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NEVADA LAW BULLETIN

No Guidance from the U.S. Supreme Court in Off-Campus Speech Cases

By Ann Alexander, Esq.

In January, the United States Supreme Court denied *certiorari* in three school district cases involving off-campus speech where students used the internet to make statements about school principals and a fellow student. Despite urging from the ACLU and the National School Boards Association, the Supreme Court declined an opportunity to provide clearer guidelines to schools about disciplining students for off-campus internet speech. Two decisions were from the Third Circuit: *J.S. v. Blue Mountain Sch. Dist*. and *Layshock v. Hermitage Sch. Dist*. The third decision was from the Fourth Circuit: *Kowalski v. Berkeley County Schools*.

At issue in these cases is application of the standard established by the Supreme Court in 1969 in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, the Court held that "conduct by the student, in class or out of it, which for any reason … materially disrupts classwork or involves substantial disorder or invades the rights of others" is not protected by the First Amendment. Applying this standard, the Court held that wearing black armbands to protest the Vietnam War would not substantially disrupt school activities, and the discipline of the students for wearing the armbands violated the students' First Amendment rights to free speech. *Tinker* has become the standard applied by state and federal courts to determine whether discipline for off-campus speech violates students' First Amendment rights.

In *Layshock*, a 17-year-old gifted student created a MySpace profile of the school principal claiming that he took steroids, used drugs, was gay, and shoplifted, among other things. The student was suspended for ten days before being placed in an alternative setting. He was banned from school-sponsored events, including graduation. The Third Circuit found that the student's speech originated off-campus, did not disturb the school environment, and was not related to school-sponsored events. There was no showing that the student's speech caused a substantial disruption to the school under *Tinker*. In fact, two parodies even more offensive than Layshock's were created at about the same time by other students, and the school could not differentiate which of the parodies had any particular disruptive effect on the school. All 14 judges ruled for the student.

In *J.S. v. Blue Mountain School District*, an honor-roll student created a fake MySpace profile of the principal on her home computer. The

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profile contained "crude and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family." The district suspended the student for ten days, and in a close 8-6 ruling, the Third Circuit held for the student, finding that the student's speech did not cause a substantial disruption in the school, nor could the school reasonably forecast a substantial disruption. The six dissenters would have held there was a "reasonable forecast" of disruption at the school, and stated that the majority opinion "leaves schools defenseless to protect teachers and school officials against such attacks and powerless to discipline students for the consequences of their actions."

In *Kowalski v. Berkeley County Schools*, the Fourth Circuit upheld discipline imposed against Kara Kowalski, a high school senior and cheerleader who had been elected the "Queen of Charm" by her schoolmates. Kara created a MySpace discussion group webpage called "S.A.S.H." that ridiculed another student and was followed by about 100 student "friends." School officials determined that Kara created a "hate website" in violation of school policy against harassment and bullying. The Fourth Circuit stated that "school officials must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning." Applying the *Tinker* standard, the Court stated: "To be sure, it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the "S.A.S.H." group's members and the target of the group's harassment were Musselman High School students." Because Kara's conduct created a reasonably foreseeable disruption at school, the Fourth Circuit upheld the discipline.

Legal watchers have observed that when students are disciplined for online speech that involves student-on-administrator bullying or parody, even when the speech is extremely offensive, courts tend to find that the speech has not created a substantial disruption in the school and cannot be disciplined. In contrast, when online statements bully other students or contain threats of physical harm, courts tend to find that the discipline does not violate students' First Amendment rights. A clear message from each of these cases is that before imposing discipline for speech that originates off campus, school districts should ensure that they can clearly articulate the substantial disruption created by the speech, or the reasonable forecast of substantial disruption. Until the Supreme Court provides further guidance about disciplining off-campus speech in the internet age, the substantial disruption test is a key to prevailing in First Amendment challenges.

ETS NEWS

Andrea Pressler has been appointed as the Chair of the State Bar of Nevada Construction Law Section for 2012-2013.

ATTORNEY BOYDEN VICTORIOUS AFTER SIX-WEEK JURY TRIAL

Attorney John Boyden recently completed a six week construction defect jury trial where he represented the plumbing contractor, who was alleged to have incorrectly installed all of the toilets in a large hotel-to-condominium conversion project in downtown Reno called Riverwalk. Plaintiffs contended the toilets were not installed per manufacturer guidelines or the plumbing code in that a wax gasket was used instead of a neoprene seal at the toilet horn-to-trap arm connection. Plaintiffs requested that all 228 toilets be pulled and repaired at a significant cost. The defense countered with the position that the project was a remodel and the installation method was appropriate under the circumstances, and provided a better attachment, such that the standard of care was indeed satisfied. The jury agreed with the defense position and awarded zero dollars and a complete defense verdict for the plumber on all issues related to its scope of work.

EEOC Issues Guidance On High School Diploma Requirements In Hiring And Application To The ADA

By Rebecca Bruch, Esq.

