

Legally Speaking

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*Education is the ability to
listen to almost anything
without losing your temper
or your self-confidence.*

Robert Frost (1874-1963)



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discrimination and harassment based
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Another Exception to *Tinker*-Disciplining Threats of Mass Violence

By James A. Robinson, School Board Attorney

In the Winter 2007, Vol. III, Issue 2 of Legally Speaking, we wrote about the Supreme Court's decision in *Morse v. Frederick*, the "Bong Hits 4 Jesus" case in which the Court held that a student's First Amendment right to free speech did not prevent a school district from suspending him for displaying a banner that the principal reasonably thought promoted the use of illegal drugs. *Morse* represented an exception to the rule of *Tinker v. Des Moines Independent Community School District* that school officials must justify their decision to discipline student speech by showing "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." The Fifth Circuit Court of Appeals recently relied on *Morse* in a case involving a student's threats of a Columbine-style attack on a school. In *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), the Fifth Circuit held that such speech was not protected by the First Amendment because it posed a direct threat to the physical safety of the school population.

The facts of the *Ponce* case are as follows. While enrolled as a high school sopho-

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Mission Statement

The mission of the
School Board
Attorney's Office
is to provide the highest
quality legal services
to the
Pinellas County School
Board and district by
ensuring timely and
accurate legal advice and
effective
representation
on all legal matters.

Congress Expands Benefits Under Family and Medical Leave Act

By James A. Robinson, School Board Attorney

On Jan. 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, which, among other things, amends the Family and Medical Leave Act (FMLA). The amendments permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 work weeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpa-

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SSNs – Collection & Disclosure of Use

By David Koperski, Assistant School Board Attorney

State and federal laws provide various protections for individuals' Social Security numbers (SSNs). The Florida Legislature has expressly recognized in law that "... the Social Security number can be used as a tool to perpetuate fraud against an individual and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual."

In Florida, SSNs are confidential and exempt from disclosure in response to a public records request. So, even though the vast majority of an employee's personnel file is a public record, the employee's SSN would be redacted from the file prior to any release to an outside individual or organization. In addition, another Florida law allows our school district and other public agencies to collect and use SSNs if they state in writing the purpose for the collection and if the collection is either specifically authorized by law or is imperative for the performance of the agency's duties and responsibilities.

In our district, new students and applicants for employment now receive a notice describing the district's collection and use of SSNs. That notice lists the following purposes for collection and use of SSNs. After each item listed below, a brief description of the legal grounds authorizing such collection and use is given.

Employment eligibility

Pursuant to various federal immigration and homeland security laws, the district collects SSNs from employment applicants to confirm that they possess sufficient authorization to work in the country. See 8 U.S.C. 1324a(b) and 8 C.F.R. 274a(2).

Certification/licensure

Various State Board of Education regulations and practices

require the district to communicate with DOE using SSNs regarding employee certifications and licensures.

Payroll deductions

Federal Internal Revenue Service laws and regulations require that employees' income and pre-tax retirement contributions be reported and tracked using SSNs. See 26 C.F.R. 31.6011(b)-2, 31.6051-1, and 301.6057-1.

Retirement contributions

Same as "Payroll deductions" above.

Tracking of students as required by State Board Rule

State Board of Education regulations require districts to maintain SSNs of adult students for tracking purposes. See Rule 6A-1.0955(3)(e), F.A.C. Regarding all students, state law requires that districts request SSNs from each pre-K–adult student. See s. 1008.386, F.S. However, each student or parents may refuse to provide the SSN and such refusal cannot be the basis of any denial of educational services

Tracking and reporting of Corporate Tax Credit Scholarship students as required by State Board Rule

State Board of Education regulations describe the collection and use of SSNs to track students benefiting from a Corporate Tax Credit Scholarship. See Rule 6A-6.0960(2)(b)1.

Student identification numbers

While the district primarily uses non-SSN student ID numbers, it does use student SSNs as a backup for internally tracking students, unless the parents elect to withhold it pursuant to s. 1008.386, F.S. discussed above.



State directory of new hires

Federal law requires employers to collect SSNs from new hires for purposes of tracking in the State Directory of New Hires. See 42 U.S.C. 653a.

Annual report of wages

Aside from the tax laws, a separate federal law requires employers to include SSNs in their annual report of wages of individuals. See 20 C.F.R. 404.452.

Record of remuneration paid to employees

Similarly, a separate federal law requires employers to include SSNs in their records of remuneration paid to employees. See 20 C.F.R. 404.1225.

Unemployment benefits

Same as "Payroll deductions" previously. In addition, the district communicates with the Florida Department of Workforce Innovation using SSNs.

While the district takes all reasonable precautions to protect the privacy of employees' and students' SSNs, as you can see from the descriptions of the laws above, we must use SSNs in certain instances. They only should be used when allowed by law or imperative for the performance of the district's duties and responsibilities. ■

“I REFUSE TO ANSWER ON THE GROUNDS THAT IT MIGHT TEND TO INCRIMINATE ME.”

By James A. Robinson, School Board Attorney
and Laurie Dart, Staff Attorney

Does an employee under investigation by OPS have the right to refuse to answer questions on the grounds that the answers may incriminate him or her in a criminal prosecution? Some attorneys are advising their school district employee clients that they should refuse to answer questions from their employer if the matter being investigated involves possible criminal misconduct on the employee's part. They claim to be invoking the 5th Amendment right against self-incrimination.

