

# Inquiry & ANALYSIS

## August 2008

Supreme Court Update .....	1
Sample Amendments to Standard Construction Contracts .....	8
2008 School Law Practice Seminar ....	8
Nominate a Colleague for a COSA Award .....	8
Annual Notices .....	8

## SUPREME COURT UPDATE

By: *Laura Klein & Margaret Ruthenberg-Marshall, NSBA Legal Interns, Alexandria, Virginia*



On the surface of things, the 2007-2008 Supreme Court term offered little of the intrigue of the 2006-2007 term. In short, no cases against school districts seemed equivalent to the "BONG HITS 4 JESUS" case and the race and student assignment cases. Adding further to the anti-climatic nature of the term is the fact that the only case the Supreme Court decided directly involving a school district was essentially a tie. The 2008-2009 term promises a little more obvious intrigue; the Court has already accepted for review two cases against school districts. Despite the lack of highly prominent cases against school districts in the 2007-2008 term, a closer look reveals numerous interesting employment decisions that affect school districts. Likewise, in the 2008-2009 term the Court will consider a wide breath of legal issues from voting rights to free speech that may have an impact on school districts.

### 2007-2008 TERM – DECIDED

#### Reimbursement for Unilateral Private School Placement

In *Board of Education of the City School District of New York v. Tom F.*<sup>1</sup> the Court affirmed, in a 4-4 per curiam opinion just two sentences long, a Second Circuit decision holding that parents who unilaterally enroll a child with disabilities in private school without first trying a public school placement may seek tuition reimbursement.

Tom F. enrolled his son in a private school and was reimbursed for two years of tuition. When the New York City school system offered his son a placement which the district believed would provide a free appropriate public education (FAPE), Tom F. continued the private school placement and sought tuition reimbursement. A federal district court overruled determinations by a special education hearing officer and a state review officer that Tom F.

### National School Boards Association's Council of School Attorneys

1680 Duke Street  
Alexandria, VA 22314-3493  
(703) 838-6722  
Fax: (703) 548-5613  
E-mail: [cosainfo@nsba.org](mailto:cosainfo@nsba.org)  
Web site: <http://www.nsba.org/cosa>



# Inquiry & ANALYSIS

A Membership Service of the  
NSBA Council of School Attorneys

Lisa E. Soronen, *Editor*  
and *Senior Staff Attorney*

## NSBA Council of School Attorneys 2008–2009 Officers

Sam S. Harben, Jr., *Chair*  
A. Dean Pickett, *Chair-elect*  
Thomas E. Wheeler, II, *Vice-chair*  
Patrice McCarthy, *Secretary*

## NSBA Officers and Staff

Barbara L. Bolas, *NSBA President*  
Anne L. Bryant, *NSBA Executive Director*  
Joseph S. Villani, *NSBA Deputy Executive Director*  
Francisco M. Negrón, Jr., *NSBA Associate Executive Director and General Counsel*  
Susan R. Butler, *Director, Legal Services & Council of School Attorneys*  
Naomi E. Gittins, *Deputy General Counsel*  
Thomas Hutton, *Senior Staff Attorney*  
Lyndsay Andrews, *Manager, Council of School Attorneys*  
Thomas Burns, *Legal Assistant*

## ABOUT THE NSBA COUNCIL OF SCHOOL ATTORNEYS

Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

*Inquiry & Analysis* is a membership service of the Council, or can be purchased by subscription for \$120 per year. Published electronically ten times a year, *Inquiry & Analysis* does not appear in March or September.

Copyright © 2008 by the National School Boards Association. All Rights Reserved.  
ISSN: 1069-0190

was entitled to reimbursement. The Second Circuit vacated the decision and remanded the case for proceedings consistent with a similar case decided a few days earlier, *Frank G. v. Board of Education of Hyde Park*.<sup>2</sup>

In *Frank G.*, the Second Circuit held that parents of children who were enrolled in private school and had never received special education services from the district could seek tuition reimbursement under the Individuals with Disabilities Education Act (IDEA). The court specifically rejected the argument that a 1997 amendment to IDEA—which authorizes tuition reimbursement for a student who has previously received district services but was not provided with a FAPE in a timely manner before enrolling in private school—limited the availability of reimbursement to that particular situation.

Because the decision in *Tom F.* was a 4–4 split, with Justice Kennedy recusing himself, it is precedential only in the Second Circuit. The Supreme Court subsequently denied a writ of *certiorari* to hear *Frank G.*, in which Justice Kennedy also did not participate. *Tom F.* and a recent Ninth Circuit<sup>3</sup> decision reflect a circuit split with the First Circuit,<sup>4</sup> which has held that students must attempt a public school placement first in order to be eligible for tuition reimbursement.

Reimbursing parents for private placement when their child has never attended public school provides an incentive for parents of disabled children to automatically reject a public school district's placement, unilaterally place their child in private school, and request reimbursement. Practically speaking, school districts may have difficulty defending their placements where a child with a disability is thriving in an expensive private school tailored to meet his or her needs and has never tried the district's proffered placement.

### "Class-of-One" Theory

In a 6–3 decision, the Court held in *Engquist v. Oregon Department of Agriculture*<sup>5</sup> that plaintiffs may not invoke the "class-of-one" theory of equal protection in the public employment context.

