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COMMONWEALTH COURT REINSTATES ARBITRATOR'S DECISION REDUCING A DISCHARGE TO A 180 DAY SUSPENSION WITHOUT PAY

Clarion Cty. Career Ctr. v. Clarion Cty. Career Ctr. Education Assoc.,
2022 WL 17574178, 2022 Pa. Commw. Unpub. LEXIS 541 (Pa. Commw. 2022)

BACKGROUND:

Grievant was employed for 17 years as an automotive technology instructor at the Clarion County Career Center, a vocational-technical school. His discharge arose out of a complaint by a student that the Grievant's conduct towards her was inappropriate. Following an investigation, the Center discharged the instructor based on eleven separate charges. Following four days of hearing, a labor arbitrator sustained six of the eleven charges. Specifically, the Arbitrator confirmed that the Grievant failed to ensure that students with IEPs and 504 plans received appropriate instruction in his classroom. The Arbitrator held further that the Grievant behaved inappropriately towards a female student, staring at her, while commenting on her jeans, as well as touching her hand and pulling her close to him. With respect to another student, the instructor behaved inappropriately by commenting on how her uniform pants fit her and inquiring about her personal activities out of school. The Arbitrator also sustained the charge that the Grievant told some students they were "too dumb" or "not smart enough" for his automotive shop class and that, on occasion, he left the class unattended.

The Arbitrator, however, concluded that the Grievant's conduct did not rise to the level of sexual harassment and that discharge was too harsh a penalty in light of his "consistent satisfactory annual evaluations and his disciplinary record with only one serious incident of misconduct in 17 years." In lieu of discharge, the Arbitrator substituted a penalty of a thirty-day suspension without pay for each of the six charges he sustained, resulting in a total cumulative suspension of 180 days without pay, and ordered the Grievant reinstated to his job.

The Center appealed to the Court of Common Pleas, which reversed the Arbitrator's award and sustained the discharge. Citing the Commonwealth Court's decision in *Slippery Rock University of Pennsylvania v. Association of Pennsylvania State College and University Faculty,* 71 A.3d 353 (Pa. Cmwlth. 2013), the trial court concluded that the Grievant's conduct "visibly implicates and violates…public policies [prohibiting sexual harassment and discrimination against individuals with disabilities.]" The trial court held such conduct poses a "substantial risk of undermining the Commonwealth's public policy prohibiting such behavior" and potentially jeopardizes future students by exposing them to discrimination and harassment.

The Commonwealth Court reversed the trial court's decision, and reinstated the Arbitrator's award. The Court cited previous rulings that the

continued

decisions of arbitrators should be "afforded great deference." Reasoning that the public policy exception to deference to arbitration awards is a narrow one and turns on whether the remedy reached by the Arbitrator implicates public policy, the Commonwealth Court decided that the imposition of a 180-day unpaid suspension — the equivalent of one full school year - constituted "substantial discipline" for conduct that "the Arbitrator did not find… constituted sexual harassment or unlawful discrimination."

The Commonwealth Court concluded that a court "may not infer that public policy demands only the most serious penalty under these circumstances where an Arbitrator has imposed substantial discipline." As a consequence, the Commonwealth Court held the trial court erred by vacating the award.

PRACTICAL ADVICE:

It is clear from the facts recounted by the Commonwealth Court that the Career Center had ample reason for concern about the Grievant's conduct and an understandable basis for concluding that he should no longer be a member of the faculty. Nevertheless, the Commonwealth Court's holding reaffirms the risk of appealing an arbitrator's decision to reinstate a discharged public employee. The Grievant was discharged on December 19, 2017. By the time the Arbitrator issued his award, on February 18, 2020, two years and two months had already passed and, according to the award, the Center already owed the Grievant some 20 months of back pay. The delays resulting from the Center's successful appeal to Common Pleas Court and the subsequent appeal to and reversal by the Commonwealth Court on December 12, 2022, added another 20 months of back pay for a total of more than three years of back pay owed to the Grievant. In deciding whether to appeal an award reinstating a discharged employee, an employer must balance the potential cost versus the limited chances of success. Generally, compliance with the award and reinstatement will be the sensible option in all but the most egregious cases.

