PORTER FOSTER RORICK LLP

April 2024

Washington School Law Update

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

United States Supreme Court

First Amendment

Lindke v. Freed
No. 22-611 (3/15/24)

The United States Supreme Court held that a public official's social media activity only constitutes state action subject to constitutional scrutiny when the public official (1) possessed actual authority to speak on the government's behalf, and (2) purported to exercise that authority when speaking on social media. James Freed created a personal Facebook account sometime before 2008. Over the years, Freed amassed thousands of Facebook friends, and he converted his page to "public" status, which allowed anyone to view and comment on his posts. In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect his new job. Freed primarily posted about his personal life, including sharing pictures of his children, posting Bible verses, and updating followers on his home-improvement projects. However, he also posted information related to his work as city manager, including sharing news about the City's leaf pickup, water stabilization program, and an annual financial report from the finance department. Freed also solicited feedback from the public, and on one occasion, he shared a link to a city housing survey and encouraged his followers to complete it. Freed's followers often commented positively on these posts, and Freed replied to questions they had in the comments. Freed occasionally deleted comments that he believed were "derogatory" or "stupid." After the COVID-19 pandemic began, Freed posted content related to the pandemic, including messages encouraging followers to "stay safe" and "save lives." Kevin Lindke is a City resident who was unhappy with the City's approach to the pandemic, and expressed his discontent by posting negative comments on Freed's Facebook posts. For example, Lindke commented on one post that the City's response to the pandemic was "abysmal" and that "the city deserves better." Freed initially deleted Lindke's comments, but ultimately blocked him, which prevented Lindke from commenting on Freed's Facebook page. Lindke filed a Section 1983 lawsuit against Freed, alleging that Freed acted under the color of state law when he blocked Lindke from the Facebook page, which Lindke alleged violated his free speech rights under the First Amendment to the U.S. Constitution. The district court dismissed Lindke's lawsuit, finding that the Facebook page was primarily personal in nature, not a government page. The Sixth Circuit Court of Appeals affirmed, but applied a different test to determine whether the public official's social media activity is

state action, which asked whether state law required the official to maintain a social media account or whether the official used state resources to manage the account. The U.S. Supreme Court granted review and vacated the holding of the Sixth Circuit. The Court disagreed with the test the Sixth Circuit applied in analyzing whether Freed's account was a government account, and it adopted a new framework for determining when a public official's social media activity constitutes state action under Section 1983. Under the new test adopted by the Court, a public official's social media activity is only state action—a necessary element for pursuing a constitutional claim against the state actor—when the public official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority through the social media posts. Both prongs of the test must be satisfied, and the appearance and function of the account are relevant only to the second step. In analyzing the first prong, the Court held that the power to speak on the State's behalf must come from "statute, ordinance, regulation, custom or usage," such as if a city ordinance empowered the official to make an official announcement. The court cautioned that the relevant inquiry is not whether the official "could" make an official announcement on behalf of the government, but instead, whether making such announcement is part of the public official's job. As to the second prong of the test, the Court held that the social media post's "content" and "function" are the most important characteristics. To illustrate, the Court provided a hypothetical example of a mayor who makes an announcement suspending a municipal parking ordinance on his Facebook page, which the Court opined would meet this new test, particularly if the ordinance is not available anywhere else. But if the mayor were simply sharing otherwise available information, such as a link to an announcement on the city's webpage, then the Court opined the mayor is more likely to be engaging in private speech, not government speech. The Court further held that if a public official were to put a disclaimer on the social media account stating that it is a "personal" account not an "official" one, then the official would be entitled to a "heavy (though not irrebuttable) presumption" that every post on the page is personal. Finally, the Court held that in cases where the public official blocks a user rather than simply deletes certain comments, the new test must be applied to every social media post separately. The Court vacated the opinion of the Sixth Circuit, it and remanded the case for the lower court to apply its new test "to the extent that this test differs from the one applied by the Sixth Circuit."

This opinion also vacated the Ninth Circuit decision Garnier v. O'Connor-Ratcliff*, which involved school board members' social media activity, and which was summarized in the August 2022 Washington School Law Update. Whether a public official or employee's social media activity constitutes state action should be analyzed under the new test introduced by the U.S. Supreme Court in* Lindke*, not the test used by the Ninth Circuit in* Garnier.

Washington Supreme Court

Student Discipline

M.G. v. Yakima School District No. 7
No. 101799-5 (3/7/24)

