

U.S. Supreme Court Update & National School Law Trends

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Thomas Hutton



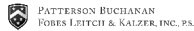
Today's Road Map

Themes:

- School as workplace
- Balance between individual and community
- Law as intergovernmental dialogue
- The legalization of education

Cases, inside baseball, issues to watch

Law, policy, politics – Outlook



Inside baseball?



**HUTTON'S
RULES OF SCHOOL LAW**

I. SEXINESS = SIGNIFICANCE

II. EVERYONE IS AN EDUCATION EXPERT

III. THE SCHOOL DISTRICT IS ALWAYS WRONG

School as workplace

Hutton's Rule #1

- Walmart: 1.8 mil., DOD: 3.8 mil.
- Public school districts: 6.2 mil.
- NSBA tracked 55 S. Ct. cases last term, including decided or denied in 2009
 - Of these, 40 employment-related
 - Of these, 23 employment discrimination
- So far this term: 50 cases
 - 28 employment, 20 discrimination

School as workplace

Gross v. FBL Financial Services, No. 08-441

- 526 F.3d 356 (8th Cir. 2008)
- In age discrimination claim, must employee show age was a factor in adverse decision or decisive factor to switch burden of proof to employer?
- If so, must employee present direct evidence of discrimination?

School as workplace

Gross

- Background: *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008)
 - Burden of persuasion if employer cites “reasonable factors other than age”?
 - Fact pattern: End of Cold War
 - Ct. (8-0, Souter): Employer has burden
 - Sympathetic, but “We have to read it the way Congress wrote it.”

School as workplace

Gross

- NSBA: Beware of inhibiting legitimate, nondiscriminatory decisions that may have effect of disadvantaging older employees
 - Examples – Hutton’s Rule #3!
 - “Inappropriate prophylactic measures”
 - Use “but for” test, or at least require direct evidence of discrimination

School as workplace

Gross, 129 S.Ct. 2343 (June 18, 2009)

- (5-4, Thomas):
 - Unlike Title VII, Age Discrimination in Employment Act (ADEA) does not expressly allow plaintiff merely to show age was a motivating factor
 - Therefore “because of” = “but for”
 - IMPLICATIONS

School as workplace

Crawford v. Metropolitan Government of Nashville & Davidson County,
129 S.Ct. 846 (Jan. 26, 2009)

- Under Title VII, is employee's cooperation in employer-initiated harassment investigation protected "opposition" or "participation"?
- Concern: "Post hoc, ergo propter hoc"

School as workplace

Crawford

- Ct. (9-0, Souter): This is protected
- IMPLICATIONS:
 - Multiple contexts in schools (harassment, other whistleblowing)
 - DUTY to report
 - Protection from adverse consequences

Changing workplace

The traditional tradeoff?

- Unprecedented demands on education system
- Era of accountability
- Fiscal constraints
- Bottom line: More difficult choices looming?

Individuals & Community

- *Safford USD #1 v. Redding*
 - (en banc) 531 F.3d 1071 (9th Cir. 2008)
 - Strip search for prescription Ibuprofen
 - Student in previous year sickened and violent from prescription medication (Hutton’s Rule #3!)
 - Kids as young as 10 at this school

Individuals & Community

Safford

- NSBA:
 - Not “Rah-rah strip searches!”
 - Key: Don’t push reasonable suspicion standard toward probable cause
 - 9th Cir. erred in not deferring to educators about potential risks here (Hutton’s Rule #2!)
 - Qualified immunity!

Individuals & Community

Safford

- Oral arguments: Justices hinted this was harder than news media made out
- Bottom lines:
 1. It’s how you lose that matters
 2. Qualified immunity issue

Individuals & Community

Safford, 129 S.Ct. 2633 (Apr. 21, 2009)

- (6-3, Souter):
 - Search violated Fourth Amendment
 - Nature of infraction, limited threat
 - No reason to suspect pills concealed in undergarments
 - But qualified immunity (disputed)
- The inside story: Role of Ginsburg
- IMPLICATIONS: Test?

Individuals & Community

M.A.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008)

- Flyers in hallways – impact litigation
- *Tinker* standard, or forum analysis?
- NSBA brief:
 - *Tinker* mission creep?
 - Paradox: Schools least discretion?
 - Hutton’s Rule #2! Hallways big deal
- Ct: Very strong ruling for school
- IMPLICATIONS: Still hot issue?

