TEXAS SCHOOL ADMINISTRATORS' LEGAL DIGEST™

Publisher: Park Place Publications, L.P.
Managing Editor: Jim Walsh
Editor: Jennifer Childress
Publisher: Ted Siff

www.legaldigest.com

Volume 29, Number 9 **October 2013**

A LOOK INSIDE . . .

We open this month with an insightful article on assault leave claims by Walsh Anderson Shareholder Robb Decker, including analysis of recent decisions by the Commissioner of Education. We follow up with reports on twelve court cases, including one from the 5th Circuit, one decision from the Commissioner's office, and two special education due process hearing decisions. Here are the highlights.

Labor and Employment

We report a slew of retaliation claims this month. The first, *Mooney v. Lafayette County Sch. Dist.* (page 6), demonstrates that an employee's open endorsement of a school board candidate is protected speech under the First Amendment. The First Amendment prohibits adverse employment actions taken against an employee for engaging in such political speech.

Vallejo v. North East ISD (page 6) involved both overtime and retaliation claims under the Fair Labor Standards Act (FLSA). The trial court held that the employee could pursue FLSA claims that the district denied him overtime compensation and retaliated against him for complaining about missed wages.

The Equal Pay Act also prohibits retaliation against an employee who complains about unequal pay. Although the employee in *Morgan v. Denton ISD* (page 7) sued for violations of the Equal Pay Act, she was unable to produce sufficient evidence to support those claims.

The plaintiffs in *Cole v. Pearland ISD* (page 8) and *Fort Bend ISD v. Williams* (page 9), both alleged race discrimination and retaliation stemming from their employment. Neither employee, however, was able to prove the claims. The court in *Cole* also made it clear that working in "unpleasant" working conditions does not amount to a hostile work environment under Title VII, without a showing of discriminatory animus.

Retaliation also was the subject of *Crutcher v. Dallas ISD* (page 10), and *Farran v. Canutillo ISD* (page 11). It would appear that retaliation claims are on the rise. The districts were able to prevail in each of these cases, in part, because they were able to demonstrate through clear documentation legitimate, nonretaliatory reasons for the employment decisions at issue.

Liability

Government officials being sued in their individual capacities can raise the defense of "qualified immunity." Two cases this month address the qualified immunity defense, *Fennell v. Marion ISD* (page 12) and *Moreno v. Northside ISD* (page 16), and show that qualified immunity protects school officials from civil liability based on the performance of discretionary functions. The officials' conduct must be objectively reasonable under clearly established law.

Practice and Procedure

Those who practice before the Commissioner of Education should look closely at *McDonald v. Houston ISD* (page 13). It sets out the briefing standards that apply in cases before the Commissioner. The failure to follow those standards could jeopardize the party's case.

Special Education and Disability Law

To learn more about when a district will be required to provide a special education student a private or residential placement, see the three cases in our Special Education and Disability Law section this month. In *Student v. Little Cypress Mauriceville CISD* (page 14), the student required a residential placement to achieve meaningful education progress. However, in *G.I. v. Lewisville ISD* (page 14) and *Student v. Austin ISD* (page 15), the school districts offered the student a free appropriate public education in the least restrictive environment.

And you don't want to miss this month's Web Exclusive and Law Dawg entries. Both columns will take you on a ride to investigate what happened to Mary Beth Tinker, the student plaintiff in the landmark U.S. Supreme Court case *Tinker v. Des Moines Ind. Community Sch. Dist.*

Hope you enjoy!

Also . . .

- **Assault Leave 101 –What To Do When An Employee Requests Assault Leave (Robb Decker)**
- **Law Dawg (Jim Walsh)**
- **Legal Developments**
- **25th Annual Personnel Law Conference for School Administrators Registration Form (LD-TASPA)**

ASSAULT LEAVE 101 –WHAT TO DO WHEN AN EMPLOYEE REQUESTS ASSAULT LEAVE

By Robb Decker
Attorney at Law
Walsh Anderson Brown Gallegos Green & Treviño, P.C.
San Antonio, Texas

The Texas Legislature has provided assault leave for school district employees for many years. Fortunately, many districts rarely have a situation arise where an employee submits a claim for assault leave. Unfortunately, if you read the provisions for assault leave in the Texas Education Code or in your policy, generally policy DEC, you may be left with a lot of questions. When is an employee entitled to assault leave? What are the events that must occur for an employee to assert a right to assault leave? When should you approve assault leave? How do you determine whether the employee is, in fact, entitled to assault leave? Finally, once given, when does the right to assault leave end?

This is a timely topic, given some new developments coming from the Commissioner of Education's office. Recently, the Commissioner issued the decision *Smith v. Dallas Independent School District*, Docket No. 072-R10-0710 (Comm'r Educ. June 5, 2013). The decision provides a great overview of the status of assault leave in Texas. This article will review *Smith v. Dallas ISD,* and other assault leave cases, and offer some practical tips for administrators to use when an assault leave claim is filed in your district.

Texas School Administrators' Legal Digest
ISSN 0882 – 021X
Published 10 times a year

Individual subscription.. $140

Copyright © 2013. Reproduction of all or part of this publication requires permission from the publisher.

Managing Editor: Jim Walsh
Editor: Jennifer Childress
Chief Operating Officer: Ted Siff

Editorial Advisory Board:
Lisa Brown – Thompson & Horton, L.L.P.
Robb Decker – Walsh, Anderson, Gallegos, Green & Treviño, P.C.
Wayne Haglund – Haglund Law Firm, P.C.
Sarah Orman – Walsh, Anderson, Gallegos, Green & Treviño, P.C.
Joe Tanguma – Walsh, Anderson, Gallegos, Green & Treviño, P.C.
David Thompson – UTSA

Texas School Administrators' Legal Digest welcomes your comments and contributions, though publication is not guaranteed. The views of feature article authors are their own and do not necessarily reflect the views of the **DIGEST.** *The information provided in the* ***DIGEST*** *is not intended to constitute specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.*

Direct correspondence and subscription inquiries to:
Texas School Administrators' Legal Digest
1601 Rio Grande, Ste. 455 • Austin, TX 78701
512-478-2113 FAX 512-495-9955
Email: info@legaldigest.com
Website: www.legaldigest.com

Legislative Background of Assault Leave

The Texas Legislature has provided public employees with the right to paid leave from work when injured by someone while performing their job. While this type of leave clearly has a proper place in our system, the amount of detail the Legislature provided about assault leave is very limited. The right to assault leave is found in Texas Education Code section 22.003(b) & (c), which states:

> (b) In addition to all other days of leave provided by this section or by the school district, an employee of a school district who is physically assaulted during the performance of the employee's regular duties is entitled to the number of days of leave necessary to recuperate from all physical injuries sustained as a result of the assault. At the request of an employee, the school district must immediately assign an employee to assault leave and, on investigation of the claim, may change the assault leave status and charge the leave against the employee's accrued personal leave or against an employee's pay if insufficient accrued personal leave is available. Days of leave taken under this subsection may not be deducted from accrued personal leave. The period provided by this subsection may not extend more than two years beyond the date of the assault. Notwithstanding any other law, assault leave policy benefits due to an employee shall be coordinated with temporary income benefits due from workers' compensation so that the employee's total compensation from temporary income benefits and assault leave policy benefits equals 100 percent of the employee's weekly rate of pay.
>
> (c) For purposes of Subsection (b), an employee of a school district is physically assaulted if the person engaging in the conduct causing injury to the employee:
>
> (1) could be prosecuted for assault; or
>
> (2) could not be prosecuted for assault only because the person's age or mental capacity makes the person a nonresponsible person for purposes of criminal liability.
>
> (c-1) Any informational handbook a school district provides to employees in an electronic or paper form or makes available by posting on the district website must include notification of an employee's rights under Subsection (b) in the relevant section of the handbook. Any form used by a school district through which an employee may request leave under this section must include assault leave under Subsection (b) as an option.

TEX. EDUC. CODE § 22.003(b) – (c-1).

This is the totality of the legislative provisions concerning assault leave. As you can see, it is not even its own section under the Texas Education Code, but is instead included as a part of the requirements of the minimum personal leave program that must be offered to every school district employee. Because the details are limited, much of what we know about assault leave comes from cases in which the Texas Commissioner of Education has heard an appeal of a district's denial of an employee's request for assault leave. So why do you care? An employee who meets the requirements of assault leave is entitled to up to two years of paid leave to recuperate from the assault. Workers' compensation benefits likely will reduce the cost of the leave for the district; but depending on the size of your district and the position of the employee, any extended leave by an employee can cause a hardship district. For these reasons, it is important that administrators fully understand when an employee is entitled to assault leave and how to proceed when an employee makes a request for assault leave.

Assault Leave is a Remedial Statute

As a first consideration when reviewing nearly any provision under the Texas Education Code, we must consider the rights given in the Code broadly and defer to the general principle that the employee be given the benefit included in the law. Under statutory interpretation principles, this is called giving a "remedial effect" to the statute. In practice, giving a remedial effect means we read what is given in a statute broadly and if it is a close call, then generally the statutory protection applies. Giving the most comprehensive and liberal construction to the statutory language, will provide the employee as much protection as possible. Even with this general standard, however, there are many situations in which an employee is seeking assault leave but the facts surrounding the situation do not meet the required elements.

What are the Key Elements for Assault Leave Considerations?

The first thing to do when faced with an assault leave request is to thoroughly investigate the events that occurred. On its face, the statute provides that "an employee of a school district who is physically assaulted during the performance of the employee's regular duties is entitled to the number of days of leave necessary to recuperate from all physical injuries sustained as a result of the assault." That sounds simple, but many times these terms must be considered in depth to determine whether assault leave is proper. After consideration of the specific facts, it may be determined that the situation does not meet the requirements necessary to qualify for assault leave as defined in the statute. The first term that you must consider is what is meant by "physical injury."

What Injury Qualifies Under Assault Leave

The language in the statute is clear that the employee needs to have a "physical injury" sustained as a result of the assault to qualify. What this means is that for an employee to qualify for assault leave they must have some physical injury to their body, which was caused by the assault, which needs medical attention and requires that they be absent from work to recuperate from that injury.

It is not unusual to encounter a situation where an employee may seek assault leave following an incident, but the issue is not a physical limitation. Instead, the employee's lingering issue is their mental status following the incident. Consider a situation where an employee was struck by a student, but suffered no disabling physical injuries. The employee, however, now is afraid to return to the classroom or school where the assault happened and is asking for assault leave because they are afraid to return to work. While this employee might be entitled to some type of protected leave to deal with, and try and overcome the mental aspect of the trauma, that employee would not be entitled to assault leave as the employee is not requesting leave to recuperate from a physical injury. *Cavazos v. Raymondville ISD*, Docket No. 017-R10-1006 (Comm'r Educ. 2009).

A second initial step is to determine when the assault and injury happened. The right to assault leave is specifically limited to assaults that occurred during the employee's performance of their regular duties. For example, an employee using the district's track for their own personal use would not be eligible for assault leave if they were assaulted on the track. But, what if the employee was assaulted on the track by a parent of a student who was mad at the teacher for a grade the teacher gave their child? Is this "during the performance of the employee's regular duties"? While this particular issue about the course and scope of duties has not been presented to the Commissioner in any appeal, it is a situation which could easily come up in some variety. So far, the assault leave cases taken to the Commissioner have involved events during the school day and thus whether it is "during the performance of the employee's regular duties" has not been discussed. If you run into such a scenario where an assault happens outside of the school day, but nonetheless is clearly related to the employee's job, you may want to consult your district's attorney to discuss the situation and how to proceed with the request.

