WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

June 2023

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

Ninth Circuit Court of Appeals

First Amendment

Roberts v. Springfield Utility Board
No. 21-36052 (5/12/23)

The Ninth Circuit Court of Appeals held that a public employer did not violate the First Amendment when it prohibited an employee from discussing an internal workplace misconduct investigation with potential employee witnesses. Todd Roberts worked for the Springfield Utility Board (SUB), an Oregon public agency. SUB has a workplace policy requiring its employees to request time off in advance, except in cases of emergency, and it warns employees that dishonesty, including written or verbal misrepresentations, will generally result in immediate dismissal. Roberts notified his human resources manager that he needed to take an unscheduled day off to address an issue with his child's school. Four minutes later, Roberts emailed a co-worker: "I'm looking at your boat's slip right now headed to the Pig N Pancake." Roberts later (and unsuccessfully) attempted to delete this second email. After discovering the email, SUB initiated an internal investigation into Robert's potential violations of its workplace leave policies. SUB placed Roberts on paid administrative leave during the pendency of the investigation, and it prohibited him from communicating with any potential witnesses or other employees of SUB regarding the ongoing investigation. Roberts was interviewed as part of the investigation, and he was again advised that he was prohibited from discussing it with other employees. Through legal counsel, Roberts asked SUB to remove the communication restriction, asserting that it prevented him from gathering information for his defense. SUB denied this request and again instructed Roberts that he was not to communicate with potential witnesses about the investigation. Roberts filed a lawsuit in district court, arguing that SUB violated his First Amendment right to free speech by instructing him not to speak with other SUB employees regarding the ongoing investigation. The district court dismissed Roberts' complaint, ruling that SUB could restrict his speech because it had a legitimate interest in preventing interference with an ongoing workplace investigation. The Ninth Circuit Court of Appeals affirmed dismissal on other grounds, holding that Roberts did not have a free speech right to discuss the investigation with his co-workers because such speech was not a matter of public concern. The Court reasoned that the First Amendment only protects the right to speak as a citizen on a matter of public concern, and here the speech at issue involved an individual personnel dispute and

grievance, which federal courts have long held are generally not of concern to the public.

Religious Accommodation

Keene v. City and County of San Francisco
No. 22-16567 (5/15/23) (unpublished)

The Ninth Circuit Court of Appeals held that two California public employees had adequately demonstrated that a COVID-19 vaccine requirement violated their sincerely held religious beliefs based on information they presented that vaccine manufacturers used fetal stem cells early in the vaccine development process. The City and County of San Francisco (CCSF) adopted a policy in 2021 requiring all employees to be fully vaccinated against COVID-19. Selina Keene and Melody Fountila, two CCSF employees, requested a religious accommodation to the vaccine requirement, asserting that they were Christians who "believe in the sanctity of life," and that taking the vaccine would conflict with their religious beliefs because the COVID-19 vaccine manufacturers used fetal cell lines from elective abortions early in the development process. The CCSF denied this request, and the employees retired under threat of termination for failure to vaccinate and filed a lawsuit alleging violations of Title VII of the Civil Rights Act of 1964. The employees sought a preliminary injunction requiring the CCSF to accommodate their religious beliefs by allowing them to work from home or wear additional personal protective equipment at work in lieu of being vaccinated. The district court denied the request, concluding that the employees had not demonstrated their religious beliefs were sincere or that those beliefs conflicted with receiving the COVID-19 vaccine. Specifically, the district court ruled that there were no grounds for the employees to "assert the mistaken conclusion" that the COVID-19 vaccines are "derived from murdered babies." The Ninth Circuit reversed, reasoning that an employee's religious belief need not be "consistent or rational" to be protected under Title VII, and that an assertion of a sincere religious belief is generally sufficient to merit protection. Relying on an article in the record from UCLA Health, the Court held that there was sufficient evidence the COVID-19 vaccines are, "albeit remotely, derived from fetal cell lines." Finally, the Ninth Circuit held that the district court had failed in its analysis to properly balance the employees' interest against the public interest in increased vaccination against the COVID-19 pandemic, citing a recent opinion in which the U.S. Supreme Court held that the government must conduct a "serious examination" of the need for drastic measure before restricting religious practice due to COVID-19. As a result, the Court remanded for the district court to reconsider and analyze the employees' request for preliminary relief from the CCSF's vaccination requirement.

