School Law for Administrators

Around the Nation ~ New Mexico

Football player allowed to play by New Mexico judge in spite of state mandated concussion protocols

After a high school football player got a severe concussion in the state semi-final game, school officials told him that he would not be allowed to play for seven days, meaning that he would have to sit on the bench for the state championship due to state law concerning concussions. Upon hearing this, his parents sued the school, and a state trial court judge granted the parents' motion for a temporary injunction, ordering school officials to ignore state mandated concussion protocol and allowing the student to play in the state championship.

According to school officials, Shawn Nieto, a running back on Cleveland High School's football team, suffered a blow to the head during his team's state semi-final game and got knocked unconscious for 20 to 30 seconds and suffered a concussion. This type of injury can be extremely dangerous and school districts around the country are elevating their safety standards concerning concussions after a number of serious injuries and deaths resulting from this type of injury. Even so, Shawn is adamant in saying that he never lost consciousness, and his family insists he did not suffer a concussion. The family wanted him to play in the state championship so badly that they hired a lawyer and filed a motion in court last month, pleading with a judge to let Shawn play in the title game.

Even though awareness about concussions is on the rise, there is still a lot of gray area about what is safe and what is not, and much of this territory is uncharted. There is a great deal of uncertainty and inconsistency about head injuries in young athletes. In fact, a Harris Poll last year found that 87% of adults cannot correctly define a concussion, and 37% say they are confused about how a concussion is defined.

While many parents are grateful that there is more emphasis being placed on player safety, others like Nieto's parents say concussion hysteria has made the sport's decision-makers overcautious at times. "That's the bogey-man blanket they're throwing in sports now," said Peter Nieto, Shawn's father. By barring Shawn from competing, the family said the school district violated his constitutional right to due process, his state constitutional right to participate in extracurricular activities and interfered with his educational opportunities.

Rio Rancho school district is mandated to follow state law when it comes to concussion protocol, and district officials contend that is exactly what they were doing when they told Shawn that he had to sit out for a game. Even so, based on the evidence presented in state court, the judge granted a temporary injunction allowing Nieto to play in the state title game and now district officials are left wondering how they are supposed to proceed if a similar situation presents itself.

According to Shawn's parents, the school never gave them any training related to concussions, but they were given an informational sheet and required to sign a form after Shawn got hurt. Shawn claims that he never got a concussion and he was fine, but when he came to school the following day he was told by school officials that he would have to go through the concussion protocol and would be unable to play in the state championship game. The trainer explained that after the incident, Shawn was unresponsive and unconscious for at least 20 seconds. Even so, Shawn's parents say that they were never given any paperwork to support the school's assessment and never observed any symptoms that Shawn had suffered a head injury in the game.

Upon hearing that Shawn would not be allowed to play due to a concussion, his parents made a doctor's appointment for the following day. Shawn met with a doctor and according to the doctor, he exhibited normal cognitive ability, orientation, memory recall, and concentration. Backed by the doctor's recommendation, the Nietos became even more determined for him to play in the state title game and explored their legal options.

School district officials believe that if Shawn is allowed to play, it could be a slippery slope and lead to a lot of confusion when it comes to head injuries in football and how to proceed. The decision needs to be black and white, there is no room for gray area where this matter is concerned. The school district, was adamant that Shawn had suffered a concussion and state law required he sit out seven days. "There's no wiggle room," said Bruce Carver, the school district's athletics director. "If somebody thinks it is a concussion, we go the safe road and keep him out."

Although all 50 states, and the District, have passed laws that address concussion safety in youth sports, the details of these laws vary. A concussion might be diagnosed differently in South Carolina than Colorado, and the required recovery might

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Around the Nation ~ Tennessee

District faces lawsuit from former employee claiming he was forced to resign after being called to active military duty

An assistant principal for the Clarksville-Montgomery County School System (CMCSS) named Culen Keith Robinson, a lieutenant colonel in the U.S. Army Reserve, was called to active military duty for a period of 50 days in 2010. During this time he resigned his position for the school district. Robinson has now filed suit against the school district claiming that he was forced to resign in violation of his rights under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The suit, filed in the U.S. District Court Middle District of Tennessee asserts that Robinson was pushed to resign from his position by then-Chief Human Resources Officer Bruce Jobe. Jobe is no longer employed by the school district. He retired from his position at the end of 2011.

After Robinson reported to Jobe that he had been called to active duty, Jobe responded with anger and distrust. The lawsuit claims that Jobe, "contacted Robinson's wife and very rudely and unprofessionally advised her that she had an assistant principal sitting at home who was not on duty and was in Clarksville at the time." After this phone call Robinson sent Jobe an e-mail informing him that he was on military order and had no choice in this situation. After this message, things became more heated and Robinson and Jobe had "a tense back and forth," which led to his fear that if he did not resign his position "his teaching license would be taken and his career in education ruined."

Robinson claims that the situation culminated with an e-mail that he received from Jobe on September 3, 2010, asking for his immediate resignation, so that the position could be staffed by someone else. At this time, Jobe accepted Robinson's resignation. The school district disputes the series of events leading up to Robinson's resignation as presented by the plaintiff and denies making any "willful attempt" to violate the Uniformed Services Employment and Reemployment Rights Act of 1994.

