

School Law for Administrators

14th Amendment

Appeals court dismisses Florida teachers' challenge to statewide teacher evaluation system

Citation: *Cook v. Bennett*, 792, F.3d 1294, 320 Ed. Law Rep. 35 (11th Cir. 2015)

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

The Eleventh United States Circuit Court of Appeals recently affirmed a lower court grant of summary judgment to Florida state education officials and three Florida school districts charged by a group of teachers and teacher organizations with violating their 14th Amendment rights through legislation and the implementation policies of a new teacher evaluation system. The system linked student learning in English and math to all teachers' evaluations and compensation. Teacher associations and individual teacher plaintiffs who did not teach students English or mathematics as assessed in state exams claimed the evaluation system violated their rights to substantive due process and equal protection. The appeals court found that since there was a rational connection of the test system to a legitimate governmental purpose, the defendants' implementation of the teacher evaluation system for teacher employees did not violate teachers' substantive due process or equal protection rights.

Florida's legislature passed the Student Success Act in 2011, requiring teacher performance evaluations linked to student learning and compensation. To comply with the act, the State Department of Education developed the Florida Comprehensive Assessment Test Value Added Model (FCAT VAM), which generated a score to reflect an individual teacher's impact on student learning.

As implemented, at least 50% of a teacher's performance score was based on data reflecting students' annual growth scores on the FCAT in English and math. The other 50% reflected other factors and adjusted in terms of school environment and demographics. The system had been designed to assess English and mathematics teachers whose students took the annual assessments.

Students took the FCAT in English annually from third to 10th grade and in mathematics from third to eighth grade. A previous year's student's score was held as the baseline; then growth was measured by comparing the current year's student score to the previous year. Teachers of fourth grade to 10th in English and fourth through eighth grade mathematics, designated as Type A teachers, were assessed based on data. Type B teachers taught those grade levels, not those subjects, yet students they taught had taken FCATs in both English and mathematics. Type C teachers did not teach fourth to 10th grades, or their students did not take the two FCAT assessments.

The Act, implemented in 2011-2012, directed school districts to select an "equally appropriate formula" for evaluating Type B and C teachers. Since most districts lacked resources to develop appropriate alternative formulas, the Act required them to evaluate Type B teachers with the students' FCAT scores in English and math. It directed the districts to evaluate Type C teachers with "measurable learning targets," yet in their absence, most districts evaluated Type C teachers based on FCAT student scores.

Seven Type B or C teachers and three teacher associations brought action against Alachua, Escambia, and Hernando Counties, the State Commissioner of Education, and state school board members to challenge the constitutionality of the Florida's Student Success Act and its implementation. They argued that the Act and its implementation policies violated teachers' rights under the due process and equal protection clauses of the 14th Amendment. They were being evaluated based on students and/or subjects they did not teach. The district and state defendants moved to dismiss.

The lower court granted in part and denied in part the defendant's motion to dismiss. It found that the plaintiffs did have standing to carry their case forward. For them, the teacher assessment system created a concrete risk that teachers would make less money in the future. The lower court dismissed the plaintiffs' facial challenge to the Student Success Act deeming that the legislature had a rational basis for enacting the evaluation system. It also dismissed the "as applied" claims by school districts as the court concluded the defendants' implementation too had a rational basis.

The teacher plaintiffs appealed the judgment, abandoning the facial challenge to the Student Success Act and addressing only the claims related to implementation.

In its *de novo* review, the appeals court applied the rational basis test to assess whether it was reasonable for policymakers to establish the contested policies. Teachers complained that it was irrational for teachers who did not teach the subjects or students tested to be evaluated on the basis of the test. The defendants argued that all teachers could reasonably have some impact on student learning through their presence in the school and their impact on the environment. The appeals court agreed with defendants and pointed out as well that it was rational to believe that use of an evaluation system tied to student learning and to teacher compensation could incentivize teachers to

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Retaliation

Teacher claims she was fired because of her gender

Citation: *Knott v. DeKalb County School System*, 2015 WL 4895392 (11th Cir. 2015)

The Eleventh U.S. Circuit Court of Appeals has jurisdiction over Alabama, Florida, and Georgia.

The Eleventh U.S. Circuit Court of Appeals recently affirmed a lower court's decision in favor of a school district in a Title VII retaliation case brought by a teacher who alleged that she was fired because she was a woman and the principal had originally wanted to fill her position with a male. The appeals court concluded that although the teacher believed that her principal discriminated against her based on her gender because of his hostility towards her, she failed to provide any evidence that this was an objectively reasonable belief.

Brenda Knott was a teacher in the DeKalb County School System. Originally, James Jackson, the principal at the school, had chosen a male candidate for Knott's position but at some

point, Knott was hired for the teaching position instead. Jackson was her supervisor.

Though there are not many details on the facts and circumstances, Jackson and Knott did not get along well and their working relationship was strained. For example, Knott believed that Jackson acted with hostility towards her and subjected her to excessive classroom monitoring. She also believed that he did not provide her with a prompt and sufficient orientation, and unnecessarily put her in two different teacher support programs.

