Public Sector

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***Friedrichs v. California Teachers Ass'n*, 136 S.Ct. 1083 (2016).**

The Supreme Court affirmed the Ninth Circuit's ruling that the collection of agency fees by an exclusive representative from objecting non-members does not violate the First Amendment.

California law allows unions to be the exclusive bargaining representation for employees in public schools, by "submitting proof that a majority of employees in the unit wish to be represented by the union." California law also allows the use of agency fees "germane" to collective bargaining. The portion of the expenses that fall outside of this category must be estimated by the union each year, and the non-members must be notified of the fee and the non-chargeable portions of the fee. If the non-members do not want to pay these non-chargeable portions, they must notify the union after they receive their notice.

Plaintiffs are teachers who object to paying the non-chargeable portion of their agency fee each year, as well as the non-profit Christian Educators Association International, which serves Christians working in the public schools. Plaintiffs claim that the payment requirement to the union violates their rights to free speech and association and allege that even the "opt-out" procedures amount to violations of the First Amendment.

In an attempt to have precedent overturned on appeal, plaintiffs moved for judgment on the leadings on behalf of the Defendants. Relying on *Abood* and other precedents, the district Court entered judgment on the pleadings in favor of the defendants. Plaintiffs appealed the case to the Ninth Circuit. In a brief decision the Ninth Circuit affirmed the district court's judgment.

The United States Supreme Court granted certiorari, and in a one-sentence opinion affirmed the decision of the Ninth Circuit by an equally divided 4-4 vote. As a result, *Abood* remains good law.

***Heffernan v. City of Paterson*, 136 S.Ct. 1412 (2016).**

In a 6-2 decision, the Supreme Court held that when a public employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge the unlawful action under the First Amendment and § 1983 even if the employer's actions were based on a factual mistake about the employee's behavior.

Jeffrey Heffernan was a police officer working in Patterson, New Jersey. Jose Torres was the mayor of Patterson, and he had appointed the City's chief of police. Torres was running for reelection against Lawrence Spagnola, a rival candidate. Heffernan was not involved in the campaign of either candidate, but, as a favor to his bedridden mother, he agreed to pick up and deliver to her a Spagnola lawn sign. Other police officers observed Heffernan while he was

holding the lawn sign and speaking to campaign workers at the Spagnola distribution center. The next day, a supervisor demoted Heffernan from detective to patrol officer for his "overt involvement" in the Spagnola campaign.

Heffernan filed suit, claiming that he was demoted because of the mistaken view that he had engaged in conduct protected by the First Amendment. The district court denied the claim on the grounds that Heffernan had not actually engaged in any First Amendment conduct. The Third Circuit affirmed, concluding that a § 1983 claim is actionable only if the employer's action was prompted by the actual, rather than perceived, exercise of free-speech rights.

The Supreme Court reversed. The Court began its analysis by acknowledging that § 1983 does not expressly state whether the "right" protected primarily focuses on the employee's actual behavior or on the supervisor's motive. The Court cited favorably to *Waters v. Churchill*, 511 U.S. 661 (1994), in which the Court had held that a public employer did not violate the First Amendment when it took adverse action against an employee based on the mistaken belief that the employee was not engaged in protected activity. The Court determined that motive also should control in the context of a government employer's mistaken belief that an employee *had* engaged in protected speech. The Court found that this interpretation was supported by three policy considerations. First, such a ruling tracks the language of the First Amendment which focuses on the government's activity. Second, the constitutional harm – discouraging employees from engaging in protected speech or association – is the same whether or not the employer's action rested on a factual mistake. Finally, a rule that imposes liability despite the employer's factual mistake is not likely to impose significant extra costs on the employer, since it is the employee who bears the burden of proving the employer's improper motive.

For purposes of this opinion, the Court had assumed that the City of Patterson demoted Heffernan because of an improper motive. The Court explained that the lower courts should decide in the first instance whether the City had actually acted with such a motive as opposed to acting pursuant to some neutral policy that does not offend First Amendment rights. The Court, accordingly, remanded that issue for determination.

***Harlow v. Dep't of Human Services,* 883 N.W.2d 561 (Minn. 2016).**

The Minnesota Supreme Court held that public information does not become private just because it is duplicative of information held in confidential materials (including personnel files). Additionally, deputy commissioners are entitled to absolute immunity from defamation claims for statements made within the scope of their statutory authority.