COURT RULES THAT INFLAMMATORY SOCIAL MEDIA POSTS BY A PUBLIC EMPLOYEE ARE NOT PROTECTED BY THE FIRST AMENDMENT

*Vallecorsa v. Allegheny Cty., No. 2:19-CV-1495-NR, 2022 U.S. Dist. LEXIS 206720, at *2 (W.D. Pa. Nov. 15, 2022). United States District Court for the Western District of Pennsylvania holds that Allegheny County ("County") did not violate former employee's First Amendment rights when it terminated her following a public outcry after her private conversation on Facebook about the shooting of a young Black teenager, Antwon Rose, was publicized.*

BACKGROUND

Plaintiff worked as a full-time dispatcher for the Allegheny County Department of Emergency Services ("Department"). In this role she would answer 911 calls from people in need of emergency assistance and dispatch police, fire department and emergency medical services personnel. On June 19, 2018, a young Black man named Antwon Rose was shot and killed while fleeing the police after a traffic stop. The incident sparked immediate protests and generated debate across many mediums, including social media.

On June 24, 2018, Plaintiff engaged in a conversation on Facebook regarding the protests. Her Facebook account was private and she believed that her posts could only be viewed by her Facebook "friends." The exchange included inflammatory statements about the protesters, but also included comments supporting the police. While the conversation was on her private Facebook page, an individual took a picture of the exchange, reposted it and "tagged" Allegheny County Emergency Services Facebook page. The posted exchange was seen by many, including Plaintiff's co-workers and direct supervisors. Some submitted complaints about having to work with a "racist coworker." In addition, the public began chastising the Department via telephone calls, social media posts and expressed doubt as to the capabilities of the Department. Some calls threatened protests of the 911 call center and others tied up the 911 lines.

The Department determined that the posts violated several policies, stirred public outcry and mistrust in the Department and disrupted and risked further disruption to the

Department's ability to render emergency services to the public. Accordingly, the County terminated Plaintiff's employment because of the Facebook comments. Plaintiff sued, claiming the termination violated her First Amendment right to freedom of speech.

DISCUSSION

The sole issue in this case was whether the Facebook posts were protected by the First Amendment. "A State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." That said, a citizen who enters government service must accept certain limitations on his or her First Amendment freedom. To establish a First Amendment retaliation claim, a public employee must show that: 1) her speech is protected by the First Amendment; and 2) the speech was a substantial or motivating factor in the alleged retaliatory action, which, if both are proved, shifts the burden to the employer to prove that; 3) the same action would have been taken even if the speech had not occurred.

The Court only addressed the first element in this case (i.e., whether her speech was protected). In order for her speech to rise to the level of constitutionally protected expression, the public employee must speak as a citizen (and not as an employee), the speech must involve a matter of a public concern, and the government must lack an adequate justification for treating the employee differently than the general public based on its needs as an employer under the Pickering balancing test. The Pickering balancing test requires the courts to balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In this case, the Court assumed that Plaintiff spoke as a private citizen and that her statement involved a matter of public concern. However, the Court determined that the County's justification for terminating Plaintiff outweighed her interest in making the statements on Facebook.

First, the Court considered the content and context of the speech. While the Court agreed that the content deserved a high level of protection because it commented on race relations and the treatment of police, it was not entitled to the highest rung of protection because it was made on a private Facebook page and not in a traditional public forum devoted to assembly and debate (like a public online platform).

Nevertheless, even if her speech was entitled to the highest rung of protection, the Court found that the evidence of actual disruption and the nature of the County's operations supported the County's decision to terminate Plaintiff's employment. The Court noted that Plaintiff's service is as a dispatcher for the Department, a public facing agency that works intimately with law enforcement, and that law enforcement agencies are typically granted a wide latitude to regulate an employee's speech when that speech impacts areas such as discipline, morale and uniformity within the force. In this case, the County demonstrated that public outcry and mistrust (telephone calls, emails, threats of protest) interrupted the Department's mission. In addition, the Department's staff reported feeling unsafe following the public outcry and one employee expressed discomfort with working with Plaintiff. Accordingly, internal morale and teamwork were impacted. Moreover, the County demonstrated that there were numerous potential disruptions both internally and externally that, if they had materialized, would have caused substantial disruptions.

Accordingly, Court granted summary judgment in favor of the County and dismissed Plaintiff's claims because Plaintiff's interest in commenting on matters of public concern did not outweigh the County's interest in providing emergency services without disruption to the public under the Pickering test.

PRACTICAL ADVICE

This decision provides helpful guidance to any school district that faces backlash for a social media post made by one of its employees that threatens to disrupt the orderly operations of the school district. Nevertheless, each case is different and, school districts should work closely with their solicitor if they consider terminating or otherwise punishing a school employee for speech involving matters of public concern.

