

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

Spring 2022

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Supreme Court of the United States

Publicly Elected Boards Can Verbally Censure a Rogue Member

In a unanimous decision, the Supreme Court of the United States finds that a publicly elected board member doesn't have an actionable First Amendment claim arising from the board's purely verbal censure.

SUPREME COURT REJECTS BOARD MEMBER'S CLAIM THAT CENSURE VIOLATES HIS FREE SPEECH RIGHTS

Houston Community College (HCC) System Board of Trustees is a publicly elected body. Soon after David Wilson was elected to the board in 2013, he began challenging the board's actions with a series of lawsuits, arranging robocalls to constituents, and using media outlets to voice his views. In 2018, the board responded by adopting a public resolution censuring Wilson. The resolution stated that Wilson's conduct was "not consistent with the best interests of the college" and "not only inappropriate, but reprehensible."

Wilson responded with a lawsuit alleging the censure was issued to punish him for exercising his First Amendment right to free speech. HCC moved to dismiss the lawsuit, and the district court granted the motion. On appeal, the Fifth Circuit reversed, holding that a reprimand against an elected official for speech addressing public concerns is actionable under the First Amendment.

The Supreme Court agreed to review the Fifth Circuit's ruling. In a 9-0 decision, the Supreme Court held that Wilson didn't have an actionable First Amendment claim based on a purely verbal censure from other members of the board.

"ARGUMENT AND COUNTERARGUMENT, NOT LITIGATION, ARE THE WEAPONS AVAILABLE FOR RESOLVING THIS DISPUTE."

The opinion written by Justice Neil Gorsuch noted that publicly elected bodies in the United States have long exercised the power to censure their members. Congress has censured members for objectionable speech, as well as public statements to the media, or any conduct or speech that is damaging to the

nation. A purely verbal censure has never been considered to offend the First Amendment. When members of a publicly elected body disagree, the First Amendment “permits free speech on both sides and for every faction on any side.”

The Supreme Court noted that an actionable First Amendment claim must show that the public body took an “adverse action.” Here, the adverse action at issue was a form of speech from the other board members, which the Supreme Court held doesn’t qualify as a materially adverse action that is capable of deterring Wilson from exercising his own right to free speech.

Per the opinion, “[a] reprimand, no matter how strongly worded, does not materially impair freedom of speech,” especially when “the censure at issue before us was a form of speech” by other members of the board. The First Amendment promises an elected representative the right to speak freely on questions of policy, but “it cannot be used as a weapon to silence other representatives seeking to do the same.”

THE BOTTOM LINE



The court’s decision addresses a narrow issue involving the verbal censure of one member of a publicly elected body by other members of the same body. Still, it is an important decision for educational institutions with publicly

elected bodies, as it allows these bodies, such as boards, to respond to a member’s speech with a verbal censure, another form of speech.

Houston Community College System v. Wilson, Case No. 20-804, 212 L. Ed. 2d 303, 142 S. Ct. 1253 (Mar. 24, 2022).

UE Stands With Our Members on Important Issues of Principle

For 35 years, UE has focused on the liabilities educational institutions face. When matters of principles arise, we remain committed and have the fortitude to support the defense of our members — up to and including the highest court.

We are grateful to the U.S. Solicitor General for speaking in support of the HCC system as well as the numerous other organizations in support of the system’s position. This includes the Association of Governing Boards of Universities and Colleges, the state of Texas and the District of Columbia — joined by a coalition of 15 additional states (Alabama, Connecticut, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, Oklahoma, Pennsylvania, Utah, and Virginia); the Texas Association of School Boards Legal Assistance Fund; the National School Boards Association; and the American Jewish Committee.

News Release: United Educators Member Wins Case Before the U.S. Supreme Court

U.S. Court of Appeals for the Eleventh Circuit

Court Joins Other Circuits in Streamlining Pleading Requirements for Respondent Title IX Cases

As previously reported in Winter 2021’s edition of UE on Appeal, federal circuit courts of appeals have applied different tests when evaluating a Title IX claim involving a disciplinary proceeding on a motion to dismiss for failure to state a claim.

In this decision, the Eleventh Circuit joins a plurality of other circuits in streamlining its analysis to focus on whether the allegations support a claim of discrimination “on the basis of sex,” as stated in the text of Title IX.

STUDENT SUSPENDED FOR TITLE IX VIOLATIONS CLAIMS NUMEROUS IRREGULARITIES IN PROCESS

Plaintiff John Doe was a senior at Samford University, a private Christian university, in October 2020. During an off-campus Halloween party, Doe was introduced to Jane Roe and offered her some of the alcoholic beverage he brought to

the party. About 15 minutes after meeting, Doe and Roe left the party for his friend’s apartment. There, they engaged in sexual intercourse.

