

ANDREWS AND BEARD EDUCATION LAW REPORT

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U.S. Supreme Court Denies Request to Hear Home School Case

Andrews and Beard attorneys have been involved in federal litigation on behalf of a Pennsylvania public school district that was sued by parents who claimed a religious exemption from the requirements of Pennsylvania's home school law. The parents claimed that the state's home school requirements – specifically the requirement that the parents submit a portfolio of work for review by the district, which then assures that some education is going on – violates a number of constitutional protections. They argued that the education of their children was a God-given obligation and that to submit any portion of their educational program to governmental review would be inconsistent with their submission to God's guidance on the same subject.

Last fall, the United States Court of Appeals for the Third Circuit had upheld a lower court decision in that case, essentially concluding that the United States Constitution's guarantees of religious freedom did not prevent the state from regulating home school programs in the limited manner that current law provides.

The parents in the case had asked the United States Supreme Court to review that decision, and recently the US Supreme Court formally denied that request. This essentially ends the dispute with respect to the federal constitutional claims. In other words, the religious freedoms guaranteed by the First Amendment to the US Constitution do not exempt parents from compliance with the Pennsylvania home school law and its requirement that the parents provide some evidence to the public school district that some appropriate education is in fact occurring.

There still are some state court claims that remain alive, however. Specifically, the parents also claimed that a Pennsylvania statute known as the Religious Freedom Protection Act (RFPA) provides the protection that the parents sought in this case. The RFPA is a relatively new statute that Pennsylvania Courts have not had much opportunity to consider yet, so the Third Circuit Court of Appeals did not address it and actually sent that specific question back to Pennsylvania state Courts. The decision by the US Supreme Court marks a significant win for Pennsylvania school districts. Soon, though, the next chapter will begin, as the battle turns to state court and the RFPA claims.

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Clarifying Everyone's Obligations: Changes to the FMLA

For the first time, Congress amended the Family and Medical Leave Act, ushering in important new changes to the law which will have a dramatic impact on School Districts and employees. The new regulation took effect on January 16, 2009. In addition to changes made to the regulations governing the application and use of FMLA leave time, the new amendments also added new sections allowing family members of National Guard and Reserve personnel to use FMLA leave to care for the consequences and incidents of deployment, calls to active duty, and injury resulting from military service. Most importantly, drastic changes have been made to the prior sections of the FMLA, which requires that employers, including School Districts, examine, evaluate, and update their FMLA policies for compliance.

The definition of the term "serious health condition" has been given clarification. The six original definitions have been retained but the "incapacity and treatment" definition has been clarified. Under the new definition, when the employee has paid two visits to a health care provider within 30 days of the beginning of the period of incapacity, he or she has met the first requirement of the "incapacity and treatment" category. Further, the first visit must have taken place in-person and within seven days of the first day of incapacity. If the employee meets this definition, or one of the remaining five definitions, the employee is entitled to FMLA leave.

Employees have gained several new protections under the new amendments. For instance, light duty time can no longer be counted against an employee's FMLA leave entitlement. Although it is not a change in the law, the Department's longstanding position was made explicit, allowing employees to settle or release FMLA claims without court or Department approval. Also, teachers and employees who work on school year schedules (e.g. summers off) cannot have that time counted against FMLA leave. This is true even if the individual was on FMLA leave when the school year ended. At that point the District is responsible for treating the employee as actively employed during that time off. If the employee would be regularly required to perform work activities during the summer, then this provision does not apply.

School Districts have also gained some additional rights as well under the new amendments. School Districts may now offer perfect attendance awards without excluding FMLA leave time so long as the School District is holding

employees who have taken FMLA to the same standard as employees who have not taken FMLA leave. In other words, these programs are legitimate so long as they are not retaliatory. Districts may also now require, in certain limited circumstances, that instructional staff who take leave near the end of an academic term take off the remainder of the term. For instance, if a teacher takes two weeks of leave with three weeks remaining in the term, then the District could ask that the employee continue the leave. Further, if an instructional employee requests intermittent leave, and the employee would be on leave for more than 20% of the total number of days over that period, the District may now require that the employee take leave for a period of particular duration or transfer to an alternative position during the period of planned treatment so long as this new position better accommodates the recurring periods of leave necessary by the treatment.

School Districts are also now able to require employees to take any accrued paid vacation, personal, sick, or other leave offered to the employee by the School District concurrently with FMLA leave. Any paid leave taken by the employee by his or her own election may only be taken according to the School District's conditions for taking the selected form of paid leave. However, if the employee cannot meet those conditions, the employee is still eligible to take the unpaid FMLA leave. Employees must also comply with company rules regarding call-in procedures for reporting absences unless there are unusual circumstances sufficient to justify non-compliance.