Washington Court of Appeals

Discrimination

Wilcox v. Tumwater School District
No. 57125-1-II (5/31/23) (unpublished)

The Washington Court of Appeals held that placing an employee on paid administrative leave could constitute an adverse employment action for purposes of establishing a claim under the Washington Law Against Discrimination (WLAD). Jon Wilcox was a principal in the Tumwater School District for 18 years. According to Wilcox, on multiple occasions, District Superintendent Sean Dotson asked Wilcox when he would be retiring, and Dotson also stated that he believed Wilcox had dementia and was not fit to serve as principal. In March 2020, the District's executive director of human resources requested a meeting with Wilcox and Dotson. Wilcox refused to meet until he could find a representative to accompany him. Less than an hour after Wilcox asked for representation at the meeting, the District placed Wilcox on paid administrative

leave, citing his refusal to meet as requested by human resources. The letter clarified that no decision had yet been made, but it stated, "the District knows that being placed on administrative leave is a tense and stressful event." Three days later, all school staff were placed on paid home assignment due to the COVID-19 pandemic, and the investigation into Wilcox's alleged misconduct never occurred. Wilcox resigned effective at the end of the school year. Wilcox then filed a lawsuit alleging in part that his placement on paid administrative leave constituted disparate treatment and retaliation based on his age and perceived dementia in violation of the WLAD. The superior court dismissed the lawsuit, ruling that being placed on paid administrative leave was not an adverse employment action, a necessary element to establish a claim under the WLAD. The Washington Court of Appeals reversed, and departing from federal precedent, held that in some circumstances, placement on paid administrative leave could constitute an adverse employment action if it represents "a significant change in employment status." The Court held that Wilcox had presented sufficient facts for a jury to find that his administrative leave was an adverse employment action given that he was effectively removed from his position for more than two and a half months without the District initiating any investigation that could permit his return. The Court also cited the language in the letter describing administrative leave as a "tense and stressful event" in holding that Wilcox had presented sufficient facts for his lawsuit to survive a motion to dismiss. As a result, the Court reversed dismissal of Wilcox's claims and remanded to the superior court for further proceedings.

Public Records Act

Beidler v. Snohomish County
No. 84316-8-I (5/8/23) (unpublished)

The Washington Court of Appeals held that Snohomish County timely and diligently responded to a public records request that sought thousands of pages of collision reports involving its sheriff's office. Robert Beidler previously worked as the County undersheriff, a role in which he developed a traffic safety program ultimately implemented by the Snohomish County Sheriff's Office (SCSO). After separating from employment with the County, Beidler submitted a public records request in March 2021, seeking all collision reports for 2020 in which a SCSO vehicle was involved, and information related to the number of resulting injuries, damages, and litigation. The request sought documents maintained by various County departments including its legal department, maintenance department, and a review board tasked with conducting internal collision and driving reviews. The County responded to Beidler's request within five business days, and it advised him that the first installment of records would be available in May 2021. The estimated production date was based on the number of responsive records, which included more than 6,000 pages, 74 audio files, a PowerPoint slideshow, and 147 images; the number of other pending public records requests; staffing levels; and the manual review required to redact exempt information. Between May 4 and December 8, 2021, the County provided Beidler seven installments, comprising 824 pages. Beidler then sent a demand letter to the County seeking the remaining records. The County provided seven more installments to Beidler following his demand letter, and by June 10, 2022, it had provided 14 installments, totaling 4,388 pages. In March 2022, Beidler filed suit against the County, alleging that it had unreasonably delayed production and wrongfully withheld the requested records. To support his claims, Beidler relied on his declaration, in which he stated that he knew based on his experience as an undersheriff that the information he sought was "easily accessible." The superior court dismissed Beidler's lawsuit, finding that the evidence did not show he was

denied an opportunity to inspect the requested records. The Court of Appeals affirmed, holding that no reasonable person would believe the County had denied Beidler's request given that Beidler had received two thirds of the requested records at time of his lawsuit. The Court further held that the County had allocated sufficient resources to respond to public records requests based on the uncontroverted evidence that it had hired two additional staff members in 2021 to support its public records department and had paid $23,000 in overtime to meet public records demands. Finally, the Court held that Beidler's declaration could not support his claims because it failed to recognize that he had ready access to internal, unredacted County records when he had worked for the County, but as a private citizen, he could not access those records until they had been reviewed for exemptions. As a result, the Court affirmed dismissal of Beidler's lawsuit.

