SPRING 2014 NEWSLETTER

SCHOOL LAW UPDATE

By John D. Husted

FIFTH CIRCUIT COURT OF APPEALS

***Morgan v. Swanson*, No. 13-40433, 2014 U.S. App. LEXIS 6125 (5th Cir. April 2, 2014)**

A school official is entitled to qualified immunity from an elementary school parent's First Amendment viewpoint discrimination claim arising from the discretionary decision to not allow a parent to distribute religious material to other adults at his son's in-class winter party.

In December, 2003, Mr. Morgan attended his son's elementary school in-class winter party. Principal Lynn Swanson prohibited Morgan's son from distributing candy canes bearing a religious message at the in-class party, and the family filed suit alleging a First Amendment violation. In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), the Court held that Swanson's conduct was unconstitutional, but she was entitled to qualified immunity because relevant law was too "abstruse" and "complicated" for Swanson to have known how to handle the situation. Now, with this case, Mr. Morgan asserts that he, too, experienced viewpoint discrimination when Principal Swanson told him not to distribute the religious material to other consenting adults in the classroom.

A school official is entitled to qualified immunity from civil liability arising out of her discretionary decisions unless her conduct is "clearly established" as unconstitutional. The court found that "educators are nearly always immune from liability arising out of First-Amendment disputes, except in the rare incidents when there is precedent directly on point." Where, as here, there is no authority recognizing an asserted right, and where the area of law is abstruse and complicated, the asserted right is not clearly established for qualified immunity purposes. Therefore, the Court dismissed Mr. Morgan's claim.

TEXAS COURT OF APPEALS

***Mt. Pleasant Independent School District v. Elliott*, No. 06-13-00115-CV, 2014 Tex. App. LEXIS 4159 (Tex. App. – Texarkana April 17, 2014, no pet. h.) (mem. op.)**

School bus maintenance is not a "use" or "operation" of the bus that would waive a school district's immunity to a personal injury claim stemming from a bus crash under the Texas Tort Claims Act (TTCA). Also, a school district's immunity is not waived if, at the time of the accident, it had contracted out the operation, use, and maintenance of the bus fleet and bus-driver employment to a third party.

Durham Transportation, Inc. had recently contracted with Mount Pleasant ISD to operate and maintain the District's bus fleet. Durham also took over the employment of the district's bus drivers. Shortly thereafter, the brakes failed on the school bus driven by Dona K. Elliott. Elliott's kneecap was broken in the ensuing crash, and she filed a personal injury lawsuit against the District. Elliott claims the District, a governmental unit of the State of Texas, was negligent in failing to adequately repair and maintain the brakes on the bus.

Before Durham took over fleet maintenance and operations, the District had received numerous complaints related to the brakes on the seventeen-year-old bus, and a different District-owned bus had similar brake problems. The District contends that any pre-contract brake maintenance or repairs on the bus cannot operate as a waiver of its sovereign immunity. The trial court overruled the District's plea to the jurisdiction, and the District appealed.

The Texas Tort Claims Act (TTCA) provides a limited waiver of immunity from suit in certain narrowly-defined circumstances, and the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. The District, as a governmental unit, is therefore immune from suit for Elliott's injuries unless immunity has been waived by the TTCA. For school districts, the waiver of the immunity under the TTCA is limited to claims arising from the operation or use of a motor-driven vehicle. The District contends that immunity was not waived because the District did not operate or use the bus at the time of the crash. Because (1) the District did not operate, use, or control the bus at the time of the accident, and (2) maintenance is not a "use" or "operation" of the bus, the court reversed, and dismissed Elliott's claims against the District.

***Dallas Independent School District v. Watson*, No. 05-12-00254, 2014 Tex. App. LEXIS 2383 (Tex. App. – Dallas February 28, 2014, no pet. h.)**

Under the Texas Whistleblower Act, a school district employee's report of a belief that conduct might happen in the future that might violate the law does not amount to a good-faith report of an existing or past violation of law.

Watson worked as a plumber for DISD for nineteen and a half years until he was terminated in 2007. On July 11, 2007, Debbie Pruitt, Watson's supervisor, notified him to stop his normal duties and start gas tests at schools in their division, and she allegedly demanded that Watson do three tests a day. Watson and his co-worker completed one test that day. The next day, a heated argument ensued between Pruitt and Watson over Watson's progress on the gas tests. On July 13, Watson called the Texas Railroad Commission (TRC) and later the Texas State Board of Plumbing Examiners (TSBPE), to inform them he was being pressured into doing gas tests in an unsafe, hurried-up manner. On July 16, Watson was informed that he was being taken off the gas tests. Shortly thereafter, he was notified that his employment was being terminated due to his insubordination and hostile and belligerent behavior.

Watson filed suit, claiming he was terminated in violation of the Texas Whistleblower Act. The trial court denied DISD's plea to the jurisdiction, the case went to trial, and in accordance

with the jury's verdict, the Court entered judgment in favor of Watson. The court of appeals reversed the trial court's judgment and dismissed the case for lack of subject-matter jurisdiction. Watson's allegations merely recite his prediction that completing three gas tests on a single day in the future might be "unsafe" and "hurried-up." A report of belief that laws might be violated in the future is not a good-faith report of existing or past violation of law required to support a claim under the Texas Whistleblower Act.