Individuals & Community

Busch v. Marple Newtown Sch. Dist.,
No. 05-2094 (3d Cir. June 1, 2009)

- Parent wants to read scripture to kindergarten class (from Psalms)
- Hutton’s Rule #3!
- Ct.: Curriculum -- legitimate pedagogical purpose (Catch 22)
- Barry, conc.: Kindergarten exception?
- Hardimann dissent: Incomplete!
- IMPLICATIONS

Intergovernmental dialogue

- Many of the cases we've already discussed include this element -- all the IDEA cases do
- Statutory interpretation
- *Chevron* deference to administrative agencies
- Judicial deference to educators
- Standard of judicial review of decisions

Intergovernmental dialogue

20 U.S.C. § 1412(a)(12)(C):

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special ed. and related services under the authority of a public agency, enroll the child in a private... school without the consent of ... the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the ... agency had not made a [FAPE] available in a timely manner
....

Intergovernmental dialogue

- *Forest Grove Sch. Dist. v. T.A.*, No. 08-305
 - Note: Also Individual & Community
 - 523 F.3d 1078 (9th Cir. 2008)
 - Tuition reimbursement where student never received public school services
 - Parent agreed child not disabled, placed in residential private school without notice to district
- Note: IDEA & Hutton's Rule #2!

Intergovernmental dialogue

Forest Grove background

- *Board of Educ. of City of New York v. Tom F.*, 128 S. Ct. 1 (U.S. 2007)
 - 4-4, so 2d Cir. decision stood (there)
 - Justices not identified
 - Kennedy recusal – Why?

Intergovernmental dialogue

Forest Grove

School advocates:

- Collaborative model of IDEA
- Disincentives to collaborate
- Unfair advantages not only as to school district but also as to parents who do act in good faith
- Cost implications

Intergovernmental dialogue

Forest Grove, 129 S Ct 2484 (June 22, 2009)

- (6-3 Stevens):
 - Note: Someone switched sides!
 - If reimbursement where inadequate IEP, surely can get if no IEP
 - No services *because* district refused
 - 1997 language didn't expressly prohibit – conditioning not enough
 - “Elucidative, not exhaustive” -- “common factual scenario”

Intergovernmental dialogue

Forest Grove

- Dissent (Souter)
 - Congress expressly prohibited, not “implicitly”
 - When Mom says you can go out if your homework’s done, not “elucidative”
 - Parents who do not work with district have advantage over “more deserving”
 - A Pennsylvania presentation
 - Cites procedural safeguards

Intergovernmental dialogue

Forest Grove

IMPLICATIONS

- Two competing theories:
 1. Congress means what it said
 2. Congress is inept at writing statutes
- “Child find” takes on added importance
- Think twice about finding ineligible?
- Silver lining: In considering equities, presume school officials performing
- Note: IDEA funding

Intergovernmental dialogue

Finance cases

- *Horne and Speaker of Ariz. House of Reps v. Flores*
 - 516 F.3d 1140 (9th Cir. 2008)
 - ELL funding sufficient to comply with Equal Educational Opportunity Act?
 - State relief under Fed Rules of Civil Procedure?
 - Never complied vs. No more violation

Intergovernmental dialogue

Flores

- Petitioners:
 - Incentives for schools not to succeed?
 - NCLB defines compliance
- Try that in IDEA!

Intergovernmental dialogue

Flores

- Ct. (5-4, Alito):
- 9th Cir. approach was too strict, narrow
 - If violation remedied, enforcement of court order should be reconsidered
 - Case remanded for court to look again
 - Breyer: Forceful dissent
 - IMPLICATIONS?
 - BIG: Get out from court orders?
 - Maryland foster care case
 - D.C. special ed consent decree

Intergovernmental dialogue

Flores -- IMPLICATIONS, cont.

