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IN THIS ISSUE

EMPLOYEE RIGHTS

page 2

STUDENTS' RIGHTS

page 3

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Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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EMPLOYEE RIGHTS

Dougherty v School Dist. Of Philadelphia, No. 12-3836 (3d Cir. Nov. 21, 2014). Dougherty was employed as the Deputy Chief Business Office for Operations and the Acting Chief of Operations for the Office of the Deputy Superintendent for the Philadelphia School District (PSD). Dougherty was charged with procuring cameras to be installed at persistently dangerous schools. Because of the short time frame which he was given, a competitive bidding process could not be used. Instead, following state guidelines and school district policies, Dougherty selected a “pre-qualified contractor,” a contractor who already had a contract with either PSD or another state agency and that existing contract had been awarded through a competitive bidding process. Security and Data Technologies, Inc. (SDT) was the contractor chosen, but was rejected by Dougherty’s superior, Ackerman, because of lack of minority participation. Instead, Ackerman chose IBS Communications (IBS), a minority owned firm. However, IBS was not a pre-qualified contractor and therefore was ineligible for a no-bid contract. Ackerman took IBS’s implementation plan to the school for review and subsequently transferred the management of the camera project to the PSD procurement director, a department that did not ordinarily handle such work.

IBS ended up lodging a complaint. Dougherty was not included in the meeting where the complaint was discussed, yet he was blamed for obstructing IBS’s work. Dougherty sent an e-mail rejecting such allegations and then met with the press about how Ackerman went over his head and hired IBS, an ineligible contractor. Dougherty also submitted a report to the FBI Tips and Public Leads website, contacted state representatives, and the U.S. Inspector General. Dougherty was placed on administrative leave while the source of the “leak” to all of these individuals was investigated. Dougherty informed PSD’s human resources executive that he was the source of the leaks. The issue was investigated. In the resulting report Dougherty was found to have violated the Code of Ethics of the district by e-mail certain information to his personal e-mail account from a school e-mail account. Dougherty was fired and he filed suit in federal district court against PSD and certain district officials alleging retaliation for his “whistle-blowing.” PSD’s motion for summary judgment based on qualified immunity was denied; stating that the motivation for Dougherty’s firing was a disputed issue of material fact and should go to a jury.

On appeal, the Third Circuit affirmed the lower court, denying PSD’s claim of qualified immunity. In looking at the test used to determine a First Amendment retaliation challenge, the court focused on whether Dougherty’s speech was protected by the First Amendment, as that was the only question before the court. Turning to the Supreme Court test established in decisions in *Garcetti v Ceballos*, 547 U.S. 410 (2006) and *Lane v Franks*, 134 S.Ct. 2369 (2014) the court found that topic of Dougherty’s speech was of public concern. As regarding whether it was pursuant to his official duties, the court agreed that Dougherty had not spoken pursuant to his official duties when he disclosed Ackerman’s alleged misconduct because there was nothing about Dougherty’s position that compelled him to provide or report this information to anyone. “Dougherty’s report to *The Philadelphia Inquirer*; therefore, was made as a citizen for First Amendment purposes and should not be foreclosed from constitutional protection.” The court stated that because public employees are often privy to information of general public concern, the Supreme Court in *Lane* had strengthened the right of public employees to speak as a citizen “even if his speech involves the subject matter of his employment.”

Next, the court turned to the Pickering Balancing test, where it agreed with the lower court that “any disruption to the School District was outweighed by the substantial public interest in exposing government misconduct, tipping the Pickering balancing test in Dougherty’s favor.” The court went on to say, “Given the citizen like nature of Dougherty’s disclosure to *The Philadelphia Inquirer*, the lack of close working relationship with either Dr. Ackerman or Dr. Nunery, and the disputed issue of fact with regard to the cause of the disruption, it is sufficiently clear that Dougherty’s speech was protected under the First Amendment.”

Estate of Carlos Bassatt v School Dist. No. 1, No. 13-1244 (10th Cir. Dec. 31, 2014). Bassett, a Hispanic student teacher at West High School (WHS) was accused of masturbating while sitting in his car in the WHS parking lot. It was investigated and determined to be a founded accusation. He was removed from his student teaching placement at WHS. Bassett denied the allegations and stated that they were racially motivated and that his removal from the school was discriminatory. Bassatt filed a complaint with the Colorado Civil Rights Commission (CCRC) seeking an administrative hearing. The administrative law judge upheld his removal, stating that Bassatt had neither established discrimination nor retaliation. The CCRC issued a final order reversing the ALJ’s conclusion on the issue of retaliation; the district’s reason for terminating Bassatt was pretextual. On appeal to the Colorado Court of Appeals, the finding of the CCRC was affirmed. While the issue was on remand to the CCRC for further determination of whether discriminatory retaliation existed, Bassatt filed suit in federal district court alleging unlawful retaliation in violation of Title VII. While the litigation was pending, Bassatt died and his estate was substituted as plaintiff. The district court granted the school district’s motion for summary judgment, concluding that the estate had failed its burden of proof on the issue of pretext. On appeal, the Tenth Circuit affirmed the district court’s decision. On the Title VII claim, the court focused on whether the non-discriminatory reason given by the school district (i.e. misconduct in the parking lot) as the reason for termination was in reality a pretext for discrimination based on ethnicity. The court rejected all three arguments put forth by the estate. First, the court found that burden of proof had been correctly assigned regarding the pretext question. Second, the court found that the decision to believe one individual over another during the investigation when there was no direct evidence either way, was not sufficient evidence to show pretext. Finally, the court rejected the argument that an e-mail invitation to return to work was evidence that the district did not actually believe that Bassatt had engaged in misconduct.

