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EDUCATION LAW REPORT

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SUPREME COURT ADDRESSES SOCIAL MEDIA USAGE BY A PUBLIC OFFICIAL

Lindke v. Freed, 2024 U.S. LEXIS 1214 (2024) (A public official who blocks someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both 1) possessed actual authority to speak on the government's behalf on a particular matter and 2) purported to exercise that authority when speaking in the relevant social-media posts.)

BACKGROUND

James Freed ("Freed") originally created a Facebook page in 2008, at which time the page was private and could only be accessed by "friends" of Freed's. However, in 2014, Freed became the City Manager of Port Huron, Michigan, and converted his page to "public" so that *anyone* could access and comment on his posts. The activity on his public page consisted of both personal and job-related posts. To illustrate, some posts were about his family, his dog, and Bible verses, while others involved his visits to local school districts as City Manager, press releases from other city officials, and the city's response to the COVID-19 pandemic. Freed's readers frequently commented on his posts, and he often replied to them.

Kevin Lindke ("Lindke"), who strongly disapproved of the city's response to the pandemic, visited Freed's page and posted a series of comments expressing his opinion. Initially, Freed deleted Lindke's comments but eventually blocked him entirely so that he could see Freed's posts but could no longer comment. Lindke then filed suit against Freed under 42 U.S.C. § 1983 for violations of Lindke's First Amendment rights.

The District Court and the Sixth Circuit ruled in favor of Freed and held that Freed's Facebook page was managed in his private capacity, and because only state action can give rise to liability under § 1983, Lindke's claim failed. The Supreme Court subsequently granted certiorari and issued its decision on March 15, 2024.

DISCUSSION

At the outset of its discussion, the Court noted that a suit under § 1983 must be based on state action rather than private action. Therefore, in this case, the ultimate issue is whether Freed, a state official, engaged in state action or functioned as a private citizen in operating the Facebook page. The Court recognized that state officials are private citizens with their own constitutional rights, and simply because Freed was a state official does not necessarily mean that his posts constituted state action.

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The Court then established the following two-part test: a public official who blocks someone from commenting on the official's social-media page engages in state action under § 1983 only if the official both 1) possessed actual authority to speak on the government's behalf on a particular matter and 2) purported to exercise that authority when speaking in the relevant social-media posts.

The first prong of the test is satisfied when the individual has authority derived from written law or longstanding custom to speak for the government. In other words, the act of speaking for the government must be part of his official duties. It is insufficient that Freed's Facebook page looked and functioned like an outlet for city updates and citizen concerns; rather, it must be shown that Freed had state authority to post city updates and register citizen concerns.

As for the second prong, the Court stated that an individual purports to exercise state authority when he speaks in his official capacity or uses his speech to fulfill his official responsibilities. When making this determination, it is important to examine the context of the speech. For example, if Freed's page was labelled as his "personal page," he would be entitled to a presumption that his posts were personal. However, Freed's page did not contain such a label and included a mixture of personal and job-related posts; therefore, the content and function of his posts must be carefully considered.

The Court noted that a public official does not necessarily purport to exercise state authority simply by posting job-related information. Further, the Court warned that public officials who do not keep personal posts in a clearly designated personal account expose themselves to greater potential liability.

Ultimately, the Court did not decide whether Freed acted in state or private capacity. Instead, they vacated the judgment of the Sixth Circuit and remanded the case for further proceedings. The lower courts were directed to apply the two-part test as set forth above in making their determinations.

PRACTICAL ADVICE

After *Lindke*, public officials should exercise caution when posting both personal and job-related information on the same social media page. Though a post about job-related information on a personal page does not automatically constitute state action, the post may be construed as state action depending on its context. Further, *Lindke* suggests that public officials should clearly designate their personal social media accounts as such. The Court explicitly warned that the failure to do so may expose the individual to greater potential liability. A label or disclaimer on a social media page would create a strong presumption that the page's content is personal.

UPDATED PROCESS FOR ENFORCEMENT OF PENNSYLVANIA'S SCHOOL BUS STOP-ARM CAMERA PROGRAM

Pennsylvania law requires motorists coming from any direction to stop at least ten (10) feet from a school bus with its lights flashing and stop-arm sign extended. Unfortunately, data suggests that many motorists fail to follow those requirements, supporting the need for legislation to enforce the law and increase safety for school children across the state.