CRUDE REMARK DOES NOT JUSTIFY PUSHING FELLOW EMPLOYEE

Reading Sch. Dist. v. Unemployment Comp. Bd. of Rev., 2023 Pa. Commw. Unpub. LEXIS 36 (Pa. Commw. Ct., Jan. 20, 2023). In an unpublished opinion the Commonwealth Court of Pennsylvania reversed the decisions of an unemployment compensation referee and the Pennsylvania Unemployment Compensation Board of Review, each of which found a teacher was justified in shoving a school janitor who made an extremely crude remark to the teacher. The Court held the teacher's actions were not justified, and she was not entitled to unemployment compensation after being terminated, citing precedent that physical contact is rarely justified in response to crude or hostile verbal remarks.

DISCUSSION

In 2019 a teacher employed by Reading School District ("District") experienced a "personal and embarrassing mishap in the restroom between classes." The teacher was discussing the embarrassing mishap with two female security guards when the male janitor interjected himself into the conversation and made a crude and suggestive remark about the mishap, stating, "I can clean that up. I can clean that up real good with my tongue." In response, the teacher shoved the janitor.

The District investigated the incident and terminated the teacher for violating policies and standards of conduct related to fighting, acts of violence and unprofessional conduct. The teacher was denied unemployment compensation benefits and appealed to an unemployment compensation referee. The referee held the teacher was provoked and had good cause to shove the janitor. The Pennsylvania Unemployment Compensation Board of Review agreed and upheld the referee's decision, granting unemployment compensation benefits to the teacher. The District then appealed to the Pennsylvania Commonwealth Court, which reversed the decisions of the referee and Unemployment Compensation Board of Review.

ANALYSIS

The Pennsylvania Commonwealth Court explained willful misconduct disqualifies an employee for unemployment compensation. However, once the employer establishes prima facie willful misconduct, the burden shifts to the employee to establish good cause for her actions in order to retain benefits. Good cause exists when the employee's actions are justified or reasonable, such as when the employee is provoked.

The Court explained that an employee is generally not justified in pushing another employee in response to abusive or personally offensive language. For example, the Court has held calling an employee a "dirty bastard" does not justify an employee pushing another employee. Similarly, the Court has held offensive references to an employee's nationality do not justify fighting a co-worker.

On the other hand, if the offensive language is accompanied by threatening gestures or movements, then an employee may be justified in defending him or herself. For example, the Court held an employee was justified in punching a co-worker who was threatening to kill the employee, was making racial slurs, and was reaching for something in his back pocket.

An employee also may be justified in physically responding to an extended, aggressive verbal tirade. For example, when a supervisor verbally intimidated an employee for 45 minutes, with loud and aggressive statements about the employee's work attitude, the Court held the employee was justified in throwing a writing tablet at the supervisor.

Finally, if an employer deliberately provokes an employee, the employee may be justified in physically retaliating. For instance, a supervisor who wanted to fire an employee arranged for a co-worker to repeatedly bang a steel bin in which the employee was welding. The employee emerged from the bin, pushed the co-worker, and was fired. The Pennsylvania Commonwealth Court held the employee was justified in pushing his co-worker and was entitled to unemployment compensation.

In the case at hand, there was no dispute the teacher committed willful misconduct by pushing the janitor. And although the janitor's remark was extremely crude and personally offensive it was not enough, according to the Court, to justify pushing the janitor under any of the exceptions above.

PRACTICAL ADVICE

In Pennsylvania cases considering unemployment compensation benefits, there are limited circumstances in which an employee is justified in physically attacking a co-worker in response to a verbal statement, no matter how offensive the statement. To justify physical retaliation the verbal statements must be accompanied by either 1) physically threatening behavior, 2) extended aggressive verbal haranguing or 3) a deliberate, calculated effort to provoke the employee. Given the fact-specific nature of such incidents, it is important school districts seek guidance from their solicitor when facing similar situations.

STATE SUPREME COURT DECISION RESULTS IN CONTINUED TAXING BODY APPEALS

GM Berkshire Hills LLC v. Berks County Board of Assessment (2023 Pa. LEXIS 272, February 28, 2023) — Split Supreme Court Ruling Enables Taxing Body Assessment Appeals Based on Recent Sales to Remain

Counties, schools, and municipalities can continue to maintain tax assessment appeals based on recent sales of a property as a result of a split Pennsylvania Supreme Court decision on the matter. In GM Berkshire Hills LLC v. Berks County Board of Assessment, the Court split 3 to 3, thereby allowing the July 2021 Commonwealth Court decision upholding the legality of such appeals to stand.

