Hodges Loizzi Eisenhammer Rodick & Kohn LLP

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

EDUCATION EDITION

June 2015

U.S. Supreme Court Finds Facebook Rants Not "Threats" Without Author Intent--In *Elonis v. United States*, the U.S. Supreme Court overturned a criminal conviction for making threats on Facebook.

The Court remanded the case to the trial court after holding that the trial court erroneously convicted the man based on a "reasonableness" standard but without proof of criminal "intent." While not a civil case, the Court's ruling has broad potential applicability to school employment and student matters.

The case arose after Elonis developed an online persona to post violent, graphic rap lyrics to Facebook about: security at his workplace; his soon-to-be ex-wife, including weapons and a diagram of her house; and using explosives on law enforcement officials and shooting a gun at a nearby elementary school.

He posted "disclaimers" that his posts were therapeutic venting. Elonis was convicted after a trial based on a reasonableness standard, meaning the trial court found his comments on Facebook were considered threats if a reasonable person

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Consumer Price Index

Percent change for the month of **April 2015,** for the urban wage earners and clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago Mthly	0.1	0.2
12 Mth	-0.9	-1.6
St. Louis, 2nd Half 2014		
6 Mth	-0.2	-0.3
12 Mth	0.7	0.4
U.S. Mthly	0.2	0.2
12 Mth	-0.2	-0.8

April CPI figures will be released May 20, 2015.

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Remember to provide ISBE documentation of your "timely and meaningful consultation" with private school and parent representatives regarding provision of services to private/home schooled students with disabilities.
- Adopt a resolution to transfer or designate interest earnings on funds before June 30 to prevent conversion to principal under ISBE Regulations.
- Make your reservations now to attend the Lake County Superintendents Fall Leadership Conference in Galena on October 18-20. HLERK is proud to co-sponsor this popular conference.

Frakes Reinforced—No Statutory Right to Recall for Certain Teachers RIF'd Following Unsatisfactory Evaluations-- Following the 2011 legislative overhaul that was Senate Bill 7, teacher performance evaluations—not tenure or seniority—dictate the order of teacher layoffs. Unsurprisingly, the result of SB7 has been a slew of litigation surrounding teacher reductions-in-force ("RIFs") and recall rights.

As we reported in *Frakes v. Peoria School District No. 150*, 2014 IL App (3d) 10306, successfully defended by **Stan Eisenhammer**, **Jeff Goelitz**, and **Tony Loizzi** (see July 2014 *Extra Mile*), the appellate court upheld the RIFs of two tenured teachers who fell into Group 2 and who were not subsequently recalled when positions became available for the next school year. The court concluded that the *School Code* did not grant recall rights to Group 2 teachers (though that rule has been modified by subsequent legislation).

Relying heavily on the rationale in *Frakes*, another district of the appellate court recently upheld the dismissal of another tenured teacher classified as Group 2. In *Segobiano-Morris v. Grayslake Community Consolidated School District No. 46*, 2015 IL App (2d) 140822, the teacher was honorably dismissed as part of a

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Frakes Cont. RIF, along with 19 other teachers. When a vacant position opened that summer, the teacher was not recalled to it, and a Group 1 teacher filled the position instead. The plaintiff argued that she was not properly RIF'd because a position she could teach came open before the start of the next school year, and that she had superior rights to the Group 1 teacher and should have been recalled to the vacancy.

In denying the teacher's claims, the court noted the distinction between the dismissal component and the recall component of the RIF process. The teacher was properly dismissed because she received timely written notice and was dismissed in order of groupings. Once properly dismissed, the Group 2 teacher had no recall rights, let alone any priority recall rights over a Group 1 teacher.

As the court noted, "nothing in section 24-12(b) provides for recalling a group 2 teacher either in general or based on grouping. That the district hired another teacher at the beginning of the 2013-14 school term was, therefore, irrelevant because plaintiff did not have the right to be recalled *at all*."

This case reiterates that the validity of a RIF is not dependent on future staffing (at least absent evidence of bad faith) and that, once RIF'd, a teacher's right to return to a vacant position is governed solely by the recall rules of Section 24-12(b).

Contact any of our "RIF Team" attorneys with your employee dismissal and reduction-in-force inquiries, or Stan Eisenhammer or Jeff Goelitz with questions regarding the impact of the Grayslake ruling on your school district.

Facebook Cont. perceived he or she would come to harm.

The U.S. Supreme Court, however, held that the reasonable-person standard is insufficient to convict a person for making violent Facebook comments, and that what matters is what the sender or poster means by his comments.

Similar situations occasionally arise within the school community. Consider *Burge v. Colton School District*, an Oregon case in the Ninth Circuit (which does *not* govern Illinois). In *Burge*, the court held that a student's Facebook rant about his teacher was protected free speech and not a true threat of violence because the student did not intend to threaten the teacher.

This case arose after a student posted to Facebook that he wanted his teacher fired because she was "just a b*tch" and "she needs to be shot." The principal questioned the student and briefly suspended him but did not call the police, further investigate, or remove him from this teacher's class.

Contact Michelle Todd with your social media inquiries.

U.S. Supreme Court Finds Employer Illegally Discriminated Despite Claim that Employer Did Not Know Applicants Religious Beliefs--Clothing retailer Abercrombie & Fitch's refusal to hire a Muslim job applicant who wore a headscarf to her interview was religious discrimination, even though the company had no actual knowledge of the applicant's religious beliefs.

