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Ninth District Court of Appeals Declines to Order Reinstatement of Football Coach

The United States Court of Appeals for the Ninth Circuit, in *Joseph Kennedy v. Bremerton School District,* 869 F.3d 813 (9th Cir. 2017) has ruled the Bremerton School District did not retaliate against a former football coach in violation of his First Amendment rights when the District terminated his coaching contract after he refused to stop publicly praying after games at the fifty yard line in view of students and parents.

Joseph Kennedy, the coach and employee in question, is a practicing Christian. Kennedy argued that his religious beliefs require him to give thanks through prayer at the end of each game for his players' accomplishments and his opportunity to be a part of their lives through football. As a result, Kennedy began performing prayers by taking a knee at the fifty yard line after each game. His prayer usually lasted about thirty seconds while he wore a shirt or jacket bearing a Bremerton High School logo during the prayer.

Eventually another school alerted Bremerton School District to Kennedy's post-game prayer. After being informed, the School District wrote a letter to Mr. Kennedy informing him of the District's policy regarding religious-related activities and practices and their request that he cease his mid-field post-game prayers. For approximately four weeks after this letter Kennedy complied with the District's request. However, on October 14th, Kennedy issued a letter through his attorneys to the District stating his intention to resume praying on the field following the next home game. Indeed, once the final whistle blew, Kennedy took the field, knelt on the fifty yard line, bowed his head, closed his eyes, and prayed a brief silent prayer. As he was kneeling, coaches and players from the opposing team, members of

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Football Coach
Continued

the general public, and media spontaneously joined him on the field and knelt beside him joining him in prayer.

After this incident, the School District responded to Kennedy with a second letter thanking him for his efforts to comply with their prior directives not to pray on the field and that his conduct at the previous game was inconsistent with their policy on religious-related activities and practices. The District also emphasized that while the District does not prohibit prayer or other religious exercise by employees while on the job, such exercise must not interfere with the performance of job responsibilities and must not lead to a perception of District endorsement of religion. The District felt that Kennedy's actions, while after the game, still took place during a time when Kennedy owed duties to the district during District athletic programs where the District was still responsible for supervision of students.

Notwithstanding this letter from the District, Kennedy continued to pray after the conclusion of subsequent games and was subsequently placed on administrative leave from his position as an assistant coach. Following the conclusion of the season, Kennedy elected not to reapply for a job. Kennedy instead chose to file suit claiming First Amendment retaliation and violation of his right to free speech. The Federal District Court denied Kennedy's requested preliminary injunction and he appealed to the United States Court of Appeals for the Ninth Circuit. In analyzing Kennedy's retaliation claim and violation of the First Amendment, the Court of Appeals laid out three factors that must be considered:

1. Kennedy must show he spoke on a matter of public concern;
2. Kennedy must show he spoke as a private citizen rather than a public employee; and
3. The relevant speech in question must be a substantial or motivating factor in the adverse employment action.

If Kennedy were to prove these three things, the District must then demonstrate that it (1) had an adequate justification for treating Kennedy differently from other members of the general public, or, (2) that the District would have taken the adverse employment action even absent the protected speech.

In this case, the parties only differed on one factor: whether Kennedy spoke as a private citizen rather than a public employee. Because of the parties' stipulation to these facts, the Court of Appeals only considered whether Kennedy spoke as a private citizen or a public employee.

The Court of Appeals determined that Kennedy spoke as a public employee and began with two critical points that deserve attention in coming to this conclusion. First, the relevant speech at issue involves kneeling and praying on the fifty yard line immediately after games while in view of students and parents. Kennedy was not alone and the Court of Appeals knows this because Kennedy was offered an accommodation permitting him to pray on the fifty yard line after the stadium had emptied and students had been released to the custody of their parents. Second, for the same reason, the speech at issue is directed, at least in part, to the students and surrounding spectators. Kennedy's refusal of the accommodation indicated that it was essential that his speech be delivered in presence of students and spectators.