What is a Physical Assault

If the employee has a physical injury, administrators next will want to consider whether the incident rises to the level of an assault as defined by law. More often than one might think the answer to that question is going to be yes. To have a physical assault that qualifies the employee for assault leave, there only needs to be some bodily injury. According to the Commissioner, the definition of "bodily injury" as used in the assault leave provision is the definition provided by the Texas Penal Code. Under Texas Penal Code § 1.07(a)(8), bodily injury is defined as "physical pain, illness, or impairment of physical condition." Texas courts interpreting this provision have made clear that bodily injury can be reached with even minor physical contact. *Smith v. Dallas Independent School District*, Docket No. 072-R10-0710 (Comm'r Educ. 2013) (citing *Lewis v. State*, 530 S.W.2d 117 (Tex. Cr. App. 1975)). Bodily injury is separate from "serious bodily injury," which is defined under Penal Code § 1.07(a)(46) as a "bodily injury that creates a substantial risk of death or that causes death or serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

What this all means in a practical sense is that if an employee involved in an incident felt pain or had any level of injury from the strike, then they have met the definition of an "assault" under the assault leave provision. But, deciding that the situation has met the definition of an assault is not the sole consideration. The next consideration is whether the student who committed the assault had the requisite mental state to engage in an assault. This question, much like the question of whether there was an assault or not, generally should not require too much review or consideration.

Intent to Assault

To meet the statutory definition of assault, the assailant needs to have the requisite intent to engage in the assault. Assault under Penal Code § 22.01(1) and (3) requires that the assailant "intentionally, knowingly, or recklessly causes bodily injury to another . . . or . . . intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the conduct as offensive or provocative."

There are two issues that have frequently come up over the years about intent when an assault involves a student. The first reason to deny assault leave that some districts implemented was based on the notion that, because the student was a minor, the student did not have the mental capability to engage in an assault. In both civil and criminal law contexts, minors are legally incapable of having "intent" because under our legal system children are deemed to be unable to understand the consequences of their actions. Thus, they cannot act intentionally, knowingly or recklessly under the law. This legal limitation was raised several times in incidents involving students with special needs who caused injury to an employee.

As an administrator looking into an assault claim today, however, you no longer need to spend too much time or effort on determining whether the student had the mental capacity to intend the injury because the Texas Legislature put that question to rest. After several Commissioner decisions on whether the student was capable of formulating the required intent or not, in 2001 the Texas Legislature added subsection Texas Education Code § 22.003(c) to the assault leave provision. This new section eliminated the possibility for a district to assert that a student was too young or too mentally infirmed to have the requisite intent. The statute states:

> For purposes of Subsection (b), an employee of a school district is physically assaulted if the person engaging in the conduct causing injury to the employee:
>
> (1) could be prosecuted for assault; or
>
> (2) could not be prosecuted for assault only because the person's age or mental capacity makes the person a nonresponsible person for purposes of criminal liability.

This additional provision confirmed what the Commissioner had generally held, that when reviewing whether an employee was assaulted by a student, we should not look at the mental capacity of the student assailant. Thus, based on the 2001 amendments, whether the student has the mental capacity to understand that their action could lead to an injury clearly is not a relevant consideration any longer.

What about a Student's Reckless Behavior Leading to Assault?

Nevertheless, whether a student has the mental capacity to understand the consequences of their actions is a different question from whether the student intended to cause an assault. Not every incident in which an employee sustains a physical injury based on a touching by a student falls under the protections of the assault leave statute. An assault under the law requires action that is purposeful or reckless. Reckless under the Penal Code is when the "person acts recklessly, or is reckless, with respect to the circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." Tex. Penal Code § 6.03(c). I am certain that administrators will be surprised to read this, but students act with reckless behavior quite often. If a student acts in a reckless manner and an employee is injured due to that reckless behavior, assault leave likely is appropriate.

The decision on whether a student's behavior is reckless was one of the issues addressed this summer in *Smith v. Dallas ISD*. The facts in *Smith* involved whether an elementary student acted recklessly when the student jumped onto the back of a teacher at recess. The record showed that the student and Mr. Smith had engaged in similar "horseplay" in the past. The district argued that the teacher could not claim that it was an assault because the two had engaged in similar behavior in the past without incident. The Commissioner agreed and stated that the student clearly could not have tried to injure Mr. Smith intentionally or knowingly as they had engaged in such behavior before and Mr. Smith was not injured by it. When deciding if this behavior qualified as reckless behavior, one piece of evidence the Commissioner reviewed was the fact that the student was given a disciplinary referral for the action. While it was not dispositive of deciding whether the behavior was reckless, the Commissioner stated that it was relevant to the determination. *Smith v. Dallas ISD,* (citing *Charles-Washington v. Fort Bend Independent School District*, Docket No. 091-R10-804 (Comm'r Educ. 2006)). Here, the Commissioner held that the student committed an assault under Penal Code § 22.01(a)(3) because the evidence showed that the student intentionally caused physical contact with Smith and the student should have known that Smith would find that contact offensive. Nevertheless, Smith was not entitled to assault leave because Smith failed to prove that he sustained an injury that required him to take time off in order to recuperate.

Assault by Offensive Touching

The Texas definition of assault recognizes two distinct types of assault. The first is the intentional or reckless conduct which

ASSAULT LEAVE 101 continued on page 17

LAW DAWG

by Jim Walsh
Attorney at Law
Walsh, Anderson, Gallegos, Green & Treviño, P.C.

DEAR DAWG:
I'm a little concerned about our trustees' attendance at the TASA/TASB convention. In the past, we have had trustees who partied at the convention more than they learned. We had one guy who went to the convention every year and never attended a single session. But he didn't miss any of the receptions! This slowed down when the new law came into effect that required trustees to get training and required us to publicly shame the ones who didn't get enough of it. And then there was the year when the guy from the local TV station interviewed our board president about what he had learned at the session on the Open Meetings Act. The board president gave a very nice answer, summarizing some key points. What the board president didn't know is that the TV guy already had film of the board president skipping out of the session. In fact, he was eating a very expensive lunch at a swank restaurant during the session that he claimed to have attended!

So we have been on our best behavior of late, but still, there are a lot of receptions, and frankly…a lot of alcohol. Now I understand there is a new law that authorizes a judge to remove a school board member from office if the trustee is intoxicated "on or off duty." So if I understand this correctly, even if a trustee dutifully attends all sessions and participates in all meetings, he or she can be removed from office for having a few too many at a reception after hours. Am I reading that right? NEW SUPERINTENDENT, WANTING TO AVOID EMBARRASSMENT FOR OUR TRUSTEES.

DEAR NEW SUPE:
We applaud your proactivity! And yes, you are reading it right. But perhaps you didn't read all of the relevant sections. There is a loophole. Section 87.012 of the Local Government Code does indeed add school board members to the list of officials who might be removed from office for a variety of offenses. And yes, intoxication "on or off duty" is one such reason. But subsection (b) of the law provides a loophole: it says that the trustee cannot be removed "if the intoxication was caused by drinking an alcoholic beverage ON THE DIRECTION AND PRESCRIPTION OF A LICENSED PHYSICIAN PRACTICING IN THIS STATE." So how bout that! You just need to get a doctor's prescription and then get as snockered as you'd like. No problem!

We happen to know that the Walsh Anderson law firm will be hosting a reception during the TASA/TASB Convention at the Iron Cactus. Alcoholic beverages will be dispensed. Being a "full service" law firm, Walsh Anderson has already arranged to have a team of physicians on hand, ready to write prescriptions as appears necessary. We want to keep our trustees on the job!

If your trustees plan to attend a reception where alcohol will be served, we encourage you to check things out before you go. Let the host know that some of your trustees may get blasted. Ask the host if they have "licensed physicians practicing in this state" on hand, prescription pads at the ready. If they don't provide that service, don't go. Go to the Walsh Anderson reception.

With our sharp legal analysis, we also noticed that removal of the trustee due to intoxication can only be done if the trustee got intoxicated on "an alcoholic beverage." Thus there is no problem with getting high smoking pot, snorting cocaine, ingesting huge quantities of mouthwash, sniffing glue or just getting "high on life." It appears that the trustee could save his or her seat on the board by acknowledging that, "Yes, your honor, I was blotto that night, but it was marijuana. Not alcohol." PLEASE NOTE THAT THE DAWG DOES NOT ENDORSE ANY OF THESE ACTIVITIES (other than being high on life) BUT IS SIMPLY TRYING TO PROVIDE ACCURATE INFORMATION ABOUT THE LAW.

DEAR DAWG:
Some of us were sitting around the other day wondering what ever happened to Mary Beth Tinker. I'm sure you know that name, Dawg. She was the 8th grader in Des Moines, Iowa in 1965 who defied her principal's directive by wearing a black armband to school in support of a truce in the war in Vietnam. The principal suspended her and she sued. The case went to the U.S. Supreme Court, which ruled in her favor, thus confirming that students enjoy constitutional rights while they are at school. *Tinker v. Des Moines*. We figure it is very likely that she went on to a life of political activism. Just wondering: WHAT EVER HAPPENED TO MARY BETH TINKER?

DEAR WHAT EVER HAPPENED:
We can't prove it but we strongly suspect that the former peace activist has been writing CSCOPE lesson plans for the past several years. She is now on a bus tour around the country to promote student free speech. Go to www.tinkertourusa.org for details. For more on this, look for the Digest's Web Exclusive for this month.

DEAR DAWG:
Is it true that bus drivers can now kick kids off the bus for misconduct? LONGTIME, FRUSTRATED DRIVER.

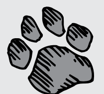
DEAR LONGTIME:
Nope. In fact, we just read of a bus driver in Longview who threw 20 kids off the bus at an unauthorized stop. That driver no longer works for the district. There is a new law that says bus drivers can refer unruly kids to the principal, but then it's up to the principal to decide how to handle it. We think that law just says out loud what has been the common practice. Bus drivers are not authorized to suspend students from the bus.

Got a comment or question for the *Dawg?* Send it to jwalsh@wabsa.com.

NOTE TO READERS:
THE DAWG NOW TWEETS!
FOLLOW THE LAW DAWG ON TWITTER:
@JWalshtxlawdawg

Follow Us on Facebook! facebook Legal Digest

Follow Us on Twitter! twitter twitter.com/legaldigest



LEGAL DEVELOPMENTS

LABOR & EMPLOYMENT

First Amendment Retaliation

DID THE SCHOOL DISTRICT RETALIATE AGAINST THE ASSISTANT PRINCIPAL DUE TO HER POLITICAL SPEECH?

Case citation: Mooney v. Lafayette County Sch. Dist., __ Fed.Appx. __, 2013 WL 4018662 (5th Cir. 2013).

Summary: Lisa Mooney worked for the Lafayette County School District (LCSD) as an assistant principal when she openly supported a candidate for superintendent who was running against the incumbent superintendent. The school principal, who was Mooney's supervisor, and the assistant superintendent openly supported the incumbent superintendent and made a number of statements regarding Mooney's allegiance to the opposing candidate.

Following the election, Mooney's work performance was questioned and she was recommended for a demotion to her former position of speech pathologist. The demotion did not occur, but Mooney was placed on a Performance Improvement Plan (PIP). Mooney was later investigated for conducting a strip search of a student in violation of district policy. She was formally reprimanded by the principal for her conduct. Ultimately, LCSD eliminated Mooney's position as part of a reduction in force (RIF), resulting in the nonrenewal of her employment contract and her termination.

Mooney brought this suit under 42 U.S.C. § 1983 and Title VII against the school district, alleging the nonrenewal was retaliation (1) for engaging in political speech protected by the First Amendment and (2) for opposing unlawful gender discrimination. The trial court granted judgment in favor of LCSD and dismissed Mooney's complaint. Mooney appealed to the Fifth Circuit Court of Appeals.

Ruling: The Fifth Circuit held that Mooney produced sufficient evidence to overcome summary judgment on her First Amendment claim that her political speech was a motivating factor in LCSD's decision to not renew her contract; but she failed to introduce sufficient evidence to support her Title VII retaliation claim based on gender discrimination.

To prevail on her First Amendment retaliation claim, Mooney had to show that (1) she suffered an adverse employment action; (2) her speech involved a matter of public concern; (3) her interest in speaking outweighed the employer's interest in promoting efficiency in the workplace; and (4) the speech motivated the employer's adverse employment action. According to the appeals court, Mooney met each element of her claim. Although the nonrenewal occurred three years after her political speech, the chronology of events leading up to her nonrenewal raised genuine issues as to whether the district's employment decisions were motivated by her speech. Following her political support of the opposing candidate, Mooney came under harsher scrutiny by her supervisors, who were open supporters of the incumbent superintendent. Given the events leading up to her nonrenewal, the appeals court held that the evidence was sufficient for a "reasonable juror to infer retaliatory causation, especially considering that the 'causal link' need only be that her protected activity was one reason motivating LCSD's decision." Mooney also raised doubt concerning the district's stated reasons for its employment decisions. Thus, genuine issues of material fact existed on whether the district's stated reasons were a pretext for retaliation. The appeals court returned the case to the trial court for further proceedings on the First Amendment claim.

