PENNSYLVANIA ASSOCIATION OF ELEMENTARY AND SECONDARY SCHOOL PRINCIPALS

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LEGAL UPDATE – 2010

David P. Andrews, Esquire
ANDREWS & BEARD
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
Telephone: (814) 943-7796
Fax: (814) 943-0519
E-mail: dandrews@andrewsbeard.com

UPDATE ON SOCIAL MEDIA

AND TECHNOLOGY DEVELOPMENTS

1. In the case of ***Richerson v. Beckon***, (9th Cir. 2009), the Circuit Court of Appeals found that a School District did not violate the First Amendment rights of an Administrator by demoting her to a teacher position as a result of a posting on her personal blog. In this case, the blog maintained by the Administrator contained highly negative comments regarding fellow school employees. The Court found that these negative comments severely impaired her ability to effectively supervise and work with others at the school. In rejecting the First Amendment claim of the Administrator, the Court held that the School District had a legitimate interest in the well-being of the work place, and that that interest outweighed the Administrator’s interest to engage in her blog speech.

2. ***Snyder v. Millersville University*** (M.D. Pa. 2008). In this case, Millersville University denied a teaching certificate to a student teacher as a result of her comments and a photograph posted on her MySpace profile. The student teacher had told her students about her MySpace webpage, and she had posted a critical comment about her cooperating teacher and a photo of herself captioned as the %drunken pirate.+ The teacher challenged the denial of her certificate based upon First Amendment rights. The Pennsylvania Federal Court found that the University did not violate the First Amendment rights of the student teacher.

   The Court, in its decision, noted that the student teacher had been told by University and School District officials to refrain from communicating about personal matters with District students through her webpage. The student teacher was thus given an Unsatisfactory Rating for her student teaching, and the University did not award her an Education degree.

In addition, the Federal Court found that the teacherφs MySpace posting raised only %personal matters,+ and did not touch on matters of %public concern,+ which would be protected under the First Amendment.

3. ***Spanierman v. Hughes*** (D. Conn. 2008). In this case, a Federal Court found that a school superintendent did not violate the First Amendment rights of a non-tenured high school teacher by refusing to renew his contract after the discovery of images and comments on his MySpace page.

   In this case, the teacher created a MySpace webpage under the name of %Mr. Spiderman,+ which included a picture of him taken ten years earlier and pictures of naked men with comments beneath them. School officials had confronted the teacher about his webpage, and he merely created a new webpage under the name %Apollo68+ and it contained the same material.

   Importantly, in this case, the teacher also engaged in on-line exchanges with students. He teased a student about %not getting any+ in one exchange, and threatened a student with detention if he referred to him as %sir+ again.

   Although the teacherφs webpage did have a poem of a political nature, the Court found there was no evidence that the school retaliated against the teacher because of political views. The Court concentrated on the fact that the teacherφs webpage did not touch on matters of public concern generally, and also found that the webpage interactions with students could disrupt the learning atmosphere at the school.

4. ***Stengle v. Office of Dispute Resolution*** (M.D. Pa 2009). In this case, a Special Education Hearing Officer made a public blog which advocated certain positions on Special Education matters. Attorneys appearing before

the Hearing Officer had complained about this conduct, and had asked that their cases be reassigned or that the Hearing Officer recuse herself.

The Federal Court found that the state agency did not violate the First Amendment rights of the Special Education Due Process Hearing Officer by not renewing her contract. The Court found that the Hearing Officer's speech undermined the integrity of the Special Due Process Hearing system by failing to remain impartial, and the Court concluded that the well-being of the adjudicatory system outweighed the value of the hearing officer's blog speech.

5. ***The City of Ontario v. Quon*** (U.S. S. Ct., decided June 17, 2010).   The United States Supreme Court upheld the review of text messages of its police officers, and found that the warrantless review of the text message transcripts was reasonable because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. The City had issued these pagers which sent text messages to its police officers, and provided a monthly limit on the number of messages that could be sent. The U.S. Supreme Court did not specifically decide the issue of the privacy expectation in the text messages.

   Likewise, the issue of privacy in text messages of student cell phones has not yet been decided by the Courts. Although the Courts have upheld the confiscation of student cell phones in the school setting, there is current litigation by the ACLU challenging the ability of a School District to download and review the content of the text messages in a student's cell phone.

SEXUAL HARASSMENT IN THE SHOOL WORKPLACE

1. **HOSTILE WORK ENVIRONMENT – EMPLOYEES**

1. Joking is not a defense.

2. Courts use %reasonable woman standard+. what may be offensive to a woman may not be the same for a man.

3. Touching . If you want to avoid the possibility of a sexual harassment claim, do not touch co-workers at any time.

4. Out of school conduct can be sexual harassment.

5. Same sex sexual harassment . an all female or all male group may have someone offended that constitutes sexual harassment, even though a person of the opposite gender is not present. Further, harassment based upon sexual orientation can constitute sexual harassment.

6. Pattern of conduct of a sexual nature leads to sexual harassment. One isolated remark will not generally constitute sexual harassment. However, one offensive touching could constitute sexual harassment.

