

School Law for Administrators

Fit for Duty

Former janitor sues school district claiming he was placed on leave due to his disability and in retaliation for protected activity

Citation: *Carnes v. Lima City Schools*, 2018 A.D. Cas. (BNA) 156200, 2018 WL 2045783 (N.D. Ohio 2018)

A federal district court in Ohio recently granted a school district's request for judgment without a trial in a case in which a school custodian sued alleging his school district failed to accommodate his disability and violated his due process and First Amendment rights after the school district placed him on leave and required him to undergo a fit-for-duty evaluation. The court found that the undisputed evidence showed that the custodian could not complete his job duties without posing a threat to students and other staff and, therefore, that the district did not violate any of his rights by placing him on leave.

Daniel Carnes was a custodian in the Lima City Schools from 1985 through 2015 when he retired. In October 2014, Superintendent Jill Ackerman got a call from the principal of Liberty Arts Magnet School, and the principal explained that Carnes had told her the school's first-grade teacher was his "best friend" and he wanted to put her children in his will.

Carnes made other claims about the teacher and her husband, and tried to visit her house, but she gave him the wrong address. Ackerman and the union representative, Tim Haller, met with Carnes and he told them he and the teacher were best friends for more than five years. He said he was "in charge of making sure that her children were safe when she was out of town." Ackerman suggested the relationship was inappropriate and Carnes asked what she planned to do about it. He claimed the teacher had been "rubbing on his legs . . . rubbing her hair against his face, and whispering in his ear that she wanted to give him alcohol."

Concerned about his mental health, Ackerman placed him on paid leave and referred him to the school's behaviorist. Ackerman told Carnes he could not return to work until he got a fit-for-duty slip from a mental health professional. Haller was also concerned about Carnes' mental state and said that he may be a threat to the first-grade teacher, the students, and even himself.

Ackerman and Haller investigated the sexual harassment claims Carnes had made about the teacher. It turned out the teacher felt uncomfortable because Carnes was always in her classroom and had asked for her address. She gave him the wrong address, and when he tried to visit, he became "visibly upset" when he discovered it was the wrong address. On October 31, 2014, the teacher obtained a court-issued protection order against Carnes, which barred him from any contact with her or her three children. It also prohibited him from entering her workplace, her residence, or the school her children attended.

The behaviorist at the school district, Monica Clark, met with Carnes on October 27, 2014, and concluded he was a threat to himself and possibly others. She asked that he "not return to

Lima Senior High School because of the threat of safety for the students."

Ackerman recommended that Carnes meet with psychologist Fred Ferri, which he did on November 2, 2014. Ferri concluded that Carnes had "a significant delusional disorder" that was "specifically encapsulated in the firmly held belief that he and the teacher have a loving relationship." He recommended that Carnes not return to work "at the present time."

Carnes filed a complaint with the EEOC on November 4, 2014, claiming he was harassed because of his sex by another custodian who was female, in violation of Title VII. School officials previously had disciplined the other custodian for her altercations with Carnes. The EEOC dismissed his charge on December 4, 2014.

Carnes took unpaid leave after his paid leave ran out. He never obtained a fit-for-duty note to return to work, and he retired in November 2015. He filed a Section 1983 lawsuit against the school district and officials claiming discrimination because of his disability, violations of his due process rights, and violations of his First Amendment rights. The school district asked for judgment without a trial.

The court granted the school district's request for judgment in its favor.

DISABILITY DISCRIMINATION

Carnes brought a state law claim of disability discrimination for the school's adverse employment action against him on the basis of a perceived disability. Under Ohio law, it is illegal for an employer to fire an employee because of their disability. To establish his claim, Carnes had to show that: 1) he had a disability; 2) his employer took an adverse action against him because of, at least in part, the disability; and 3) he could safely and substantially perform the duties of his job in spite of the disability (*Wallace v. Mantych Metalworking*).

The court concluded that no reasonable jury could rule in Carnes' favor because the undisputed evidence demonstrated that he could not perform his job duties without being a threat to teachers and students. The school district placed him on leave because of concerns about his mental health. The evidence of delusional statements and his inappropriate behavior with a teacher convinced administrators and mental health professionals that he was not fit for duty and should be placed on leave until a mental health professional could affirm he was able to go back to work. A psychologist also recommended he receive psychiatric treatment for three to six months, and he never did. Additionally, the school district was aware that the teacher had received a court order barring Carnes from any contact with her

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Court issues temporary restraining order allowing student to wear shirt supporting Trump border wall

A federal district court in Oregon recently stepped into the fray in a situation in which a high school student in Hillsboro wanted to have the right to wear a t-shirt supporting the Trump border wall to school. The court issued a temporary restraining order that allows the student to wear the shirt at school.

In the case, the high school student wore a shirt to school in January that promoted the building of a border wall. An assistant principal told him to cover up the shirt with a sweatshirt, which the student did for a short time. Later that day however, he took his sweatshirt off and was disciplined for wearing the shirt which the school said created a hostile learning environment. He was told not to wear the shirt again.

The student filed a lawsuit against the district, seeking a judge's order allowing him to continue to wear the shirt to school on First Amendment grounds.