However, the Fifth Circuit upheld the dismissal of the Title VII retaliation claim. Mooney simply failed to produce any evidence of gender animus to support the Title VII claim. The appeals court held that genuine issues of material fact existed to support the First Amendment retaliation claim, but dismissed the Title VII claim.

Things to Remember: ***Notice the court's statement that the protected activity needs to be only "one reason" motivating the adverse employment decision. This makes it difficult for employers to get such cases dismissed on summary judgment.***

Compensation

DID THE EVIDENCE SUPPORT THE EMPLOYEE'S OVERTIME CLAIMS?

Case citation: Vallejo v. North East ISD, 2013 WL 3050484 (W.D. Tex. 2013) (unpublished).

Summary: Manuel Vallejo worked for the North East Independent School District as a materials handler from September 1985, until his resignation on August 9, 2011. Around 2008, Vallejo began noticing problems with his paychecks. According to Vallejo, his paychecks did not reflect the total hours of overtime he worked. Vallejo complained to his supervisor, but the supervisor assured him the paychecks were correct. Vallejo then spoke to a payroll specialist, and then ultimately the district's senior payroll manager, Emma Jackson. After an investigation into the matter, Jackson determined that Vallejo's supervisor had improperly subtracted the overtime because of his incorrect assumption that the district did not pay for unapproved overtime. As a result, the district conducted an audit of payment records for all employees under Vallejo's supervisor and paid them for overtime due. Vallejo was paid $32.78 for unpaid overtime, but he did not agree with the amount paid.

The day after Vallejo met with Jackson to state his concerns about the overtime pay, Vallejo's supervisor allegedly issued Vallejo a reprimand for tardiness and poor work performance. He had never been reprimanded for those reasons before. The supervisor also held a meeting with the department employees, purportedly indicating that three tardies would result in termination. According to Vallejo, the supervisor stated that if the employees did not like it he "would meet them on the other side," and that "one bad apple ruins it for everybody." After the meeting, the supervisor and general manager met with Vallejo and asked him why he "went over his head" to report the overtime problems to Jackson. In the months that followed, Vallejo alleged that he was required to perform jobs outside of his usual responsibilities, such as unloading trucks, sweeping, and picking up trash, among other things. On August 2, 2011, Vallejo got upset that his supervisor was checking up on him and told the supervisor, "I'm tired of this f____ing shit, you checking up on me." Shortly thereafter, Vallejo was recommended for termination. He resigned, however, in lieu of termination.

Labor and Employment, continued

Vallejo filed suit against the school district, claiming that the district denied him overtime payments in violation of the Fair Labor Standards Act (FLSA). He claimed that the violations were "willful," which would entitle him to three years of accrued, unpaid overtime pay. Vallejo also claimed that the district retaliated against him by harassing him and forcing him to resign (*i.e.,* constructive discharge). In response, the district requested judgment in its favor prior to trial.

Ruling: The trial court dismissed the constructive discharge claim, but let Vallejo proceed on his FLSA overtime and retaliatory harassment claims. The district argued that the overtime claims were subject to dismissal because Vallejo had not produced sufficient evidence of the amount and extent of overtime worked. The trial court disagreed and held that the evidence created a genuine issue of fact regarding whether the district's payment of $32.78 was sufficient to compensate him for unpaid overtime.

The evidence, however, was insufficient to sustain the claims that the alleged violations were willful. Vallejo was unable to show that the district knew of or showed reckless disregard for overtime pay discrepancies. While he could not show a "willful" violation, that did not preclude an award of liquidated damages (*i.e.,* additional damages determined by the trial court). To avoid an award of liquidated damages, the district would have to show that it acted in good faith and had reasonable grounds to believe that its actions complied with the FLSA.

Vallejo's evidence was sufficient to raise genuine issues of material fact on whether he was harassed due to his complaints of unpaid overtime. He engaged in "protected activity" under the FLSA by complaining to his supervisors about overtime pay discrepancies. The evidence also was sufficient to establish a causal link between his complaints and the alleged harassment, by being reprimanded a day after he raised his complaints, being made to do extra jobs, and being called out during a staff meeting as a "bad apple." The evidence, however, did not support a claim of "constructive discharge." The evidence showed that the district had a legitimate, nonretaliatory reason for recommending his termination after Vallejo used profanity against his supervisor in violation of district policy.

Things to Remember: ***Yet another retaliation case that survives the first hurdle.***

THE EMPLOYEE FAILED TO ALLEGE VALID DISCRIMINATION AND RETALIATION CLAIMS UNDER THE EQUAL PAY ACT

Case citation: Morgan v. Denton ISD, 2013 WL 4418447 (E.D. Tex. 2013) (unpublished).

Summary: Valda Morgan worked for the Denton Independent School District as the Director of Special Education from 1999-2010, and the Residential Facilities (RF) Administrator during the 2010-11 school year. While she was the Director of Special Education, the district's special education department came under scrutiny for being out of compliance with Texas Education Agency requirements concerning students living in residential facilities. As a result, Morgan was placed on a growth plan. An independent agency later evaluated the department and recommended a change in leadership. Instead of proposing nonrenewal, the district reassigned Morgan to the position of RF Administrator. She received the same salary in that position. Morgan later filed suit against the district alleging discrimination and retaliation under the Equal Pay Act (EPA), which prohibits discriminatory wage practices. In response, the district sought judgment in its favor prior to trial.

Ruling: The trial court granted judgment in favor of the district on Morgan's claims. According to the court, Morgan failed to establish a *prima facie* case of discrimination or retaliation under the EPA. To establish a violation of the EPA for discrimination, a plaintiff must show that (1) the employer is subject to the Act; (2) the plaintiff performed work in a position requiring skill, effort and responsibility equal to that of a co-worker of the opposite sex, under similar working conditions; and (3) the plaintiff was paid less than the employee of the opposite sex providing the basis of comparison. If Morgan satisfied this burden, then the employer had to show that the differential is justified under one of the EPA's four exceptions, which are (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor than sex.

Here, Morgan failed to establish that she performed work in a position requiring skill, effort, and responsibility equal to that of a male coworker, under similar working conditions. The evidence was sufficient to eliminate any fact issue as to whether the male comparators performed work requiring greater skill, effort, and responsibility. Even if Morgan had established her *prima facie* case of discrimination under the EPA, the district was able to show that its pay system was a merit-based system comprised of gender-neutral criteria.

Morgan's retaliation claim also was without merit, according to the trial court. To establish a claim for retaliation under the EPA, Morgan had to show (1) that she engaged in an activity protected by the EPA; (2) that she was subjected to an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action. In this case, the trial court concluded that Morgan never engaged in a protected activity, and could not show that she was subjected to an adverse employment action. The record showed that she never complained about unequal pay throughout her career with the school district. In addition, her reassignment to the RF Administrator position did not amount to an adverse employment action. The trial court, therefore, dismissed Morgan's EPA discrimination and retaliation claims.

Things to Remember: ***Notice that this is the third retaliation case we report this month. This one failed because of lack of evidence of "protected activity" and "adverse employment action." In the first two cases the employees were able to produce evidence to satisfy these requirements, and at least some evidence of a causal connection. This case, however, does not address "causal connection" because the employee failed to produce evidence to satisfy the other two parts of the burden of proof.***

Discrimination

DID THE SCHOOL DISTRICT DISCRIMINATE AGAINST THE POLICE OFFICER?

Case citation: Martinez v. Hempstead ISD, 2013 WL 3873237 (S.D. Tex. 2013) (unpublished).

Summary: Efrain Martinez worked for the Hempstead Independent School District as a middle school police officer. Martinez was fired on April 7, 2011. He filed suit against the school

district claiming that the termination decision amounted to race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. The school district sought judgment in its favor prior to trial arguing that Martinez could not present sufficient evidence to support his claims.

The district presented evidence that Martinez had been counseled repeatedly over several school years not to interview students without notifying or securing the presence of an administrator. Martinez also had a history of tardiness, insubordination, and the failure to monitor students, according to the district. Despite being instructed not to do so, Martinez interviewed several high school students without an administrator present, when the high school principal requested that he investigate an incident of vandalism. One of the students accused Martinez of threatening her during the interview. The following day, the director of operations instructed Martinez and another officer not to conduct any further investigation of the matter unless asked to do so. Nevertheless, Martinez again started interviewing students.

As a result, Martinez was issued a formal Letter of Correction and instructed not to go on to the high school campus, at the high school principal's request. The district also suspended Martinez for two days without pay. Martinez disregarded those directives and went to the high school campus and solicited statements from two high school employees. The chief of police then recommended Martinez's termination and the superintendent terminated Martinez.

Ruling: The trial court granted the school district's request for pretrial judgment on Martinez's Title VII lawsuit. Martinez met his initial burden to show that (1) he was a member of a protected class, (2) was qualified for the police officer position, (3) was subjected to an adverse employment action, and (4) was replaced by someone outside of his protected class. Contrary to the district's argument, the evidence was sufficient to raise a fact issue on whether Martinez had been replaced by a white officer.

The district then met its burden to articulate a legitimate, nondiscriminatory reason for its decision to terminate Martinez. According to the district, it suspended Martinez for violating previous verbal and written directives to refrain from interviewing students without first notifying and securing the presence of an administrator. It also terminated Martinez when, less than a week later, he violated another written directive by returning to the high school campus.

Because the district offered legitimate, nondiscriminatory reasons for Martinez's suspension and termination, the burden shifted to Martinez to show that the defendant's reasons were a pretext for discrimination. Martinez relied on a "disparate treatment" theory, which requires a showing that the district treated one employee more harshly than other "similarly-situated" employees, under "nearly identical circumstances." Although Martinez argued that five other employees outside of his protected category were treated more favorably than him, the record did not show that those employees were similarly-situated or that the circumstances were nearly identical. Two of the officers Martinez pointed to were supervisors of Martinez and, thus, not similarly situated. Two other officers were not similarly situated to Martinez because they had no prior written warnings, similar to Martinez. The remaining officer also was terminated after receiving three warnings, thus, negating an inference of preferential treatment. The record also did not show that the last officer was terminated for "nearly identical conduct." Martinez failed to meet his burden of proof to show that the reasons for his termination were a pretext for discrimination. The trial court granted judgment in favor of the district.

Things to Remember: ***A good illustration of how the burden shifts from employee to employer, and then back to employee in these cases. It's like a tennis match.***

COULD THE FORMER EMPLOYEE ESTABLISH DISCRIMINATION CLAIMS AGAINST THE SCHOOL DISTRICT?

Case citation: Cole v. Pearland ISD, 2013 WL 4494423 (S.D. Tex. 2013) (unpublished).

Summary: Tonya Cole worked as a junior high counselor for the Pearland Independent School District. Following her resignation, Cole sued the school district alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. Cole, who was African American, alleged that her supervisor continuously harassed her over a six-year period after Cole reported a number of problems at the junior high school. In 2009, Cole filed two grievances against the principal concerning the alleged mistreatment and wrote a letter to the superintendent. The district granted Cole a transfer in January of 2010, to another junior high school. However, in March of 2010, shortly after the transfer, she received a performance evaluation that was less favorable than her previous evaluation. According to Cole, she was not allowed to contest the evaluation and was told that her former principal had provided the low ratings. Cole resigned from the district one month later. After the suit was filed, the school district sought a pretrial judgment in its favor, arguing that Cole could not produce sufficient evidence of race discrimination.

Ruling: The trial court granted judgment in favor of the district on the Title VII discrimination and retaliation claims. Cole's hostile environment claims failed because she offered no competent evidence to establish that the alleged harassment was based on her race. Even though she filed several grievances and complaints, she never alleged that the harassment was based on her race. Her subjective belief that the alleged mistreatment was due to her race, was insufficient to meet her burden of proof.

