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HIGH SCHOOL FOOTBALL COACH'S MID-FIELD, POST-GAME PRAYER RULED PROTECTED SPEECH

Kennedy v. Bremerton School District, 597 U.S. __ (2022) (The United States Supreme Court concludes that a coach praying at mid-field following a high school football game was engaged in private religious expression protected by the Free Exercise and Free Speech Clauses of the First Amendment).

BACKGROUND

Joseph Kennedy was a football coach at Bremerton High School. Like many other football players and coaches across the country, Kennedy made it a practice to kneel at mid-field and pray on the field at the conclusion of each game. Initially, Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him, which Kennedy allowed. The number of players who joined Kennedy eventually grew to include most of the team and sometimes opposing players joined.

For several years, no one complained to the Bremerton School District about this practice. In 2015, the District directed that any religious activity on Kennedy's part must be "non-demonstrative (i.e., not outwardly discernible as religious activity)" in order to avoid the perception of endorsement. Following that directive, Kennedy briefly abandoned his practice of saying his own quiet, on-field post-game prayer. Driving home after a game, however, Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

Following a subsequent game, Kennedy bowed his head at midfield after the game, while his players were engaged in the traditional singing of the school fight song to the audience. Though Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. Shortly before the next game, the District wrote to Kennedy explaining that, while appreciative of his effort to comply with the District's directive to avoid demonstrative prayer, a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The District thus made clear that the only option it would offer Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public." After the game ended, Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." After the final football game, Kennedy again knelt alone to offer a brief prayer as the players engaged in post-game traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a post-game talk, after they had finished singing the school fight song.

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Shortly after the final game, the District placed Kennedy on paid administrative leave. In a letter explaining the reasons for this disciplinary action, the superintendent criticized Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games. While Mr. Kennedy had received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended, the District gave him a poor performance evaluation. Kennedy was not renewed for the next season.

After these events, Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. The United States Supreme Court ruled that the District impermissibly punished Kennedy for engaging in prayer following football games.

DISCUSSION

The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. A free exercise violation can be demonstrated by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." The contested exercise here did not involve leading prayers with the team. The District disciplined Kennedy only for his decision to persist in praying quietly without his students after three games in October 2015. Prohibiting Kennedy's religious exercise was the District's unquestioned objective, while it allowed other on-duty employees to engage in personal secular conduct. Thus, the Court concluded that forbidding Kennedy's brief prayer was neither neutral nor generally applicable.

While noting that teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," (*Tinker v. Des Moines Independent Community School Dist.*), the Court recognized that as a government employee, a coach acts on the government's behalf and can convey its intended messages. Thus, when an employee speaks as a citizen addressing a matter of public concern, the Court's cases indicate that the First Amendment may be implicated and courts must engage in a balancing analysis of the competing interests of the employee and the government employer.

A threshold question was whether Kennedy prayed in his capacity as a private citizen or as a District employee. The Court concluded that the timing and circumstances of Kennedy's prayers — during the post-game period when coaches were free to attend briefly to personal matters and students were engaged in other activities — confirmed that Kennedy did not offer his prayers while acting within the scope of his duties as a coach.

The Court then considered whether the District's interests as employer, to avoid liability for endorsement of religion, outweighed Kennedy's right to engage in what the Court determined was private speech. The District asserted that its prohibition of Kennedy's religious activity was justified because doing otherwise would coerce students to pray. The Court rejected the argument, concluding "A government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights."

PRACTICAL ADVICE

The ruling essentially determined that the District punished the coach for engaging in a personal religious observance, based on a view that it had a duty to suppress that conduct to avoid the appearance of endorsement of religious activity. The crucial aspect leading to this ruling was that the coach's prayer was considered private expression. Although the prayer occurred immediately following a school activity, the coach did not require students to join him and was not actively engaged in performing his duties. Had the coach sought to lead his team in pre-game or post-game prayers in the locker room, the outcome would have differed.

The decision may present challenges to school districts in determining whether school employees inclined to pray in a school environment are engaged in protected private expression or impermissibly promoting religion to students. As the dissenting opinion queried: "[i]f even Judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all

else?" Such situations will require particularized factual analyses and present the potential for claims of either impermissible religious endorsement or infringement.

