

COUNCIL OF SCHOOL BOARD ATTORNEYS – LEGAL UPDATE ON RECENT COURT CASES

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FEDERAL CASES Vaping – Electronic Cigarettes

- *Alice Buffon, et al v. Kim Alford*, Civil No. 1:21CV308-HSO-RHWR, U.S. Dist. Ct., S.D. Miss., Southern Div. (April 11, 2022)
 - Student was vaping, what he said was flavored water, while at a football game on school property. The vape was confiscated and discarded. The student was given 3 days ISS.
 - Plaintiff's due process claims were dismissed because students are not deprived of their property interest in an education when placed in ISS. Also, a formal hearing is not required prior to ISS. An informal give-and-take between student and school employee is sufficient.
 - Plaintiff's Eight Amendment claims were dismissed in that the school did not "impose excessive penalties" and "excessive fines" by confiscating the vape. A student cannot have a legitimate property interest in something that he cannot legally possess, so confiscating the vape was not an excessive fine or penalty.
 - Plaintiff's Fourth Amendment claim of unlawful search was dismissed. The student was smoking it in plain view.

FEDERAL CASES Off Campus Speech

- *Mahanoy Areas Sch. Dist. V. B.L., et al*, 141 S.Ct. 2038 (June 2021)
 - B.L. tried out for varsity cheerleading but only made the junior varsity team. She also tried out for a private softball team but did not get the position she wanted.
 - That weekend, while off campus, B.L. posted on her Snapchat story a picture of her and a friend with middle fingers raised and a caption that read "F*** school f*** softball f*** cheer f***everything".
 - B.L. was suspended from cheerleading for the upcoming school year as punishment.
 - School District violated B.L.'s First Amendment Freedom of Speech
 - Outside school hours, off school campus, did not target the school or anyone in the school with vulgar or abusive language, on her private Snapchat, and school was not standing in loco parentis.

FEDERAL CASES Board Member Behavior

- *Houston Community College System v. Wilson*, 595 U. S. ____ (2022)
 - Wilson was an elected member of the Houston Community College Board of Trustees who wrecked havoc with the Board.
 - He brought multiple lawsuits against the Board, aired his grievances on social media, rebuked constituents of the other members, hired a public investigator to investigate the residency of a board member.
 - Three years into his term, the Board publicly reprimanded him. Five years into his term, they censured him, among other penalties.
 - Procedurally, the only question before the Supreme Court was whether a Board censoring one of its own members is a violation of the censored member's First Amendment Freedom of Speech.
 - Censorship of board members has occurred throughout our history from the 1800s to the 2020s.
 - Censorship did not meet the requirements needed for a retaliatory First Amendment claim since it was not a "materially adverse action" capable of deterring Wilson from exercising his own freedom of speech.
 - Free speech is permitted "on both sides and for every faction on any side"

FEDERAL CASES Prayer

- *Joseph A. Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021) (U.S. Sup. Ct. granted cert., oral arguments heard April 25, 2022)
 - Kennedy was a football coach at Bremerton who, as a practicing Christian, would pray on the 50-yard line immediately after each game while in his Bremerton School District attire.
 - Students began joining him and this turned into "pep talks" with a religious theme.
 - Kennedy was instructed to stop praying on the 50-yard line in that it violated school board policy and the Establishment Clause. Kennedy was given other "religious accommodations." Kennedy continued to pray on the 50-yard line and was placed on administrative leave.
 - Kennedy sued claiming violation of free speech. 9th Circuit held that Kennedy was speaking as a public employee, not a private citizen, and "could not show a likelihood of success on the merits of his First Amendment retaliation claim and was thus not entitled to a preliminary injunction."

