BEARD LEGAL GROUP

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US Supreme Court Rules Title VII protects LGBTQ+ Workers From Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against any person based upon an individual's "race, color, religion, sex, or national origin." The contours of this prohibition have been a point of legal contention for over half a century. The issue of "sex" is particularly prevalent, as it has the potential to encompass substantially more than the other categories. The Supreme Court of the United States grappled with this issue in the landmark case *Bostock v. Clayton County*, 590 U.S. ____ (2020) rendered on June 15, 2020.

Bostock was a consolidation of three (3) cases that involved employees who claimed to have been disciplined, ridiculed, or dismissed on the basis of their sexual orientation or gender status shortly after their sexual orientation or gender status was revealed.

In a 6-3 decision, the Supreme Court held that Title VII prohibits employers from discriminating on the basis of sexual orientation or gender status. The Court engaged in a textual analysis, which prompted the Court to conclude that dismissal, at least in part, on the basis of sex is unlawful under Title VII. Specifically, the Court stated that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex…" then sex was a "necessary and undisguisable role in the decision…," which is "exactly what Title VII forbids." The Court continued to espouse cautionary words and anecdotes, warning that the consideration of sex is a litmus test – or, it does not matter if there could be other reasons for the employment action if a prohibited factor was a consideration. To explain this point, the Court anecdotally stated: "[i]ntentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view…"

Two of three (3) cases consolidated were to consider whether gay workers are protected under the law. Gerald Bostock claimed he was fired from his job as a social worker in Clayton County, Georgia, after he became more open about being gay, including

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Inside …

"A Teacher is a Teacher is a Teacher" – Equal Pay Act Requires Justification for Pay Differences

Twelve male Moon Area School District teachers filed suit in federal court against the School District in May 2016 claiming they were paid less than their female counterparts because they are men. On April 16, 2020, a federal judge denied the plaintiffs' and defendant's cross-motions for summary judgment. As the court is no closer to a final decision than when the suit began in 2016, the case will proceed to trial unless it is settled.

The Equal Pay Act (EPA) prohibits employers from paying different wages for substantially equal work on the basis of sex. The EPA framework follows a two-step process. First, as applied to the allegations in the Moon Area case, the plaintiffs must establish a prima facie case by demonstrating that female teachers were paid more while performing "equal work." "Equal work" means that of "substantially equal skill, effort, and responsibility, under similar working conditions."

Second, the burden shifts to the defendant-employer to demonstrate that one of the four affirmative defenses listed in the EPA applies – seniority system, merit system, a system which measures earning by quantity or quality of production, and a differential based on any other factor other than sex. Here, the School District's affirmative defense advanced falls under the fourth defense.

However, after hearing oral arguments, reviewing the status reports, briefings, record evidence, and a vast amount of supporting material in the Moon Area case, the judge was not convinced that either the plaintiffs or the defendants met their burden of proof.

The judge noted that the male teachers could not establish they were unequally paid on the basis of their sex as a matter of law and the School District did not definitely show its salary decisions were made for nondiscriminatory reasons.

The male teachers presented information on eighteen comparator women who are teachers in the same district. However, the men failed to show they were paid any different for equal work. In fact, to the court, it seemed as though "the District (and likely its teachers' union in the collective bargaining process) [has] decided that when it comes to pay rates, a teacher is a teacher is a teacher."

The court then touched upon the salary schedule used by the District in the hiring process. Using a "step" and "lane" system, a teacher is placed based on the number of years worked in the district and their education level. The higher the step and lane a teacher is placed, the higher the starting salary he or she may make. The EPA does contemplate a type of system in which an employee of one gender with significant years of service may receive a higher wage than an employee of the other gender with fewer years of service. Unfortunately, "not a single person [could] testify nor [could] any record evidence demonstrate that those justifications actually motivated the District's salary decisions at the time of hire."

