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Legal Insights

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Court allows discovery of closed session audiotape in federal lawsuit

by Matt Roeschley

A recent federal district court decision sheds new light on the circumstances requiring the release of audio or video tapes of closed session meetings to interested parties. In *Kodish v. Oakbrook Terrace Fire Protection District*, 235 F.R.D. 447 (N.D.Ill. 2006), a firefighter who allegedly was unlawfully terminated by the Oakbrook Terrace Fire Protection District brought a lawsuit against the District in federal district court, asserting a Section 1983 claim for a civil rights violation, as well as state law claims for wrongful termination and defamation.

The Board of Trustees for the District held a closed session meeting to discuss the firefighter's employment. The closed session was documented on audiotape, as required by Section 2.06(a) of the Illinois Open Meetings Act (5 ILCS 120/1 2.06(a)), and the District's attorney was present. After learning of his termination, the firefighter filed a lawsuit, claiming denial of his due process rights, wrongful termination, and defamation.

During the discovery stage of the litigation, the firefighter made a request to obtain the closed session meeting audiotape. However, the District refused to produce the audiotape, arguing that it was not subject to disclosure under the Act (5 ILCS 120/2.06(e)) and was protected by attorney-client privilege because it contained discussions among the District board members and their attorney. According to Section 2.06(e) of the Act, audiotapes of closed sessions "shall not be open for public inspection or subject to discovery in any judicial proceeding other than one brought to enforce this Act."

When the District refused to produce the audiotape, the firefighter petitioned the federal district court to compel discovery of the audiotape, requiring the court to determine whether federal or state law should apply.

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High school basketball players allege First Amendment violation

by David Zafiratos

A recent decision from the United States Court of Appeals for the Ninth Circuit has provided members of a Clatskanie, Oregon high school basketball team an opportunity to prove their school violated the First Amendment when it permanently suspended them from the team. The players claimed the school suspended them in retaliation for criticizing their basketball coach. The school argued it punished the players' conduct, not their speech, when the players boycotted a game. In *Pinard v. Clatskanie School District 6J*, 466 F.3d 964 (9th Cir. 2006), the Ninth Circuit addressed protection provided student speech and expressive student conduct under the First Amendment. The court held that criticizing the coach was constitutionally protected "pure speech," but that the boycott was conduct that the school may rightfully punish.

In *Pinard*, the players alleged that their coach displayed abusive behavior towards them, including physical and verbal threats, humiliation, and intimidation. One player testified that the coach had broken a dry erase board over his knee and kicked garbage cans in the locker room. Others testified as to the coach's yelling, profanity, and abusive coaching tactics.

After team members held a meeting on the evening of a scheduled game to discuss their coach's behavior, they gave a letter to their coach requesting that he resign. Two team members, the coach's son and a foreign-exchange student, did not attend the team meeting and did not sign the letter. The coach then took the letter to the principal and superintendent. When school officials met with the team members, they explained that the coach could not be removed without an investigation. The team members contended that school officials gave them the option of participating in a mediation process and attending that evening's game, or forfeiting their right to play in the game. The players also stated school officials did not inform them that they would be punished further for choosing the second option and refusing to play.

All but one of the players who signed the letter to the coach chose not to board the bus to the game that evening. Those players were permanently suspended from the team. The suspended players then brought a lawsuit against the school, alleging they were dismissed from the team for exercising their First Amendment right to complain about their coach. A lower court granted the school's motion for summary judgment, concluding that since the players' speech did not raise public concerns and was not political speech, the First Amendment provided no protection.

On appeal, the Ninth Circuit stated the lower court should

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First Amendment violation

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not have used the public concern test, which applies in the public employment context. Instead, it should have followed *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992), and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1968). Under the *Chandler* case, schools may regulate student speech under certain circumstances. First, schools may punish "vulgar, lewd, obscene and plainly offensive speech." Second, they may regulate "school-sponsored speech." Student speech that does not fall under one of the first two categories is analyzed under *Tinker*. In *Pinard*, the Ninth Circuit held that the players' speech did not fall under the first two categories, and thus was governed by *Tinker*. The court noted that *Tinker* has never been interpreted to allow courts to apply the public concern test to student speech.

In *Tinker*, the United States Supreme Court held that the First Amendment protected students' rights to wear black armbands in protest of the Vietnam War. In applying *Tinker* to the basketball players' letter, the Ninth Circuit stated the school may only justify its decision to permanently suspend the players by showing "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities." After reviewing the evidence presented to the lower court, the Ninth Circuit concluded that the school could not reasonably have expected a substantial disruption simply through the letter.

