

Inquiry & ANALYSIS

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SUPREME COURT UPDATE

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In Justice Alito's first full term on the Supreme Court, many commentators were looking for signs of what the Roberts Court will stand for. It is safe to say that in this term the Roberts Court has shown itself to be both very conservative and divided. Twenty-four 5-4 decisions were issued this term, most favoring the conservatives. Even in the conservative bloc, however, there was tension between the Roberts/Alito approach of creating exceptions to precedent which all but overrule it, and the Scalia/Thomas approach of outright overruling precedent. As predicted, practically speaking, Justice Kennedy controls the outcome of most cases. In fact, this term he was in the majority of every 5-4 decision.

So what has this meant for school law? The Court has ruled both for and against school districts this term. In the terms most controversial case, the conservatives struck

down two student assignment plans that use race as a factor. Just four days earlier, however, the conservatives championed deference to school districts, deciding they can regulate student speech advocating drug use. Both cases were 5-4 and, in just these two cases, the Justices issued nine separate opinions, which leaves ample room for subsequent litigation to determine the meaning of the rather muddled precedent.

2006-2007 TERM

School Assignment Plans

In a 5-4 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹ the Court held that two school assignment plans that considered race as a factor violated the Fourteenth Amendment's Equal Protection Clause. However, five Justices,

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including Justice Kennedy, concluded that racial diversity can be a compelling state interest in K-12 student assignment plans. Likewise, five Justices including Justice Kennedy, concluded the plans in this case were not narrowly tailored. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. They opined that the districts' plans "serve 'compelling interests' and are 'narrowly tailored' on any reasonable definition of those terms."²

Seattle Plan

Seattle's plan allows incoming ninth graders to rank the high schools they wish to attend. If too many students select a particular school, "tiebreakers" apply in the following order: (1) a sibling attending the desired school; (2) the racial composition of the student and the school; and (3) geographic proximity. The district's overall racial composition includes 41% white students and 59% non-white students. If an oversubscribed school is not within 10 percentage points of the district's overall racial composition, the district selects students for assignment based on race. Seattle has never operated segregated schools or been subject to court-ordered desegregation.

Jefferson County Plan

Jefferson County's student assignment plan was adopted shortly after its desegregation decree was dissolved. Nonmagnet schools have to maintain a minimum black enrollment of 15% and a maximum black enrollment of 50 percent. Elementary students apply for their first and second choice of nonmagnet schools contained in a geographically-based cluster. Students are assigned to schools within the cluster based on space and the district's current racial guidelines. Transfers are possible; however, they may be denied due to lack of space or based on the racial guidelines.

Majority/Plurality Opinion

Writing for the majority, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, reviewed the plans under the strict scrutiny. The majority stated that when evaluating the use of race in the school context, the Court has previously recognized two compelling interests, remedying past discrimination and diversity in higher education. According to the Court, neither are applicable in these cases. Regarding remedying past discrimination, the Court noted Seattle was never "segregated by law," and Jefferson County had achieved unitary status before the plan in this case was adopted.

Regarding diversity in higher education, the Court distinguished the plans in this case from the University of Michigan law school's plan in *Grutter v. Bollinger*.³ First, in *Grutter* each applicant was focused on as an individual, while in these cases race was not considered as part of a "broader effort to achieve 'exposure to a widely diverse peoples, cultures, ideas, and viewpoints.'"⁴ Second, while other factors, such as student preference, affected assignment in these cases, according to the Court, when race comes into play it is "the factor."⁵ Next, the Court noted that the plans employed a "limited notion of diversity" by viewing race exclusively as white/nonwhite (Seattle) or black/other (Jefferson County).⁶

A plurality of the Court, excluding Justice Kennedy, concluded that it need not determine whether racial diversity in K-12 districts is a compelling state interest because the plans in this case were not narrowly tailored. The plurality opined that the districts' plans amounted to unconstitutional racial balancing. The plans tried to attain a level of diversity based on the district's racial composition, "rather than any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."

Finally, Justice Kennedy joined a majority of the Court in concluding the plans were not narrowly tailored because the "minimal effect" the racial classifications had on student assignments indicates "other means would [have been] effective" in achieving racial diversity.⁸ Moreover, neither district considered methods other than "explicit racial classifications to achieve their stated goals."⁹

Justice Kennedy's Concurrence

In his concurrence, Justice Kennedy opined "[d]iversity, depending on its meaning and definition, is a compelling educational goal a district may pursue."¹⁰ However, he agreed the plans were not narrowly tailored and offered some of his own reasons for reaching this conclusion. He characterized Jefferson County's plan as "broad and imprecise" because it failed to clarify "who makes the decision; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision."¹¹ Likewise, he criticized Seattle's plan for failing "to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."¹²

