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Court Rules in Favor of School District in ADEA and Title VII Claim

In the recent decision of *Daniels v. School Dist. of Philadelphia,* 776 F.3d 181, Dorothy Daniels, who is over 60 years old and of minority status, was employed by the School District of Philadelphia (SDP) as an elementary and middle school teacher. Her tenure at the first school to which she was assigned was successful and at the end of the year, she received a satisfactory evaluation. Her position at that school was eliminated due to budgetary cuts and she was forced to participate in the site selection process to find another position within the District.

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After participating in the site selection process, Daniels elected to teach middle school and SDP approved that assignment. The principal at the Middle School, during a parent teacher conference, made comments that Daniels found to be ageist and offensive. The Principal conducted several classroom observations of Daniels, as is required by SDP procedures, and evaluated her based upon these classroom observations. The Principal gave Daniels a negative evaluation, which Daniels believed to be unwarranted.

At the end of the school year, the Principal reduced the number of budgeted middle-school teachers for the upcoming year from three to two, an action that required Daniels to go through another forced transfer process. Although SDP's central office, rather than the local principal, decides which teachers to retain and which to transfer, Daniels received late notice of this action and was not able to participate in the site selection process because of the late notice. She wrote a letter to the SDP's human resources department complaining about comments that an administrator had made to her, attributing them to discrimination based upon her age. Approximately one day later she met with the Deputy Chief of SDP's staffing office about a teaching assignment, and shortly after Daniels began her new assignment, she filed a complaint with the Pennsylvania Human Relations Commission (PHRC).

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ADEA and Title VII Claim

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The Court ruled that the teacher failed to state a *prima facie* case of retaliation under the Age Discrimination in Employment Act (ADEA) and Title VII based on her complaints of race and age discrimination. It concluded that while the teacher had established that she was engaged in a protected activity and the school district took adverse employment actions against her, the teacher had failed to establish that there was causal connection between the protected activity and the adverse actions taken against her. The panel also found that the teacher's retaliation claim failed because she was unable to show that the legitimate reasons proffered by the school district for the adverse actions were a pretext for age or race discrimination.

Under the *McDonnell Douglas* burden-shifting framework, a plaintiff asserting a retaliation claim under either the Age Discrimination in Employment Act (ADEA), Title VII, or the Pennsylvania Human Relations Act (PHRA) first must establish a *prima facie* case by showing (1) that she engaged in protected employee activity; (2) adverse action by the employer, either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action. (Age Discrimination in Employment Act of 1967.)

The Court of Appeals held that neither the complaint about principal's statement about age, any complaints about monitoring, nor the teacher's letter to administrators and complaints to Pennsylvania Human Relations Commission (PHRC) constituted protected activities. Furthermore, whereas it was true the school district engaged in several adverse employment actions; there was no causal connection between teacher's protected activities and district's adverse actions. For this reason, the Court ruled in favor of the School District and dismissed the teacher's ADEA and Title VII Claim.

Teacher Loses Fight Over Outrageous Blog Posts

In the case of *Munroe v. Central Bucks School District,* 805 F.3d 454, a school teacher, Natalie Munroe, filed a First Amendment retaliation action against Defendants, Central Bucks School District ("School District"), the School District Superintendent, and the Central Bucks East High School ("CB East") Principal. The School District fired Munroe, an English teacher at CB East, after her blog—in which she made a number of derogatory comments about her own students—was discovered. The United States District Court for the Eastern District of Pennsylvania granted the District's summary judgment motion and Ms. Munroe appealed this decision.

The teacher was hired by the School District and assigned to teach English at CB East in Doylestown, Pennsylvania. Her performance evaluations indicated that she was generally considered to be an effective and competent teacher. The Principal even wrote a letter of recommendation in support of the teacher's application for admission to a graduate program.