A public employee in Oregon brought a "class-of-one" claim under the Fourteenth Amendment Equal Protection Clause alleging she was terminated not because she was a member of a protected class, but simply for "arbitrary, vindictive, and malicious reasons."<sup>6</sup> The Ninth Circuit declined to extend "class-of-one" claims from cases involving government

legislative and regulatory actions to the public employment context.

The Court, in an opinion by Chief Justice Roberts, affirmed the Ninth Circuit. The Chief Justice analyzed *Village of Willowbrook v. Olech*,<sup>7</sup> where the Court recognized a "class-of-one" equal protection claim of a property owner who was required to obtain a longer easement than other property owners. What was significant in *Olech*, the Court opined, "was the existence of a clear standard against which departures, even for a single plaintiff could be readily assessed."<sup>8</sup> The employment context, unlike the "arm's length" regulatory context, involves subjective and individualized decision-making. In short, the Court opined, "treating similarly situated individuals differently in the employment context is par for the course,"<sup>9</sup> making the "class-of-one" theory of equal protection "simply a poor fit in the public employment context."<sup>10</sup>

As the Court noted, public employers could not function if every personnel decision, from terminations to promotions and pay raises, was subject to constitutional review. Employers' ability to use discretion in making personnel decisions would be hampered, and employment-related litigation surely would increase, if every personnel decision was required to have a demonstrably rational basis.

### Burden of Proof for Reasonable Factor Other than Age

In *Meacham v. Knolls Atomic Power Laboratory*<sup>11</sup> the Court held that, in a disparate impact Age Discrimination in Employment Act (ADEA) case, an employer asserting the "reasonable factors other than age" (RFOA) defense bears the burden of production and persuasion.

In *Meacham*, the plaintiffs were among 31 employees laid off in an involuntary reduction in force. Thirty of the 31 employees were at least 40 years old. The plaintiffs alleged that the process for selecting employees for layoff had a disparate impact on ADEA-protected employees because it relied heavily on subjective ratings of employees' "flexibility" and "critical skills." The Second Circuit reversed a jury verdict for the plaintiffs, concluding that, based on *Smith v. City of Jackson*,<sup>12</sup> the plaintiffs bore the burden of proving the RFOA defense, and they failed to prove their employer's layoff process was unreasonable.

The Supreme Court vacated the Second Circuit's decision in a 7–1 opinion written by

Justice Souter. According to the Court, prior precedent, similarities to the BFOQ exemption, and the use of the phrase "otherwise qualified" indicate the RFOA language is an affirmative defense which the employer must prove. Likewise, the Court rejected the Second Circuit's determination that *City of Jackson* required the burden of proof to rest with the plaintiffs. The Court stated that its reliance in *City of Jackson* on *Ward's Cove Packing Co. v. Antonio*,<sup>13</sup> holding the burden of persuasion in Title VII cases to prove business necessity falls on the employee,<sup>14</sup> is not "at odds with the view of RFOA as an affirmative defense"<sup>15</sup> because "only an over-reading of *City of Jackson* would find lurking in it an assumption that *Ward's Cove* has anything to say about statutory defenses in the ADEA (never mind one that Title VII does not have)."<sup>16</sup>

Even Justice Souter admits "there is no doubt that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with employees."<sup>17</sup> Particularly as school districts face new challenges, such as restructuring under the No Child Left Behind Act and teaching about ever-changing technology, they may make employment decisions that disproportionately affect older employees, which they may have to defend as "reasonable" in court.

### Retaliation Claims Under Section 1981

In *CBOCS West, Inc. v. Humphries* the Court held 7-2 that 42 U.S.C. § 1981 encompasses retaliation claims.<sup>18</sup> Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."<sup>19</sup>

Plaintiff sued under both Title VII and Section 1981 alleging he had been fired because of his race and because he complained about another employee being fired because of race. The Title VII claim was dismissed because of failure to timely pay filing fees. The Seventh Circuit affirmed the district court's grant of summary judgment for the employer on the direct discrimination Section 1981 claim. However, the Seventh Circuit remanded for a trial on the retaliation Section 1981 claim, rejecting the employer's argument that Section 1981 does not encompass a claim of retaliation.



According to Justice Breyer, writing for the majority, the Court based its decision largely on *stare decisis* considerations. First, the Court pointed to its 1969 decision in *Sullivan v. Little Hunting Park, Inc.*,<sup>20</sup> where it found Section 1982, which is similar to Section 1981 but focuses on rights related to property ownership, includes retaliation claims.<sup>21</sup> Second, the Court noted that when it excluded post-contract-formation conduct, where retaliation would most likely be found, from the scope of Section 1981 in *Patterson v. McLean Credit Union*,<sup>22</sup> Congress enacted legislation reversing *Patterson*. Third, since the demise of *Patterson*, federal courts of appeals have reached a "broad consensus"<sup>23</sup> that Section 1981 includes retaliation claims.

The Court likewise rejected a number of the employer's arguments that Section 1981 does not encompass a retaliation claim, including the fact the statute's text does not contain the word retaliation. Of no surprise to school attorneys, Justice Breyer dismissed this argument pointing to the Court's recent decision in *Jackson v. Birmingham Board of Education*,<sup>24</sup> holding that despite the absence of the word "retaliation" in Title IX, the statute still permits retaliation claims.