In order to determine whether Kennedy spoke as a public employee, the Court of Appeals also had to make factual determinations of Kennedy's job responsibilities. The Court of Appeals noted, through Kennedy's own acknowledgement, that as a football coach he was constantly being observed by others. Kennedy also agreed that he was responsible for modeling good behavior while acting in an official capacity. Indeed, *amici curiae* briefs written by former professional football players noted that a football coach serves as a personal example or role model to the players. By acknowledging that he was constantly being observed by others, Kennedy plainly understood that demonstrative communication fell within the compass of his professional obligations. His insistence that his prayer occur in view of

students and parents suggests that Kennedy prays pursuant to his responsibility to serve as a role model and moral exemplar. As a football coach, it was also Kennedy's duty to use his words and expression to instill values in the team. The record reflects that Kennedy pursued this task.

It was also important to the Court of Appeals that Bremerton High School players had never prayed on their own in Kennedy's absence. Rather, players were only observed praying on the field at the games where Kennedy personally elected to do so. Finally, the Court of Appeals determined that Kennedy's public actions while serving as a coach were also part of his responsibilities. Kennedy's demonstrative speech, the act of kneeling in prayer in view of the public, thus occurred while performing a function that fit squarely within the scope of his position. Kennedy spoke at a school event on school property wearing Bremerton High School logoed attire, while on duty as an employee, and in the most prominent position on the field, the fifty yard line. Thus, Kennedy knew it was inevitable that students, parents, fans and occasionally the media would observe this behavior. By kneeling and praying on the fifty yard line immediately after games, while in view of students and parents, Kennedy was sending the message about what he values as a coach, what the District considers appropriate behavior, and what students should believe or how they ought to behave. Because this act fell within the scope of Kennedy's professional obligations, the constitutional significance of Kennedy's job responsibilities is plain. He spoke as a public employee, not as a private citizen, and his speech was therefore unprotected.

In conclusion, because Kennedy spoke as a public employee when he kneeled and prayed on the fifty yard line immediately after games while in view of students, parents, and media, he cannot show a likelihood of success on the merits of his First Amendment retaliation claim. Therefore the Court of Appeals for the Ninth Circuit affirmed the Federal District Court's Order denying Kennedy's Motion for Preliminary Injunction.

Other Circuits over the years are in line with the *Kennedy v. Bremerton* decision. In *Borden v. School District of Township of East Brunswick,* 523 F.2d 153 (3rd Cir. 2008) the Third Circuit concluded that a Coach spoke pursuant to his official duties as a coach, and thus as a public employee, when he bowed his head and took a knee with his team while they prayed in the locker room prior to football games. In *Evans-Marshall v. Board of Education,* 624 F.3d 332 (6th Cir. 2010) the Sixth Circuit explained that when a Teacher teaches, the school system hires that speech. As a consequence it can surely regulate the content of what is or is not expressed, because a teacher is not the employee and employer. Similarly in *Doe v. Duncanville Independent School District,* 70 F.3d 402 (5th Cir. 1995) the Fifth Circuit barred school employees from participating in, or supervising student-initiated prayers that took place after basketball practice. The challenge prayers in that case took place during school and controlled curriculum-related activities that members of the basketball team were required to attend. During these activities, district coaches and other school employees are present as representatives of the School and their actions are thus representative of district policies.

Third Circuit Says District and Coach are Not Liable for Student's Traumatic Brain Injury

In November 2011, a football player from Palmerton Area School District experienced a hard hit during a practice session. While some players thought that the student may have been exhibiting concussion-like symptoms, he was sent back into the practice session by his coach. After being returned to practice, the student suffered another violent collision and was removed from the practice field. He would later be diagnosed with a traumatic brain injury.

