UE on Appeal

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

May 2025

Decisions Featured in This Issue:

United Educators

U.S. Supreme Court

Supreme Court Update: A Landmark Ruling for ERISA Litigation

On April 17, 2025, the U.S. Supreme Court delivered a unanimous decision that will significantly impact future litigation involving Employee Retirement Income Security Act (ERISA) employee benefit plans. The ruling clarifies the pleading requirements for plaintiffs alleging prohibited transactions under ERISA and, in doing so, lowers the bar employees must meet when challenging retirement plan transactions in federal court.

Employees Allege Plan Fiduciaries Engaged in Prohibited Transactions Under ERISA

In 2011, Cornell University, the named administrator for two employee-defined contribution retirement plans, hired Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA) and Fidelity Investments Inc. (Fidelity) to offer investment options to plan participants and to serve as recordkeepers for the plans by tracking account balances and providing account statements. Cornell compensated TIAA and Fidelity with fees from a set portion of plan assets.

In 2017, a putative class of current and former Cornell employees who participated in the plans filed a lawsuit against Cornell and other plan fiduciaries. They alleged Cornell and other fiduciaries violated ERISA by causing the plans to engage in "prohibited transactions" for recordkeeping and administrative services with TIAA and Fidelity and that the fees paid for such services were excessive. The district court granted the defendants' motion to dismiss for failure to state a claim.

Plaintiffs appealed to the Second Circuit, which affirmed, albeit on different grounds. Plaintiffs then appealed to the Supreme Court, which granted the petition to resolve a split among the circuits as to whether the exemptions to "prohibited transactions" under ERISA impose additional pleading requirements.

Plaintiffs Need Not Plead Allegations Disproving Applicability of ERISA Exemption

Section 1106 of ERISA categorically bars certain transactions by fiduciaries that are deemed likely to injure the pension plan.

Specifically, the subsection at issue in the lawsuit prohibits fiduciaries from:

1. Causing a plan to engage in a transaction
2. That the fiduciary "knows or should know … constitutes a direct or indirect … furnishing of good, services, or facilities"
3. Between the plan and a "party in interest," defined to include various plan insiders, such as the plan's administrator, sponsor, officers, as well as entities "providing services" to the plan

Section 1108 separately enumerates 21 exemptions to the prohibited transaction ban. One such exemption is any transaction that involves "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."

The Supreme Court held that to state a claim under Section 1106, plaintiffs need only plausibly allege the elements contained in that provision itself, without addressing potential Section 1108 exemptions. That means plaintiffs do not need to allege the transaction was unnecessary or involved unreasonable compensation at the pleading stage. Justice Sonia Sotomayor, writing for the Court, emphasized that requiring plaintiffs to plead facts to disprove hundreds of statutory and regulatory exemptions would be impractical, especially since relevant information is typically held by fiduciaries. The Court clarified that ERISA's exemptions are affirmative defenses, which fiduciaries must raise and prove later in the legal process.

This decision is expected to have an impact on future litigation against ERISA employee benefit plans, including those administered by educational institutions. By lowering barriers for employees to get their cases past the initial stage and into court, the ruling heightens the risk that institutions will have to expend significant resources engaging in discovery to defend meritless lawsuits through summary judgment. The Court recognized this risk and pointed to existing procedural tools that could be used as safeguards, such as Federal Rules of Civil Procedure 7(a)(7) (permitting a court to order a plaintiff to reply to an answer), 11 (authorizing sanctions for pleadings not filed in good faith), and discovery limits preventing the fact-gathering stage of trials from going on for too long.

The Bottom Line

The Supreme Court's decision marks a significant shift in ERISA litigation, making it easier for employees to challenge retirement plan transactions in court. As the legal landscape evolves, plan fiduciaries should be mindful of the Court's roadmap of procedural tools available to mitigate the impact of having to defend through summary judgment frivolous lawsuits that might be encouraged by this ruling.

Cunningham v. Cornell Univ. et al., Case No. 23-1007 (U.S. April 17, 2025).

Supreme Court's Ruling Adds Burden for Education

UE members face added burdens after the U.S. Supreme Court decision in *Cunningham v. Cornell*. The ruling increases the risk of litigation against our members at a time when they already face considerable challenges. We will continue to defend Cornell in the case and help our members navigate the increased risk this decision creates.

We thank Cornell, the appellate team and the more than 20 organizations filing amicus briefs including the American Council on Education, the U.S. Chamber of Commerce, and AT&T.

