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FILLING VACANCIES WITH INTERNAL CANDIDATES WITHOUT APPLICATION PROCESS LEADS TO DISCRIMINATION CLAIM

S.G. v. Norristown Area S.D., No. 20-1682, 2021 WL 6063122 (E.D. Pa. Dec. 22, 2021) (Federal court allowed a discrimination claim of part-time teacher to proceed arising from a school district's practice of hiring internal candidates to vacant positions without an application process).

BACKGROUND

S.G. was a sixty-year-old, African American female who was employed as a high school Spanish teacher by Norristown Area School District. In spring 2014, S.G. applied for a "Per Diem Substitute Spanish Teacher" position with the School District through an online portal. One week later, S.G. was hired by the School District and after the end of the 2014 school year, she was offered and accepted three different teaching positions with the School District: a "Per Diem Substitute Spanish Teacher"; a ".4 part-time Spanish Teacher"; and a ".8 part-time Spanish Teacher," all which came with salary increases and increased benefits. Importantly, S.G. did not apply for the aforementioned positions.

During her time as a School District employee, S.G. did not have an individual workspace and had to share textbooks with other teachers. During the 2016-2017 school year, S.G. told her Assistant Principal that she believed she was being discriminated against because of her race and age due to the fact that her younger, non-African American language teacher colleagues had their own classrooms, workspaces, and textbooks.

After S.G. reported the alleged discrimination, her Assistant Principal instructed her to begin including students who received individual education plans (IEPs) in her student learning objectives (SLOs), which are designed to measure educator effectiveness based upon student achievement. While all language teachers in the District were advised to do this, S.G. claimed that because she was forced to include special education student's IEPs in her reports, her performance ratings were lowered. However, it was undisputed that S.G. received a "Satisfactory" performance review during the 2016-2017 school year.

After S.G. was told to include student IEPs in her SLOs, she filed a complaint with the Pennsylvania Human Relations Commission and a union grievance. S.G. claimed that district administrators and counselors had

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solicited complaints from students and parents about her performance and she was subjected to unannounced and frequent visits and reviews from school administrators. She also claimed that administrators instructed a school secretary to prevent her from signing into work on three different occasions during the 2017-2018 school year.

S.G. was eventually informed by School District administrators that due to District budget cuts and decreased enrollment, there was a possibility that her contract would be decreased. However, after providing notice of potential budget cuts, two full-time Spanish teachers resigned and the School District posted job openings to fill both vacant positions. While the job openings were posted on an online portal for ten days, S.G. did not apply for either of the positions. In fact, during the ten-day application window, S.G. was informed that her employment would be changed from a ".8 part-time Spanish Teacher" to a ".4 part-time Spanish Teacher" due to budget cuts, resulting in a salary decrease and loss of certain benefits. The School District ended up hiring two Latina women to fill the open full-time Spanish Teacher positions and both women were younger than S.G. and there was a question of whether one was even qualified for the position.

S.G. subsequently filed discrimination claims under Title VII and the ADEA in addition to retaliation claims under Title VII against the School District. However, the School District moved for summary judgment (dismissal) with regard to both issues. The court determined that there were disputed issues of fact that precluded summary judgment with regard to S.G.'s discrimination claim, but it granted summary judgment with regard to the retaliation claim because S.G. did not present sufficient evidence demonstrating that she suffered professional repercussions resulting in an adverse employment action.

DISCUSSION

S.G. asserted that she was discriminated against under a disparate impact theory, meaning that she believed she was singled out and treated less favorably than others based upon her race and age. To make out a prima facie case of failure to hire or promote under the ADEA, a plaintiff must prove that 1) they belong to a protected class; 2) she applied for and was qualified for the job; 3) she was subject to an adverse employment action despite being qualified for the job; and 4) under the circumstances that raise an inference of discrimination, the employer continued to seek out individuals with similar qualifications for the position.