The District also used "unwritten guidelines" based on prior teaching experience in order to place teachers into a step and lane. However, the District occasionally departed from those guidelines. While there is evidence that administrators conducted interviews, made hiring recommendations, and used these unwritten guidelines in making salary recommendations, it is also plausible that a jury could reasonably infer that, because the District occasionally departed from the unwritten guidelines, the District considered certain other factors to determine above-step placements. Because of the unwritten guidelines and the deviation from them in certain circumstances, the court concluded this hiring method seems to permit a level of discretion that could allow for sex-based discrimination. Accordingly, it should be up to a jury to determine when, how, and if at all the District did in fact base its decisions on nondiscriminatory factors.

Ultimately, given the mountain of record evidence in this case, it was decided that only a jury may resolve the many determinations of factual inference, weight, and credibility that are inherent in

the arguments advanced by each party.

Practice Note: Cleary, the case reinforces the importance of documenting the reasons for hiring individual candidates at other than Step 1 and reviewing past hiring decisions to ensure consistency and, the take away is that anecdotal information must be maintained to explain any inconsistencies on salary credit and/or salary placement decisions at the time of hire.

Differences in pay rates will not necessarily be illegal but the justifications for the difference should be clearly articulated and documented. Many school districts have also addressed this issue either within the body of their collective bargaining agreements or through school district policy.

Court Says Public Employees Can Be Disciplined for Social Media Posts

In *Carr v. Commonwealth of Pennsylvania Department of Transportation*, the Supreme Court of Pennsylvania was tasked with deciding whether a government employer properly terminated an employee based on messages she posted to a social networking website, Facebook. Ultimately, the Court held that Rachel Carr's post, in which she vented frustration about local school bus drivers stating she would "gladly smash into a school bus," could be grounds for firing if the message could harm PennDOT's reputation in the eyes of the public.

Writing for the Supreme Court, Justice Donohue stated, "even if Carr never intended to drive her vehicle into a school bus, if her words alone could erode the public's trust in her employer's mission, the Department acted reasonably in terminating her employment." In fact, "few statements could be more contrary to the department's mission of providing safe roadways for the traveling public."

In reviewing Carr's termination, the Court relied on the 1968 decision of *Pickering v. Board of Education* which allows a government employer to terminate an employee on the basis of their speech, even when it touches upon a matter of public concern, so long as the employer can demonstrate that an adverse effect could be reasonably foreseen. In short, courts ultimately must balance an employee's free speech rights against the entity's interest in preventing impaired performance, morale, and workplace relationships.

Previously, Commonwealth Court decided that Carr should not have been terminated, concluding that even though Carr's tone and intimations of the post were reprehensible, that did not negate the post's characterization as addressing a public concern. The Commonwealth Court went further and opined that the matter of public concern outweighed PennDOT's interest in protecting their reputation.

The Supreme Court of Pennsylvania reached the opposite conclusion and pointed to the fact that the Department received complaints via social media about Carr's posts which highlights the reasonableness of its concerns regarding the loss of public trust. Further, the Court also found that Carr's post offered little value as a discussion of a matter of public concern. In her position as a Roadway Programs Technician I, Carr lacked experience and specialized knowledge that would have given her the authority and expertise to touch upon public matters.

Justice Donohue concluded that "there is no present dispute whether Carr's comments touched on a matter of public concern, they were essentially a rant based on her personal observation of a particular bus driver rather than an explanation of safety concerns that she became aware of as a Department employee." Therefore, in light of the posts' limited public importance and their detrimental effect on the Department, Carr's posts were not protected under the United Stated Constitution and her termination was upheld.

Ultimately, this case solidifies the notion that there are lines that can be crossed in social media posts, especially when those postings disregard common civility standards. When a post is injurious to the reputation and public interests of the employer, there will be consequences.

Practice Note: Due to the legal nuances and factual distinctions in each case, public sector employers should consult with legal counsel before proceeding to discipline or dismiss an employee for posting comments on social media.

COMMONWEALTH COURT AFFIRMS REVERSAL OF BOARD'S DECISION TO EXPEL STUDENT

"Safe" behind screens, high schoolers J.S. and "Student One" gossiped about their peer "Student Two" via a private social media platform, Snapchat. J.S. joked that Student Two looked like a school shooter because of his long hair and preference for wearing a death metal band tee shirt. As part of this exchange over social media, J.S. sent two "Snapchat memes" about Student Two that were subsequently "screenshotted," posted publicly, and reported to the police. As a result of this private conversation made public, J.S. was brought up on administrative charges of violating the District's Terroristic Threats and Cyberbullying Policy and eventually expelled.

