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EDUCATION LAW REPORT

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In This Issue

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PENNSYLVANIA SUPREME COURT HOLDS THAT EMPLOYERS HAVE DUTY TO PROTECT THEIR EMPLOYEES' DATA

Dittman v. UPMC, 196 A.3d 1036 (Pa. 2018). The Pennsylvania Supreme Court holds that employers have a legal duty to use reasonable care to safeguard sensitive personal information of their employees when the employer chooses to store such information on an internet accessible computer system. In addition, the Court holds that the economic loss doctrine does not bar purely financial damages resulting from a breach of this duty.

BACKGROUND

In a class action lawsuit against UPMC d/b/a the University of Pittsburgh Medical Center and UPMC McKeesport (collectively, "UPMC"), Plaintiff employees ("Employees") alleged that a data breach had occurred through which the personal and financial information, including names, birth dates, social security numbers, addresses, tax forms, and bank account information of all 62,000 UPMC employees and former employees was accessed and stolen from UPMC's computer systems. Employees further alleged that the stolen data, which consisted of information UPMC required Employees to provide as a condition of their employment, was used to file fraudulent tax returns on behalf of the victimized Employees, resulting in actual damages.

UPMC filed preliminary objections to Employees' complaint arguing that, inter alia, their negligence claim failed as a matter of law. Specifically, UPMC argued that no cause of action exists for negligence because Employees did not allege any physical injury or property damage and, under the economic loss doctrine, "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." The trial court sustained UPMC's preliminary objections and dismissed Employees' negligence claim. In a split opinion, a three-judge panel of the Superior Court affirmed the order of the trial court sustaining UPMC's preliminary objections and dismissing Employees' claims.

DISCUSSION

To state a claim for negligence, a plaintiff generally must demonstrate the following elements: 1) the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; 3) a causal relationship between the breach and the resulting

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injury suffered by the plaintiff; and 4) actual loss suffered by the plaintiff.

In this case, both the trial court and the Superior Court found that UPMC owed no duty to the Employees under Pennsylvania law. In reversing the decisions of the lower courts, the Supreme Court of Pennsylvania concluded that UPMC owed the Employees a common law duty to reasonably protect against data breaches. Specifically, the Court observed that, under Pennsylvania law, "[i]n scenarios involving an actor's affirmative conduct, he is generally 'under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." Accordingly, because Employees alleged that UPMC required them to provide certain personal and financial information, which UPMC collected and stored on its internet-accessible computer system, the Court found that UPMC had a duty to protect them against an unreasonable risk of harm arising out of that requirement.

The Court rejected UPMC's argument that the presence of third-party criminality eliminates this duty. Because data stored on internet-accessible computers held by large entities like UPMC are obvious targets for cybercriminals, the Court found that UPMC should have realized the likelihood that a third person might avail himself of the opportunity to commit such a crime and taken steps to protect the Employees' data.

Accordingly, the Court concluded that the lower courts erred in finding that UPMC did not owe a duty to Employees to exercise reasonable care in collecting and storing their personal and financial information on its computer systems.

The Court also found that the economic loss doctrine did not bar Employees' negligence claims. This doctrine generally bars negligence claims that result solely in economic damages unaccompanied by physical injury or property damage. The Court, however, clarified that the economic loss doctrine, as applied in Pennsylvania, does not preclude all negligence claims seeking solely economic damages. Instead, the Court set forth a "reasoned approach" to applying the economic loss doctrine that "turns on the determination of the source of the duty plaintiff claims the defendant owed." Specifically, if the duty arises under a contract between the parties, a tort action will not lie from a breach of that duty. However, if the duty arises independently of any contractual duties between the parties, then a breach of that duty may support a tort action.

Because Employees asserted that UPMC breached its common law duty to act with reasonable care in collecting and storing their personal and financial information on its computer systems, a duty that exists independently from any contractual obligations between the parties, the Court held that the economic loss doctrine did not bar Employees' claim.

CONCLUSION

The *Dittman* decision is important because the Supreme Court of Pennsylvania has determined that, in certain circumstances, employers owe a duty to protect employee data and can be liable for data breaches. Moreover, in such circumstances, the economic loss doctrine will not bar such claims.