The facts of this case illustrate why this ruling is unfavorable to employers. The plaintiff tried to bring his retaliation case under Title VII but missed a deadline and then relied on Section 1981. Employers would prefer that Title VII be the exclusive remedy for employment-related retaliation claims for a number of reasons including Title VII's administrative remedies, caps on damages, and short statute of limitations, which are not part of Section 1981. In short, Section 1981 gives late plaintiffs another opportunity to sue employers for retaliation under a less employer friendly statute.

### Retirement Plans Based on Age

In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, the Court held 5-4 that where a pension plan includes age as a factor, and the employer treats employees differently based on pension status, to state a claim under the Age Discrimination in Employment Act (ADEA), a plaintiff must prove differential treatment was "actually motivated" by age and not pension status.<sup>25</sup>

Kentucky's retirement system for hazardous workers has two plans: normal retirement and disability retirement. Under normal retirement, workers are eligible after either 20 years of service or 5 years of service and reaching the age of 55. Under the disability retirement, if an employee becomes disabled before age 55, Kentucky will add years to the retirement calculation equal to the number of years the employee would have had to continue working to be eligible for normal retirement benefits. The plaintiff was a hazardous position worker who worked until he became disabled at age 61. Because he was already eligible for normal retirement, Kentucky calculated his retirement benefits based on his actual years of service (18 years) and did not impute additional years of service. The plaintiff claimed that Kentucky discriminated against workers based on age who became disabled after becoming eligible for normal retirement.

Relying on *Hazen Paper Co. v. Biggins*,<sup>26</sup> where the Court stated the plaintiff must prove in disparate treatment cases that age actually motivated the employer, the Court found that Kentucky's retirement system "does not, on its face, create treatment differences that are 'actually motivated' by age."<sup>27</sup> Justice



Breyer, writing for the majority, explained that pension status was not a proxy for age in this case; there was a clear non-age related rationale for the disparity (to help workers who become disabled before normal pension eligibility); in some instances, the plan would actually place older workers at an advantage because they might get more imputed years than younger workers; and the system did not rely on the stereotypical assumptions about the capacity of older workers. Finally, the Court pointed out that the plan was designed to provide a reasonable pension for disabled workers. If it was found to violate the ADEA, Kentucky would have to either significantly cut the retirement benefits available to disabled workers not yet eligible for normal retirement, or increase benefits for normal retirement eligible employees who become disabled without any clear criteria for determining how many years to impute.

Justice Kennedy, writing for the dissent, argued that based on the most straightforward reading of the ADEA, the use of age as a factor to the detriment of older employees violates the act.<sup>28</sup> The dissent likewise rejected the majority's interpretation of *Hazen Paper*, stating that the case does not require proof of motive when a policy is discriminatory on its face.

School districts have lost numerous cases involving cash payments to employees who retire after a certain age where the cash payments are reduced or cut off based on age. Many of these cases are cited in the dissenting opinion. It is unclear whether (and how) lower courts will apply this case to future cases involving age-based cash plans offered by school districts particularly considering Justice

Breyer explicitly attempted to limit the holding of this case to *pension* plans that use age as a factor.

### "Charges" under the ADEA

In *Federal Express Corp. v. Holowecki*<sup>29</sup> the Supreme Court held that for a filing with the Equal Employment Opportunity Commission (EEOC) to be deemed a charge under the Age Discrimination in Employment Act (ADEA), "it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."<sup>30</sup>

Under the ADEA, an individual may commence a private lawsuit 60 days after filing a charge with the EEOC. The plaintiff filed an intake questionnaire and a 6-page affidavit with the EEOC, which the EEOC did not act on, alleging that certain FedEx programs discriminated against older employees. More than 60 days later, the plaintiff filed a lawsuit. The Second Circuit reversed the district court's holding that the plaintiff's suit was untimely since she had not filled out a valid charge form.

The Supreme Court affirmed in a 7-2 opinion written by Justice Kennedy. In holding that in addition to the express requirements in the EEOC's regulations that a charge be a "written statement" and "name the [employer] and ... generally allege the discriminatory act(s),"<sup>31</sup> a charge must make a request for the EEOC to act, the Court accepted the EEOC's position that the charge regulations are not exhaustive. In clarifying how this standard should be applied, the Court opined that the filing must be examined from the perspective of an "objective observer."<sup>32</sup> Moreover, the Court stated that whether the EEOC actually takes action is not relevant because the ADEA does not condition an individual's right to sue on the EEOC taking action.

According to the Court, in this case, the plaintiff's intake questionnaire and affidavit sufficed as a charge because they met the regulations' express requirements and the affidavit made a request for action, stating, "Please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of [the allegedly discriminating programs]."<sup>33</sup>

Justice Kennedy pointed out the disadvantages for employers of the ruling in this

case. Specifically, the EEOC failed to treat the plaintiff's filings as a charge so "both sides lost the benefits of the ADEA's informal dispute resolution process."<sup>34</sup> Moreover, "the employer's interests, in particular, were given short shrift, for it was not notified of [plaintiff's] complaint until she filed suit."<sup>35</sup> To remedy these disadvantages, Justice Kennedy encouraged the EEOC to make "what additional revisions in its forms and processes are necessary or appropriate" to ensure the agency pursues filings that make a request for action.<sup>36</sup> Dissenting Justices Thomas and Scalia proffered an additional disadvantage of the decision: "Today's decision does nothing – absolutely nothing – to solve the problem that under the EEOC's current processes no one can tell, *ex ante*, whether a particular filing is or is not a charge."<sup>37</sup>

### "Me Too" Testimony

In *Sprint/United Management Co. v. Mendelsohn*<sup>38</sup> the Court held that testimony by nonparties alleging discrimination by supervisors who played no role in the adverse employment action challenged by the plaintiff is neither *per se* admissible nor *per se* inadmissible.