J.S. appealed his expulsion, and on February 25, 2019, Lancaster County Court of Common Pleas Judge Leonard Brown III ruled in favor of J.S. effectively reversing his expulsion. The decision was controversial as it was the first overturn of a student's expulsion from Manheim Township High School in five years. The District was concerned that "the result of the decision [would] be that the students and staff of [the] High School [would] feel less safe." As a result, the District appealed raising four issues which were as follows:

> (1) The trial court erred in holding that J.S. had a due process right to confront Student One, the person identified by the District as the target of J.S.'s alleged terroristic threats and cyberbullying; (2) the trial court abused its discretion because the trial court did not defer to the School District's interpretation of its policies against terroristic threats and cyberbullying; (3) the trial court erred in its analysis of the First Amendment; and (4) the trial court abused its discretion in its application of the substantial evidence standard to the School Board's finding of fact.

Ultimately, after reviewing the record, the arguments of the parties, and the relevant law, the Commonwealth Court concluded that the District's issues were ably resolved in the thorough and well-reasoned opinion of the trial court. Thereby, on May 13, 2020, the Court affirmed the reversal of the District's expulsion of J.S. The key factors that lead to this reversal were the District's failure to prove whether the victim had reason to believe the speaker was inclined to engage in violence and how the victim reacted to the statement.

Although many Districts expressed concern over this decision, this case has actually given school administrators more control over how they discipline students, not less. What was decided in this case is that if a student is threatening school violence, regardless of whether they are on school grounds or not, schools can now follow through with disciplinary action so long as the process is fair. This contextual process was laid out in the case of *Commonwealth v. Knox*, 190 A.2d 1146 (Pa. 2018), and described in detail in the trial court's opinion. Using this process as guidance, schools can better shape their case against a student who makes a threat. It comes as no surprise that no one is "safe" behind their screens and inappropriate actions will have consequences.

The original Court of Common Pleas decision was reported in the May 2019 edition of Beard Legal Group's Education Law Report.

Email, Text and Social Media Refresher: School Business is best conducted on School District-issued accounts

One of the most frequent sources of headaches created by Right to Know Law requests submitted to our clients pertains to searches of email and text communications among School District employees and officials. The PA Office of Open

Records and PA Courts have consistently held that the Right to Know Law applies to records regardless of the manner or form in which they are stored. This means that communications about School District business are subject to review, at minimum, and potential disclosure, even when they exist in the form of messages exchanged via text on personal cell phones, personal email accounts, or within social media apps such as Facebook or Instagram, or even Remind or Classtag, if they involve the discussion of School Business.

In such cases, the obligation of the Open Records Officer is to retrieve and review potentially responsive messages and determine whether they do in fact discuss school business, and if so, whether they are subject to disclosure as a record under the Right to Know Law. This may result in surprise to School Board Directors and Administrators receiving requests, for example, to search their personal devices and app accounts in order to identify and produce any/all messages exchanged between them for a one year period that discussed the closing or construction of a school, the COVID-19 pandemic, or an incident arising at an athletic event.

Even where the communications at issue are expected to be exempt from disclosure, the Right to Know Law requires the Open Records Officer to search, retrieve, review and in some cases create a log of all such messages, even if they are withheld from the requester under one of the Right to Know Law exemptions. Requests of this nature often are noted as some of the most burdensome of those received by School Districts, as they often apply themselves to large groups or categories of individuals – i.e. all School Administrators, all Classroom Teachers, or all School Board Directors, and must be addressed within a period of a little over 30 days.

Given the variety of means of instantaneous communication through personal devices, the interests of School District and all School Officials and Employees in avoiding the type of burden described above are best served by maintaining strict boundaries for communications about School District business by limiting them to School District-issued email accounts, School District issued devices, and School District-designated platforms for electronic communication that do not implicate the use of personal accounts or personal devices. Keeping school business on school accounts, and personal business on personal accounts, is always our recommendation in these situations.