Accordingly, to the extent school districts require their employees to submit sensitive personal or financial information (e.g., names, birth dates, social security numbers, addresses, tax forms, and bank account information), then such districts have a duty to install reasonable security measures to protect such data, including, but not limited to, proper encryption, adequate firewalls, and an adequate authentication protocol and should take all necessary steps to comply with this duty. Districts should work with their solicitors and Information Technology Department employees to

determine what constitutes reasonable in this ever evolving field.

COURT ESTABLISHES 5 FACTORS TO DETERMINE WHEN A SCHOOL DISTRICT'S OFFER TO RESIGN IS ACTUALLY A CONSTRUCTIVE DISCHARGE

Judge v. Shikellamy Sch. Dist., 905 F.3d 122 (3d Cir. 2018). When a public school district offers an employee a chance to resign in lieu of termination, courts will review five factors to determine whether the resignation was legitimate or was the product of coercion and duress.

BACKGROUND AND DISCUSSION

A public school principal was arrested for driving under the influence of alcohol with a .332 blood alcohol level, over four times the legal limit. The school district superintendent gave the principal an option: either immediately resign or the superintendent would issue written charges for dismissal, and conduct a hearing on the charges prior to termination. The principal resigned, but then claimed she was constructively terminated without due process because the district "forced the resignation by coercion or duress."

The U.S. District Court for the Middle District of Pennsylvania held that the principal voluntarily resigned, and the Court granted the school district's motion for summary judgment, dismissing the case. On appeal, the United States Court of Appeals for the Third Circuit upheld the lower court's decision. The Court of Appeals explained that under 3rd case law, there is a presumption in this situation that the employee has voluntarily resigned. However, the Court explained that this presumption may be overcome and adopted five factors to help determine whether a constructive discharge had occurred:

1] Whether the employee was given some alternative to resignation;

2] Whether the employee understood the nature of the choice she was given;

3] Whether the employee was given a reasonable time in which to choose;

4] Whether the employee was permitted to select the effective date of the resignation;

5] Whether the employee had the advice of counsel.

With regard to the first factor, the Court of Appeals held that the principal was presented with a legitimate alternative to resignation, noting that the principal did have a right to a hearing on the charges and that the proposed charge against her (immorality due to driving while intoxicated) was a valid basis for termination. With regard to the third factor, the principal was given less than 24 hours to decide whether to resign, but the Court explained this was reasonable since the principal had been arrested weeks earlier and should have known termination was likely. Although the principal did not choose the effective date of termination and did not have the advice of counsel, the Court held that these factors were not enough to overcome the presumption that her resignation was voluntary. The Court noted that the principal had retained counsel to defend her against the criminal charges, but did not seek legal advice regarding her decision to resign. Weighing these five factors, the Court held that the principal had not been coerced or forced to resign.

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CONCLUSION

The Third Circuit Court of Appeals in *Judge v. Shikellamy Sch. Dist.* offers a road map school districts can follow in order to offer resignation to employees without exposure to claims for constructive discharge. Any time a Pennsylvania school district offers an employee the opportunity to resign in lieu of termination, administrators should consult with the school district solicitor to ensure that the district is observing the five factors identified in this case.

MUNICIPALITY'S RETALIATION AGAINST NEWSPAPER FOR UNFAVORABLE PRESS LEADS TO CIVIL RIGHTS CLAIM

Press and Journal, Inc. v. Borough of Middletown, Civil Action No. 1:18-CV-2064 (M.D. Pa. 2018) (Borough faces a civil rights claim for retaliation against newspaper for unfavorable press coverage).

BACKGROUND

The *Middletown Press & Journal* ("Journal") is a newspaper of general circulation in Dauphin County. For over 100 years, the Borough of Middletown advertised in the Journal, placing notices for meetings of Borough council and the local zoning hearing board, advertisements for public events and other notices required by law to be published in a newspaper of general circulation. In the ten-year period from June 2008 to May 2018, the Borough ran 207 such legal advertisements in the Journal.

In June 2018, the Borough informed the Journal that it was ending all advertising with the newspaper. When the Journal inquired why the Borough was no longer advertising in the newspaper, the Borough responded with a letter, signed by the mayor and six of the Borough's seven council members, providing the following explanation for the Borough ending its advertising relationship with the Journal:

> "This decision was arrived at through discussion of a number of topics that we feel have been detrimental to the efforts and initiatives of the Borough, including articles and editorials published in the Press and Journal over the past year…Through these disheartening and demoralizing instances of distasteful sensationalism, misrepresentation of information and statements, unfounded speculation, questionable sourcing and observable bias, we feel that the Press and Journal is not entirely committed to presenting the news of our community with an acceptable amount of impartiality or accuracy of facts."