SCHOOL DISTRICT'S DISCIPLINE FOR OFF-CAMPUS SOCIAL MEDIA POST VIOLATED STUDENT'S FIRST AMENDMENT FREE SPEECH RIGHTS

In re Appeal of G.S., 269 A.3d 718, 722 (Pa. Commw. Ct. 2022), appeal denied, 61 MAL 2022, 2022 WL 2447538 (Pa. July 6, 2022) (The Pennsylvania Commonwealth Court determined that the expulsion of a student for a social media post containing violent song lyrics violated the student's First Amendment free speech rights).

BACKGROUND

G.S. was an eleventh-grade student at Rose Tree Media School District ("the School District"). In April 2018, G.S. used his personal smartphone while on Easter vacation to post the following song lyrics from a death metal band on his Snapchat: "Everyone, I despise everyone! / F--- you, eat sh--, blackout, the world is a graveyard! / All of you, I will f---ing kill off all of you! / This is me, this is my, snap!" The snapchat was not directed toward the School District or any of its students, although some of his Snapchat followers who took notice of the post, independently reposted screenshots of it on different social media applications. One student even tagged their repost on Instagram with the phrase "@ penncrest_students."

Parents of other children in the school district reported the post to the Pennsylvania State Police ("PSP") who conducted an investigation. In response, the local Assistant District Attorney signed off on charging G.S. with the crime of terroristic threats and harassment, due to the violent sentiment contained in G.S.'s post, and School District administration, including the District Superintendent, was made aware of the issue. At this point, neither local law enforcement nor School District officials were aware of the true provenance of G.S.'s post and, instead, were operating under the presumption that it constituted a legitimate threat of violence.

When G.S. was brought in for questioning, he admitted that he was responsible for the Snapchat post, but maintained that he never intended to harm anyone and was simply reposting song lyrics. G.S. was subsequently arrested, his phone was confiscated, and he was taken to a nearby juvenile detention center.

The community expressed their concern about G.S.'s post which prompted the School District to disseminate a pre-recorded telephonic message and an e-mail to parents and to update their main School District Webpage regarding the incident. There was increased police presence at the school the following day, there was decreased student attendance, and those students who did attend appeared to be anxious and on-edge during the school day. The School District also received a second terroristic threat from another student, which prompted it to send out another message to parents.

G.S. underwent a psychological evaluation while in the juvenile detention facility. The evaluation revealed that G.S. was low-risk and did not appear to have underlying anger or depression issues that posed a risk to the community. Accordingly, it was recommended that he be released from the facility. After G.S.'s release, the School District expelled him on the grounds that he violated the District's Discipline Code by making terroristic threats, disrupted the school environment, and constituted harassment.

G.S. appealed the School District's decision to the Court of Common Pleas, which reversed the School District's decision in part and affirmed it in part. The Court held that the School District's determination that G.S. had made terroristic threats was not supported by substantial evidence and reversed that portion of the School District's decision. However, it concluded that the School District did not abuse its discretion by determining that G.S.'s Snapchat post had constituted harassment and had disrupted the school environment and affirmed the School District's expulsion of G.S. on those bases. Both parties then appealed to the Commonwealth Court of Pennsylvania.

DISCUSSION

The Commonwealth Court noted that the Pennsylvania and United States Supreme Courts have long recognized the

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inherent tension between students' First Amendment-based right to freedom of speech and public schools' ability to control their charges' expressive conduct or to mete out discipline. Recent case law establishes limitations on schools' discipline of student for off-campus speech, observing that: 1) schools will rarely stand in loco parentis, as off-campus speech normally falls within the zone of parental responsibility; 2) courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all; 3) the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, as America's public schools are the "nurseries of democracy" and should protect the "marketplace of ideas" which may include the protection of unpopular ideas that have a greater need for protection.