This is the sixth time UE has supported a member all the way to the highest court of our country.

Defamation Claim Based Solely on Politically Charged Statements of Opinion Can't Survive Motion to Dismiss

The D.C. Circuit determined that politically charged statements, standing alone, are imprecise and non-actionable. For a defamation claim based on opinion to survive a motion to dismiss, the controversial statements must imply or be based on facts that are provably false.

Publication of Old Fraternity Photo, New Statements Results in Defamation Lawsuit

Kappa Gamma is the oldest fraternity at Gallaudet University, the first U.S. university established to provide higher education to the deaf. In 1989, 34 Kappa Gamma members were photographed performing the Bellamy salute, which was created in the late 19th century for use while reciting the Pledge of Allegiance. Because of the salute's resemblance to the Nazi salute, Congress in 1942 amended the Flag Code to establish the Pledge shouldn't be recited with a Bellamy salute, but instead with the right hand over the heart. Kappa Gamma, however, continued using the Bellamy salute until the early 1990s.

Although not depicted in old photographs, Kappa Gamma members also wore hooded ceremonial robes until Gallaudet prohibited their use in 2015 due to their resemblance to Ku Klux Klan robes. The 1989 photograph resurfaced online around 2016.

In 2020, following increased racial unrest on campus, Gallaudet President Roberta Cordano posted a YouTube video using American Sign Language (ASL) announcing the suspension of Kappa Gamma, which per Kappa Gamma alumni translated in part to Kappa Gamma "pictures distributed on social media of their use of hooded robes and of the [Bellamy] salute, they have become the face of systemic racism." In the video, Cordano performed a version of the Bellamy salute, which resembled the Nazi salute.

In a later video post, Cordano clarified that the old photograph didn't lead to the suspension, which was instead based on new evidence of Kappa Gamma's intent to bring back use of the robes. She also said while "Kappa Gamma used robes and a salute that is racist," no one "person or group" was solely responsible "for the systemic racism at Gallaudet."

The Washington Post covered the story, stating the 1989 photograph showed an "apparent Nazi salute," requoting Cordano's "face of systemic racism" comment, and including headlines stating, "Gallaudet University suspends fraternity after anti-Semitic photo resurfaces" and "Photos involving Nazi salute, KKK-style garb seal Kappa Gamma's fate."

Four Kappa Gamma alumni who attended Gallaudet in the late 1980s or early 1990s filed a lawsuit against Gallaudet, its board of trustees, Cordano, and The Washington Post for defamation. Two plaintiffs were in the 1989 photograph, while the other two had not yet joined Kappa Gamma when it was taken. The alumni alleged they suffered reputational and financial harm from the insinuations of racism, antisemitism, and Nazi sympathizing, and the harm was intensified by their positions in a tight-knit deaf community where "everybody knows everybody."

The district court dismissed the lawsuit for failure to state a claim, concluding the challenged statements did not "concern the individual plaintiffs" and also were non-actionable statements of opinion or concededly true.

The plaintiffs appealed to the D.C. Circuit.

Statements About the Photo Concerned Only the People in It

On appeal, the court conducted a *de novo* review and disagreed with the district court's reasoning in part, but affirmed the dismissal for failure to state a claim. In its review, the court restated the elements of a defamation claim under D.C. law and noted the only issues of dispute were whether the statements at issue concerned the plaintiffs and whether they were actionable.

The district court determined a reasonable person could not think the allegedly defamatory statements referred to the plaintiffs individually but, rather, the statements were about Kappa Gamma as a whole.

The D.C. Circuit disagreed with this finding. If Cordano's "face of systemic racism" statement referred to the individuals in the 1989 photograph, the implication that they performed a Nazi salute would plausibly reference the two plaintiffs who appeared in the photograph. The court reasoned each person in the photograph was easily identifiable because faces were visible and statements about the salute plausibly referred to all of them since they performed the salute in unison.

But the court held the statements did not concern the two plaintiffs who were not in the photograph and were not Kappa Gamma members at the time.

Statements Constituted Non-Actionable Opinion

Notwithstanding that finding, the D.C. Circuit agreed with the district court that statements about the 1989 photograph were non-actionable opinions. To be actionable under D.C. defamation law, a statement must be defamatory — make the plaintiff appear "odious, infamous, or ridiculous" — and be provably false, meaning the statement must be factual or, if framed as an opinion, must "imply a provably false fact or rely on facts that are provably false."