Once the teacher was granted tenure, she began a blog entitled *"Where are we going, and why are we in this handbasket?"* The teacher did not expressly identify either where she worked or lived, the name of the school where she taught, or the names of her students. According to the teacher, her blog was meant to be viewed by friends that she had asked to subscribe. She did not intend for it to be read by the public at large. For most of the blog's history, there were no more than nine subscribed readers, including herself and her husband. However, no password was required to access the blog.

The teacher wrote a total of eighty-four blog posts in a year's time, "most of which had nothing to do with her school or work." Intended as a vehicle to keep in touch with friends; however, on a number of occasions, she wrote about her co-workers, the School District administration, her students, and their parents.

In what the District Court called "one memorable passage," the teacher explained that she was entering grades, discussed the grading process, and, finally, offered some comments she would like to see added to the so-called "canned" comment list used to fill out students' report cards. At the top of blog post, there was a depiction of a school bus with a "Short Bus" sign and the following heading: "I don't care if you lick the windows, take the special bus or occasionally pee on yourself ... you hang in there sunshine, you're friggin special." The teacher also had multiple blog posts regarding kids within the teacher's class where she called them "rat like," "lazy," "just as bad as their siblings, don't you know how to raise your kids," and "devil's spawn." *Munroe v. Cent. Bucks Sch. Dist.,* 805 F.3d 454.

The Court examined what they called the teacher's expressed hostility and disgust against her own students. The Court stated that "Is it unreasonable to think a student who learned that, to give just one example, their teacher referred to her students as 'the devil's spawn' may decide against" asking her advice? *Id.* The Court also asked the question as to how could students be expected to participate in a class when a teacher indicated that she wished she could use terms like "Rat-like" on their own report cards? Accordingly, the Court determined that, pursuant to the *Pickering* balancing test, which requires the courts to balance the interests of the employee, as a citizen, in commenting upon matters of public concern against the interest of the state, and as an employer, in promoting the efficiency of the public services it performs through its employees, the teacher's speech did not constitute speech protected by the First Amendment and thus the District's termination of this teacher was upheld.

Act 15 Modifications to Clearance Law

On July 1, 2015, Governor Wolf signed Act 15 which modified the Child Protective Services Law.

Act 15 was drafted to clarify the law concerning employees and adult volunteers, who work or volunteer with children. The Act explained who must obtain criminal background clearances and child abuse clearances. The Act was intended to clear up certain aspects of the law and to address concerns expressed by numerous volunteer-based organizations and other entities from across the Commonwealth that are affected by the Child Protective Services Law.

Legislators sought to make the background check requirements easier for adult volunteers who work with children and to keep volunteers for programs that are beneficial to children from diminishing.

The most important aspect of Act 15 for paid employees of school districts is that it extended the time frame for employees to renew their clearances from 36 months to 60 months.

Act 15 includes provisions that will have some impact on paid employees; but the catalyst to the bill was to modify the earlier child protection reforms directed at volunteers and the organizations in the Commonwealth who rely on these volunteers.

Highlights of the changes to the Child Protective Services Law (CPSL) made by the now enacted Act 15 include:

- The Act added definitions of adult family member, direct volunteer contact, education enterprise, family child-care home, immediate vicinity matriculated student, and routine interaction.
- The Act defined routine interaction as regular and repeated contact that is essential to one's employment or volunteer responsibilities.
- The Act modified the definition of perpetrator to include a person 14 years of age or older who is an employee of a child-care service, a school or involved in a program, activity or service.
- The Act implemented a new standard that direct supervisors, who are in the vicinity of the child during an internship, externship, work-study, co-op or similar program, will be required to obtain background checks.
- The Act established the date of August 25, 2015, as the date by which new volunteers must have background checks and that existing volunteers (who have never had background checks or who have background checks older than 60 months) will have until July 1, 2016, to obtain the required background checks.
- **The Act extended the time frame for employees and volunteers to renew their clearances from 36 months to 60 months.**
- The Act allowed volunteers to use of the clearances they have already obtained for employment purposes. Clearances obtained for employment can also be utilized for other employment purposes, but clearances obtained for volunteering may not be used for employment purposes.
- The Act waived the fees associated with volunteers completing state background checks.