The plaintiff, a 51-year-old Sprint employee, was terminated as part of a company-wide reduction in force. She brought an Age Discrimination in Employment Act (ADEA) disparate treatment suit and sought to introduce the testimony of five former Sprint employees who claimed their supervisors had discriminated against them because of age. None of these employees worked in the same group or had the same supervisor as the plaintiff. The Tenth Circuit held that the district court abused its discretion by excluding the "me too" testimony *per se*. The Tenth Circuit then determined that the evidence was relevant and not unduly prejudicial and therefore admissible.

In an opinion by Justice Thomas, the Court unanimously held that the question of whether "me too" evidence is admissible in an employment discrimination case as relevant and not unduly prejudicial under the Federal Rules of Evidence<sup>39</sup> is a "fact-intensive, context-specific inquiry."<sup>40</sup> Thus neither a *per se* exclusion nor a *per se* admission of the testimony would have been appropriate. The Court also concluded that it is unclear whether the district court's ambiguous, two sentence discussion of the admissibility of the evidence really was a *per se* exclusion of the evidence, as the Tenth Circuit claimed. The

Court thus remanded the case for the district court to explain the reasoning underlying its ruling, stating that the Tenth Circuit should have likewise remanded the case.

Employers would have preferred a definitive answer that "me too" evidence is inadmissible in disparate treatment cases where the "me too" evidence comes from employees with different supervisors than the plaintiff. Under this ruling, instead, employers will have to argue on a case-by-case basis that the facts and context do not support admitting this evidence as not relevant or unduly prejudicial. Large school districts in particular are likely to confront the problem of "me too" evidence, since in those settings it is easy for a plaintiff to find other disgruntled former employees from some part of the district willing to testify against the district.

## 2007-2008 TERM – ACCEPTED, BUT SETTLED

### Reasonable Reassignment Under the ADA

The issue in *Huber v. Wal-Mart Stores, Inc.*<sup>41</sup> was whether the Americans with Disabilities Act (ADA) requires an employer to reassign a disabled employee to a vacant, equivalent position for which he or she is qualified, or if employers may require the disabled employee to compete with other applicants for that position. The Supreme Court granted *certiorari*,<sup>42</sup> but shortly thereafter the parties reached a confidential settlement. Therefore, the Court has dismissed the case.<sup>43</sup>

Huber incurred a permanent injury while working for Wal-Mart. As a result, she sought reassignment to a certain vacant and equivalent position as a "reasonable accommodation" under the ADA. Pursuant to its policy of filling positions with the most qualified applicant, Wal-Mart required Huber to join an applicant pool. It selected the most qualified applicant for the position, which was not Huber.

The Eighth Circuit reversed the district court, which had granted summary judgment for Huber. The appeals court found that Wal-Mart followed "a legitimate nondiscriminatory policy" by filling positions with the most qualified applicant. Since "the ADA is not an affirmative action statute,"<sup>44</sup> it does not require Wal-Mart to violate that policy. The court asserted that a contrary reading of the ADA would be "an unreasonable imposition on the employers and coworkers of disabled

employees."<sup>45</sup> Likewise, the Eighth Circuit stated that the Supreme Court's decision in *US Airways, Inc. v. Barnett* supports this holding. In *Barnett*,<sup>46</sup> the Court held that under the ADA, an employer ordinarily need not "assign a disabled employee to a particular position [when] another employee is entitled to that position under the employer's 'established seniority system.'"<sup>47</sup>

Given the Court's grant of *certiorari* in this case, it is likely that if a similar case comes before the Court again, it will grant *certiorari*. School districts that have policies and practices of filling positions with the most qualified applicants would benefit from a Supreme Court decision siding with the Eighth Circuit on this issue, permitting employers to require disabled employees to enter an applicant pool for "vacant and equivalent" positions.

## 2008-2009 TERM – TO BE DECIDED

### Title IX Preclusion of Section 1983 Claims

In *Fitzgerald v. Barnstable School Committee*<sup>48</sup> the Court will determine whether Title IX precludes constitutional claims based on sex discrimination under 42 U.S.C. § 1983.

The Fitzgerald's alleged their kindergarten daughter was repeatedly harassed by a male third grader on the school bus. The school's investigation could not confirm that the harassing behavior had occurred, but the school offered to place the Fitzgerald's daughter on a different bus. This solution was unacceptable to the Fitzgeralds, and they sued the school committee under Title IX. They also sued the school committee and the superintendent under Section 1983 alleging a violation of Title IX and equal protection under the Fourteenth Amendment.

The First Circuit affirmed the district court's grant of summary judgment for the Barnstable School Committee on the Title IX claim. The court then concluded the statutory claim under Section 1983 was precluded because Title IX's remedial scheme, which allows for a private right of action under Title IX, is sufficiently comprehensive to indicate Congress' intent that the statutory remedies are the exclusive means of enforcing the statutory right. Finally, the First Circuit concluded that the Section 1983 equal protection claim, which was virtually identical to the Title IX claim, also was precluded by the "comprehensiveness of Title IX's remedial scheme."