MISSISSIPPI STATE COURT CASES Certified Employee Termination

- *South Panola Sch. Dist. v. Rone*, 315 So.3d1046 (Miss. App. 2020) (cert. denied May 3, 2021)
 - Employee was terminated mid-contract and all statutory procedures regarding the hearing appeal process were followed.
 - Two racially inflammatory comments were purportedly made by Rone, a certified teacher, on her Facebook account and removed within a few hours. Rone denied both making and deleting the posts.
 - Rone was dismissed on two grounds (1) she violated the employee conduct policy and the MS Educator Code of Ethics and (2) she exercised poor judgment in failing to adequately protect her social media account.
 - At the hearing, no evidence was presented by the District that anyone saw the posts directly on Rone's Facebook account. Instead, one District employee was sent screenshots via DM and another saw it on Facebook's "news feed".
 - Rone testified that she was in possession of her cellphone at the times the posts were made; that she can only access Facebook via her cellphone; and that while Facebook is password protected, it will automatically login on her cellphone which is not password protected.

MISSISSIPPI STATE COURT CASES Certified Employee Termination Cont'd

- *South Panola Sch. Dist. v. Rone*, 315 So.3d1046 (Miss. App. 2020) (cert. denied May 3, 2021) Cont'd
 - Rone had a computer software engineer testify that the posts and deletions could have happened in one of four ways: (1) that Rone made them herself; (2) that someone hacked Rone's Facebook account; (3) that someone could have cloned the Facebook account; or (4) that someone doctored or manipulated the screenshots that the school district obtained via DM.
 - The School Board, after a hearing held by an appointed hearing officer, held that there was "substantial and credible evidence to support" the decision to terminate based on both grounds.
 - The Panola County Chancery Court reversed the Board's decision stating that the termination was not supported by "substantial evidence".

MISSISSIPPI STATE COURT CASES Certified Employee Termination

- *South Panola Sch. Dist. v. Rone*, 315 So.3d1046 (Miss. App. 2020) (cert. denied May 3, 2021) Cont'd
 - The "burden rests on the superintendent to prove by a preponderance of the evidence that there were adequate grounds for dismissal."
 - The Chancellor stated "[t]he fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author..."
 - Additionally, the School District did nothing to authenticate the posts.
 - The MS Court of Appeals affirmed the Chancery Court ruling finding that in today's technological age it is too easy for an account to be hacked or cloned without the owner's knowledge and too easy to get someone's username and password.
 - The MS Court of Appeals held that neither reason for termination was supported by **substantial evidence**.
 - The MS Supreme Court denied cert.

MISSISSIPPI STATE COURT CASES Breach of Contract

- *Warnock & Associates, LLC v. City of Canton, MS*, No. 2020-CA-00611-COA
 - Warnock was appointed the city engineer and entered into a professional services agreement.
 - Warnock's appointment was reflected in the minutes of the city, but the minutes made no mention of the contract.
 - Warnock was later relieved of his duties, after which he submitted an invoice for \$109,145.70 for work he claimed was done prior to his termination. The city refused to pay, and Warnock sued for breach of contract.
 - Contracts must be recorded on the official minutes and action of the board.
 - The entire contract does not have to be in the minutes but enough language has to be in the minutes to "determine the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence."
 - It is the contracting parties obligation to ensure that the contract is properly recorded on the minutes.
 - Motion for summary judgment in favor of the city affirmed.

MISSISSIPPI STATE COURT CASES Sex Abuse – Latent Injury

- *Robert McGowen v. Roman Catholic Diocese of Biloxi, et al*, No. 2020-CA-00418-SCT
 - Plaintiff was allegedly sexually abused in the mid-1980s by a priest but allegedly repressed the memories which were not recalled until December 2018.
 - Plaintiff filed a lawsuit against the Diocese and Catholic Church on September 17, 2019.
 - The Circuit Court dismissed the Complaint finding that it was barred by the statute of limitations set forth in Miss. Code Sec. 15-1-49.
 - The Mississippi Supreme Court found that the Circuit Court should have applied the Discovery Rule in Miss. Code Sec. 15-1-49(2) which states that "a cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.
 - Whether the Plaintiff knew or reasonably should have known about the injury in a repressed memory case is a question of fact for the jury to decide.

