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SUPREME COURT UPDATE

By: *Katie Demedis and Dana Russo, NSBA Legal Interns, Alexandria, Virginia*



National School Boards Association's Council of School Attorneys

1680 Duke Street

Alexandria, VA 22314-3493

(703) 838-6722

Fax: (703) 548-5613

E-mail: cosainfo@nsba.org

Web site: <http://www.nsba.org/cosa>



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hile school districts were not a party to two of the biggest Supreme Court cases of the 2009-2010 term, school districts are directly affected by both decisions. *City of Ontario, California v. Quon* involves a public employer's ability to search an employee's text messages on an employer-issued pager. *Christian Legal Society v. Martinez* involves a law school's ability to deny official recognition to a student group that did not accept all comers. Meanwhile, the 2010-2011 term promises to be an interesting one for school districts not just because the Court will welcome a new Justice. The Court has already decided to hear four cases which will impact school districts—four employment

cases and a case involving tax-credits for students to attend religious schools.

Cases Decided in the 2009-2010 Term

Search of Employee's Text Messages Is Not a Fourth Amendment Violation

In *City of Ontario, California v. Quon*,¹ the Court unanimously held that a public employer's search of an employee's text messages communicated on an employer-issued pager was reasonable under the Fourth Amendment.

When the Ontario Police Department (OPD) issued police sergeant Jeff Quon a pager the City made it clear that the computer use policy, which stated the City had

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the right to monitor e-mail and users had no expectation of privacy in e-mail, applied to text messages. Quon exceeded his monthly character allotment and was told by an OPD lieutenant that the lieutenant did not intend to audit Quon's messages to see if they were work related but instead Quon could reimburse the City for his overage. However, after several months, the police chief wanted to determine whether the existing character limit was too low, causing employees to pay fees for sending work-related messages, or whether the overages were for personal messages. A review of transcripts of Quon's messages revealed that most of his messages sent during work hours were not work-related; some were sexually explicit.

Quon filed suit alleging that the search violated the Fourth Amendment. The district court found that although Quon had a reasonable expectation of privacy, the search was reasonable since its purpose was to determine the efficacy of the character limit. The Ninth Circuit reversed, finding that the scope of the search was not reasonable because there were less intrusive ways to verify the efficacy of the character limit.

The Supreme Court reversed, disposing the case on the narrow grounds of the reasonableness of the search. The Court assumed, without deciding, that Quon had a reasonable expectation of privacy in his text messages. The Court did not decide the expectation of privacy question because it did not want to "elaborat[e] too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."²

Justice Kennedy, writing for the majority, opined that the search in this case was reasonable because it was both justified at its inception and reasonable in scope. The search was justified at its inception because: "The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand, that the City was not paying for extensive personal communications."³ The search was reasonable in scope because reviewing the transcripts was an "efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use"⁴ and not excessively intrusive because OPD only reviewed two months of messages both of which had overages and redacted all messages sent

off-duty. Finally, according to the Court, the Ninth Circuit's conclusion that only the least intrusive search can be reasonable under the Fourth Amendment is "inconsistent with controlling precedents."⁵

School districts and other public employers were hoping that the Supreme Court would hold that there is no reasonable expectation of privacy in messages from employer-issued electronic communication devices where employers have stated in policy that no expectation of privacy exists. Under such a ruling school districts would not have to determine if an intended search is "reasonable." The conservative approach to this case is for school districts to assume school employees have a reasonable expectation of privacy in electronic communications made from employer-issued devices, even where school districts have adopted policies that explicitly state otherwise, and to determine if a search is "reasonable" under the Fourth Amendment before undertaking it.

Public Law School May Require a Student Club to Accept All Comers to Receive Official Recognition

The Court held 5-4 in *Christian Legal Society v. Martinez*,⁶ that a public law school may refuse to officially recognize a student group if it does not open its membership to all students.

To receive the benefits of being an officially recognized "Registered Student Organizations" (RSO), Hastings College of Law required student groups to abide by the school's nondiscrimination policy, which it interpreted to mandate acceptance of all comers. Hastings refused to recognize the Christian Legal Society (CLS) as an RSO because it denied membership to anyone who held different religious convictions than those contained in its "Statement of Faith" or engaged in "unrepentant homosexual conduct." CLS sued Hastings claiming it violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The Ninth Circuit affirmed the district court's holding that Hastings' all-comers rule was viewpoint neutral and reasonable and therefore constitutional.