On October 23, 2023, Governor Shapiro signed Act 19 of 2023 ("Act 19 or the Act") into law, which re-authorized Pennsylvania's School Bus Stop-Arm

Camera Program. As a general matter, the Act permits school districts to install and operate automated camera systems on school bus stop-arms that photograph drivers illegally passing stopped school buses. School districts have the option to partner with third-party vendors who install the automated camera systems on the school bus stop-arms, and they are also required to enter into an agreement with their local police department to certify all violations caught on camera. If the local police department issues a violation, the violator will be required to pay a $300 fine, of which $250 is paid to the school district or the school district's third-party vendor, $25 is paid to the local police department that reviewed the violation, and the remaining $25 is paid to PennDOT for the School Bus Safety Grant Program. However, the Act prohibits third-party vendors from requiring school districts to issue a certain number of fines as part of their contract.

On March 6, 2024, the Pennsylvania Department of Transportation ("PennDOT") published updated program guidelines which include instructions for school districts and third-party vendors regarding the hearing process and other key reminders related to the program. Prior to the adoption of the Act and the new PennDOT regulations, violators could contest a violation by requesting a hearing with the magisterial district where the violation occurred. However, violators are now able to contest liability and request a hearing before a PennDOT hearing officer at no cost to them. If the violator is not satisfied with the hearing officer's decision, they can appeal to the district magisterial judge.

The Act also requires additional transparency in the form of a mandatory annual report. This means that school districts (or third-party vendors on the school district's behalf) who have installed stop-arm cameras must submit an annual report to PennDOT and the Pennsylvania State Police by July 1 of each year. The reports must include the following information:

1) The name of the system administrator;
2) the number of school buses equipped with a side stop signal arm enforcement system;
3) the number of notices of violation issued;
4) the amount of fines imposed and collected;
5) the amounts paid under agreements authorized under the law;
6) the results of contested violations; and
7) use of additional revenue funds and any grants awarded from the program.

STAFFING AGENCY EMPLOYEE CONSIDERED A SCHOOL DISTRICT EMPLOYEE FOR TITLE VII CLAIM

Larkin v. Upper Darby School District, 2024 WL 377812 (E.D. Pa. January 31, 2024) (An employee of a staffing agency placed at a school district was considered an "employee" of the school district for purposes of a Title VII discrimination claim)

BACKGROUND

In 2022, Khalil Larkin worked for a staffing agency, U.S. Medical, which contracted with Upper Darby

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School District to provide temporary staffing to the school district. U.S. Medical placed Larkin at Beverly Hills Middle School in the Upper Darby School District. As his placement, Upper Darby determined Larkin's pay and controlled his daily activities — including the days and times worked and the type of work performed. They also furnished the necessary work equipment.

Larkin, a Black man, was supervised by John Purcell, a White man who oversaw staffing at Upper Darby. Larkin alleges that Purcell "routinely spoke to [Larkin] and other Black employees in a demeaning manner" and made racist comments. After multiple instances of Purcell's allegedly harassing and discriminatory behavior, Larkin filed a discrimination complaint with assistant principal Jerome Neal in November 2022. A human resources representative told Larkin they would internally investigate his complaint. On January 13, 2023, Larkin met with school administrators to discuss his complaint. After the meeting, Upper Darby informed Larkin that he would no longer work there.

Larkin filed a complaint with the Equal Employment Opportunity Commission alleging that he suffered racial discrimination and retaliation for reporting racial harassment. Following receipt of a "right to sue" letter from the EEOC, Larkin initiated a civil action in the U.S. District Court for the Eastern District of Pennsylvania. Upper Darby filed a motion to dismiss Larkin's complaint on several grounds, including that Larkin was not an employee of Upper Darby. The court rejected Upper Darby's argument and held that Larkin was permitted to proceed with his Title VII claims against Upper Darby.

