

TEXAS LAWYER

June 9, 2003

Superintendent Didn't Meet Burden in Religious Freedom Case

By John Council

The 5th U.S. Circuit Court of Appeals reversed the summary judgment dismissal of a suit against a public school superintendent, which was filed by a public school teacher who alleged the superintendent denied her a promotion because the teacher sent her own children to a private school. The June 2 opinion in *Barrow v. Greenville Independent School District, et al.* reversed a lower court decision that granted qualified immunity to Dr. Herman Smith, former superintendent of the district, and remanded it to the trial court.

The decision also reaffirms two previous 5th Circuit decisions that found that public school employees have a constitutional right to send their children to private schools.

Karen Jo Barrow was a teacher in the Greenville ISD who expressed an interest in becoming an assistant principal in the district. Smith allegedly told her that she had to enroll her children in public school to be considered for the position, according to the 5th Circuit's opinion. Barrow refused to comply, and, as a result, the district did not consider her for the position, the 5th Circuit wrote.

Basing its decision on two prior rulings – 1983's *Brantley v. Surles*, which found that a school district could not terminate a school cafeteria manager who transferred her son to a "segregated" private school, and 1990's *Fyfe v. Curlee*, which found that a school district could not demote a secretary who sent her daughter to a "segregated" private school - the 5th Circuit found that a school district has a burden to prove that requiring its employees to send their children to public schools "furthers the state's interest in the efficient operations of its schools."

In her amended complaint, Barrow alleged that Smith violated her right to select a private-school education for her children, which is guaranteed by the First Amendment; her right under the Due Process Clause of the 14th Amendment to direct the upbringing of her children; and her right under the Free Exercise Clause of the First Amendment to provide religious education for her children. In its opinion, the 5th Circuit assumed that Barrow has a constitutionally protected right to select a private-school education for her children.

"The state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of a private school materially and substantially affects the state's educational mission," wrote Senior Judge Thomas M. Reavley, who was joined in the opinion by Chief Judge Carolyn Dineen King and Judge Carl Stewart.

"Because Smith failed to present a fact issue that Barrow's children's attendance of a private school would negatively impair district operations were Barrow selected for assistant principal, the violation of a constitutional right is shown," Reavley wrote.

Constitutional Rights

Plano-based Liberty Legal Institute, which represents clients in religious freedom cases, represents Barrow, who is a Christian and believes she has the right to send her children to a private Christian school without being punished by her employer, says her lawyer Kelly Shackelford.

"It's a victory for every teacher and school administrator in the country," says Shackelford, chief counsel of Liberty Legal Institute. "They now have a decision that makes it clear that their children aren't children of the state."

The government should never be able to blackmail teachers and administrators into taking their children out of religious schools."

Barrow's constitutional rights are stronger than the school district's desires to have its employees send their children to public schools for the sake of good public relations, Shackelford says.

Her case is moot as far as injunctive relief, Shackelford says, but she still intends to take the case to trial "to make sure this doesn't happen to other folks."

Smith's attorney, Thomas P. Brandt, a partner in Dallas' Fanning Harper & Martinson, did not return two phone calls seeking comment before press time on June 5. Dennis Eichelbaum, a partner in the Frisco office of Schwartz & Eichelbaum who represents the school district, was out of town last week and was not available for comment.

In his brief to the 5th Circuit, Smith argued he had qualified immunity because Barrow had not alleged a violation of a federal right and alternatively that no such right was clearly established.

Eric Schulze, who represents the Texas Association of School Boards Legal Assistance Fund, which filed an amicus brief in the Barrow case supporting the school district's right to set its own policies, is surprised by the decision.

"If a federal district court judge didn't recognize that this was a clearly established right, how could a school superintendent?" asks Schulze, a shareholder in Austin's Walsh Anderson Brown Schulze & Aldridge, speaking of U.S. District Sidney Fitzwater of Dallas, who granted Smith qualified immunity last year.

"I'm not sure how broadly courts will interpret this," Schulze says. "But the issue in this case really wasn't clearly established - that you could not have this policy for high-level administrators. This district court didn't think it was clearly established, but the 5th Circuit clearly thinks it was."

While it might make sense that a school district has a right to require its employees to send their children to public schools as a show of confidence in the public education system, such a policy does not outweigh a constitutional right, says Steven Fitschen, president of the National Legal Foundation in Virginia Beach, Va., who filed an amicus brief with the 5th Circuit supporting Barrow's position.

"The argument does sort of appeal to common sense," Fitschen says of the position that school districts should be allowed to set such a policy. "But school boards are held to a higher standard than man-on-the-street common sense. They are held to strict constitutional rights."