

School Law Matters

FEBRUARY 2013



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

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Firm News

Attorney Spotlight

Firm Wins Summary Judgment for Client District Facing Discrimination Claims Related to Hiring Superintendent

by Craig M. Atlas, Esq.

In a recent federal court case, Firm Partner, Miles G. Lawlor, Esq., won a motion for summary judgment, persuading the judge to dismiss a discrimination complaint against one of our school district clients. The case involved a claim of racial and gender discrimination in the District's hiring of a new Superintendent of Schools. While the case had an unusual fact pattern (described below), it illustrates the need for all school districts to have well-trained hiring committees and to carefully document all aspects of their hiring process.

The background of the case was unique in that it was brought by a person who had been a Board member, resigned from the Board to apply for the position of Superintendent of Schools, and then was on the Board again. The Board did not select the plaintiff to be Superintendent. The plaintiff (an African-American woman) claimed that the Board did not choose her because of her race and sex. On January 4, 2013, the judge granted summary judgment in favor of the Board because the Board showed that it had a nondiscriminatory reason for its decision, and the plaintiff did not submit admissible evidence to rebut the Board.

In this case, approximately 23 candidates applied for the position. The Board decided to interview six candidates (three male and three female), including the plaintiff. Besides the Board, a group of District residents and a group of District employees also interviewed the candidates. The community group and the employee group

both rated the plaintiff the lowest of the six. The three candidates with the highest composite scores from the community and employee groups were named as finalists. Two were male and one was female. The Board selected one finalist, a white male, as the Superintendent.

The plaintiff then rejoined the Board, and served on it for a year and a half, until she moved outside the District. While she was on the Board, she pursued a charge of discrimination with the U.S. Equal Employment Opportunity Commission. After she had moved out of the District, she brought a lawsuit in the U.S. District Court for the Western District of New York, claiming that she was not hired because of her race and sex.

The plaintiff claimed that one Board member had expressed a preference for a male Superintendent. However, her claim was based on hearsay. (The plaintiff said that a Board member made the comment, another person overheard it, and that person told another person (the plaintiff's sister-in-law), who relayed it to the plaintiff.) The District rebutted it with affidavits from the Board member and the person to whom she had supposedly made the statement.

The Plaintiff alleged that the District had never had a female or black Superintendent. Judge Telesca said that, even assuming this was true, it did not raise an inference of discrimination. The plaintiff did not provide evidence that any black or female candidates



Craig M. Atlas received a B.A. in 1980 and a Master of Labor and Industrial Relations in 1981 from Michigan State University, and his J.D. *cum laude* from SUNY Buffalo in 1986.

He was employed as Law Clerk for the N.Y.S. Public Employment Relations Board (PERB) in Buffalo while attending law school. He is a member of the Labor and Employment Law Section of the New York State Bar Association. He is also a member of the National School Boards Association Council of School Attorneys, New York State Association of School Attorneys, New York State Association of Management Advocates for School Labor Affairs, and the Labor and Employment Relations Association.

Mr. Atlas devotes a substantial portion of his practice to employment and labor relations matters, including the representation of school districts and other public employers in proceedings before PERB. He counsels and represents public and private employers in court and before administrative agencies. He also has extensive experience and background in the general representation of school districts and BOCES.

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Firm News**Firm Wins Summary Judgment for Client District Facing Discrimination Claims Related to Hiring Superintendent (cont'd)**

had previously applied for the position and had been rejected.

The plaintiff asserted that she was better qualified to be Superintendent than the white male who was selected. This required the District to present evidence that it had a non-discriminatory reason for its decision.

The District provided evidence that the plaintiff was ranked lowest of the six candidates by the community and employee groups, and was not selected to be one of the three finalists. The court determined that this stated a legitimate, non-discriminatory reason for the Board's decision not to select the plaintiff.

The court determined that the plaintiff did not rebut the Board's reason by showing that the reason was pretextual and that the Board really had an improper motive for its decision.

The plaintiff contended that she was more qualified to be Superintendent than the individual selected by the Board. However, the court said that an employee or candidate's self-serving, subjective opinion about her own qualifications was not enough to raise an issue of fact that would warrant allowing the case to proceed to trial. Also, she would have had to demonstrate that her qualifications were so obviously superior to those of the person selected that no reasonable person could have chosen him. The court found that the plaintiff and the successful candidate had comparable academic and administrative experience. The court did not second-guess the Board's decision to give favorable consideration to the other person's approximately 20 years of experience as the CEO of a company.

The court determined that the plaintiff

failed to produce evidence suggesting that the Board was motivated by racial or gender bias. Therefore, the court concluded that she failed to rebut the reasons given by the Board for not hiring her, and dismissed her complaint.