DISCUSSION

Title VII requires a claimant to allege an employment relationship with the defendant. Upper Darby claimed that Larkin had failed to sufficiently plead that it was his employer under Title VII. To determine whether an employment relationship exists, courts in the Third Circuit apply the test first set forth in the United States Supreme Court decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) to Title VII cases. The *Darden* Court outlined a "non-exhaustive list of relevant factors" to be used in determining whether a hired party is an employee under the general common law of agency. In making this determination for purposes of Title VII, courts should focus on which entity pays salaries, hires and fires employees, and has control over daily employment activities.

Larkin's amended complaint alleged that Upper Darby determined his pay, controlled his daily employment activities, including the days and times he worked and the type of work Larkin performed, and decided when he was terminated. Accordingly, the court determined that Larkin sufficiently alleged an employment relationship with Upper Darby to allow him to proceed with his Title VII discrimination and retaliation claims.

PRACTICAL ADVICE

The *Larkin* decision is instructive in demonstrating that the use of temporary staffing agencies to furnish personnel does not necessarily insulate a school district from employment-related claims from persons assigned by that agency. As in *Larkin*, school districts commonly exercise control over such personnel's daily work activities and agreements with staffing agencies typically allow school districts to require the removal of unacceptable personnel, circumstances which may be sufficient to support an allegation of an employment

relationship for purposes of Title VII claims. Consequently, when staff furnished by a staffing agency presents claims of discriminatory or harassing conduct in the school district's workplace, a school district should implement its discrimination policies to investigate and address such allegations.

CONFIDENTIALITY PROVISION OF EDUCATOR DISCIPLINE ACT RULED UNCONSTITUTIONAL

John Doe v. Jennifer Schorn, 2024 WL 128210 (E.D. Pa. 2024) (The confidentiality provision of the Educator Discipline Act was declared unconstitutional by a federal judge, precluding criminal charges against a complainant who wished to publish the contents of an educator misconduct complaint and comment on its disposition.)

BACKGROUND

Pennsylvania's Educator Discipline Act governs educator misconduct complaints filed with the Department of Education for investigation and, if warranted, discipline. 24 Pa. Stat. Ann. § 2070.9. Once a misconduct complaint is filed, PDE "promptly review[s] it and all other complaints and information relating to the educator." If the facts are not legally sufficient to warrant discipline under the Act, the PDE dismisses the complaint and gives written notice of the dismissal to the complainant and to the educator. If the facts as alleged are legally sufficient to warrant discipline, PDE provides notice and opens an investigation into the allegations. After completing its investigation, PDE may dismiss the misconduct complaint, determine that the school entity already has imposed sufficient punishment, enter into a settlement agreement with the educator, proceed to alternative dispute resolution, or initiate the formal adjudicatory hearing process by filing charges with the Professional Standards and Practices Commission (the "Commission").

The Discipline Act mandates that "all information relating to any complaints or any proceeding relating or resulting from such complaints…shall remain confidential, unless or until discipline is imposed." 24 Pa. Stat. Ann. § 2070.17b(a); 22 Pa. Code § 233.114(a). The Act provides that the Professional Standards and Practices Commission may order the release of information but can reject a request to make a misconduct complaint public. Without the Commission's authorization, a person who discloses a complaint or its disposition is subject to a misdemeanor charge.

In June of 2023, an unnamed person (Plaintiff) submitted an educator misconduct complaint relating to an employee of a Bucks County public school district. The online form that Plaintiff used to submit the complaint included a confidentiality notice reminding him that the complaint process is confidential under the Act. A month later, the Plaintiff was advised that his misconduct complaint was dismissed and no further action would be taken. The letter reminded Plaintiff that "any unauthorized release of confidential information is a misdemeanor" under the Act.

The Plaintiff filed a federal court suit against Pennsylvania's Attorney General (AG) and the Bucks County District Attorney (DA) because he wanted to publicize the complaint and its resolution. He filed suit under 42 U.S.C. §1983, asserting violation of the First Amendment. He sought an injunction to protect himself from criminal prosecution for violating the confidentiality requirement of the Act.

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DISCUSSION

The court held that the confidentiality provision of the Act is unconstitutional because on its face it imposes a content-based restriction on speech that does not satisfy the strict scrutiny standard of legal review.