- State versions of argument in state funding cases?
- State cases generally
 - Justiciability & separation of powers
 - Some thoughts about demographics

Legalization

- *Nurre v. Whitehead*, No. 07-35867 (9th Cir. Sept. 8, 2009)
 - 520 F.Supp.2d 1222 (W.D. Wash. 2007)
 - Instrumental “Ave Maria” at graduation?
 - Prior complaints – Hutton’s Rule #3!
- Sued superintendent in personal capacity

Legalization

Nurre

- NSBA:
 - Evidence of concerns school personnel have about legalization
- Invitation to court re. “Play in the joints”
 - Allowed by Establishment Clause, but not required by Free Exercise Clause
 - *Locke v. Davey*, 540 U.S. 712 (2004)
 - Action shifted to Free Speech Clause

Legalization

Nurre

- School officials could reasonably restrict music given circumstances of graduation
 - IMPLICATIONS: Not nec. MUST
 - But 9th Cir. does take hard line:
 - Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003)
 - Note: *McComb v. Crehan*, No. 07-16194 (9th Cir. Mar. 20, 2009) -- petition to Supreme Court

Legalization?

- Hess & Fusarelli, draft paper, Oct. 2008:
 - “Cages of Their Own Design? Superintendents and the Law”
- *De facto* legal standards
 - Remember *Gross*? IDEA, etc.
 - Breyer concurrence in *Garcetti v. Ceballos*, 547 U.S. 410 (2006): “[J]udicial need to *undertake the balance* in the first place”
- Big Picture: Whose sense of urgency?

Other issues to watch

- Inappropriate teacher-student relations
- Reported incidents on the rise -- Why?
 - Really more? Telecommunications?
 - Better at ferreting out?
 - Remember *Crawford*
 - Similar preventive practices, training, duty to report, duty to investigate, liability for “passing the trash”?

Other issues to watch

- School resource officers
- \$1 *billion* in federal funds forthcoming
 - Legal & policy questions:
 - Police or school hat?
 - Fourth Amendment standard
 - Summer scenarios for SROs
 - Quality of services / effectiveness

Other issues to watch

“Sexting”

- Mar. 2009: Prosecutor sued by ACLU in case arising in Tunkhannock Sch. Dist., Wyoming County, Pennsylvania
- June 2009: Loudoun County, Va. school board votes to pay legal expenses of ass't principal prosecuted after investigating
- Unavoidable popular culture influences + perception of online anonymity/impunity
- Policies, preventive education?

Other issues to watch

School board elections

- Federal Voting Rights Act
- *Bartlett v. Strickland*, 128 S.Ct. 1648 (Mar. 9, 2009) (vote dilution case)
- Periodic lawsuits over at-large election of school directors
- Governance considerations?
- But take a look at local demographics

Other issues to watch

Charter schools

- (Full disclosure)
- Race to the Top funding implications
- Results so far mixed
- *Can* be a good tool for school districts
 - Civic vision
- Much depends on state law
- IF coming, strategic role in shaping law
- After, legal counsel critical

Please provide feedback on this session at:
<http://wssda.org/conference/feedback>

Outlook

- Supreme Court & today's themes
- Workplace: Unpredictable
 - Individual & Collective: Varied
 - Intergovernmental dialogue: Mostly deferential to Congress
 - Deference to educators: Varied
 - *De facto* standards: Conscious
 - Case to watch: *Perdue v. Kenny A.*, 532 F.3d 1209 (11th Cir.) -- Argued Oct. 14
 - Qualified immunity: Sympathetic

Outlook

- Sonia Sotomayor
- Measured opinions, not ideological
 - No pronounced tilt toward plaintiffs or defendants
 - Perry Zirkel, Lehigh University
 - ELA Notes, Fall 2009
 - Rulings so far more for districts
 - Note: *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (student online case)

Outlook

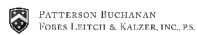
Obama admin's role in shaping law?

- Speculation re. two camps
- NCLB: Got it backwards? Reconsider
- But ARRA, Race to the Top
 - Federal role expansive, assertive
 - *E.g.* for Washington: Charter schools?
- Restraint & seclusion: Both sides?
- Note: ED Gen'l Counsel Charlie Rose

Outlook

A question on all this:

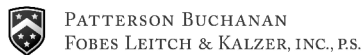
How informed by education world?



Contact info

Tom Hutton

temhutton@gmail.com



2112 Third Avenue, Suite 500
Seattle, WA 98121