The Borough's letter further stated that "[s]hould the Press and Journal demonstrate reliability to professionally and responsibly report on actions and statements of Borough Council and Management, as well critiquing us from a founded and balanced position, we will be happy to patron your newspaper again."

A representative of the Journal attended a public meeting of the Borough council and read from a letter expressing that the Borough's actions were unconstitutional infringements of the Journal's First Amendment rights and requesting that the Borough reconsider its decision. Copies of the letter then were provided to the mayor and council members, which the mayor ripped in half and threw on the Council table.

Subsequently, the Journal initiated a suit in federal district court accusing the Borough of a violation of the Journal's First Amendment rights. The Borough filed a motion to dismiss the complaint contending that it did not state a viable claim. The

federal district court rejected the Borough's motion and allowed the Journal's suit to proceed.

DISCUSSION

Independent contractors who provide services to governmental entities enjoy certain protections under the First Amendment. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the United States Supreme Court examined whether the First Amendment protects independent contractors from the termination or non-renewal of at-will government contracts in retaliation for their exercise of freedom of speech. The Court held that such protection exists in the context of a pre-existing commercial relationship with the government.

In a related case decided that same day, *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court considered whether First Amendment rights held by government employees also applied to an "independent contractor, who, in retaliation for refusing to comply with demands for political support,…is removed from an official list of contractors authorized to perform public services." In *O'Hare*, the local government allegedly removed an independent contractor, who had provided towing services to the municipality for many years, from an official rotation list of towing-service companies in retaliation for the contractor's exercise of political association. The Supreme Court held that these allegations stated an actionable claim for violation of the contractor's First Amendment rights.

In this context, the federal court observed that, although there was no contract between the Journal and the Borough ensuring continued placement of advertisements in the newspaper, the Journal had provided services continuously for a significant period of time. These ongoing services ceased when the Borough terminated the business relationship expressly due to dissatisfaction with the Journal's coverage of Borough matters. Under these circumstances, the court concluded that the Journal stated plausible claims against the Borough for viewpoint discrimination in contravention of the right to free speech and free press; content discrimination in violation of the right to free speech and free press; and violation of the right to freedom of association.

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Tucker Arensberg, P.C. Introduces New Blog:
The Right to Know Law Blog

The Right to Know Law Blog

Every municipality and school district receives requests for records pursuant to the Pennsylvania Right to Know Law ("RTKL"). Because the question of whether a record is "public" is complex, the RTKL has generated a significant amount of litigation before the Office of Open Records and the courts of this Commonwealth. To help your organization keep up with the latest news and developments, the Municipal and School Practice Group has created the Right to Know Law Blog. Posts to the Blog will provide an overview of key sections of the RTKL, summarize important historical court decisions and keep you aware of recent developments in the RTKL, including summaries of important rulings from the Pennsylvania Office of Open Records and appellate courts. We hope that this Blog will be a valuable asset for you and your organization. For more information, contact: Attorney Chris Voltz at *cvoltz@tuckerlaw.com.*

Visit the Blog at http://www.tuckerlaw.com/category/right-to-know-law-blog/

CONCLUSION

Governmental entities may enter into contracts with vendors for the provision of services on terms that reserve the right to terminate the relationship at any time and without cause (commonly referred to as "at-will" contracts). While government officials are accorded broad discretion to terminate at-will relationships without cause, that discretion cannot be exercised as a means of punishing, or to impose conditions upon, the expression of political viewpoints by those doing business with the government. Instead, such decisions must be made without consideration of the content of a service provider's speech.

COURT DISMISSES STUDENT'S CLAIM THAT CONFISCATION OF HIS CELL PHONE WHILE DISTRICT INVESTIGATED STUDENT'S SUSPECTED MISCONDUCT WAS AN UNREASONABLE SEARCH AND SEIZURE.

