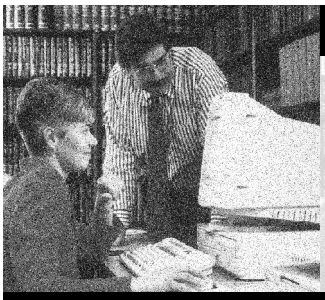

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

Latest legal developments and practical guidance for school officials & administrators **June 2005**

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Retaliation Against Male Advocate for Girls' Rights Violates Title IX, Supreme Court Rules

The U.S. Supreme Court has decided that Title IX of the Education Amendments of 1972 protects a person who complains about gender discrimination against others, as well as protecting the victim of the discrimination. *Jackson v. Birmingham BOE,* 544 U.S. ___, 125 S.Ct. 1497 (2005). In this case, a (male) girls' basketball coach complained that his players were denied equal funding and facilities because of their gender. When he received poor evaluations and was removed from coaching, he sued, claiming retaliation. The lower court dismissed the case before trial, holding that the male coach was not in the class of persons intended to be protected by the law. The Supreme Court reversed by a 5-4 vote, holding that although the statute does not specifically prohibit retaliation against non-victims who complain of discrimination, it is implied in the law.

The Court's Broad Interpretation of Title IX

In its opinion, authored by Justice Sandra Day O'Connor, the Court first noted that Title IX prohibits discrimination by recipients of federal education funding. Noting that over the years, it has defined and expanded the contours of the law, the Court found here that:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment.

The bottom line is ...

Although Title IX does not specifically prohibit retaliation against non-victims who complain of discrimination, it is implied in the law.

The Court rejected the lower court's holding that because the statute does not mention "retaliation", it does not prohibit it. According to Justice O'Connor, that holding ignores the Supreme Court's repeated holdings construing discrimination under Title IX broadly.

In support of its conclusion, the Court cited its decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), where it held that 42 U.S.C. § 1982 which provides that "[a]ll citizens of the United States shall have the same right … as is enjoyed by white citizens … to inherit, purchase, lease, sell, hold, and convey real and personal property," protected a white man who spoke out against discrimination toward one of his tenants, who was black, and who suffered retaliation as a result.

> Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is "discrimination" "on the basis of sex," just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.

Because Title IX was enacted just three years after the *Sullivan* decision was issued, it provides "a valuable context for understanding the statute.

Broad Interpretation Needed For Law's Enforcement

Next, the Court found unconvincing the School Board's argument that peti-

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Retaliation Against Male Advocate for Girls' Rights Violates Title IX, Supreme Court Rules (continued)

tioner was not protected, even if the statute covers retaliation, because he is only an "indirect victim" of sex discrimination. It stated that the statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If it provided instead that "no person shall be subjected to discrimination on the basis of such individual's sex," (emphasis in original), the Court stated that it would agree with the argument. It contains no such limitation however. "Where the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement is satisfied," and he "is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint."

The Court noted:

> Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel.

The lower court's decision was reversed and the case was remanded so that the Jackson could present evidence to support his burden of proving that the Board of Education retaliated against him because he complained of sex discrimination.

Contingency Budget – Sports Not Mandated, Appellate Court Rules

Last year an acting Supreme Court Judge in Cayuga County surprised school attorneys with a ruling that the Cato-Meridian Central School Board, which adopted a contingency budget for the 2004-05 school year after the voters twice defeated the board's proposed budget, was compelled by law to include sports and other extracurricular activities in the contingent budget and at the same amount as had been proposed in the defeated budget. If that caused problems with the cap, the Board should reduce all expenses a uniform percentage. The judge took the position that the statutory amendments which *permit* school districts to fund these things while on contingency budget actually *require* them to do so. The Appellate Division has now reversed, holding that the Board has the discretion to determine whether to include these expenses in a contingent budget. *Polmanteer v. Bobo*, __ A.D.3d __, 794 N.Y. S.2d 171 (4th Dept., 2005).

An "Avoid-the-Embarrassment" Reminder: BOE Members Must Take/File Oaths Within 30 Days of Term Commencement

Now that the elections are over, it is important to remember that newly elected and re-elected board members ***must*** file their oaths of office within 30 days of the commencement of their terms, or else they face having their offices become vacant. *See Appeal of Rausch*, 41 Ed. Dept. Rep. 351 (2002). Where a board member is either elected or appointed to fill a vacancy, the member's term is supposed to commence immediately. Otherwise, a term typically commences on July 1.

In either case, the Education Law requires the district clerk to provide prompt written notice to the successful candidates of their election (or appointment) to the board. A failure to give this notice prior to the start of a term may delay the start of the 30-day period within which the oath of office must be filed.