As to the Plaintiff's challenge, the Act differentiates between disclosure of complaints resulting in discipline, and those that do not. If a complaint results in discipline, confidentiality is, in most cases, lifted and all information regarding the complaint and its disposition are free to be disclosed. When discipline is not imposed, however, an individual wishing to speak about a misconduct complaint is typically limited to information previously known and information for which the Commission authorizes disclosure. That means that if a complainant, like Plaintiff, wishes to criticize PDE or the Commission for refusing to impose discipline in connection with a misconduct complaint, he or she may do so only if the Commission authorizes disclosure. This distinction between disclosure of claims where the Commission imposes discipline and disclosure of claims where it does not, suggests the Act's confidentiality provision is at least in part content based.

To survive strict scrutiny analysis, a statute must: 1) serve a compelling governmental interest; 2) be narrowly tailored to achieve that interest; and 3) be the least restrictive means of advancing that interest." Here, the government interest identified was "the privacy of students and teachers involved in a confidential administrative process." The court concluded that the Act appears both over and under inclusive for protecting the identities of the individuals involved in the administrative process. It was considered overinclusive because it does not merely limit the release of names, but instead, broadly prohibits disclosure of any information related to the filing of a complaint. The Act was underinclusive because, when discipline is imposed, the Act allowed educators' and students' identities and the underlying facts to be released. Thus, the court ruled that the confidentiality provision of the Act was not narrowly tailored to achieve the governmental interest and, therefore, violated Plaintiff's First Amendment speech rights.

PRACTICAL ADVICE

Unless the district court's decision is reversed on appeal by the Third Circuit Court of Appeals or the statute is amended by the General Assembly to address the constitutional infirmities found by the district court, individuals can rely upon the court's ruling that the confidentiality provision of the Educator Discipline Act to disclose information relating to the filing and disposition of educator misconduct complaints. Nonetheless, it would be prudent for school officials to maintain the confidentiality of educator misconduct complaints to avoid creating potential claims for disparagement for which statutory immunity may not be available.

STUDENT CANNOT CLAIM DAMAGES FOR EMOTIONAL DISTRESS OR NEGLIGENCE ARISING FROM HAZING

Michael Reed V. Mount Carmel Area School District, Et Al., Case No. 4:23-Cv-00890 (M.d. Pa., October 3, 2023) U.S. District Court dismissed claims against School District for emotional distress under Title IX and for negligence under Pennsylvania Law.)

SUMMARY AND BACKGROUND

Plaintiff, Michael Reed, was a seventeen-year-old member of the Mount Carmel High School football team when he suffered a violent assault during a hazing incident at the family home of the captain of the team. As part of a ritual to "initiate" new starting players, the team captain and other players restrained Reed and inflicted eight to ten burns on Reed's bare buttocks. Similar hazing incidents had occurred in the past and were allegedly known to this School District, which failed to act on the reports.

DISCUSSION

In the ensuing litigation, the School District successfully moved the Court to dismiss Reed's claims for emotional distress damages under Title IX of the Education Amendments of 1972, as well as all pendent claims for negligence brought under state law, specifically, the Pennsylvania Political Subdivision Tort Claims Act.

Applying the United State Supreme Court's reasoning in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562 (2022), the Court concluded that federal funding statutes such as Title IX, which "operate based on consent: 'in return for federal funds the [recipients] agree to comply with federally imposed conditions'," do not imply consent to claims for emotional distress damages, which were not foreseen as stipulations upon federal funding, and, accordingly, are unavailable. The Court also noted the absence of any textual evidence in the statute that Congress authorized claims for emotional distress.

The Court, in turn, reasoned that Reed's claims did not fit within the "sexual abuse" waiver of sovereign immunity under the Pennsylvania Political Subdivision Tort Claims Act, because the crime of "institutional sexual assault" does not cover actions by students, who are excluded from the definition of "volunteers" and "employees" under the Act.

PRACTICAL ADVICE

This District Court's decision is consistent with recent cases following the Supreme Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, which substantially narrow the type of liability school districts face in these suits. Nevertheless, the plaintiff's claim for compensatory damages was permitted to go forward, and, if the School District's alleged failure to investigate prior reports of physical assault and abuse is found to be meritorious, that claim alone could result in substantial liability. Even with a narrower scope of remedies, this decision calls for renewed vigilance by school districts in monitoring any school activity.

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