The 5th Amendment provides in part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." However, the 5th Amendment protection only applies in a criminal case. A public employee may not refuse to answer a question posed during an investigation into employee misconduct. To do so amounts to insubordination, which is grounds for termination of employment. Well, you ask, isn't that unfair to the employee who is forced to waive his or her 5th Amendment protection against self-incrimination, and faces potential criminal conviction, in order to save his or her job?

Fortunately, the employee's statements may not be used in a subsequent criminal prosecution. The

A public employee may not refuse to answer a question posed during an investigation into employee misconduct.

United States Supreme Court addressed that issue in the case of *Garrity v. New Jersey*, a 1967 case in which the Court ruled that the Constitution prohibits the use in criminal prosecutions of statements obtained from a public employee who is threatened with termination of employment if the employee does not answer questions. Under those circumstances, the answers given by the employee cannot be used in a criminal prosecution.

The public employee required to answer questions that disclose criminal conduct still can be prosecuted criminally because there is no "transactional immunity." Law enforcement, however, must find evidence other than the answers given to the employer to prove the "criminal transaction" in the criminal prosecution.

The 11th Circuit Court of Appeals, whose decisions are binding in Florida, has ruled that the *Garrity* "use immunity" is automatic, and a public employee's refusal to answer the public employer's questions is insubordination that could lead to dismissal from employment.

Thus, the public employee is not being required to give up 5th Amend-



ment protections when required to answer a public employer's questions. The 5th Amendment still protects the employee because the answers given under threat of dismissal automatically are given "use immunity" and cannot be used in a criminal prosecution. The answers given, however, may be the basis of termination of employment, and the refusal to answer also may be the basis of termination of employment based upon insubordination.

The School Board has implemented these legal principles by adopting [policy 8.04, Employee Investigations. Paragraph \(3\)](#) provides "All Board employees shall cooperate fully with appropriate authorities who are conducting investigations into employee conduct." [Policy 8.25 \(1\) \(u\) Disciplinary Guidelines for Employees](#) provides that insubordination is an offense constituting grounds for discipline ranging from caution to dismissal. ■



United States Constitution Bill of Rights Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. ■

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FMLA

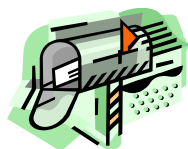
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tient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." This additional leave, called "Servicemember Family Leave," combines the 12 weeks of leave already available for the serious health condition of a spouse, son, daughter or parent with an extra 14 weeks of leave that is only available during a single 12-month period.

The amendments also provide an additional justification for FMLA leave, which is "any qualifying exigency ... arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." The Department of Labor is in the process of adopting regulations that will define the kinds of pressing or urgent situations and needs that will support a FMLA leave application based upon a "qualifying exigency." Until the regulations are final, this part of the new law will not take effect. District employees will be advised when this occurs.

The law makes it clear that a husband and wife working for the same employer only may take an aggregate of 26 weeks of leave in a 12-month period. ■

Please send comments or suggestions for future articles to Melanie Davis at davisme@pcsb.org.



Another Exception to Tinker

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more, the student, identified as E.P., kept a notebook diary written in the first-person perspective in which he detailed the creation of a pseudo-Nazi group on the high school campus and at other schools in the district. Among other acts of violence, the notebook detailed the group's plan to commit a Columbine-style shooting attack on the high school or a coordinated shooting at all the district's schools at the same time. At several points in the journal, the student expressed the feeling that his anger had gotten the best of him and that he was at the point where he will lose control. He predicts that the outburst will occur on the day that his close friends will graduate from high school.

... speech that "gravely and uniquely threatens violence including massive deaths, to the school population as a whole."

E.P. told another student about the notebook, and that student told a teacher who in turn informed an assistant principal. An investigation ensued. Under questioning, E.P. consented to the assistant principal's review of the notebook, which he had in his backpack, and explained that he was writing a work of fiction. The assistant principal determined that the writing posed a "terroristic threat" to the safety and security of the students and the campus and suspended E.P. from school for three days and recommended that he be placed in the school's alternative education program. E.P.'s parents unsuccessfully appealed the decision and then placed him in private school. The parents sued the district alleging, among other violations, a violation of E.P.'s First Amendment right of free speech.

The federal district court granted the parents a preliminary injunction on First Amendment grounds relying on the Supreme Court's *Tinker* standard. In the *Ponce* decision, the Fifth Circuit Court of Appeals reversed the lower court, holding that the speech was not protected by the First Amendment. The Fifth Circuit ruled that the school could punish threatening language of the kind written by E.P. without having to decide whether it posed a risk of substantial disruption in the school. The Court of Appeals reasoned that if school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," citing the *Morse* case, then it would defy logic to hold school administrators to a stricter standard with respect to speech that "gravely and uniquely threatens violence including massive deaths, to the school population as a whole."

Ponce is a binding legal precedent only in the Fifth Circuit at this point (which includes Texas, Louisiana and Mississippi). Florida is in the Eleventh Circuit Court of Appeals (along with Georgia and Alabama). It remains to be seen whether other courts will follow *Ponce*. ■