The trial court also held that the alleged harassment did not affect a "term, condition, or privilege of her employment," a necessary element of her claim. The trial court stated: "While it may well be that the plaintiff was working in an unpleasant environment and while some of the actions she complains of may have been inconvenient, annoying, and even embarrassing, the Court, nevertheless, is of the opinion that they were not so 'severe and pervasive' as to alter the plaintiff's conditions of employment." Cole also could not meet her burden to show that she was treated less favorably than other similarly-situated employees who were outside of her protected category. She simply failed to provide any evidence that the alleged mistreatment was on the basis of her race. For these reasons, Cole could not establish a hostile environment or race discrimination on the part of the district.

The trial court also found the retaliation claims without merit. To meet her initial burden of proof, Cole had to show that (1) she engaged in activity protected by Title VII; (2) she was subjected to an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action. The trial court held that Cole had not engaged in "protected activity" before October 15, 2009, because she had not complained about race discrimination. Thus, any alleged adverse action before that date could not serve the basis of her Title VII retaliation claim. For actions after October 15, 2009,

the trial court held that it was undisputed that the district was not aware that Cole had engaged in protected activity under Title VII. In addition, she could not establish that she had suffered an "adverse employment action." She alleged only that she had been "uncomfortable" in a meeting; had to work with another counselor on a project; had been accused of improprieties during a meeting; and had been written up. According to the trial court, those did not amount to materially-adverse employment actions.

Cole also failed to rebut the district's legitimate, nonretaliatory reasons for writing her up. Specifically, the record showed that she had been written up for her failure to (1) follow proper protocol during a meeting with a parent and (2) prepare for a meeting as directed. In addition, she received an unfavorable performance evaluation due to her unsatisfactory performance. In response, Cole did not produce sufficient evidence that the district's reasons for its actions were a pretext for discriminatory retaliation. Thus, the trial court granted judgment in favor of the district on Cole's Title VII discrimination and retaliation claims.

Things to Remember: ***Lesson: working in an "unpleasant environment" and dealing with things that are "annoying, and even embarrassing" does not always equate with a hostile environment in the legal sense.***

THE TEACHER FAILED TO SUPPORT HER DISCRIMINATION CLAIMS AGAINST THE SCHOOL DISTRICT

Case citation: Fort Bend ISD v. Williams, 2013 WL 4779693 (Tex. App. – Hous. [1st Dist.] 2013) (unpublished).

Summary: Tyra Williams worked for the Fort Bend Independent School District as a teacher for four years before she resigned. When she resigned, Williams filed suit alleging that she had suffered race discrimination, a hostile work environment, and retaliation, ultimately culminating in her constructive discharge. Williams was an African American female.

Williams's lawsuit alleged that she began to suffer discriminatory treatment when she was hired to teach English at Elkins High School, a school Williams described as a "white school." According to Williams, other teachers in the English Department treated her "oddly" because of her race and suggested that she was not qualified to teach at Elkins because she previously worked at a "black school." One student allegedly was permitted to withdraw from Williams's class after complaining that "he didn't do black teachers." The suit also claimed that, when Williams complained of unequal treatment to school administrators, she was subjected to a campaign of harassment, excessive scrutiny, and unwarranted discipline. According to the lawsuit, tempers flared at one disciplinary meeting, and Williams was escorted off campus and placed on paid administrative leave.

After she was placed on administrative leave, Williams filed a charge of race discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). While the EEOC charge was pending, Williams extended her absence from the school by taking temporary disability leave to recover from anxiety, panic attacks, and depression allegedly caused by work-related stress. When Williams returned from temporary disability leave, there was no longer a teaching position for her at Elkins. Williams alleged that the district discriminated and retaliated against her by removing her from her position at Elkins and replacing her with a less-qualified white teacher. Williams also claimed that she was treated differently from other similarly-situated teachers because another teacher in the English Department, who was white, was not replaced after taking a leave of absence.

Upon her return, the district transferred her to M.R. Wood, the alternative high school to which Williams had requested reassignment in an employee grievance form. The district later claimed the assignment was a mistake and offered Williams her choice of teaching positions from a list of schools with job openings. Williams filed an amended charge with the EEOC, alleging that the district's decision to reassign her to M.R. Wood was an act of retaliation.

Ultimately Williams was placed at Willowridge High School. After about six months at Willowridge, Williams, along with seventeen other teachers, was placed on a staff-reduction list for the next school year. The district then offered her another teaching contract for the next school year and was reassigned to another high school. That school, however, was located more than sixty miles from Williams's home. Williams resigned during the summer break before the new school year.

Williams later filed suit against the district alleging race discrimination and retaliation in violation of the Texas Commission on Human Rights Act (TCHRA). The district filed a plea to the jurisdiction challenging the trial court's jurisdiction to hear Williams's claims, and arguing that Williams could not establish a *prima facie* case of discrimination or retaliation and failed to exhaust her administrative remedies with respect to her hostile work environment and constructive discharge claims. The trial court denied the district's plea and the district appealed.

Ruling: The appeals court reversed and rendered judgment in favor of the school district, holding that the court did not have jurisdiction over Williams's claims. First, Williams failed to meet her initial *prima facie* burden to show that she was (1) a member of a protected class, (2) qualified for her teaching position, (3) subjected to an adverse employment action, and (4) replaced by someone outside of her protected class. Specifically, she failed to demonstrate that she suffered an adverse employment action. Her allegations of excessive scrutiny and unwarranted discipline did not amount to "ultimate employment decisions" actionable under the TCHRA. Further, the alleged transfer did not amount to a demotion because her title, salary, and job responsibilities stayed the same. Williams also could not establish a claim of constructive discharge because she was not demoted, her salary was not reduced, and her job responsibilities did not change. Because Williams could not establish a *prima facie* case of discrimination, the trial court did not have jurisdiction over the race discrimination claim. For those same reasons, the trial court determined that Williams's retaliation claim was subject to dismissal.

In addition, the record showed that Williams failed to exhaust administrative remedies under the TCHRA with respect to hostile work environment and constructive discharge claims. The appeals court observed that the factual allegations in an EEOC charge of discrimination are important because the litigation will be "limited in scope to the claims stated in the charge and factually related claims that could reasonably be expected to grow out of the investigation of the stated claims." Here, because the charges of discrimination that Williams filed did not contain allegations supporting hostile environment or constructive discharge claims, the appeals court held that she had failed to exhaust administrative remedies. Because the trial court lacked jurisdiction over the discrimination and retaliation lawsuit, the appeals court rendered judgment in favor of the district.

Labor and Employment, continued

Retaliation

COULD THE FORMER EMPLOYEE PROVE RETALIATION?

Case citation: Crutcher v. Dallas ISD, __ S.W. 3d __, 2013 WL 4517002 (Tex. App. – Dallas 2013).

Summary: Alexandrea Crutcher was employed by the Dallas Independent School District. In August 2004, after she was no longer employed by the district, Crutcher filed a lawsuit against the district in federal court alleging discrimination and retaliation (the "2004 Lawsuit"). The 2004 Lawsuit was settled out of court. In the summer of 2009, Crutcher interviewed for a position as a basketball coach and science teacher at the district's Moises E. Molina High School. Crutcher first interviewed with the school's athletic director. Her second interview was with the school principal, Dorothy Gomez. After the interview, Gomez submitted a form to the Human Resources Department and recommended that Crutcher be hired. Crutcher then had a third interview with Bethany Knighten, the head of the science department. Gomez also joined in at the conclusion of the third interview. Knighten initially supported the hiring of Crutcher, but withdrew her support after speaking with one of Crutcher's former colleagues.

The district's staffing manager received the form from Gomez recommending that Crucher be hired, but rejected the recommendation because the position for which Crutcher had interviewed had not been properly posted in accordance with district policy. Three days after Gomez recommended Crutcher, the position was actually posted. Crutcher did not apply for the posted position. The district ultimately selected an applicant who could teach special education and coach basketball. The school did not hire a new science teacher for that school year.

Crutcher filed suit against the district alleging retaliation. In response, the district sought pretrial judgment in its favor, arguing that Crutcher could produce no evidence in support of her retaliation claims. The trial court granted the motion and Crutcher appealed.

Ruling: The appeals court upheld the judgment in favor of the district. Crutcher brought her claim for retaliation under the Texas Commission on Human Rights Act (TCHRA). With regard to retaliation, the TCHRA provides that "[a]n employer ... commits an unlawful employment practice if the employer ... retaliates or discriminates against a person who, under this chapter: 1) opposes a discriminatory practice; 2) makes or files a charge; 3) files a complaint; or 4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." It is undisputed that Crutcher's filing of the 2004 Lawsuit was a protected activity and an adverse employment action occurred when the district declined to hire her in 2009. The issue, in this case, was whether Crutcher established a causal connection between the protected activity and the adverse employment action so as to establish a *prima facie* case of retaliation.

Crutcher's attempt to establish a causal connection, included contentions that the district (1) extended and then withdrew an offer of employment for "conflicting and unbelievable reasons," (2) offered the position to another candidate, (3) retracted the job offer because of the 2004 Lawsuit, and (4) the district's claim that the position was not posted in accordance with district policies and procedures was false. However, the evidence regarding the district's knowledge of the 2004 Lawsuit did not establish a causal connection between the adverse employment decision and the protected activity. The individual in the HR Department who received the recommendation to hire Crutcher testified that she was not aware of the 2004 Lawsuit. Crutcher's own contentions also defeat any inference that the decision to withdraw her recommendation was premised on Crutcher having filed the 2004 Lawsuit.

The close timing of the actions at issue also did not support a causal connection. While temporal proximity may be evidence of a causal connection, the district employees involved in the employment decision denied any knowledge of the 2004 Lawsuit. Even under Crutcher's version of events, she was recommended for hire after she disclosed the 2004 Lawsuit. Therefore, there was not sufficient proximity to support a causal connection between the 2004 Lawsuit and the decision not to hire Crutcher.

There was also no evidence to suggest that the district failed to follow its ordinary policies and procedures or treated other similarly-situated persons differently. To the contrary, the summary judgment evidence showed that one of the reasons Crutcher was not hired was because the position for which she was initially recommended was not properly posted in accordance with district policy. The district did not post the position for basketball coach until three days after the recommendation to hire Crutcher. Thus, at the time Crutcher interviewed at the school and Gomez recommended her, the position for which she interviewed had not been posted and was not available. Crutcher failed to establish a causal connection between the 2004 Lawsuit and the decision not to extend her an offer of employment. As a result, Crutcher failed to establish a *prima facie* case of retaliation. Crutcher also failed to rebut the district's legitimate, non-retaliatory reason for its actions. Thus, the district was entitled to pretrial judgment on the retaliation claims.

Things to Remember: ***We certainly have a lot of retaliation cases this month! Notice how important documentation is.***

DID THE LAWSUIT STATE VALID CLAIMS AGAINST THE SCHOOL DISTRICT?

Case citation: Weslaco ISD v. Perez, 2013 WL 3894951 and 2013 WL 3894970 (Tex. App. – Corpus Christi 2013).

Summary: From 2004 until June 2010, Adan Perez Jr. was employed as Weslaco Independent School District's risk manager. Perez oversaw the district's employee benefit plans, including the school district's self-funded workers' compensation fund and health insurance program. In June 2010, Perez's employment with the district was terminated. In March 2011, Perez filed suit against the district and Richard Rivera, the district's superintendent.

Perez alleged that in early 2009, he became aware of the district's purported decision to withdraw funds from the district's self-funded insurance programs "for the specific purpose of beginning construction of a new 'Press Box' at [the district's] football stadium." Perez claimed that he was "rebuked" when he informed the district's chief financial officer that the withdrawal of funds was illegal. Perez claimed further that he made several attempts to meet with Rivera about the issue, but "was denied access" to him. According to the suit, although Perez allegedly continued to present his complaints to his supervisor, as well as "other administrators and members of [the district's] Board of Trustees," the district and Rivera sought to "silence" him and put a plan in place to terminate his employment.

Perez filed suit against the district and Rivera asserted various claims including: (1) breach of contract; (2) breach of Perez's right of reasonable expectation to renewal of his contract; (3) violations of the Texas Whistleblower Act; (4) constitutional

violations of due course of law rights, equal protection rights, and free speech under the Texas Constitution; and (5) common-law retaliation. The district filed a plea to the jurisdiction and a separate motion to dismiss. When the trial court denied those motions, the defendants appealed. [*Editor's Note:* The appeals court issued two separate decisions on the same day, one covering the denial of the plea to the jurisdiction and one regarding the motion to dismiss. We report both opinions together here].

