

## Ohio Education Law Monthly (November 2010)

November 2, 2010

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### **Court Allows a Citizen's Civil Rights Claims to Proceed Against a School Board President Accused of Silencing Speech**

A U.S. District Court in Virginia recently held that a jury should decide whether to hold a school board president personally liable on claims that she violated the civil rights of a citizen when she abruptly stopped the citizen from speaking at a school board meeting and ordered him to sit down.

On April 14, 2008, the Clarke County School Board met to consider the superintendent's recommendation that a female, African-American principal be demoted to a classroom teaching position. The school board invited public comment on the matter. The board president asked interested speakers to complete public comment cards, and advised that remarks would be limited to three minutes. Approximately 150 individuals showed up for the board meeting in support of the principal.

Kenneth Liggins, who is African American, was one of 16 individuals who signed up to address the board during the public comment portion of the meeting. When it was his turn to speak, Mr. Liggins began by stating, "[b]e it known that my name is Kenneth Liggins. As I sat and heard what you all have already done, it reminded me that you all did with willful intent to violate Section VII of the Civil Rights Act ." At which point, the school board president interrupted Mr. Liggins and asked him to sit down. The board president stated, "[y]ou are accusing this board of an illegal act. We will not tolerate that."

Nonetheless, Mr. Liggins tried several times to continue his address to the school board. Each time, the school board president immediately interrupted Mr. Liggins and ordered him to "sit down". After it became clear that Mr. Liggins would not do so, the school board president summoned the sheriff. Mr. Liggins conceded the podium when the sheriff arrived.

Thereafter, Mr. Liggins filed suit against the school board, the board president, and several individual board members claiming that his First Amendment right to free speech and his Fourteenth Amendment right to equal protection under the law were violated.

The trial court dismissed the school board on summary judgment, finding there was no evidence that the school board, as an entity, embraced any policy of silencing citizens at its public meeting, or that other school board members directly condoned the conduct of the board president. Individual board members other than the board president were also dismissed from the suit for similar reasons.

However, the court refused to dismiss the school board president on her defense that she was entitled to qualified immunity as a public official from Mr. Liggins' free speech and equal protection claims. The court held that the school board had established a limited public forum by making its meetings generally available for expressive activity. The court noted that, "officials presiding over such meetings may 'cut off speech which they reasonably perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion , whether by virtue of its irrelevance, its duration, or its very tone and manner.'"

However, any such restriction must not discriminate on the basis of the speaker's viewpoint.

The court concluded that the issue of whether Mr. Liggins was silenced for expressing his particular viewpoint (for which qualified immunity does not apply), or because the board president reasonably believed that his remarks threatened the orderly progress of the meeting (for which qualified immunity would apply) was a fact issue that must be decided by a jury. In its ruling, the court specifically noted that the board president emphasized, on more than one occasion, that her reason for cutting off Liggins was that he was accusing the board of an illegal act, and not that he was speaking in a manner that threatened to disrupt the orderly conduct of the meeting.

The court also allowed a jury to hear Mr. Liggins' "class-of-one" claim that the board president's suppression of his speech was motivated, in part, by his race in violation of the Equal Protection Clause of the Fourteenth Amendment. The court found that there was a genuine issue of fact as to whether the school board president intentionally treated Mr. Liggins differently from other citizens who addressed the board without any rational basis for this disparate treatment.

As of the date of this publication, Mr. Liggins' claims against the school board president are awaiting trial to a jury.

#### Lessons Learned

When a school board establishes a limited public forum by opening its meetings to public discussion, it must be cognizant of the scope of the public's right to free speech. A board and its individual members should be cautious in placing restrictions on free speech other than time, place and manner restrictions. Prior to taking a position on the content of a citizen's speech, a school board and its board president should be aware of the permissible reasons and proper procedures to regulate speech and/or to maintain control and order over a school board meeting. As evidenced in this case, an individual board member may be personally liable if their decision to silence a citizen's speech proves to be unconstitutional.

Should you have any questions concerning the laws and constitutional provisions governing the operation of school board meetings, please contact an attorney in our Education Law Practice Group.