The court determined that without more, "politically charged epithets are often protected opinions lacking sufficient factual content to be provably false." The court cited defamation cases that held statements calling a political adversary a fascist and a university professor a Marxist were imprecise and indefinite and thus non-actionable statements of opinion. In other words, even if inflammatory, such imprecise phrases are based on opinion that cannot be provably false. With that reasoning, the court found that in the abstract, the phrases allegedly describing people in the photograph as the "face of systemic racism" and antisemitic were "hopelessly imprecise" phrases based on opinions that were not provably false. For those reasons, the D.C. Circuit affirmed the district court's dismissal of the complaint.

The Bottom Line

The D.C. Circuit's decision demonstrates that even inflammatory, politically charged statements may constitute non-actionable opinion. However, courts sometimes disagree whether a statement includes sufficient factual content to be provably false and, thus, actionable. See *Gibson Bros. v. Oberlin College*, 2022-Ohio-1079 (Ohio. App. March 31, 2022) (statement in flyer distributed during a student protest, which called a local bakery a "racist establishment with a long account of racial profiling and discrimination" can be verified as true or false by "determining whether there is, in fact, a history or account of racial profiling or discriminatory events at the bakery"). Given the principles of academic freedom and the rights to protest recognized in higher education, it can be challenging to distinguish the fine line between non-actionable opinion and provably false statements sufficient to support a defamation claim.

Florio v. Gallaudet Univ., 119 F.4th 67 (D.C. Cir. Oct. 4, 2024).

U.S. Court of Appeals for the Sixth Circuit

Professor's Panel Presentation on Gender Dysphoria Treatment Constitutes Protected Speech

The Sixth Circuit Court of Appeals upheld a lower court decision denying summary judgment on a § 1983 claim a professor of psychiatry brought against six senior administrators at his university. The plaintiff alleged retaliation after he spoke about the treatment of childhood gender dysphoria on a panel hosted by a conservative think tank. The appellate court held the plaintiff's speech was protected, a reasonable jury could find the defendants retaliated against him at least in part due to his speech, and the defendants did not demonstrate they were entitled to sovereign or qualified immunity.

Professor's Contract Nonrenewed After He Engages in Controversial Speech

In 2003, Allen Josephson was hired as a professor of psychiatry at the University of Louisville School of Medicine (SOM), where he also served as chief of the Division of Child and Adolescent Psychiatry and Psychology (the Division) within the Department of Pediatrics (the Department) until 2017.

In 2014, Josephson became concerned about new treatment for youth experiencing gender dysphoria. He acted as a consultant in several lawsuits minor students brought seeking to use showers, restrooms, and locker rooms different from their sex assigned at birth. In 2016 and 2017, he acted as an expert witness in similar lawsuits, opining on the causes of childhood gender dysphoria, children's inability to make medical decisions, and the tendency for gender dysphoria to subside late in adolescence, and calling for "a more conservative, comprehensive and developmentally based treatment" for gender dysphoria in minors.

In October 2017, he was invited to speak at a Heritage Foundation panel on the topic. The moderator announced that each panelist spoke "in his or her individual capacity" and not "on behalf of any organization."

During the panel discussion, which was published online, Josephson stated: "[G]ender dysphoria is a sociocultural, psychological phenomenon that cannot be fully addressed with drugs and surgery. Thus, doctors and others should explore what causes this confusion and help the child learn how to meet the developmental challenge."

SOM administrators subsequently received widespread complaints from university staff and Division faculty that Josephson's comments were "counter to the messages of inclusion and welcome that we have been sending." His colleagues also raised concerns that his remarks would harm the SOM's reputation. A rift emerged between Josephson, his supervisors, and other faculty in the Division.

With the consent of the SOM Dean and the Department Executive Vice Chair, on Nov. 28, 2017, the Department Chair sent a letter asking Josephson to resign as Division Chief because most Division faculty disagreed with his "approach to management of children and adolescents with gender dysphoria." The next day, Josephson agreed to resign.

The Department Chair and the Executive Vice Chair appointed three faculty members to serve as interim Division co-chiefs. The co-chiefs, who were responsible for developing Josephson's new work assignment, increased his clinical load and told him not to treat LGBTQ+ patients. They also began scrutinizing his work performance and asserted, in a July 2018 letter, that he had failed to meet outpatient clinical and telepsychiatry hours, attend faculty meetings, and otherwise show up for work. Josephson claimed he immediately increased his productivity, no further concerns were shared with him, and he was not placed on a performance improvement plan before he was informed during his annual review in February 2019 that his contract would not be renewed.

