



Court Report

August 2022

US Supreme Court

- **First Amendment – Religious Expression**

***Kennedy v. Bremerton School District (WA)*, 142 S.Ct. 2407 (Jun. 27, 2022)**

This case involved a Washington high school football coach who wanted to pray on the football field after games. The coach initially prayed on his own, but over time, players began to join him. The coach began incorporating “short motivational speeches” into his prayers. Once the superintendent became aware of this practice, he cautioned the coach about his conduct for fear that those expressions could look like the school was endorsing a religion in violation of the Establishment Clause of the U.S. Constitution. He said that, while students could freely engage in prayer if they chose to do so, the coach’s religious expression should be “nondemonstrative”—essentially that he could silently pray to himself. Letters were exchanged between the district and coach’s attorney but the district remained firm in its decision that demonstrative prayer would violate the Establishment Clause. Following subsequent letters and games, the coach continued to pray on the field and the district continued its attempts to limit his conduct. The coach was ultimately released from his coaching position.

The coach sued the district for violating his First Amendment right to freedom of speech and free exercise of his religion. After the lower court and appellate court ruled in favor of the district, the coach appealed to the U.S. Supreme Court.

Neither teachers nor students “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines ICSD*, 393 U.S. 503 (1969). But those rights have limits, particularly for government employees paid to speak on the government’s behalf. The coach has the burden to show that his rights were violated. If he can do that, the burden shifts back to the district to show that the action it took was justified.

The Free Exercise Clause bars the government from prohibiting the free exercise of religion. To carry his burden, a plaintiff must show that the government has blocked his ability to engage in a religious practice in a way that is not neutral. If the plaintiff does so, the government must survive “strict scrutiny.” It must show that it has a compelling state interest and that its action was narrowly tailored to serve that interest. If it cannot do so, the Court will find a First Amendment violation. Here, the Court found that the district blocked the coach’s religious practice in a non-neutral way—that is, it specifically prohibited religious speech as opposed to all speech.

Courts use a 2-part test in freedom of speech cases involving government employees. The first step looks at the nature of the speech and asks whether the employee was speaking as an employee related to his official duties or as a private citizen on a matter of public concern. Speech pursuant to official duties is not protected by the First Amendment but speech related to a matter of public concern may be. If the speech is on a matter of public concern, the courts use a balancing test to determine if the employee’s right to speak is outweighed by the government’s interests in efficient operations.

Here, the parties agreed that the coach was speaking on a matter of public concern but they disagreed as to whether he was speaking as an employee or as a private citizen. The Court determined that the coach was speaking as a private citizen because his mid-field prayers were not part of his job duties, were not pursuant to district policy and were not designed to convey a government message. It noted that his prayers were done after the game when coaches were free to make personal phone calls or greet friends in the stands. Therefore, since private secular speech was allowed, the Court found that the district could not fairly restrict private religious speech made under similar circumstances.

Having found that the coach was speaking as a private citizen on a matter of public concern, the Court then used the balancing test to determine whether the district’s interests as an employer outweighed the coach’s interest in praying. The district must survive “strict scrutiny”—again, did its action serve a compelling governmental interest and was it narrowly tailored to serve that interest. The district argued that it removed the coach from his position to

avoid an Establishment Clause violation. The Court rejected that defense finding that no reasonable person could have confused the coach's prayers as district speech where the coach never attempted to coerce students to pray. Because the district could not survive strict scrutiny, its action violated the coach's free speech and free exercise rights.

Editor's Note: The U.S. Supreme Court's holding here was based on the specific facts particular to this case. School systems should not read this opinion as permission for school employees or school officials to pray on campus or with students. In fact, the Court specifically distinguished this case from the case which prohibits praying over the PA system at games. See *Santa Fe ISD v. Doe*, 530 U.S. 290 (2000). Work closely with local counsel if this issue arises in your system.

Eleventh Circuit

- **Title IX – Sexual Abuse**

***Doe II v. Savannah-Chatham County Public School System (Ga.)*, 2022 WL 3041276 (11th Cir. Aug. 2, 2022)**

This case arose from allegations that an assistant principal sexually assaulted a high school student. The assistant principal offered to drive the student home after serving detention. Rather than taking the student home as promised, the man drove the student to his own home and sexually assaulted him. Several months later, the boy reported the incident to his mother who contacted the school. Upon hearing the report, school administrators immediately contacted law enforcement and the Department of Family and Child Services and transferred the boy to another school. On the same day, the principal began an investigation and barred the assistant principal from having any further contact with students. The next day, his contract was nonrenewed. Before the nonrenewal took effect, he resigned. The student sued the district and assistant principal for violations of Title IX and Section 1983. The trial court ultimately granted the district summary judgment and the student appealed to the Eleventh Circuit.

On appeal, the Court first considered the student's Title IX claims. A teacher-on-student sexual assault is considered sex discrimination under Title IX. To survive summary judgment, the student must show:

1. A district employee or official with authority to take corrective measures had actual notice of the harassment; and
2. That employee or official was deliberately indifferent to the harassment.