While the School District argued that S.G. was not offered a full-time teaching position because she did not apply for either open position, the court rejected that argument. The court noted that because S.G. was promoted three times without applying for any of the positions, the school had a practice of hiring internal candidates for open positions without requiring them to submit applications. The court believed that it was unclear whether the School District handled the hiring for full-time positions differently, but because there was a disputed question of material fact, it refused to dismiss S.G.'s claim and indicated that a jury should decide if the School District's conduct constituted discrimination under Title VII and the ADEA. However, the court rejected S.G.'s retaliation claim, because she failed to establish that her inclusion of IEPs in her SLOs led to an adverse employment action that harmed her professional advancement.

PRACTICAL ADVICE

The court's decision in S.G. is instructive for any School District who has a pattern or practice of filling vacancies without adhering to a consistent hiring process. In this case, the lack of an organized system for the solicitation and appointment of candidates to open positions provided the premise for the potential finding of a discriminatory hiring decision. The development and consistent use of a structured hiring process promotes an equal opportunity among persons who may be interested in vacancies, facilitates reasoned employment decisions and, thus, ultimately aids a school district to refute claims of discriminatory practices.

PENNSYLVANIA SUPREME COURT CLARIFIES STANDARD FOR SCHOOL DISTRICT REGULATION OF OFF-CAMPUS STUDENT SPEECH

In J.S. by M.S. v. Manheim Township School District, 263 A.3d 295 (Pa. 2021), Pennsylvania's highest court took a step toward clarifying the sticky issue of school districts' ability to discipline students for off-campus speech.

BACKGROUND

Manheim involved a challenge to a school district's discipline of a student, J.S., after a meme he created was disseminated to a limited number of persons via the social media app, Snapchat. The meme at issue, which J.S. initially sent via Snapchat only to his friend, Student One, involved a photo of another student, Student Two, with the caption: "I'm shooting up the school this week. I can't take it anymore I'm DONE!" While this meme was originally private, Student One subsequently posted it to his personal Snapchat "story," where it was viewed by 20 to 40 other students before being removed by Student One at J.S.'s request. Importantly, the meme was created and disseminated from J.S.'s personal phone, off school premises, and outside of school hours.

The school district became aware of the meme and permanently expelled J.S. for making terroristic threats and engaging in cyber-bullying in violation of school district policies. The school board's adjudication was reversed on appeal by the Lancaster County Court of Common Pleas and allocatur was ultimately granted by the Pennsylvania Supreme Court as to the issue of whether the school district infringed J.S.'s First Amendment protections when it disciplined him.

DISCUSSION

After a thorough summation of First Amendment jurisprudence relevant to public schools' regulation of student speech, including the United States Supreme Court's recent opinion in *Mahoney Area School District v. B.L.* which made the *Tinker* substantial disruption test applicable to student's off-campus speech, the Court established a two-part inquiry to be employed in determining whether a student's speech is protected. Under the first part of the inquiry, a court must determine whether the at-issue speech constitutes a "true threat" by examining the totality of the circumstances, including the content and context of the speech. Amongst relevant factors cited by the Court in reaching this determination are 1) the language employed by the speaker; 2) whether the statement constituted political

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hyperbole, jest, or satire; 3) whether the speech was of a type that often involves inexact and abusive language; 4) whether the threat was conditional; 5) whether it was communicated directly to the victim; 6) whether the victim had reason to believe the speaker had a propensity to engage in violence; and 7) how the listeners reacted to the speech. Under the second part of the inquiry, a reviewing court must determine whether the at-issue speech caused or foreseeably could cause a substantial disruption to the school environment. An affirmative finding under either of the two inquiries renders the speech unprotected and thus confers the school district with the ability to regulate it.

The Court held that the school district's discipline of J.S. was not justified under either prong of the inquiry. The Court found relevant to its true threat analysis that the meme was not a direct threat of violence against Student One, but rather "a fictional message of a third party threatening violence;" was part of an ongoing dialog between J.S. and Student One not intended to be shared with others; and was communicated through Snapchat, which conveys messages which cannot be accessed from the Internet and can only be viewed for a short time.