A psychiatrist employee was fired after the Licensing Division of the Department of Human Services ("DHS") conducted a maltreatment investigation concerning the employee. The incident being investigated involved an adult patient who became violently uncooperative, and the employee ordered the patient's personal items and mattress be removed from the room and for the patient to be restrained nude. The two individual defendants employed by DHS were then interviewed on Minnesota Public Radio ("MPR") about the employee's firing, and a second MPR news report spoke about the investigation involving the employee. The employee brought

defamation and Minnesota Government Data Practices Act ("MGDPA") claims against DHS, the DHS deputy commissioner, and the hospital administrator.

The defendants moved for summary judgment "on the basis that: (1) there was no violation of the MGDPA because the statements made were based on public information, and (2) the individual defendants have an absolute or qualified privilege." The district court denied the motion, concluding that there were issues of fact. The court of appeals reversed, and certiorari was granted.

The Minnesota Supreme Court began its review by resolving the MGDPA issue. The plaintiff argued that the dissemination of his personnel data violated the MGDPA. The defendants responded that the information was public at the time the statements were made. The Court reasoned that under Minn. Stat. § 13.43 subd. 2(a)(5) (2014), "that 'the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action . . .' is public data."

The Court held that the employment investigation report and final decision from the investigation constituted a final decision under the statute. On the date of the employee's termination the investigation report was reclassified from private to public, and therefore there was no violation of the MGDPA. In addition, the Court noted that even if the information in a public report is duplicative of information in a statutorily confidential form, the information still remains public. The Court also held that the defendants did not violate the MGDPA by making statements to MPR using confidential data. The Court reasoned that the statements by the defendants could just as easily be personal impressions, and personal impressions do not constitute government data.

The Court additionally held that the deputy commissioner is entitled to the protection of absolute privilege within the scope of his/her statutory job duties, but that the administrator of a state hospital was not entitled to the same protection. According to the Court, the deputy commissioner "functions as a top-level cabinet-equivalent official within the meaning of our case law." The administrator, however, was not a cabinet-level executive official and therefore was not protected by any statutory authority. The Court remanded the question of the deputy commissioner's qualified immunity claim.

***KSTP-TV v. Metropolitan Council*, 2016 WL 4446302, 884 N.W.2d 342 (Minn. 2016).**

In a divided opinion authored by Justice Stras, the Minnesota Supreme Court held that video recordings from public buses are only private personnel data if the videos are exclusively maintained for the purposed of monitoring government employees. The Court explained that the timing of the data request determines the data's proper classification.

In this case, KSTP-TV requested recordings of two incidents that occurred on Metro Transit buses. The employer, Metropolitan Council, claimed that the recordings were private personnel data and denied the request. An administrative law judge (ALJ) ruled that KSTP was entitled to the videos as public data. The Minnesota Court of Appeals affirmed.

The Minnesota Supreme Court was asked to determine whether the video recording of the two incidents was private personnel data or disclosable public data. The Data Practices Act contains a presumption that government data is public and accessible unless an exception applies.

The Court focused on why Metro Transit maintained the data, not why the data was created or collected in the first place. Metropolitan Council claimed the recordings were maintained for public-safety and management purposes as well as for personnel purposes "because the videos contain the recorded images and voices of the two bus operators who were employees." KSTP argued that the public-safety and management purposes made the recordings public regardless of whether Metro Transit later tried to maintain the recordings for personnel reasons. The Court's analysis honed in on when the recordings were requested. Metro Transit initially maintained the recordings on a hard drive, and the Court reasoned that during this period the records were maintained for public safety reasons. The videos subsequently were transferred to DVDs and allegedly kept for other reasons, including for personnel purposes. The Minnesota Supreme Court reversed and remanded the case back to the ALJ for further proceedings to determine "whether the recording . . . was 'maintained' by Metro Transit exclusively for a personnel purpose at the time KSTP made its request to access the data."

***Briggs v. Rasicot*, 867 N.W.2d 217 (Minn. Ct. App. 2015)**

The Minnesota Court of Appeals ruled that a police officer was not entitled to official immunity for an incident where he left his unattended squad car unlocked with the engine running, in violation of city ordinance and police department policy.

The circumstances that gave rise to the suit concerned an attempted arrest of a suspect accused of property damage. Officers Rasicot and Bergquist followed the identified suspect ("Melo") into a local bar. The officers surrounded both entrances to the bar and Officer Rasicot, thinking he had seen Melo, went inside to arrest him. Officer Rasicot left the engine of his vehicle running with the doors unlocked. After a brief scuffle, Melo escaped out of the backdoor of the bar leaving the officers inside. Melo entered Officer Rasicot's police vehicle, and in an attempted escape with the car, collided with another vehicle killing the driver Eddie Briggs and injuring the passenger, plaintiff Patricia Briggs. Melo was charged criminally and was sentenced to twenty years in prison.