Shortly after his contract was nonrenewed, Josephson filed suit against six SOM senior administrators under § 1983. He alleged the defendants violated his First and Fourteenth Amendment rights by, among other things, retaliating against him for his expressed views about the treatment of childhood gender dysphoria.

The defendants moved for summary judgment, arguing sovereign immunity and qualified immunity protected them from suit. The district court denied summary judgment.

The defendants appealed.

Defendants Are Not Entitled to Sovereign Immunity

The defendants first argued the district court erred in finding they were not entitled to sovereign immunity. The Eleventh Amendment, with some exceptions, affords immunity from private actions to states, departments and agencies that are arms of the state, and state officers acting in their official capacities. One narrow exception provides that suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment.

The Sixth Circuit determined sovereign immunity was not available to the defendants because Josephson sought reinstatement and to expunge his personnel file of any reference to the nonrenewal of his contract.

Defendants Are Not Entitled to Qualified Immunity

The defendants also argued qualified immunity protected them from suit. Qualified immunity shields government officials from § 1983 civil liability for performance of discretionary functions unless their actions violate "clearly established" constitutional rights.

The Sixth Circuit thus examined whether Josephson met his burden of showing the defendants violated a clearly established constitutional right. The court noted that to

succeed on a First Amendment retaliation claim, Josephson needed to show:

- He engaged in protected speech.
- The defendants took an adverse action against him.
- There was a causal connection between the protected speech and the adverse action.

The court first applied the Supreme Court's *Pickering* balancing test to conclude Josephson engaged in protected speech. That test requires the court to consider whether the speech at issue is about a matter of public concern and whether the speech was made in the employee's individual capacity, rather than pursuant to official duties. If so, the court must balance the employee's interest in speaking on a matter of public concern against the employer's interest in an efficient, disruption-free workplace.

The court quickly found Josephson spoke about an issue of public concern when he participated in the Heritage Foundation panel and that he did not participate in the panel as part of his official SOM duties. The court also found that although some limited evidence indicated Josephson's speech inhibited his ability to mentor and lead his Division colleagues, the evidence did not suggest his speech had a significant disruptive effect on the SOM's operations or interfere with his remaining duties as Division Chief and psychiatry professor or impact patient care. Therefore, the *Pickering* balance favored protecting Josephson's speech.

The court also concluded a reasonable jury could determine the defendants took an adverse action — one that would "chill or silence a person of ordinary firmness from future First Amendment activities" — against Josephson at least in part because of this speech.

Further, the court rejected the defendants' argument that it was not "clearly established" at the time that the First Amendment protected Josephson's speech. The court noted that although there was not a prior decision "on all fours" with the facts of this case when the defendants acted, it was beyond debate that the First Amendment barred retaliation for protected speech. Thus, reasonable university officials would have understood they could not lawfully terminate or threaten the economic livelihood of a professor because of his protected speech. Further, the court held that it was clearly established at the time that employees speak as private citizens, and not as public employees, when they speak on their own initiative to those outside their chains of command and when their speech is not a part of their official or *de facto* duties.

Because Josephson showed he engaged in protected speech when he spoke on the Heritage Foundation panel, the defendants should have known his speech was protected and retaliating against him for his speech would violate his First Amendment rights. Therefore, the Sixth Circuit held the defendants were not protected by qualified immunity and affirmed the district court's denial of summary judgment.

The Bottom Line

A faculty member's speech may be protected by the First Amendment even if it is controversial and causes an uproar on campus. Before acting, school officials should carefully consider whether any adverse employment action taken against a faculty member who has engaged in speech potentially protected by the First Amendment could constitute unlawful retaliation.

Josephson v. Ganzel et al., 115 F.4th 771 (6th Cir. Sept. 10, 2024).

Related UE Resource

- Manage the Risks Associated With Faculty Use of Social Media

Ohio School Board's Decision About Placement of School Bus Stop Is Immune from Liability

Ohio's Political Subdivision Tort Liability Act (PSTLA) provides a political subdivision with immunity from liability in the performance of governmental or proprietary functions subject to five statutory exceptions. Finding no exceptions applied to this general grant of immunity afforded to Columbus City School District, the Court of Appeals of Ohio affirmed the lower court's grant of summary judgment in favor of the school district.

