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EDUCATION LAW REPORT

Published in cooperation with the University of Pittsburgh's Tri-State Area School Study Council

Summer 2023 Edition

In This Issue

AFTER SCHOOL SATAN CLUB ALLOWED TO MEET IN SCHOOL FACILITY

Satanic Temple, Inc. v. Saucon Valley Sch. Dist., 2023 U.S. Dist. LEXIS 75001, (E.D. Pa. May 1, 2023). Because a School District allowed various community groups to meet within school facilities, the After School Satan Club was also entitled to meet within school facilities. The U.S. District Court for the Eastern District of Pennsylvania granted a preliminary injunction directing the School District to allow the After School Satan Club to use District facilities in the same manner as other community groups.

BACKGROUND

The Satanic Temple, Inc. ("TST") is a religious organization sponsoring the After School Satan Club ("ASSC") at several public schools across the country. TST states its members do not "worship Satan," but instead regard "Satan…as a literary figure who represents a metaphorical construct of rejecting tyranny, championing the human mind and spirit, and seeking justice and egalitarianism for all." TST sponsors the ASSC "to provide young people with an alternative to other religious clubs that meet on campus after school."

On February 1, 2023, TST applied to hold ASSC meetings after school hours at facilities of the Saucon Valley School District ("District"). At the time, the District allowed other non-school groups to use District facilities during after school hours. These groups included Girls on the Run, the Boy Scouts, the Joetta [Sports] and Beyond Camp, the Saucon Valley Youth Sports Association, Saucon Valley Youth Basketball, and the Good News Club.

The District originally approved TST's request to use school facilities, but then rescinded its approval after being inundated with complaints from community members, including a voicemail threat to "come and f**king shoot everybody." The District explained it rescinded approval of ASSC because TST published and endorsed Facebook advertisements for ASSC without disclaimers that the club was not sponsored by the District. The District explained these advertisements violated Board Policy 707, which required such a disclaimer by all community groups using school facilities.

TST filed a complaint and motion for preliminary injunction against the District, alleging the District's reliance on School Board Policy 707 was pretext for discrimination against TST because of its controversial views. TST also alleged discrimination because the District refused to distribute flyers to District students advertising the ASSC.

The Court granted TST's motion for preliminary injunction and ordered the District to allow the ASSC to meet after school hours within District facilities. The Court agreed with TST that the District's reliance on Policy 707 was pretext for viewpoint discrimination in violation of the First Amendment of the U.S. Constitution.

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DISCUSSION

The Court explained under the First Amendment if a school district allows any non-school community groups to use its facilities, then the district must allow all non-school community groups to use its facilities, regardless of the viewpoint of the group. The Court explained the District was not permitted to enact a "heckler's veto" and restrict a group because of complaints from the public.

The District argued Policy 707 applied to all community groups using school facilities and required those groups to include a disclaimer in any advertisements that the group was not sponsored by the District. However, the Court noted other community groups, such as the Good News Club (a religious student group) published advertisements that did not include the disclaimer required by Policy 707. The District did not enforce Policy 707 against those groups.

In response, the District argued TST's failure to include a disclaimer created confusion and several community members believed the District was sponsoring ASSC. The Court disagreed, citing several e-mails from community members who understood the District was not sponsoring ASSC, and was not legally permitted to discriminate between non-school groups, but nonetheless urged the District to remove the ASSC from District buildings regardless of the legal repercussions.

Finally, the Court cited several e-mails from the Superintendent of the District, expressing frustration with the ASSC and disagreement with the TST's views.

Based on this evidence, the Court held that the District's reliance on Policy 707 was pretext for viewpoint discrimination against TST.

On the other hand, the Court did not require the District to distribute flyers to District students advertising the ASSC, as requested by TST. The Court explained that prior to TST's request to use school facilities, the District implemented a policy to stop distributing flyers on behalf of non-school groups. Because the District applied this policy evenhandedly across all community groups, the Court held the District did not discriminate against TST by refusing to distribute its flyers.

PRACTICAL ADVICE

If a school district allows any community group to use its facilities, it must allow all community groups to use facilities in the same manner and degree, regardless of the controversial nature of a specific group. If a District is concerned that an unpopular group may request the use of school district facilities, the District should consult with its solicitor to amend the District's facilities usage policy in advance of any such request.

FEDERAL COURT RULES THAT PLAINTIFF'S CLAIMS OF SEX DISCRIMINATION AGAINST A SCHOOL DISTRICT WERE SUFFICIENTLY PLED

Colavecchia v. South Side Area Sch. Dist., No. 2:22-CV-01804-CCW, 2023 U.S. Dist. LEXIS 70461 (W.D. Pa. April 21, 2023). The United States District Court for the Western District of Pennsylvania denied South Side Area School District's ("Defendant's") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) ("Motion") regarding Nicole Colavecchia's ("Plaintiff's") hostile work environment claims under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 and granted the Motion regarding Plaintiff's constructive discharge claim under Title VII.

