PORTER FOSTER RORICK LLP

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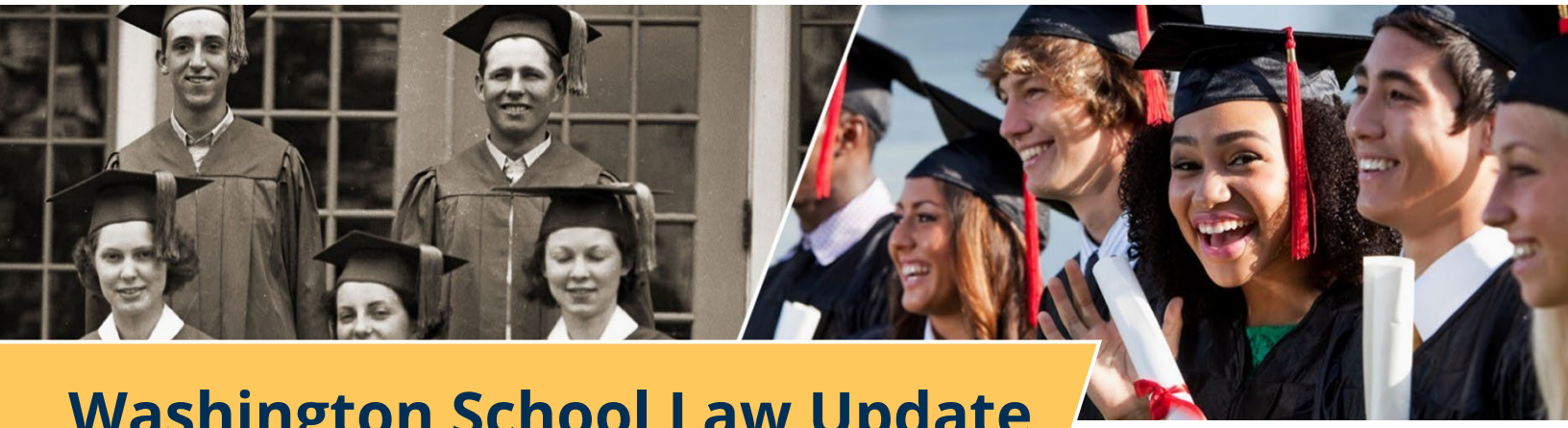

Washington School Law Update

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

Ninth Circuit Court of Appeals

IDEA

N.D. v. Reykdal
No. 23-35580 (5/22/24)

The Ninth Circuit Court of Appeals held that a federal district court erred by denying a motion for preliminary injunction regarding the State of Washington's obligation under the Individuals with Disabilities Education Act (IDEA) to provide special education services to 21-year-old students. As a condition of accepting federal funding, the IDEA requires a state to provide a free appropriate public education to students up until their 22nd birthdays, unless the state does not provide public education to nondisabled students in that same age range. Under Washington State law, students with disabilities are eligible for special education services under the IDEA until the end of the school year in which they turn 21 years old. As a result, students in Washington do not continue to receive special education services through their 22nd birthdays. N.D. and E.A. are two Washington students whose special education services would be discontinued prior to their 22nd birthdays under Washington law. In November 2022, the students filed a lawsuit against the Office of Superintendent of Public Instruction (OSPI), arguing that the State's eligibility cut-off violated the IDEA. The students sought a preliminary injunction, which if granted, would require the State to continue providing special education services through their 22nd birthdays, and they further sought provisional class certification, which if granted, would allow the injunction to apply broadly to all Washington students currently expected to age out of special education at the end of the school year in which they turn 21 years old. The district court denied the students' request for preliminary injunction, holding that the students failed to show that they would suffer irreparable harm without an injunction or that they were likely to succeed on the merits of their lawsuit, and as a result, it did not rule on the students' motion for class certification. The students appealed and the Ninth Circuit reversed, holding that Washington's practice of discontinuing special education services prior to students' 22nd birthdays likely violated the IDEA. The Court reasoned that the IDEA only allows a state to discontinue services prior to a student's 22nd birthday if it does not provide free public education to nondisabled students in that age range. The court acknowledged that Washington does not provide "ordinary secondary schooling to 21-year-olds," but held that it does provide certain adult-education programs, including High School+ and GED programs, which it reasoned are a form of public secondary education. Although those programs require