Mother Claims Daughter's Death Caused by School District's Negligence, Reckless Actions

On the morning of Sept. 18, 2019, E.R.-R., an 11-year-old Columbus City School District (CCS) student, was walking from home to her bus stop. To get there, she had to cross McNaughten Road, a high-traffic road with no sidewalks or crosswalks. Before the school bus arrived and at some distance from the bus stop, E.R.-R. attempted to cross McNaughten. One car and then another struck her. E.R.-R. died.

About two years later, E.R.-R.'s mother, B.E.R., filed a wrongful death action against CCS and the "John Doe Bus Operator," alleging two counts:

- Negligent operation of a motor vehicle
- Reckless actions

With respect to the negligent operation of a motor vehicle claim, B.E.R. alleged CCS had a statutory duty to ensure it established bus stops in safe locations, such as on the residential sides of dangerous or potentially hazardous roads.

B.E.R. claimed her daughter was struck during the "operation" of the bus because she was crossing the street to board the bus when the accident occurred. B.E.R. said CCS breached the duty of care owed to E.R.-R. in operating the bus negligently, including "instructing [E.R.-R.] to load the bus in a dangerous location in violation of [Ohio law]."

With respect to the claim for reckless actions, B.E.R. alleged CCS chose to keep the bus stop in a dangerous location despite it being a hazard for children *and* adult pedestrians, and that CCS's decision not to change the stop's location or provide a traffic control officer was a wanton and/or reckless decision.

CCS filed a motion for summary judgment on both counts, which the trial court granted in full.

B.E.R. appealed.

Political Subdivision Immunity Granted Since Accident Didn't Involve Bus Operation

The PSTLA sets forth a three-tiered analysis for determining whether a political subdivision (such as a school district) is immune from liability for damages in a civil action for injury, death, or loss to a person or property:

1. Whether the incident was caused by any act or omission of the political subdivision or its employee in connection with a governmental or propriety function
2. If so, whether an applicable exception applies which establishes that the political subdivision is liable in damages for the incident
3. If an exception applies, whether the political subdivision can establish an applicable defense to liability, which provides an absolute immunity from liability

On appeal, B.E.R. did not dispute CCS was entitled to a general grant of immunity afforded in the first tier of the analysis (that the accident was caused in connection with a governmental or proprietary function). Courts have held that governmental functions include providing a system of public education, as well as the transportation of students to and from school.

B.E.R. argued an applicable exception under the second tier of the analysis eliminated the general grant of immunity for the negligence count. Specifically, she relied on an exception establishing liability for incidents caused by the "negligent operation of any motor vehicle," which she alleged encompassed activities beyond the conventional definition of driving a motor vehicle, such as a school district's establishment of the location of bus stops and student pickup times.

However, based on the undisputed evidence that the bus was not involved in the accident and was parked at a location some distance from the stop at that time, and after having

considered prior case law interpreting the term "operation of a motor vehicle" under similar circumstances, the court determined the exception to immunity for the "operation of a motor vehicle" under the PSTLA didn't apply to B.E.R.'s claim.

As to her reckless actions count, B.E.R. argued immunity did not apply because the decision to keep the bus stop at an allegedly dangerous location was wanton and reckless, and cited the testimony of B.E.R.'s expert witness. However, because B.E.R. hadn't established an exception to CCS's immunity under tier two, the court had no reason to address whether any defenses to CCS's liability under tier three applied. Tier three would consider, among other things, whether CCS's alleged wanton or reckless conduct had caused the incident.

B.E.R. also argued a second exception from immunity under tier two applied to her reckless actions count, which provided that an *employee* of a political subdivision is immune from liability unless "the *employee's* acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner" (emphasis added).

The court held that by the express terms of the exception, it applied only to employees, not the political subdivision itself. And because B.E.R. never identified the "John Doe Bus Operator" as a party, nor named any employee of CCS as a defendant, the exception didn't apply.

Accordingly, the appellate court held that CCS was entitled to political subdivision immunity for the accident and affirmed the lower court's decision granting summary judgment for CCS.

The Bottom Line

In assessing potential liability in any lawsuit seeking damages for injuries or death, it is worthwhile for a political subdivision to first consider potential immunities under state law that may apply for performing discretionary, government, or proprietary functions.

B.E.R. v. Columbus City School Dist., et al., 2025-Ohio-582 (Ohio App. Feb. 20, 2025).

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