BACKGROUND

Plaintiff worked as an instructor for Defendant. In September of 2020, Plaintiff began receiving sexually inappropriate comments from Robert Kavals, the Chief of Safety and Security for Defendant. According to Plaintiff, Mr. Kavals has a known history of inappropriate communications with female employees of Defendant. Over a period of roughly eight months, Mr. Kavals repeatedly made such comments to Plaintiff – which included his desire to have a sexual relationship with her – both in person and via text message despite Plaintiff asking him to stop. Plaintiff reported Mr. Kavals' behavior to the principal, who referred the matter to the superintendent. Though the superintendent told Plaintiff that he was "handling" the situation on May 28, 2021, Plaintiff claimed that no investigation occurred until November of 2021 and no corrective action took place at any time. Plaintiff eventually resigned from her position on February 9, 2022 due to concerns for her safety at work.

Plaintiff filed her initial Complaint on December 16, 2022, and later filed an Amended Complaint on February 16, 2023, in which she asserted the claims described above. Thereafter, Defendant filed its Motion on March 8, 2023. This Motion is the subject of the Court's opinion.

DISCUSSION

The Court began its discussion by establishing the legal standard for reviewing a motion to dismiss, stating that the Court must accept as true a complaint's factual allegations and view them in the light most favorable to the plaintiff as long as it alleges sufficient facts to raise a reasonable expectation that discovery will uncover proof of the claims.

To state a hostile work environment claim under Title VII, an employee must allege the following:

1) they suffered intentional discrimination on the basis of sex;
2) the discrimination was severe or pervasive;
3) the discrimination detrimentally affected them;
4) the discrimination would detrimentally affect a reasonable person in that position; and
5) there is respondeat superior liability.

Because sexual proposals from colleagues may constitute sex discrimination and Plaintiff alleged that Mr. Kavals' comments included his desire to have a sexual relationship with her, the Court found that the first prong was satisfied. Further, the Court found that the second prong was satisfied since Mr. Kavals' comments were severe and pervasive based on the frequency of the comments as alleged by Plaintiff. The remaining prongs were also found satisfactory with very little discussion. Therefore, the Court denied the Motion regarding Plaintiff's Title VII hostile work environment claim.

Next, the Court addressed the constructive discharge claim under Title VII. For such a claim to survive a motion to dismiss, an employee must allege that their employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. However, because Plaintiff did not allege any discrimination from the time she reported Mr. Kavals' behavior to the principal in May of 2021 until the time she resigned on February 9, 2022, the Court found that Plaintiff did not plausibly allege she was constructively discharged. Therefore, the Court granted the Motion with regard to Plaintiff's constructive discharge claim under Title VII.

Finally, the Court addressed the hostile work environment claim under Title IX. The elements of such a claim are essentially the same as a Title VII hostile work environment claim, with one exception: for a Title IX claim, a plaintiff must allege "deliberate indifference" on the part of the employer to known sexual harassment, instead of "respondeat superior liability." Because Plaintiff alleged that

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she reported Mr. Kavals' behavior to the principal and the superintendent, Mr. Kavals had a known history of inappropriate communications with female employees, and Defendant failed to take corrective action at any time, the Court found that Plaintiff plausibly alleged that Defendant acted with deliberate indifference. Therefore, the Motion was denied regarding Plaintiff's Title IX hostile work environment claim.

PRACTICAL ADVICE

It is important to note that *Colavecchia* involves a motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6), in which a movant argues that a complaint must be dismissed for failure to state a claim upon which relief can be granted. As stated above, a plaintiff may overcome a "12(b)(6) motion" by demonstrating that the alleged facts are sufficient to raise a reasonable expectation that discovery will uncover proof of the claims. This standard is lower than the standard required for a plaintiff to ultimately prove their claims. In *Colavecchia*, Plaintiff defeated Defendant's Motion, but that does not necessarily mean Plaintiff's claims will be proven in court. Nevertheless, the *Colavecchia* ruling makes clear that school districts must promptly and diligently investigate any employee's claim of sexual harassment/misconduct and must take corrective action as necessary to avoid potential hostile work environment claims.

COMMONWEALTH COURT ESTABLISHES NEW TEST TO DETERMINE IF SOCIAL MEDIA POSTS ARE SUBJECT TO AN RTKL REQUEST

Penncrest School District. v. Cagle, 293 A.3d 783 (Pa. Cmwlth. 2023). The Commonwealth Court of Pennsylvania establishes a three-part test that must be used to determine if an individual's social media post is a record of an agency and, therefore, subject to an RTKL Request.

