

Federal and State Courts Dismiss Lawsuits Against Community College



Elizabeth Rae- O'Donnell

Recently, two separate courts agreed with CMDA that the lawsuits two former community college instructors filed against the college should be dismissed.

The underlying facts showed that two full-time instructors were involved in a series of conflict resolution sessions where both parties were advised to be civil and follow the rules of the college. The evidence also showed that when

one of the full-time instructors was going up for tenure, the two plaintiffs, a former full-time tenured instructor and a former part-time instructor, engaged in a whisper campaign to disparage and discredit the instructor who was trying to achieve tenure status. The two plaintiffs involved students in their efforts to compromise the other instructor's efforts to attain tenure. The solicited students wrote anonymous and negative e-mails to the college's administration at the same time the instructor was going up for tenure. When the instructor seeking tenure filed complaints about their behavior, the college's internal investigations resulted in recommendations that both plaintiffs be terminated.

Following their terminations, both plaintiffs sued. The part-time instructor alleged in a federal court lawsuit that she was retaliated against and fired contrary to the anti-retaliatory provisions of Title IX because she gave favorable witness statements on behalf of her colleague for the underlying Title IX investigation. This plaintiff's economist expert quoted her damages as exceeding \$300,000. The full-time instructor filed a lawsuit in state court alleging that he was a "whistleblower" who was fired in retaliation for making a FERPA (Family Educational Rights and Privacy Act, 20 U.S.C. §1232g) complaint with the college. This plaintiff's economist expert quoted his damages as exceeding \$1.5 mil-

lion. The unfortunate part of the case was that the identity of the anonymous students was outed and that is why the plaintiff filed a FERPA complaint. As it turns out, however, had the plaintiff not involved students in his efforts to discredit the tenure seeking instructor, the students would not have been drawn into an employment dispute at the college in the first place.

Both the Federal Court and the State Court granted the college's Motions for Summary Judgment and Summary Disposition respectively. The Federal Court Judge found that the plaintiff's evidence did nothing to show that her Title IX testimony in support of her colleague was a significant factor contributing to the recommendation that her part-time teaching position not be renewed. Further, the Court found that the college articulated legitimate and non-discriminatory reasons for not re-appointing the plaintiff and that there was no illegal pretext discrimination.

Likewise, the State Court Judge found that the plaintiff had not presented a prima facie case of whistleblower retaliation because he could not prove through direct or circumstantial evidence that he was fired because he made a FERPA complaint. The Court agreed that the evidence undisputedly and objectively demonstrated through the findings of the internal investigations, that the plaintiff should be terminated because of egregious behavior toward a fellow colleague, violations of confidentiality and inappropriately engaging students in an employment dispute.

One plaintiff in this case has very recently filed an appeal, which CMDA is currently vigorously defending.

Elizabeth Rae-O'Donnell

Elizabeth Rae-O'Donnell is an attorney in our Livonia office where she concentrates her practice on municipal law, employment and labor law, and education law. She may be reached at (734) 261-2400 or erae@cma-law.com.

Definition of Gender Discrimination Expanded



Suzanne P. Bartos

The Sixth Circuit Court of Appeals (the Federal Appeals Court which includes Michigan) recently reviewed the firing of a male funeral home director transitioning to female. Ms. Stephens was fired after she advised the funeral home owner, Mr. Rost, that she was intending to live as a woman including utilizing a female name, dressing in women's clothing and using the women's restroom. Litigation was filed against the funeral home by the Equal Employment Opportunity Commission (EEOC) claiming that Ms. Stephens was discriminated against due to her gender in violation of Title VII. In response to the lawsuit, Mr. Rost asserted that he was Christian and believed that his highest priority was to honor God and that since he believed that a person's gender was a gift from God, changing that gender would be a sin. As a Christian he felt that allowing the employee to alter her gender at work was supporting that sin and not honoring God. Mr. Rost also argued that since his funeral home was a religious institution it was exempt from enforcement of the requirements of Title VII.

Title VII is the federal law that prohibits discrimination (termination from employment) based upon a person's race, color, nationality, religion or sex/gender. Gender has been defined to include how a person perceives the gender, its stereotypes. In lay terms this means that you cannot discriminate against a person for being a certain sex and also you cannot discriminate against a person for not meeting your own expectations or stereotypes of how that gender should dress, act, speak, etc. In other words, you cannot fire a female because you believe that she should be wearing makeup or fire a male because you believe that he is perhaps speaking or walking in a feminine manner. Utilizing this definition, the Court of Appeals found that Ms. Stephens was terminated based upon her gender since she was terminated after she announced that she would no longer meet the stereotype beliefs of Mr. Rost as to how a male should dress and act. The Court believed that Ms. Stephens' gender was relevant to the employment decision and, therefore, the employment decision was made "because of her sex" which made it a violation of Title VII.

Having found a violation of Title VII the Court then considered Mr. Rost's argument that the company was precluded from liability under the Religious Freedom Restoration Act (RFRA) since it was a religious institution and the firing was based on a sincere religious belief. The RFRA applies when the government is attempting to intrude on a person's religious freedoms, here the EEOC was requiring Mr. Rost to allow his male employee to present as a female at work. The RFRA states that a religious institution can, in effect, discriminate against a person

in an employment situation without violating antidiscrimination laws, such as Title VII, if conforming to that Act would create a substantial burden in carrying out the religious exercise of the institution. A simple example is the Catholic Church is not violating the law by not allowing women to attend the seminary because this is based upon the tenant that only a man can be a priest.

