

WASHINGTON SCHOOL LAW UPDATE



PORTER FOSTER RORICK
LLP

December 2022

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

Ninth Circuit Court of Appeals

COVID-19 Restrictions

Horizon Christian School v. Brown
No. 21-35947 (11/17/22) (unpublished)

The Ninth Circuit Court of Appeals affirmed dismissal of a challenge to two executive orders that restricted in-person instruction in K-12 Oregon schools during the COVID-19 pandemic. In April 2020, Oregon Governor Kate Brown issued an executive order that prohibited in-person instruction at K-12 schools within the state. In June 2020, Brown issued another executive order that established county-based metrics to determine when schools could resume in-person instruction. In September 2020, a group of religious K-12 schools and parents of students attending those schools filed a lawsuit against Brown in her official capacity, alleging that the orders violated their First Amendment rights. The plaintiffs sought an order enjoining the executive orders as well as nominal damages. By the time the district court considered the plaintiffs' lawsuit, both challenged executive orders had been rescinded, and Brown had terminated the COVID-19 state of emergency, which ended her statutory

authority to impose similar pandemic restrictions in the future. As a result, the district court dismissed plaintiffs' claims as moot because there was no longer an actual live dispute to resolve. The Ninth Circuit affirmed, noting that plaintiffs had acknowledged there was no longer any state order for the court to declare unconstitutional or enjoin. The Court further held that the exception to the mootness doctrine did not apply here because the COVID-19 state of emergency in Oregon had since lifted, which meant that there was no reasonable expectation a similar order would be imposed again. Finally, the Court dismissed the plaintiff's claim for nominal damages because damages claims cannot be maintained against a state under the Eleventh Amendment, and the plaintiffs expressly brought a lawsuit against Brown in her official capacity only. Finally, the Court held that even if Brown had been sued in her individual capacity, she would have been entitled to qualified immunity because the orders did not violate a clearly established constitutional right given that there were no cases addressing this situation at the time Brown issued the executive orders. Judge O'Scannlain filed a concurrence agreeing with the outcome, but noting that if qualified immunity did not apply, he would have held the orders violated a fundamental constitutional right to in-person instruction.

COVID-19 Mandates

Kheriaty v. Regents of the University of California
No. 22-55001 (11/23/22) (unpublished)

The Ninth Circuit Court of Appeals rejected a professor's challenge to a university's COVID-19 vaccination policy, holding that the policy did not infringe upon a fundamental right, and that it also served a legitimate government purpose. Dr. Aaron Kheriaty was terminated from his teaching position at the University of California, Irvine School of Medicine because he refused to be vaccinated for COVID-19 in accordance with the University's vaccination policy. Kheriaty challenged the constitutionality of the University's vaccination policy in federal district court, arguing that such policy infringed on a fundamental constitutional right and as a result, should be subject to "strict scrutiny," which requires the government to show the policy serves a compelling interest and is narrowly tailored to meet that interest. The district court dismissed Kheriaty's lawsuit, holding that the policy was subject to "rational basis review," a considerably more deferential standard that merely requires the government to show that its policy promotes a legitimate purpose in order to survive a constitutional challenge. The Ninth Circuit of Appeals affirmed, reasoning that a fundamental right must be enumerated in the Bill of Rights or deeply rooted in this Nation's history and tradition. Because there was no historical practice in this Nation's history of protecting a person's right to be free from a vaccination mandate, the Court held that such right was not "fundamental," and the policy would not be analyzed under strict scrutiny. Instead, applying rational basis review, the Court held that the University's policy was supported by its own research showing the COVID-19 vaccine advanced the health and safety of its community. The Court further noted that the United States Supreme Court had previously upheld a more onerous smallpox vaccination requirement in 1905, which applied to all

Massachusetts adults and resulted in financial penalties and criminal charges for noncompliance. As a result, the Court held that the University's policy survived rational basis review, and it affirmed dismissal of Kheriaty's challenge.