Certification requirements have also been clarified, and many of these changes are in the School District's favor. School Districts may now contact an employee's health care provider so long as the contact is made by a health care provider, human resource professional, a leave administrator, or a management official, but, under no circumstances may the employee's direct supervisor contact the employee's health care provider. Under the new rule, School Districts may request clarifying information from the employee's health care provider to the extent required by the certification form. The School District may now also request recertification of an ongoing medical condition every six months in conjunction with an employee's absence.

School Districts may now require that fitness-for-duty certifications specifically address the employee's ability to perform the essential functions of the employee's job. Further, the School District (*continued next page*)

Rising Tide of Retaliation and Non-Sexual Harassment Claims

Retaliation claims have risen by over 46.5% since 1997 and now constitute about one-third of all claims filed with the EEOC. In that vein, on January 26, 2009, the United States Supreme Court issued a decision which will expand the definition of retaliation even further than the 2006 decision in *Burlington Northern v. White*. In that case, the Court stated that the language of Title VII did not limit the definition of retaliation solely to compensation or the terms and conditions of employment. Any School District action which would have the effect of deterring a reasonable employee from filing a claim would qualify as a materially adverse action.

In the decision handed down on January 26, 2009, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the United States Supreme Court held that Title VII's anti-retaliation provisions apply to employees who speak out about discrimination in response to questions during an internal investigation. In this case the employee did not speak out on her own initiative, but only responded to an internal investigation of sexual harassment. After she reported her own experience of harassment at the hands of the supervisor being investigated, she was fired for alleged embezzlement. The company also fired the other two accusers after finishing the investigation.

The company's action in this case serves as an excellent example of how not to handle employees alleging harassment. The termination of all three employees in close temporal proximity is a strong indicator to a court or the EEOC that the employees were not terminated for the stated reasons. In fact, temporal proximity between the filing of a complaint and termination are often high hurdles to overcome in explaining why an adverse employment action was not discriminatory. This further highlights the need for School Districts to keep accurate employment records and to ensure that these records agree with the reasoning provided for taking an adverse employment action.

School Districts should review all harassment policies to ensure that their policies clearly define and prohibit retaliatory behavior. The EEOC has also complained that too many anti-harassment policies focus solely on sexual harassment while ignoring other problematic forms of harassment in the workplace. Therefore School Districts should review whether or not their harassment policies prohibit non-sexual harassment in addition to sexual harassment. Finally, the Administration should be trained to recognize retaliatory behavior and to prevent and respond to such behavior.

Changes to the FMLA *Continued from page 2*

may also require that the fitness-for-duty certification be provided even for intermittent leave where there is a reasonable job safety concern. The new regulations regarding certification allow the School District to ensure that leave is being used appropriately while also maintaining and protecting general workplace safety.

Notice requirements have been extended in order to provide the School District with more time to properly better inform employees about their rights and responsibilities under the FMLA. School Districts now have 5 days instead of 2 days to inform employees of a variety of notifications required by the law. School Districts have 5 days to request certification, to provide the rights and responsibilities notice, to provide the eligibility notice, and to provide the designation notice. However, the School District is required to share more information with the employee than previously. Also, in order to simplify the process for School Districts, the

employee notification requirements are all contained in one regulation.

These new changes will have a major impact on the administration of FMLA leave. As a result, School Districts should review and update their FMLA policies and employee handbooks. Further, human resources and management personnel should be trained on the changes implemented by these amendments and their attendant regulations. Also, all certification documents, posters, and other documentation used for processing FMLA leave should be reviewed for compliance and to determine that the School District is receiving all information it is entitled to under the law for making a determination regarding FMLA leave. The School District should also ensure that it is in compliance with HIPAA when requesting any medical information through the certification, recertification, or fitness-for-duty certifications.

Expanding the Definition of the Disabled: Changes to the ADA

In 2008 President Bush signed the Americans with Disabilities Act Amendments Act, which significantly expanded the coverage of the ADA and presented new challenges to School Districts and businesses. The ADA Amendments Act has expanded the “major life activities” that can be affected to constitute a disability and also provided an explicit list of non-restrictive examples. Under the new law, impairment of the operation of a variety of major bodily functions, such as the neurological, brain, respiratory, circulatory, endocrine, and reproductive functions have been included in the list of major life activities. Other major life activities explicitly mentioned in the Amendments include (but are not limited to) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Amendment also requires that determinations regarding whether or not an impairment substantially limits a major life activity be made without regard to the ameliorative effects of mitigating measures. Mitigating measures which the School District cannot consider when determining if an impairment substantially limits a major life activity include: medication; medical supplies, equipment, and appliances; low vision devices; prosthetics; hearing aids; mobility devices; oxygen therapy equipment and supplies; assistive technology, auxiliary aids or services, and learned behavioral or adaptive neurological modifications. This definition is so expansive that anyone taking medication could be considered disabled under the ADA. There are only two exceptions to this requirement, the School District may consider ordinary eyeglasses or contact lenses in making this determination.