students to pay a $25 tuition fee, the court held that those programs nevertheless constituted free public education because the State provides tuition waivers allowing tens of thousands of Washington students, including some who are 21 or older, to participate in those programs at zero cost. The Court further held that the plaintiff students would suffer irreparable harm in the absence of a preliminary injunction based on the potential regression the specific plaintiff students would experience if there were interruption to their educational programming while the lawsuit was pending. As a result, the Court vacated the lower court decision and remanded to the district court to enter a preliminary injunction as to the named plaintiffs' claims, and to address the plaintiffs' request for class certification.

Washington Court of Appeals

Wrongful Termination

Holmes v. Clallam County Public Utility District No. 1
No. 57645-7-II (5/29/24) (unpublished)

The Washington Court of Appeals held that an arbitrator's decision that an injured employee was terminated for just cause collaterally estopped the employee from establishing discriminatory wrongful termination in a subsequent lawsuit, but also held that the employee could proceed with his failure to accommodate claim. Cody Holmes worked as a tree trimmer for the Clallam County Public Utility District (PUD) and was a member of the International Brotherhood of Electrical Workers Local No. 997 (IBEW) union. Tree trimming is a physically demanding job, requiring an unpredictable need to lift or pull 100 pounds. Holmes injured his back while working and was placed on "injury subsidization" medical leave in accordance with the collective bargaining agreement (CBA) between the PUD and IBEW. Over the next 10 months, Holmes exhausted the various forms of leave available to him, at which time the PUD terminated his employment because it could not accommodate his disability. The IBEW filed a grievance on Holmes's behalf, claiming that there was not just cause for his termination. At an arbitration hearing, the parties examined and cross-examined witnesses and submitted documents into evidence, and the parties later submitted post-hearing briefs. The arbitrator concluded that Holmes was terminated for just cause, also writing that the arbitration hearing was not "a disability case, an ADA case, or a Washington law against discrimination [(WLAD)] case." Holmes then filed a complaint in superior court for discrimination, wrongful termination, and failure to accommodate under the WLAD. The trial court dismissed the complaint on summary judgment, concluding that collateral estoppel applied and that the facts established during the arbitration defeated Holmes's claims. The trial court relied on the facts established at arbitration that Holmes had not recovered sufficiently to obtain a full medical release to return to work at the time of his termination. Holmes appealed and the Court of Appeals affirmed in part and overturned the trial court in part. The Court held that collateral estoppel barred re-litigation of the facts underlying Holmes's claims and that the determination that Holmes was terminated for just cause precluded a finding that he was terminated based on discrimination. As a result, the Court affirmed dismissal of the wrongful termination claim. However, the Court reversed the trial court's dismissal of Holmes' failure to accommodate claim because there was a genuine issue of material fact regarding whether the PUD could have reasonably accommodated Holmes by offering him a flagger position, as the PUD failed to engage with Holmes in any way about potential accommodations. As a result, the Court reversed summary judgment dismissal on Holmes's failure to accommodate claim and remanded for further proceedings.

PERC

Discrimination

King County
Decision 13831 (PECB, 2024) (5/9/24)

A PERC Examiner ruled that King County committed a discrimination unfair labor practice (ULP) when it removed one of its bus drivers from a joint safety committee. Chuck Lare has worked as a bus driver for King County for 18 years, and he had served on a joint

employer-employee safety committee since 2020. The safety committee operates as a labor-management committee with employees and management meeting monthly to discuss safety issues occurring in the workplace. Committee members are compensated for the time spent performing committee work, which is approximately six to seven hours per month. In 2022, the safety committee stopped regularly convening each month, and in August 2022, Lare sent an email to his supervisor expressing concern that the safety committee was not meeting. In October 2022, management decided to reduce the number of employee committee members from eight to five, with the five employees receiving the most votes remaining on the committee. Lare received the fifth highest votes and believed he would continue to be on the committee. In November 2022, Lare emailed his supervisor questioning the decision to reduce the number of safety committee members, and the next day, the County again reduced the membership from five to four. As a result of the reduction to four, Lare was no longer a member of the safety committee. The Amalgamated Transit Union Local 587 ("Union") filed a complaint against the County, alleging that its act of reducing the safety committee membership by an additional member was motivated by union animus. Following an evidentiary hearing, a PERC Examiner ruled in favor of the Union. The Examiner first held that the Union established a prima facie case of discrimination based on Lare's protected activity of questioning the County's motivations in reducing safety committee membership, and the adverse action of removing Lare from the committee. The Examiner found that the County articulated a nondiscriminatory reason for the committee reduction—staffing issues created by having a committee composed of eight employees meeting monthly—but held that the Union met its burden to show that this reason was pretext. The Examiner reasoned that the further reduction of employee membership from five to four would do little to address the County's proffered staffing concerns, suggesting the reason was truly motivated by Union animus, not staffing issues. As a result, the Examiner held that the County's decision to remove Lare from the committee constituted a discrimination ULP, and ordered the County to compensate Lare.