In this context, the Commonwealth Court considered the recent Pennsylvania Supreme Court case, *J.S. by M.S. v. Manheim Township School District*, 263 A.3d 295 (Pa. 2021), which established a two-part test for assessing student speech. The test places an emphasis on the totality of the circumstances and states that courts should first consider the substance of the offending conduct or speech followed by examination of the context in which that conduct or speech occurred. In its analysis, the Commonwealth Court continued to note that the First Amendment and Article I, Section 7 of the Pennsylvania Constitution mandates that public schools cannot exert control over their students' off-campus speech unless there is a strong nexus between a given student's expressive conduct and their school, such that when properly contextualized, the offending speech is shown to have been clearly targeted at a member or members of their school community or clearly pertained to school activities.

The Court determined that G.S.'s speech occurred off-campus and did not explicitly target or identify other students or community members. Accordingly, the Court determined that the School District's punishment of G.S. for his social media post violated his First Amendment free speech rights.

PRACTICAL ADVICE

As demonstrated by the decision *In re Appeal of G.S.*, schools' disciplinary jurisdiction does not generally extend to off-campus speech of students that may be interpreted a generally threatening or expressing an interest in violence. Whether such speech constitutes a true threat to the school, staff or students requires consideration of the totality of circumstances of the speech or a substantial and demonstrable disruption to the school environment.

EMOTIONAL DISTRESS MONETARY DAMAGES SECTION 504 CLAIMS ALLOWED BY SUPREME COURT

In Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (April 28, 2022) (U.S. Supreme Court) concludes that damages for emotional distress are not recoverable under the Rehabilitation Act of 1973 and the Affordable Care Act.

BACKGROUND

In civil rights suits against school districts and other public entities alleging discrimination based on disability, plaintiffs have often included claims for emotional distress under Section 504 of the Rehabilitation Act. The availability of such damages often have compelled public entities in the past to settle cases or face additional damages (and the accompanying attorney's fees). But under the recent *Cummings* case, such damage claims are now precluded.

Under the facts, Plaintiff, Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller and asked Premier Rehab to provide an American Sign Language interpreter at her sessions. Premier Rehab declined, informing Cummings that the therapist could communicate with her through other means. Cummings later filed suit in a Federal District Court in Texas seeking damages and other relief against Premier Rehab alleging that its failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act of 1973 and the Affordable Care Act. Premier Rehab was allegedly subject to these statutes because it received reimbursement through Medicare and Medicaid for the provision of some of its services, therefore both Acts applied.

The District Court dismissed the complaint claims for injunctive and declaratory relief, observing that the only compensable injuries that Cummings alleged Premier Rehab caused were humiliation, frustration and emotional distress. But in the District Court's view, "damages for emotional harm" were not recoverable in private actions brought to enforce the Rehabilitation Act or the Affordable Care Act. Cummings then appealed to the Federal Fifth Circuit Court of Appeals on just the District court ruling on her emotional distress damages: The Appeals Court agreed with the District Court, holding that funding recipients were not liable for damages for emotional distress given the general common law rule prohibiting that remedy for breaches of contract, which this claim essentially was. As a result, the Appeals Court adopted the same conclusion as the District Court.

DISCUSSION

All courts hearing the case agreed that this matter involved the "Spending Clause" of the Constitution, under which Congress has the power to collect taxes and to pay the debts for the general welfare of the country. Article 1, Section 8. In turn, the Supreme Court reiterated that laws (such as Section 504 of the Rehabilitation Act) apply Congress's power under this Clause to condition the receipt of federal funding on the recipient's agreement not to engage in discrimination on certain grounds. Accordingly, parties aggrieved by a violation of these conditions not to discriminate may file suit against the party receiving funds under an implied right of action recognized under Title VI of the Civil Rights Act of 1964. Similar applied rights allowing suits are available under Title IX and also under provisions of the Patient Protection and Affordable Care Act.

In reviewing the case, the Supreme Court noted that while private individuals may sue to enforce antidiscrimination statutes, it was less clear what remedies were available in such suits. Whether a particular remedy or claim is the basis of recovery must be interpreted by understanding the way Spending Clause statutes operate: such legislation essentially offers federal funding to recipients based on a promise by the recipient not to discriminate. This amounts to a contract between the government and the fund recipient. Also Spending Clause legislation operates based on consent—Congress cannot force someone to take money to perform a contract — but Congress has the power to set out such potential consequences depending on whether the recipient voluntarily accepts the term of that contract. Courts have regularly applied this contract law analogy to define the scope of conduct for which federal funding recipients may be liable, with an eye towards ensuring that recipients had notice of their obligations. A particular remedy is available in a Spending Clause action only if the funding recipient is on notice that by accepting federal funding, it exposes itself to a particular liability.