Ruling: The appeals court ruled that the trial court erred when it denied the plea to the jurisdiction and motion to dismiss, but concluded that Perez should be allowed an opportunity to amend the claim that the district violated his right of reasonable expectation to renewal of his contract. First, the appeals court held that Texas law does not recognize a common law cause of action for damages to enforce Texas constitutional rights. Thus, Perez's claims seeking damages for alleged violations of the Texas Constitution were without merit. Also, because Texas law does not recognize a common law cause of action for retaliation, that claim was dismissed. The trial court did not have jurisdiction over the breach of contract claim related to Perez's nonrenewal because Perez had not exhausted his administrative remedies through the school district's grievance policy.

However, Perez was allowed to amend the claim that he had a reasonable expectation of contract renewal. The suit alleged that his contract with the district was not renewed in June of 2010 after a negative evaluation, despite five years of prior "exemplary" reviews. While those allegations were insufficient to establish the trial court's jurisdiction, the appeals court granted Perez an opportunity to amend this claim.

The appeals court dismissed Perez's tort claims because the district was entitled to governmental immunity. Under the Tort Claims Act, the district can only be liable in tort for claims involving injuries caused by the operation or use of a motor vehicle. No such allegations were made in this case. Further, claims against Rivera were without merit because, under the Tort Claims Act's election of remedies provisions, if a suit is filed against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit. Here, because the district sought dismissal, Rivera was entitled to immediate dismissal of the claims against him. The appeals court also dismissed the Whistleblower Act claims brought against Rivera in his individual capacity, because the Whistleblower Act does not provide for claims against employees in their individual capacities.

Whistleblower

WHAT IS AN "APPROPRIATE LAW ENFORCEMENT AUTHORITY" UNDER THE WHISTLEBLOWER ACT?

Case citation: Farran v. Canutillo ISD, __ S.W. 3d __, 2013 WL 4609203 (Tex. App. – El Paso 2013).

Summary: Yusuf Elias Farran worked as the Executive Director of Facilities and Transportation for the Canutillo Independent School District. Under his contract, he could only be terminated for good cause. During his tenure, he reported to the superintendent, assistant superintendent, and the board incidents of alleged employee theft and falsification of time cards, resulting in several employee terminations and resignations. Between May and October of 2008, Farran reported that a contractor for waste services, Henry's Cesspool Services, was not removing grease-trap waste properly and that the company was being paid excessively. Some of the school board trustees reacted negatively to the reports, allegedly saying that if Farran valued his job, he would stop reporting the waste services problems. In January and February of 2009, however, Farran reported to the superintendent that the district was continuing to violate its grease trap permits and regulations concerning those activities.

In February or March of 2009, the superintendent questioned Farran about personal telephone calls allegedly made during business hours. Despite his denial of any wrongdoing, Farran was suspended with pay pending an investigation into misconduct. The board voted to propose his termination. Pending a termination hearing, Farran contacted the Federal Bureau of Investigation rearding the conduct of Henry's Cesspool Services. The district became of this report. After the termination hearing, the hearing examiner determined that good cause existed for the termination and, as a result, the board voted to terminate Farran's contract.

Farran filed suit alleging that the district terminated him in violation of the Texas Whistleblower Act, breached his employment contract, and violated public policy by firing him for his failure to perform an illegal act. The district filed a plea to the jurisdiction, challenging the court's jurisdiction over the claims. The trial court granted the motion and Farran appealed. The appeals court initially reversed the trial court judgment and returned the case to the trial court. [*See* Farran v. Canutillo ISD, __ S.W. 3d __, 2012 WL 2127727 (Tex. App. – El Paso 2012); *Texas School Administrators' Legal Digest,* July/Aug 2012]. The trial court again granted the district's plea to the jurisdiction and Farran appealed.

Ruling: The appeals court ruled in favor of the school district, finding that Farran failed to establish his Whistleblower and breach of contract claims. The Whistleblower claims failed because Farran could not show that his complaints to the school board, superintendents, and internal auditor were good-faith complaints to a "law enforcement authority." There was no evidence that those officials had authority to enforce the law outside of the institution itself or against third parties generally. The record showed, instead, that those school district officials only were responsible for internal compliance with the law. According to the appeals court, the school board, superintendents, and internal auditor did not have the authority to "enforce, investigate, or prosecute violations of law against third parties outside of the entity itself."

With respect to the FBI report, the evidence demonstrated that the report did not lead to Farran's termination. The FBI report occurred after the district had initiated termination proceedings. Thus, Farran could not meet his burden to show that "but for" the FBI report he would not have been terminated. The appeals court, therefore, dismissed the Whistleblower claims.

The appeals court upheld the dismissal of Farran's breach of contract claims, because he had failed to exhaust administrative remedies by bringing his claim before the Commissioner of Education. The appeals court also rejected Farran's request to create a new common law "public policy cause of action" for government employees discharged solely for refusing to perform an illegal act. The appeals court observed that the district enjoys sovereign immunity unless the Legislature has expressly waived it. Farran failed to show that the Legislature waived the district's sovereign immunity for any alleged violation of public policy. Thus, the public policy claim was without merit. The appeals court held that all claims were subject to dismissal except for those Whistleblower claims concerning reports of employee time card falsifications and payments made to the waste services contractor.

LIABILITY

Qualified Immunity

DID THE STUDENTS STATE VALID DISCRIMINATION CLAIMS?

Case citation: Fennell v. Marion ISD, 2013 WL 3994649 (W. D. Tex. 2013) (unpublished).

Summary: Kyana, Kyra, and Kavin Fennell attended school in the Marion Independent School District, when they alleged that they were subjected to a hostile racial environment by students and staff. Joined by their mother, Lawanda Fennell-Kinney, they filed suit against the school district and a number of district officials, claiming violations of their constitutional rights and Title VI of the Civil Rights Act of 1964.

The lawsuit alleged that Kyana, Kyra, and Kavin ultimately were forced to leave the district due to a long history of racial discrimination targeted at them. Kyra claimed that she received a text message from a white classmate that contained an animation of Klansmen swinging a noose. Kyra was suspended for confronting the classmate. Kavin claimed that a white girl and two Hispanic girls surrounded her at her locker and began taunting her. When she tried to leave, one girl allegedly punched Kavin and threw her back against her locker. The high school suspended Kavin and one of the Hispanic girls, but did not take action against the white student, according to the lawsuit.

Kavin claims to have reported numerous incidents of racial name-calling during 2011 and 2012, but the district took no action. When Kavin tried out for the cheerleading squad, white classmates supposedly told her that "black girls weren't pretty enough to be cheerleaders," and that she looked like a boy. Although she made the squad, Kavin claimed that white cheerleaders ostracized her and that, on one occasion, a student spat on her.

Kyana claims that she was the subject of racial name-calling by white classmates in kindergarten, middle school, and high school, but that the district took no action against those classmates. She claims that in kindergarten, she was disciplined for punching a student who used a racial slur against her. Kyana claims that Glen Davis, the athletic director, "targeted" her for her ethnic hairstyles. Another coach, Ashley Smith, allegedly said in front of other students that she was a "bad influence" because she had a child at the age of seventeen.

The mother was involved in an incident at a basketball game, when the coach's fiancé, approached Fennell-Kinney concerning a Facebook post in which the mother described the "bad influence" comment. The fiancé allegedly was removed from the game and the coach was not allowed to remain at the game. The plaintiffs also claimed that a noose was left near Kyana's car but that no arrests were made and surveillance equipment in the parking lot did not work. On another occasion, Kyra alleged that coach Cynthia Manley did not allow her to participate in a game because she was absent from school and late for the bus. The mother arrived at the game and took Kyra home early. Because Kyra left early, the coach did not allow her to participate in the next scheduled game.

Fennell-Kinney filed a grievance that eventually reached the board of trustees. However, when the board declined to grant the requested relief, Fennell-Kinney withdrew her children from the school district. The plaintiffs then filed suit against the school district under 42 U.S.C. § 1983 and Title VI, alleging race discrimination. The school district and the individual school officials requested dismissal of the suit. The individual defendants argued that they were entitled to qualified immunity, which protects government officials from civil liability based on the performance of discretionary functions. The officials' conduct must be objectively reasonable under clearly established law. The trial court initially held that the lawsuit did not state sufficient facts to maintain claims against the district or the school officials, but allowed the plaintiffs to amend the lawsuit. [*See,* Fennell v. Marion ISD, 2013 WL 321880 (W. D. Tex. 2013) (unpublished); *Texas School Administrators' Legal Digest,* March 2013]. The plaintiffs amended the suit, and the defendants again sought dismissal.

Ruling: The trial court dismissed the claims against Defendant Smith, but denied the motion to dismiss as to all other claims. Defendants Smith, Manley, and Davis argued that they were entitled to the defense of qualified immunity because the lawsuit did not state facts showing that the defendants violated clearly established law. The trial court determined that Smith was entitled to qualified immunity but Manley and Davis were not.

The allegations against Davis were sufficient to overcome his qualified immunity defense. Kyanna alleged that Davis admonished her because of her "ethnic hairstyles." He also allegedly allowed discriminatory punishment against Kyra by Defendant Manley. It was also alleged that Davis failed to take action when a noose was hung by the locker of a student, who was also a ward of Fennell-Kinney. According to the trial court, if proven, those allegations were sufficient to overcome Davis's qualified immunity defense.

Manley also was not entitled to qualified immunity. Supporting the plaintiffs' equal protection allegations against Manley were claims that Manley drove away from Kyra on a softball team bus even though the girl had shown up on time and Manley saw Kyra waving to her as the bus drove away. Krya also complained that Manley did not allow her to play two games because she signed out for lunch on a game day and left a game early. According to the suit, Manley had not similarly punished white students for those reasons. The trial court, therefore, denied Manley the qualified immunity defense.

Defendant Smith, however, was entitled to qualified immunity. The comment that Kyana was a "bad influence" was not sufficient to overcome the qualified immunity defense because the plaintiffs failed to allege that Smith treated similarly-situated students of other races more favorably than Kyana.

The trial court also declined to dismiss the § 1983 claims against the school district. The plaintiffs' lawsuit alleged facts supporting their claims that the district repeatedly subjected them to discriminatory treatment based on race and the board was deliberately indifferent. Taking the specific allegations as true, the trial court concluded that they had raised more than just isolated incidents of racial discrimination in violation of their equal protection rights and Title VI of the Civil Rights Act.

PRACTICE & PROCEDURE

Exhaustion of Administrative Remedies

DID THE FORMER EMPLOYEE FAIL TO EXHAUST ADMINISTRATIVE REMEDIES ON HIS DISCRIMINATION CLAIMS?

Case citation: Brownsville ISD v. Alex, __ S.W.2d __, 2013 WL 4033864 (Tex. App. – Corpus Christi 2013).

Summary: Michael Alex was a former employee of the Brownsville Independent School District. On March 12, 2010, Alex filed a complaint with the Texas Workforce Commission alleging that because of his African-American race, the school district refused to hire him in October of 2009, for a position at the Early College High School. The complaint also stated that Alex had "reapplied for employment with the BISD on numerous occasions." However, other than the October 2009 hiring decision, Alex did not state any other specific instances in which the district allegedly refused to hire him.

In December of 2010, Alex sued the school district for not hiring him because of his race. In his lawsuit, Alex alleged that (1) he was not hired as a health teacher in October of 2009; (2) he was not hired for "other subsequent positions," including a position that was filled on or about October 18, 2011; and (3) the district employed a disproportionately low number of African American persons. In response, the district filed a plea to the jurisdiction, arguing that the court lacked jurisdiction because Alex had failed to exhaust administrative remedies. According to the district, Alex failed to state in his pre-suit Texas Workforce Commission complaint any claim other than the October 2009 hiring decision. The trial court denied the school district's plea to the jurisdiction and the school district appealed.