The Court affirmed the Ninth Circuit. Applying limited public forum precedents, Justice Ginsburg, writing for the majority, concluded Hastings' policy was both reasonable and viewpoint neutral. The Court found that the policy was reasonable because it allows open access to all students

whose tuition helps fund RSOs; it allows Hastings to police its nondiscrimination policy without inquiring into an RSO's motives; it encourages tolerance, cooperation and learning; it allows the law school to refuse to fund proscriptions against discrimination contained in state law; and it still allows CLS to have a presence on campus. The majority rejected the idea that the policy "will facilitate hostile takeovers"⁷ of student organizations by those with opposing beliefs noting: "This supposition strikes us as more hypothetical than real."⁸ The Court also concluded that the policy was viewpoint neutral stating it was "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."⁹ Finally, the majority stated that on remand the Ninth Circuit could consider whether Hastings selectively enforced its all-comers policy.

In his dissent, Justice Alito argued that Hastings did not even adopt the all-comers policy until the litigation commenced and instead allowed groups like La Raza to limit voting membership to students of Raza background. Additionally, Alito opined that the all-comers policy is not reasonable because the purpose of having a variety of RSOs is to "promote a diversity of viewpoints 'among' – not within – registered student organizations,"¹⁰ and that the policy is not viewpoint-neutral because "there is strong evidence in the record that the [all-comers] policy was announced as a pretext."¹¹

While the defendant in this case is a public law school not a public K-12 school district, it is likely lower courts will apply the reasoning of this case if a similar case is brought against a public K-12 school district. In fact, at least two federal circuits have heard cases similar to this case against public K-12 school districts.¹² This ruling does not require school districts or public universities to adopt all-comer policies or to apply the district's non-discrimination clause to officially recognized student clubs. However, if school districts decide to do so they should make sure to enforce such policies against *all* student clubs.

Attorney's Fees under Federal Fee-shifting Statutes May Be Enhanced for Superior Performance and Results

In *Perdue v. Kenny*,¹³ the Court ruled 5-4 that under federal fee shifting statutes a district court may increase the attorney's fees beyond the lodestar, the number of hours worked multiplied by the prevail-

ing hourly rate, in three "extraordinary" circumstances for superior performance and results.

In a class action lawsuit on behalf of the 3,000 children in foster-care in Georgia, the plaintiffs argued that their constitutional and statutory rights were violated by extreme deficiencies in the foster-care system. In mediation, the defendants, including the Governor of Georgia, agreed to a consent decree, resolving all issues except the attorney's fees due under 42 U.S.C. § 1988. The district court awarded a lodestar calculation of \$6 million to the plaintiffs' attorneys and enhanced the award by 75% to \$10.5 million total due to the quality of representation and superior results obtained. The Eleventh Circuit affirmed the district court's decision.

Justice Alito, writing for the majority, stated that while the lodestar method in most cases brought under federal fee-shifting statutes, which allow prevailing parties to recover "a reasonable attorney's fee as part of the costs," yields a "reasonable" fee, there are some "rare" and "exceptional" circumstances when enhancements may be awarded. The Court held that three categories of enhancements may be proper in situations with superior attorney performance, including where "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value,"¹⁴ where "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted,"¹⁵ and where "an attorney's performance involves exceptional delay in the payment of fees,"¹⁶ particularly when caused by the defense. The Court reversed and remanded this case to the district court to "provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement."¹⁷

School districts are frequently sued under federal fee-shifting statutes, like the Individuals with Disabilities Education Act and other civil rights statutes, which may allow for enhanced attorney's fees to prevailing parties. Justice Alito acknowledged the concerns of school districts and other government entities that may have to pay enhancements that such additional attorney's fees will drain money away from the very causes or people that the lawsuit was meant to protect. However, Justice Alito concluded that the Supreme Court's rule would not amount to "unjustified

enhancements that serve only to enrich attorneys."¹⁸

Statute of Limitations for Disparate-Impact Claims Based on Application of An Unlawful Employment Practice

In *Lewis v. City of Chicago*,¹⁹ the Court held 9-0 that a Title VII disparate-impact claim could be brought within 300 days of the *application* of an allegedly unlawful employment practice, not just within 300 days of the *adoption* of that practice.