At some point, Jackson decided to recommend against the renewal of Knott's teaching contract, and ultimately, she was terminated. The school district cited several reasons for its employment decision including deficiencies in her classroom instruction, her failure to adhere to the certain standards and

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make improvements and, thus, improve overall student learning.

While the Student Success Act was under revision, revisions did not clearly end the activity that formed the basis for the suit. Teacher plaintiffs teaching non-FCAT classes presented their first student growth scores under the new system as concrete evidence that they suffered a real and immediate threat traceable to the teacher evaluation policies. Scores were consistently lower than the parts of their evaluations not based on the FCAT.

Initially, the appeals court, like the lower court, deemed incorrect the defendants' argument that the teacher plaintiffs' claims were moot and lacked standing since the Student Success Act was under review and in flux. The appeals court, viewing all evidence in a light most favorable to the plaintiffs and drawing inferences in their behalf, found that teachers' claims were not moot and that the case had standing to proceed.

The appeals court reviewed both substantive due process claims and equal protection claims according to the same standards, applying the rational basis test in each case. The rational basis test is applied where a challenged law violates a nonfundamental right, as in this case. The court must conclude that the districts' teacher evaluation policies rationally related to a legitimate governmental purpose.

The burden was on the plaintiffs to show the opposite, that there was no rational and legitimate governmental purpose, not even speculative ones.

Plaintiffs contended the evaluation system contradicts the purpose of the FCAT VAM—attributing student growth to specific teachers while controlling for student demographics and school environment.

Although the defendants had not justified the teacher evaluation system in relation to the FCAT VAM purpose, they did

present a rationale and justification for their action in relation to the Florida Student Success Act. Its purpose is to "increase student academic performance by improving the quality of instructional, administrative, and supervisory services in the public schools of the state."

The appeals court found that the plaintiffs failed to refute this justification for implementation. Whether or not the FCAT VAM was the best way to increase student academic performance, it was rational for policy makers to conceive that the challenged teacher evaluation policies would advance the Student Success Act's state purpose.

The appeals court concurred that unfair results for Type B and C teachers occurred, but these should be rectified through the democratic process without judicial intervention.

Although plaintiffs alluded to a number of legal precedents in their favor, the appeals court concluded that these precedents differed from the current case. In cases cited, the defense could not establish the connection of the action to a legitimate state interest. In the instant case, the defense did establish that the teacher evaluation system was connected to a legitimate governmental purpose—improvement in instruction. Policy makers could reasonably believe that the FCAT VAM made it possible to measure at least a marginal impact that teachers have on their own students' English and math learning or on the whole school environment even when they do not teach the subjects tested. It was rational to implement this model, so no due process or equal protection violations of teachers' rights occurred.

Accordingly, the appeals court affirmed the lower court's decision.

—*School Law Bulletin*,
Vol. 42, No. 19, October 10, 2015, pp. 3-5.

Around the Nation ~ Tennessee

School district in Tennessee faces lawsuit after football team accused in bullying and hazing incidents

A lawsuit has been filed against the Dickson County School District (DCS) after reports surfaced about a series of alleged bullying incidents on the Dickson Middle School football team. The allegations are serious, and the matter is being dealt with accordingly. The attorney who is working on the case, Roland Mumford said, "This is up there in terms of the degree and pervasiveness of the bullying, not only with this set of facts

but within this school district."

One of the lawsuits involves the former volunteer assistant coach Shane Dunning. According to the suit, Dunning alerted school officials of bullying and the concern was not properly addressed. Additionally, the lawsuit asserts that a high percent-

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requirements, her insubordination by not meeting with administrative personnel in a specific required context, and the numerous complaints by students and parents.

Knott believed however that she had been nonrenewed because she was a female and Jackson had originally wanted a male to fill the role. She concluded that he had discriminated against her based on her gender when he recommended her for nonrenewal and therefore Knott filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging retaliation for opposing gender-based discrimination. She later sued the district.

The district sought summary judgment and the lower court granted this request, finding that the "evidence" of retaliation that Knott could not support her claim, and that in any case, she had failed to rebut the legitimate, nonretaliatory reasons for the district's employment decision. The lower court also found that the EEOC complaint (a protected activity) occurred after the district's employment decision and therefore could not support a claim of retaliation. Knott appealed.

Title VII prohibits an employer from discriminating against an employee because the employee "opposed any practice" made unlawful by Title VII, known as the "opposition clause" or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation, known as the "participation clause." Under the burden-shifting framework used when there is no direct evidence of discrimination, a plaintiff must first establish a *prima facie* case of retaliation, at which point the burden shifts to the defendant to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to the plaintiff to demonstrate that the given reason was pretext for discrimination.

To prove a *prima facie* case of retaliation, Knott needed to show that she engaged in protected activity, suffered an adverse employment action, and that there was a causal connection between the two. According to the appeals court, when someone has engaged in protected conduct pursuant to the "opposition

clause," they do not need to prove that the underlying discriminatory conduct they opposed was actually unlawful, but instead need to show they had a "good faith, reasonable belief that the employer was engaged in unlawful employment practices." The appeals court also noted that Knott needed not only to show that she subjectively and in good faith believed that her employer was engaged in unlawful employment practices, but also that this belief was "objectively reasonable in light of the facts and record," which the court had previously concluded could not be done in cases where the plaintiff failed to cite any statutory or case law that could reasonably be believed to support the claim.

