

The First Amendment and the Public Employee

Posey v. Lake Pend Oreille Sch. Dist. No. 84

The ninth Circuit made it harder for public entities to prevail on motions for summary judgment when the court decided that the question of whether a public employee's speech is protected by the First Amendment is a mixed question of fact and law.

Facts: Plaintiff was employed as a "security specialist" for the School District. He believed that the District's safety and emergency policies were inadequate. Plaintiff spoke with the school Principal about his concerns, but the Principal did not respond directly to Plaintiff. Plaintiff then wrote a letter to several District administrators outlining his specific concerns with examples in support thereof. It was undisputed that Plaintiff wrote the letter at home, on his own time and using his own resources. However, the parties disputed whether Plaintiff wrote the letter as part of his official employment responsibilities. A year after writing his letter, Plaintiff's job was eliminated, and he was not hired into the "new" position created for a "preventative specialist." Plaintiff brought suit under 42 U.S.C. §1983 asserting that the elimination of his position and failure to rehire him into the new position was retaliation in violation of his First and Fourteenth Amendment rights. The District moved for summary judgment arguing that

Plaintiff's speech was not protected under the First Amendment since his speech (letter) was made pursuant to his duties in his role as "security specialist." The District Court agreed with the School District and the Ninth Circuit reversed.

Holding: The Ninth Circuit concluded that the question of whether a public employee's speech is protected by the First Amendment is a mixed question of fact and law. The Court found summary judgment inappropriate here where (1) the Plaintiff spoke out on a matter of public concern, (2) the state lacked adequate justification for treating an employee differently than a member of the general public, and (3) there was a genuine issue of material fact as to whether the speech fell within the scope and content of Plaintiff's job duties.

Education - Discrimination

Donovan v. Poway Unified Sch. Dist.

To prevail on an Education Code Section 220 claim for peer sexual orientation harassment against the School District, the Plaintiff must apply the stricter Title IX elements, including *actual knowledge* of the harassment rather than the FEHA's elements and negligence standard of "known or should have known."

Facts: Plaintiffs (two students) brought a Section 201 harassment claim against the District seeking monetary

damages. The trial court applied the elements of a FEHA harassment claim as the same elements applicable to a Section 210 claim. Under FEHA, a Plaintiff would only have to prove that the District "knew or should have known" of the harassment and failed to take immediate and appropriate corrective measures to remedy the harassment. The Plaintiff prevailed against the District under these elements. The District appealed and argued that the more strict elements of Title IX should be applied under a Section 201 harassment claim. The Appellate Court agreed.

Holding: In order to prevail on a peer sexual orientation harassment claim under Section 201, the student must prove the elements of a Title IX discrimination claim; namely, (1) "**severe, pervasive and offensive**" harassment which deprives the student of the right to equal access to educational benefits and opportunities; (2) the school district had **actual knowledge** of the harassment" and (3) the district acted with **deliberate indifference** in the face of that knowledge.

By applying the elements of Title IX instead of the FEHA, the court assured that school districts are not responsible for the underlying student/peer misconduct, but rather only for its "*own* misconduct determined by its *own* deliberate indifference to known acts of harassment."

Ed. Code Reemployment Rights

Tucker v. Grossmont Union High Sch. Dist.

Under Ed. Code §45298 a laid-off employee has a right to reemployment in preference to a new applicant regardless of the laid-off employee's class, so long as the laid-off employee is qualified for the position.

Facts: In 1982, Plaintiff began his employment with the School District as a general maintenance worker and was promoted to maintenance supervisor. He left the District for several years, worked for another District and earned his MBA. When Plaintiff returned to the District in 1996, he held the position of director of maintenance and operations. He then assumed more responsibilities and his job title became director of operations, safety and special projects. Due to lack of work and/or funds, Plaintiff's position was eliminated in April 2005, and he was laid off. That same month, Plaintiff applied for the position of maintenance manager, which according to the District was a position of a lower class. Although Tucker was qualified for the position, the District hired an individual who had never worked for the District. Plaintiff Petitioned the Court for a writ of mandate and declaratory relief, claiming that he had a right to reemployment preference over the new applicant. The District argued that Ed. Code § 45298 when read in conjunction with §45308,

provided preference for laid-off employees only within the class in which he was formerly employed.

Held: The court held that Tucker had the right to reemployment preference over the new applicant in any job for which he applied and for which he was qualified. Section 45298 specifically describes the preferential rights of laid-off employees for rehire with respect to new applicants. And, § 45308, which explains the order in which employees in the same class must be laid off and rehired, does not limit reemployment rights under § 45298 with respect to new applicants to a job only within a particular classification. Since Plaintiff was qualified for and applied for the maintenance manager position, he was entitled to preferential reemployment rights over new applicants.

FEHA – Statute of Limitations Tolled

The statute of limitations on an employee's FEHA claim is subject to equitable tolling When an employee voluntarily pursues an internal administrative remedy prior to filing a complaint under the California Fair Employment and Housing Act.

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2008 – No. 5

Case Law Review

Table of Contents

The First Amendment and the Public Employee

Posey v. Lake Pend Oreille Sch. Dist. No. 84
Ninth Circuit Court of Appeals
Case No. 07-35188, October 15, 2008

Education - Discrimination

Donovan v. Poway Unified Sch. Dist.
Fourth District Court of Appeals
Case No. D047199, October 10, 2008

Education Code § 45298 and the 39-month Reemployment List

Tucker v. Grossmont Union High Sch. Dist.
Fourth District Court of Appeals
Case No. D050266, November 20, 2008

FEHA; Statute of Limitations Tolled