Supreme Court Rules in Favor of Township in Local Tax Enabling Act Case

On December 21, 2015, a split Pennsylvania Supreme Court overturned a decision barring a township from imposing a business privilege tax on landlords' rental income, with the Court stating the levy didn't violate a state law against taxing leases.

In the case, *Fish v. Township of Lower Merion, 128 A. 3d 764 (2015),* the Court's ruling reverses an order last year by the Pennsylvania Commonwealth Court that held the taxes on lease transactions from the Township of Lower Merion were unlawful.

In *Fish*, the Township of Lower Merion notified Lessors that for every parcel they leased, the Lessor was obligated to purchase a separate business registration certificate and pay the business privilege tax based on all rental proceeds. The Township adopted the position that the leasing of real property constituted a business, trade, occupation, or profession and each parcel was a discrete business location subject to registration, tax-return, and tax payment requirements.

The Court stated that "the township's tax is not targeted to leases." *Id.* The Court explained, "It is rather, a general business privilege tax which encompasses all for-profit business that offer services to the public within the township borders." *Id.*

In its majority ruling, the Supreme Court held that the argument made by the Township was compelling, and that it is established law that privileges and transactions are separate subjects of taxation under the Business Privilege Tax.

The Court stated that, "Based on the precedent discussed above, clarifying that privileges and transactions are separate subjects of taxation, as well as the absence of any language in Subsection 301.1 (f) (1) prohibiting taxes on privileges, acts, or transactions related to leases, we conclude that the Townships' tax is enforceable relative to such businesses." *Id.*

The Court held that its 2008 ruling in *Lynnebrook and Woodbrook Associates LP v. Borough of Millersville 963 A. 2d 1261 (2008),* which found that state law barred a township from imposing taxes on leases, didn't apply in the *Township of Lower Merion* matter, because its tax is not targeted to leases. Rather, the tax at issue in *Township of Lower Merion* is a general business privilege tax which encompasses all for-profit businesses, which includes the rental business.

The Court stated that because privileges and transactions are separate subjects of taxation and due to the absence of language in the state law prohibiting taxes on privileges, acts, or transactions related to leases, the Court concluded that the Township's tax is enforceable relative to such businesses.

The repercussion of the decision for districts across the state is that Business Privilege Taxes can extend to the rental income of Lessors from the leasing of property.

Pennsylvania Schools and the Administration of Opioid Overdose Drug

The medication naloxone, also known as Narcan, is currently being made available to all Pennsylvania public schools through a partnership under Governor Tom Wolf's administration with Adapt Pharma. Naloxone's sole function is to reverse the effects of heroin and opiate-related overdoses by blocking the effects of opioids on the brain and restoring breathing; it has no known potential for abuse or dependency and has been safely used by medical professionals for over 40 years. As naloxone reverses the effects of opioids, the most common side effect is opioid withdrawal with serious side effects being rare. Notably, naloxone is active only if a person has opioids in their system; the medication has no effect where opioids are absent.

Act 139 of 2014 governs access to this drug overdose medication and allows physicians to prescribe naloxone to first responders, and family members and friends of those at risk of overdosing. Importantly, Act 139 provides civil, criminal, and licensing immunity for licensed health care professionals that act in good faith in prescribing or dispensing naloxone to third parties. While Act 139 does not explicitly address its application to school entities, there is some legal reasoning that supports the extension of this umbrella of authority and protection to school entities. At this time, however, it is unclear the interplay between Act 139's immunity and existing statutory immunity granted to school entities by the Political Subdivision Tort Claims Act for potential liability stemming from the administration of naloxone.

School entities wishing to obtain authorization for its school health personnel to administer naloxone to prevent opiate-related overdose deaths are strongly urged to consult their solicitor to address the legal considerations underlying Act 139 and develop appropriate policies outlining the storage and administration of naloxone, training and compliance procedures for any school district employee that may administer naloxone, and record-keeping and reporting.