To decide whether emotional distress damages are available under the Spending Clause the Court, therefore, inquired whether a prospective funding recipient, on deciding whether to accept federal funds, would have had "clear notice" regarding that liability. Because most Spending Clause statutes (such as the Rehabilitation Act) are silent as to available remedies, it was not clear to the Court how to decide that question. But relying on other federal court cases, the Supreme Court believed that the contract analogy applied and that a federal funding recipient may be considered on notice that it is subject to those remedies traditionally available in suits for breach of contract. Citing previous cases, the Court had found that punitive damages generally were unavailable for breach of contract cases, and the few exceptions allowing punitive damages in contract cases were not sufficient enough to provide funding recipients notice that they could face such damages. Applying the analogy of punitive damages to the matter before it, the Court found that the law generally holds that emotional distress damages are not compensable in contract actions. Further established treatises hold as a general rule that emotional distress damages are not available under contract law. Therefore the Court could not treat federal funding recipients as having consented to be subject to damages for emotional distress in Spending Clause cases.

Plaintiff Cummings argued for a different result, maintaining that traditional contract remedies can include damages for emotional distress under special conditions. That special condition for allowing such damages was met in her case and similar cases because discrimination is very likely to cause mental anguish to those aggrieved. Along this line, federal funding recipients should be on notice that they will face not only exposure under general rules of contract damages but under "more fine-grained" rules that govern situations such as the present one. The Court rejected this argument, finding that the approach argued by the plaintiff pushed the notion of offer and acceptance central to the Court's Spending Clause cases past its breaking point: it was

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one thing to say funding recipients should know basic general rules of contract law, it is quite another to assume that recipients should know the contours of every contract doctrine no matter how unusual or idiosyncratic. Further there was no clear majority rule under contract law on what circumstances an exception allowance should be made to allow such damages.

The Court therefore concluded that emotional distress damages are not traditionally available in breach of contract actions. Thus, there was no basis under prior precedent to conclude that federal funding recipients would have clear notice that they could be liable for emotional distress damages in Spending Clause cases (such as with Rehabilitation Act cases).

PRACTICAL ADVICE

While *Cummings* arose in the context of a disability discrimination claim, the Court's ruling will extend to emotional distress damages for all types of race, sex, and age discrimination brought against any funding recipient. Further, it appears the Court believes that its holding will also apply to damages available under Title VI and Title IX, as well as the American Disabilities Act. As a practical matter, this will limit the types of relief and damages available against public entities. When faced with a suit, schools should carefully review complaints to ensure that they are not facing claims in which the Supreme Court has held there is right to relief.

FEDERAL COURT HOLDS THAT SCHOOL DISTRICT'S DENIAL OF STUDENT'S REQUEST TO ATTEND SCHOOL WITH A DOG VIOLATED THE REHABILITATION ACT AND AMERICANS WITH DISABILITIES ACT

*C.G. by and through P.G. v. Saucon Valley Sch. Dist., 5:21-CV-03956, 2021 WL 5399920, at *1 (E.D. Pa. Nov. 18, 2021). The District Court for the Eastern District of Pennsylvania grants student's request for preliminary injunction upon finding that student was likely to prevail on her claim that her dog was a service animal and that she would suffer irreparable harm if not permitted to attend school with her dog.*

BACKGROUND

In Saucon Valley School District, a minor female ("C.G.") who was diagnosed with multiple disabilities and had a history of seizures wished to attend school with her dog, George. The dog had been trained to perform several special tasks, including the ability to detect rising cortisol levels, which can be a precursor to seizures. However, the District denied her request to attend school with the dog.

