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Retiree Health Benefits Not Guaranteed

Retirees have been found to have no contractual or other rights to continue to be provided with the same level of healthcare benefits that they possessed at the time of retirement under a recent decision of the Commonwealth Court in *Boyd v. Rockwood Area School District*. In this case, the collective bargaining agreement between the Teachers and School District provided for certain levels of benefits under Blue Cross Blue Shield, and it delineated the nature of health insurance benefits provided. When the parties negotiated changes to the health insurance plan that included changes to the retirees, the retirees filed the lawsuit to keep the level of retiree health insurance benefits the same as at the time they retired. The Commonwealth Court ruled that the retirees would pay for their health insurance just as active employees, and would be governed by whatever was negotiated between the active Teachers and the District.

The Commonwealth Court followed the decisions of the Federal Courts, and in particular, the case of the *UAW v. Skinner,* of the Third Circuit which provided that health and welfare benefits are not "vested" at the time of retirement unless there has been "clear and express language" providing for the same. The Commonwealth Court of Pennsylvania followed the Third Circuit logic in finding that these retiree health insurance benefits are subject to change through the collective bargaining process. Further, the Commonwealth Court noted that the Collective Bargaining Agreement provisions in the Rockwood School District Contract never intended to vest the benefits in retirees without subsequent change.

With the ever rising cost of retiree health insurance benefits, School Districts must negotiate Collective Bargaining Agreements with this *Boyd* decision in mind. First, the Districts should avoid any language that would provide for the vesting of any retiree benefits, including health insurance benefits.

In addition, it would be advisable for Districts whenever negotiating changes in health insurance in collective bargaining to be specific that changes will affect retirees as well as active employees. Thus, there would be no doubt that retiree benefits were being changed as a result of negotiations.

Real Estate Immunity Upheld By Court

Despite the ever-growing attacks on the immunity of the Political Subdivision Tort Claims Act, the Commonwealth Court ruled strongly in favor of School Districts in the recent case of *Repko v. Chichester School District*. In that case, a student had filed suit against the School District because of injuries she suffered when a table fell on her in the school gymnasium. The student had been playing basketball during gym class, and when a basketball went into the bleachers, a folding table that had been leaning against the bleachers fell on the student. The table had been used for a graduation ceremony the night before and was improperly stored in the gymnasium.

The student suffered injuries to her right calf and ankle, and the case went to a jury trial. The jury awarded the student $250,000 in damages. However, the School District defended the case on the immunity defense, noting that the case fell within the real property exception to immunity under the Political Subdivision Tort Claims Act. Under that exception, even where there is an action of negligence, if the negligence arose in connection with the "care, custody or control" of real property, then there is no immunity.

The Commonwealth Court overturned the jury verdict in this case and found that the immunity provisions were applicable. The Court noted that the table that fell on the student was personal property and was not real estate. The Commonwealth Court distinguished the prior case of

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Special Education Supervisor With Head Injury Not Covered Under the ADA

Despite being injured when a wooden speaker fell off of a wall and struck him on the head, a Special Education Supervisor found that he was not covered under the ADA for a "disability," in the recent Third Circuit decision in *Weisberg v. Riverside Township Board of Education.* Weisberg was responsible for overseeing the evaluation and placement of special education students in his District and became forgetful, irritable, argumentative and lethargic after being struck by the wooden speaker falling on his head at work. Weisberg sought protection under the ADA and attributed his losing track of appointments and being frequently late to his head injury.

Following the recent case law from the United States Supreme Court, the Third Circuit Court of Appeals noted that there is a substantial burden in proving a "disability" under the ADA. In this case, the Plaintiff argued that he was substantially limited in three major life activities:

(1) Cognitive function,
(2) Performing manual tasks, and
(3) Working.

In finding that Weisberg was not disabled, the Court stressed that the medical report showed that he ranked highly or in the average range on many of the mental tests performed by his physician. Although Weisberg ranked in the 25th percentile in reading comprehension, he was either average or above average in testing for other academic and vocational skills.

The Court held that "The evidence in the record shows that at most Weisberg is impaired by his post-concussion syndrome such that he falls in the bottom quartile of the country in certain measures of cognitive function, but ranks higher in the average range on other measures." Therefore, the Court used a comparison of comparing Weisberg to the general population as far as mental abilities, and found that he was not out of the ordinary in most cognitive functions.

This case further demonstrates that the Courts are making it increasingly difficult for an individual to be declared as "disabled" under the ADA. School Districts do not need to automatically classify someone as "disabled" and place them in a light duty job or restructured job as a result of presenting a medical excuse. Under the recent case law, School Districts should be wary of immediately attempting to "accommodate" an individual who claims a disability. The Courts require a showing of a substantial impairment of a major life task in order to be qualified under the ADA, and School Districts should scrutinize medical information presented by an employee before making any determination on a possible accommodation for an alleged disabled individual.

