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Charges Dropped When Defendants Constructively Denied Counsel Before Grand Jury

University's counsel could not adequately represent employees and was incompetent to testify about communications with them

Counsel for Penn State University, who purported to represent university employees at a grand jury investigation into the Jerry Sandusky sexual abuse scandal, could not provide adequate counsel to them as individuals and was incompetent to testify as to her communications with them, an appellate court in Pennsylvania has ruled.

The Pennsylvania Superior Court has reversed a trial court and dropped counts of perjury, obstruction of justice, and conspiracy against three employees who were charged in the aftermath of the case. (*Commonwealth v. Schultz*, Superior Ct., PA, No. 280 MDA 2015, 1/22/16,*Commonwealth v. Spanier*, 304 MDA 2015, 1/22/16, and *Commonwealth v. Curley*, No. 299 MDA 2015, 1/22/16.)

University counsel Cynthia Baldwin attended interviews with the Attorney General's office and subsequent grand jury proceedings at which the university president, a senior vice president in charge of the university police, and a former athletic director were asked about an allegation of Sandusky's inappropriate behavior with a minor in 1988. At the grand jury, she indicated that she represented each of the individuals, without expressly stating that she represented them solely in their capacity as agents for the university, and not in their individual capacity.

Baldwin was subsequently called before the grand jury herself and testified about her conversations with the three employees. None of them had waived any right of confidentiality arising from their perception that they were talking with their own attorney. The three were subsequently charged with perjury, obstruction of justice, and conspiracy based largely on Baldwin's testimony.

The trial judge found that they were properly represented and that no attorney-client privilege existed. In separate but similar opinions, the Superior Court has reversed and found that they were constructively denied counsel during their grand jury appearance and that Baldwin was "incompetent" because of her attorney-client relationship to testify as to her discussions with them.

In the lead opinion involving Gary Shultz, the vice president in charge of campus police, the Court gave the most extensive explana-

tion of the facts, the arguments and the law. A Pennsylvania statute guarantees a right to counsel for a witness in a grand jury proceeding. Shultz argued that he was not adequately represented when Baldwin represented him only as an agent of the university. He also argued that she did not adequately represent him as an individual or adequately advise him of his right against self-incrimination, a privilege not available to a corporation. While he admitted that an attorney could limit her representation, he argued that the attorney must obtain informed consent and that she had not discussed those limitations with him or obtained his informed consent to a waiver of the attorney-client privilege.

While the Court agreed that Baldwin could have limited the scope of her representation, it said that her "after-the-fact justifications for her own testimony were not expressed on the record prior to Schultz's testimony, nor is there sufficient evidence that she properly advised Schultz of the limits of her representation. Simply stating that she could reveal communications to the Penn State Board of Trustees and was general counsel to the University was decidedly inadequate."

"As our Rules of Professional Conduct illustrate," the Court wrote, "communications between a putative client and corporate counsel are generally privileged prior to counsel informing the individual of the distinction between representing the individual as an agent of the corporation and representing the person in his or her personal capacity. When corporate counsel clarifies the potential inherent conflict of interest in representing the corporation and an individual and explains that the attorney may divulge the communications between that person and the attorney because they do not represent the individual, the individual may then make a knowing, intelligent, and voluntary decision whether to continue communicating with corporate counsel. This is all the more essential where the purpose of the individual seeking advice relates to an appearance and testimony before a criminal investigating grand jury."

"Absent a privilege existing for preliminary communications, the putative client cannot have full and frank discussions with the attorney in order to determine whether it would be appropriate for that lawyer to represent him or her in an individual capacity. Furthermore, the attorney might be unable to make a determination as to whether he or she could represent that individual personally if the putative client believes full disclosure will not be kept confidential."

The Court found that "Schultz's statutory right to counsel during his grand jury testimony was infringed." It "left Schultz constructively without personal counsel for purposes of his grand jury appearance…. We find that a putative client must be made expressly aware of that fact."

Without Baldwin having adequately advised Schultz of those distinctions and giving him appropriate warnings, "we conclude that all the communications between Schultz and Ms. Baldwin were protected by the attorney-client privilege" and that she had breached that privilege by testifying before the grand jury with respect to those communications.

After a review of prior cases, the Court held that the charges resulting from Baldwin's testimony should be dismissed.

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A short article on these cases does not do justice to the intricacies of the legal issues involved. But it is clear that an attorney for an organization has a separate interest from an attorney for the individual employee. The organization may want to disassociate itself from the conduct of the employee and wherever there may be such an issue the individual should seriously consider obtaining personal counsel. It is the obligation of counsel for the organization to make that issue clear to the employee.

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Charity Officers Sued for Breach In Administering ERISA Plan

DOL claims breach in soliciting contributions from service providers, obtaining job for son

Charities and others are increasingly facing suits for alleged breach of fiduciary duty in failing to hold down the costs of various pension and benefit plans covered by the Employee Retirement Income Security Act ("ERISA"). (See *Nonprofit Issues®,* 6/16.) But a Department of Labor suit against a group of nonprofits in Maryland has raised two additional issues: that charity officials breached their fiduciary duty in one case because they solicited charitable contributions to their separate fundraising foundation from their plan service providers, and, in another case, because the son of an official was hired by a service provider as an employee. A federal District Court in Maryland has recently denied a motion to dismiss filed by the service providers who were also charged with breach of fiduciary duty. (*Perez v. Chimes District of Columbia*, D. MD, No. 15-3315, 9/19/16.)

