

School Law for Administrators

Breach of Contract

Administrator claims breach of contract, negligent termination after being fired for lack of certification

Citation: *Morrison v. Buffalo Board of Education*, 2018 WL 3455910 (2d Cir. 2018)

The Second U.S. Circuit Court of Appeals has jurisdiction over Connecticut, New York, and Vermont.

The Second U.S. Circuit Court of Appeals recently affirmed in part and vacated and remanded in part a lower court's decision to dismiss a complaint brought by a school administrator for breach of contract and negligent termination after the board of education terminated her for failing to have professional certifications required under her contract. The court ruled that the district allowed the administrator to begin working with the knowledge that she did not have the certifications it said were required in its job posting and could not argue after the fact that it was because of this fact that she was being fired.

The Buffalo School Board hired Andrea Morrison as an administrator under an employment agreement dated July 2, 2013. There is some disagreement amongst the parties about the contract and conditions agreed, but according to Morrison, the board was aware when it hired her that she did not have certain certifications required in New York. Morrison has alleged that she was working on getting the certifications and was responsive to each request the board made with regard to her certifications. Despite this, according to Morrison, the board renege on

the contract and terminated her on April 2, 2014.

Morrison sued the board, alleging breach of contract and negligent termination. The board asked the lower court to dismiss the claims, which the lower court agreed to do. Morrison appealed. The appeals court vacated the lower court's decision with respect to Morrison's breach of contract claim, finding that when the evidence was viewed in the light most favorable to Morrison (as it had to be on a motion to dismiss), the facts showed that the board had hired her aware of her lack of certifications and could not then terminate the contract because of the lack of certification. The appeals court affirmed the lower court's decision to dismiss the negligent termination claim.

BREACH OF CONTRACT

In New York, the elements of a breach of contract claim include: 1) the existence of a contract; 2) performance by the party seeking recovery; 3) breach by the other party; and 4) damages suffered as a result of the breach. The terms of a contract must be unambiguous in order for a district court to dismiss a breach of contract claim. Here, the lower court determined that Morrison failed to satisfy a contractual condition requiring her to maintain certain professional certifications and

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Did You Know?

Eighth Circuit rules against employee who claims school policies led to his injuries, constitutional violations

The Eighth U.S. Circuit Court of Appeals recently affirmed a lower court's decision in a case in which an employee who was injured during an assault by a student alleged a substantive due process violation based on the school's policies. The employee claimed that the school's policy of leniency with regard to discipline of minority students led to a work environment for teachers and other staff that was more dangerous than it would otherwise have been and often violent. The teacher claimed that administrators made the choice to be more lenient on minority students after historical records showed there was a disparity of minority students receiving more and harsher punishments.

The teacher was injured trying to break up a student fight after one of the students attacked him. The student was heard

to ask onlookers if they had seen him "slam that white-ass teacher."

The Eighth Circuit affirmed a lower court's decision that the employee had not established a substantive due process violation. The court explained that to meet the high bar of showing a constitutional violation, the employee would have needed to show conduct by district officials that "shocks the conscience." While the court found the school's alleged leniency policy "misguided," it was not conscience-shocking. Therefore, the employee did not make out a constitutional violation.

—*School Law Bulletin*,

Vol. 45, No. 19, October 10, 2018, pp. 5-6.

Around the Nation ~ Alabama

Former high school student sues alleging bullying and discrimination because of her transgender status

A transgender woman, Zelda Menefee, who formerly attended Grissom High School in Alabama has filed a lawsuit against Huntsville School District and a long list of teachers from the high school alleging that she was bullied and teased on a daily basis by teachers and students alike when she attended the high school because she is transgender. The lawsuit also names the Huntsville City Schools Board of Education, former superintendent, Casey Wardynski; Grissom principal, Rebecca Balentine; freshman principal, James Coln; physical education teachers, Connie Stephens and Jack Moran; history teacher, Diane Staley; health teacher, Alicia DesRosier; assistant principal, Maurice Shingleton; guidance counselor, Amy Langford; and Title IX coordinator, Shirley Wellington.

According to the lawsuit, Menefee first attended Grissom High School in January 2015, and she alleges that she was bullied from day one. She claims that she was harassed by students and staff, and she was physically assaulted by students. The suit asserts that school administrators were well aware of the problems, and they did nothing to stop the continual harass-

ment, even after Menefee turned to them for help. Abbey Clarkson, Menefee's attorney said, "Every child deserves the right to feel safe at school. Zelda Menefee was deprived of that right. She woke up every single school day for over a year knowing she would likely be bullied, harassed, ridiculed, and discriminated against at school that day." According to the lawsuit, the bullying that Menefee experienced was continual and brutal, and still the staff didn't step in to help, instead, many of them perpetrated the bullying and made it worse.

The lawsuit asserts that most of the teachers at the school refused to accept that she was transgender, and therefore, they refused her by telling her she was not a girl and calling her by her birth name instead of her new chosen name, Zelda. At one point, she was forced by the freshman principal, Coln, to change her clothes if she wanted to stay at school. She had worn a knee length skirt to school, and he made her change into a pair of boys' athletic pants and a t-shirt that the school provided, de-

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that, therefore, the board did not violate the agreement by terminating her. But the appeals court found that dismissal was premature on these grounds because that conclusion could not be reached based on the record.