Congress explicitly states in the Amendment that disability is to be interpreted broadly, which means there will be a large influx into the class of individuals that can qualify as disabled as a result of these Amendments and Congress’s interpretive instructions to the courts. Congress explicitly rejected the United States Supreme Court’s holding in *Toyota Manufacturing*, which required that “substantially” and “major” be interpreted strictly to create a demanding standard to qualify as disabled. Further, Congress has explicitly required that the individual must demonstrate

only that one major life activity is substantially limited in order to be disabled under these Amendments.

Congress has also rejected the interpretation of the courts that medical conditions which are in remission do not cause the individual to be disabled. Now, the law states that episodic impairments and/or impairments in remission constitute disabilities if they would substantially limit a major life activity when active.

Along the same lines, Congress has also expanded the coverage of the “regarded as” disabled language. Under the Amendment, an individual meets the requirements of “regarded as” disabled if the individual can establish that he or she has been subjected to discrimination because of an actual or perceived physical or mental impairment. The most important change in this section of the law is that now, when making this determination, courts will no longer consider whether or not the perceived physical or mental impairment limits or is perceived to limit a major life activity. The sole consideration revolves around whether or not the individual was discriminated against based upon the perceived impairment.

This new direction is consistent with Congress’s larger goal for the Amendment, as Congress wants the focus to be on discrimination and not the presence of a disability. The ADA Amendments Act was intended to fundamentally reframe the focus of the ADA as interpreted by the courts. No longer is the ADA about disabilities, it is about discrimination based upon a disability. As a practical matter, this means that there will be fewer discrimination lawsuits won by School Districts with a Motion to Dismiss or a Motion for Summary Judgment.

In order to protect themselves, School Districts should take several steps in response to the new requirements imposed by the ADA Amendments Act. School Districts should have a written policy coordinating procedures for processing and evaluating requests for reasonable accommodations through a central human resources office. Companies should also thoroughly train HR and management personnel on the interactive process for determining a reasonable accommodation. Also, each step in the interactive process should be adequately documented.

School Districts should also train their HR and management personnel (*continued next page*)

The Lily Ledbetter Fair Pay Act: Are You Ready?

The first bill signed by President Obama, on January 29, 2009, overturns the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Company*. Lily Ledbetter, the Act's namesake, was a 19 year employee of Goodyear who learned that she was paid substantially less than male colleagues in similar positions. Although a jury had ruled in her favor, the Supreme Court overturned their decision since she did not file her claim within the 180 day statute of limitations for filing discrimination claims.

Now, as a result of this statute, each discriminatory paycheck restarts the 180 day statute of limitations. A paycheck is covered under the act if the amount of compensation resulted in whole or in part from a discriminatory decision or practice. Further, a qualifying discriminatory paycheck includes any form of compensation, including benefits or bonuses when the amount results in whole or part from a discriminatory decision or practice. Previously, if a claim were not filed within 180 days of the issuance of the first discriminatory paycheck, the employee would have lost their right to sue on the claim. Employers must now be aware that each and every discriminatory paycheck extends the statute of limitations another 180 days.

A worker who has been compensated in a discriminatory manner may sue and recover up to two years in back pay preceding the filing of the charge. This Act protects any employee whose pay is determined in whole or in part from a discriminatory decision or practice. The Act also applies to any claims brought under Title I of the Americans with Disabilities Act or the Rehabilitation Act regarding discriminatory pay practices. If an individual is compensated in a discriminatory manner and brings a suit under Title I, the statute of limitations will commence with the most recent discriminatory paycheck, benefit, or bonus issued resulting in whole or in part from a discriminatory decision or practice.

In order to protect themselves, School Districts need to take a good look at their initial compensation packages offered to new employees entering the salary schedule. Employees performing the same jobs with similar qualifications should be paid at the same rate unless there is a demonstrable business reason justifying any disparity in pay. Also, due to the roving nature of the new statute of limitations in a case of discriminatory pay practices, a School District should retain all payroll records and performance reviews indefinitely, as they may be integral in defending a discriminatory compensation claim.

Changes to the ADA

Continued from page 4

to make disability determinations without regard to the ameliorative effects of mitigating measures. It is also important that the School District request all pertinent information from the employee seeking an accommodation and document this request. The School District should also never automatically accept a simple, undetailed medical excuse as a reason to accommodate an employee without thoroughly investigating the medical condition. Finally, it is always a good idea to seek a second opinion where the School District has reason to doubt the veracity of the employee's claim, but, the School District should always spend the money on a board-certified specialist. If the claim should go to litigation, a good expert goes a long way.

Practically speaking, the effect of this new law is that virtually any employee with any medical condition can demonstrate that he or she is covered under the ADA. As a result, School Districts must take every precaution to protect themselves from an inadvertent ADA discrimination claim, as the potential pool of claimants has swelled dramatically. Proper procedures, training, and consistent policies and practices are the best methods of combating potential violations. School Districts should review their policies, handbooks, procedures, and training programs in order to ensure that their employees, management, and other personnel are fully informed and in compliance with the dictates of the ADA as amended.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 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

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Paul T. Begley, at 814-863-1838.

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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