Duty to Bargain

City of Bellingham
Decision 13826 (PECB, 2024) (4/26/24)

A PERC Examiner held that the City of Bellingham's decision to implement a COVID-19 vaccination mandate for city employees was not a mandatory subject of bargaining. In March 2020, Bellingham Mayor Seth Fleetwood proclaimed a state of emergency in response to the COVID-19 pandemic. Under the proclamation, nonessential city personnel were ordered to work from home, but due to the nature of their work, patrol officers in the police department continued to work in person. In December 2020, the United States Food and Drug Administration issued emergency authorization for COVID-19 vaccines developed by Pfizer/BioNTech and Moderna. Based on available research at the time, the immunity from vaccines provided better protection than being previously infected or testing and masking strategies. As a result, on September 21, 2021, Fleetwood issued an executive order requiring all City employees to be fully vaccinated against COVID-19 by December 3, 2021, subject to religious and disability accommodations, as a condition of employment. Fleetwood did not attempt to bargain the decision with any labor unions representing City employees, as he felt that given the ongoing health emergency, the City could not wait to bargain before implementing the order. The same day the executive order was announced, the Bellingham Police Guild (Union), which represents uniformed police officers employed by the Bellingham Police Department, sent a letter to the police chief demanding to bargain the vaccine mandate. According to the Union, it would not have agreed to a vaccine mandate, believing that it should not be a requirement for police officers to retain their jobs. The City agreed to bargain the impact of the decision, and the parties met on September 28, 2021. At the meeting, the Union sought to have the City adopt alternatives to the vaccine mandate, while the City took the position that the decision itself was not a mandatory subject of bargaining. As a result of the mandate, approximately 10 officers left City employment, and the police force decreased from approximately 100 officers to 90 officers. The Union

filed a ULP complaint in March 2022, alleging that the decision to implement a COVID-19 vaccine requirement was a mandatory subject of bargaining. Following an evidentiary hearing, a PERC Examiner dismissed the Union's complaint, holding that under the particular facts of this case, the decision to implement a mandatory vaccine requirement was not a mandatory subject of bargaining. In balancing the parties' interests, the Examiner held that the Union's interests were significant as the mandate created a new working condition that must be satisfied for members to retain employment. The Examiner further held that there was a substantial liberty interest at stake for the officers. However, the Examiner held that the City's interest in protecting the health of its employees and the community, coupled with its need to act decisively to protect public health, outweighed the Union's interests here. In reaching this decision, the Examiner cautioned that there were several specific facts present that tipped the balanced in the employer's favor, including the unprecedented nature of the COVID-19 pandemic, the strain on the healthcare system as hospitals were at capacity, and the nature of police work, which required officers to come in close contact with each other and members of the public. Under these circumstances, the Examiner held that the City had the right to unilaterally implement the COVID-19 vaccine mandate, and dismissed the Union's complaint.[1]

[1] In a separate decision, the same PERC Examiner dismissed a complaint filed by the Puget Sound Police Managers Association and King County Police Officers Guild against King County regarding unilateral implementation of a COVID-19 vaccine mandate for County employees. Applying the same reasoning, the Examiner dismissed the complaint and held that under the specific circumstances, the decision to implement the COVID-19 vaccine mandate was not a mandatory subject of bargaining. *King County*, Decision 13825 (PECB, 2024) (4/26/24), https://decisia.lexum.com/waperc/decisions/en/item/521336/index.do.

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