On the other hand, the court also held that the players' refusal to play in the team's game was disruptive conduct, which the school had a right to punish. Schools may punish disruptive conduct, even if that conduct is viewed as symbolic speech. Unlike the armbands in *Tinker*, boycotting the basketball game "materially interfered with the school district's operation of a bona fide school activity."

The Ninth Circuit has left it up to the lower court to determine whether the players were suspended for criticizing their coach or for boycotting the game. If the suspensions resulted from the letter to the coach, the school violated the students' First Amendment rights. If the suspensions resulted from the players' boycott of the game, the First Amendment does not apply and the school was justified when it permanently suspended the players from the team. ■

Three standards of analysis in student speech matters

by Maureen Anichini Lemon

As evidenced in the *Pinard* case, First Amendment student speech issues frequently confront school districts. Following is a brief outline of three basic standards of analysis applied in cases involving student speech:

- Is the speech school sponsored, part of the school curriculum or perceived as having the endorsement of the school? Is the school promoting the speech or merely tolerating it? *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

  If the student speech is sponsored by the school, the school is entitled to exercise greater control over it to ensure that (1) students learn what is intended to be taught; (2) students are not exposed to material inappropriate for their maturity level; and (3) individual views are not attributed to the school.

  A school may edit the style or content of school sponsored student speech as long as the school's actions are reasonably related to legitimate pedagogical concerns.

- Is the speech vulgar, lewd, obscene, or plainly offensive? What is the age/maturity of the students on the receiving end of the speech? Are the students a captive audience to the speech? *Bethel School District v. Fraser*, 478 U.S. 675 (1986)

  A school may discipline a student's vulgar, lewd, obscene or plainly offensive speech as part of the school's mission to teach the boundaries of socially appropriate behavior.

- What if the speech is not sponsored by the school, nor vulgar, lewd, obscene, or plainly offensive? Has the speech caused a material and substantial disruption in the school's operation? Might the speech reasonably cause a material and substantial disruption in the school's operation? Does the speech invade the rights of others? *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)

  If the student's speech has caused or may reasonably cause a material and substantial disruption with the school's operation, or if the speech invades the rights of others, the school may prohibit the speech. ■

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Recent amendments to principal reclassification provision raise questions

by Matt Roeschley

In July 2005, the Illinois General Assembly enacted P.A. 94-201, amending Section 10-23.8b of the Illinois School Code (105 ILCS 5/10-23.8b). These revisions to Section 10-23.8b, which became effective January 1, 2006, articulate the procedures for reclassifying a principal to teacher status when a school district decides not to renew a principal's administrative contract. Prior to the enactment of P.A. 94-201, Section 10-23.8b simply set forth the due process protections afforded to principals with two or more years of administrative service in the school district in which they were subject to reclassification.

Section 10-23.8b provides for written notice to the principal of the reclassification and grants the right to a private hearing, as well as a public hearing, on the matter. However, some of the new language added by P.A. 94-201 raises questions regarding what is required of school districts that have not renewed a principal's contract. The first of the two amendments to Section 10-23.8b enacted by P.A. 94-201 provides:

> Upon non-renewal of a principal's administrative contract, the principal shall be reclassified pursuant to this Section.

Prior to this change, the language of Section 10-23.8b gave no indication that reclassification was mandatory upon non-renewal of a principal's administrative contract, but merely stated the due process protections afforded to principals when reclassification occurred. However, the provision now seems to require reclassification upon non-renewal in all circumstances, even if a principal has never previously held teacher status within the school district that is not renewing his or her contract.

In contrast, however, the second amendment to Section 10-23.8b enacted by P.A. 94-201 further explains that, "The changes made by this amendatory Act of the 94th General Assembly are declaratory of existing law." While this language intends to clarify the law relating to due process protections for principals subject to reclassification, it appears to conflict with the first amendment's mandatory reclassification requirement for all non-renewed principals.

A review of the legislative history of P.A. 94-201 reveals that the amendments were intended to clarify existing law regarding the reassignment or reclassification of principals and to safeguard their due process protections under Section 10-23.8b. While a strict interpretation of the new language may lead to dubious results (e.g., school districts being required to "reclassify" to teacher status principals who have never been teachers in the district), Illinois courts have yet to interpret or clarify the meaning of the newly amended reclassification provision. As a result, uncertainty remains regarding the correct interpretation of the provision. In our opinion, school districts are not required to reclassify a principal who was not a teacher and who has not attained tenure in the district. We encourage you to contact our office with any questions relating to this issue. ■

Illinois General Assembly amends processing of discrimination charges

by Shawn P. Flaherty

With little fanfare, the Illinois General Assembly recently adopted P.A. 94-0857, effective June 15, 2006. This legislation was trumpeted as serving to reduce the intergovernmental conflict between charges of discrimination filed with the federal Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights (IDHR). Both agencies serve a parallel purpose: to provide an avenue for processing, investigating, and enforcing discrimination and human rights violation charges.