While the court acknowledged that a school can take actions to ensure the safe and orderly running of the school, in this case, the balance of interests was swayed toward the student's constitutional free speech rights.

The district had argued that it was reasonable to forecast that the shirt could disrupt the learning environment, pointing out that more than one third of the student population was of Hispanic descent, but the court found that the t-shirt represented "core protected speech" and the district hadn't presented evidence that the shirt was harmful to any specific group such that it would impact the running of the school.

Source: *The Oregonian*

—*School Law Bulletin*,
Vol. 45, No. 13, July 10, 2018, p. 7.

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or entering her workplace. Therefore, no reasonable jury could determine that Carnes was able to safely perform his duties, and the school district had a legitimate, non-discriminatory reason for placing him on leave.

RETALIATION

Carnes also filed a retaliation claim, arguing the school district placed him on leave for making sexual harassment complaints about the teacher and for bringing an EEOC complaint against the district alleging sexual discrimination. Carnes needed to show that there was a causal connection between the school district's adverse employment action against him and the fact that he engaged in a protected activity—making claims of sexual harassment and discrimination. Again, the court found no jury could support that putting him on leave was a pretext for retaliation for Carnes' protected activity. Mental health professionals had serious concerns about his mental health and his threat to others, and an Ohio court had issued an order of protection against him. Therefore, the court granted judgment in favor of the school district.

PROCEDURAL DUE PROCESS

For his claims of violations of his procedural due process, Carnes had to show that: "(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest" (*Women's Med. Prof'l Corp v. Baird*).

The court noted it was undisputed that Carnes had a protected property interest in his continued employment, but it was clear also that he received all the process to which he was entitled. Ackerman met with Carnes and his union representative, giving him a chance to explain his situation with the statements about the teacher. After he was placed on leave he had a chance

to return by obtaining a fit-for-duty slip. He never followed up on recommended psychiatric treatment while on leave, nor did he obtain the fit-for-duty slip. Therefore, the court concluded the school district provided adequate due process.

Regarding his liberty interest claim, the court found Carnes failed to show a genuine factual dispute. He cited no evidence that Ackerman or any other school employee made defamatory statements about him or disseminated such information. He also never produced evidence that such statements were false. Therefore, the court found his liberty interest claims under the Due Process clause failed.

FIRST AMENDMENT RETALIATION

To establish a First Amendment retaliation claim, Carnes had to show that: "(1) [he] engaged in protected conduct; (2) an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by [his] protected conduct" (*Maben v. Thelen*).

The court noted that this claim failed for the same reason as his state law retaliation claim. Carnes was placed on leave because of genuine concern for his mental health and the danger he posed to the school employees and students. Mental health professionals determined he was not fit-for-duty, and a court order barred him from entering a first-grade teacher's workplace. The school district would have placed him on leave regardless of whether he engaged in any constitutionally protected activity.

Therefore, the court granted judgment in favor of the school district on all claims.

—*School Law Bulletin*,
Vol. 45, No. 12, June 25, 2018, pp. 4-5.

Around the Nation ~ Pennsylvania

In place of guns, a school district in Pennsylvania is arming students with rocks to protect themselves from armed intruders

As the controversy about gun control grips our country, some schools have opted to arm teachers, others have hired additional armed security guards, but one school in Pennsylvania is trying something different. David Helsel, Blue Mountain School District Superintendent, announced his plan to protect students against school shootings by arming students and teachers with rocks. He testified in front of a state legislative education committee and said, "Every classroom has been equipped with a five-gallon bucket of river stone." He added, "If an armed intruder attempts to gain entrance into any of our classrooms, they will face a classroom full of students armed with rocks, and they will be stoned."

Many schools around the country are feeling desperate, and desperate times call for desperate measures. Helsel contends that students in his district routinely drilled on shooter simulations and were given active-shooting training through a program known as ALICE, short for Alert, Lockdown, Inform, Counter, Evacuate. The ALICE protocol involves evacuating students and barricading classroom doors for those who can't safely leave. In at least one school district, in Redmond, Wash., ALICE training also involved guidance for children to distract an intruder. He wanted to take these precautions a step further and give the students a way to fight back.

These rocks, according to Helsel, will be kept in classroom closets and will only be used as a "last ditch" option to use as an alternative to students hiding passively under desks. Helsel claims that he will still follow the previous protocol of getting

students out of sight or to a safe location, but if that doesn't work, the rocks will come out. He said, "At one time, I just had the idea of river stone. They're the right size for hands, you can throw them very hard, and they will create or cause pain, which can distract."

Blue Mountain School District is not the only district thinking along these lines. In fact, another district in the area floated the idea of using golf balls, Helsel said, but that idea did not seem effective to him. "Obviously a rock against a gun isn't a fair fight, but it's better than nothing," he said. "I'm not sure why some people feel that it's more appropriate to be a stationary target under a desk in a classroom rather than be empowered to defend yourself and provide a response to deter the entry of an armed intruder into their classroom."