Real Estate

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Blocker where the Court found an action could occur for the defective condition of bleachers. However, the Court noted that this case did not involve the bleachers, but a table that was not part of the real estate.

Importantly, the Commonwealth Court specifically ruled a Plaintiff must show there was real property that caused the injury. When it is personal property that causes the injury, the real property exception does not occur.

Fortunately, this decision reaffirms the principle that personal property items that cause injury to students, even if caused by negligence, will still come within the auspices of the Political Subdivision Tort Claims Act. However, School Districts must be aware of the fact that the care, custody and control of the real estate is an exception to the immunity, and School Districts must be vigilant in maintaining the real estate and fixtures attached to the real estate, in order to avoid liability whenever possible.

Discrimination In Hiring

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they can never use terms that could be considered racial, such as usage of the word "boy." School Districts must inform all employees that any terms of a racial nature will receive zero tolerance.

In addition, this case also illustrates that in hiring decisions, School Districts must be careful to document the difference in qualifications if an individual is hired in a non-protected class over an applicant in a protected class.

Standard for Compensatory Education for Gifted Adopted By Commonwealth

The standard for determining how much compensatory education a gifted student is entitled to, when denied a "Free Appropriate Public Education" was addressed in a case of first impression by the Commonwealth Court in *BC v. Penn Manor School District*. The Court ruled in this case that when there is a finding "that a student is denied a FAPE, and the panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the School District's failure to provide a free appropriate public education." The Court explained that in doing so, it may require awarding the student more compensatory education time than a 1-4-1 standard would accomplish, while in other situations a student may be entitled to little or no compensatory education because he or she has progressed appropriately despite being denied a FAPE.

In this particular case, the Commonwealth Court affirmed the Hearing Officer Award of one hour of compensatory education for every school day of a school year, which has been affirmed by the Due Process Appeals Review Panel. The parents of a kindergarten student in the Penn Manor School District felt that their "gifted" child had not received sufficient individualized instruction. The parents had challenged several years of education as being inadequate for their gifted student. However, in a review of the facts, the Court affirmed the finding that only one year was of the "cookie-cutter variety" that failed to meet the individualized standard needed for a gifted student. The Court also deferred to the Hearing Officer and Appeals Panel on the computation of one hour for each day of the school year that had been declared inadequate. The Court noted that the amount of gifted support given to the students at the School District approximated an average of slightly more than one hour per day; thus, the compensatory education award of one hour per day was considered reasonable. The Commonwealth Court cited a prior Pennsylvania Supreme Court Decision noting that "A School District may not be required to be a Harvard or Princeton to all who have IQ's over 130. We agree that "gifted" students are entitled to special programs to bring their talents to as complete a fruition as our facilities allow. We do not, however, construe the legislation as authorizing individual tutors or exclusive individual programs outside beyond the District's existing, regular and special education curricular offerings."

Thus, the Commonwealth Court has given the first guidance on a standard of compensatory education for gifted students. It must be noted that this standard enunciated by the Commonwealth Court is actually a less objective standard than the standard given by the Courts with disabled students. Thus, we can expect a great difference will be given to the Hearing Officers and Due Process Appeals Panels in determination of the appropriate amount of compensatory education in any finding for gifted students.

Racial Term Can Be Basis of Discrimination In Hiring

The United States Supreme Court has ruled in the case of *Ash v. Tyson Foods* that reference to an African American applicant as "boy" can be evidence of discriminatory animus by an Employer standing alone. The United States Supreme Court reversed a Ninth Circuit decision that held that the use of the word "boy" by itself is benign. The United States Supreme Court held that an Employer's use of the word "boy" when referring to an African American applicant can be evidence of discriminatory animus, depending upon factors such as the context, inflection, tone of voice, local custom and historical usage.

The United States Supreme Court also noted that pretext of discrimination in hiring decisions can be found if a reasonable Employer would have found the Plaintiff to be significantly better qualified for the job. The Ninth Circuit had previously ruled that pretext could be established through comparing qualifications only when the disparity in qualifications was so apparent as to virtually jump off the page and slap you in the face.

This case provides two important practical points for School Districts. First, employees must be trained that

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School District Policy Rules Cannot Interfere With FMLA Rights If Contrary To Act

A Tennessee employer was found to be in violation of the FMLA by the United States Court of Appeals for the Sixth Circuit when he fired an employee at the expiration of an FMLA leave despite the employee's request to extend the leave. In the case of *Killian v. Yorozu*, an employee's FMLA leave of six days expired on December 4th. At that time, Company policy required her to present a Fitness for Duty Certification. However, the employee stated that she had complications from her medical condition and requested an FMLA leave extension. The Employer asked for a certification from the employee at that point. However, six days later, the Employer terminated the employee.

The Sixth Circuit Court found that the FMLA Regulations "clearly and unequivocally" require the Employer to give the employee 15 days from the date of its request to submit medical certification. The Court emphasized in finding against the Employer that the Employer did not wait 15 days for a certification, but terminated the employee six days after she made the request for an FMLA leave extension.