Ruling: The appeals court agreed with the district that Alex had not exhausted administrative remedies on all but the October 2009 claim, and reversed the trial court ruling. Texas Labor Code § 21.201 sets out the exhaustion requirements for discrimination claims brought under the Texas Commission on Human Rights Act (TCHRA). Under Labor Code § 21.201, before filing his discrimination lawsuit, Alex was required to file a complaint with the Texas Workforce Commission. Such complaints must contain a factual statement that puts the employer on notice of the existence and nature of the discrimination charge being made. Further, the scope of the lawsuit is limited to the scope of the investigation that can reasonably be expected to grow out of the discrimination charge in the pre-suit complaint. Specifically, under Labor Code § 21.201(c), the pre-suit complaint must provide the date, place, and circumstances of the alleged unlawful employment practice.

Alex argued that he was not required to specify the exact hiring decisions, because it was a "continuing violation" (*i.e.,* a continuing course of conduct that does not require specificity in a pre-suit complaint). The appeals court observed that a decision not to hire an applicant is a "discrete act," and not subject to the continuing violation standard. In this case, the pre-suit complaint referenced a failure to hire for a single position in October of 2009. The complaint did not reference a failure to hire for any other specific position. Thus, the appeals court held that Alex failed to exhaust administrative remedies for his alleged claims that arose after the October 2009 decision.

The district also argued that Alex failed to exhaust administrative remedies on a claim of disparate impact (*i.e.*, that the district employed a disproportionately lower number of African Americans). The appeals court observed that a plaintiff raising a disparate impact claim must allege in their pre-suit complaint (1) an employer's facially-neutral employment policy; (2) that, in fact, has a disproportionately adverse effect on a protected class. Alex, however, failed to raise those allegations in his complaint to the Texas Workforce Commission. Because Alex did not properly exhaust administrative remedies as to the disparate impact cause of action, the appeals court dismissed the claim for lack of jurisdiction. The appeals court rendered judgment in favor of the district on all of Alex's claims, except for the one stemming from the October of 2009 hiring decision.

WHAT ARE THE BRIEFING STANDARDS IN AN APPEAL TO THE COMMISSIONER OF EDUCATION?

Case citation: McDonald v. Houston ISD, Dkt. No. 039-R2-05-2013 (Comm'r Educ. June 20, 2013).

Summary: Kevin McDonald worked as a teacher in the Houston Independent School District, when the district's board of trustees conducted a reduction in force (RIF). McDonald's position was impacted by the RIF. As a result, the district nonrenewed his contract. McDonald appealed the district's actions to the Commissioner of Education. He claimed that the district improperly terminated his contract and that the decision to do so was arbitrary and capricious, and not supported by substantial evidence. McDonald complained specifically about actions of the school principal to give some of his job duties to a probationary employee. The school district filed a response to McDonald's petition, indicating that it did not terminate McDonald's contract, but instead, the board of trustees properly nonrenewed the contract under its RIF policies.

Ruling: The Commissioner upheld the nonrenewal decision. One of the main issues on appeal was whether the parties properly briefed their arguments to the Commissioner. Under 19 Tex. Admin. Code § 157.1058(a)(4), a brief must contain a clear and concise argument for the contentions made with appropriate citations to authorities and to the record. Although the school district did not submit a separate brief, its response to McDonald's petition, met the requirements of a brief. Specifically, the district's answer demonstrated that McDonald's contract was nonrenewed and not terminated, as McDonald claimed. The district demonstrated further that the board of trustees properly applied its RIF policy, proposed McDonald's nonrenewal, and voted to nonrenew McDonald's contract. McDonald's unsupported allegations that the principal acted improperly did not make the board's nonrenewal decision arbitrary and capricious.

McDonald's brief, on the other hand, was not sufficient because it did not identify any finding of fact of the hearing officer that was not supported by substantial evidence. According to the Commissioner, because McDonald did not properly brief the substantial evidence claim, McDonald did not exhaust administrative remedies. McDonald also failed to properly brief the argument that the board's decision was arbitrary and capricious. He did not challenge any specific finding of fact made by the hearing examiner with regard to the RIF decision. In addition, McDonald did not raise any allegations that the board improperly applied its RIF policy. Instead, he complained about actions taken by the principal. However, the principal did not make the decision to RIF McDonald. Because McDonald did not properly brief his claims, the Commissioner dismissed his appeal.

Things to Remember: ***Those who practice before the Commissioner should take note.***

SPECIAL EDUCATION & DISABILITY LAW

Private Placement

WAS THE STUDENT ENTITLED TO A PRIVATE PLACEMENT AT DISTRICT EXPENSE?

Case citation: G.I. v. Lewisville ISD, 113 LRP 34444 and 113 LRP 34446 (E.D. Tex. 2013)

Summary: G.I. received special education services from the Lewisville Independent School District due to autism, Pervasive Developmental Disorder, speech impairment, and a non-categorical Early Childhood disability. The student had a history of impulsivity, hyperactivity, anxiety, obsessive thinking, outbursts, defiance, and aggression. G.I. began the 2009-10 school year in a regular education classroom with pullout to the resource room for language arts. However, after becoming increasingly aggressive at school, G.I. was placed in the Academic Life Skills (ALS) class full time. The district conducted a functional behavioral assessment (FBA) and developed a behavior intervention plan (BIP). G.I.'s negative behaviors decreased once the BIP was implemented. The student's medication also was adjusted during the school year and, by April of 2010, school staff noted a sharp decline in behavioral incidents.

In May of 2010, the district conducted a full individual evaluation (FIE), which showed that G.I. needed a smaller student-to-staff ratio in order to learn new material and during transitions to decrease the possibility of aggressive behavior. G.I.'s Admission, Review, and Dismissal (ARD) Committee, therefore, recommended full-time placement in the ALS class, extended school year (ESY) services, and in-home training. The parents declined the in-home training and disagreed with the full-time placement in the ALS.

The parents first requested an independent educational evaluation (IEE), and the district provided all of the information they needed for the (IEE). The parents then withdrew G.I., providing notice of their intent to seek reimbursement for the student's private placement. The student's ARD Committee met, without participation of the parents, and determined that the student's proposed program was appropriate. In the meantime, the IEE was completed and the findings were largely consistent with the school district's FIE and other assessments. The parents requested a due process hearing, raising numerous claims concerning the district's handling of ARD meetings, denial of parental participation, evaluations, implementation of the student's IEP, placement decisions, prior written notice, and alleged withholding of information. The parents requested reimbursement for G.I.'s private placement. The hearing officer ruled in favor of the school district on each of the parents' claims. [*See,* Student v. Lewisville ISD, 225-SE-0511 (Hearing Officer Ann Vevier Lockwood, March 26, 2012); *Texas School Administrators' Legal Digest,* September 2012]. The parents appealed by filing suit in federal court.

Ruling: The trial court upheld the hearing officer's decision in favor of the district. The hearing officer properly determined that the claim that the district denied the student a free appropriate public education (FAPE) during the 2009-10 school year, fell outside of the one-year statute of limitations under the Individuals with Disabilities Education Act (IDEA). The parents failed to establish exceptions to the statute of limitations because there was no evidence of misrepresentations by the district that the issues had been resolved or that the district withheld information from the parents.

The trial court determined that, despite disagreements in what disability label G.I. should have had, G.I.'s proposed program and placement were reasonably calculated to provide the student FAPE. The program provided a small student-to-staff ratio, individualized instruction, and opportunities for mainstreaming. The program properly addressed the student's complex individual set of needs and was based on extensive assessments. The trial court stated that there was "ample evidence in the administrative record that not only was Defendant well aware of G.I.'s difficulties staying on task and paying attention, they addressed these needs in G.I.'s IEP."

The trial court determined that the district properly assessed G.I. in all areas of suspected disability. The parents claimed that G.I. should have been assessed in the areas of ADHD, Sensory Integration Disorder, and Hyperacute Hearing. The trial court observed that, although the district had not labeled G.I. as a student with ADHD, it provided G.I. with services and accommodations based on his history of inattention. There was no evidence to support a label of Sensory Integration Disorder. The district nevertheless provided accommodations for G.I.'s sensory and hearing issues.

The trial court also rejected the parents' claims that the district failed to (1) provide G.I. with appropriate assistive technology, (2) conduct a functional behavioral assessment (FBA), (3) include an Autism supplement, (4) provide ESY services, (5) put a physician on the ARD Committee, and (6) work with the parents and provide notice of G.I.'s change of placement. The parents simply failed to meet their burden of proof as to each of those claims.

Ultimately, the trial court concluded that, despite disagreements in those areas, the district provided G.I. a FAPE. The district properly implemented the student's IEP. In addition, the student's proposed goals and objectives addressed the student's complex needs. The trial court ruled in favor of the district on each of the parents' claims, and denied the parents' request for reimbursement for the student's private placement.

Residential Placement

RESIDENTIAL PLACEMENT PROVIDED THE STUDENT FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT

Case citation: Student v. Little Cypress Mauriceville CISD, Dkt. No. 054-SE-1112 (Hearing Officer Mary Lynn E. Rubinett, March 25, 2013).

Summary: The student attended school in the Little Cypress Mauriceville CISD and qualified for special education under the categories Autism and Specific Learning Disability. The student was diagnosed with Bipolar Disorder, Attention Deficit Hyperactivity Disorder, Disruptive Behavior Disorder, and Asperger's Disorder, among other things. The student had a long history of violent and aggressive behavior to the student and others, and a medication regimen to address the serious behaviors.

Between the spring of 2011 and the fall of 2012, the student had been hospitalized numerous times due to the severity of the student's behavioral and emotional issues. The multiple hospitalizations caused numerous absences that significantly disrupted the student's educational progress. While at school, the student had numerous disciplinary referrals and caused concern for the well-being of the student and others.

The program offered by the district in the spring of 2011 involved a self-contained setting with content mastery and social

skills instruction. The goal of the program was to transition the student into the general education setting. The student's behavior during the spring of 2011 included escalating aggression at school, at home, and in the community. The district completed an FIE in the summer of 2011, but did not change the student's IEP. The parent requested a functional behavioral assessment, but it was not completed until June of 2012.

In September of 2011, the student's behavior continued to decline and become increasingly violent and aggressive. The student was hospitalized again, but upon the student's return to school the behavioral issues continued. When the student was discharged, recommendations included low student/student and student/staff ratio, highly structured environment and routines, and a calm and quiet setting. The student's ARD Committee placed the student in a Life Skills setting, but it was undisputed that that was not an appropriate placement for the student. The student's placement was revised to increase the student's support to one-to-one assistance for transitions and small group instruction in an applied setting. The parent objected to the program. The student's behavior continued to deteriorate throughout the 2011-12 school year.

In May of 2012, the student's ARD Committee met but proposed the same behavioral approach that had been used with the student. In addition, the IEP for the 2012-13 school year contained the same goals, with no present levels of performance and no objectives. Despite a recommendation for counseling services, the student's IEP did not contain any counseling goals. The student's ARD met to discuss the parent's request for a residential placement. The ARD ended in disagreement. A second FIE was completed in August of 2012, which differed with the earlier FIE in that the student showed slow processing speed, lower cognitive scores, and lower achievement scores. The FIE indicated learning disabilities in Reading Fluency, Mathematics Problem Solving, Math Calculation, and Written Expression. However, the IEP did not address the newly identified learning disabilities.

In November of 2012, the parent requested a due process hearing, claiming that the district denied the student FAPE. The parent requested placement at a residential treatment facility. The district maintained that it could provide the student FAPE.

Ruling: The hearing officer concluded that the student required a residential placement to achieve meaningful educational progress at school. The residential placement offered the student education in the least restrictive environment. Specifically, it was necessary to provide the student educational programming to meet the student's academic, behavioral, and emotional needs with the structure and consistency necessary to enable the student to make academic and nonacademic progress.

The hearing officer found that the program provided by the district was not individualized to meet the student's unique academic and behavioral needs. The record showed that the student had been hospitalized numerous times and experienced escalating behavioral and emotional problems at school. The district had evaluated the student twice and yet the student's IEP goals, present levels of performance, BIP, and placement remained essentially the same. The district attempted to place the student in the Life Skills classroom for 6-12 weeks, but it was undisputed that it was inappropriate for the student. The hearing officer concluded that the district had failed to individualize and update the student's program based on the student's assessment and performance.