Washington Court of Appeals

Employment Discrimination

Elgiadi v. Washington State University Spokane
No. 38784-4-III (11/8/22)

The Washington State Court of Appeals held that a "no-rehire" provision in an agreement settling a former employee's discrimination claims was lawful and enforceable. Saleh Elgiadi worked in information technology for Washington State University (WSU) for 29 years. WSU terminated Elgiadi following a wage dispute, and Elgiadi subsequently brought multiple claims against WSU including wrongful termination in violation of public policy and age discrimination. In early 2020, Elgiadi and WSU entered into a settlement agreement in which WSU agreed to pay Elgiadi \$295,000 in exchange for him releasing WSU from all claims arising out of his former employment. Additionally, the settlement agreement contained a "no-rehire" provision in which Elgiadi agreed that he would never seek nor accept employment with WSU Spokane at any time in the future. Elgiadi was represented by legal counsel, and he knowingly agreed to this "no-rehire" provision. Nonetheless, seven months after executing the agreement, he brought suit against WSU, arguing that the "no-rehire" provision violated the public policy behind the Washington Law Against Discrimination (WLAD). The trial court granted summary judgment in favor of WSU, ruling that the "no-rehire" provision was valid and enforceable. In a split decision, the Court of Appeals affirmed, reasoning that Elgiadi did not have a "vested" right to be rehired because he did not work for WSU when he signed the settlement



agreement. The Court reasoned that it did not violate public policy or violate the antiretaliation provision of the WLAD for a former employee to waive a non-vested right. The Court further noted that the “no-rehire” provision was narrow, as Elgiadi was free to work for any other employer besides WSU Spokane, including other WSU campuses. Because the provision was narrow and applied to a right that had not been vested, the Court held it was valid and enforceable. Judge Fearing dissented, writing that he would have invalidated the “no-rehire” provision as void against public policy, reasoning that the antiretaliation policy of the WLAD would be frustrated if through the process of settling discrimination lawsuits, employers are able to demand that employees agree to not work for the employer again.

Employment Discrimination

Cahill v. Swedish Health Services

No. 82590-9-I (11/14/22) (unpublished)

The Washington Court of Appeals held that a former physician for Swedish Health Services (Swedish) failed to show that her employer took adverse action against her based on her alleged disability of alcoholism. In 2014, Deborah Cahill applied for a simulation facilitator position with Swedish, which required a valid medical license. At the time, Cahill’s license was due to be suspended following her admitted struggles with alcoholism. Cahill disclosed this to Swedish, who in turn offered her a physician facilitator position at a lower hourly rate, which Cahill accepted. Cahill’s medical license was suspended before her start date, and Swedish informed Cahill that it could no longer offer her the same role or pay because of her license status. Cahill agreed to take a different role at a lower rate of pay, which was specifically created for her to accommodate her license suspension. In April 2019, Cahill’s license was reinstated, and her supervisor recommended that Cahill be moved to a physician facilitator role with

higher pay. Around that time, Swedish learned that Cahill was on the Washington State Health Care Authority’s list of excluded providers, and Swedish policy states that any employee excluded from participation in government programs will be terminated. In July 2019, Swedish terminated Cahill based on this policy. Cahill filed a complaint for employment discrimination and wrongful termination in superior court, alleging that Swedish treated her less favorably than her similarly situated peers based on her disability of alcoholism in violation of the Washington Law Against Discrimination (WLAD). The trial court dismissed Cahill’s claims on summary judgment. The Court of Appeals affirmed, reasoning that an employee must show that the employer took adverse action based on a disability in order to establish a disparate treatment claim under the WLAD. The Court acknowledged that Washington courts have yet to decide whether alcoholism is a disability under the WLAD, but it did not decide the issue because both parties to this case agreed that alcoholism was a qualifying disability. However, the Court rejected Cahill’s claim that similarly situated colleagues who were not alcoholics were paid a higher rate, noting that the colleagues she compared herself to possessed a valid medical license, and were therefore not similarly situated. As a result, the Court held that Cahill failed to establish an employment discrimination claim based on disparate treatment and affirmed dismissal of her case.