In *Appeal of Rausch*, a board member was elected in May for a term that was to begin on July 1. Although the Commissioner's decision does not specifically say so, we assume that the district clerk provided the member with written notice of his election prior to the commencement of his term. Nevertheless, the member did not file his oath until August 8. The Commissioner ruled that this failure caused his office to become vacant, automatically. Therefore, school districts should be sure to have the district clerk (1) provide prompt written notice to newly elected/appointed members and (2) remind them that they must file their oaths of office within 30 days of the commencement of their terms.

Prior Tenure as Teaching Assistant Shortens Teacher's Probationary Period

In a recent case, the Commissioner of Education held that a new teacher's probationary period will be two years, instead of three, if the teacher was previously tenured as a teaching assistant. In *Matter of Alexander* (Decision No. 15,172), the South Orangetown Central School District gave Lynda Alexander a three-year probationary appointment as a special ed teacher effective September 1, 2001. Prior to that appointment, she had received tenure in a different District as a teaching assistant. When South Orangetown attempted to terminate her on June 30, 2004, the Commissioner of Education held that Alexander had already acquired "tenure by estoppel" due to her prior service with the other District.

Age Discrimination Now Can Be Proven Statistically (Within Limits)

In recent years, there has been a difference of opinion among federal courts about whether age discrimination can be proven solely by the use of statistical information. In other words, some courts have held that if an employment decision adversely effects a disproportionate number of older workers (in comparison to younger workers), the employment decision is automatically deemed to be unlawful age discrimination under the Age Discrimination in Employment Act (ADEA). This is known as the "disparate impact" theory of discrimination. Other courts have held that this theory only applies to claims under Title VII of the Civil Rights Act of 1964 (e.g., discrimination on the basis of race, gender, religion, national origin, etc.) but not to ADEA claims. The U.S. Supreme Court has now settled this disagreement by holding that while disparate impact analysis **does** apply to the ADEA, it is more limited in scope than it would be for race, sex or other types of discrimination under Title VII. *Smith v. City of Jackson, Mississippi*, 544 U.S. ___, 125 S.Ct. 1536 (2005). Specifically, the Court ruled that the disparate impact analysis for an age case is limited by the right of the employer to show that the statistically disproportionate impact on older workers was based on "reasonable factors other than age" (RFOA).

Facts

In *Smith*, the City of Jackson, Mississippi negotiated salary increases for its police officers which gave larger percentage raises to officers with five or fewer years of service. The stated reason was to make starting salaries more competitive with other police forces in the region. Older officers sued, claiming this constituted "disparate impact" discrimination because most officers with fewer than five years service were under the age of 40.

The bottom line is ...

In light of this case, employers should review their policies, practices and procedures that may negatively impact older workers, and be able to demonstrate (through documentation) that they are based upon "reasonable factors other than age."

ADEA Similar to Title VII

The Court first examined the history of the ADEA and found that many of its provisions are identical to those of Title VII, with the mere substitution of the word "age" for "race, color," etc. The Court noted that when Congress uses the same language in two statutes having similar purposes (particularly when one is enacted shortly after the other, as was the case here), it is appropriate to presume that Congress intended that the two statutes have the same meaning. The provisions of both laws specifically prohibit employment actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's ..." race or age. In the context of Title VII, it has long been settled that discrimination can be proven statistically, based on this language. Since the ADEA was derived from Title VII, the Court held that discrimination can be proven statistically for age, as well.

ADEA Different in One Key Way

However, even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII because Congress included another provision in the ADEA which does not appear in Title VII. Specifically, the ADEA includes a qualifier on an employer's liability for disparate impact where "... where the differentiation is based on reasonable factors other than age discrimination … ." The Court stated:

> It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable."

Turning to the case before it, the Court noted that older workers who brought the case (the Petitioners) did little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They did not identify any specific test, requirement, or practice within the pay

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Age Discrimination Now Can Be Proven Statistically (Within Limits) (continued)

plan that had an adverse impact on older workers. It was not enough to simply allege that there was a disparate impact on older workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.

After discussing in greater detail the provisions of the pay plan at issue, the Court found that the Petitioners' evidence established two principal facts: (1) almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did; and, (2) the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority. Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

Based on all of this, the Court concluded that reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. The court noted:

> In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" that responded to the City's legitimate goal of retaining police officers.

In light of this case, employers should review their policies, practices and procedures that may negatively impact older workers, and be able to demonstrate (through documentation) that they are based upon "reasonable factors other than age."

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