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Teacher Who Resigned Rather Than Exercise His Right to a Pre-Termination Due Process Hearing Entitled to Unemployment Benefits

by Jerry A. Richardson

School districts should be aware of a recent decision by the Oklahoma Court of Civil Appeals granting unemployment benefits to a teacher who resigned rather than exercise his right to a pre-termination due process hearing. In *Moore v. Oklahoma Employment Security Commission*, 2013 OK CIV APP 46, 301 P.3d 885, the appellate court reversed the decision by the Board of Review of the Oklahoma Employment Security Commission denying the teacher's application for unemployment benefits. The appellate court held that the teacher had proven that he had "good cause" for leaving employment. The court ruled that the teacher was justified in resigning based on the teacher's belief that he would be terminated if he went forward with a due process hearing, his fear that his reputation as a good teacher would be damaged because the hearing would take place in an open public meeting accessible to the news media, and his concern that the entire process would be harmful to his health.

The facts of the case were not in dispute. After working for many years

in the same school district, the teacher was notified that the superintendent had determined to recommend to the board of education that the teacher be nonreemployed. The teacher was notified of his right to a due process hearing before the board of education. The teacher voluntarily chose to resign and forego his right to a due process hearing.

The teacher then filed an application for unemployment benefits. Oklahoma law provides, "An individual shall be disqualified for [unemployment] benefits for leaving his last work voluntarily without good cause connected to the work, if so found by the Commission." At the telephone hearing before the Appeal Tribunal of the Employment Security Commission, the teacher testified that in his twenty years of employment as a teacher, he did not know of any teacher who had ever prevailed at a due process hearing before the board of education. The school district was not represented by an attorney at the hearing, and it did not present any evidence to contradict the teacher's testimony. However, the teacher's representative admitted

in response to a question from the hearing officer that she knew of at least one case in which a teacher had prevailed in a due process hearing.

The Appeal Tribunal denied the teacher's application for unemployment benefits, and the Board of Review affirmed. The Board of Review concluded that an applicant for unemployment benefits does not have "good cause" for leaving employment merely based on his own subjective belief that his termination is imminent. The district court affirmed the decision of the Board of Review.

The Court of Civil Appeals reversed. The appellate court held that the admission by the teacher's representative that teachers sometimes prevail in board hearings was not evidence and could not be considered. The court then announced that the only evidence presented at the hearing was the teacher's testimony that he believed he would be terminated if he went forward with the hearing. Although the teacher presented no evidence that the board of education was biased against him or had prejudged his case, the Court of Civil Appeals ruled that the teacher had established that his hearing was "perfunctory" and his termination was

"certain." The court concluded that the teacher had proved that having to go forward with a due process hearing was an "unusually difficult working condition" that was "so harmful, detrimental, or adverse to [the teacher's] health ... that leaving work was justified." The Court of Civil Appeals ordered that the teacher be awarded unemployment compensation.

a school district should have its attorney handle the telephone hearing before the Appeal Tribunal and . . . present evidence that the due process hearing would not have been "perfunctory" and the teacher's termination was not "certain."

The school district and the Oklahoma Employment Security Commission asked the Oklahoma Supreme Court to review the decision of the Court of Civil Appeals, but the Oklahoma Supreme Court declined. Although decisions of the Court of Civil Appeals are not binding on other Oklahoma courts the way decisions of the Oklahoma Supreme

Court are, such decisions are considered "persuasive" and are typically followed by trial courts.

School districts wishing to avoid having to pay unemployment benefits to employees who resign when confronted with a recommendation for their nonreemployment or dismissal should be aware of this ruling. At a minimum, a school district should have its attorney handle the telephone hearing

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The Tenth Circuit Affirms Summary Judgment in Lawsuit Brought Against the Deer Creek School District

By Staci L. Roberds

The Tenth Circuit Court of Appeals recently affirmed the trial court's grant of summary judgment to the Deer Creek School District and three of its employees in an action brought by the parents of a special education student. In *Muskkrat v. Deer Creek Public Schools, et al.*, the parents of a student with disabilities alleged that the School District and its employees had violated their child's Fourteenth Amendment substantive due process rights by repeatedly placing him in a timeout room and subjecting him to physical abuse. The Plaintiffs alleged that the Defendants' actions were

so outrageous as to "shock the conscience of the court." After the trial court granted summary judgment to the Defendants on the Plaintiffs' Fourteenth Amendment claim, the Plaintiffs argued that the Defendants' actions had also violated their child's right under the Fourth Amendment to be protected from "unreasonable seizures." The United States District Court for the Western District of Oklahoma ruled that the Plaintiffs had not raised a Fourth Amendment claim in their pleadings and could not raise a new cause of action after the entry of summary judgment.