The Court also found that the meme did not cause a substantial disruption to the school environment. While noting that the meme had an indirect nexus to the school by virtue of its suggestion that a student would "shoot up" the school and that this nexus "counsels strongly in favor of school regulation," the Court continued to find that the school district's interest in punishing J.S. was diminished by the fact that J.S. communicated the meme via his personal cell phone, off campus, on his own time, through Snapchat, and to an intended audience of one. Furthermore, the facts that meme caused the school campus to be "abuzz," caused apprehension amongst some students, parents, and faculty resulted in an investigation by the administration and local police to determine if the threat was real, and caused Student One and Student Two to lose educational time due to their being interviewed, did not constitute such a significant impact on the delivery of instruction or administrative burdens to serve as a basis to expel J.S.

PRACTICAL ADVICE

The primary take away of *Manheim*, is that a school district may permissibly regulate student speech, even that which occurs off school premises and outside of school hours, if the speech either 1) constitutes a "true threat" under the totality of the circumstances or 2) causes, or foreseeably could cause, a substantial disruption to the school environment. While school districts will face a heightened burden when the at-issue speech occurs outside of school, this circumstance alone does not foreclose the school district's ability to discipline students for their off-premises speech.

SETTLEMENT DOES NOT VOID MANDATORY EXPULSION FOR WEAPON POSSESSION

R.S. by R.S. v. Hempfield Area School District, 268 A.3d 521 (Pa. Commw. Ct. 2021). (The Pennsylvania Commonwealth Court explained that the Pennsylvania Public School Code requires a one-year expulsion for possession of a weapon on school grounds, and an expulsion on these grounds may not be overturned by a subsequent settlement agreement on appeal).

BACKGROUND

In February, 2020 the Board of School Directors for Greater Latrobe Area School District ("Latrobe") held a disciplinary hearing and found student R.S. guilty of approximately 11 charges, including possession of a weapon on school grounds in violation of Latrobe's weapon policies and Section 1317.2(a) of the Pennsylvania Public School Code. Latrobe's adjudication resulted in the expulsion of R.S. based on a finding that he violated the weapons policy. Section 1317.2(a) states that a Pennsylvania School District *"shall expel, for a period of not less than one year, any student who is determined to have brought onto or is in possession of a weapon on any school property."*

R.S. and his family appealed Latrobe's decision to the Court of Common Pleas of Westmoreland County. Prior to a determination on appeal, the parties entered a settlement agreement under which Latrobe agreed to withdraw the weapons charge adjudicated by its Board of School Directors. R.S. and his family then moved into the Hempfield Area School District ("Hempfield"). Due to the weapons adjudication entered by Latrobe, Hempfield offered to enroll R.S. in an alternative education cyber-school program rather than in-person instruction.

On October 5, 2020, R.S. and his family filed a complaint with the Court of Common Pleas of Westmoreland County, seeking a declaratory judgment that R.S. was entitled to in-person instruction because the weapons violation had been withdrawn via the settlement agreement with Latrobe. At trial, the school solicitor testified about the development and execution of the settlement agreement, which withdrew the weapons violation from the disciplinary adjudication. He noted that during the negotiation of the settlement agreement, Latrobe was aware of case precedent holding that a pencil was not a weapon, and, because R.S. maintained in his appeal of the disciplinary adjudication that the item involved that led to the weapons charge was similar to a pencil, Latrobe agreed to drop the weapons violation in exchange for R.S. withdrawing the appeal of his expulsion. The solicitor explained, however, that none of the other charges or the term of R.S.'s expulsion was amended by the settlement agreement. He further insisted that Latrobe continued to take the position that the item was a weapon, but Latrobe, nonetheless, agreed to withdraw the weapons violation.

The Court of Common Pleas agreed with the family that, because the weapons charge had been withdrawn, Hempfield could not preclude R.S. from in-person, regular education instruction pursuant to Section 1317.2(a). Hempfield then appealed this decision to the Pennsylvania Commonwealth Court.

DISCUSSION

The Commonwealth Court reversed the decision of the trial court, explaining that under Section 1317.2(a) Latrobe was required to expel R.S. for at least one year after determining R.S. possessed a weapon on school

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property. The Commonwealth Court explained the expulsion period is mandatory under the Pennsylvania Public School Code and may not be reduced or withdrawn via a subsequent settlement agreement.