The district's proposed program in general education with behavioral supports, a BIP, and academic support of the applied setting, content mastery, and inclusion was not appropriate for the student. Instead, the residential placement was essential for the student to benefit from special education. According to the hearing officer, without that placement, the student would not be able to achieve meaningful educational benefit. The hearing officer ordered the district to place the student at a residential treatment facility approved by the Texas Education Agency.

WAS THE STUDENT ENTITLED TO RESIDENTIAL PLACEMENT AT DISTRICT EXPENSE?

Case citation: Student v. Austin ISD, Dkt. No. 087-SE-1212 (Hearing Officer Mary Carolyn Carmichael, April 8, 2013).

Summary: The student attended school in the Austin Independent School District and received special education and related services under the categories of Emotional Disturbance (ED) and Other Health Impairment (OHI). The student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Obsessive Compulsive Disorder. The student also had a history of truancy and failing to complete schoolwork. Between June of 2011 and December of 2012, the student underwent ten assessments, eight by the district and two independent educational evaluations. The student's program consisted of three and a half hours of inclusion support in all four core classes. The district also offered the student counseling.

However, because of a behavioral incident, the district put the student in an emergency placement and conducted a manifestation determination review. The student's Admission, Review and Dismissal (ARD) Committee determined that the student's behavior was not a manifestation of the student's disabilities. Consequently, the student was placed in in-school suspension. The district then agreed to an independent functional behavioral assessment (FBA), a psychological reevaluation, a counseling reevaluation, and a district-provided FBA.

At the ARD meeting to discuss the evaluations, the parents asked for hospitalization of the student at district expense. However, the ARD Committee agreed to try a self-contained placement until the fall 2012 holiday break. In November of 2012, the ARD Committee reviewed and revised the student's behavior intervention plan, and determined that a specific individualized behavior contract would be developed. In December of 2012, the ARD Committee reviewed the student's progress and observed that the student had not exhibited aggressive or disruptive behaviors. Nevertheless, the parents requested a residential placement and the ARD Committee denied the request. The parents declined a 10-day recess. Instead, the parents requested a due process hearing arguing that the program provided by the district was inappropriate and requesting a residential placement at district expense.

Ruling: The hearing officer ruled in favor of the district, finding that the program offered by the school district provided the student a free appropriate public education (FAPE) in the least restrictive environment. The school district conducted numerous assessments and made multiple efforts to review and revise the student's program based on new assessment and performance data. The residential placement proposed by the parents was a highly restrictive setting with only disabled peers, some distance away from the student's family and community. According to

Special Education & Disability Law, continued

the hearing officer, the residential placement was not appropriate for the student.

The hearing officer also concluded that the parents and their advocate had been involved in developing the student's program, and the district worked with the parents and independent evaluators in a collaborative manner. Although the student had a history of refusing to attend school and complete schoolwork, the record showed that the student made some academic and non-academic progress. The student improved at completing homework, had passing STAAR results in math and science, and received good benchmark scores in reading, science, and social studies. The student's absences hindered the student's non-academic benefits that the district provided through tutoring, in-home training, and other opportunities to build better communication between the parent and the student. The parents failed to meet their burden of proof to show that residential treatment was required for the student to access the student's education. Thus, the parents were not entitled to place the student in a residential treatment facility at district expense. The parents also offered no evidence to support their claim that the district failed to properly train and supervise staff.

Things to Remember: ***Residential placement is highly restrictive, and appropriate only when necessary to provide FAPE.***

STUDENTS

Excessive Force

DID THE PARENT RAISE SUFFICIENT EVIDENCE TO SUPPORT CONSTITUTIONAL CLAIMS STEMMING FROM HER SON'S SHOOTING DEATH?

Case citation: Moreno v. Northside ISD, 2013 WL 3716531 (W.D. Tex. 2013) (unpublished).

Summary: On November 12, 2010, Derek Lopez was a fourteen-year-old student in the Northside Independent School District, when he was shot and killed by Daniel K. Alvarado, a uniformed Northside ISD police officer. Derek and another fourteen-year-old boy exited a school bus, crossed the street, and began fighting. Derek punched or hit the other boy. Alvarado, having responded to a call regarding a bus with a flat tire, witnessed Derek strike the other boy and ordered Derek to "freeze." Instead, Derek ran, and Alvarado gave chase in his patrol car, eventually losing sight of Derek and returning to the location of the fight. Ignoring his supervisor's directive to stay with the victim and "not do any big search," Alvarado placed the second boy into the patrol car and drove into the neighborhood to search for Derek. Derek was hiding in a shed in the back yard of a residence. The homeowner witnessed Derek enter the fenced yard and hide in the shed, and called 911. The 911 operator informed her that the San Antonio Police Department had been dispatched, and the homeowner went to the front of her home to wait for the city police officers.

As she was waiting, the homeowner saw a neighbor walking across the street, opened a window, and told him what happened. The neighbor saw Alvarado in his patrol car, flagged him down, and pointed towards the home. Alvarado went to the home, where he was met by the homeowner, who told him that Derek was in the shed. According to the lawsuit, although Derek posed no threat, and in violation of school district police department procedures, Alvarado immediately drew his weapon and entered the back yard, where he shot and killed Derek.

Derek's mother filed suit against the district, Alvarado, and Northside ISD Police Chief John W. Page. She asserted the following causes of action: (1) a claim under 42 U.S.C. § 1983 for excessive force against Alvarado, individually; (2) a § 1983 claim against the school district based on the failure to train Alvarado; (3) a § 1983 claim against Police Chief Page for his failure to train Alvarado; (4) common-law negligence against Page; and (5) common-law negligence against Alvarado. The district, Alvarado and Page sought judgment in their favor prior to trial.

Ruling: The trial court granted judgment in favor of the district and Page, but found that genuine issues of material fact existed to support the claims against Alvarado. The trial court first found that issues of fact remained on whether Alvarado used excessive force against Derek. The trial court observed that an officer has the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an "immediate threat to [his] safety."

Here, Alvarado argued that he had been pursuing a fleeing, noncompliant assault suspect. He also argued that there may have been items in the shed that could have been potentially used as a weapon. Under the circumstances, according to Alvarado, he was justified in having his revolver drawn as he approached the shed. He argued further that as he opened the shed, Derek "bull-rushed" the door, causing the door to hit Alvarado's face, causing a cut lip. Alvarado then claims that he perceived that Derek was charging at him for his weapon.

Looking at all of the facts and circumstances, the trial court held that genuine issues of material fact existed as to whether Alvarado had an objective and reasonable belief that Derek presented an "immediate threat to [his] safety." The trial court declined to dismiss the § 1983 excessive force claims against Alvarado.

The trial court next considered the failure to train claims against the district and Page. To establish individual liability upon Page (a supervisor) for the failure to train, a plaintiff must show that "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." To succeed on her failure-to-train claim against the district, Moreno had to show that (1) any training procedures were inadequate; (2) the district was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused Derek's injury. According to the trial court, "deliberate indifference is more than mere negligence." The plaintiff must show that "in light of the duties assigned to specific officers or employees, the need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

In this case, the record showed that Alvarado completed the initial state-mandated training by the Texas Commission on Law Enforcement Standards and Education for police officers at the police academy. He also received an intermediate peace officer certification in 1997, an advanced peace officer certificate in 2001, and a master peace officer certificate in 2008. He also completed numerous law enforcement classes throughout the years. For example, one 60-hour course was titled Use of Force

Students, continued

(Intermediate) and Alvarado completed this course in 1994.

"Failure to train" claims usually require a showing of a pattern of incidents in which citizens were injured and which show that the failure to train was an official policy of the municipality. In this "single incident" case, the plaintiff "must prove that the highly predictable consequence of the failure to train would result in the specific injury suffered, and that the failure to train represented the moving force behind the violation." The record showed here that Alvarado had received adequate training. Further, even if Moreno established a fact issue as to whether training procedures were inadequate, she failed to present competent summary judgment evidence that the district or Page were deliberately indifferent in failing to provide any additional training to Alvarado prior to the incident.

Alvarado and Page also raised the defense of qualified immunity, which protects government officials from personal liability unless the plaintiff can show that the official violated a clearly established statutory or constitutional right. The trial court held that Page was entitled to qualified immunity, but Alvarado was not.

Moreno raised sufficient evidence to raise a genuine issue of material fact suggesting that Alvarado's conduct violated an actual constitutional right. Further, a rational jury could conclude that Derek did not pose an especially significant threat of harm such that the use of deadly force was justified. Under the facts here a jury could conclude that Alvarado's conduct was not a reasonable response to any threat, according to the trial court. Thus, Alvarado was not entitled to qualified immunity. On the other hand, the trial court concluded that Moreno failed to present competent summary judgment evidence that Page was deliberately indifferent in failing to provide any additional training to Alvarado.

Page and Alvarado next argued that the state law negligence claims were barred by Texas Education Code § 22.0511(a) which provides: "A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students." Page and Alvarado were "professional employees" as defined in the statute.

Regarding Alvarado, a genuine issue of material fact existed as to whether he used excessive force. Further, the evidence was sufficient to raise a negligence claim. Thus, the trial court held that the statutory immunity was not applicable to the negligence claim asserted against him. With respect to Page, Moreno did not specifically respond to Page's claim of statutory immunity. The trial court concluded, therefore, that Education Code § 22.0511(a) barred the negligence claim against Page. The record showed that Page was a professional employee of the school district. The challenged conduct was within or incident to the scope of Page's duties, which involved the exercise of discretion or judgment. Page did not cause Derek's injury as a result of the use of excessive force and Page did not discipline Derek. Thus, Page was entitled to statutory immunity under § 22.0511(a). The trial court dismissed the claims against the district and Page, but let Moreno proceed on the excessive force and negligence claims against Alvarado.

Things to Remember: ***This is a good illustration of the application of "qualified immunity" standards. The court draws a distinction between the chief of police, who was not directly involved in this tragic incident, and the police officer, who was.***

ASSAULT LEAVE 101 continued from page 4

leads to the bodily injury. The other form of assault is intentional or knowing conduct that the assailant should know would be offensive or provocative to the victim. Tex. Penal Code § 22.01(3). The offensive touching provision is less common in assault leave claims, because generally there is going to be intentional or at least reckless behavior involved by the assailant. In *Smith v. Dallas ISD*, the Commissioner held that the conduct was not an assault based on the intentional and reckless provisions, but found that the facts supported an offensive touching.

In *Smith v. Dallas ISD*, the Commissioner determined that despite the fact that the student and Mr. Smith had engaged in similar horseplay behavior in the past, the student should have known that Mr. Smith would find his actions offensive on this particular occasion. To support the determination that the student should have known that his touching would be offensive, the Commissioner cited to the discipline that was given to the student for the incident. "The student was disciplined for inappropriate physical contact by [the district]. Because of this it must be concluded that the student should have believed that his conduct would be considered offensive by Petitioner. Petitioner was assaulted by physical conduct." While the Commissioner did not overtly make this holding, this case suggests that if the district disciplines the student for the conduct, the disciplinary decision will be viewed almost as an admission by the district that the touching was offensive.

Assault or an Accident?

Accidents happen in our world all the time. Accidents that happen in the course and scope of employment are unavoidable, but a true accident does not entitle an employee to assault leave. It is a fine line between what is an accident and what is reckless behavior that will be covered under assault leave. The Commissioner has upheld board decisions in several cases where the incident was determined to be an accident and not an assault.

Long-Walker v. Fort Bend Independent School District, Docket No. 067-R10-404 (Comm'r Educ. 2006), involved a student who was angry in the school's front office and faced with the threat of a phone call to his parents. The student tried to stop his teacher from calling his parents by pulling the phone plug out of the wall. In doing so, the student caused the bookshelf that was in front of the cord to fall and injure the teacher. The Commissioner decided that the student's behavior was not reck-

less because there was not a "conscious disregard of a substantial risk" that the bookshelf would fall over by pulling on the phone cord. Thus, this incident was an accident. Keep in mind, the employee's injury stemmed from the falling bookcase. Had the injury been caused by the flying phone cord, a different result might have been reached. In that scenario, it may have been a conscious disregard of a substantial and unjustifiable risk; *i.e.,* reckless behavior. The Commissioner upheld the board's denial of assault leave.