BACKGROUND

In May 2021, a high school library in Penncrest School District displayed at least six books addressing LGBTQ+ issues in anticipation of Pride Month. An individual photographed the displayed books and then publicly posted the photograph on their own Facebook page and stated: "Hey Maplewood/PENNCREST parents...just a little pic of what is on display at Maplewood High School Library...I realize this makes me a hater, but I am totally ok with that label." One member of the Penncrest school board, David Valesky, then publicly shared that post on his own personal Facebook page along with the following statement: "This is on display at Maplewood High School. Besides the point of being totally evil, this is not what we need to be teaching kids. They aren't at school to be brainwashed into thinking homosexuality is okay. Its [sic] actually being promoted to the point where it's even 'cool.'" Another school board member, Luigi DeFrancesco publicly shared the original post on his own personal Facebook page without comment.

In June 2021, Thomas Cagle submitted a request for records under the Pennsylvania Right-to-Know Law ("RTKL") seeking Facebook posts and comments "related to homosexuality and Penncrest School District, its officials, employees, or students, or its curriculum, physical [resources], or electronic resources, between January 1, 2020[,] through June 13, 2021, including posts or comments removed or deleted by Valesky and DeFrancesco." The District denied the Request, asserting that no such posts or comments existed on any District-owned Facebook pages.

On appeal, the Office of Open Records ("OOR") ruled in favor of the Requester and found that Valesky and DeFrancesco's posts on their own Facebook page were records of the School District. In ordering that the records be provided, the OOR determined that it was "immaterial" as

to whether the District controlled the Facebook page. Instead, the OOR reviewed the contents of the Facebook page to determine whether it was used as a significant platform by an elected official or employee to conduct or discuss District business. The Trial Court affirmed, stating that posts on private Facebook pages can become a "record" if they are created by persons acting as board members and contain information related to District business.

DISCUSSION

In deciding this case, the Commonwealth examined how the RTKL defines "record" including how a "record" must document a transaction or activity of an agency, examined how the disclosure of social media activity has been handled under the RTKL and other statutes, and then developed a test for this and future cases.

As a result of this analysis, the Court concluded that in resolving whether a school board member's social media post was "of an agency" under the RTKL, courts must consider three nonexclusive factors. In a footnote, the Court explained that while future courts must consider every factor, those courts could decide how much weight to give each factor.

First, courts must examine the social media account itself, including the private or public status of the account, as well as whether the account has the "trappings" of an official agency account. As part of this analysis, courts must also consider whether the school board member has an actual or apparent duty to operate the account or whether the authority of the public office itself is required to run the account.

Second, in examining the school board member's social media posts, a court must consider whether such posts prove, support, or evidence a transaction or activity of an agency. In resolving this factor, the content of the posts may be reviewed to address whether the posts were merely informational in nature, i.e., did not directly prove, support, or evidence the agency's governmental functions. *See* 65 P.S. § 67.102 (defining a record as information documenting a transaction or activity of the agency). The court must also address whether the posts were created, received, or retained by law or in connection with a transaction, business, or activity of an agency.

Third, the court must consider the account and posts were made in the official's "official capacity." In other words, the information at issue must be created, received, or retained by public officials in their official capacity, i.e., scope of employment, as public officials. Under this factor, the court may consider whether the agency required the posts, the agency directed the posts, or whether the posts furthered the agency's interests.

After establishing this new test, the Commonwealth Court concluded that the Trial Court erred in:

1) holding that it "does not matter" if the social media post was on a public or private account; and

2) suggesting that merely because a board member expressed his views about board business in a social media post, he created a public record.

Instead, the case was remanded to the Trial Court with instructions to determine if the posts were made by the board members while acting in their "official capacity" by analyzing the three factors established by the Commonwealth Court.

PRACTICAL ADVICE

Many people, including elected officials, have personal social media accounts and members of the public frequently want to view what is said on these accounts. The *Penncrest* decision provides necessary guidance for any School District and school board members to analyze whether their posts are public records and subject to an RTKL request.

Nevertheless, each Facebook post is different and school districts should work closely with their solicitor to determine whether a social media post made by a school board member is a record of the School District.

TEACHER DISCHARGED FOR SOCIAL MEDIA POSTS

In the Matter of Arbitration Between Milton Area Education Association and Milton Area School District (Talarico 2022) (Arbitrator sustains discharge of teacher for inappropriate social media posts).