In this case, for the funeral home to rely on this exemption it had to show that employing a transgender funeral director would impose a substantial burden on its ability to carry out the self-proclaimed religious exercise of the business of "caring for the grieving." Mr. Rost argued that Ms. Stephens would cause a distraction and this distraction would interfere with the customer's grieving process.

The Court found that Mr. Rost could not rely on a customer's potential biases to establish a substantial burden. In other words, any possible distraction Ms. Stephens may cause was not a reason to terminate her. The Court also disagreed that allowing Ms. Stephens to present as a female was not at odds with Mr. Rost's religious beliefs and, therefore, it was not a substantial burden in carrying out the religious exercise. Tolerating Ms. Stephens' gender identity decisions was not the same as supporting these decisions so this would not be against his religious belief that challenging one's gender was a sin.

There are two important takeaways from this ruling: (1) a business cannot allow an employee's gender, or how a gender is expressed, to be a reason for an employment decision and, (2) in today's culture of demanding tolerance of self-expression, the courts will bend the laws beyond their original intent to find discriminatory conduct. Discriminatory conduct goes beyond not approving of women in the workplace or not approving of who one chooses to love to not approving of how someone does not conform to your stereotypical beliefs.

If you have any questions regarding this matter, how it may impact your employment decisions, or any question on an employment issue please contact me at your convenience.

Suzanne P. Bartos

Suzanne P. Bartos is a partner in our Livonia office where she focuses her practice on employment and labor law, insurance defense, municipal law, education law, and litigation.

She has a wealth of experience negotiating grievance arbitrations, contract negotiations, and other labor related issues. Ms. Bartos routinely provides assistance in employment relations matters, including defending claims in state and federal courts involving civil rights, wrongful discharge, discrimination, the Fair Labor Standards Act (FLSA), and the Family Medical Leave Act (FMLA). She may be reached at (734) 261-2400 or sbartos@cnda-law.com.

CMDA Happenings

Attorneys Join Firm

Please join us in welcoming three attorneys to our Firm.



Shane R. Nolan

Shane R. Nolan joined our Firm as an attorney in our Livonia office. An experienced litigator at both the trial court and appellate levels, he maintains a primary focus on the defense of liability lawsuits on behalf of insurance companies, self-insured corporations, businesses, and municipal entities in a wide variety of civil litigation, including Michigan No-Fault claims (PIP, automobile negligence, uninsured/underinsured motorist), as well as premises liability, general liability, and insurance coverage disputes.

He successfully argues dispositive motions, tries cases to verdict, and regularly represents clients in various alternative dispute forums, including case evaluation, facilitation, and arbitration. Mr. Nolan may be reached at (734) 261-2400 or snolan@cmda-law.com.

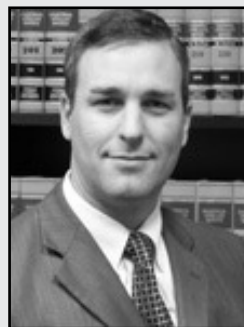


Stanley I. Okoli

Stanley I. Okoli is an attorney in our Livonia office where he focuses his practice on appellate work, research and writing, insurance and personal injury litigation. He writes briefs for submission to all levels of state and federal courts, argues cases in both the state and federal courts of appeals, and performs research for all areas of law handled by our Firm. Mr. Okoli has taken over 30 cases to Michigan Court of Appeals and the Sixth Circuit Court of Appeals and has handled 14 jury trials.

He assists clients with many types of negligence actions, workers' compensation claims, and social security disability claims.

Mr. Okoli is a strong advocate for his clients and vigorously fights to obtain favorable lawsuit settlements and verdicts. He has the experience, resources, and written and oral advocacy skills necessary to help clients recover full and fair compensation for lost wages, property damage, medical care, pain and suffering, and more. Further, he is well-versed in issues involving law enforcement and qualified immunity. Mr. Okoli may be reached at (734) 261-2400 or sokoli@cmda-law.com.



Ryan D. Miller

Attorney Made Partner

We are pleased to announce that **Ryan D. Miller** has been elected a Partner at CMDA. Mr. Miller joined the Firm in 2011 and works out of our Riverside, CA office. Christopher Schultz, managing partner, explains, "Ryan is an exceptional attorney who produces a great work product and maintains excellent relations with clients and co-workers. He has proven to be a strong and effective leader since taking over the responsibility of managing our Riverside office last year. Please join us in welcoming Mr. Miller to the partnership and congratulate him for a job well done."

He concentrates his practice on employment and labor law, public entity defense, and plaintiff's personal injury. He has successful appellate and trial experience. Mr. Miller may be reached at (951) 276-4420 or rmiller@cmda-law.com.

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 Cummings, McClorey, Davis & Acho, P.L.C.

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 first rate legal services at a fair value to a full range
 of business, municipal, insurance and individual clients.