The Washington Supreme Court held that the Yakima School District violated state student discipline laws when it refused to allow a student back to the school from which he had been suspended, and further held that compensatory education is a potential remedy when a student's rights under the state's student discipline laws have been violated. In 2019, student M.G. was emergency expelled from Eisenhower High School in the Yakima School District for violating a gang contract by wearing a red shirt and for an altercation with a student. The emergency expulsion was then converted into a 12-day long-term suspension. Prior to the suspension's expiration, the District informed M.G.'s mother that the District's school transfer committee decided that M.G. was prohibited from returning to Eisenhower after his suspension. The District later enrolled M.G. in its online alternative learning experience. M.G. requested to return to Eisenhower or another building-based high school multiple times, but the District denied the requests based on M.G.'s alleged gang-style haircut and incidents in which M.G. visited different schools

and flashed gang signs. The District did not impose additional discipline using the process required by the student discipline laws, but rather based its denial of M.G.'s requests on its policy which gives it the right and responsibility to enroll students and determine enrollment options, arguing that it had discretion to enroll M.G. at a school other than Eisenhower based on "safety concerns." M.G. appealed the District's refusal to allow M.G. to return to Eisenhower to superior court, where the appeal was dismissed on summary judgment. M.G. then appealed to the court of appeals, which held that M.G. had been indefinitely suspended in violation of his statutory procedural rights and that compensatory education was available as an equitable remedy. The Washington Supreme Court affirmed. The Court relied on WAC 392-400-430(8)(b), which states that "If a school district enrolls a student in another program or course of study during a suspension or expulsion, the district may not preclude the student from returning to the student's regular educational setting following the end date of the suspension or expulsion," subject to limited inapplicable exceptions. The Court held that by refusing to allow M.G. to return to Eisenhower after his suspension, the District unlawfully precluded him from returning to his regular educational setting. The Court further held that the District's reliance on its enrollment policy allowing it to place M.G. at a school of the District's discretion was unlawful in light of the policy's conflict with WAC 392-400-430(8)(b), which entitled M.G. to return to Eisenhower. Finally, the Court held that because the student discipline laws are silent as to a remedy for violations, the trial court has discretion to craft an equitable remedy which can include compensatory education, and the Court remanded for determination of an appropriate remedy.

Washington Court of Appeals

Public Records Act

Cutler-Flinn v. Washington State Department of Corrections
No. 57159-5-II (3/19/24) (unpublished)

The Washington Court of Appeals held that the Washington State Department of Corrections (DOC) did not violate the Public Records Act (PRA) when it charged a requester for printed copies of records that were also available on its website. Talon Cutler-Flinn was incarcerated in a DOC facility when he filed multiple PRA requests with the agency. Flinn first requested a copy of two DOC policies, which were available on the DOC's website but inaccessible to Flinn in an online format due to his incarceration. The DOC identified seven records responsive to Flinn's request, and it assessed him $1.75 in copying costs for the records. Flinn filed a lawsuit against the DOC, alleging that it violated the PRA by imposing copying charges for records that were routinely posted on its website. The superior court dismissed Flinn's complaint, ruling that the DOC complied with the PRA by offering Flinn copies of documents upon payment of the copying charge. The Court of Appeals affirmed, rejecting Flinn's argument that an agency cannot charge a requestor for copies of documents that are accessible online. The Court acknowledged that under the PRA, an agency may respond to a request by providing an internet address and link on the agency's website to the specific records requested, and in those circumstances, the agency cannot charge the requestor a fee for downloading or viewing the record online. However, when a requestor cannot access the internet, the agency must respond by either providing copies or access to an agency computer to view the record. Relying on the plain language of the PRA, which explicitly allows agencies to impose charges for copies, the Court held that the DOC could still impose copying fees when providing the records to Flinn, regardless of whether they were regularly posted online. As a result, the Court affirmed dismissal of Flinn's case.

Washington Law Against Discrimination

German v. University of Washington
No. 85038-5-I (3/25/24) (unpublished)

The Washington Court of Appeals held that a "counseling memo" issued to a flight nurse could constitute an adverse employment action for purposes of establishing a prima facie retaliation case under the Washington Law Against Discrimination (WLAD). Angela German worked as a flight nurse for Airlift Northwest (ALNW), which provides air transport for

critically ill and injured patients. In January 2020, German reported that a pilot had sexually assaulted her. Approximately ninth months later (while the investigation into German's complaint was still ongoing), German was part of a flight crew that landed a helicopter in an area where there were two large flag poles. According to other crew members, German did not properly inform the pilot of the position of one pole, which ALNW asserted was part of German's responsibilities. Following an investigation into the incident, ALNW scheduled a counseling session with German for her failure to "communicate appropriately," and it created an action plan that restricted German from flying certain aircraft for a year. The Court referred to the letter which memorialized the counseling session and attached the action plan as a "counseling memo." Although this restriction did not reduce German's pay, it resulted in her transferring to a different ALNW base, which increased her commute time and required her to spend an additional night away from home. In July 2021, German filed a lawsuit against the University of Washinton, which operates ALNW, alleging that ALNW had retaliated against her for reporting sexual harassment in the workplace. The trial court dismissed German's claim, ruling that there was no adverse employment action against German as a matter of law because the counseling memo and action plan did not result in a pay reduction. The Washington Court of Appeals reversed, holding that retaliation under the WLAD encompasses any adverse action that would dissuade a reasonable person from making a complaint of sexual harassment or retaliation. The Court held that even if ALNW's argument that the counseling memo did not carry any negative consequences to German's employment status was accurate, the memo would nevertheless dissuade a reasonable person in German's position from reporting sexual harassment, especially in light of the fact the action plan resulted in a transfer to a different worksite. As a result, the Court held that German's complaint had alleged sufficient facts to survive a motion to dismiss, and it remanded the case to the trial court for further proceedings.

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