The parents brought a lawsuit against Palmerton Area School District and Head Football Coach, Christopher Walkowiak. The Student's parents asserted that by requiring the student to continue to practice after sustaining the first substantial blow, the coach had violated their son's constitutional right to bodily integrity under a state-created danger theory of liability. The Parents also brought suit against the District under a former U.S. Supreme Court decision of *Monell v. Department of Social Services of City of New York*.

The Federal District Court for the Middle District of Pennsylvania ruled in favor of the coach and Palmerton Area School District finding that while there was ample evidence to suggest that the coach was culpable under a state-created danger theory of liability, a constitutional right to protection in the context presented in this case was not clearly established in 2011. (189 F.Supp. 3d. 467 (M.D. Pa. 2016)).

The Middle District Court granted the coach qualified immunity and dismissed him from the lawsuit on that basis. As to the District, the Court found that the parents had failed to present evidence sufficient to warrant a jury trial on the question of whether the School District had a custom or policy that caused a violation of the student's constitutional rights. The District Court entered judgment in favor of the School District.

The Third Circuit Court of Appeals case provides a good overview of what is required to prove a state-created danger claim against a public school entity. 2017 WL 4172055.

The first element of a state-created danger claim requires plaintiffs to establish that the harm sustained as a result of the defendant's conduct was "foreseeable and fairly direct."

The second element that needs to be present for liability to attach is that the state actor acted with the degree of culpability that shocked the conscience.

The third element of a state-created danger claim that needs to be proved by the plaintiffs is that a "relationship between the state and the student existed such that the student was a foreseeable victim of the defendant's acts." It needs to be noted that of the four elements, this third element, by far, would be the easiest to prove since it is clear that a student-athlete stands in such a relationship with coaching staff.

The fourth and final element of a state-created danger claim requires a showing that the state actor (in this case the coach) affirmatively used his authority in a way that created a danger to the student-athlete or rendered him more vulnerable to danger.

After reviewing everything the Court stated as follows:

> "In summary, we hold that there exists a relationship between student-athlete and coach at a state-sponsored school such that the coach may be held liable where the coach requires a player, showing signs of a concussion, to continue to be exposed to violent hits. Stated otherwise, we hold that an injured student-athlete participating in a contact sport has a constitutional right to be protected from further harm, and that a state actor violates this right when the injured student-athlete is required to be exposed to a risk of harm by continuing to practice or compete. We now turn to the difficult question of whether this right was clearly established in November of 2011."

The Court then goes on to review a number of cases on state-created danger.

In arriving at a decision in this case, the Court looked at how the information relative to concussions and other types of safety awareness and risk of harm issues have evolved. In ultimately deciding the case, the Court concluded that they were aware of no appellate case decided prior to November 2011 that held that a coach violates the students constitutional rights by requiring the student to continue to play in the circumstances of this particular case.

Looking at this issue as to what people knew in November 2011 is critical in this case. According to the Court, in November of 2011, it was not so plainly obvious that requiring a student-athlete, fully clothed in protective gear, to continue to participate in practice after sustaining a violent hit and exhibiting concussion symptoms implicated the student-athlete's constitutional rights.

The Court then went on to look at the qualified immunity issues stating that the touchstone of qualified immunity analysis is whether there was "sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put [the] defendant on notice that his or her conduct is constitutionally prohibited." The Court turned to a 2000 U.S. Supreme Court decision on qualified immunity that stated as follows:

> "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'"

The Court ultimately closed out by saying:

> "Given the state of the law in 2011, it cannot be said the coach was "plainly incompetent" in sending the student in to continue to practice after he saw the student athlete rolling his shoulder and being told by the student, "I'm fine.""

The Court also stated:

> "Nor is there any basis for concluding that he knowingly violated the student's constitutional rights."

Before closing out the case, the Third Circuit of Appeals Court addressed the challenge against the School District. The Court then went into the prior U.S. Supreme Court Decision in *Monell* stating that local governments, such as school districts, cannot be held liable under §1983 claims for the acts of their employees. Rather, local governments may be found liable under §1983 for "their own illegal acts."