Four days later, Roe filed a Title IX complaint with the university asserting that Doe had sexually assaulted her when she was incapacitated.

Following an investigation, a live hearing occurred before a panel in early 2021. The panel found Doe responsible for engaging in prohibited conduct in violation of university policy and suspended him for five years. An appeal panel dismissed Doe’s appeal.

Doe sued the university for violating Title IX. In his complaint, Doe advanced two tests for establishing Title IX liability arising out of a university disciplinary proceeding:

- (1) The “erroneous outcome” test, alleging that gender bias was a motivating factor in the university’s decision
- (2) The “selective enforcement” test, arguing that Doe was treated differently under the university’s Title IX policy than a female student would have been treated if accused of a similar offense

Doe alleged that various steps of the process violated the university’s Title IX policy, including: failing to provide him with written notice of the allegations before being interviewed or conducting an initial meeting; not asking certain questions during witness interviews; and failing to conduct follow-up interviews.

Doe further alleged that the preliminary investigation report contained highly prejudicial hearsay statements. He alleged that at the hearing, Roe claimed for the first time she had consumed alcohol before arriving at the party. He further contended that the hearing panel improperly refused to hear testimony regarding his autism and received a copy of the Title IX report containing statements from non-testifying witnesses.

Throughout the process Doe lodged objections with the Title IX Coordinator, contesting the university’s jurisdiction over the complaint, lack of impartiality by the investigator, and the investigator’s failure to do more to uncover exculpatory evidence.

VIALE RESPONDENT TITLE IX CLAIM REQUIRES ALLEGATIONS THAT SUPPORT PLAUSIBLE INFERENCE OF SEX DISCRIMINATION

First addressing the threshold question of the appropriate framework for establishing a violation of Title IX, the Eleventh Circuit joined a plurality of other circuit courts in adopting the test first articulated by the Seventh Circuit in *Doe v. Purdue University*. Rather than adhering to any formal doctrinal tests, the Eleventh Circuit held that in determining whether the plaintiff has stated a Title IX claim, the standard is whether the alleged facts, if true, permit a reasonable inference that the university discriminated against the plaintiff on the basis of sex.

Viewing Doe’s allegations in isolation or collectively, the court found that it wasn’t plausible that he was suspended on the basis of sex and, therefore, had failed to state a Title IX claim.

The court rejected Doe’s argument that “gross procedural deviations” permitted a reasonable inference of sex discrimination because some of his allegations were either

conclusory or incomplete, while the others didn’t permit a reasonable inference of sex discrimination.

Significantly for the court, Doe’s allegations permitted obvious alternative explanations that suggested lawful conduct rather than the unlawful conduct Doe asked the court to infer. These lawful explanations include ineptitude, inexperience, and pro-complainant bias.

The court found Doe’s allegations about deficiencies in the investigation more in line with the appeal board’s explanation that the deficiencies were attributable to the investigator’s inexperience — a sex-neutral explanation that doesn’t violate Title IX.

Additionally, throughout the complaint, Doe asserted that the university was biased against all respondents in Title IX proceedings. The Eleventh Circuit clarified that while this allegation may permit a reasonable inference that Doe’s suspension was motivated by a pro-complainant, anti-respondent bias, it isn’t discrimination on the basis of sex because neither party is limited to a particular gender.

The Eleventh Circuit was similarly unpersuaded by Doe’s generalized allegations about the “Dear Colleague” letter, the university’s Clery statistics, and other conclusory statements.

THE BOTTOM LINE



The Eleventh Circuit joins other circuits, including the Third, Fourth, Seventh, Eighth, Ninth, and Tenth, in applying a broad test based on the statutory language of Title IX to determine whether a plaintiff has stated a claim.

The court emphasized that its conclusion doesn’t impose a probability requirement but rather rests on whether the plaintiff’s assertion of sex discrimination is plausible based upon the allegations of the complaint.

Doe v. Samford, et. al, 2022 U.S. App. LEXIS 7778, 29 F.4th 675 (11th Cir. Mar. 24, 2022), petition for reh’g en banc filed (Apr. 12, 2022).

RELATED UE RESOURCES

- [Higher Education Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures](#)
- [Considerations in Independent School Student Sexual Misconduct Investigations](#)
- [Checklist: Sexual Harassment Investigations](#)

Repeated Requests for Extension of Medical Leave of Absence Don't Necessarily Equate to Indefinite Leave

In a recent decision, the California Court of Appeal contemplates the interaction between a university's maximum leave policy and its duty to provide reasonable accommodations in a case in which the university had previously granted an employee four consecutive leaves of absence.