In July 1995, the City of Chicago administered a written test to over 26,000 firefighter applicants. In January 1996, the City announced it would likely only hire "well-qualified" candidates who scored 89 or above on the test but, depending on hiring needs, might hire "qualified" candidates who scored lower. The City selected its first group of applicants in May 1996, and used the results of the 1995 test ten additional times over the next six years, only once hiring "qualified" candidates after the pool of "well-qualified" candidates had been exhausted. In March 1997, African-American applicants who were "qualified" but had not been hired, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter they brought suit against the City alleging its practice of only selecting applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII. The Seventh Circuit held that the suit was untimely because the EEOC charge was filed more than 300 days after the only discriminatory act: sorting the scores based on qualification status in January 1996.

The Supreme Court reversed. Justice Scalia pointed out that disparate-impact claims can be brought under Title VII where an employer "uses a particular employment practice."²⁰ According to the Court, the employment practice used in this case was excluding applicants who did not score above 89 and "the City 'use[d]' that employment practice in each round of selection,"²¹ essentially restarting the statute of limitations.

The Court disagreed with the Seventh Circuit's reasoning that *United Airlines, Inc. v. Evans*²² and its progeny "stand for the proposition that present effects of prior actions cannot lead to Title VII liability."²³ The Court stated that those cases only establish that a violation must be shown within the statute of limitations period. The Court reasoned that because this claim

was one of disparate *impact* and not one of discriminatory *intent*, the firefighters did not need to demonstrate deliberate discrimination within the claim-filing period. Rather, the allegation that the use of the hiring list caused a disparate impact on African-Americans was sufficient to state a cognizable Title VII claim.

A win for employees, practically speaking, the Court's decision restarts the statute of limitations for disparate-impact discrimination cases every time an employer applies, rather than adopts, an unlawful employment practice giving plaintiffs more time to discover that the practice is unlawful and bring a lawsuit. Based on this decision school districts are well advised to determine on an ongoing basis if particular employment practices may cause a disparate impact on protected classes of employees and change such practices.

Pre-Amended False Claims Act Bars Qui Tam Suits Based on State and Local Administrative Reports

In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*²⁴ the Court held 7-2 that *qui tam* plaintiffs cannot file suit if their allegations are based on publicly disclosed information from state or local administrative reports and investigations.

Karen Wilson filed a *qui tam* action alleging that her employer, the Graham County Soil and Conservation District, among others, violated the False Claims Act (FCA) by knowingly submitting fraudulent billings to the federal government for flood repair work. The FCA authorizes private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the federal government. However, the FCA bars *qui tam* actions based on "public disclosure of allegations or transactions" made in specified sources, including "administrative" reports, hearings, audits, and investigations. The district court dismissed the case for lack of jurisdiction, finding that Wilson failed to refute that her action was based on allegations already publically disclosed in a state audit report. The Fourth Circuit reversed, finding that the FCA's public disclosure bar was limited to *federal* administrative sources.

The Supreme Court reversed the Fourth Circuit, interpreting the FCA's reference to "administrative" reports, etc. as including disclosures made in *state and local* as well

as in *federal* sources. Based upon consideration of the entire text of the FCA's public disclosure bar as well the legislative record, the Court found that an exclusively federal interpretation of the term "administrative" was unsupported. The Court also reasoned that a broader interpretation of the public disclosure bar would help stifle "parasitic lawsuits"²⁵ brought by opportunistic plaintiffs who had no inside information of their own to contribute.

Justice Sotomayor, joined by Justice Breyer, dissented, arguing that the majority misread the text of the FCA and gave insufficient weight to the contextual and historical evidence that clearly indicated Congress's intent in passing the 1986 FCA amendments was to expand the government's ability to combat fraud. The pre-1986 legislation "unquestionably"²⁶ only barred information obtained from federal sources so it would be unreasonable and erroneous, Sotomayor argued, to interpret the new text as creating an even more restrictive bar that includes state and local administrative reports.

One week before the case was decided President Obama signed the Patient Protection and Affordable Care Act (PPACA), which included an amendment clearly limiting the public disclosure bar to federal sources of information. As Justice Stevens noted, the new act was not retroactive, so the Court's decision would still apply to claims filed prior to when the new health care legislation took effect.