MISSISSIPPI STATE COURT CASES Discretionary Function/Ministerial Duties

- *Christopher Shane Strickland, Sr. et al v. Rankin Co. Sch. Dist.*, No. 2019-CA-01669-COA
 - Prior to running a cross-country meet Christopher was stung by a red wasp on the head. After being advised of the sting, Christopher's coach allowed him to run in the meet. Christopher became dizzy while running, fell and hit his head.
 - The next day, Christopher's father took him to urgent care for what the father thought was a severe concussion. Christopher was subsequently diagnosed with multiple complications including brain and spinal injuries.
 - Christopher's father sued on behalf of Christopher alleging that the coaches were negligent in allowing Christopher to run after being notified of the wasp sting and for failing to provide proper medical care after the fall.
 - The School District filed a motion for summary judgment arguing that they were immune from liability since coaching responsibilities are discretionary.
 - Circuit Court held that the decision to allow Christopher to run in the meet was covered by discretionary function immunity and granted summary judgment.

MISSISSIPPI STATE COURT CASES Discretionary Function/Ministerial Duties

- *Christopher Shane Strickland, Sr. et al v. Rankin Co. Sch. Dist.*, No. 2019-CA-01669-COA – Cont'd
 - Christopher reported that he may have been stung; the coaches examined him and found no evidence of a sting; medical professionals provided aid; Christopher wanted to run and said he was fine; and parents signed a form stating that Christopher was not allergic to stings.
 - Two prong test – (1) does the activity involve an element of choice or judgment and (2) does that choice or judgment in supervision involve social, economic or political alternatives.
 - Court of Appeals relied on several past cases which held that the way a coach operates his program involves choice and judgment and that a school district's decision to run an athletic program is an exercise of a political function. The COA also stated that ordinary care was provided and that the coaches' actions were not negligent.
 - The Mississippi Supreme Court granted cert on December 14, 2021.

MISSISSIPPI STATE COURT CASES Discretionary Function/Ministerial Duties

- *J.D., et al v. McComb Sch. Dist., No. 2020-CA-00022-COA*
 - J.D. was assaulted at school by another student (A.B.) which caused severe head, neck and jaw injuries to J.D. A.B. had engaged in similar conduct before.
 - J.D.'s complaint alleged that the District (1) failed to provide a safe environment for J.D.; (2) failed to supervise or discipline A.B.; or (3) failed to prevent A.B. from bullying or harassing J.D. or (4) failed to hold A.B. to strict account for his disorderly conduct.
 - The District argued that it was entitled to discretionary function immunity or alternatively, that was specifically immune to claims related to student control and discipline.
 - Circuit Court dismissed the complaint for failing to state a claim upon which relief could be granted.
 - The COA reversed and remanded on 3/15/2022 stating that the complaint adequately stated a cause of action for negligence.

MISSISSIPPI STATE COURT CASES Discretionary Function/Ministerial Duties

- *J.D., et al v. McComb Sch. Dist., No. 2020-CA-00022-COA – Cont'd*
 - The COA reiterated that "public schools have the responsibility to use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment."
 - Considering the allegations in the complaint as true, "J.D. adequately stated a claim that the District had breached its ministerial duty to use ordinary care and to take reasonable steps to minimize foreseeable risks to her."

MISSISSIPPI STATE COURT CASES Discretionary Function/Ministerial Duties

- *Lemond Robertson, et al v. MS, Houston, Pub. Sch. Dist., No. 2020-CA-00931-COA* (motion for rehearing denied 3/22/22)
 - The school was alerted that one student, T.B., planned to assault another student, A.R., once they arrived at school. The school took precautions to help ensure that the students did not meet before school started. However, T.B. ran from the adults who were escorting her. She ran into the gym where A.R. was located. A.R. ran into the bleachers in an attempt to elude T.B. While coming out of the bleachers, A.R. jumped from the bleacher stairs to the gym floor and hurt her knee which later required surgery.
 - Her complaint alleges that one of the teachers told her to jump. This was denied by the school district. This is the only disputed fact.
 - A.R.'s complaint stated that the District (1) failed to hold T.B. to strict account for disorderly conduct of the school; (2) failed to use ordinary care and take reasonable steps to minimize the foreseeable risks to A.R.; and (3) failed to provide a safe school environment for A.R.