Title VII Protects LGBTQ+ *...continued*

joining a gay softball league. Donald Zarda claimed he was fired as a skydiving instructor after joking with a female client to whom he was strapped for a tandem dive that he was gay.

In the third case, *GR Harris Funeral Homes vs. EEOC et al*, a Michigan funeral home employee (Stephen) claims she was fired after informing the owners and colleagues of her gender transition.

Prior to the US Supreme Court's decision in *Bostock*, only twenty-one states had codified employment discrimination protections for members of the LGBTQ+ community.

In August 2018, the Pennsylvania Human Relations Commission issued guidance based on the Pennsylvania Human Relations Act (PHRA) outlining that discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition and gender expression is unlawful.

Moreover, the Equal Employment Opportunity Commission (EEOC) maintained an expansive view of the "sex" category under the Civil Rights Act that encompassed sexual orientation and gender status—even prior to the Court's *Bostock* decision. However, the EEOC's decisions on the subject tended to lack uniformity. These discrepancies are now resolved, as the *Bostock* decision extended the full employment protection provided by Title VII to the LGBTQ+ community.

NOTE: Please see a more detailed write up of the three (3) consolidated cases leading to the US Supreme Court decision in *Bostock* reported in the Education Law Report Volume XV, Number 3, August 2019 (page 6).

PA School Reopening Task Force Report

Working groups made up of cross-disciplinary practitioners and experts from participating organizations have spent the past month addressing areas of facility/logistics, staffing, instruction, transportation, special education, extracurricular activities, health and safety, communication, resources, and community. The culminating report contains compiled insights and considerations to support information decision-making as local leaders factor in the specific resources and needs of their communities, working to reopen public schools. These insights may or may not apply across every school entity and every circumstance faced, and should not be viewed as directives. However, we hope and trust that the report will be supportive as school districts respond to orders from the administration, recommendations from health officials and guidelines from the Pennsylvania Department of Education (PDE) and develop instructional and operational continuity plan.

To read the Pennsylvania School Reopening Task Force Report go to **https://www.psba.org/wp-content/uploads/2020/06/School-Reopening-Task-Force-Report_FINAL-061820.pdf**

COSA: Health Checks

Employee self reports of medical information do not generally implicate HIPAA. There is helpful guidance from the EEOC about asking employees medical questions in the context of a pandemic.

Here is the link: **www.eeoc.gov/wysk/what-you-should-konw-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws**

Presentations

Carl P. Beard's recent presentations:

- February 26, 2020 co-presenter for Shippensburg University on "An Update on Special Education Law"

- April 24, 2020 Virtual co-presenter for PBI on "Educating Students with Disabilities During COVID-19"

- June 24, 2020 Virtual co-presenter for Dr. Samuel Francis School Law Symposium on "School Law Update"

Before the COVID-19 Pandemic cancellations, Attorney Beard had been invited to present at:

- March 8, 2020 Lehigh University on "Medical Marijuana issues for students with disabilities"

- April 3, 2020 NSBA's Council of School Attorneys Conference on "Protection from Abuse Orders: A School Solicitor's Newest Challenge."

A special "Thank You" to Legal Intern Margaret Thompson for her invaluable assistance in preparing articles for this edition of the Education Law Report.

Save the Date

The Pennsylvanai School Study Council, Penn State Law, Penn State College of Education, and the Partners of Beard Legal Group invite you to join us for:

Education Law Day 2020
A Day with Legal Experts and Educational Topics:
Tough Topics that Occupy Instructional Time and Resources

Possible dates:
Tuesday, November 10, 2020 or Wednesday, November 11, 2020

Location is to be determined based on COVID-19

Special Report

A special Education Law Report will be issued soon regarding the important changes coming August 14, 2020 and will address the impact on schools:

"New Mandates for Dealing with Unlawful Harassment Complaints in the School Setting Coming in August 2020

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Peggy Schooling.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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