STUDENTS’ RIGHTS

Bell v Itawamba Cnty. Sch. Bd., No. 12-60264 (5th Cir. Dec. 12, 2014). Bell was a student at Itawamba Agricultural High School (IAHS). He was suspended and sent to alternative school for posting a rap song he had composed on Facebook in which he accused two IAHS coaches of inappropriate contact with female students. The school based his discipline on a finding that he had “threatened, harassed, and intimidated school employees.” Bell filed suit in federal court against IAHS, the superintendent Teresa McNeese, and the principal Trae Wiygul alleging violation of his First Amendment rights, and interference in the parenting rights of his mother as guaranteed under the Fourteenth Amendment. Bell stated that his song “was produced off school property, without using school resources, never played or performed at the school, not performed at a school sponsored event, and never accessed by students on school property.” The district court

found for IAHS, stating that under the Supreme Court decision in *Tinker v Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) that schools can regulate off-campus speech/expression that causes material and substantial disruption at school. The district court also dismissed the Fourteenth Amendment due process claim because it had not been shown by the parent that the disciplinary measures taken by IAHS were not tied to the school's compelling state interest of maintain school order. On appeal, the Fifth Circuit reversed the lower court on Bell's First Amendment claim, but affirmed the lower court on all other counts. Looking at the First Amendment issue, the court disagreed that Supreme Court precedent expressly allows school officials to regulate off-campus speech that causes material and substantial disruption, stating that *Tinker* and its progeny dealt with student speech in school or at school events; off-campus speech does not fall under the dicta in *Tinker*. Assuming arguendo, however, even if the material and substantial disruption standard applied to off-campus speech it was not justified in this case because the defendants failed to establish that substantial disruption occurred. As for whether the rap song was a true threat, the court stated, "As was evidenced by the reactions of the listeners themselves, there was no reasonable or objective ground for the coaches to fear that Bell personally would harm them." A disinterested third party would conclude that the stylized violent language used by Bell in his rap song was an attempt to raise awareness of an occurrence at the high school that Bell found unjust, and to further his musical career by attracting listeners.

***Boston v Athearn*, A14A0971 (Ga. App. Ct. Oct. 10, 2014).** Athearn and his friend, Snodgrass, decided to create a fake Facebook page for a classmate. They used a computer provided by Athearn's parents and accessed the Internet through the family account. In the profile, they stated that the classmate, Boston, was a racist and a homosexual and took drugs for a mental disorder. They posted offensive material. This kept on for a period of time until Boston's parents went to the school principal, Wentworth, for assistance. Wentworth called Athearn and Snodgrass to her office where they admitted what they had done and were disciplined. The Facebook account remained active for 11 months, during which time the Athearns never attempted to do anything to remove the page or rectify what had been done by their son. Finally, the Bostons filed a suit for defamation and emotional distress against Athearn and his parents. Athearns motion for summary judgment was granted by the trial court. On appeal, the Georgia Court affirmed in part and reversed in part. Regarding the argument that the Athearns could not be held liable for negligently supervising use of the computer, the court found that a jury could find that the child's misconduct even after the parents had notice of such was negligent supervision and that it was the proximate cause of Boston's injury at least in part. Therefore, the court reversed the lower court's granting of summary judgment on the issue of negligent supervision. As for summary judgment on the issue that the Athearns breached their duty as landowners to remove defamatory content existing on the Facebook page, the court stated: "There is no evidence that the Athearns unilaterally had the ability to take down the unauthorized Facebook page by virtue of the fact that it was created on a computer in their home, because it was created using an Internet service they paid for, or otherwise." Therefore summary judgment on this issue was appropriate and was affirmed.

***Phillips v City of New York*, No. 14-2156 (2d Cir. Jan. 7, 2015).** The state of New York requires that public school students be immunized. State law allows to exemptions: 1) a medical exemption if the immunization would be detrimental to the child's health; and 2) a religious exemption. Phillips received a religious exemption for their children. After receiving the exemption, however, their children were excluded from school after a classmate became ill with a "vaccine-

preventable” illness. There was an exception in the state law that, in the event of an outbreak of a vaccine-preventable disease in a school, students who had received exemptions from being vaccinated could be excluded from school. Another plaintiff, Dina Check, had also applied for a religious exemption but was denied because the district determined that her objections were not based upon a “genuine and sincerely held belief.” Phillips, Check, and a third party, Mendoza, filed suit challenging the constitutionality of the law. The district court found the law to be constitutional, concluding that there was no precedent holding that the U.S. Constitution provides a constitutional right to religious objectors to be exempt from New York’s compulsory inoculation law; the law was well within the state’s recognized police power. On appeal, the Second Circuit affirmed the lower court. The court concluded that the argument had already been decided in the Supreme Court’s decision in *Jacobson v Commonwealth of Massachusetts*, 197 U.S. 11 (1905) which held that mandatory vaccination laws are within the states’ police power. As for exclusion from school when a vaccine-preventable illness occurs, the court stated: “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”