In response, C.G. sued the District, alleging discrimination under the Rehabilitation Act ("RA") and the Americans with Disabilities Act ("ADA"). The Court determined, inter alia, that C.G. had shown a substantial likelihood of success that George was a service animal and granted C.G.'s motion for a preliminary injunction allowing her to bring her dog to school.

DISCUSSION

Both the RA and the ADA secure the rights of individuals with disabilities to independence and full inclusion in American society. For those with disabilities, the RA assures "meaningful access" to federally funded programs and the ADA provides for "full and equal enjoyment" of public accommodations. To fulfill these goals, the RA and the ADA require that reasonable accommodations or modifications be made by covered actors for individuals with disabilities. In the context of service animals, "it constitutes discrimination under the RA, to the same extent as under the ADA, to refuse to permit disabled individuals to be accompanied by service animals."

School districts are covered by both the RA and the ADA and, in Saucon Valley School District, it was not disputed that C.G. was a person with disabilities protected under both statutes. Thus, the main question was whether George qualified as a service animal.

Whether an animal qualifies as a service animal is a two-part test. First, the animal must be "individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." Second, the tasks performed by the animal "must be directly related to the

individual's disability." Examples of qualifying tasks include "assisting an individual during a seizure" and "providing physical support and assistance with balance and stability to individuals with mobility disabilities." In contrast, animals that merely provide emotional support, comfort, or companionship do not qualify as service animals.

If an individual requests to be accompanied by his or her service animal, a public entity may make two inquiries to determine whether [the] animal qualifies as a service animal: 1) is the animal required because of a disability; and 2) what work or task the animal has been trained to perform. Once these two questions have been answered, the investigation must end. The public entity "shall not ask about the nature or extent of a person's disability" and "shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal."

The Court rejected the District's argument that the services performed by George, including cortisol detection and alert, deep pressure therapy ("DPT") and mitigation of anxiety, were in the nature of emotional support. First, the court noted that these tasks were not something an ordinary pet can do. Specifically, changes in cortisol levels can be a precursor to something dangerous and George's ability to detect these changes and alert C.G. to them could be lifesaving. Similarly, with respect to DPT, George's ability to "read" C.G. and strategically place his body on hers to improve her condition was not something a normal dog can do. Finally, while mitigating anxiety was a closer call, the Court found that because some of C.G.'s disabilities were psychiatric in nature, George's training allowed him to mitigate them. Importantly, the Court noted that psychiatric ailments, as opposed to physical ailments, are still real ailments.

Accordingly, the Court determined that C.G. showed a substantial likelihood of success on the merits because there was a substantial likelihood that George qualifies as a service animal because he has been trained to perform tasks that relate to one or more of C.G.'s disabilities.

The Court also found that C.G. would suffer irreparable harm if she was denied in-person attendance with George because attending school without George put her health at risk and because other alternatives (like virtual education) deny her the chance of making "meaningful progress" in her education. The Court strongly rejected the District's argument that no injunction should be issued because it offered, and C.G. declined, to provide a completely virtual education. The court stated that if it accepted this argument, then no person suffering from a disability could ever prove irreparable harm by being turned away from a public entity if the entity offered access without the service animal or a virtual comparison.

Accordingly, the Court granted the preliminary injunction and ordered the District to allow C.G. to attend school with her dog, George.

PRACTICAL ADVICE

As noted above, a school district's ability to require information about a service animal is limited. Specifically, while it can ask if the animal is required because of a disability and what work or task the animal has been trained to perform if the answer is not readily apparent, it cannot require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

In addition, a school district's ability to exclude a service animal is limited. Generally speaking, the RA and ADA do not require school district's to "fundamentally alter" its services. However, the Department of Justice has opined that the presence of a service animal will not result in a fundamental alteration in most settings.

The laws also provide that if a particular service animal is out of control and the handler does not take effective action to control it, or if it is not housebroken, that animal may be excluded. Again though, this rule has limited applicability in the school context. In fact, the Department of Justice has advised that in this situation, the school may need to provide some assistance to enable a particular student to handle his or her service animal.

Accordingly, when faced with decisions regarding the admission or exclusion of service animals, school districts should work with their solicitors to ensure that their decision complies with applicable disability laws.

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