According to a U.S. Supreme Court Decision in 2011, a municipality is liable under §1983 when a plaintiff can demonstrate that the municipality itself, through the implementation of a municipal policy or custom, causes a constitutional violation.

In this case the parents argued that coaches were not adequately trained on concussion recognition and protection, and had they been, the student may not have suffered his severe injury. The parents argued that the school's generic handbook for dealing with injured student-athletes failed to provide a protocol for dealing specifically with concussions. The parents submitted national news articles from 2011 that reported on the risk of concussions in football as well as manuals from neighboring school districts that had implemented concussion policies as of November 2011.

The parents relied upon a 2014 case from the same Circuit Court of Appeals in which the Court had occasion to assess the significance of an expert's report establishing the need for training corrections officers to address and avoid inmate-on-inmate violence. The Court, in the 2014 decision, stated that because the evidence showed that the municipality failed to train its employees to handle recurring acts of violence, the District Court should not have precluded the factual issues from going to a jury.

In the Palmerton Area School District case, the Court held there was no evidence of a pattern of recurring head injuries in the football program. Nor was there evidence that the coach, or any member of the coaching staff, deliberately exposed injured players to the continuing risk of harm that playing football poses. The Court also commented in the context of the *Monell* claim it is also significant that the Pennsylvania General Assembly did not pass legislation that mandated training for coaches to prevent concussions until November 9, 2011, and the legislation did not even go into effect until July of 2012. It was under these limited circumstances there

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New York State Bus Driver Orders Two Transgender Students Off Bus After They Refuse to Sit in Section of Bus Designated for Females Based on Gender at Birth

A South Glens Falls school bus driver ordered two transgender students off the bus after they refused to sit on the girls' side of the bus. The driver had directed students to sit in designated sections of the bus based on their birth gender. Two students, who identify as neither male nor female, referred to as trans nonbinary, decided to sit on the boys' side of the bus. The driver told them to move to the girls' side.

Leo Washington, one of the students, said, "Before he started the bus, (the bus driver) gave us this weird look and he told us to get to the girls side of the bus and we didn't move because we felt more comfortable where we were sitting. When we tried to explain it to him, he started yelling at us to move to the other side of the bus." Student Washington believes the rationale for separating the sexes was to avoid interactions among couples.

Other students showed pages in the student handbook to the driver to show him that he cannot control them based on their gender expression. They also showed him the anti-discrimination law. The two students eventually got off the bus, however the driver did not contact any officials about what happened and left without a way for them to get home.

Superintendent of Schools called the matter "unfortunate" and said it was not handled appropriately at all. The students should not be segregated by sex on a bus.

The Superintendent said he does not believe that the driver intended to discriminate but wanted to create some type of order on the bus. However, he could have handled the situation better. The Superintendent stated "That practice can never continue. We've got to come up with other ways to organize kids on a bus — as long as they're following the rules and following expectations."

The Superintendent said the district would be meeting with the bus driver, but he did not say more because he said it is a personnel matter. He also said the students were completely within their right to refuse the request.

The Superintendent said the district also received information about the incident through text messages from students on the bus sent to the school's anonymous tip line, which was established this year. The Superintendent commented, "We don't tolerate any form of discrimination against kids. All students need to feel safe. They need to feel supported — whether it's in the classroom or on a school bus."

The district trains its staff every year. This year, all staff members received information about the Dignity for All Students Act, and the Superintendent said this incident will be a valuable learning experience and refresher.

SCOTUS to Weigh Challenge to Mandatory Public Sector Union Fees

Approximately 40 years ago, the U.S. Supreme Court in a case where a Detroit, Michigan, teacher sought declaration that agency shop provisions of a collective bargaining agreement were invalid under state law and the federal Constitution. *Abood v. Detroit Board of Education, et al.,* 431 U.S. 209 (1977).