Rorvik v. Snohomish School District, et al., 2018 WL 3917932. The U.S. District Court for the Western District of Washington rejects student's Section 1983 claims that District officials' confiscation of his cell phone, interrogation by Assistant Principal and search of his car violated his rights under the Fourth and Fifth Amendments

BACKGROUND

Plaintiff was an 18 year old senior at the Snohomish School District's Glacier Peak High School on the date of the incident. Plaintiff had parked his car on school grounds and was subject to the school's "Student Parking Rules and Regulations." The one page document, signed by the Plaintiff states that the signer understands that "by parking on campus, my vehicle is subject to search." The Student Parking Rules and Regulations also state that students are not permitted to go to their vehicle during school hours and "school inappropriate items" are not permitted in a student's vehicle.

A security monitor observed Plaintiff return to the school building from his car and demanded to see his permission slip. The security monitor questioned the authenticity of the permission slip and the Plaintiff confessed that he had forged the slip. The security monitor confiscated Plaintiff's cell phone and took him to the school's administration office where he was told to wait for the Assistant Principal. While Plaintiff was waiting for the Assistant Principal, the security monitor returned to Plaintiff's car and by looking through a window, observed a bong in the back of the vehicle. The Assistant Principal believed that this information established reasonable suspicion to search the car. Nonetheless, the Assistant Principal asked Plaintiff if there would be a problem if he were to search the car and the student said "no." When the Assistant Principal informed him that he was going to search the car, the student admitted to having a bong in the car.

A search of the car yielded two knives, a bag containing prescription and non-prescription pills, vape devices, drug paraphernalia and a BB gun. The student was given a forty day suspension from school which was reduced to twenty-five days when Plaintiff completed a drug and alcohol assessment. Plaintiff filed suit against the School District, the Assistant Principal and the security monitor alleging that his rights under the Fourth Amendment were violated by the confiscation of his cell phone and the search of his car and that this right against self-incrimination under the Fifth

Amendment were violated by the questioning in the Assistant Principal's office. Defendants moved for summary judgment which was granted by the court, dismissing all of Plaintiff's claims.

DISCUSSION

Plaintiff alleged that by confiscating his cell phone, Defendants conducted an unreasonable search and seizure in violation of his Fourth Amendment rights. Plaintiff provided no evidence that his phone had been searched. Defendants provided testimony that the phone was confiscated for three hours while the District conducted an investigation of Plaintiff's conduct in order to prevent him from contacting anyone during the investigation. The court found that this was a reasonable practice as it limited the student's ability to interfere with an ongoing investigation by contacting persons such as co-conspirators to assist in concealing evidence. The claim relating to the confiscation of Plaintiff's cell phone was dismissed.

The court also dismissed Plaintiff's claims with respect to the search of his vehicle, finding that, even if Plaintiff had not given permission to search his car, his admission that he had a bong in his car constituted reasonable suspicion to search the car. A search of a student and/or his belongings is justified at its inception if there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Thus, the court dismissed Plaintiff's claims relating to the search of his car.

Plaintiff also alleged that Defendants violated his Fifth Amendment right against self-incrimination as he was not given a Miranda warning at any point during the questioning. In dismissing this claim, the court recognized that the requirement of a Miranda warning applies only in a custodial interrogation resulting in information to be used in a criminal case. In order for questioning by a school official to constitute "custodial interrogation" the school official must be acting on behalf of law enforcement. There was no evidence that the Assistant Principal was acting on behalf of law enforcement in questioning the student. The School Resource Officer was not called until after the search of the Plaintiff's vehicle was completed. Further, the information obtained by the Assistant Principal through the questioning did not violate Plaintiff's right against self-incrimination as the information obtained through such questioning was not used in a criminal prosecution but rather was used only for purposes of a student disciplinary proceeding.

CONCLUSION

The Rorvik case is an illustrative example of two important elements of an investigation of suspected student misconduct. First, when it is necessary to search a student or his/her belongings, always be sure that you are able to articulate facts that form the basis for a reasonable cause to suspect that the search will result in evidence of a violation of the laws or school rules. Second, it is important to know when to get the school resource officer involved. Searches by school officials are subject to the reasonable suspicion standard rather than probable cause, and questioning of a student by school officials is not a "custodial interrogation" which requires Miranda warnings. Involving the School Resource Officer before the District completes its investigation of a suspected violation of a school rule may enable the student to argue that the school official was acting as an agent of law enforcement.

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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.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

The Tri-State Area School Study Council at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact Dr. Diane Kirk, Director, 412.648.1716.