This case demonstrates the need for school districts to carefully document all aspects of their hiring decisions, from choices made to relative abilities of the job candidates. Having such information available in this case permitted our firm to get the case "thrown out of court" early on in the litigation process, thereby saving the District a great deal of money and other resources.

If you have any questions about similar situations or need our assistance in training hiring committees on minimizing the risk of litigation in the hiring process, please feel free to contact our office.

Employee Discipline**Court of Appeals Case Creates Questions as to the Use of "Holt Letters"**

For years, school districts have been issuing counseling letters to instructional and non-instructional staff members whose conduct fail to conform to expectations, but do not necessarily warrant suspension, termination, or other such discipline. This widespread practice has been fundamental in allowing districts to address personnel issues without resorting to the costly and protracted procedures required by sections 3020-a of the Education Law, Section 75 of the Civil Service Law or contract procedures. A recent decision from New York State's highest court, however, casts doubt on the extent to which such letters can be used.

In *D'Angelo v. Scoppetta*, 19 N.Y.3d 663 (2012), New York City fire fighter Michael D'Angelo was accused of directing racial epithets at an EMT after both men arrived at the scene of a motor vehicle accident. Shortly after the

incident, the EMT filed an Equal Employment Opportunity ("EEO") complaint with the New York City Fire Department. The complaint was investigated over the course of two years and resulted in D'Angelo receiving a letter from Assistant Commissioner of the Fire Department advising him that the Department's EEO office found he had engaged in unprofessional conduct by using the racial epithet, and informed him that he would be receiving additional EEO training. The letter was subsequently placed in his personnel file.

D'Angelo subsequently challenged the Department's determination, arguing that its actions were disciplinary in nature and that he was entitled to a formal hearing. On appeal, the Court of Appeals found in favor of D'Angelo, holding that the letter was not merely a counseling letter or critical evaluation, and that required participation in EEO

training was a form of discipline.

In its opinion, the Court took pains to distinguish *D'Angelo* from *Holt v. Board of Educ. of Webutuck Cent. School Dist.*, 52 N.Y.2d 625 (1981), wherein it held that counseling letters were not disciplinary in nature and did not trigger the due process protections of a formal hearing. In doing so, the Court noted that the investigation in *D'Angelo* took two years to complete, included the preparation of a detailed report to the Assistant Commissioner—who discussed the matter with the Commissioner, and resulted in both a letter and required counseling. By contrast, the letters underlying *Holt* involved relatively minor breaches of school policy, encouraged future compliance with the same, and were prepared by and reflected the opinions of the teachers' immediate supervisors.

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Employee Discipline**Court of Appeals Case Creates Questions as to the Use of Holt Letters (cont'd)**

Despite the Court's attempts to clearly delineate what constitutes a disciplinary reprimand and what is merely a counseling letter or critical evaluation, this case creates considerable confusion. As Judge Smith argued in his dissent, the letter issued to fire fighter D'Angelo is no harsher than the letters discussed in the

Holt case. The letter issued by the Fire Department also made clear that its purpose was to warn and instruct, not punish. Finally, the EEO training D'Angelo was required to attend supported the Department's attempts to instruct and educate, and was not intended to be punitive.

In light of the Court's decision, school districts must carefully consider how

determinations regarding the possible misconduct of teachers and para-professionals are made, as well as how and by whom counseling letters are prepared. Should you have any questions or concerns regarding the preparation and use of *Holt* letters, please do not hesitate to contact our office.

Student Bullying**Remember July 1, 2013 Deadline for Dignity for All Students Act ("DASA")**

On July 1, 2012, the Dignity for All Students Act ("DASA") became effective which required school districts and BOCES to make several modifications to school policies, procedures, codes of conduct as well as to the school climate in order to be in compliance.

Effective July 1, 2013, additional requirements must be implemented which will require school districts and BOCES to revisit some of their recently enacted modifications as well as implement additional modifications.

As a summary, school districts and BOCES must:

- Amend policies, procedures and codes of conduct to include DASA's modified definition of "harassment" and the new definition for "cyberbullying". Remember, "harassment" now expressly includes "bullying" and has been modified from the 2012 definition.
- Implement additional DASA requirements and amend, as necessary, policies, procedures and codes of conduct. Amongst other requirements, these require school districts and BOCES to:

- identify the employee to receive reports;
- allow for oral or written complaints;
- require employees to provide oral and written reports under certain time lines;
- require a thorough investigation which is completed promptly;
- require prompt actions to end the harassment;
- prohibit retaliation;
- include a school strategy to prevent harassment;
- require regular reporting on data and trends; and
- require notification to local law enforcement agency under certain circumstances.
- Amend guidelines used in school training programs to include provisions to discourage the development of harassment and to make school employees aware of the effects of

harassment on students.