UNIVERSITY EMPLOYEE PROVIDES BARE-BONES DOCTOR NOTES OF NEED FOR MEDICAL LEAVE

Junie Colby, a longtime employee in Loyola Marymount University's Financial Aid department, visited the emergency room on Feb. 27, 2017, where she reported feeling exhausted, unable to sleep, depressed, and hopeless. Her doctor sent a notice of Colby's disability in the form of a one-sentence work status report, stating merely that "This patient is placed off work from 2/28/2017 through 3/8/2017." The university received two more equally terse work status reports placing Colby off work first for an additional week and then for an additional two months, through mid-May 2017.

A few weeks before her leave was scheduled to end, Colby met with a representative from the Human Resources department, who told her that, pursuant to university policy, Colby's medical leave eligibility would end Aug. 28, 2017 (six months from her first day of leave), and her employment would end if she was unable to return to work by that date.

Colby then submitted a fourth work status report placing her off work for an additional three months, through mid-August 2017, and was reminded again of the university's leave policy. Colby expressed dismay with how the university was handling her medical issues and stated that while she desired to work, she didn't know if her severe anxiety would allow her to return by Aug. 28.

In response, the university outlined four scenarios for Colby:

- Be released to return to full duty.
- Be released with work restrictions, for which she could request reasonable accommodations, provide a medical certification describing her restrictions, and engage in the interactive process with the university.
- Request a 30-day personal leave of absence through the end of September if she was close to full recovery.
- Be terminated if she was unable to return to work with or without restrictions by Aug. 28 (or Sept. 28, with an approved personal leave of absence).

When Colby responded, she didn't address the scenarios the university outlined, merely stating "I will continue to work with my doctor and will keep you updated on the status of my requests for an accommodation." Colby's only further response was for her doctor to send a fifth work status report stating that Colby was placed off work through mid-November 2017.

On Aug. 30, 2017, the university advised Colby that because she had reached the six months allowed for an extended medical leave and was unable to return to work, she was terminated.

Colby filed suit in the Superior Court of Los Angeles County alleging, among other things, that the university's failure to accommodate her disability and to engage in good faith in the interactive process constituted a wrongful termination in violation of California law. The trial court granted the university's motion for summary judgment, finding that Colby's request for additional medical leave was tantamount to indefinite leave and therefore not a reasonable accommodation.

Colby appealed.

FINITE LEAVE MAY BE REASONABLE IF IT ENABLES AN EMPLOYEE TO RETURN TO WORK

The appellate court reversed, concluding that a jury could find it was unreasonable for the university to assume Colby would continue to extend her medical leave indefinitely. Although an employer need not provide repeated leaves of absence for an employee with a poor prognosis of recovery, in some cases, an employer may need to consult directly with the employee's doctor to determine the employee's medical restrictions and prognosis for improvement of recovery.

The university had argued that based on the repeated extensions of leave, Colby's fifth work status report was not a projected return to work date, as evidenced by a declaration

Colby submitted to the Social Security Administration, which stated that she became unable to work because of her disabling condition in March 2017 and she remained disabled in May 2018.

Colby's doctor testified at deposition that if the university contacted her for a prognosis, she would have told them that Colby was close to being able to return to work on or about Nov. 15, 2017. Because the doctor also said Colby's termination had exacerbated her condition, the appellate court held that a jury could reasonably find that Colby would have been able to return to work in November absent the major setback of her termination. A jury also could find that the university's decision to terminate Colby without further discussion regarding her prognosis and likelihood of returning at the expiration of the fifth work status report caused a breakdown in the interactive process.

Because questions of fact existed on those issues, the appellate court remanded the case to the trial court for further proceedings.

The university has filed a petition asking the California Supreme Court to review the appellate decision.

THE BOTTOM LINE



Although this case was analyzed under the California Fair Employment and Housing Act, the appellate court decision is a reminder that employers should tread lightly before seeking to enforce a policy that establishes the maximum amount of leave an employee may take. Such policies may have to be modified as a reasonable accommodation for a disability unless the employer can show that granting additional leave would cause an undue hardship.

An employer should make an individualized assessment. It is prudent to avoid making employment decisions based on assumptions from silence, which might require an employer to be more proactive in asking more questions regarding the employee's prognosis and likelihood of being able to return to work to avoid causing a breakdown in the interactive process.

Colby v. Loyola Marymount Univ., 2022 Cal. App. Unpub. LEXIS 416 (2d Dist. Jan. 24, 2022), pet. for review filed (Cal. Mar. 4, 2022).

Supreme Court of Alabama

State Immunity Applies to Public University's Supervision of Students Performing Field Coursework

Like most states, Alabama provides immunity to government employees acting within the scope of their official duties and exercising their own judgment or complying with relevant laws. In this case involving a tragic accident and death of a student, the Alabama Supreme Court reinforces the applicability of immunity to professors at public institutions when instructing and supervising students.