In addition to charges of not satisfactorily monitoring fees of the service providers, the Department charged that two officers solicited the service providers to make gifts to a separate foundation raising funds for many entities within an overall system. In one pledge, the service providers referenced their "special relationship" and "gratifying partnership" with the charity. In the other situation, the service provider hired the son of an officer after obtaining a contract in 2009 but before it was renewed in 2011. The officers were charged with "self-dealing" by receiving benefit from the payments to the foundation and in the employment arrangement. The Department charged that the service providers, as co-fiduciaries, were also liable because they knowingly participated in the transactions.

The service providers argued that no one received a personal benefit from the transactions and that the employee whose son was hired was not a board member and not in a position to control the selection of providers. The Court, however, accepting the allegations of the complaint as true for the purposes of the motion, said the allegations were sufficient to preclude granting a motion to dismiss.

YOU NEED TO KNOW

Charities regularly solicit their vendors for contributions to the cause, but this may be a warning that the Department of Labor will not take kindly to soliciting anyone involved in the administration of an ERISA Plan.

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Museum must admit attendant for disabled free

The Franklin Institute science museum in Philadelphia has been ordered to provide free admission to a required personal care attendant providing assistance to a severely disabled visitor. A "frankly puzzled" judge of the federal District Court has approved the "manifestly reasonable request" for modification of its admission policy to comply with the Americans With Disabilities Act.

Michael Anderson requires a personal care attendant 24 hours a day to provide assistance with activities of daily living. The attendant assists with his position in his wheelchair several times an hour, helps him go to the bathroom, eat, and direct his wheelchair. The museum required Anderson to buy a "dual membership" at a higher price so that the attendant did not have to pay separately for general admission, and required him to purchase a separate ticket for films in the IMAX theater and for other limited-capacity special exhibits. Anderson, along with a nonprofit supporting people with disabilities, sued under the ADA.

The museum first argued that there was no case under the ADA, and then argued that the case was moot because it had changed its admission policy. It also argued that it could not afford to make the requested accommodation.

The Court rejected the mootness claim for several reasons. First it recited the museum's motion to dismiss because it said it had no obligation to make an accommodation in this case. The museum argued that the situation was no different from requiring a parent accompanying a minor child, or a tour guide with a group, to pay an individual admission fee. "This ignores the fact that in enacting the ADA, Congress aimed to address discrimination specifically against disabled individuals," the Court said.

The Court also said that the museum could easily change its policy, as it had during the course of the litigation. "The continuing evolution of Defendant's position over the course of this litigation justifies Plaintiffs' insistence upon formal adjudication."

On the merits, the Court found that the museum's statement that it now provided general admission to personal care assistants without charge made moot its claim that such admission would result in a fundamental alteration of its program or cause an undue financial hardship. The museum continued to contest, however, the cost of admission to the IMAX theater or limited-capacity events.

In its statement of the facts of the case, the Court had noted that the Franklin Institute had $134 million in net assets as of December 31, 2014 and that it failed to respond to discovery requests concerning the potential cost of providing free tickets for personal care attendants. The museum said it had never calculated the potential cost of the accommodation, although one official testified that "we simply can't afford it." The museum admitted that it provided significantly discounted tickets under a program for low-income individuals and complimentary tickets as awards for promotional contests, thank-you gifts for donors, and perks for certain employees.

The museum argued that there was no violation of the ADA because Anderson received the same treatment as all other patrons. But the Court said the argument "reflects a misreading of the case law and a lack of appreciation for one of the chief purposes of the ADA, because disabled people are not similarly situated to the able-bodied, a facially neutral policy can still result in discrimination." Since Anderson cannot meaningfully access the museum and receive all of its benefits without the assistance of the attendant, "a benefit exceeding that of the general public is necessary for Anderson to achieve the baseline of equality," it wrote.

The museum next argued that if Anderson was denied access, it was not on the basis of disability, but merely because of its policy of charging individually for admission. "This is pure sophistry," the Court responded, "as a PCA is not a patron in his own right, but at the museum solely because of the need to render supportive services."

With regard to the IMAX theater, the museum admitted that an attendant would sit on a folding chair next to the person in the wheelchair area during a picture showing. The museum never counted the wheelchair area toward its sell-out numbers, and never allowed an individual to purchase a space to sit on a folding chair in the wheelchair area. The museum never argued that allowing an attendant would displace a paying customer.

The museum argued that offering free admission to attendants would have severe economic consequences, suggesting that it could cause a deficit and force employee layoffs. "The illogic of the Institute's position is as striking as its hyperbole," the Court said. Attendants "would in most instances not otherwise be there except for their supportive role, with the result that waiving admission fees does not represent a genuine opportunity cost. Moreover, without such support, the disabled patron would not be present. Not only is free admission of the PCA revenue neutral, because such persons would otherwise not be visitors, but failure to admit them for free might result in the loss of revenue from the disabled."

The Court noted that the ADA sometimes requires substantial investment in elevators, ramps or special seating. "If the ADA can require such affirmative expenditures, then certainly it can require an entity simply to forgo charging a fee. In a cruel irony, the crux of Defendant's objection is that it cannot profit from the entrance of one who is there only because of another's disability. To credit such a theory would not only render the ADA meaningless, but endorse a result inimical to its purposes." (*Anderson v. The Franklin Institute*, E.D. PA, No. 13-5374, 5/6/16.)