The Supreme Court has only accepted *certiorari* on the question of whether Title IX precludes constitutional claims under Section 1983. This case is important to school districts because under Section 1983, unlike Title IX, the superintendent may be sued in his or her official capacity for money damage. In other words, allowing a virtually identical constitutional claim to proceed under Section 1983 will allow students a "second bite at the apple" in sexual harassment cases.

### Title VII Retaliation

The issue in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*<sup>49</sup> is whether an employee's participation in an internal investigation is protected activity under either the opposition clause or participation clause of Title VII.

Vicky Crawford, a school district employee, claimed she was terminated in retaliation for participating in a sexual harassment internal investigation which occurred a few months earlier. Crawford's participation consisted of responding to questions asked of her in an internal investigation that was initiated due to another employee's complaint.

The Sixth Circuit held that Crawford's cooperation with the internal investigation was neither opposition activity nor participation activity. The court concluded that because Crawford neither took any action nor made any complaint before or after the investigation, she did not oppose any of her employer's activities. It also found Crawford's cooperation with the investigation was not participation activity because Title VII protects participation in internal investigations conducted pursuant to a pending EEOC charge. However, no EEOC charge had been filed at the time of the investigation or before Crawford was fired.

If mere participation in an internal investigation is considered protected activity under Title VII, school boards may be exposed to the risk of a lawsuit every time they take an adverse employment action against any employee who has cooperated with an internal investigation. For this reason, a ruling for the plaintiff in this case may discourage school districts from conducting internal investigations.

### Qualified Immunity

The issue of interest to school districts in *Callahan v. Millard County*<sup>50</sup> is whether *Saucier v. Katz*<sup>51</sup> should be overruled. In *Saucier* the

Court held that when determining whether a government official is entitled to qualified immunity, courts must first decide whether, on the facts, the government official violated a Constitutional right, then decide whether the right was clearly established. *Saucier* requires not only that a court decide both prongs of this test, but that it do so in order.

The two-prong test has been called into question since *Saucier* was decided in 2001. The merits of *Saucier* for school districts are debatable. On one hand, the test forces courts to clarify unclear constitutional law. On the other hand, as noted by Justice Breyer in his concurring opinion in *Scott v. Harris*,<sup>52</sup> this test wastes judicial (and school district) resources when the right was not clearly established and deciding a difficult constitutional question is therefore irrelevant to the case's outcome.

### Past Pregnancy Discrimination

The issue in *Hulteen v. AT&T Corp.*<sup>53</sup> is whether calculations of pensions and other employee benefits are current violations of Title VII if the employer does not grant employees service credit they were denied when they took pregnancy leave prior to the Pregnancy Discrimination Act (PDA).

AT&T Corp. uses a Net Credited Service (NCS) date to calculate employee benefits. Prior to 1977, a pregnant woman could receive a maximum of 30 days of service credit for pregnancy leave. In contrast, employees who took temporary disability leave could accrue unlimited service credit. AT&T eliminated this distinction after the PDA was passed, but did not retroactively grant service credit to women who had taken pregnancy leave pre-PDA.

Plaintiffs resigned from AT&T between 1994 and 2000 with uncredited pregnancy leave that prevented them from receiving certain benefits. The Ninth Circuit, on rehearing en banc, affirmed the district court's holding for the employees under *Pallas v. Pacific Bell*,<sup>54</sup> that AT&T's benefits calculations are current violations of Title VII.

*Pallas* is based on *Bazemore v. Friday*<sup>55</sup> in which the Supreme Court held that each paycheck in a discriminatory salary scheme was actionable even though the employer started using the scheme before Title VII's enactment when it was lawful. The Ninth Circuit held in *Pallas*, and reaffirmed in *Hulteen*, that, like the salary scheme in *Bazemore*, "the NCS system is facially discriminatory" and, like each paycheck issued in *Bazemore*, a post-PDA benefits

calculation is an "actionable discriminatory employment practice."<sup>56</sup>

Judge O'Scannlain dissented in *Hulteen*.<sup>57</sup> He argued that *Pallas* was wrongly decided because the controlling cases are *United Air Lines, Inc. v. Evans*<sup>58</sup> and *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>59</sup> not *Bazemore*. *Evans* and *Ledbetter* stand for the proposition that facially neutral employment decisions are not actionable, even if they reflect adverse effects of past discrimination. Judge O'Scannlain argued that post-PDA calculations of employee benefits are facially neutral decisions that, unlike the continued use of a discriminatory salary scheme in *Bazemore*, "simply gave present effect to past, unchallenged acts."<sup>60</sup> He contended that current benefits calculations cannot be "discriminatory" without impermissibly applying the PDA retroactively, since such a finding necessarily depends on viewing female employees who took pregnancy leave pre-PDA as "similarly situated" with employees who took temporary disability leave pre-PDA. Judge O'Scannlain pointed out that "because it was then lawful to distinguish between the two reasons for leaves prior to the PDA, the two groups were not similarly situated."<sup>61</sup>

The Supreme Court granted *certiorari* to determine two questions. First, the Court will decide whether AT&T's post-PDA benefit calculations are current violations of Title VII. Second, it will decide whether the Ninth Circuit's finding that AT&T's post-PDA calculations are facially discriminatory impermissibly applies the PDA retroactively.