7. Courts look at the %context+where the alleged sexual harassment has occurred.

2. **ELECTRONIC COMMUNICATION AS SEXUAL HARASSMENT**

1. Any message sent by the computer is always retrievable; it is never really deleted.

2. Text messaging by employees is also retrievable.

3. Courts permit computers to be inspected by experts to find deleted messages.

3\. **EMPLOYEE-STUDENT RELATIONSHIPS**

1. Do not email students from a personal computer.

2. Do not email students on any computer on %personal+issues.

3. Do not text message students from a personal cell phone.

4. Avoid one-on-one student meetings or discussions.

4\. **COACHES**

1. Do not use text messaging regarding practices and games. Coaches should designate a captain or use a phone chain for such communications.

2. Do not get %personal+with the players.

3. Maintain distance on away game trips with players.

TRANSFERS, DEMOTIONS AND FURLOUGHS IN TOUGH ECONOMIC TIMES

1. **Age Discrimination as a Factor**. In a case recently decided on August 24, 2010, the U.S. Court of Appeals for the Tenth Circuit found age discrimination with the demotion of a public schools administrator who was 60 years of age. In this case, the Court found that the reassignment of Judy Jones from Executive Director for Curriculum to Elementary School Principal was a %demotion+ and an adverse employment action under the Age Discrimination in Employment Act. Prior to the reassignment, the Court found evidence that other administrators had asked her about her retirement plans. Ultimately, a new Superintendent determined that the executive team should be organized and that Jonesq position would be eliminated with her duties absorbed by other administrators in the school district. Initially, the pay of Jones remained the same, albeit with a reduction of vacation benefits. However, the second year as Principal, her annual salary decreased by $17,000 which also affected her retirement benefits.

   Importantly, a month after Jones was reassigned, a new position was created entitled %Executive Director of Learning and Teaching+ with duties quite similar to Jonesq former job. The school district selected a 47-year old candidate for that job, when Jones was 60 years of age when reassigned.

   The Court found that although the school district gave a legitimate non-discriminatory reason for its decision, which was economic in nature, the Court found the economic reason to be overcome by a %pretext+ for age discrimination.

2. **The Pennsylvania School Code does not give the right to "lay off" school district employees for economic reasons.**

The School Code, in Section 1124, refers erroneously to the %suspension+of professional and school district employees. Section 1101 of the School Code defines %professional employees+as including Supervisors, Supervising Principals, Principals, Assistant Principals, Vice Principals, as well as other professional employees in the school setting. Section 1124 limits the suspension of professional school district employees to the following circumstances:

a. Substantial decrease in pupil enrollment in the district;
b. Curtailment or alteration of the educational program on recommendation of the superintendent, concurred in by the board of school directors, approved by the Department of Public Instruction, as a result of substantial decline in class or course enrollments or to conform with standards of organization or educational activities required by law or recommended by the Department of Public Instruction;
c. Consolidation of schools, whether within a single district, through a merger of districts, or as a result of joint board agreements, when such consolidation makes it unnecessary to retain the full staff of professional employees;
d. When new school districts are established as a result of reorganization of school districts pursuant to Article II., subdivision (i) of this act, and when such reorganization makes it unnecessary to retain the full staff of professional employees.

3. **Basic Education Circular of PDE on 1124.**

PDE, in its Basic Education Circular of July 1, 2002, recommends that to establish the curtailment or alteration as a result of a substantial decline in class or course enrollments, that the district must submit enrollment data, certified by the Superintendent, that either:

a. That enrollment in the class or course has decreased at least 20% from the school year five years prior; or
b. That enrollment of the class or course is less than ten students.

4. **Demotions.**

The School Code addresses demotions in Section 1151, wherein it provides that unless the employee consents, demotions are subject to the right to a hearing before the Board of School Directors, and an appeal in the same manner that will be required for the dismissal of any other professional employee.

The only case addressing demotion of a principal under the School Code is a case from 1994, *Hritz v. Laurel Highlands School District* , 648 A. 2d 108 (Pa. Commw. Ct. 1994).

a. An assistant principal/buildings and grounds supervisor appealed his demotion to a teacher when the district eliminated his position but retained a less senior assistant principal at the school. The appellant's duties had been split between those of assistant principal and those of buildings and grounds supervisor, while the other assistant principal performed assistant principal duties full-time. The appellant argued that demotions are the

same as suspension for the purposes of §11-1125.1 and, therefore, must be based on seniority. The court stated that, for a demotion to be considered a %realignment-demotion+, and thus trigger the requirements of §11-1125.1, %the demotion must be (1) due to one of the enumerated reasons provided in Section 1124 of the Code, such as declining enrollment or the closing of a school, and (2) involve some sort of regrouping or reorganizing of duties of other professionals within the district beyond simply the abolishment of a single position resulting in the demotion of one person.+ The court found that the appellant did not prove either element and that the district demoted him for economic and efficiency reasons, and thus his demotion was a %pure demotion,+ which triggered other provisions in the Public School Code relating to demotions (§11-1151).