BACKGROUND

As detailed in our *Summer 2021 Education Law Report* reviewing the Commonwealth Court decision, the case began in 2017 when related owners purchased multiple residential rental properties located in the Wilson School District, Berks County, for about $55 million. At the time of the purchase, though, Berks County recorded an assessed value for the properties at just under $10.5 million. The following June, the school district passed a resolution authorizing its business office to initiate assessment appeals within the District, and the business office used state-generated monthly sales reports to select properties for appeals. The resolution further instructed the business office to review sold properties applying the applicable common level ratio ("CLR") (the CLR very roughly is a state-published ratio that measures the assessed value of properties sold over the sales price of such properties). The District filed appeals if the difference between the sales price (adjusted for the CLR) and the assessed value was $150,000. This $150,000 figure represented the threshold that would justify the legal and appraisal fees necessary for the appeal. Using the method outlined in the resolution, the District calculated that the CM Berkshire properties combined sales price when multiplied by the applicable CLR, resulted in a combined assessment of over $37 million, well over the approximate $10.5 million assessment. The District appealed the properties' assessment for the 2018-2019 tax years to the Berks County Board of Assessment. That Board conducted a hearing and by decision increased the assessed value of the properties to over $37 million.

The taxpayer, GM Berkshire LLC, first appealed the decision to the Court of Common Pleas of Berks County. The Court, while recognizing the taxpayer's constitutional arguments, found acceptable the School District's method of filing appeals on recently-sold properties where the assessment differential after adjusting for the CLR is at least $150,000. The taxpayer further appealed to the Commonwealth Court, where that Court rejected the taxpayer's argument that the District was violating the Uniformity Clause of the State Constitution by selectively seeking reassessment of properties based on recent sales while not appealing the assessments of unsold properties that may be similarly under assessed. (The Uniformity Clause requires that taxes be uniform on the same subjects of taxation: e.g., you cannot tax commercial properties higher than commercial parcels.) The Court also rejected the taxpayer's argument that the use of the $150,000 threshold was invalid because it resulted in disparate treatment of otherwise similarly situated properties even if based on a valid cost-benefit analysis. Relying on state assessment statutes, the Court found the School District could file assessment appeals in the same manner that taxpayers are allowed. Also, based upon recent court cases, differentiation of appeals based on a property's value and use of a monetary threshold was proper.

ANALYSIS

Next the taxpayer further sought review by the Pennsylvania Supreme Court whether the District's selection of recently-

sold properties that also met a revenue threshold violated the state's Uniformity Clause. The Court, however, because of the recent death of Justice Max Baer, had six remaining members, who split 3-3 on the issues presented by the taxpayer. In the Opinion in Support of Affirmance ("OISA"), Justice Mundy, joined by Justices Wecht and Brobson understood the uniformity arguments of the taxpayers: the School District's program included a subclass of recently purchased properties and targeted only those properties for appeal. But the OISA Opinion did not find that tax uniformity was upset as the properties subject to appeal were analyzed under a fair market value multiplied by the CLR. Also that Opinion asserted that if the Uniformity Clause precludes any and all efforts by taxing districts to select properties to appeal, such would undermine uniformity because property owners would be able to lodge appeals to reduce their assessments, but aggrieved taxing bodies would not be able to seek an increase in a property's assessment.

The OSIA noted that what the Uniformity Clause did prohibit is systematic differential treatment of a subclass of property, such as the type of residency status of the owner or by neighborhood. These types of factors are prohibited because they are used to create property subclasses but use of monetary figures in recent sales data is qualitatively different. A sales price has two features making its use consistent with uniformity: it is not unique to one subset of property within the District and as long as the transaction is undertaken at arm's length, it reflects the properties fair market value, an important piece of evidence in determining whether the property's assessment ratio varies widely from the norm. Also such valuation data is not arbitrary as sales data is directly connected to the ability to gauge whether the parcel's assessment is non-uniform. The OSIA found that there was nothing in the decisional law that prohibits the type of methodology used by the School District. Further, those Justices rejected the argument that a taxing body must appeal all similar comparable properties in the district in order for an appeal program to be valid: the Uniformity Clause never interpreted to embrace such a requirement.

In contrast, Justice Donohue, joined by Justices Todd and Dougherty, and Justice Dougherty separately wrote Opinions in Support of Reversal (OSIR). Justice Donohue's Opinion did hold that the School District's policy of focusing on recently-sold properties and use of a threshold created an improper sub-classification of properties, in violation of the Uniformity Clause. Her Opinion also disavowed language in prior case footnotes implying that monetary thresholds would not violate the Uniformity Clause. Moreover, use of the CLR does not save the legality of an appeal as the classification of properties to appeal is invalid in the first place.