The implications of *Hulteen*'s first issue for school districts may depend on how many districts had pre-PDA benefits policies that denied service credit to pregnant employees and, like AT&T, declined to restore that service credit post-PDA. However, the second issue, regarding retroactivity, may have more sweeping consequences. A ruling that AT&T's decision violates Title VII and does not apply the PDA retroactively could make employers liable under Title VII and other employment statutes for other employment decisions that are affected by past employment decisions, which are currently unlawful but were lawful at the time they were made.

### Arbitration Provisions in Collective Bargaining Agreements

The issue in *Pyett v. Pennsylvania Building Co.*<sup>62</sup> is whether an arbitration clause in a collective bargaining agreement (CBA)

which clearly and unmistakably waives union members' right to a judicial forum for federal discrimination claims is enforceable.

The plaintiffs are unionized employees of a building service and cleaning contractor who were reassigned to less desirable positions when the building in which they worked hired a new company to fill their positions. The plaintiffs filed grievances with their union, alleging age discrimination, among other claims. The union declined to pursue the age discrimination claims because the union had consented to the new company being brought into the building. The plaintiffs then commenced Age Discrimination in Employment Act (ADEA) lawsuits against the building and their employer in federal court. The building moved to enforce a provision in the CBA between the plaintiffs' union and their employer which required that discrimination claims be arbitrated.

Three major Supreme Court cases discuss waiving a judicial forum for federal claims. *Alexander v. Gardner-Denver Co.*<sup>63</sup> held that a CBA cannot waive union members' right to a judicial forum for federal causes of action. That case would appear to answer the question in *Pyett*, but its holding has since been called into question. *Gilmer v. Interstate/Johnson Lane Corp.*<sup>64</sup> held that an individual employee who has waived his right to a judicial forum in an individual contract can be required to arbitrate a federal age discrimination claim. In *Wright v. Universal Maritime Service Corp.*<sup>65</sup> the Court held that without a "clear and unmistakable" waiver of the right to a judicial forum, that right cannot be waived in a CBA. In *Wright*, the Court declined to determine whether *Gilmer* overruled *Gardner-Denver* and explicitly did not decide whether the provision would be enforceable if it were a "clear and unmistakable" waiver.

The Second Circuit held that *Gardner-Denver* remains good law, and that even a "clear and unmistakable" arbitration provision in a CBA is unenforceable.

The decision in this case will affect school districts that have CBAs that waive employees' rights to a judicial forum for federal statutory claims. While lack of expertise in applying federal employment statutes is frequently cited as a disadvantage of having arbitrators decide federal claims, arbitration also has advantages for school districts; it is often less expensive, arbitration results may be more predictable than jury trials, and juries tend to be unsympathetic to employers and prone to awarding

high damages. For these latter reasons, it may be desirable for school districts to at least have the option to include enforceable arbitration provisions in collective bargaining agreements.

### Content-Based Restrictions on Speech

The issue in *Summum v. City of Pleasant Grove*<sup>66</sup> is whether a city's content-based denial of a religious organization's desire to place a monument in a public park violates the First Amendment.

Summum, a religious organization, wanted to donate a monument displaying the Seven Aphorisms to a public park, which already had a monument displaying the Ten Commandments. The city denied the request stating the monument did not meet its criterion for permanent displays because it was not related to the city's history or donated by a group with long-standing ties to the community.

The Tenth Circuit granted Summum a preliminary injunction allowing it to build its monument based on Summum's First Amendment free speech claim. The court found that the park was a traditional public forum, and thus applied strict scrutiny to the city's content-based restrictions. It found that the city's interest in promoting its history was not compelling and that its policy was not narrowly tailored to the city's interest in history or its interest in aesthetics and safety.

Numerous school districts have litigated cases involving bricks, tiles, and murals. In all the cases, school districts have disallowed someone from displaying a religious message. The results of these cases are divided, and the reasoning varies from decision to decision. The *Summum* case may provide lower courts some insight into how similar bricks, tiles, and murals cases against school districts should be decided.

### Vote Dilution

The issue in *Pender County v. Bartlett*<sup>67</sup> is whether minority groups must make up a numerical majority of a single-member district for Section 2 of the Voting Rights Act (VRA) to mandate the drawing of such a district. North Carolina's General Assembly split a county to create a district in which African Americans of voting age made up 39% of the population. Splitting a county to draw districts violates North Carolina's constitution.<sup>68</sup> However, state officials contend that the split is mandated by Section 2 of the VRA, which preempts North Carolina's state constitution.

Section 2 of the VRA requires that districts be drawn such that they do not dilute a racial or language minority citizen's ability to elect his or her preferred representative. In *Thornburg v. Gingles*, the Supreme Court held that in order for Section 2 to mandate the drawing of a single-member district, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>69</sup> The reason for this requirement is that unless the minority voters would have the ability to elect their preferred representative in a single-member district, they are not victims of vote dilution by virtue of being in a multi-member district.