Discrimination

Hoffman v. Providence Health and Services Washington
No. 38833-6-III (5/23/23) (unpublished)

The Washington Court of Appeals affirmed dismissal of a physician's employment discrimination claims, holding that evidence he had stolen 300 masks from his employer at the beginning of the COVID-19 pandemic was a legitimate, nondiscriminatory reason for his discharge. Dr. Mark Hoffman worked for Providence as a physician in its urgent care centers. At the beginning of 2020, the practice manager for Providence sent an email to staff advising them that they would continue to see patients who reported recent travel to China or who had close contact with a person suspected of having COVID-19. Dr. Hoffman replied-all to this email, criticizing the policy and accusing Providence of risking the safety of patients and staff. According to Dr. Hoffman, after sending this email, his immediate supervisor called him "aggressively angry," and told him that he "would pay for sending that email." Approximately three weeks later, several employees reported seeing Dr. Hoffman carrying boxes of face masks from the clinic to his car at the end of his shift. Providence placed Dr. Hoffman on administrative leave and initiated an investigation, which found that Dr. Hoffman had removed 300 masks from the clinic without permission. Providence policy stated that theft of resources used for serving patients constituted immediate grounds for termination, and based on this policy, Providence terminated Dr. Hoffman. Dr. Hoffman sued Providence for employment discrimination, asserting claims for wrongful termination in violation of public policy and failure to accommodate his allergy disability. Dr. Hoffman argued that his termination was retaliation for his email criticizing Providence's COVID-19 safety protocols, which he characterized as a whistleblower report. Dr. Hoffman's disability discrimination claim was based on an allegation he was allergic to Providence's standard masks, and that Providence had initially accommodated his disability by ordering him the alternative masks that he had taken home. The superior court dismissed Dr. Hoffman's claims. The Court of Appeals affirmed, holding that Dr. Hoffman had failed to produce any evidence upon which a jury could conclude that his discharge was motivated by his email criticizing Providence's COVID-19 safety protocols. The Court held that the statements made by Dr. Hoffman's supervisor that he would "pay" for that email were insufficient to support such claim because the supervisor did not make the discharge decision. The Court further dismissed Dr. Hoffman's disability discrimination claim because the evidence showed that Providence did accommodate Dr. Hoffman's allergies by making alternative masks available onsite during his workday. The Court rejected Dr. Hoffman's claim that Providence was also required to allow him to take 300 of those masks home after work as a reasonable accommodation.

PERC

Refusal to Bargain

Washington State Department of Social and Health Services
Decision 13657 (5/3/23)

A PERC Examiner held that the Washington State Department of Social and Health Services (DSHS) committed a refusal to bargain unfair labor practice (ULP) when it unilaterally removed two positions from a bargaining unit represented by the Washington Federation of State Employees (Union). The Union represents a bargaining unit of civil service employees who work for DSHS, including the Investigator 2 position. On August 18, 2021, DSHS notified the Union that it was reallocating two employees and their Investigator 2 positions to non-represented Investigator 3 positions. On September 10, the Union demanded to bargain the removal of the two employees, and the parties met to bargain over the decision. The parties agreed that the two employees would remain in the bargaining unit until negotiations were complete. Despite this agreement, the Union learned that the two employees had been removed from the bargaining unit. The next day, DSHS returned the two employees to the bargaining unit while negotiations continued. The Union filed a ULP complaint, alleging that DSHS had refused to bargain over a mandatory subject of bargaining when it unilaterally removed the two employees despite the ongoing negotiations. The PERC Examiner held that DSHS's decision to reallocate the two employees was a mandatory subject of bargaining. The Examiner reasoned that the move created a material and substantive change to the terms and conditions of employment for those two employees, and as a result, DSHS was required to bargain with the Union regarding that decision. Even though DSHS had since returned the employees to the bargaining unit, the Examiner held that DSHS had still committed a refusal to bargain ULP when it removed them prior to March 18, 2023. The Examiner ordered DSHS to restore a lost personal day to both employees and return the status quo by reinstating the wages, hours, and working conditions for those employees that existed prior to the unilateral change.

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