PFR Announcements

2023 Bargaining Skills Workshops

January 23, 24, 30 and 31, 2023

Porter Foster Rorick is once again partnering with the Washington School Personnel Association (WSPA) to present our popular workshops on collective bargaining skills. The workshops include a primer on the legal rules for collective bargaining,



but also focus on the behavioral and strategic skills which help bargaining teams find agreements. These skills are important for all members of a management bargaining team, and particularly as we head into another challenging year for collective bargaining in 2023. The courses are taught by attorneys who regularly sit at bargaining tables with certificated and classified employee unions in Washington State and who collectively have negotiated settlements for more than 800 open labor contracts over the past 30 years.

This year we are offering our classic Bargaining Skills 101 curriculum on two dates: Monday, January 23, and Monday, January 30. We are also offering a Bargaining Skills 201 curriculum on two dates: Tuesday, January 24, and Tuesday, January 31. Attendees can choose to come to Bargaining Skills 101 or Bargaining Skills 201, or attendees can choose to come to both workshops on back-to-back days. The workshops will be held at the Two Union Square Conference Center in downtown Seattle with each section limited to 40 participants to facilitate small group activities and informal dialogue. The cost is \$295 per day for WSPA members and \$395 per day for non-members, with a \$400 daily discount for districts who send a team of four or more. Lunch and refreshments are included.

More information is attached. If you have any questions about the workshops, please feel free to call our attorneys or staff at (206) 622-0203 or reply to info@pfrwa.com.

Porter Foster Rorick LLP

WASHINGTON SCHOOL LAW UPDATE is published on or about the 5th of each month. To be added to or removed from our 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



Liz 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	Josh Halladay	Liz Robertson
Lynette Baisch	Parker Howell	Mike Rorick
Chase Bonwell	Megan Knottingham	Jay Schulkin
Macaulay Dukes	Rachel Miller	Greg Swanson
Cliff Foster	Nick Morton	Christina Weidner
Olivia Hagel	Buzz Porter	Lorraine Wilson



PORTER FOSTER RORICK
LLP



21st Century Bargaining Skills Workshops



January 23 – Bargaining 101
January 24 – Bargaining 201
January 30 – Bargaining 101
January 31 – Bargaining 201

9 AM to 4 PM



Two Union Square
Conference Center

601 Union Street, 51st Floor
Seattle, Washington



\$295/day – WSPA Members
\$395/day – Non-members

\$400/day discount for teams
of 4 or more from the same
school district



PORTER FOSTER RORICK
LLP

Invitation

The Washington School Personnel Association and the attorneys of Porter Foster Rorick are pleased to partner on our annual collective bargaining skills workshops. These workshops include a primer on the legal rules for collective bargaining, but also focus on the behavioral and strategic skills which help bargaining teams find agreements. These skills are important for all members of a management bargaining team.

Options

Bargaining Skills 101 is offered on January 23 and January 30. Bargaining Skills 201 is offered on January 24 and January 31. Attendees can choose to come to **101 or 201**, or attendees can choose to come to **both 101 and 201** on back-to-back days.

Faculty

The courses are taught by attorneys who regularly sit at bargaining tables with public school employee unions in Washington and who have collectively settled more than 800 open labor contracts over the past 30 years.

Format

Each workshop is limited to 40 participants to facilitate small group activities and informal dialogue. The registration fee includes a box lunch from Ingallina's and refreshments throughout the day. Clock hours and CLE credits are pending.

Lodging

Two Union Square is near dozens of hotels in downtown Seattle including Crowne Plaza, Grand Hyatt, Hilton, Monaco, Motif, Theodore, Hyatt at Olive 8, Hyatt Regency, Renaissance, Sheraton Grand, The W, and Westin.

Registration

Register to attend by sending an email to info@pfrwa.com with the name and email address for each attendee, the date(s) you wish to attend, and a purchase order number for invoicing your school district.

Refunds

Cancellations more than three weeks out will be refunded minus a \$75 administrative fee. No refunds after that date.

No show = No refund.

Questions

If you have any questions, please feel free to contact WSPA at admin@wspa.org or (360) 770-7454 or to contact PFR at info@pfrwa.com or (206) 622-0203.