IMPAIRED DRIVER HITS STUDENTS CONDUCTING GEOLOGY FIELDWORK

Two Auburn University students, Cole Burton and Nicholas Hood, were enrolled in a field-camp course offered by the Department of Geosciences in spring 2018. As part of that course, students participated in a series of field exercises, including traveling to geologically significant sites in Alabama. One such location, the Gadsden site, is located along a section of U.S. Highway 431, and allowed students to

observe, describe, and measure the orientation of exposed Paleozoic rocks.

On May 24, 2018, students and faculty in the course traveled to the site for a field exercise. Beforehand, faculty conducted an informational meeting to brief students on safety and what they could expect to encounter during the exercise. The students were advised to wear bright colors to stay visible to drivers.

Upon arrival at the site, Professor John Hawkins gave a safety briefing. He learned there were some reflective safety vests in one of the vans the group was using and encouraged students to wear them. Several students complained that the vests were soiled and damp, and ultimately neither Hawkins nor any students wore one. Hawkins didn't require the students to wear the vests because nothing in the course syllabus required their use, nor had it been a rule or practice of the department to require students to wear a reflective safety vest during field exercises.

Toward the end of the exercise and in preparation for departure, Hawkins briefed a group of students while standing on the edge of the highway. As he was making his way to speak with other students, an impaired driver driving southbound approached the group when her side tires ran off the highway into the median, causing her car to over-correct. Her car crossed both southbound lanes of the highway and struck Burton and Hood, who were studying the rock outcrop along the southbound side of the highway. Burton suffered severe injuries and Hood died from his injuries about a month later.

The estates of Burton and Hood sued Hawkins and two other Geosciences faculty members who served various roles teaching and leading the field exercises. The professors filed a motion for summary judgment arguing that they were entitled to state-agent immunity on all claims asserted against them because they were acting in the course of their employment with a public university in educating and supervising the students at the time of the accident.

Plaintiffs argued that the professors acted outside the course of employment because they hadn't required the students to wear reflective safety vests as required by the Manual on Uniform Traffic Control Devices for Streets and Highways issued by the Federal Highway Administration (FHWA), and because Hawkins had been standing on the paved shoulder of the highway in violation of an Alabama regulation requiring pedestrians to walk as far as practicable from the edge of the roadway.

The circuit court granted summary judgment in favor of the professors, and plaintiffs appealed to the Supreme Court of Alabama.

BURDEN-SHIFTING FRAMEWORK FOR STATE-AGENT IMMUNITY

To claim state-agent immunity, the agent bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the agent to immunity. If the state agent makes such a showing, the burden shifts to the plaintiff to show that the state agent acted willfully, maliciously, fraudulently, in bad faith, or beyond the agent's authority. A state agent acts beyond authority, and is therefore not immune, when failing to discharge duties pursuant to detailed rules or regulations.

Plaintiffs contended that the professors failed to establish that plaintiffs' claims arose from a function that would entitle them to immunity because they never established what duties

were imposed upon them by statute, rule, or regulation. The court rejected this argument, citing the statutory authority establishing Auburn and its educational purpose and the court's own repeated holdings that public educators are entitled to immunity for claims based upon the discharge of their statutory duty to educate students. Here, the court found undisputed evidence that the professors were acting in their official capacities as educators and furthering the educational purpose of the university at the time of the accident.

The court then addressed plaintiffs' contentions that the professors had acted beyond their authority. The court rejected the contention that the professors had acted beyond their authority by failing to require the students to wear high-visibility safety apparel. The court concluded that the FHWA manual — the source of the alleged requirement — wasn't applicable to the students because they were at the rock outcrop as part of their course requirements and not within the scope of highway construction, maintenance, or safety. Because the students didn't fall within the term "worker" under the FHWA manual, the requirement that "workers" wear high-visibility safety apparel didn't apply to them at the time of the accident.

Plaintiffs also argued that Hawkins acted beyond his authority by standing too close to the highway in violation of an Alabama state law requiring pedestrians to walk on the shoulder of a road "as far as practicable from the edge of the roadway." Assuming the law applied to Hawkins, the court determined that the use of the term "practicable" in the statute vested Hawkins with the discretion to determine where to stand on the shoulder of the highway as he supervised the students. Accordingly, he didn't act beyond his authority which would remove him from the protection of state-agent immunity.

THE BOTTOM LINE



Although state law varies, most states have some limitations on the claims and damages that can be pursued or recovered from state entities, including school districts and public institutions of higher education.

Claimants often attempt to skirt immunity applicable to the institution itself by pursuing claims against individual employees.

Institutions should be mindful that there may also be viable immunity-related defenses for individually named defendants.

Burton v. Hawkins, 2022 Ala. LEXIS 26 (Ala. Mar. 11, 2022).



ABOUT UE'S RESOLUTIONS PROCESS:

[Resolutions Philosophy](#)

[Claims Handling](#)

[How to Report a Claim](#)



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