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### **Supreme Court Rules Foreclosure Sale Is Not An Arm's Length Transaction**

On October 12, 2010, the Ohio Supreme Court held that a foreclosure sale of real property generally does not qualify as an arms-length transaction in an action to revalue the property before the Board of Revisions ("BOR"). The Court's ruling will impact future BOR cases involving property sold through foreclosure.

In this case, Fenco Development Company filed a BOR complaint against the auditor's valuation of an apartment building that Fenco acquired on February 27, 2006. The auditor valued the property at \$479,600; however, Fenco claimed the property's value was \$135,000 - the price it paid to the U.S. Department of Housing and Urban Development ("HUD") at a foreclosure auction.

The Court noted that ORC 5713.03 generally requires the auditor to ". . .consider the sales price of [any] tract, lot, or parcel to be the true value for taxation purposes" if the sale was "an arms-length sale" that occurred "within a reasonable length of time, either before or after the tax lien date." However, the Court noted an exception to this general rule in ORC 5713.04, which states, "the price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value."

The Court noted that as a general matter, foreclosure sales reflect a strong impetus to liquidate property in order to obtain cash to satisfy one or more creditors. This Court considered this motivation as a type of

duress — though the compulsion to sell quickly may be greater or less in any particular case. More generally, the circumstances of a foreclosure sale deprive the sale of its arms-length character for purposes of R.C. 5713.03, because the motivations of the parties to the sale, particularly the seller, do not qualify as “typical” of the motivations of other persons in the general marketplace.

The Court held that the record did not contain any reliable and probable evidence to support the Board of Tax Appeals (“BTA”) finding that the HUD sale of the property qualified as “voluntary.” First, the Court noted the documentation of the sale referred to it a “foreclosure.” Second, the BTA did not specifically state what evidence it relied upon in finding that the HUD sale was voluntary. Rather, the evidence showed that HUD had attempted to sell the property to a previous bidder for \$506,000, and when that sale fell through, HUD accepted Fenco's bid of \$135,000 approximately two months later.

#### Lessons Learned

School boards should be cognizant of the manner in which real property is sold in assessing a BOR complaint to re-value real property. Unfortunately in the current economic climate, foreclosure sales are a common means by which title to real property is transferred. School boards that confirm a foreclosure sale may wish to challenge any BOR Complaint seeking to re-value property based on an arm's length transaction.

Should you have questions on matters involving the Board of Revisions, please do not hesitate to contact an attorney in our firm's Education Law Practice Group.

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### **Sixth Circuit Finds That Teacher Does Not Have Constitutional Right To Select Books And Methods Of Instruction For Use In Her Classroom**

The Sixth Circuit Court of Appeals in *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District*, held that an Ohio public school teacher does not have a Constitutional right to select books and methods of instruction for use in her classroom without interference from the school board.

The Tipp City School Board hired Shelley Evans-Marshall to teach English and supervise the high school's literary magazine. Evans-Marshall distributed to her class a list compiled by the American Library Association of the “One Hundred Most Frequently Challenged Books.” She asked her students to pick a book from the list, to investigate the reasons why the book was challenged, and to lead an in-class debate about the book.

At an ensuing school board meeting, approximately 25 parents complained about the curricular choices in the school, including Evans-Marshall's challenged-book assignment. The next day, Evans-Marshall's principal called a meeting of the English Department and told Evans-Marshall that she was “on the hot seat.”

Nearly 100 parents and the local news media attended the school board's next meeting. Again, parents raised particular objections to the materials in Evans-Marshall's classroom and her teaching methods. Furthermore, a group of parents presented the school board with a 500-signature petition calling for “decency and excellence” in the classroom.

In a subsequent performance evaluation, the building principal critiqued Evans-Marshall's use of materials that “pushed the limits of a community standards.” Evans-Marshall filed a written objection to the performance evaluation and a grievance with the school district. Thereafter, the school board voted unanimously to non-renew Evans-Marshall's teaching contract. The written reasons for the non renewal included “problems with communication and teamwork.”