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

A school official is deliberately indifferent if their response to harassment (or lack thereof) is clearly unreasonable under the circumstances.

The district had actual knowledge of the incident once the student reported it to the principal several months after it occurred. The Court then considered whether the district's response was deliberately indifferent. Here, where school administrators contacted law enforcement, Child Services, interviewed the student and the assistant principal, barred the assistant principal from being around students and reviewed the assistant principal's emails for evidence, all on the day of the report, and then nonrenewed him the following day, they were not deliberately indifferent to the harassment. The district also reported the assistant principal to the state licensure agency, which ultimately revoked his teaching certificate. Therefore, the Court held that the district was not deliberately indifferent and affirmed summary judgment for the district on the Title IX claim.

The Court next considered the student's Section 1983 claim. Section 1983 allows a person to sue the government for violating his civil rights. The Court noted that the student could only hold the district liable if he could identify a custom or policy that caused his injury. The mere fact that it employed the offender is not enough. Here, there was no dispute that the district had a policy prohibiting sexual contact between employees and students but the student claimed that the district had a "custom" of ignoring complaints about such incidents. A district's repeated failure to address misconduct can lead to a finding that they have a "custom" of implicitly authorizing the misconduct. The student failed to put forward any evidence of past incidents of lax enforcement. Accordingly, the Court upheld summary judgment for the district but held that the assistant principal was not entitled to summary judgment and remanded the case for further proceedings against him alone.

Alabama Supreme Court

- Immunity – Sex Abuse

Ex parte Wilcox County Board of Education, 2022 WL 2093198 (Ala. Jun. 10, 2022)

This case arose from allegations that a high school principal sexually assaulted a student at school. The student reported the assault to law enforcement and the principal was eventually convicted. Following his arrest, the principal was placed on administrative leave and ultimately terminated. The student sued the board, board members in their official and individual capacities, the superintendent and her predecessors and the principal alleging that they knew of past abuse by the principal and failed to take appropriate action. The board members denied being aware of past incidents with the principal. The student agreed that the board and board members in their official capacities were entitled to absolute immunity but argued that the board members were not entitled to state agent immunity in their individual capacities. Specifically, the student argued the board members knew or should have known of the principal's past misconduct based on rumors in the community regarding other incidents and a 20-year old complaint made by a school employee. The trial court ultimately denied summary judgment and the board and board defendants filed a mandamus petition with the Alabama Supreme Court.

The Court quickly disposed of the claims against the board and board members in their official capacities holding that they were entitled to absolute immunity. The bulk of the decision addressed whether the board members were entitled to state agent immunity in their individual capacities. Public officials are entitled to state agent immunity (also referred to as discretionary function immunity) when the allegations involve matters for which they must use their discretion, such as hiring and firing staff and educating students. However, if the public official acts willfully, maliciously, in bad faith or in a way that violates law or policy, they may not be immune. *Ala. Code* §36-1-12.

Here, the board members claimed that they were using their judgment in making employment decisions that would entitle them to state agent immunity. In response, the student claimed that the board members should

be stripped of their immunity because they acted beyond their authority—specifically by violating sex harassment rules adopted by the board. The Court found no evidence that board members violated the sexual harassment rules. Moreover, the Court noted that those rules did not apply to board members.

The student also alleged that the board members acted maliciously or in bad faith by keeping the principal employed despite knowledge of his past misconduct. Specifically, the student alleged that the principal—who also held a statewide office—paid the board members to ignore his misconduct. The Court questioned the credibility of the evidence submitted, noting that most of the testimony relied upon rumors and suspicions. Nevertheless, the Court decided that the widespread evidence of rumors was at least sufficient evidence that the board members should have known of the principal's reputation in the community. Because the standard of review requires the Court to look at evidence in a light most favorable to the student, the Court held that the board members did not have a clear legal right to summary judgment.

The Court ordered the trial court to enter judgment in favor of the board and the board members in their official capacities but remanded the case back to the trial court for further proceedings against the board members in their individual capacities.

Matters of Interest

- **First Amendment – Voucher Program**

Carson v. Makin, 142 S.Ct. 1987 (Jun. 21, 2022)

This case involved a voucher program in Maine. The program provided tuition assistance to families that lived in school districts with no secondary schools. Under the program, families could send their child to a high school of their choice and the resident school district would send payments to the schools to cover part of the cost. Only public and nonsectarian private schools—high schools that do not promote a particular religion—were eligible to participate in the program. Two families sued the State Department of Education claiming that the nonsectarian requirement violated their First Amendment right to free exercise of their religious beliefs and their Fourteenth Amendment right to

equal protection. Both the lower court and appellate court ruled in favor of the Department but the U.S. Supreme Court agreed to hear the appeal.

In a recent case, the Court held that the state is not required to fund private education, but once it does, it cannot discriminate against religious education. *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020). The Court made the same holding here, finding that the tuition program violated the Free Exercise Clause by discriminating against religious schools.

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