Still, this idea does not sit well with some people. For example, Kenneth S. Trump, president of the National School Safety and Security Services, a K-12 security consulting firm, said that the idea was illogical and could possibly cost lives, adding that it fills an emotional security need but does not actually improve security. However, some students and parents are supportive of the idea. "We've been trying to be proactive, just in case," Helsel said. "We wanted to provide some type of last response to an intruder . . . rather than crawling under a desk and getting shot."

Source: *The Washington Post*.

—*School Law Bulletin*,
Vol. 45, No. 9, May 10, 2018, p. 7.

Headlines on School Law

by Rob Taylor, PhD

Two states step up on mental health

In early July the *Associated Press* reported that a measure passed in 2016 by New York's legislature would take effect by July 8, mandating schools to begin teaching mental health to students in elementary, middle, and high school. Virginia's new law is more limited, but still requires mental health instruction in the ninth and tenth grades.

An early supporter of the law in New York, high school health teacher Dustin Verga, said, "We're seeing a huge increase in youth anxiety and depression." In Virginia three students from the University of Virginia searching for a sponsor for their concept of a new program focused on the science of mental health found an eager advocate in state Senator Creigh Deeds, a Democrat from Charlottesville. In 2013, after being

denied emergency psychiatric services, Deeds' son stabbed him and later committed suicide.

According to a recent *EdWeek* article, most states have mandates requiring health teachers to build curricula on tobacco, drug and alcohol addiction, safe sex, and disease detection. But until now, mental health has been left out of the lesson planning. "We teach them how to detect the signs of cancer and how to avoid accidents, but we don't teach them how to recognize the symptoms of mental illness," Verga said. "It's a shame because, like cancer, mental health treatment is much more effective if the disease is caught early."

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Recognition of many causative factors of emotional and mental health issues—based on much accumulated data—has led to lawmakers pursuing new health-related mental health strategies in the schools:

- A recent report by the Centers for Disease Control and Prevention (CDC) shows the U.S. suicide rate has risen by 25% between 1999 and 2016;
- The National Alliance on Mental Illness warns that while half of lifetime mental illnesses begin before age 14, commonly young people wait 10 years after the first symptoms occurs before getting treatment;
- The rate of adolescents experiencing depression has gone up nearly 40% from 2005 to 2014, as revealed by a Johns Hopkins University School of Medicine study, which estimated the number of depressed children aged 12 to 17 at 2.2 million;
- The teen suicide rate, according to the CDC, for boys aged 15 to 19 surged by nearly a third between 2007 and 2015, while for girls the same age it more than doubled;
- Meanwhile, according to CDC's 2015 Youth Risk Behaviors survey, nearly 9% of adolescents in grades nine through 12 attempted suicide in the past year.

The response to such findings has been uneven. Some states have increased funding for school counseling, a move now being considered by Texas after the recent shooting at a Santa Fe school, but the Longhorn state remains one of 20 that don't mandate school counseling. Just more than half the states require suicide prevention training for school staff, while more than a dozen states encourage such training but do not require it.

People supporting the need for mental health education point to a spate of factors besetting today's school-aged population. One such factor is the opioid crisis, which is seen as both a result of mental conditions and a cause of further mood or anxiety disorders.

Dustin Verga adds to the list of pressures being experienced by today's adolescents. "The life students live today is very different from what it was just 10 years ago. Technology and social media have taken over. Kids are getting cellphones at an earlier age and facing escalating academic expectations and standardized assessments starting in third grade."

Paul Gionfriddo, the CEO of Mental Health America, a non-profit advocating for improved mental health care, points to the explosion of school shootings as a reason for increased state legislation. "People are talking more about youth mental health and the effects of trauma on kids, but it's taken a long time to get traction. I think what we've seen recently in terms of school shootings is spurring this. It wouldn't surprise me to see a number of states go in the same direction over the next few years."

In Virginia, the newly mandated mental health statewide educational program is intended to explore "the brain science" behind mental illness, to assist students to work on their own mental health, and to reduce any cultural negativity related to mental health issues.

In New York, Glenn Liebman, chief executive of the Mental Health Association of New York State, refers to the new law as "groundbreaking." One reason is that school-based education on the facts related to emotional wellness can free students to seek help for themselves and their friends and can prevent later substance abuse and suicides.

New York's first push toward legislation mandating mental health education came seven years ago from a nonprofit mental health agency, the Mental Health Association in New York State, Inc. The group's public policy director, John Richter, said, "The problem was finding a way to cut in line ahead of dozens of other competing educational issues." That avenue, Richter contends, was the opioid epidemic hitting New York, so that the General Assembly was ready to pass a bill in 2016.

While the New York law does mandate public school mental health education, it allows the exact curriculum to be crafted by the board of education. The state is also kicking in \$1 million a year to provide an online mental health resource center and to offer free training for teachers, starting in July.

As a basic educational strategy, when mental health instruction begins in the fall, teachers will be asked not only to use independent lesson plans but to integrate the topic of mental illness into traditional areas of science, literature, history, and social studies, as appropriate. Health courses will now be expected to cover the disease of mental illness along with treatment modalities.

—*School Law Bulletin*,
Vol. 45, No. 15, August 10, 2018, pp. 1-2.