The narrow issue in *Bartlett* is whether *Gingles*' "majority" requirement means that the minority group must make up a numerical majority in a potential single-member district, so that its members could elect their preferred representatives on their own, or whether they must simply have significant enough influence in the single-member district that with the help of other racial groups they would have an opportunity to elect their preferred representatives. The North Carolina Supreme Court held that a numerical majority is required. Therefore, the creation of a district by the General Assembly, with African Americans making up only 39% of eligible voters, was not mandated by Section 2 of the VRA and thus was unconstitutional under state law.

*Pender County v. Bartlett* may offer guidance on when at-large school board election schemes may be subject to challenge under the VRA. Challenges have been made to at-large school board elections where minority candidates have not been elected to the school board, but likely would have been elected if candidates were chosen by electoral district or ward. The "bright line" numerical majority test, if adopted by the U.S. Supreme Court, would make it harder in some cases for minority groups to challenge at-large election schemes. However, the North Carolina Supreme Court found that the bright line test would provide a relatively more objective, consistent, and predictable standard than the "opportunity to elect" standard. **I&A**

### End Notes

- <sup>1</sup> 128 S. Ct. 1 (U.S. Oct. 10, 2007), *aff'd*, 193 Fed. Appx. 26 (2d Cir. 2006).
- <sup>2</sup> 459 F.3d 356 (2d Cir. 2006).
- <sup>3</sup> *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008).
- <sup>4</sup> *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004).
- <sup>5</sup> 128 S. Ct. 2146 (U.S. July 9, 2008), *aff'd*, 478 F.3d 985 (9th Cir. 2007).
- <sup>6</sup> *Id.* at 2149.
- <sup>7</sup> 528 U.S. 562 (2000).

- <sup>8</sup> 128 S. Ct. at 2153.
- <sup>9</sup> *Id.* at 2155.
- <sup>10</sup> *Id.*
- <sup>11</sup> 128 S. Ct. 2395 (U.S. June 19, 2008), *vacated and remanded*, 461 F.3d 134 (2d Cir. 2006).
- <sup>12</sup> 544 U.S. 228 (2005).
- <sup>13</sup> 490 U.S. 642 (1989).
- <sup>14</sup> *Wards Cove's* holding that the burden of persuasion rests with the plaintiff was reversed by § 105 of the Civil Rights Act of 1991.
- <sup>15</sup> 128 S. Ct. at 2404.
- <sup>16</sup> *Id.* at 2405.
- <sup>17</sup> *Id.* at 2406.
- <sup>18</sup> 128 S.Ct. 1951 (U.S. May 27, 2008), *aff'd*, 474 F.3d 387 (7th Cir. 2007).
- <sup>19</sup> 42 U.S.C. § 1981.
- <sup>20</sup> 396 U.S. 229 (1969).
- <sup>21</sup> 491 U.S. 164 (1989).
- <sup>22</sup> 128 S. Ct. at 1957.
- <sup>23</sup> 544 U.S. 167 (2005).
- <sup>24</sup> 128 S. Ct. 2361 (U.S. June 19, 2008), *rev'd*, 467 F.3d 571 (6th Cir. 2006).
- <sup>25</sup> 507 U.S. 604 (1993).
- <sup>26</sup> 128 S. Ct. at 2369.
- <sup>27</sup> *Id.* at 2371 (Breyer, J., dissenting).
- <sup>28</sup> 128 S. Ct. 1147 (U.S. Feb. 27, 2008), *aff'd*, 440 F.3d 558 (2d Cir. 2006).
- <sup>29</sup> *Id.* at 1158.
- <sup>30</sup> 29 C.F.R. §§ 1626.6, 8(b).
- <sup>31</sup> 128 S. Ct. at 1158.
- <sup>32</sup> *Id.* at 1159-60.
- <sup>33</sup> *Id.* at 1160.
- <sup>34</sup> *Id.*
- <sup>35</sup> *Id.* at 1161.
- <sup>36</sup> *Id.* at 1168 (Thomas, J., dissenting).
- <sup>37</sup> 128 S. Ct. 1140 (U.S. Feb. 26, 2008), *vacated and remanded*, 466 F.3d 1223 (10th Cir. 2006).
- <sup>38</sup> See Fed. R. Evid. 401, 403.
- <sup>39</sup> 128 S. Ct. at 1147.
- <sup>40</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (2007).
- <sup>41</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (2007), *cert. granted*, 128 S. Ct. 742 (U.S. Dec. 7, 2007) (No. 07-480).
- <sup>42</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (2007), *dismissed*, 128 S. Ct. 1116 (U.S. Jan. 14, 2008).
- <sup>43</sup> 486 F.3d at 483.
- <sup>44</sup> *Id.*
- <sup>45</sup> 535 U.S. 391 (2002).
- <sup>46</sup> *Id.* at 406.
- <sup>47</sup> 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 2903 (U.S. June 9, 2008) (No. 07-1125).
- <sup>48</sup> 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 1118 (U.S. June 1, 2007) (No. 06-1595).
- <sup>49</sup> 494 F.3d 891 (10th Cir. 2007), *cert. granted sub nom. Pearson v. Callahan*, 128 S. Ct. 1702 (Mar. 24, 2008) (No. 07-751).
- <sup>50</sup> 533 U.S. 194 (2001).
- <sup>51</sup> 127 S. Ct. 1769, 1780-81 (2007) (Breyer, J., concurring).
- <sup>52</sup> 498 F.3d 1001 (9th Cir. 2007), *cert. granted*, 2008 WL 2484730 (U.S. June 23, 2008) (No. 07-543).
- <sup>53</sup> 940 F.2d 1324 (9th Cir. 1991).
- <sup>54</sup> 478 U.S. 385 (1986).
- <sup>55</sup> *Hulteen*, 498 F.3d at 1009.
- <sup>56</sup> *Id.* at 1016-31 (O'Scannlain, J., dissenting).
- <sup>57</sup> 431 U.S. 553 (1977).
- <sup>58</sup> 127 S. Ct. 2162 (2007).
- <sup>59</sup> *Hulteen*, 498 F.3d at 1031 (O'Scannlain, J., dissenting).
- <sup>60</sup> *Id.* at 1023 (O'Scannlain, J., dissenting).
- <sup>61</sup> 498 F.3d 88 (2d Cir. 2007), *cert. granted sub nom. 14 Penn Plaza LLC v. Pyett*, 128 S. Ct. 1223 (U.S. Feb. 19, 2008) (No. 07-581).
- <sup>62</sup> 415 U.S. 36 (1974).
- <sup>63</sup> 500 U.S. 20 (1991).
- <sup>64</sup> 525 U.S. 70 (1998).
- <sup>65</sup> 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (U.S. Nov. 20, 2007) (No. 07-665).
- <sup>66</sup> 649 S.E.2d 364 (N.C. 2007), *cert. granted sub nom. Bartlett v. Strickland*, 128 S. Ct. 1648 (U.S. Mar. 31, 2008) (No. 07-665).
- <sup>67</sup> N.C. Const. art. II, § 3(3).
- <sup>68</sup> 478 U.S. 30, 50 (1986).