On appeal, the Defendants argued that the Plaintiffs had not exhausted their administrative remedies under the Individuals with Disabilities Education Act ("IDEA") and that exhaustion of remedies available under the IDEA was a jurisdictional prerequisite to bringing the lawsuit. The Tenth Circuit questioned whether past circuit precedent fully explored the jurisdictional nature of exhaustion because the cases made the assumption the issue was jurisdictional without conducting an analysis of "whether Congress intended IDEA exhaustion to be jurisdictional." The court discussed several cases from other circuit courts which held the failure to exhaust was an affirmative defense. The court ultimately declined to decide the issue, noting that "for purposes of this case IDEA exhaustion's status as a jurisdictional prerequisite is not at issue" because the "defendants did raise IDEA exhaustion below and do raise it again here."

Turning to the merits of the Defendants' exhaustion argument, the Tenth Circuit held that the Plaintiffs were not required to exhaust their administrative remedies with regard to "scattered" incidents of alleged physical battery, primarily because it was not Congress's intent under the IDEA "to funnel isolated incidents of common law torts into the IDEA exhaustion regime." The court relied on case law noting that "random acts of violence" were excluded from the IDEA exhaustion requirement when injuries were non-educational in nature. The court also considered the exhaustion requirement as it related to the District's utilization of a timeout room with the student. It noted that the facts of the case demonstrated that the Plaintiffs made demands on the District to stop the use of the timeout room and that the student's IEP was eventually modified to include a provision that a timeout room would no longer be used with the student. Although the court acknowledged prior Tenth Circuit precedent holding that "a timeout related claim must be exhausted through the IDEA's statutory procedures," the court reasoned nonetheless that requiring the Plaintiffs to exhaust their administrative remedies under the IDEA at this juncture of the proceedings would be futile.

The Tenth Circuit next considered the Plaintiffs' substantive due process claim under the Fourteenth Amendment. The Plaintiffs alleged their child's rights were violated based on instances of physical abuse by District employees, including incidents of a "pop" to the cheek, a slap on the arm, restraint in a chair, and the repeated use of the timeout room even after the Plaintiffs had indicated they no longer wanted it used with their child. The court discussed its application of the "shocks-the-conscience" standard in cases involving "school-inflicted corporal punishment" and held it was appropriate to apply the standard "to all school discipline cases." Applying the standard to the facts as alleged by the Plaintiffs, the court held that the physical abuse and the use of the timeout room alleged against District employees in their individual capacities was at most "a merely careless or unwise excess of zeal rather than a brutal and inhumane abuse of official power" and did not amount to conscious-shocking behavior. With regard to the claim against the District, the court determined liability against the District was precluded because no District employee had committed a constitutional violation. Moreover, the court provided an additional reason for the failure of the claim against the District—the Plaintiffs failed to identify an official policy or custom of the District which caused their child's unconstitutional treatment.

As a final argument, the Plaintiffs alleged the trial court should have analyzed the Fourteenth Amendment claim under the reasonableness standard of the Fourth Amendment. The Tenth Circuit reviewed the pertinent pleadings in the case and determined the trial court did not abuse its discretion in denying the Plaintiffs' post-summary judgment motion asserting a Fourth Amendment claim, as the Plaintiffs never raised a Fourth Amendment argument in the trial court prior to its granting of the Defendants' motions for summary judgment. Recognizing that circuit precedent predominately applied the "shocks-the-conscience" test in school discipline cases, the court also declined to impose an obligation on the

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- Seminar—9:00 a.m. to 11:00 a.m.
- Lots of Giveaways!
- Download Brochure at www.rfrlaw.com

The Teacher Entitled to Unemployment Benefits

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before the Appeal Tribunal of the Employment Security Commission and be prepared to present evidence that the due process hearing would not have been "perfunctory" and the teacher's termination was not "certain."

Even this, however, may not be enough to guarantee that an employee who resigns when faced with a recommendation for nonreemployment or dismissal will not be awarded unemployment benefits. If your district wants to be in the best position possible to avoid paying unemployment compensation, the safest practice, in light of the Court of Civil Appeals' decision in *Moore v. Oklahoma Employment Security Commission*, would be to refuse to accept the employee's offered resignation, go forward with a due process hearing, and prove that the employee is guilty of the misconduct for which the termination was recommended.

The Tenth Circuit Affirms Summary Judgment

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trial court for an independent evaluation of Fourteenth Amendment school discipline cases under the reasonableness standard of the Fourth Amendment, especially when the claim was not raised by the pleadings or otherwise prompted by the Plaintiffs. The court further rejected the Plaintiffs' request that it abrogate the "shocks-the-conscience" standard and instead apply a reasonableness standard under the Fourth Amendment.

The Deer Creek School District and two of its employees were represented by Kent "Bo" Rainey, John E. Priddy, Staci L. Roberds, and Jerry A. Richardson, all of Rosenstein, Fist and Ringold.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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