Given the changes to the FCA made by the PPACA, regardless of the Supreme Court's ruling, school districts receiving federal money can be faced with FCA lawsuits brought by a whistleblower with inside information or one who has zealously sifted through publicly disclosed local or state administrative reports and has found fraudulent or false claims. And, as recent cases have shown, FCA settlements against school districts can be costly. A *qui tam* allegation brought by a speech therapist resulted in findings that Jefferson County, New York improperly collected Medicaid reimbursement for services provided to disadvantaged children and in July 2009, the case settled for \$540 million.²⁷ Likewise, in March 2010, a federal investigation into possible fraud and anti-competitive conduct in the E-rate program resulted in a settlement in which Houston Independent School District gave up millions of dollars in requests for federal funds and paid \$850,000 to settle

allegations of FCA violations.²⁸ Thus, it goes without saying that school districts should spend federal funds within the confines of the law to avoid FCA lawsuits.

Cases to be Decided in the 2010-2011 Term

Do Tax Credits that Fund Mostly Religious Schools Violate the Establishment Clause?

In *Winn v. Arizona Christian School Tuition Organization*,²⁹ the Court will decide whether Arizona taxpayers have standing to bring an as applied Establishment Clause challenge to tax credits for contributions to "school tuition organizations" (STOs) that give scholarships to students attending private school and whether the tax credits violate the Establishment Clause.

Arizona allows taxpayers to claim up to a \$1,000 tax credit for contributions to STOs. In practice many STOs limit the schools to which they offer scholarships and a number of STOs only provide scholarships for use at religious schools. In fact, Arizona's three largest STOs restrict scholarship use to religious schools. Arizona taxpayers filed suit alleging that the STO scholarship tax credit program, as applied, violates the Establishment Clause.

The Ninth Circuit found the Arizona taxpayers have standing to bring suit. While taxpayers cannot generally challenge government spending solely because they are taxpayers, under the *Fast* exception, taxpayers can bring Establishment Clause challenges to government spending if they can show "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercises of taxing and spending power."³⁰ According to the Ninth Circuit, the Supreme Court has repeatedly decided Establishment Clause challenges brought by taxpayers involving tax credits "without ever suggesting that such taxpayers lacked Article III standing."³¹

The Ninth Circuit also concluded that plaintiffs were able to state a claim that as applied the tax credit scheme violates the Establishment Clause. As to the purpose of the statute, the court found that the legislature's stated purpose of providing equal access to a wide range of schooling options may be a sham because the tax credit scheme could have been interpreted to require STOs to provide scholarships to all qualifying private schools, religious or secular, but instead was interpreted to al-

low STOs to restrict scholarships to religious schools. The court also found that the effect of the tax credit scheme violates the Establishment Clause because it "deliberately skew[s] incentives toward religious schools."³² Because a disproportionate amount of STO money goes to religious schools, parents are deprived of "genuinely independent and private choices to direct the program aid to secular schools."³³ The Ninth Circuit distinguished the Arizona law with the voucher law the Supreme Court upheld in *Zelman v. Simmons-Harris*,³⁴ where the parents were able to choose a secular or religious school.

Groups on both sides of the voucher debate are waiting to see not only which side wins this case but how the Court applies Establishment Clause precedent to the facts of this case. If the plaintiffs lose, Arizona tax dollars will continue to be channeled towards private religious schools, decreasing the amount of revenue available to the state's public schools.

May Employers be Liable as "Cat's Paws" for the Bias of Subordinates?

In *Staub v. Proctor Hospital*,³⁵ the Court will decide whether under the "cat's paw" theory of subordinate bias liability an employer can be liable for the discriminatory animus of a supervisor who does not make the actual decision to take an adverse employment action.

Vincent Staub had a long history at Proctor Hospital of being accused of insubordination and shirking his duties. At the same time, his supervisors were hostile toward his military service obligations, scheduling him to work when he had drill duty and referring to it as "bullshit," among other things. After one of his supervisors reported to the vice-president of Human Resources (HR) that Staub had once again failed to report his whereabouts, even though Staub had left his supervisor a voicemail saying that he had gone to lunch, the vice-president of HR considered the recent incident as well as past issues with Staub and decided to fire him. Staub then filed a grievance claiming one of his supervisors fabricated an earlier allegation against him because of his military obligations. The vice-president of HR did not investigate Staub's claim and instead stuck with her initial assessment that Staub was difficult to work with and insubordinate. Staub filed a discrimination suit under the Uniform Services Employment and Reem-

ployment Rights Act (USERRA) deploying the "cat's paw" theory arguing that his supervisors' bias should be attributed to the vice-president of HR and Proctor Hospital.