School district officials claim that Robinson was not forced to resign, in fact, they were fully expecting him to return to his position at the end of his active duty. The CMCSS narrative states that Robinson provided the school district with his orders directing him to Fort Buchanan, Puerto Rico, for a period of

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be different in California than Pennsylvania. Arkansas allots money for a program but has no standards in place. Wyoming does not require parents to sign a consent form. Only a handful, such as New Mexico, have a mandatory waiting period before a player can return to action.

Many states have mandated a "waiting period" after a concussion to allow the brain sufficient time to heal before being hit again. New Mexico's statute was known for being one of the toughest in the nation when it was signed into law in 2010. But, doctors do not agree about whether or not a mandatory waiting period is effective or necessary. A 2009 study looked at 635 high school- and college-aged concussed football players and found that the waiting period "did not intrinsically influence clinical recovery or reduce the risk of a repeat concussion in the same sports season."

In Shawn's case, the timing was key. Alan Malott, the State District Judge scheduled a hearing for December 4 barely 24 hours before the championship game was scheduled to kick off. Neither the school nor the school district showed up in court, and Malott had at his disposal one key piece of evidence: Shawn's doctor clearing him to play. Malott granted the injunction.

The doctor who "cleared" Shawn for play took back her recommendation upon learning more about the situation. In fact, the morning of the title game, Karen Oritz, Shawn's physician, sent a letter to the school district rescinding her opinion and saying the family was not forthcoming with the extent of Shawn's injury. "Had I understood that there was a loss of consciousness, I would have never provided medical clearance," Oritz wrote.

Shawn was allowed to play in the game, but because he missed a week of practice, he was limited to one play on a kick off. The Nietos remain upset with the letter of the law and the school's application of it. They still contend that Shawn never suffered a concussion. School officials overreacted, they say, and Shawn suffered because of it. They plan to write a letter to the local board suggesting ways the rules could be improved.

The athletic director for the school, Carver, claims that the school and team officials "could've done a better job communicating," but they still support the spirit of the law. "We feel like we did what's best for the kid and trying to protect him," he said.

Source: *The Washington Post*

—School Law Bulletin,
Vol. 43, No. 5, March 10, 2016, pp. 6-8.

You Be the Judge

Will appeal court dismiss case in which school security officer said he was retaliated against for complaining of discrimination?

The facts

In 2010, a woman who was a secretary at a high school had an unfortunate exchange with a school security officer. The security officer was an employee of the city who was assigned to the school. According to the security officer, he made a joking comment to the secretary who he alleged then responded by calling him a "nobody" and calling him a racial slur under her breath. The secretary claimed that the security officer sexually harassed her, and that he had done so on several previous occasions, and made a complaint to the Executive Director of Human Resources, who placed the security officer on paid administrative leave while the allegations were investigated.

The same day, the security officer wrote a memorandum to his supervisor, copying the city's Director of Labor Relations, accusing the secretary of using a racial slur against him. In March 2011, the security officer filed a charge of discrimination against the HR director with the Connecticut State Commission on Human Rights and Opportunities (CCHRO), who was then removed from the investigation of the sexual harassment complaint.

The security officer was reinstated to his job at the end of 2011 and assigned to a different school. In December 2012, the board of education informed the officer that he was being placed on a leave of absence because it had come to the board's attention that he lacked a certification that was required by the state. The security officer was provided an opportunity to prove that he had obtained the necessary certification, but instead, he tendered his resignation.

He later sued the board of education, the secretary, and the HR director, claiming that he had been a victim of retaliation in violation of the Connecticut Fair Employment Practices Act (CFEP) and Title VII of the Civil Rights Act of 1964. The lower court granted the defendants' request to dismiss the lawsuit and the security officer appealed.

The Question

Did the security officer have a valid claim of retaliation?

—School Law Bulletin,
Vol. 43, No. 7, April 10, 2016, p. 3.

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50 days and was anticipated to return to work September 9, 2010. CMCSS asserts that on September 2, Jobe contacted the plaintiff's home to find out if he would be returning by September 9 or if his leave of absence would need to be extended past his expected return date.

CMCSS claims that Jobe received e-mail correspondence from Robinson in response to his query about when Robinson would be returning. In this e-mail, Robinson stated that, "he could not reveal any information about his leave to his employer" without the risk of disclosing classified information, and told Jobe that CMCSS could give his position "to someone else."

Source: *The Leaf-Chronicle*

—School Law Bulletin,
Vol. 43, No. 6, March 25, 2016, pp. 6-7.

You Be the Judge (Answer)

Will appeal court dismiss case in which school security officer said he was retaliated against for complaining of discrimination?

The appeals court affirmed the lower court's decision, dismissing the complaint. To make out a baseline case of retaliation under Title VII or the CFEPA, an employee must demonstrate that he "was engaged in protected activity; that the employer was aware of that activity; that the employee suffered adverse employment decisions; and that there was a causal connection between the protected activity and the adverse employment action." The lower court dismissed the security officer's retaliation claims finding that he failed to present any evidence of a causal connection between his protected activity—either his December 2010 memorandum to his supervisor or his March 20, 2011 CCHRO complaint—and his retirement in December 2012.