In the employment contract, Morrison was required to "maintain any certifications or qualifications . . . required by the [New York] Department of Civil Service or State Education Department." However, Morrison has argued that she declared her lack of certification (possessing a Florida certification at the time of her application) and was hired nonetheless. Further, Morrison has said that she was directed to apply for interstate certification reciprocity during her first week, which she promptly did and received a conditional School Building Leader certification in December 2013. Later, in March, Morrison claims she was directed to apply for a School District Leader internship certificate, which she did and received on March 29. Therefore, according to Morrison, not only was the board aware of her certification situation when it hired her and let her begin working, but also, she was adequately certified at the time of her termination in early April.

The board argued that the two certifications Morrison received did not meet the requirement of certification, pointing to the district's posting for the position, which stated that the candidates needed New York certification as a school district administrator or school district leader at the time of appointment.

While the posting for the position may have said that, the appeals court pointed out that Morrison's contract did not make mention of these particular certifications and instead required more generally that she satisfy certification requirements in the state. Thus, the appeals court found that it could not reject, as a

matter of law, Morrison's pleading that her school district leader internship certificate satisfied the agreement's certification requirement. Moreover given that Morrison had admitted that she did not possess the required certification at her time of appointment, the appeals court concluded that it could be plausibly inferred that the board waived the agreement's requirement for New York certification, at least at the time of appointment, particularly given that she was receiving specific instruction on receiving her certifications.

This claim needed to go back to the lower court for further proceedings.

NEGLIGENT TERMINATION

A negligent termination requires showing the existence of a duty owed to the injured party. Morrison claimed that her termination was caused proximately by school district defendants who gave her "negligent directions" as to the process she needed to follow to get the appropriate certifications. The appeals court found that the school district defendants did not have a duty to give Morrison assistance in receiving her certifications.

Tort liability, which Morrison was trying to prove, would require the existence of a "legal duty independent of the contract" or the voluntary assumption of a duty. There was no evidence supporting either theory of liability and that a school district official may have directed her to apply for specific certifications which ended up not being sufficient did not amount to a situation supporting negligent termination. Therefore, the appeals court affirmed the lower's court's decision to dismiss this claim.

—School Law Bulletin,

Vol. 45, No. 18, September 25, 2018, pp. 4-5.

Title IX

Student alleges Title IX discrimination after being subject to harassment and bullying

Citation: *A.T. v. Oley Valley School District*, 2018 WL 3046601 (E.D. Pa. 2018)

A federal court in Pennsylvania has denied a school district's request to dismiss a Title IX complaint brought against it by a student who sued after she suffered bullying and harassment in the wake of being sexually assaulted at a party hosted by another student in the district. The court found that the complaint alleged facts that supported that the student suffered severe and pervasive harassment over the course of nearly a year, which was easily enough to survive a motion to dismiss. The court also denied the district's claim to dismiss a request for attorney's fees from a separate action under the Individuals with Disabilities Education Act (IDEA).

O.T. was a high school student in the Oley Valley School District when she attended a party hosted by Ryan Kline, another student in the district. O.T. became intoxicated at the party and was allegedly raped by Kline. Following this incident, according to O.T., Kline's sister and multiple other students took part in harassment and bullying against her in relation to the rape. According to O.T. the harassment and bullying continued from November 2015 until October 2016 when she transferred to another school district to escape the situation.

During that time, O.T. has alleged that she made two suicide attempts, after both of which she was hospitalized. She also has alleged that she complained on multiple occasions to school administrators, teachers, and sports coaches about the situation, but that no one took any action to investigate or stem the bullying, even in spite of the fact that they were also aware of O.T.'s suicide attempts.

O.T. initiated legal action against the school district. Relevant to this decision, O.T. sued the school district, alleging a violation of Title IX of the Education Amendments of 1972 and Section 1983. There were several other counts, but the only other one at issue here was a request for attorney's fees included in the lawsuit, which followed a due process hearing under the IDEA. The district requested that the court dismiss both the Title IX and the attorney's fee claims.

In its request to dismiss the Title IX complaint, the district relied almost entirely on cases that focused on the state-created danger doctrine rather than on Title IX cases. The state-created danger doctrine falls under Section 1983 rather than Title IX, and the court surmised that the district focused on this doctrine instead of Title IX because the family had styled their complaint as a violation of Title IX and Section 1983. The family's rationale was that the Third Circuit has not definitively determined whether Title IX claims can be brought as independent causes of action or if they need to be brought pursuant to Title IX. But here, the court found that in *A.W. v. Jersey City Pub. Sch.*, the Third Circuit ruled that Section 1983 did not provide a remedy for Section 504 of the Rehabilitation Act and instead that the Rehabilitation Act adopted the remedies of Title VI, which the Circuit Court noted was nearly identical to the Title

IX scheme. Thus, in this case, the court found that the Third Circuit has made it clear that a Title IX claim cannot be brought under Section 1983 and the family would not be allowed to proceed with a state-created danger claim.