After a series of various appeals, at that time U.S. Supreme Court Justice Stewart outlined that insofar as service charges were used to finance expenditures by the union for collective bargaining, contract administration and grievance adjustment purposes, the agency shop clause was valid. At the same time, the Court also held that the First Amendment principles prohibited both the union and the board of education from requiring any teacher to contribute to support of an ideological cause he might oppose as a condition of holding a job as a public school teacher.

Not everyone will recall but, at some point a great deal of energy and effort was expended requiring the Union to have an internal appeal procedure for dissenters to object on religious grounds to paying such a fee.

Ultimately, in Pennsylvania in 1993 the State Legislature passed the Public Employee Fair Share Fee Law that amended Act 195 to permit various public sector unions to negotiate fair share fee provisions within the body of public sector contracts.

While fair share fees could be collected for purposes of the services that the exclusive bargaining representative expended in regard to the collective bargaining contract and grievance adjustment purposes, the Union could not compel people who did not want to join the Union to pay any more than the percentage of the dues that were directly related to the above activities.

It is for that reason that public sector business agents must maintain on a daily basis activity logs that show what portion of their day-to-day activities are directly related to collective bargaining, contract administration and grievance adjustment purposes.

It is for that reason that the amount of fair share fees may vary from year to year. So, if someone is paying $900 a year in Association dues, and they don't want to become an Association member, and the contract requires them to pay fair share fees because it has been bargained within the four corners of the agreement, the employer would have to deduct the fair share fees from the employee's paycheck and turn that over to the Union for purposes of collective bargaining, contract administration and grievance related matters.

Clearly, this has been an interesting topic at negotiation tables for the last 30 years. While some activity might occasionally come into play where there is a belief that the Pennsylvania State Legislature may revisit the issue, that simply has not occurred.

Things may change in the near future. Recently, a U.S. Seventh Circuit Court of Appeals decision had thrown out an Illinois Department of Healthcare and Family Services worker suit challenging the claim that requiring public sector workers to pay fees to unions violates their First Amendment rights. *Janus and Trygg v. AFSCME and Attorney General of the State of Illinois,* No. 16-3638 (3/21/2017). The U.S. Supreme Court took this issue up approximately a year ago, however the U.S. Supreme Court Justice deadlocked in a 4/4 vote on the same question after the death of Justice Antonin Scalia. On September 28, 2017, the U.S. Supreme Court stated it will again take up the question of whether making public sector employees pay fair share fees violates their First Amendment rights.

The Seventh Circuit Court of Appeals case came along because Illinois had a Public Relations Act, similar to Michigan, that permitted a Union representing public employees to collect dues from its members, but only fair share fees from nonmember employees on whose behalf the Union also negotiated.

The Governor in 2015 filed suit in Federal District Court to halt the Unions collecting the fees, his grounds being the Statute violates the First Amendment by compelling employees who disapprove of the Union to contribute money to it. The Federal District Court dismissed the Governor's complaint, however, on the

ground that he had no standing to sue because he had nothing to gain from eliminating the compulsory fees as he is not subject to them. However, two employees had already moved to intervene. Ultimately, the Seventh Circuit Court of Appeals looked at the two plaintiffs and outlined that one of them had never before challenged the requirement that he pay Union fair share fees while the other Plaintiff did. Irrespective of same, the Seventh Circuit outlined that they could not overturn the U.S. Supreme Court's decision of *Abood v. Detroit Board of Education.*

Apparently, this case will now go back to the U.S. Supreme Court 40 years after fair agency shop/fair share fees were found to be permissible and the issue will be revisited.

Stay tuned.

Brain Injury *Continued from page 5*

was no basis for concluding that a policy or custom of the school district or its failure to provide more intense concussion training to its coaches caused a violation of the student's constitutional rights.

