WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

June 2019

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

Ninth Circuit Court of Appeals

First Amendment

Greisen v. Hanken
No. 17-35472 (5/31/19)

The Ninth Circuit upheld a district court's award of damages to a city police chief who alleged that the city manager had violated the First Amendment by retaliating against him for discussing the city manager's oversight of the budget with other city officials. After the police chief learned that the City had been delaying payment of invoices for the police and other departments, he discussed the city manager's budgeting practices with department heads, city councilors, and the city finance administrator. The police chief alleged that the city manager retaliated against his exercise of free speech by initiating three outside investigations of alleged misconduct by the police chief, resulting in defamatory media statements, a suspension, and an indefinite leave. The success of the police chief's claim depended upon whether he was speaking as a private citizen on matters of public concern. The Court upheld the judgment in favor of the police chief, finding that he had spoken as a private citizen outside of his chain of command and outside of his defined role in the budget process on the public concern of suspected budget mismanagement.

Washington Court of Appeals

Public Records Act

Strahm v. Snohomish County
No. 79254-7 (5/6/19) (Unpublished)

The Court of Appeals held that Snohomish County did not violate the Public Records Act when it refused to translate requested public records into alternative electronic formats. Robert Strahm requested certain public records from the County and specified that he would like to receive the records in Database File (DBF) format. Certain of the records were instead available as PDFs, and others only as paper records. Strahm informed the County that he wanted to receive the paper records as PDFs. The County declined to translate the PDFs into DBF format and declined to provide the paper records as PDFs. Relying on the Attorney General's Model Rules, Chapter 44-14 WAC, the Court held that the County was not required to translate the PDFs into DBFs. Further, the Court held that the County was not required to disclose the paper records in electronic format.

Public Records Act

Wolfe v. Washington State Dep't of Transportation
No. 50894-0 (5/6/19) (Unpublished)

The Court of Appeals held that the statute of limitations applied and prevented a requestor from prevailing against a public agency when the agency discovered and provided responsive records to a requestor three years after having closed the request. Charles Wolfe requested records from the Washington State Department of Transportation in May 2008. WSDOT provided responsive records and closed the request in August 2008. Wolfe made another public records request in 2011. When responding to the new request, WSDOT found three records that were responsive to the 2008 request but that had not previously been provided. WSDOT then produced the three records to Wolfe. Wolfe sued for violations of the Public Records Act in 2012, alleging that WSDOT violated the PRA by not providing the three records in 2008. WSDOT argued to the trial court that it had made an adequate search for records back in 2008, and that Wolfe's claims should be dismissed because of the one-year statute of limitations. The trial court ruled that WSDOT violated the PRA by providing the three records three years late and awarded penalties and attorney fees to Wolfe. The Court of Appeals reversed and held that Wolfe's claims were time-barred. The Court held that WSDOT gave its final definitive response to the May 2008 request in August 2008, thus triggering the one-year statute of limitations, and that equitable tolling did not apply because WSDOT had not acted in bad faith, acted in a deceptive manner, or given false assurances.

Discrimination

Hollis v. Snohomish Cnty. Medical Examiner's Office
No. 78034-4 (5/20/19) (Unpublished)

The Court of Appeals held that a tentative performance evaluation could not constitute an adverse employment action for purposes of a retaliation claim and that conclusory allegations of a hostile work environment were not sufficient to survive summary judgment. Deborah Hollis worked for the Snohomish County Medical Examiner's Office (SCMEO). In 2013, she testified on behalf of a coworker in a discrimination lawsuit brought by the coworker against SCMEO, and later brought and settled her own discrimination lawsuit against SCMEO. In the instant case, Hollis alleged retaliation and hostile work environment in violation of the Washington Law Against Discrimination, Chapter 49.60 RCW. A retaliation claim requires a plaintiff to prove that, among other things, the employer took an adverse employment action against the employee. The trial court found, and the Court of Appeals affirmed, that Hollis failed to establish retaliation because she did not present sufficient evidence she had experienced an adverse employment action. The Court held that a negative performance evaluation was not an adverse employment action because the evaluation was not final, and a tentative evaluation cannot be an adverse employment action. The trial court also found, and the Court affirmed, that Hollis' allegations that she "was ridiculed [by coworkers] for requesting breaks" and "faced the intolerable choice of avoiding censure and ridicule and maintaining healthy blood sugar levels" were conclusory because they did not include any detail about specific acts of harassment. Because harassment is a necessary element of a hostile work environment claim, Hollis' conclusory allegations did not raise an issue of fact as to whether she was subjected to a hostile work environment. As a result, the Court affirmed dismissal of Hollis' retaliation and hostile work environment claims.