While the security officer did not challenge the lower court's holding that there was no causal nexus between the protected activity and his 2012 retirement, he argued instead that the lower court should have considered other adverse employment actions that he suffered, including the school board's failure to investigate his claim of racial discrimination, and the fact that he was placed on paid administrative leave for approximately one year while the secretary's complaint was investigated. But, according to the appeals court, neither argument had merit.

The appeals court noted that it has held that "[a]n employee whose complaint is not investigated cannot be said to have thereby suffered a punishment for bringing that same complaint." Rather, failure to investigate can be considered an adverse employment action only "if the failure is in retaliation for some separate, protected act by the plaintiff."

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First Amendment

Woman claims district retaliated after she advocated for special needs students, causing her to lose school board election

Citation: *Munoz-Feliciano v. Monroe-Woodbury Cent. School Dist., 2016 WL 26635 (2d Cir. 2016)*

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

The Second U.S. Circuit Court of Appeals has affirmed a lower court's decision in favor of a school district in a case which a woman who ran for school board claimed that the district retaliated against her after she advocated for students with special needs. The appeals court concluded that the women did not have a First Amendment right to be free from criticism as she ran in the school board election, and found the other conduct of which she complained did not support her First Amendment retaliation complaint. Therefore, the appeals court affirmed the dismissal of her claims against the district.

Clara Munoz-Feliciano lived in the boundaries of the Monroe-Woodbury Central School District. According to Munoz-Feliciano, she engaged in protected speech when she began advocacy efforts on behalf of special needs students in 2008. Following this advocacy work, Munoz-Feliciano claimed that the district engaged in retaliation against her in several ways. First, she claimed that when she decided to run to be elected as a school board member, the district engaged in a "smear" campaign against her, spreading a rumor that she was running on behalf of the Hasidic Jewish community, sending an e-mail that she had unlawfully distributed campaign literature at a school event, and refused her request to home-school her daughter. She also claimed that the district refused to take disciplinary action against another student who attacked her daughter, also in retaliation for her advocacy efforts on behalf of special needs students.

As a result of these alleged retaliatory actions, Munoz-Feliciano sued the district alleging that they illegally retaliated against her after she engaged in First Amendment protected speech. The school district asked the lower court to dismiss the complaint, arguing that Munoz-Feliciano did not state a claim with respect to any of the conduct alleged in her complaint. The lower court agreed and dismissed the complaint and Munoz-Feliciano appealed.

To state a valid First Amendment retaliation claim, Munoz-Feliciano had to show that she had a right protected by the First Amendment, the school district's actions were motivated or substantially caused by her exercise of that right, and the action caused her an injury. Based on this framework, the appeals court found that Munoz-Feliciano's First Amendment retaliation claim against the school district had to fail.

First, on the "smear" campaign, the appeals court found that Munoz-Feliciano did not have a First Amendment right that prevented public officials from criticizing her. The appeals court had concluded in an earlier case that a public official's "advocacy is not actionable in a First Amendment retaliation suit," unless there were "threats, intimidation, or coercion," none of which were present here. Munoz-Feliciano's decision to run for school board made her a "public official" in this context and the allegedly false statements were not actionable here given there was no evidence that plausibly supported a conclusion that the school district defendants acted with "actual malice."

Next, on the e-mail and alleged conduct against Munoz-Feliciano's daughter, the appeals court found that the lower court correctly concluded that Munoz-Feliciano's amend complaint "failed to allege facts sufficient to permit an inference that defendants' conduct was caused by Feliciano's protected activity." Such an inference can be drawn either directly through a demonstration of retaliatory animus or indirectly when there is evidence that an adverse action followed closely after protected activity.

In this case, the appeals court found no direct evidence of retaliatory animus either in the alleged retaliatory conduct with regard to her daughter, and also noted that no timeline was provided connecting this alleged retaliatory conduct to Munoz-Feliciano's advocacy efforts. With regards to the e-mail, the court similarly found no direct evidence of retaliatory animus, and also noted that the e-mail was sent a year after Munoz-Feliciano lost the school board election. "No plausible inference of causation based on temporal proximity can be drawn from the passage of a year or the passage of some undefined period," the appeals court concluded.

Thus, it affirmed the lower court's decision dismissing the First Amendment claims against the school district.

—School Law Bulletin,
Vol. 43, No. 4, February 25, 2016, pp. 3-4.

You Be the Judge (Answer) . . . *(Continued from page 3)*

Here, the security officer alleged that the school board's failure to investigate his complaint constituted retaliation for bringing that same complaint. This was not sufficient to make a baseline case of retaliation.

Moreover, the appeals court noted, it has held that "administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action." In this case, the security officer was placed on paid administrative leave before he wrote the memorandum to his supervisor complaining of racial harassment, and there was no evidence that the decision to place him on administrative leave amounted to anything more than "simply appl[ying] reasonable disciplinary procedures to an employee."

—School Law Bulletin,
Vol. 43, No. 10, April 10, 2016, pp. 6-7.