School Districts, School Boards, Administrators and Coaches are encouraged to read this Decision. While the District was fortunate to avoid liability because of what people knew about in 2011, the same set of facts today - since the passage of Concussion Requirements and Protocols - would certainly have caused a different result in 2017. The School District's Administrators and Coaches are all encouraged to ensure that their Policies and Procedures and Concussion Protocols are in place.

While all litigation is fact-specific depending upon the totality of the circumstances in each instance, it is not far-fetched to believe that the same fact pattern today would certainly expose not only a coach but also the District and other employees to §1983 claims.

First Amendment Refresher:

Russo v. Central School District No. 1, Towns of Rush, et al., County of Monroe, State of New York, et al., 469 F.2d 623 (1972)

Susan Russo was appointed as a probationary arts teacher assigned to the high school. As a condition of her employment, she was required by New York Education Law to sign a loyalty oath confirming her support of the Constitution of the United States and New York State. She signed that oath without reservation. Shortly after the school year began in September 1969, a notice appeared on the school's bulletin board announcing that the "pledge of allegiance" would be recited each day and that "all students and staff members [were] expected to salute the flag." The practice at the school was to have the pledge read into the school's intercommunication system by a faculty member or a student. Students and teachers would then stand in their homeroom classes and recite the pledge along with the voice over the public address system.

Mrs. Russo shared a class with another teacher who supervised the home room and exercised senior authority in the classroom. Although the fellow teacher saluted the flag and recited the pledge each morning, Mrs. Russo did not. On the first day of school, when it came time to recite the pledge, Mrs. Russo rose and faced the flag but neither recited the pledge nor saluted the flag. She simply stood at respectful attention with her hands at her sides.

There was no evidence in the record indicating Mrs. Russo ever tried to influence her students to follow her example and no evidence disclosing even a trace of disruption in the classroom as a result of her action. The students all knew the pledge and under the other teacher's guidance recited it each day without incident.

According to Mrs. Russo's belief, the sincerity of which was unchallenged in the proceedings before the Federal District Court, was the phrase "liberty and justice for all" appearing in the pledge, which to most of us represents the spirit and abiding genius of our institutions, in her mind simply did not reflect the quality of life in America today. For this reason, she felt it to be an act of hypocrisy on her part to mouth the words of the pledge when she lacked the belief in either its accuracy or efficacy.

This issue pretty much went unnoticed until the spring of 1970. That morning, the building principal entered Russo's homeroom and observed her standing in silence as the pledge was being recited. She was subsequently summoned to the principal's office to explain her behavior. Mrs. Russo outlined it was a matter of personal conscience.

In May, the principal entered her homeroom a second time on April 14 and noticed that she was still continuing to stand respectfully and not salute the flag at which time the principal indicated that he was going to recommend her probationary period not be renewed unless she resigned. It needs to be noted that previously on February 2 the Board gave a directive to Principals that students had to stand during the pledge. Because of a lot of controversy, the School Board had changed its policy and indicated that if students wanted to be conscientious objectors, they would be permitted to remain seated during the pledge if they so chose. Despite this, the Board, before acting on this, passed a new regulation on May 12 requiring all students who refused to salute the flag to stand in respectful silence. At the same meeting, Mrs. Russo was dismissed from service and no reason for her dismissal was set forth by the Board.

The Second Court of Appeals then undertook a comprehensive review of the law to include a review of the *West Virginia State Board of Education vs. Barnette* case as well as the case they recently decided a few months earlier in *James v. Board of Education.* 461 F.2d. 566 (2nd Cir. 1972). The Court looked at *Barnette* for guidance and knew that it addressed the issue of students who were required to recite the pledge or suffer expulsion. The Court addressed the fact that there was no question but that the refusal to recite the pledge and salute the flag was a form of expression and it matters not that the expression takes the form of silence. (See *Brown v. Louisiana,* 383 U.S. 131 (1966).

In this court, however, the Court stated as follows:

> "But here we are concerned with a teacher, and we are asked to determine whether the responsibilities which that teacher has voluntarily assumed, to shape and to direct the supple and still impressionable minds of her students in accordance with policies of the school board, somehow lessen the constitutional rights she would otherwise enjoy."