Negligence, Expert Testimony

Kelso v. Olympia School District
No. 49272-5 (5/21/19) (Unpublished)

The Washington Court of Appeals held that an expert opinion which relied on reverse-engineering plaintiffs' trauma symptoms to identify that abuse

had occurred and to identify the alleged abuser was inadmissible. Gary Shafer was employed as a bus driver for the Olympia School District from 2005 to 2011. In 2011, he admitted to molesting multiple students. In the instant case, three students and their parents sued the District for negligence related to Shafer's conduct. Shafer did not admit to molesting any of those three students, and none of the students reported that Shafer inappropriately touched them. Instead, the students viewed all contact with Shafer as innocuous, or did not recall contact at all. The plaintiffs offered expert testimony opining that each of the students presented posttraumatic stress disorder caused by exposure to Shafer's predations, despite a lack of evidence (including lack of any statements by the children themselves) that Shafer had molested any of the students. The District argued that the expert's methodology was impermissible reverse engineering of existing symptoms to find a conclusion of abuse by Shafer. The trial court agreed and struck the expert's opinions and testimony. The trial court granted summary judgment to the District on the children's claims, ruling that without the expert's opinions and testimony, the children were unable to present a genuine issue of material fact that the District breached its duty to the students. The Court of Appeals affirmed the trial court's determination that the expert's opinions were inadmissible, holding that an expert cannot use trauma symptoms to prove abuse, let alone determine the identity of an abuser. The Court next considered whether, given the striking of the expert's testimony, dismissal on summary judgment was appropriate. The Court held that for two of the students, summary judgment was appropriate because there was insufficient evidence of harm to the students: there was no evidence that Shafer touched their intimate areas, and the students viewed their contacts with Shafer as innocuous or nonexistent. For the third student, though, there was evidence that Shafer had placed her on his lap to show her pictures on his phone, so there was a question of fact whether Shafer's contacts caused harm to the student. As a result, the Court dismissed the first two students' claims and remanded the third student's claims for further proceedings.

Fair Campaign Practices Act

State v. Economic Dev. Bd. for Tacoma-Pierce Cnty. No. 49892-8 (5/21/19)

The Washington Court of Appeals held that the Fair Campaign Practices Act, Chapter 42.17A RCW, required the defendants (including the Port of Tacoma) to disclose as independent expenditures their legal fees expended challenging a ballot proposition, and also held that the Port's legal fee expenditures violated the FCPA's prohibition on the use of public facilities for opposition to a ballot proposition. Citizens filed local ballot propositions that would require any land use proposal in the City of Tacoma requesting a daily consumption of one million gallons of water be submitted to a public vote. The defendants filed a declaratory judgment action and ultimately successfully blocked the propositions from being placed on the ballot. A citizen filed a complaint regarding defendants' use of funds to challenge the ballot propositions. The Public Disclosure Commission reviewed the complaint and recommended that the Attorney General take no legal action. The State nevertheless filed suit, alleging that the defendants failed to properly report independent expenditures made in opposition to the ballot propositions in violation of RCW 42A.17.255, and that the Port impermissibly used public facilities to oppose the ballot propositions in violation of RCW 42.17A.555. The trial court dismissed on summary judgment, and the State appealed. The Court of Appeals first held that under the plain language of RCW 42.17A.255, "independent expenditure" includes expenditures on legal services challenging ballot propositions. As a result, such expenditures were required to have

been disclosed by the defendants. Next, the Court held that the Port of Tacoma violated RCW 42.17A.555 because neither of the statutory exceptions to the prohibition on the use of public facilities to oppose a ballot proposition applied. First, the Court determined that the "normal and regular conduct" exception did not apply. The Court read WAC 390-05-273 as requiring that an agency have constitutional, charter, or statutory authorization to oppose a ballot proposition in its usual course of operations. Because the Port could identify no such authorization, the normal and regular conduct exception did not apply. Second, the Court interpreted RCW 42.17A.555's exception for actions taken at open public meetings to authorize only an expression of support or opposition to a ballot proposition, and held that it does not allow agencies to bring litigation in furtherance of its support or opposition to a ballot proposition. As a result, the Court reversed dismissal by the trial court and remanded for further proceedings.

PERC

Discrimination

Franklin County
Decision 13003 (5/17/19)

A PERC Examiner dismissed a discrimination unfair labor practice claim because the employee's amended complaint failed to link the employer's alleged conduct to the employee's exercise of a protected activity. A Franklin County Sheriff's deputy challenged his termination through the grievance process, and an arbitrator ultimately reinstated him with retroactive pay and benefits. The deputy alleged that upon reinstatement numerous terms and conditions of his employment changed. The deputy alleged that he was reassigned with a different title and different working hours, he was no longer eligible to be included in the retirement plan, and he was unable to attend union meetings in a secured area of the workplace without an escort. The deputy's amended complaint sufficiently alleged that he was engaged in protected activity and that the employer denied him a right or benefit. However, the amended complaint was dismissed because it lacked specific facts connecting the employer's denial of a right or benefit to the deputy's exercise of a protected activity.

PFR Announcements

Welcome Elliott Okantey

The attorneys and staff of Porter Foster Rorick are pleased to welcome a new attorney to our team:

Elliott Okantey graduated in 2009 from Whitman College in Walla Walla, Washington, and received his law degree from the University of Washington School of Law in 2018. During law school, Elliott clerked with Porter Foster Rorick and interned with the Labor and Employment Section of the Seattle City Attorney's Office. Prior to law school, Elliott managed environmental education programs to help municipalities meet ambitious environmental sustainability goals.

Student Discipline Trainings

Porter Foster Rorick will be holding several regional trainings on the new student discipline regulations. Space remains for the trainings at the Burlington-Edison School District (August 1, 9:00

am to noon, and the Ridgefield School District (August 9, 9:00 am to noon). Registration is $175 per person. Reserve a space by sending an email with the names of attendees to info@pfrwa.com.

Porter Foster Rorick LLP

Washington School Law Update is published electronically on or about the 5th of each month. To be added to or removed from our e-mail distribution list, simply send a request with your name, organization and e-mail address to info@pfrwa.com.

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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