BACKGROUND

Rebecca Krall was employed as a teacher by the Milton Area School District. Over a three-month period, Krall posted 13 videos to the social media platform, TikTok, of herself lip-syncing the lyrics to certain popular songs that included profanity, including one that was recorded while she was in her classroom. Among the songs in Krall's videos were "Because I Got High" by Afroman and "WAP" (an acronym for a slang sexual phrase) by Cardi B. The latter song includes lyrics that reference "whores in the house," describe oral sex and aggressive intercourse, and allude to drug and alcohol use. She utilized hashtags on her posts that incorporated profanity. One video included Krall stating, "you should give a f--- but only about sh-- that sets your soul on fire." In others, she lip-synced several iterations of "bitch," "bad bitch," "I don't give a sh--," and "hot as "sh--." There were references to explicit sexual subject matters such as "my man is so loyal he watches porn with no women in it" and "one thing every woman wants starts with a 'P' and ends with an 'S' - Pockets." Some of the videos depicted alcohol or drug use and included hashtags such as #daydrinkingmoms, #nightdrinking, #areyoudrunk, #cheerstothat, and #wineme and displayed items commonly associated with drinking and glorifying alcohol consumption.

Krall maintained her TikTok account as a public profile, meaning that the content was available to the general public. Although TikTok has a privacy setting and child-lock settings, Krall allowed her profile and content to be public because she was marketing a nutritional supplement through the account. One of Krall's students approached her during the lunch period, stated that he had viewed one of Krall's videos, and referenced the content of that video to Krall. There was no evidence that Krall had communicated with her students about her account or that there was any disruption in her classroom.

The School District initiated proceedings to discharge Krall for persistent negligence, willful neglect of duties, immorality, and persistent failure to comply with the school laws. Krall grieved the proposed termination, asserting that she was being dismissed without just cause. The matter was processed to binding arbitration pursuant to the teachers' collective bargaining agreement. Following an evidentiary hearing, the arbitrator denied Krall's grievance and sustained her termination from employment.

DISCUSSION

The arbitrator examined seven factors commonly used to analyze just cause:

1) was the employee adequately warned of the consequences of his conduct;

2) was the employer's rule or order reasonably related to efficient and safe operations;

3) did management investigate before administering the discipline;

4) was the investigation fair and objective;

5) did the investigation produce substantial evidence or proof of guilt;

6) were the rules, orders, and penalties applied evenhandedly and without discrimination; and

7) was the penalty reasonably related to the seriousness of the offense and the past disciplinary record of the employee?

The arbitrator rejected the union's argument that Krall did not have prior notice that this type of activity would constitute grounds for dismissal in consideration of the school district's policies. These policies outlined the boundaries and expectations of professionalism and professional development provided to staff regarding appropriate use of social media platforms. The arbitrator noted the role of an educator "to provide a safe environment for learning and development, and that role is completely undermined by the same educator portraying, supporting, and glorifying scenes of graphic excess." That only one of Krall's students apparently had viewed her social media posts was not considered by the arbitrator as dispositive since the posts were made with the express objective of the messages reaching the general public.

The arbitrator found that the severity of discipline – termination – was appropriate because "[t]he misconduct in this case was severe and irreparable." The arbitrator concluded by stating that "if an educator chooses to maintain a separate personal identity on social media that conveys a message so grossly at odds with the educator's professional responsibilities, it is incumbent on the educator to make sure there is a stout firewall of separation between the two. That is not what happened here." Accordingly, the grievance was denied.

PRACTICAL ADVICE

The outcome of this arbitration contrasts with a similar matter reported in our Winter 2023 edition of the *Education Law Report* in *Central Valley School District v. Central Valley Education Association*, 2022 Pa.Commw. Unpub. LEXIS 482 (Pa.Commw.Ct. November 7, 2022). In the *Central Valley* matter, the school district sought to discharge a teacher for recording a video featuring a song containing explicit lyrics, including words referencing a sexual act and suggestive hand and body motions, that her daughter posted to her TikTok account. The arbitrator reinstated the teacher to her position reasoning, in part, that there was no evidence that the video was widely disseminated.

The primary distinguishing circumstance between the teachers' conduct in *Central Valley* and *Milton Area* was the persistency of the teacher's misconduct – posting thirteen inappropriate videos over a three-month period – in contrast with the single video post involved in *Central Valley*. Another exacerbating factor was that, in *Milton Area*, Krall utilized her TikTok account to promote a nutritional supplement, indicative of an intent of having her posts viewed by a wide, public audience. Thus, although both cases involved indisputably inappropriate and unprofessional social media posts by teachers, the disparate fact patterns explain the different outcomes.

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Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions, and other municipal sub-entities.

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