PRACTICAL ADVICE

The School Code empowers a school district to provide for alternate education services if a transferring student is expelled for a weapons violation. Whenever an adjudication of a weapons violation has not been vacated or struck from the student records of the prior school district of residence, the school district into which that student relocates has the legal authority to enforce the expulsion regardless of any settlement agreement to resolve a pending appeal.

COMMONWEALTH COURT HOLDS THAT THE FAILURE TO IDENTIFY A TRANSACTION OR ACTIVITY OF AN AGENCY IN A REQUEST FOR RECORDS UNDER THE RIGHT-TO-KNOW LAW DOES NOT AUTOMATICALLY MAKE THE REQUEST INVALID FOR BEING INSUFFICIENTLY SPECIFIC

*Methacton Sch. Dist. v. Off. of Open Records of Cmmw., 250 C.D. 2021, 2021 WL 6122163, at *1 (Pa. Cmmw. Dec. 28, 2021). The Commonwealth Court of Pennsylvania holds that a request for the emails of four individuals over a short timeframe is sufficiently specific under Section 703 of the Right-to-Know Law ("RTKL") even though the request did not identify a subject matter (i.e., a transaction or activity of the agency).*

BACKGROUND

In *Methacton School District*, the Requester sought copies of all emails sent and received by four specific school district ("District") employees for four discrete one-month time periods. The District performed a search using the parameters of Requester's requests and extracted responsive emails. However, after extraction, the District stored the potentially responsive emails in an electronic folder without reviewing them. Instead, the District denied the requests for being insufficiently specific under Section 703 of the RTKL for failure to identify a subject matter in the request.

The Office of Open Records ("OOR") issued a final determination directing the District to provide all responsive emails within thirty days. The District appealed to the trial court. The trial court affirmed, rejecting the District's argument that the request was insufficiently specific because it lacked a specific email subject or search keywords.

The District then appealed to the Commonwealth Court, which affirmed the order of the Trial Court.

DISCUSSION

Section 703 of the RTKL provides that a "request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain

which records are being requested ....” 65 P.S. § 67.703. The three-part balancing test for considering a challenge to the specificity of a request requires an examination of the extent to which the request sets forth: (1) the subject matter of the request; (2) the scope of the documents sought; and (3) the timeframe relating to the records sought. Generally, the subject matter of the request must identify the “transaction or activity” of the agency for which the record is sought.

Because the request included a finite timeline and specific email addresses, the Court concluded that parts two and three of the balancing test had been satisfied. In addition, the Court rejected the District’s argument that a Requester must precisely identify the subject matter of the requested record. Instead, the Court explained that the absence of a stated subject matter is only one factor to consider in determining whether the request is sufficiently specific.

In the context of requests for emails, the Court stated that when a request includes limited specific timeframes and email addresses, a requester’s failure to identify a subject matter may be accorded less weight in ascertaining whether the request is sufficiently specific.

In the present case, the lack of subject matter was given very little weight because the District was actually able to locate responsive records. The Court noted that the purpose of the balancing test is to make it possible for agencies like the District to locate responsive documents and, in this case, “the request was obviously sufficiently specific because the [District] has already identified potential records included within the request.”

Accordingly, the Court concluded that the Request was sufficiently specific and affirmed the order of the trial court.

PRACTICAL ADVICE

Open Records Officers should not automatically deny RTKL requests for being insufficiently specific simply because the request lacks one of the three parts of the balancing test because, if a court or the OOR later determines that a request is specific enough, the consequences of solely relying on the position that a request is insufficiently specific can be severe.

As noted above, in Methacton School District, the District did not review the emails it located and, therefore, did not raise any other grounds to redact or withhold any of the responsive emails it had located. When the Court ultimately found that the Request was sufficiently specific, it did not allow the District to redact or remove nonpublic information or records. According to the Court, the District should have reviewed the located emails for the presence of exemptions and protected information and it was too late to seek redaction of the emails or to argue that any of them do not constitute records subject to disclosure.

Accordingly, Open Records Officers should consult with their solicitors prior to denying a vague, annoying and burdensome request for being insufficiently specific, especially if they are able to locate records that might be responsive.

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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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