Supreme Court Rules School Reform Commission's Section 6-696(i)(3) Suspension Powers Unconstitutional

On February 16, 2016, a split Pennsylvania Supreme Court ruled in *West Philadelphia Achievement Charter Elementary School v. School District of Philadelphia,* No. 31 EM 2014, 2016 WL 616748, that the School Reform Commission ("SRC") did not have legal authority to suspend portions of the Pennsylvania Charter Law and Public School Code in managing the distressed Philadelphia school district.

Under the 1998 provisions of the School Code, the Secretary of Education appointed a chief executive officer ("CEO") to oversee the school district that was declared financially distressed; the CEO had broad powers to suspend the requirements of the School Code and regulations of the State Board of Education. 24 P.S. §§ 6-696, 6-691(c) (1998). The 2001 amendments to Section 696 allowed for the creation of a five-member SRC to govern the distressed district and empowered the SRC with numerous powers, including the ability to suspend provisions of the School Code. 24 P.S. § 6-696(i)(3).

In *West Philadelphia Achievement Charter Elementary School,* the Philadelphia School District was declared distressed in 2001 and the SRC was appointed to govern the district. At that time, the West Philadelphia Achievement Charter Elementary School applied and was granted a five-year charter that was subsequently renewed for an additional five years. Upon the charter school's request for a subsequent renewal in 2011, the SRC passed a resolution that not only placed conditions on the renewal of the charter, but partially suspended the requirement that a charter school be in a corrective action status prior to imposing reasonable conditions in the charter. Although the charter school refused these conditions and did not sign the renewal agreement, it continued to operate with additional funding provided by the Department of Education with monies diverted from the school district.

The SRC eventually passed Resolution 1 of 2013 that, in effect, suspended portions of the Charter Law and School Code by bypassing the procedures for nonrenewal or termination of charters, imposing student performance targets without the charter school being in corrective status, dictating enrollment caps unilaterally, and eliminating the charter school's ability to receive funding for enrolled students directly from the Department of Education. In response, the charter school challenged the constitutionality of the SRC's suspension power within Section 696(i)(3) and subsequent creation of its own laws pertinent to charter schools as an unlawful delegation of legislative authority in violation of the Article II, Section 1 of the Pennsylvania Constitution.

In its majority ruling, the Pennsylvania Supreme Court held that the legislature did not establish definite standards, policies and limitations in Section 696(i)(3) to guide the SRC's discretion in suspending provisions of the School Code to remediate a school district's financial distress. The Court stated that the non-delegation rule "ensure[s] that the Legislature makes basic policy choices" and "protect[s] against the arbitrary exercise of unnecessary and uncontrolled discretionary power." *Id.* However, Section 696(i)(3) as enacted gave the SRC "what amounts to *carte blanche* powers to suspend virtually any combination of provisions of the School Code – a statute covering a broad range of topics." *Id.* As there were no standards to guide the SRC's suspensions, the Court concluded that Section 696(i)(3) of the School Code was an impermissible delegation of legislative authority and thus unconstitutional.

Although this ruling directly affects the Philadelphia School District, this decision could impact ongoing cases in other financially distressed districts across the state, particularly where the Pennsylvania Supreme Court has ruled a number of the SRC's actions pursuant to Section 696(i)(3) as null and void.

Andrews and Beard Education Law Focus

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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 Dr. Lawrence Wess at ljw11@psu.edu.

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:

David Andrews: *dandrews@andrewsbeard.com*
Carl P. Beard: *cbeard@andrewsbeard.com*
Elizabeth Benjamin: *ebenjamin@andrewsbeard.com*
Ronald N. Repak: *rrepak@andrewsbeard.com*
Brendan J. Moran: *bmoran@andrewsbeard.com*
Jennifer L. Dambeck: *jdambeck@andrewsbeard.com*
Carl D. Beard: *cdbeard@andrewsbeard.com*

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ANDREWS & BEARD
LAW OFFICES

MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
www.andrewsbeard.com