Therefore, the court focused its analysis on the Title IX claim, rejecting the district's request to dismiss. Title IX mandates that no individual can be "excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" on the basis of sex. There is an implied private cause of action against a school district for student-on-student sexual harassment, for which a district can be liable if the district acted with "deliberate indifference to known acts of harassment in its program and activities" and the sexual harassment was so "severe, pervasive, and objectively offensive" that it prevented the victim from enjoying an educational opportunity or benefit.

The question of whether student-on-student sexual harassment rises to an actionable level is not clear-cut and depends on a number of considerations, including things such as the age of the victim and harassers and the number of harassers. In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court found that a student who was sexually harassed by one other student over a five-month period, resulting in a decline in the student's grades, experienced harassment sufficiently severe and pervasive to survive a motion to dismiss.

Here, the facts put forth by O.T. were that she experienced sexual harassment following a rape, that there were several perpetrators, and that the conduct lasted for nearly a year during which time O.T. missed school frequently and attempted suicide twice. Further, O.T. alleged that she reported the harassment to numerous district employees but that no action was ever taken. Based on these things, the court found that O.T.'s Title IX claim would survive the district's motion to dismiss.

Turning next to the attorney's fee request, the court also rejected the district's motion for dismissal. The family argued that they were the prevailing parties in a due process proceeding they had separately brought pursuant to the IDEA and that they were "compelled to bring their claim for counsel fees and expenses in the present action in order to avoid the bar of claim preclusion theories." What this meant was that they wanted to avoid an argument by the district that they were required to bring all of their claims against the district at one time.

Without analyzing the logic of this argument, the court found that the IDEA, ADA, and Section 504 give prevailing parties the right to an award of attorney's fees at a court's discretion. Thus, the family could pursue their claim for attorney's fees under the IDEA based on their IDEA and Section 504 claims.

—*School Law Bulletin*,
Vol. 45, No. 15, August 10, 2018, pp. 5-6.

Around the Nation ~ Texas

AG supports school officials who expelled student for refusing to stand for the Pledge of Allegiance

Ken Paxton, Texas Attorney General, recently filed a motion to intervene in a federal court suit brought by India Landry. Landry was previously expelled from Windfern High School after she refused to stand during the Pledge of Allegiance while she was sitting in the principal's office for another offense. According to the lawsuit, Principal Martha Strother expelled her for non-compliance after this incident.

The state of Texas mandates by law that all public-school students stand as the Pledge is recited at the start of each day unless they have explicit permission from their parents to do otherwise. Landry did have her mother's permission to stay seated during the Pledge, but still Paxton filed a motion asking for permission to intervene in the case. He claims that his intent is to, "defend the constitutionality" of the state's education codes. "The U.S. Supreme Court has repeatedly held that parents have a fundamental interest in guiding the education and upbringing of their children, which is a critical

aspect of liberty guaranteed by the Constitution," Paxton said. "The Texas Legislature protected that interest by giving the choice of whether an individual student will recite the Pledge of Allegiance to the student's parent or guardian. School children cannot unilaterally refuse to participate in the pledge."

Randall Kallinen, Landry's attorney, questions Paxton's motives, pointing out that he is up for reelection as a Republican, and that this is likely just a ploy to get himself some recognition and political attention. Kallinen dismissed Paxton's attempt to intervene, saying Landry already had her mother's permission to sit during the Pledge of Allegiance, so this is a non-issue. Kallinen said, "The reason he's challenging this case is that it's election time. It's an attempt to rally the troops."

—*School Law Bulletin*,
Vol. 45, No. 21, November 10, 2018, pp. 6-7.

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spite the fact that her clothing didn't violate any school dress code. She was asked to change her clothes a number of other times after this incident.

Menefee strongly identifies as a girl, and yet she was enrolled in the boys' physical education class, where students commented about her clothes and harassed her. The suit alleges that on at least two occasions Menefee reported the bullying she was experiencing in gym class to the teacher, but he turned a blind eye. According to the lawsuit, Menefee was persistent, and eventually, she was allowed to enroll in girls' physical education, but the teacher wouldn't let her dress in the girls' locker room or have a locker with the other girls in the class.

In addition to the constant harassment and bullying Menefee experienced, the school also refused to accommodate her transgender needs in any way. The suit alleges that she was not allowed to use female restrooms. After continual complaints, she was finally given permission to use the nurse's restroom.

The lawsuit contends that the bullying Menefee experiences got so bad that she was attacked in the halls at school and had food thrown at her during lunch. She also was pictured in the yearbook under the name James Menefee, despite asking that she not be pictured in the yearbook at all.

Menefee faced a situation that was both scary and dangerous, and despite all of her efforts, no one at the school ever stepped up to help her. Numerous complaints went uninvestigated, and none of the students or teachers who harassed her ever faced any consequences for their behavior, the complaint states. Eventually Menefee saw no other choice but to drop out, and she finally quit Grissom in May 2016, stating on her exit interview form that the reason was "dislike of school experience." The suit is seeking compensatory and punitive damages.

—*School Law Bulletin*,
Vol. 45, No. 20, October 25, 2018, pp. 6-7.