The Court also emphasized that since the employee gave the Employer adequate notice of her need to extend the leave, under the Regulations the employee's leave period had not yet ended at the time of her termination, and therefore, she was still covered under the "restoration" provisions of the FMLA. This case emphasizes that it is the Employer's responsibility to monitor medical certification requests and to make sure that 15 days have expired before denying any FMLA leave or taking any adverse employment action. If the Employer has documented the fact that 15 days have been given for the submission of a medical certification to qualify for the FMLA leave, and the 15 day period has expired, the Employer can proceed to deny the FMLA leave and take appropriate action at that point. It is recommended that the School District provide a written notice to the employee at the time that medical certification is requested, noting that the employee is being given 15 days to submit the medical certification, and the School District should give a subsequent letter confirming that the 15 day period has expired at the conclusion of that time period.

New Student Discipline Regulations Go Into Effect

The new Chapter 12 Regulations governing student discipline procedures went into effect on October 13, 2006. School districts are required to have their policies revised to reflect these changes.

Importantly, no student can be excluded from school for more than 15 school days without a formal hearing. In addition, the School District must give at least three days' notice of the time and place of hearing, and the notice must contain a copy of the expulsion policy. This notice must also contain a statement of the right to an attorney, and a statement of the procedures of the hearing.

Schools must have policies regarding student searches in their policies, and must inform parents of these policies. All of these policies must be in the District's Code of Conduct.

With these Regulations now in effect, Districts must comply with these provisions or risk having student discipline overturned on a technicality. Districts should immediately revise their policies accordingly if they have not already revised them.

Workplace Speech Not Protected Under U.S. Supreme Court Decision

Although employees may think that speech in the workplace is always protected by the First Amendment, the United States Supreme Court held to the contrary in the recent decision of *Garcetti v. Ceballos*. A deputy in the District Attorney's office had reviewed a criminal case and stated that he recommended that the case be dismissed because of misrepresentations in the Probable Cause Affidavit. He alleged that he had been transferred to a lower position and was denied promotion because of his speech. The employee had alleged that his speech was protected under the First Amendment.

Although the Ninth Circuit had determined that speech was not a matter of public concern in ruling in the employee's favor, the Supreme Court reversed the Ninth Circuit and held that the employee's speech was not protected because he was carrying out part of his duties as a deputy in the workplace when he made his recommendation. The Supreme Court emphasized that the employee was acting as an employee only and not as a citizen.

Importantly, the Court gave support to Employers in regulating workplace speech when it stated "Government Employers, like private Employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." The Supreme Court went on further to note that it held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from Employer discipline."

This decision gives support to School Districts in regulating speech by employees on work-related matters that are harmful to the School Districts. Employees cannot rely on vague "First Amendment" rights when attempting to defend improper speech in the work place.

Special Ed Parents Not Entitled to Reimbursement of Expert Fees

In 2006, the United States Supreme Court resolved a long standing conflict among the united States Circuit Courts as to whether or not parents who prevail in IDEA actions are entitled to reimbursement of expert witness costs. I a 5-4 decision in the case of *Arlington Central School District v. Murphy*, the Court concluded that non-attorney expert fees for services rendered on behalf of prevailing parents in IDEA actions are not recoverable from the state. In reaching this conclusion, the Court analysed the plain language of the IDEA as well as the legislative history reflective of Congress' intent at the time of its passage in 1970.

The purpose of the Act, in part, was to ensure that all children with disabilities have available to them a free, appropriate public education, including special education and related services, designed to meet each child's unique needs. The Act further identifies procedural safeguards to ensure compliance by local educational agencies.

In *Murphy*, Pearl and Theodore Murphy filed suit on behalf of their son seeking payment for their son's private school tuition for certain school years. The parents, with the assistance of an educational consultant, prevailed. As a result, the parents sought reimbursement for the fees of their educational consultant. The District Court awarded expert fees.

The United States Supreme Court accepted the appeal, ultimately determining that it was not Congress' intent to reimburse for expert witness fees. The Court noted that the statute uses the term "cost" as opposed to "expense" and concluded that the word "cost" strongly suggests that Congress did not intend to have an open-ended provision making local educational agencies liable for all expenses incurred by prevailing parents.

In addition, the Court emphasized that the statutory provision at issue specifically states that reasonable attorneys' fees may be awarded to prevailing parents as part of the reimbursable costs. The Court opined that by only adding the phrase "reasonable attorneys' fees" to the list of otherwise recoverable costs, Congress did not intend to include expert witness fees.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 school districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the school district.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes:

- Negotiation of teacher and support staff contracts
- Employment Discrimination
- Special Education Litigation
- Veterans' Preference Litigation
- Teacher and student discipline hearings
- Leaders in Timed Mediation contract negotiations

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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