MISSISSIPPI STATE COURT CASES
Discretionary Function/Ministerial Duties

- Lemond Robertson, et al v. MS, Houston, Pub. Sch. Dist., No. 2020-CA-00931-COA (motion for rehearing denied 3/22/22) Cont'd
 - The COA reiterated that Miss. Code Section 37-9-69 "imposes upon school districts a ministerial duty to use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment. The school ... has a duty of exercising ordinary care, or reasonable prudence, or of acting as a reasonable person would act under similar circumstance."
 - In this case there is no genuine issue as to a material fact that would show a breach of the District's duties
 - In viewing the evidence in the light most favorable to the Plaintiff, there is nothing in the record to show that the District either failed to provide A.R. with a safe school environment or failed to use ordinary care and take reasonable steps to minimize foreseeable risks to the student.
 - Motion for summary judgment affirmed and rehearing denied.

MISSISSIPPI STATE COURT CASES
Discretionary Function/Ministerial Duties

- Other Cases dealing with Discretionary Function Immunity
 - City of Jackson v. Grace Hilton*, No. 2019-CA-01397-COA – Governmental immunity is an affirmative defense and is subject to waiver. (City of Jackson lost its ability to claim immunity under MTCA when it did not assert the claim until the eve of the second trial in the matter and 17 years after filing the initial answer.)
 - Shannon Sanders v. Atala County, MS*, No. 2020-CA-00175-COA – Circuit Court granted summary judgment based on immunity. COA reversed and remanded. MS Supreme Court denied cert on 1/26/22 (Deputy's decision to give a woman a courtesy ride was discretionary but his alleged reckless driving, speeding in the rain on a curvy road, were not a policy decision that gives rise to refuge under discretionary immunity.)

MISSISSIPPI STATE COURT CASES
Discretionary Function/Ministerial Duties

- Other Cases dealing with Discretionary Function Immunity
 - Sherry Williams v. City of Batesville, MS*, No. 2019-CA-01300-SCT – Circuit Court granted the City of Batesville's motion for summary judgment finding that the City was immune from liability. The Miss. Supreme Court reversed and remanded on 3/18/2021. (Property flooded by raw sewage – negligent management of sewer system is a question of fact and not entitled to discretionary immunity.)
 - Marty Calhoun, et al v. Mississippi Dept. of Transp. Comm., et al* No. 2019-SA-01818-COA – Circuit Court granted summary judgment finding that there was no proof that the dept. breached its ministerial duty or that a breach proximately caused harm. The COA affirmed. (Riders in a parade hit by low-hanging tree limb.)

MISSISSIPPI STATE COURT CASES Unemployment Claims

- *City of Grenada v. Miss. Dept. of Emp. Security*, No. 2020-CC-00446-SCT
 - Police officer was terminated because he suffered from psychological problems (delusional disorders) which are "outside the control" of the former employee and are "not considered misconduct connected with work."
 - Therefore, employee was entitled to unemployment benefits.
- *Quentin Mayes v. Miss. Dept. of Emp. Security*, No. 2020-CC-01701-COA
 - "Misconduct can occur even if the employee is off-duty or off-premises"
 - Hotel employee used vulgar and abusive language toward staff while a guest denied unemployment
- *Shirley Jones v. Miss. Dept. of Emp. Security*, No. 2019-CC-01734-COA
 - "Burden is on the employer to prove that a former employee's conduct warrants disqualification of benefits by substantial, clear and convincing evidence."
 - The former employee "must be unemployed through no fault of their own."
 - Employee was continually getting a relative to do her after-hours cleaning job, and the relative's work was subpar. Unemployment benefits were denied.