After a lengthy closeout/conclusion, the Court held that Mrs. Russo's First Amendment rights were violated when school officials discharged her for standing silently at attention during the daily classroom recitation of the pledge of allegiance in which school regulations required her to participate. The case was ultimately reversed and remanded back to the District Court for proceedings not inconsistent with the Second Court of Appeals decision. In so doing, the Court stated as follows:

> "It is our conclusion that the right to remain silent in the face of an illegitimate demand for speech is as much a part of the First Amendment protections as the right to speak out in the face of an illegitimate demand for silence."

NOTE: This case is being outlined in the Education Law Report in follow up to the First Amendment Refresher that was sent out to School Districts in September 2017 as a Client Alert, and is being outlined in light of several inquiries regarding what is the status of law if a professional educator refuses to stand or otherwise participate in the Pledge of Allegiance."

United States Supreme Court Declines to Take Up Issues of Prayers at School Board Meetings

The United States Supreme Court recently declined to take up a case about prayers before school board meetings, leaving continuing uncertainty over the constitutionality of the practice.

In a docket entry without comment, the Justices declined to hear an appeal in *American Humanist Association v. Birdville Independent School District,* (Docket No. 17-178). In this case, a former student from the Birdville Independent School District in Texas and the Washington-based American Humanist Association sought review of a decision by the United States Court of Appeals for the Fifth Circuit in New Orleans which upheld the District's policy of permitting students to lead prayers before board meetings.

In March, the Federal Appeals Court had said their decision was based on the key question of whether this case is essentially more a legislative prayer case or a school prayer matter. The Federal Appeals Court had ruled in a 3-0 decision that the practice by the Birdville Independent School District did not violate the First Amendment's prohibition on a government establishment of religion.

Since 1997, the Birdville School Board has allowed students, typically in elementary or middle school, to open school board meetings with statements that the challengers said were usually prayers often referring to Jesus Christ and asking audience members to pray. Board Members often stood and bowed their heads during the invocations.

Circuit Judge Jerry Smith, in delivering the opinion of the U.S. Court of Appeals, said the matter involved legislative prayer because a school board was more like a legislature than a classroom. Judge Smith went on to state, "Most attendees at school board meetings are mature adults and even board members' polite requests that the audience stand during invocations do not coerce prayer."

While two other Federal Appeals Courts had reached opposite conclusions in similar cases, the Court in Birdville was able to draw distinctions between those two cases. These distinctions were that the prior decisions had predated *Town of Greece v. Galloway,* 134 S.Ct. 1811 (2015) and other U.S. Supreme Court cases that upheld the practice of prayer before council meetings as legislative prayer and that the students in the other two cases, unlike in Birdville, had formal roles in board proceedings.

The key question since *Galloway*, was whether school boards that open their meeting with prayers are more like general municipal bodies, such as town councils and county boards, or whether their involvement as part of the educational process, with students frequently present at such meetings, make school boards more like schools, which implicates a separate line of case law. The Fifth Circuit Court held that Birdville's practices fell under the *Galloway* line of cases allowing legislative prayers. "The Birdville Independent School District Board is a deliberative body charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds and other tasks that are undeniably legislative. In no respect is it less a deliberative legislative body than was the town board in *Galloway*."

In their appeal to the Supreme Court, the challengers said the Federal Appeals Courts were split on whether school board prayers should be viewed the same as prayers in state legislatures and town councils. "This case presents a recurring question of exceptional Constitutional importance affecting millions of students nationwide that is right for this court to review."

In their brief urging the Justices not to take the case, the Birdville Independent School District argued that the lower court was correct and that school board meetings are not the same as school events such as graduation ceremonies and football games where the Supreme Court has struck down clergy or student-led prayers. "Although school boards deliberate and adopt policies that govern the

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Pennsylvania Employee Fired Over Religious Objections Gets Benefits

The Commonwealth Court of Pennsylvania recently ruled that a school bus driver who had been fired after refusing to be fingerprinted for her job was entitled to unemployment compensation benefits overturning a prior decision by the Commonwealth's Unemployment Compensation Board of Review.

