the Directors of Transportation and Maintenance and Operations were not excluded from DESA representation since the employees they supervised were in a bargaining unit represented by another union. The Director of Technology was not excluded from the bargaining unit as a supervisor since the position did not perform a preponderance of supervisory duties and did not exercise the type of authority that requires separation from the bargaining unit, such as hiring, firing, or issuing suspensions without pay. Finally, the Executive Director determined that the Director positions shared a community of interest with the bargaining unit based on the extent of organization, education and training requirements, terms and conditions of employment, and the degree of contact, and also determined that excluding the Director of Technology would create work jurisdiction disputes since a majority of this Director's time was spent performing technical work that overlapped with the work performed by the positions that report to this Director.

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