A second and potentially more common accident scenario is found in *Brown v. Mansfield Independent School District*, Docket No. 026-R10-105 (Comm'r. Educ. 2006). Ms. Brown was escorting a student down the hallway after the student had engaged in bad behavior on the playground, including throwing a rock at Ms. Brown. The incident which caused an injury to Ms. Brown, however, is described by the Commissioner as follows: "As they entered the Music Room, the student tripped and fell. This resulted in Petitioner and the teacher also falling. At the time of the fall, the student was not kicking or struggling. The student's fall and Petitioner's fall were accidents." The write up on the incident, which Ms. Brown signed, stated that, "the student tripped and wouldn't walk tripping Ms. Brown." This statement which the employee did not object to was key evidence supporting the lack of any student intent.

In that case, while Ms. Brown's student was not acting out at the time of the injury event, what happens when students are horsing around with each other in a hallway or classroom and during the course of the horseplay a teacher finds herself in the middle of the fray and suffers an injury? In this type of scenario, the student likely has not even noticed the employee. Clearly, the student is not intending to hurt the employee if they are unaware that the employee is there. The main consideration here is whether the student engaged in purposeful or reckless behavior that resulted in bodily injury to the employee. This was the very scenario and discussion in *Paggett-Bryant v. Sunnyvale ISD,* Docket No, 071-R10-603 (Comm'r Educ. 2004). The record showed that one student in a busy hallway shoved another student. That student lost his balance and fell into other students who then fell into the teacher.

The Commissioner held that, when an assailant acts with the requisite intent to have engaged in an assault, who is ultimately assaulted is irrelevant to the question of whether it was in fact an assault. This is the application of the doctrine of transferred intent. This too is defined in the Penal Code § 6.04. Generally, transferred intent means that if the assaultive action was intended towards one person, but ends up assaulting another, the intent necessary to meet the statutory requirement exists. In other words, if a student assaults another student, or even intended to assault another student but missed, and instead strikes the employee, or causes another person to strike the employee, through transferred intent, the employee suffered an assault. The Commissioner applied this doctrine directly in *Paggett-Bryant*. The Commissioner summed up application of the doctrine stating that it is "[t]he natural and probable result of pushing someone in a hall full of moving people [] that people will fall down." Accordingly, Ms. Paggett-Bryant was assaulted and entitled to assault leave.

What this and other cases mean is that in the hallway and horseplay scenarios that frequently exist, the issue is whether the students were engaging in reckless behavior; meaning behavior that had a reasonable chance of resulting in injury to someone. Even if the student did not realize the possibility that the employee could be assaulted, the conduct of the student was reckless. If an injury happened to the employee, as opposed to or in addition to the intended target, this factual scenario would result in the employee being assaulted under the law, and entitled to assault leave to recuperate from whatever injuries were suffered. Accidentally hurting a teacher is not the same as an accident.

The decision whether to award assault leave requires a detailed analysis of the facts surrounding the actual incident. As a general rule though, if an employee is injured due to a student's purposeful action, or if the employee is injured and discipline is imposed on the student, the employee likely was assaulted for purposes of assault leave. These cases illustrate that in determining what happened, it is critical to get detailed witness statements in any possible assault leave situation. Frequently an employee's right to assault leave turns on the specific facts and how they are documented and presented to the board, and ultimately to the Commissioner. Thus, witness statements are extremely helpful in developing the case before the board.

Provide Assault Leave Upon Request or Not?

Once an employee requests assault leave, as the statute provides, absent a very obvious exclusion from the right to receive assault leave, you should "immediately assign an employee to assault leave." This is of course important because assault leave is fully paid and is separate from the other various types of leave available to an employee. However, the statute further provides that upon "investigation of the claim," the district may change the leave if the situation does not meet the assault leave requirements. In addition, any days initially designated as assault leave can be changed to any other available type of leave, if it is determined that assault leave was not appropriate. Finally, if the employee has insufficient paid leave available to cover the assault leave given, the district may dock the employee's pay. Accordingly, there is no reason not to always give initial assignment of the leave as assault leave.

It would be a good practice to develop a letter providing notice to an employee that assault leave is granted, however, that this is just an initial designation and the district will conduct an investigation into the situation. The notice should state further that should it be determined that the incident did not qualify for assault leave, (1) the district will change any days designated as assault leave to other applicable leave, or (2) if insufficient paid leave days exist, then the employee's pay will be deducted for any days missed and for which no paid leave was available.

What Investigation Can the District Conduct Following A Request for Assault Leave?

There often are two completely different investigations that may need to be conducted related to assault leave claims. The first obviously is to determine what happened. As discussed above, written statements from various witnesses are key. If necessary, you should follow up with specific questions that will help determine whether the incident was an accident. During

the initial determination, if the employee challenges the decision, the board will have to review the facts available and make its own assessment as well. The information best suited for consideration by the board, and ultimately the Commissioner if appealed, will come from written statements about the incident, signed and dated by the person making the statement.

The second type of investigation done in assault leave claims may be both at the initial stage of the request for assault leave, as well as an ongoing investigative need. Unfortunately, there are employees who may try and take advantage of the district through assault leave. Because the statute provides leave for the purpose of recuperation from injuries sustained in the assault, and only for that, the employee's medical information may become important. The district clearly has a right to request medical information from an employee asserting an assault leave claim. There are several Commissioner decisions which have been quite clear on this point. For example, in *Taylor v. Sharyland Independent School District*, Docket No. 001-R10-904 (Comm'r Educ. 2006), the employee asserted that the district had no right to seek medical information dated before the assault occurred because the evidence in that case was clear that the employee had been assaulted. The Commissioner disagreed stating that because assault leave is meant to allow for recuperation from injuries incurred in the assault, it may be relevant to know the employee's medical history. The Commissioner reiterated this same holding in the recent decision, *Smith v. Dallas ISD*. In fact, the Commissioner upheld the denial of Mr. Smith's assault leave claim due to the fact that he did not provide medical information to the district to support the necessity for the leave.

A frequent help to administrators handling an assault leave claim is the connection to workers' compensation that nearly always will exist. When an employee is injured on the job in any manner, workers' compensation insurance will be invoked. Working in conjunction with your workers' compensation carrier when your employee is seeking assault leave is helpful because of the medical reports that are required under workers' compensation. First, the medical examination may provide information about whether the injury that is keeping the employee out of work is related to the assault that happened or some other pre-existing condition. This is in part why prior medical information can be requested and is potentially relevant. Additionally, follow-up workers' compensation evaluations may provide relevant information about when the employee has recuperated enough to return to work. Workers' compensation carriers seek to have employees return to work as quickly as possible and are generally diligent about securing pertinent medical information.

When Is Assault Leave Concluded?

Two recent Commissioner's decisions touch on the issue of when an employee is supposed to return to work from a request for assault leave. The language in the statute is that the employee is entitled to "the number of days of leave necessary to recuperate from all physical injuries sustained as a result of the assault." Here again, workers' compensation status reports may be important to come to a determination on recuperation. As most administrators recognize, when an employee is out under workers' compensation, at some point the workers' compensation doctor will release the employee to return to work, at times with restrictions and at times without any.

In *Harper v. Northeast Independent School District*, Docket No. 005-R10-0906 (Comm'r Educ. 2009), Ms. Harper was released by the workers' compensation physician with a restriction of no use of her arm which was injured in the assault. A few days later a revised work status report provided that Ms. Harper could use her arm for simple tasks like writing and holding papers. The doctor further provided a continuing treatment plan that included ongoing physical therapy. Upon receiving this information, the district required Ms. Harper to return to work but she did not do so. The Commissioner held that Ms. Harper "was able to do her job while complying with her doctors' restrictions. Returning to work on those days would not worsen her injuries. Additional days of leave would not facilitate the healing process."

Based on *Harper*, the Commissioner provides three questions to consider in any return to work decision. The first is whether additional days would be needed to be able to do the job. The second involves whether there is any information showing that a return to work would worsen the injury. Third, is whether any information supports a need for additional days to facilitate the healing process. In applying these factors to Ms. Harper, the Commissioner reviewed her medical release information and found that the doctors released her back to work. The Commissioner found that despite the medical information stating a need for continued therapy, there was no medical information indicating that returning to work would worsen the injury. Further, the medical information did not show that additional days of leave would facilitate the healing process.

Garcia v. United Independent School District, Docket No. 046-R10-0410 (Comm'r Educ. 2011), provides a follow-up to *Harper* and makes a similar determination on the effect of workers' compensation information on the issue of whether the employee needs additional recuperation time. Ms. Garcia actually was denied any assault leave, but that decision was due to the timing of the request for assault leave. Ms. Garcia had been under workers' compensation coverage prior to the time that she requested assault leave. Before finally requesting assault leave, the workers' compensation doctors determined that she had reached maximum medical improvement and assigned her a whole body improvement rating of 0%. Ms. Garcia did not provide any additional medical information beyond this information. As a result, when she applied for assault leave, the district determined that she did not have a need to recuperate from her injuries. The Commissioner agreed. The determining factor, in this case, was that Ms. Garcia already had been cleared to return to work before she requested assault leave. The medical information was clear that she was fully recovered from any injuries she suffered at the time she requested the assault leave.

The third question concerning whether additional days of leave would facilitate the healing process is somewhat confusing, and the Commissioner has not offered a lot of guidance in this area. In *Harper*, the employee was released to return to work, but was given medical instructions to continue with physical therapy. The Commissioner made specific reference

TEXAS SCHOOL ADMINISTRATORS' LEGAL DIGEST™

1601 Rio Grande, Ste. 455
Austin, TX 78701

PRSRT STD
U.S. Postage
P A I D
Denton, TX
Permit No. 438

to that medical information but still held that Ms. Harper was no longer entitled to assault leave. The focus seemed to be on the employee's ability to return to work, rather than the need for ongoing treatments to continue to aid the employee's healing. Thus, even if the employee has some limitations and are supposed to continue with some medical treatments to further heal the injury, the right to assault leave ends when the employee is released by their health care provider to return to work. Ms. Harper did not return to work at all despite her medical clearance. She was not entitled to continued assault leave once she was released to return to work.

CONCLUSION

Assault leave can be a very complex issue for a district to deal with when the underlying situation is less than a clear case of an assault or if the level of injury incurred or length of recovery is in doubt. Remember that assault leave is paid leave, separate and apart from any other leave, and can last up to two years. Accordingly, the potential cost of an assault leave claim to the district can be rather large. For these reasons, you should review all requests for assault leave closely. Because assault leave claims do not come up very often, it is easy to forget the factors to consider when a claim is made in your district. Below is a short checklist to keep in mind when you are confronted with an assault leave request.

Assault Leave Checklist

1) Absent obvious disqualification, assume coverage exists and place the employee on assault leave when requested. Inform employee that an investigation will follow.
2) Investigate the facts surrounding the incident as quickly as possible and be sure to ask questions and gather information to determine whether the injury was caused by a purposeful action of the assailant. Get statements in writing, signed, and shared with the employee.
3) Begin the process of gathering medical information from the employee related to the injuries alleged to have been caused by the assault. If the employee is seeking workers' compensation, work closely with your carrier.
4) Assuming assault leave is granted, set up a system for monitoring the employee's leave status and recuperation. If the employee is under workers' compensation coverage, be sure that you coordinate your efforts with your carrier.

Finally, if you decide to deny an employee's request for assault leave, and the employee disagrees, they are required to appeal that decision through your district's grievance policy and ultimately to present that decision to your board of trustees. *Craig v. North Forest Independent School District*, Docket No. 175-R10-699 (Comm'r Educ. 2000). Because the employee must proceed through the grievance process, there will be time to review and reassess the request before matters become too complicated or expensive. If assault leave is warranted, go back and correct any erroneous leave reduction made and pay any missed salary. If an employee challenges the denial of assault leave, contact the district's legal counsel to help review the situation and determine whether the facts support the denial of the assault leave. Legal counsel can help gather essential information and documentation to support a decision to deny a request for assault leave. While the employee technically has the burden of showing their right to assault leave, in an appeal to the Commissioner, the record before the board of trustees must include all the necessary information supporting the decision. So long as facts exist that support the Board's decision, even if the Commissioner disagrees, under a substantial evidence review standard, the Board's decision should be upheld. Working with your legal counsel can help ensure that you have everything you need in place to meet the sometimes complicated legal requirements.