The basis of the woman's objection against fingerprinting was for religious reasons. The Commonwealth Court held that it was wrong for the Unemployment Compensation Board to hold that Bonnie Kaite's belief that being fingerprinted would prevent her from going to heaven was a personal and not a religious belief. The Commonwealth Court was quoted as saying, "Even if it were somehow proper for an employer to question the religiosity of one's beliefs, given that petitioner stressed that her beliefs were biblically rooted and dwelt on concepts such as heaven and the devil, it is difficult to comprehend how the board determined them to be personal and not religious."

Ms. Kaite, who had worked for Altoona Student Transportation since August of 2001, was notified in November of 2015 that she would have to submit to a fingerprinting background check due to the amendments to the Child Protective Services Law. However, Ms. Kaite informed her employer it was against her religious beliefs and asked if she could submit to a different form of background check that did not involve fingerprinting.

Roughly a monthly later, Ms. Kaite was suspended by her employer and told she could only return to work if she submitted to fingerprinting. The Petitioner then filed for unemployment compensation benefits but was determined to be ineligible by the Unemployment Compensation Service Center. After the Unemployment Compensation Board denied her petition, Ms. Kaite appealed to the Commonwealth Court. The Commonwealth Court agreed with Ms. Kaite that her beliefs were religious and not personal. Although she did not belong to a formal religious organization, she did claim to practice her Christian faith at home with her family and she traced her beliefs about fingerprinting to her father, a Christian evangelist preacher.

The United States Supreme Court has previously held that conditioning the availability of benefits upon an employee's willingness to violate a cardinal principal of their religious faith effectively penalizes the free exercise of their constitutional liberties. Sherbert v. Verner, 374 U.S. 398 (1963). Denying Ms. Kaite unemployment benefits effectively forced her to choose between upholding the mandate of her religion, or receiving unemployment benefits. Therefore, it was a violation of her right to free exercise of religion under the Constitution.

Ms. Kaite justified her belief by citing scripture in her testimony. "My father was a Christian Evangelist. In Revelations where it speaks of the mark of the devil to the head and the hands, we were brought up to believe that means tattoos and fingerprints. That's the way I was brought up, and that's the way I still believe today, that if I do this I'm not going to get to heaven because I'm marked with the mark of the devil."

The Commonwealth Court also noted that a Plaintiff in a recent employment case before the Fourth Circuit made a similar claim about the handprint scanners at his job, saying he believed using the scanners would make him vulnerable to being marked with "the mark of the beast." The Fourth Circuit also sided with the employee in that case.

Ms. Kaite has also filed suit against her employer in Federal Court, alleging discrimination and retaliation in violation of federal law.

Prayers at Board Meetings *Continued*

school district, board meetings are not student-centered activities like graduation and football games. Prayer to open a school board meeting, which is brief, solemn and respectful in tone, and which does not proselytize or denigrate other beliefs or non-beliefs, fits within the historical tradition of legislative prayer."

Beard Legal Group Education Law Focus

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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. Lawrence Wess at ljw11@psu.edu.

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:

Carl P. Beard*	*cbeard@beardlegalgroup.com*
Elizabeth Benjamin*	*ebenjamin@beardlegalgroup.com*
Ronald N. Repak*	*rrepak@beardlegalgroup.com*
Brendan J. Moran	*bmoran@beardlegalgroup.com*
Jennifer L. Dambeck	*jdambeck@beardlegalgroup.com*
Carl Deren Beard	*cdbeard@beardlegalgroup.com*
Jon Higgins	*jhiggins@beardlegalgroup.com*

*Partner

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MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
www.beardlegalgroup.com