Ever since 1971, in a case called *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), it has been the law that a high school diploma requirement was discriminatory because it had a disparate impact on minorities, since a higher number of minorities do not have a high school diploma, and the requirement was not job-related and consistent with business necessity. We have advised our clients for many years to be sensitive to such a requirement if it truly is not a job that needs a high school diploma or GED.

In November of last year, the EEOC issued a clarification and expansion on its position regarding the application of the ADA to employers requiring a high school diploma. It is important to understand that clarification if you are an employer who uses a high school diploma or GED as a way to screen applicants.

The EEOC has not made it illegal to require a high school diploma. Employers can still require that a job applicant have a high school diploma. However, if an applicant informs the employer that he or she has a disability that has prevented them from getting a high school diploma, the applicant should be given an opportunity to show they are qualified for the job in some other way. For example, an employer may need to consider work experience in the same or similar jobs, or allowing the applicant to demonstrate an ability to perform the essential functions of the job. The employer can require the applicant to demonstrate that he or she has a disability and that the disability actually prevents him or her from meeting the high school diploma requirement.

The EEOC brought a lawsuit on behalf of an employee with an intellectual disability who was fired from her job as a certified nursing assistant when the employer adopted a requirement that CNAs have a high school diploma. The CNA had been working in the position for at least four years, and had tried to get her GED, but could not do so because of her disability. The employer refused to work with the GED instructors to find an alternative way to assess the employee's ability to do the job. The employer eventually settled the suit.

The ADA protects someone whose disability makes it impossible for him or her to get a diploma. It does not protect someone who simply decided not to get a high school diploma. And even if the applicant with a disability can demonstrate the ability to do the job through some means other than possessing a high school diploma, you can still choose the best qualified person for the job. The disabled applicant does not get a preference over the best qualified applicant.

Just remember, whatever the screening criteria you are using during the application process, it must be job-related and consistent with business necessity.

For all of your employment issues, including handbooks, policies, training, investigation, defense of administrative claims or litigation, be sure to contact one of Erickson Thorpe's experienced employment law attorneys.

Recent Nevada Supreme Court Cases Affecting Indemnity Agreements And Duty To Defend Provisions

by Brett Dieffenbach, Esq. and Andrea Pressler, Esq.

In 2010, the Nevada Supreme Court rendered a seminal decision in the interpretation of indemnity agreements. In *George L. Brown Insurance v. Star Insurance Co*., the Court adopted the rule that, while parties are free to contractually agree to indemnify another for its own negligence, "an express or explicit reference to the indemnitee's own negligence is required." The Court further established that "contracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent and a general provision indemnifying the indemnitee 'against any and all claims,' standing alone, is not sufficient."

Recently, the Court again took the opportunity to further expand this holding with regard to construction contracts. In *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Company, Inc.*, the Court held that absent express language of indemnification for contributory negligence as well as the sole negligence of the indemnitor, a subcontractor not only must be partially negligent to trigger the indemnity provisions, but also that the indemnity provision covers only that subcontractor's negligent acts. 127 Nev. Adv. Op. 26 (June 2, 2011).

In *Reyburn*, a group of homeowners filed a class action construction defect suit against Plaster Development Company, Inc., the general contractor. Plaster tendered the defense of the defect claims to Reyburn, one of the subcontractors on the project, among others, which Reyburn did not assume. Plaster also filed a third-party complaint against Reyburn based upon Reyburn's contractual indemnification obligation and the failure to defend pursuant to the tender. The indemnification clause upon which Plaster relied did not expressly state that Reyburn would have to indemnify Plaster for Plaster's own negligence, but linked Reyburn's indemnification and defense duties to *defects caused or allegedly caused by Reyburn only*.

In rendering its decision, the Court held that because the indemnity clause is not explicit about whether Reyburn is required to indemnify Plaster even if Reyburn was not negligent, nor was it explicit as to whether the scope of the agreement includes indemnity for Plaster's contributory negligence, the clause at issue necessarily covered *only Reyburn's negligence*.

In light of the onslaught of construction defect litigation in the recent years, the insight to take away from the Reyburn decision is that indemnification for any form of the indemnitee's own negligence *must be explicitly and unequivocally expressed* in the contract. If this is not explicitly stated, there must be a showing of negligence on the part of that specific subcontractor prior to triggering a duty to indemnify. Where an indemnity clause does not explicitly state the subcontractor must indemnify the general contractor for the general contractor's own contributory negligence, the subcontractor is required to indemnify *only for liability or damages that can be attributed to that specific subcontractor's negligence*.

The impact of these recent decisions is still yet to be determined, but the hope is that they have significant impact on how developers and general contractors attempt to obtain settlement money from subcontractors.

Save the Date

October 4, 2012, 9:00 a.m. to 4:00 p.m.

The ETS Employment Law Seminar will be held October 4, 2012 at The Grove. The tentative agenda will include the most current news on social media and the law, safeguarding the hiring process, the latest in wage and hour issues, and other hot topics. Stay tuned for more information and a finalized seminar agenda. We look forward to seeing you again in the fall.