Complaining parties have the option of filing charges with the EEOC or IDHR. P.A. 94-0857 amends the IDHR procedures for handling charges of discrimination that initially are filed with the EEOC. Any charge filed with the EEOC within one hundred eighty (180) days after an alleged civil rights violation occurs is deemed filed with the IDHR on the same date as the EEOC filing. (775 ILCS 5/7A-102 (A-1)) The IDHR will promptly notify the complaining party of his or her right to file with the IDHR, as well as the EEOC. The complainant then has thirty-five (35) days to notify the IDHR, in writing, that he or she wishes to proceed with an IDHR investigation instead of an EEOC investigation.

If the complainant does not act within the thirty-five (35) day time limit, the IDHR will close its file on the matter. If the complainant opts to proceed with the IDHR investigation, the IDHR will not initiate an investigation until the EEOC completes its investigation and ultimately produces a written determination. Once the EEOC determination is made, the IDHR may opt to either adopt the EEOC determination or process the charge on its own.

The new public act also provides that the IDHR does not lose jurisdiction over charges filed with it for failure to complete an investigation within one hundred (100) days after filing.

The primary impact of the new legislation is that a complaining party in a civil rights case must decide from the beginning whether he or she wishes to proceed through the EEOC, the IDHR, or now, potentially both agencies. In certain instances, under this new legislation, a complaining party may receive a second hearing on the same set of facts. ■

Attorney Notes

- **OBKC&G, Ltd.** is pleased to announce that **Stephen H. DiNolfo** has become a shareholder of the firm. Steve is the manager of the firm's litigation practice and handles a variety of liability, employment, discipline and labor matters for the firm. In addition, he devotes a significant portion of his practice to counseling and advising fire protection districts, emergency service providers, as well as municipalities on legal issues. He is a former Cook County Assistant State's Attorney with extensive litigation experience. Steve received his bachelor's degree from LeMoyne College in Syracuse, New York and his J.D. from the University of Toledo College of Law.

- **Matt Roeschley** has joined the Wheaton office of OBKC&G, Ltd. as an associate. Matt earned his bachelor's degree at Anderson University in Anderson, Indiana and his J.D. from Northern Illinois University College of Law in 2006, where he was a member of the Moot Court Society and was a semi-finalist in the 2005 Moot Court Competition. In addition, he served as vice president of the Public Interest Law Society. In the summer of 2004, Matt clerked for the Livingston County State's Attorney's Office. During his last two years of law school Matt clerked for OBKC&G, Ltd. and has written several articles for the firm newsletters, *Legal Insights*, and various other publications.

- **OBKC&G, Ltd.** welcomes two law clerks. **Jacqueline Clisham** is a third year law student at Loyola Law School. Jackie will divide her time between the Joliet and Wheaton offices. **David Zafiratos** is a third year law student at Chicago-Kent College of Law. David will work in the Wheaton office. ■

Closed session audiotape

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Since his primary claim was brought under federal law (42 U.S.C. §1983), the court determined that federal common law should apply, and the state Open Meetings Act privilege did not apply. Consequently, the court held that the audiotape could be released to the firefighter. Addressing the inapplicability of state law privilege, the court explained that "[i]f state law controlled, the state authorities could insulate themselves by developing privilege doctrines which would virtually render it impossible for plaintiffs to develop the kind of information they need to prosecute a federal claim."

The court pointed out that the firefighter was merely attempting to acquire the audiotape to ascertain the District's basis for terminating him and to know the facts the District focused on in reaching its decision. Accordingly, the court found that "the interest served by the open meetings privileges are overcome by the need for probative evidence."

The court also examined the District's contention that attorney-client privilege protected the audiotape from discovery because the District's attorney was present at the closed session meeting. The court agreed in part with the District and concluded that discovery of the audiotape should be limited by the attorney-client privilege. Accordingly, the court ordered that any portions of the audiotape transcript containing conversations among the board members and their attorney regarding potential litigation risk and legal strategy should be removed and the remaining portions of the transcript be produced to the firefighter.

Under *Kodish*, the normal protection provided by the Open Meetings Act for closed session tapes and transcripts is only partially available when a lawsuit involves federal claims. When federal claims are involved, the attorney-client privilege will still protect closed session discussions on legal risk and strategy between public entities and their attorneys, but as *Kodish* indicates, the state Open Meetings Act privilege will not trump discovery concerns in a federal case.

Note, however, that *Kodish* does not change the Open Meetings Act privilege that protects closed session audiotapes and transcripts involving claims under state law other than credible claims involving a violation of the Open Meetings Act. ■

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