## SAMPLE AMENDMENTS TO STANDARD CONSTRUCTION CONTRACTS

The NSBA Council of School Attorneys is pleased to partner with the Texas Council of School Attorneys and the Texas Association of School Boards to make this valuable educational tool available to COSA members nationwide. These sample amendments are designed to assist school attorneys in their work with school districts to improve every school district's ability to provide excellent educational facilities in the most cost effective manner.

The sample amendments reference the following AIA agreements: B141-1997 Part 1 and 2; A101-1997; and A121 CMc-2003.

For more information, including a table of contents, please visit the Member Resources section of the Council's website at [www.nsba.org/cosa](http://www.nsba.org/cosa). **I&A**

## 2008 SCHOOL LAW PRACTICE SEMINAR

**October 30 – November 1, 2008 Westin Alexandria Hotel, Alexandria, Virginia**

Do not miss this opportunity to visit the Washington area just before the 2008 Presidential election and join your colleagues for this comprehensive continuing legal education event. The advanced school law program will offer 10 hours of CLE, including 1 hour of ethics.

On Thursday, October 30, Major General **William K. Suter**, Clerk of the U.S. Supreme Court will present the keynote address on "Today's Supreme Court."

On Friday, October 31, **Douglas M. Brattebo**, Ph.D., J.D., Director of Foundation and Association Development and Presidential Scholar, Case Western Reserve University, will start the day's sessions with a talk about the role that education, formal and informal, can have upon a president's ability to make decisions. He will also address the role of education as a policy issue in the 2008 presidential election and the outlook for the No Child Left Behind (NCLB) Act. Finally he will take a look at the Electoral College math with Election Day less than a week away.

Additional sessions include Section 1983 and State-Created Danger Theory; Dealing with Difference – Diversity, Discomfort or Discrimination; Legal Obligations of School Districts to English Language Learners Under Title VI; Legal Issues with Respect to Immigrant Students; Participation of Disabled Athletes in Mainstream Athletic Programs with Accommodations; Litigation Ethics and the School Attorney, and much more.

Please visit the Council's website at [www.nsba.org/cosa](http://www.nsba.org/cosa) for more information and a registration form. **I&A**

## NOMINATE A COLLEAGUE FOR A COSA AWARD

The NSBA Council of School Attorneys is now accepting nominations for the **Lifetime Achievement Award** and the award for **Distinguished Service to the Council**. Award recipients will be recognized at the 2009 School Law Seminar in San Diego, California. Nominations must be made by at least two active or retired members of the Council, or by an affiliated state council of school attorneys acting through their board of directors. Please visit the Council's website at [www.nsba.org/cosa](http://www.nsba.org/cosa) for more information and to download a nomination form. **I&A**

## ANNUAL NOTICES

Download from the Council's homepage at [www.nsba.org/cosa](http://www.nsba.org/cosa) a list of annual notices required by federal law and resources you can use to create the content of required annual notices. Numerous federal laws require school districts to provide students, parents, and/or the public with notices, many of which must be provided at the beginning of the school year. Fortunately, oftentimes federal agencies or other entities create "model" notices (or provide information useful to creating notices) that can be easily tailored to meet individual district needs. The Annual Notices article covers notices required under the following statutes:

- No Child Left Behind
- Federal Educational Rights and Privacy Act
- Protection of Pupil Rights Amendment
- Child Nutrition Programs
- McKinney Vento Act
- Asbestos Hazard Emergency Response Act
- Title VI, Title IX, Section 504, Age Discrimination Act, Title II of the Americans with Disabilities Act
- Individuals with Disabilities Education Act
- Health Insurance Portability and Accountability Act **I&A**