After reviewing Knott's claims in this context, the appeals court affirmed the lower court's decision in favor of the school district. It found that the only evidence Knott provided that Jackson's actions were based on her gender went back to the fact that Jackson had originally hired a male for the position that Knott later filled. "But this," the court noted, "does not lead to an objectively reasonable conclusion that she was discriminated against on the basis of her gender."

Further Knott failed to show that the district's purported legitimate nondiscriminatory reasons for the nonrenewal of her contract were pretext. The district cited many reasons for the nonrenewal of Knott's contract and Knott did not offer any evidence that the district's reasons were not true or were unworthy of belief. While she believed the decision was discriminatory and provided a summary of the events that led up to the nonrenewal of her contract, her subjective belief and the summary of events before her termination did not explain how the motivation for her nonrenewal was discriminatory.

The appeals court also noted in its decision that even if Knott's allegations were true about excessive monitoring she was subjected to, a poor orientation program, and other such grievances, "these allegations reflect only potentially unfair treatment, which is not actionable under Title VII."

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Around the Nation ~ Pennsylvania

Pittsburgh high school implements new forward-thinking rules to accommodate transgender students

Schools across the country have battled to find the right balance between maintaining a safe environment and allowing students to express themselves freely. There are a wide variety of policies regarding which bathroom/locker room transgender students should use. Brashear High School (BHS) in Pittsburgh, Pennsylvania is stepping up and making a statement about this issue by implementing a very open policy at their school. This policy could set the tone for other schools who are wrestling with this same issue. Starting this year at BHS, transgender students may choose the names they put on their ID and the gender pronouns that their teachers and peers use to refer to them.

In addition, all locker rooms will have the same rules as the bathrooms. The school district made steps in the direction of being more open last spring when the high school's prom dress code was not gender specific, setting out guidelines for suits and dresses, rather than male and female dress. Devin Browne, a teacher at BHS and an adviser for the school's Gay Straight Alliance, wants the policy to become district-wide.

At the end of the last school year Browne shared his vision with district representatives, including Jocelyn Kramer, deputy solicitor for Pittsburgh Public Schools. She calls Brashear's draft "perfectly timely." The district is working with the federal Office for Civil Rights to update its nondiscrimination and harassment policies, Ms. Kramer said. Like many school districts around the country, protections under Title IX include gender identity but have not been recently updated.

In order for changes to be made within a school district, the school board and the district administration need to be on the same page and have the same objectives. Board policies are "a recitation of the law and position of the board," Ms. Kramer said. It is the administrative regulations that are at play here, the "more technical pieces"—permitting students to use the bathroom of the gender with which they identify, allowing them to choose their name on nonofficial school documents, and not permitting a dress code that would prohibit gender expression.

This new policy seems to be on track for approval. Kramer said the administrative regulations, which require review but not a formal vote from the school board, are being "informed by the work Brashear has done." "They may not be identical," she said, stating that the district hopes to streamline the language because generalizing school-specific policies over the district is difficult. "Different schools have different needs."

A decision on this policy is not far off. In fact, Kramer anticipates the policy and administrative regulations going before the board in October at the latest. After board review, they would go into effect immediately with an update of the online policy manual. The next cycle of staff professional development in the winter will include training on transgender issues.

Source: *Pittsburgh Post-Gazette*

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age of the bullying was orchestrated by a family member of one of the players on Coach Scott Robert's team. The lawsuit states that Dunning was relieved of his duties as a volunteer assistant coach after voicing his concerns about the bullying. Mumford also said, "The school boards across this state try to avoid reporting a high number of bullying cases for the state of Tennessee, which they're required to by law."

The second lawsuit that Mumford filed in federal court is on behalf of Northington and at least four more families. Reports state that there is a pervasive trend of bullying on the football team, and many members of the team feel threatened or have been hurt in some way. The lawsuit alleges that members of the football team regularly use racial slurs and threaten players with rape and other forms of hazing and inappropriate touching in the locker room. "There is a culture of deliberate indifference on the part of school directors Danny Weeks and Steve Sorrells,

and it permeates through the administration," said Mumford.

The school district denies that there is a problem, and believes these allegations to be false. Two parents brought their concerns to Steve Sorrells of DCS, but he believed the allegations were made up. According to Sorrells, the claims were unfounded and highly questionable. Sorrells maintains that the reason Dunning was let go was a difference in coaching philosophy, while the claims of racial slurs and rape threats were reported and investigated. Sorrells said no parents reported hazing and inappropriate touching to the school district. However, parent Kenya Northington disputes Sorrells, saying she did tell school officials about the hazing and inappropriate touching.

Source: *WSMV 4*

—*School Law Bulletin*,
Vol. 42, No. 20, October 25, 2015, p. 7.