- Additional training must also be provided to staff on:
 - the social patterns of harassment;
 - the identification and mitigation of harassment; and
 - the strategies for effectively addressing problems of exclusion, bias and aggression in educational settings.
- Instruction to students in civility, citizenship and character education must include instruction of safe and responsible use of the internet and electronic communications.

Districts and BOCES can expect additional regulations and guidance from the Commissioner of Education regarding these requirements. Please check the New York State Education Department's Dignity Act website for additional updates and information: www.p12.nysed.gov/dignityact/. For more information or if there are further questions, please contact Joseph J. Bufano at 315-437-7600.

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3020-a Hearings**A Year Later: The Impact of the 2012 Amendments to Education Law §3020-a**

Amendments were made to the teacher disciplinary statute, Education Law Section 3020-a, that became effective April 1, 2012 (Our May, 2012 newsletter summarizes the specific changes). It has been almost a year since those changes became effective and this is a good time to summarize our experience with the amendments and their impact on teacher disciplinary hearings.

The main purpose of the amendments was to reduce the time from the filing of charges to the issuance of a decision from the hearing officer. Prior to April 2012, it was not unusual for a teacher disciplinary hearing to take one-and-a-half to two years or longer. Generally, the school district was paying both the teacher who was the subject of discipline as well as a substitute during the pendency of the hearing. The cost of the substitute, the dedication of internal administrative resources and legal fees made the hearing process an expensive proposition in most circumstances.

Generally speaking, the amendments and the new timelines have resulted in a much quicker process. It is not unreasonable for a board of education to expect a decision from the hearing officer within six months from the date it votes on disciplinary charges. The new timelines are being taken seriously by the State Education Department and the hearing officers. To the extent that one of the goals of the amendments was to shorten the length of the disciplinary process, they have enjoyed some early success.

The shortened process has resulted in more favorable settlements. In cases where both parties perceive termination as the likely (although always uncertain) result, settlement discussions begin at dollar amounts consistent with six months' pay as opposed to one to two years pay. Also, there seems to be more of a willingness to discuss settlement earlier in the process as a result of the quicker pace of discovery and hearing schedules.

There are a number of other issues associated with the amendments that have impacted the strategy and timing of disciplinary charges not the least of which is the compensation and selection process for hearing officers. The amendments and resulting changes in the Commissioner's Regulations have decreased compensation for many hearing officers. A number of hearing officers with whom many districts may have been familiar are no longer willing to accept appointments under the new compensation structure and expedited timelines. As a result, districts are seeing new hearing officers for the first time. While the short-term consequences of the amendments have generally been positive, the long term consequences will only be understood once there is a greater body of decisions from hearing officers now willing to accept appointments.

If you have any question regarding the foregoing, please feel free to call our office.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Program/Location</u>
Joseph Shields Joseph Bufano	3/3/13	NYSCOSS Winter Institute, presenting on "Alternative Sources of Revenue" along with East Syracuse-Minoa CSD Superintendent Donna J. DeSiato, Ed.D., Desmond Hotel & Conference Center, Albany, NY
Eric Wilson	3/4/13	NYSCOSS Winter Institute, presenting on "How to Plan for Staff Reductions", Desmond Hotel & Conference Center, Albany, NY
Don Budmen Colleen Heinrich	3/4/13	NYSCOSS Winter Institute, presenting on "Understanding Your Obligation in Dealing with Reports of Abuse: Protecting Students, Your District and Yourself", Desmond Hotel & Conference Center, Albany, NY
Craig Atlas	3/15/13	Health Insurance Symposium sponsored by MASLA, NYSUT and CSEA, presentation on "Retiree Health Insurance", Rochester Convention Center, Rochester, NY
Eric Wilson	3/15/13	Health Insurance Symposium sponsored by MASLA, NYSUT and CSEA, presentation on "Creative Strategies on Health Care Negotiations for Current Employees and Future Retirees", Rochester Convention Center, Rochester, NY
Joseph Bufano	3/15/13	Client In-Service Programs on "Dignity For All Students Act"
Susan Johns	3/21/13	Annual CSE Chairpersons' Technical Assistance Meeting, presentation on "Conducting Manifestation Determinations", Lake Placid, NY
Joseph Shields	3/23/13	Monroe County School Boards Association, presenting on "School Board Candidates' Guide to School Law"

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.