Briggs commenced this civil lawsuit against Officer Rasicot and the City of Crookston, alleging negligence, wrongful death, and negligent infliction of emotional distress. During discovery, it was determined that Crookston Code of Ordinances § 72.27A made it unlawful to leave a motor vehicle unattended while the engine was running unless the doors were locked. It was also determined that the police department had a policy that stated "vehicles will not be operated in an unlawful manner except in circumstances allowed by Minnesota statute and department policy on pursuit and emergency driving." 862 N.W.2d at 220. Both Officer Rasicot and the City of Crookston moved for summary judgment on theories of immunity, but the district court denied both motions.

The Minnesota Court of Appeals first considered the issue of whether the officer was entitled to official immunity. Official immunity "precludes a public official who is charged by law with duties calling for the exercise of his judgment or discretion from being held personally liable for damage . . ." *Id.* The court therefore had to determine whether the Officer's duty in the situation was one that left him with discretion over how to act, or was a ministerial duty. Officer Rasicot attempted to argue that he did not have a ministerial duty because Crookston Ordinance § 72.27A was largely unknown and had never been enforced, and the police department policy was merely a guideline. The court determined that this ordinance clearly created a ministerial duty for Officer Rasicot to lock his unattended vehicle. The Court determined that although Officer Rasicot argued he was not aware of the ordinance, "we expect that a police officer knows the laws that he is hired to enforce." *Id.* at 221. The Minnesota Court of Appeals also determined that Officer Rasicot's actions did not fall within the ordinance exceptions of responding to an emergency or a vehicle pursuit. In the circumstances of this arrest, Officer Rasicot was responding to a damage to property arrest, and there was no evidence of immediate danger.

The second issue considered by the Minnesota Court of Appeals was whether the district court erred in denying the City of Crookston's summary judgment motion for vicarious liability. The Court concluded that because Officer Rasicot's conduct was not protected by official immunity, the City of Crookston also was not entitled to vicarious immunity.

Kariniemi v. City of Rockford, 863 N.W. 2d 430 (Minn. Ct. App. 2015)

The Minnesota Court of Appeals held that a contractor retained by a city to serve as the city engineer was entitled to official immunity from tort liability, and that the city enjoyed vicarious official immunity.

The City of Rockford, along with a developer, entered into an agreement to build townhomes. The agreement provided that the City would install storm sewers, ditches, and water retention ponds and undertake erosion-control measures and street grading. The agreement, tasked the city engineer with determining whether these items were satisfactorily completed. The City contracted with a private engineering company, Bonestroo, Rosene, Anderlik and Associates ("Bonestroo") to act in the capacity of city engineer and implement the project.

Nathan and Sanna Kariniemi lived in a home adjacent to the developed land. After a rainstorm, the Kariniemi family experienced flooding, damage to their home, and a wetland formed on their property. They subsequently brought suit against the City alleging negligence regarding the design and approval of the storm-drainage system as well as nuisance claims. The district court granted the City's motion for summary judgment on the negligence claims, but denied the City's motion on the nuisance claim. Both parties appealed.

The court of appeals first considered the district court's ruling on the negligent-approval claim. In their appeal, the Kariniemis focused entirely on the negligent design claim and did not discuss the City's regulatory approval process. Because the approval claim requires an identification of the precise governmental conduct being challenged, the Kariniemi's focus on the design claim waived their challenge to the district court's ruling on the negligent-approval claim.

Next, the court considered the negligent-design claim. The district court had ruled that this claim was barred by official immunity. The Kariniemis argued that extending the protection of official immunity to contractors hired by the city would abrogate the Municipal Tort Liability statute. The common law doctrine of official immunity provides that a public official with duties that call for discretion is not personally liable for damages unless the official acts willfully or maliciously. "Official immunity thus protects government officials from suit for discretionary actions taken in the course of their official duties." *Id.* at 434. The Kariniemis argued that Bonestroo did not qualify as a "public official" eligible for protection of official immunity. The district court, relying on *Filarsky v. Delta*, 132 S. Ct 1657 (2012), determined that small municipalities need to have the ability to contract out government responsibilities. The Court of Appeals affirmed this reasoning, and determined that the City should not lose its protection of official immunity because it outsourced some of its functions.