The Seventh Circuit overturned a jury's verdict in favor of Staub concluding that Proctor Hospital could not be liable for his supervisors' bias where they did not make the decision to fire Staub and the actual decision-maker conducted her "own investigation into the facts relevant to the decision."³⁶ The Seventh Circuit instructed that in a "cat's paw" case, first the judge should make a "threshold determination of whether a reasonable jury could find singular influence before admitting evidence of the nondecisionmaker's animus."³⁷ In this case, the court concluded that "a reasonable jury could not find that [Staub's supervisors] had singular influence over [the vice president of HR],"³⁸ because she did not rely on only one person's report but instead conducted her own investigation.

In *Staub*, the Court will address the circuit split over the standard of liability that should be applied in "cat's paw" cases. While the Seventh Circuit's standard of "singular influence" is better for school boards than more lenient standards applied in other circuits, it still compels actual decision makers to conduct investigations any time they are advised by a subordinate to take an adverse employment action in order to avoid liability under federal employment discrimination statutes. School boards are likely targets for "cat's paw" cases because they almost always rely on the advice of subordinates when making employment decisions. Two federal circuits, including the Seventh Circuit, have held that school boards could be liable for the unknown bias of subordinates even where they held (or tried to hold) a hearing before non-renewing an employee.³⁹

May FLSA Retaliation Claims Be Based on Oral Complaints?

In *Kasten v. Saint-Gobain Performance Plastics Corporation*,⁴⁰ the Court will decide whether the anti-retaliation provision of the Fair Labor Standards Act (FLSA) protects an oral complaint of a violation.

Kevin Kasten sued his employer claiming that he was terminated in retaliation for making numerous verbal complaints about the location of time clocks in violation of the FLSA. The Seventh Circuit concluded that unwritten verbal complaints are not protected activity because the statute's an-

ti-retaliation provision prohibits discharging any employee who "has filed any complaint." According to the court, "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body."⁴¹ The court also distinguished the FLSA's anti-retaliation provision with broader anti-retaliation provisions in Title VII and ADEA that protect any employee who "has opposed any practice."

If the Supreme Court holds the FLSA anti-retaliation provision applies to unwritten verbal complaints, school boards and other employers will have to modify anti-retaliation policies and practices to treat unwritten complaints as protected by the FLSA.

How Broad Is Employees' Constitutional Right to Informational Privacy?

In *Nelson v. NASA*⁴² the Court will decide whether the constitutional right to informational privacy protects contractors from undergoing a background investigation that includes questions about treatment or counseling received for illegal drug use and open-ended inquiries about "any adverse information" sent to employees' references, employers, and landlords.

Contract employees of the Jet Propulsion Laboratory, a research lab run jointly between the National Aeronautics and Space Administration (NASA) and the California Institute of Technology, brought a class action lawsuit alleging that NASA's new background investigation policy violated their constitutional right to informational privacy. The new policy required applicants and existing contractors who do not work with classified material to undergo a National Agency Check with Inquiries (NACI), the same in-depth background investigation required of government civil service employees. NACI Standard Form 85 requires, among other things, a disclosure of treatment and counseling for illegal drug use. NACI Form 42 requires references, employers, and landlords to disclose "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters."⁴³

The Ninth Circuit granted a preliminary injunction to the contract employees as to the question from Standard Form 85 about treatment and counseling for illegal drug

use and the open ended questions from Form 42. According to the Ninth Circuit, regarding Standard Form 85:

Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy. The government has not suggested any legitimate interest in requiring the disclosure of such information; indeed, any treatment or counseling received for illegal drug use would presumably *lessen* the government's concerns regarding the underlying activity."⁴⁴

Likewise, the court concluded that asking Form 42 "open-ended questions . . . designed to elicit a wide range of adverse, private information"⁴⁵ implicates the right to informational privacy. While the court agreed that the government has "several legitimate reasons for investigating its contractors,"⁴⁶ these questions were not narrowly tailored. As the court opined: "It is difficult to see how the vague solicitation of derogatory information concerning the applicant's 'general behavior or conduct' and 'other matters' could be narrowly tailored to meet any legitimate need."⁴⁷

Judge Callahan, who dissented from the denial of rehearing en banc, stated that the Ninth Circuit's decision could "open the doors to lawsuits against employers who perform standard reference checks to ensure that applicants are suitable candidates for employment."⁴⁸ While school districts do not typically do background investigations of applicants that are as extensive as the NACI, districts may ask references and former employers open-ended questions like those in Form 42. If the Supreme Court affirms the Ninth Circuit, school districts will have to make sure that if they ask questions that implicate a candidate's informational privacy rights that such questions are narrowly tailored to meet a legitimate state interest.

