WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

February 2021

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

Ninth Circuit Court of Appeals

Family and Medical Leave Act

Scalia v. State of Alaska
No. 19-35824 (1/15/21)

The Ninth Circuit Court of Appeals held that both the on-weeks and off-weeks of a "rotational" employee working a one week on, one week off schedule count toward the employee's 12 weeks of continuous Family and Medical Leave Act (FMLA) leave. The State of Alaska required rotational employees with one week on, one week off work schedules who took continuous FMLA leave to return to work after 12 weeks. The U.S. Secretary of Labor sued the State, asserting that rotational employees with such schedules should return to work after 24 weeks because their off-weeks did not count as "workweeks of leave" as provided by FMLA regulations. The federal district court granted summary judgment in favor of the Secretary, holding that a rotational employee's off-weeks could not count against the employee's FMLA leave entitlement because the term "workweek" refers to time that the employee is actually required to be at work. The Court of Appeals reversed, holding that Congress intended to adopt the definition of "workweek" contained in the Fair Labor Standards Act (FLSA): a seven-day period designated in advance by the employer during which the employer is in operation, without regard for an individual employee's own work schedule. Next, the Court held that the Secretary's reading of "workweek" conflicted with Congress's intended method of calculating FMLA leave since Congress did not provide for any employees' continuous FMLA leave to last longer than 12 weeks. The Court then held that an employer may count a rotational employee's on-weeks and off-weeks as "workweeks of leave," and remanded to the district court for judgment in the State's favor.

Washington Supreme Court

Anti-SLAPP Statute

Leishman v. Ogden Murphy Wallace PLLC
No. 97734-8 (1/28/21)

The Washington State Supreme Court held that a government contractor hired to perform an independent investigation is a "person" immune to civil claims under the anti-SLAPP (strategic lawsuit against public participation) statute, RCW 4.24.510. The Attorney General's Office (AGO) retained law firm Ogden Murphy Wallace (OMW) to independently investigate an AGO employee's allegations that his supervisor had committed sexual orientation discrimination and his

supervisor's allegations that the employee had acted with inappropriate aggression toward her. OMW's investigative report concluded that there was no support for the employee's sexual orientation discrimination claims but that the employee had acted inappropriately toward his supervisor. After the AGO terminated the employee, he sued the AGO for employment-related claims and later reached a settlement agreement releasing all claims against the AGO and its agents. Subsequently, the employee brought a series of claims against OMW under the theory that the firm had not acted as the AGO's agent and that the claims were therefore not barred by his settlement with the AGO. The trial court granted judgment on the pleadings in favor of OMW on the basis that it was a "person" immune under RCW 4.24.510, which provides immunity from civil liability for a "person" communicating a complaint based on investigative findings to a public agency regarding a matter of reasonable concern to the agency. The Court of Appeals determined that OMW was not a "person" under RCW 4.24.510 as a government contractor performing the work of a government agency, but the Supreme Court reversed. The Court held that OMW was a "person" immune under RCW 4.24.510 based on the statute's plain language indicating that individuals and organizations are immune regardless of whether they are paid under a contract with the government.

Washington Court of Appeals

Public Records Act

West v. Clark County
No. 52843-6-II (1/20/21) (unpublished)

The Washington State Court of Appeals held that a county councilmember's Facebook posts were not posted in the councilmember's official capacity and were therefore not subject to the Public Records Act (PRA). Arthur West submitted a PRA request for certain records related to Clark County Councilmember David Madore's discussion of County business, including communications on Madore's personal Facebook page that discussed his opinions on Clark County governance and invited commentary. The County responded to West with an affidavit from Madore stating that his personal Facebook page contained no public records. West then filed a PRA lawsuit against the County. The trial court granted summary judgment in favor of the County, finding that Madore's Facebook posts were not public records. The Court of Appeals affirmed, holding that that Madore's posts did not satisfy the three-part test for determining whether a record was prepared within an individual's official capacity under Nissen v. Pierce County, 183 Wn.2d 863 (2015): (1) whether his position required the posts, (2) whether Clark County directed the posts, or (3) whether the posts furthered the County's interests. The Court analyzed only the third element, and held that Madore's Facebook posts did not further the County's interests since the posts established Madore's views on particular policies and invited discussion among his constituents, thereby furthering Madore's own interests rather than those of the County.

Public Records Act

Berg v. City of Kent
No. 81253-0-I (1/19/21) (unpublished)

The Washington State Court of Appeals held that the City of Kent did not violate the Public Records Act (PRA) by providing responsive email records in PDF format and subsequently providing associated metadata in a separate spreadsheet. In 2018, the attorney for Donald and Karen Berg requested certain records and associated metadata related to a hearing officer's determination that they violated the City's zoning code in 2012. The City provided responsive records in three installments. The first two installments consisted of records provided in native format, and the third

consisted of redacted emails in PDF format and an accompanying redaction/withholding log. The Bergs' attorney then requested that the City provide the emails from the third installment in native format instead, but the City replied that it could not do so since redactions could not be applied to emails in that format. The Bergs then sued the City for violating the PRA and filed a series of other claims related to the zoning code enforcement determination. After reviewing the PRA claim and learning that the Bergs' attorney was seeking metadata for the redacted emails, the City developed a method for accessing the redacted emails' metadata (delivery date and time, sender and recipient names, subject line, information about content and attachments, and explanations of claimed exemptions) and exporting it to an Excel spreadsheet. The City then provided the Bergs with copies of the spreadsheet, a redaction/withholding log, and a letter explaining the spreadsheet's contents and redactions. The City then produced redacted text file versions of other files that had been produced as part of the third installment and their associated metadata. The trial court granted summary judgment in favor of the City, finding that the City did not wrongfully withhold the native version of redacted emails or the associated metadata. The Court of Appeals affirmed, holding that the City did not violate the PRA because the redactions from the spreadsheet of metadata were consistent with the redactions from the emails in the third installment, the Bergs identified no information within the metadata that had not been included in the prior production, and the City's redaction/withholding log contained sufficient information to allow the Bergs to determine the validity of each claimed exemption.

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.

Update Editors

Elliott Okantey
elliott@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	Rachel Miller	Jay Schulkin
Lynette Baisch	Elliott Okantey	Greg Swanson
Cliff Foster	Buzz Porter	Valerie Walker
Tevon Edwards	Liz Robertson	Christina Weidner
Parker Howell	Mike Rorick	Lorraine Wilson