In March of 2003, Evans-Marshall filed a civil rights action against the school board, building principal and superintendent. Therein, she claimed the school board retaliated against her “curricular and pedagogical

choices”, interfering with her First Amendment right to “select books and methods of instruction for use in the classroom without interference from public officials.”

On appeal to the Sixth Circuit, the court noted that in free speech retaliation cases, it asks three questions:

1. Was the individual involved in “constitutionally protected” activity - here activity protected by the free speech clause of the First Amendment?
2. Would the employer’s conduct discourage individuals of “ordinary firmness” from continuing to do what they are doing?
3. Was the employee’s exercise of constitutionally protected rights “a motivating factor” behind the employer’s conduct?

The court must find in the affirmative on each question for a claimant to prevail on a free-speech retaliation claim.

The Sixth Circuit held that the Evans-Marshall’s curricular speech discussed topics of “public concern” to the community. Furthermore, the Court held that Evans-Marshall’s interest as a citizen to comment upon matters of public concern outweighed the school board’s interest in enforcing curricular standards. The court noted that the school board’s position on this matter was compromised by the fact that it had purchased the books at issue and had made them available to teachers as optional text.

The Sixth Circuit noted that before any parents complained about her reading assignments and classroom discussions, Evans-Marshall had never received a negative performance review. Shortly thereafter, she not only received a negative performance review, but her employment contract was “terminated”. Thus, the court found that Evans-Marshall had successfully proven that her teaching choices caused the school board to non-renew her contract.

However, the court held that even if Evans-Marshall’s discipline was prompted by her curricular and pedagogical choices, the First Amendment does not insulate her from employer discipline. The court reasoned that when a teacher teaches, “the school system does not regulate [that] speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.” Therefore, if the school board hires that speech, it can surely “regulate the content of what is or is not expressed.”

The court then noted that ORC 3313.60 vest the board of education for an exempted village school district with the authority to prescribe a curriculum. The court found this statute to be an accountability measure that ensures the citizens of a community have a say over their children’s education by giving them control over membership on the board.

Therefore, the Sixth Circuit held that the school board had the authority to non-renew the contract of Evans-Marshall when her “pedagogical attitude and teaching methods do not conform to institutional standards.”

### Lessons Learned

This case helps to clarify the United States Supreme Court’s 2006 decision in *Garcetti v. Ceballos*, whereby the Court held that traditional concepts of academic freedom might require the development of some kind of exception for classroom instruction. However, the *Garcetti* Court declined to address what those exceptions may be. The *Evans-Marshall* case supports the authority of an Ohio School Board to oversee a teacher’s pedagogical and curricular choices.

School boards with a collective bargaining agreement that contains an academic freedom clause may wish to review this clause to ensure it is consistent with the rulings and reasoning found in *Evans-Marshall*.

Please feel free to contact an attorney in the firm's Education Law Practice Group should you have any questions concerning employee Free Speech rights and Academic Freedom.

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### **REMINDER TO REGISTER FOR DINSMORE & SHOHL'S OSBA CAPITAL CONFERENCE RECEPTION**

It is not too late to register for Dinsmore & Shohl's cocktail reception at the OSBA Capital Conference on Monday evening, November 8th from 4:30 to 6:30. Meet members of our firm's Education Law Practice Group and mingle with school administrators from across the state. All are welcome! Please click [HERE](#) to register for this free event.

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### **UPCOMING STATUTORY DEADLINES**

#### December 31st

Last day for Treasurer to canvass the Board to establish a date for the organizational meeting. R.C. 3313.14.

#### January 15th

Deadline for the boards of education of a city, exempted village, joint vocational and local school districts to hold their organizational meeting. R.C. 3313.14.

Deadline for the boards of education of a city, exempted village, joint vocational and local school districts to adopt a tax budget for the upcoming fiscal year. R.C. 5705.28.

#### January 20th

Deadline for school boards to submit their fiscal tax-year budget to county auditor. R.C. 5705.30.

#### January 31st

Annual campaign finance reports due detailing contributions and expenditures through December 31, 2010. R.C. 3517.10.

Deadline for governing boards of educational service centers to meet and organize. R.C. 3313.14.