Does Title VII Provide A Cause of Action for Retaliation Against Third Parties?

In *Thompson v. North American Stainless*⁴⁹ the Court will decide whether a closely associated third party, such as a spouse, may bring a Title VII lawsuit for retaliation where an employee engaged in protected activity and the employer retaliated against the third party.

Eric Thompson and Miriam Regalado met at North American Stainless and became engaged. Regalado filed charges of gender discrimination with the Equal Employment Opportunity Commission and slightly more than three weeks after North American Stainless was notified of the charges it terminated Thompson. While North American Stainless claimed Thompson was terminated for performance reasons, Thompson sued claiming he was terminated solely because of his relationship with Regalado in violation of Title VII's anti-retaliation provision.

A majority of the Sixth Circuit decided en banc that Title VII's anti-retaliation provision only protects employees who have engaged in protected activity. Specifically, § 704(a) protects employees who have "opposed any practice" or have "made a charge, testified, assisted, or participated" in an investigation, proceeding, or hearing. Thompson did not claim that he engaged in any protected activity on his own behalf or on behalf of Regalado. While the Third, Fifth, and Eighth circuits have all rejected third-party retaliation claims, a concurring judge suggested Regalado could bring a retaliation claim, and three judges dissented in three separate opinions.

If third party retaliation claims may be brought under Title VII, practically speaking, it will be much more difficult to take adverse employment actions against the spouse, relatives, and friends of any employee who has recently brought Title VII charges. Third party retaliation claims might be more likely in school districts because they are often one of the largest employers in the community and numerous relatives may work for the district. **I&A**

End Notes:

1. No. 08-1332, 2010 WL 2400087 (June 17, 2010), *rev'd and remanded*, 529 F.3d 892 (9th Cir. 2008).
2. Quon, 2010 WL 2400087, at *9.
3. *Id.* at *2.
4. *Id.* at *11.
5. *Id.* at *12.
6. No. 08-1371, 2010 WL 2555187 (June 28, 2010), *aff'd and remanded*, 319 Fed. Appx. 645 (9th Cir. 2009).
7. *Christian Legal Society*, 2010 WL 2555187, at *17.
8. *Id.*
9. *Id.* at *18.
10. *Id.* at *41 (Alito, J., dissenting).
11. *Id.*
12. *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839

(2d Cir. 1996).

13. 130 S.Ct. 1662 (2010), *rev'd and remanded*, 532 F.3d 1209 (11th Cir. 2008).
14. *Perdue*, 130 S.Ct. at 1674.
15. *Id.*
16. *Id.* at 1675.
17. *Id.* at 1676.
18. *Id.*
19. 130 S.Ct. 2191 (2010), *rev'd and remanded*, 528 F.3d 488 (7th Cir. 2008).
20. *Lewis*, 130 S.Ct. at 2197.
21. *Id.* at 2198.
22. 431 U.S. 553 (1977).
23. *Lewis*, 130 S.Ct. at 2199.
24. 130 S.Ct. 1396 (2010), *rev'd and remanded*, 528 F.3d 292 (4th Cir. 2008).
25. *Graham*, 130 S.Ct. at 1407.
26. *Id.* at 1414.
27. Press Release, Governor David Patterson, Governor Patterson Announces Resolution of Decade-Long Dispute with Federal Government Regarding the School Supportive Health Services Program (July 21, 2009), available at http://www.ny.gov/governor/press/press_0721092.html.
28. Press Release, United States Department of Justice, Houston Independent School District Agrees to Settle False Claims Allegations Involving the E-rate Program (Mar. 8, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-civ-236.html>.
29. 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 2010 WL 2025143 (U.S. May 24, 2010) (No. 09-987).
30. 562 F.3d at 1008 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988)).
31. 562 F.3d at 1010.
32. *Id.* at 1013.
33. *Id.* (citations omitted).
34. 536 U.S. 639 (2002).
35. 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 2089 (U.S. April 19, 2010) (No. 09-400).
36. 560 F.3d at 656.
37. *Id.* at 658.
38. *Id.* at 659.
39. In *Mateu-Anderegg v. School District of Whitefish Bay*, 304 F.3d 618, 622, 624 (7th Cir. 2002) the plaintiff declined the opportunity for a statutory non-renewal hearing before the school board, yet the Seventh Circuit still concluded that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer v. Logan County School District*, 157 F.3d 620, 624 (8th Cir. 1998), although the teacher participated in a five-hour hearing before the school board, neither she nor her attorney ever uttered a word about discrimination; nonetheless, the two-judge majority affirmed a \$125,000 judgment in her favor.
40. 570 F.3d 834 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 1890 (U.S. Mar. 22, 2010) (No. 09-834).
41. 570 F.3d at 839.
42. 530 F.3d 865 (9th Cir. 2008), *cert. granted*, 130 S.Ct. 1755 (U.S. Mar. 8, 2010) (No. 09-530).
43. 530 F.3d at 871.
44. *Id.* at 879.
45. *Id.*
46. *Id.* at 880.
47. *Id.* at 881.
48. 568 F.3d 1028, 1045 (9th Cir. 2008) (Callahan, J., dissenting from denial of rehearing en banc).
49. 567 F.3d 804 (6th Cir. 2009). *cert. granted*, 2010 WL