In *EEOC v. Abercrombie & Fitch Stores, Inc.,* the U.S. Supreme Court held that employers are prohibited from making religion a motivating factor in employment decisions. Whether the employer had actual knowledge of the individual's religious beliefs or practices was irrelevant.

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Abercrombie Cont. Samantha Elauf, a practicing Muslim, applied for a sales position with Abercrombie. In keeping with her religious beliefs, Elauf wore a headscarf to the interview. Elauf did not discuss her religious beliefs during the interview, nor did she request an accommodation from the company's dress policy, which prohibits "caps," a word that is not defined in the policy.

The U.S. Supreme Court held that Title VII does not impose a knowledge requirement. Instead, the intentional discrimination provision prohibits the employer from acting with certain motives. An employer who has actual knowledge of an applicant's religious affiliation does not necessarily violate Title VII for refusing to hire the applicant if avoiding an accommodation was not the employer's motive. On the other hand, an employer who acts with the motive of avoiding an accommodation may violate Title VII even if it has "no more than an unsubstantiated suspicion that accommodation would be needed."

Religious accommodation employment issues continue to increase in complexity. Please contact Vanessa Clohessy or Tina Christofalos with your employment discrimination inquiries.

Immunization Records Now Available Via State Database--The Illinois Department of Public Health ("DPH") has adopted rules implementing an immunization data registry by establishing procedures for data collection and use of the registry.

In July 2011, the Illinois General Assembly passed the *Immunization Data Registry Act*, which provided the DPH with the authority to develop an immunization data registry to collect information regarding immunizations.

The registry contains immunization information for both children and adults, including, but not limited to, the type of immunization, when the immunization was administered, who administered the immunization, religious or medical exemptions, and demographic information. The information is gathered from health care providers for all individuals, unless the individual has "opted out" of the registry.

Illinois public schools may obtain information about their students from the registry if the school has signed a Provider Site Agreement and a Confidentiality Agreement with the DPH. The Confidentiality Agreement places certain parameters on schools including: restricting access to the registry to only those employees who are associated with students' immunization information; restricting access to the registry for any employee who willfully misuses the registry; stating that the registry will not be used for non-health purposes; and agreeing that the registry information identifying students will not be disclosed to unauthorized individuals.

Additionally, any school employee who will use the registry must sign an Individual User Agreement, which includes a confidentiality statement. The Individual User Agreement states that information obtained from the registry that identifies an individual will not be released without the written consent of that person, or his or her parents if the person is under the age of 18. The Individual User Agreement is to be kept in the employee's personnel file.

Information obtained through the registry may only be used for specified reasons, such as documenting that a student has received the required immunization for school admission. If the data is knowingly, intentionally, or recklessly disclosed without consent from the student or student's parents, the person who discloses the information commits a Class A Misdemeanor.

Contact Lori Martin or Stephanie Jones with questions regarding the impact of the Immunization Registry Code on your school district.

Newly Updated Model FMLA Forms Available for Use by Employers--On May 27, the U.S. Department of Labor ("DOL") published updated model *Family and Medical Leave Act* ("FMLA") notices and certification forms, making them available for use as of May 31, 2015, on the DOL's website: http://www.dol.gov/whd/fmla/.

Employers are not required to use the DOL's model notices and certification forms, but employers that choose to use the DOL's model forms *must* discontinue using older versions of the DOL's model forms immediately. The new forms are valid through their expiration date of May 31, 2018.

The most notable update made by the DOL concerns the inclusion of specific references to the *Genetic Information Nondiscrimination Act* ("GINA"), which is a federal law enforced by the Equal Employment Opportunity Commission ("EEOC") that prohibits employers from discriminating against employees/applicants on the basis of their genetic information and imposes restrictions on employer access to and disclosure of genetic information.

Employers will not be in violation of GINA if they receive genetic information from a health care provider (HCP) in response to an FMLA-compliant request for medical information.

However, the EEOC, in its implementing regulations, requires employers to affirmatively instruct HCPs not to release genetic information to employers. GINA provides model language for employers to use to effectuate such notice to HCPs. Interestingly, the DOL's updated notices and certification forms do not include the EEOC's model notice language.

School districts using the DOL's model FMLA notices and forms are required to begin using the updated notices and forms immediately, and should consult with legal counsel to determine whether their GINA notices to HCPs are sufficient to avoid violations of GINA due to an HCP's inadvertent disclosure of genetic information in response to an employer's request for medical information. School districts utilizing non-DOL forms must modify their forms to comply with current law.

FMLA issues continue to grow in number and complexity. Contact John DiJohn with your FMLA inquiries.

Newly Updated Board Member Handbooks Available--As part of our 25th anniversary celebration, we are happy to announce that a newly updated edition of the acclaimed *A School Board Member's Handbook* is now available. HLERK retainer clients have received eight complimentary copies.

Other school districts and cooperatives can purchase copies by simply sending in the attached order form. The new edition includes updates on SB7 and PERA as well as the *Freedom of Information Act* and the *Open Meetings Act*.

No school board member or administrator should be without this handy reference book that addresses the key legal issues you face in a concise, user-friendly format.

Submit the attached form to purchase your copies today.