Judge Dougherty's Opinion generally concurred with Justice Donohue's Opinion but also that the OSIA's reliance on the CLR is being reflective of uniformity was not supported in the caselaw. Both OSIRs focus on the fact that the problem raised by the present case has arisen because of the infrequency of county-wide reassessments in Pennsylvania, noting that Pennsylvania is only one of two states that does not have statutorily-mandated reassessments on a regular cycle.

PRACTICAL ADVICE

At least for the short-term, taxing body appeals based upon sales prices can continue. Any new case addressing taxing body appeals is unlikely until the late Justice Baer's successor is elected in November, and even then a new challenge will have to begin at the trial court level. However there appears to be some pressure from the state judiciary that regular countywide reassessments are the ultimate solution to these issues.

SCHOOL DISTRICT'S CLAIM FOR REIMBURSEMENT FROM CHARTER SCHOOLS FOR EXTRACURRICULAR ACTIVITIES REJECTED

Saucon Valley School District v. Commonwealth Charter Academy, No. C-48-CV-2022-1284 (Northampton Com Pl. 2022). (The Court of Common Pleas of Northampton County dismisses a claim by a school district for reimbursement from a charter school of costs incurred in providing extra-curricular activities to charter school students).

BACKGROUND

Certain students who reside within the Saucon Valley School District (Saucon Valley) attend the Commonwealth Charter Academy (Academy) and, as required by the Charter School Law (CSL), were permitted to participate in extracurricular activities offered by Saucon Valley. Saucon Valley invoiced the Academy to recoup the costs incurred in providing extracurricular activities to the Academy's students. Instead of paying the entire invoice, the Academy attempted to pay only $500 for each student.

Saucon Valley refused to accept the reduced amount and filed a complaint in the Court of Common Pleas of Northampton County seeking money damages for violation of the CSL, 24 P.S. §§ 17-1701-A *et seq*. The Academy filed a motion to dismiss the complaint for failure to state a claim for which relief can be granted, asserting that the CSL does not provide an implied cause of action for civil damages.

The court granted the Academy's motion to dismiss Saucon Valley's suit, concluding that the CSL did not allow school districts to directly sue charter schools for claimed violations of the CSL.

DISCUSSION

The CSL mandates that charter school students be permitted to participate in extra-curricular activities conducted by their school district of residence if their charter school does not provide a similar program. The CSL does not provide for compensation of school districts for the costs of a charter school student's participation in extracurricular activities. However, a Basic Education Circular issued by the Pennsylvania Department of Education states that school districts may bill charter schools for student participation in extracurricular activities on a per pupil cost basis.

To determine whether the CSL provides an implied cause of action to school districts, the trial court applied the standard set by the Statutory Construction Act, which permits courts to ascertain the intention of the General Assembly if the words of the statute are ambiguous. Since the CSL does not expressly provide or forbid a cause of action of the type alleged by Saucon Valley, the trial court found the CSL to be ambiguous.

The trial court then surveyed the relevant case law, noting that implied causes of action are seldom recognized by Pennsylvania courts. The court observed that the presence of "rights-creating language" in statutes such as the Motor Vehicle Financial Responsibility Law and the Medical Marijuana Act is a clear signal that such a remedy was contemplated by the General Assembly. Yet the trial court did not find an implied cause of action in the CSL. The court reasoned that the intent behind the CSL is to benefit pupils through alternative means of education as shown by the transfer of benefits from educational institutions to pupils, teachers and parents. The court pointed to a corresponding lack of any benefits flowing to the public school districts under the CSL.

This analysis led the court to find Saucon Valley's implied cause of action to be inconsistent with the legislative intent behind the CSL. The court buttressed this argument by noting that it is only charter schools, rather than public schools, that have been given an express right of redress under the CSL when school districts fail to make the required funding payments. See 24 P.S. § 17-1725-A(a)(5). The court also disregarded the Department of Education's guidance as set forth in the Basic Education Circular because "it is violative of legislative intent." Accordingly, the Academy's preliminary objection in the nature of demurrer was sustained and the Complaint was dismissed with prejudice.

PRACTICAL ADVICE

While the decision of the Court of Common Pleas of Northampton County is not binding precedent throughout the Commonwealth of Pennsylvania, it provides charter schools with an authoritative basis to refuse to reimburse school districts for costs incurred for charter school students' participation in extra-curricular activities despite the contrary guidance of the Pennsylvania Department of Education.

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