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- Earn up to 10.5 hours of CLE including 1 hour of ethics
- Hear Thursday evening keynote address, "Lincoln: Lawyer and Mediator -- A Study in Political Courage," by the **Hon. Frank J. Williams**, Chief Justice (Ret.), Rhode Island Supreme Court
- Attend Thursday early bird sessions on **labor relations** or **special education** and choose from three concurrent sessions on Friday afternoon. Select "**School Law Boot Camp**"--**student and employee discipline**," additional **labor relations** sessions, or a variety of sessions on **general school law**
- Enjoy **smaller sessions** where you can learn from your colleagues
- **School district in-house counsel** – Friday complimentary luncheon networking followed by CLE session on **internal investigations**
- Enjoy New England in the fall and stay at the **Providence Renaissance Hotel**, a AAA "4 Diamond" property for only \$159 plus tax per night
- Bring the whole "school law team" and register additional members for as low as \$252.

Applications for Patricia E. Baker Scholarship due October 1, 2010

Applications are now being accepted from COSA Members for the **KASB/NSBA Patricia E. Baker Scholarship**. This scholarship, named in honor of past COSA chair and Kansas Association of School Boards associate executive director and general counsel, Patricia E. Baker, honors Pat's legacy and contributions to the field of school law.

The scholarship will be awarded annually and will allow a COSA member, who would not normally participate due to financial hardship, to attend the Annual School Law Seminar.

For more information and an application form, please visit the Council's website.

Nominate a Colleague for a COSA Award

NSBA's Council of School Attorneys (COSA) is now accepting nominations for the **Distinguished Service** and **Lifetime Achievement Awards**.

- **The Distinguished Service Award** may be given annually and recognizes a COSA member who has provided exemplary leadership and distinguished service in support of COSA's mission.
- **The Lifetime Achievement Award** is given periodically to recognize an individual who has provided exemplary leadership and distinguished service in support of COSA's mission over an extended period of time.

Award recipients will be recognized at the 2011 School Law Seminar, April 7-9 in San Francisco, California.

Past recipients include **Kelly Frels**, Bracewell & Giuliani, **Gerald Caplan**, Caplan & Earnest, **Nancy Fredman Krent**, Hodges Loizzi Eisenhammer Rodick & Kohn, **Gus Steinhilber**, NSBA General Counsel (Ret.), and **Edgar H. Bittle**, Ahlers & Cooney.

Visit the Council's website at www.nsba.org/cosa for more information and to download a nomination form. **Deadline for nominations is October 29, 2010.**

New School Law Practice Article Added to COSA's eDocs Store

Copyright Law: Do Schools Need a License to Show a Movie?

School Law Practice, Vol. 4 No. 2 (8 pages) \$20.00.

When can a school district show a movie at school without obtaining a license? It depends! This article describes when a license is required and what districts have to do to obtain a license.

School Law Practice articles are a series of electronic documents on school law topics written from a practical perspective. They are available for immediate purchase and download from the Council's eDocs Store at www.nsba.org/cosa, your on-line 24-hour resource for immediate access to vital information to assist you in your school law practice.

NSBA Council of School Attorneys'

2010 School Law Practice Seminar

October 14-16, 2010



Renaissance Providence Hotel - Providence, Rhode Island

Registration Now Open!