Finally, the court considered the Kariniemi's nuisance claim. This claim, the court determined, should also be dismissed because the allegations underlying the nuisance claim focused on the same conduct as alleged with respect to the negligent design claim. Therefore, because Bonestroo and the City were entitled to official immunity on the negligent-design claim, they were also entitled to it on the nuisance claim.

***Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352 (Minn. Ct. App. 2016)**

The Minnesota Court of Appeals held that the Columbia Heights School District was immune from vicarious liability for sexual abuse that was outside of the coach-employee's scope of employment, and that such abuse was not foreseeable.

Christopher Lloyd Warnke ("Warnke") was an employee of Columbia Heights School District ("school district"), working as a football coach and a weight room supervisor. Warnke was aware of the school district's policy prohibiting sexual relationships with students through the handbook he received when he started his employment. Jane Doe, age fourteen, was a student of the school district. Starting in fall of 2009, Warnke began inappropriately to send to text messages and engage in conversations with Doe. The text messages contained sexually graphic material and took place over a period of two months. During this period, Warnke was alone in the weight room office with Doe and he coerced her into sexual contact. Eventually, Doe's mother was contacted by a concerned parent about the sexually explicit text messages being exchanged by Doe and Warnke. The school was informed, and they reported this to the police. Warnke pled guilty to criminal sexual conduct and solicitation of a minor to engage in sexual conduct.

Doe initiated this law suit against Warnke and the school district, alleging sexual battery against Warnke and vicarious liability, negligence, and negligent supervision against the school district. The district court granted summary judgment to the school district on all Doe's claims.

The court of appeals first reviewed the vicarious liability claim. The court looked at Minn. Stat. § 466.02 and Minn. Stat. § 3.736, subd. 1, and determined that the language of the statutes was unambiguous, and the school district's interpretation of the statute was the only

"reasonable" interpretation. 873 N.W.2d at 358. The court found that "[b]y limiting the state's vicarious liability to the torts of employees 'acting within the scope of office or employment," section 3.736 plainly excludes from vicarious liability torts committed by a state employee who was *not* acting on behalf of the state." *Id.* It was undisputed that Warnke was acting for his own personal reasons when he engaged in this conduct, therefore the school district was not vicariously liable for his actions.

Secondly, the court considered Doe's negligence and negligent supervision claims. Doe claimed Warnke's behavior raised several "red flags" and should have put the school on notice, thereby making the abuse foreseeable. For a negligence claim to succeed, a duty to protect a party arises if there is a special relationship between the parties, and if the risk was foreseeable. The district court determined that Warnke's sexual abuse of Doe was not foreseeable, and granted summary judgment on the negligence and negligent supervision claims. The court of appeals affirmed. After it considered each of the "red flags" raised by Doe, it concluded that they were insufficient to raise a general issue of material fact as to whether Warnke's sexual abuse was foreseeable.

***Tipka v. Lincoln Int'l Charter Sch.*, 864 N.W.2d 371 (Minn. Ct. App. 2015)**

The Court of Appeals held that a charter school is not a public corporation subject to appellate jurisdiction via a writ of certiorari.

Bradley Tipka ("Tipka") was the executive director for Lincoln International Charter School until August 2014, when the school's board terminated him. Tipka petitioned the Minnesota Court of Appeals for a writ of certiorari to review the termination decision. Tipka alleged that two of the board members that made the discharge decision were not statutory qualified to be on the board and that the decision was arbitrary.

The court determined that it did not have subject matter jurisdiction under Minnesota Statute § 480A.06 to issue a writ of certiorari to review the charter board's decision to discharge its executive director. The court looked at the statute language and determined that in order for the court to have jurisdiction, the charter school board needed to be classified as a public corporation. Despite the fact that charter schools have an education purpose and have other similarities to traditional public schools, they are distinguished by the legislature in ways that led the court to the conclusion, that charter schools are not pubic corporations. This conclusion comes from the fact that the other types of schools were expressly deemed public corporations. Even when the statute was amended in 2011, the legislature still did not expressly deem charter school as public corporations, and additionally charter schools were omitted from the public-corporation list. Through an examination of the legislature's intent, the court determined that charter schools are not public corporations.

The court also determined that the term "charter districts" in Minn. Stat. § 123A.55 means "charter schools." The legislature deemed the term "district" rather than "school" in the statute to creatively describe charter schools in a manner "that allowed them to receive fund disbursements as 'districts.'" 864 N.W.2d at 375. The court backed its reasoning to treat charter schools differently than other types of public schools because this was consistent with related

statutory provisions, including: exempting charter schools from statutes and rules, that charter schools must be organized as non-profit corporations, and that charter schools can be created by private entities.