Interestingly, Justice Kennedy also opined that school districts may use other means to achieve racial diversity that would presumably not be held to the strict scrutiny standard, such as "site selection of schools," drawing attendance lines with the demographics of neighborhoods in mind, resource allocation, student and faculty recruitment, and "tracking enrollments, performance, and other statistics by race."¹³

Implications of this Case

Following this decision, school districts can still adopt student assignment plans that use race as a factor, as long as such plans are narrowly tailored. Unfortunately, the Court failed to provide much guidance as to what a "narrowly tailored" plan would look like. In fact, five Justices agree on only two reasons these particular plans were not narrowly tailored: the use of race had a minimal effect and race-neutral options were not considered. Only time will tell whether districts will attempt to craft narrowly tailored student assignment plans that use race as a factor or instead only use race-neutral criteria.

Student Speech

In a 5-4 decision, the Court held in *Morse v. Frederick*¹⁴ that a student's First Amendment rights were not violated when a principal restricted the student's speech that the principal reasonably viewed as promoting illegal drug use.

In 2002, the Olympic Torch Relay was passing through Juneau, Alaska, and the local high school principal permitted students to leave class to attend. As the camera crews and torchbearers passed by, a number of students unfurled a 14-foot banner that stated "BONG HITS 4 JESUS." The principal asked the plaintiff to take the banner down, he refused, and the principal confiscated the banner and suspended the student for 10 days. The principal later explained she was acting in accordance with a school board policy which prohibits any expression that promotes drug use to minors at a school event.

The district court granted summary judgment to the school board and the principal ruling they had qualified immunity and had not infringed on the student's free speech rights. The Ninth Circuit found that the student's First Amendment rights had been violated because his speech gave rise to no risk of substantial disruption. Furthermore, the Ninth Circuit denied the principal qualified immunity concluding that the student's right to display

the banner was "clearly established."¹⁵

Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, first stated that this is a school speech case. The majority noted that the incident happened during regular school hours at an approved trip that teachers supervised. Also, other students, such as the band and cheerleaders, participated in the event. Chief Justice Roberts next stated that the message on the banner was "cryptic," but could reasonably be found to be promoting illegal drug use. The Court then examined its prior rulings in student speech cases¹⁶ and drug testing cases,¹⁷ concluding that the "'special characteristics of the school environment' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and the myriad school boards, including [the district in this case]—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."¹⁸

The majority did not address the issue of qualified immunity because the Court concluded the speech was not protected. Justice Breyer, who concurred in judgment, would have decided this case in favor of the district and the principal on qualified immunity, and would not have discussed the free speech issue.

In a concurrence, Justice Alito, joined by Justice Kennedy, stressed that the Court's decision is limited to speech advocating illegal drug use and does not restrict speech on political or social issues. Justice Thomas opined in a separate concurrence that the Court should have overruled *Tinker* and should give complete deference to school officials to regulate student speech in their role acting *in loco parentis*.

Justice Stevens dissented, joined by Justices Souter and Ginsburg. The dissent was "willing to assume" that the "pressing need to deter drug use" supports the district's policy prohibiting the advocating of illegal drugs.¹⁹ However, the dissent concluded this was a "nonsense banner," not a banner advocating illegal drug use.²⁰

This decision has created another exception to the *Tinker* material disruption rule. So, the question is how broad is the *Morse* ruling? The majority's reasoning focused on the dangers of drugs. Will lower courts only apply *Morse* to cases involving promoting illegal drugs, as Justices Alito and Kennedy have suggested? Or will lower courts also apply *Morse* in cases involving other speech which may be harmful or dangerous to students?

Parent Pro Se Representation Under IDEA

In *Winkelman v. Parma City School District*,²¹ the Supreme Court held 7-2 that parents have "independent, enforceable rights" under the Individuals with Disabilities Act (IDEA)²² which allow them to proceed with a lawsuit in federal court without counsel.²³

Jacob Winkelman's parents challenged the adequacy of their son's individualized education program (IEP) in federal court *pro se*. The Sixth Circuit dismissed the appeal stating the Winkelmans were not allowed to proceed *pro se* because the right to a free appropriate public education belongs only to children.

The Supreme Court rejected the Sixth Circuit's conclusion and held that "a comprehensive reading of IDEA ... leads to the necessary conclusion that parents have independent, enforceable rights."²⁴ Justice Kennedy, writing for the majority, pointed out that IDEA entitles parents to participate in the substantive formulation of their child's education and allows them to challenge a broad range of issues through a hearing. This statutory structure lead the Court to conclude that "parents [have] an independent stake ... in the substantive decisions to be made,"²⁵ and should therefore be able to prosecute an IDEA action *pro se* in federal court.

In a concurring opinion, Justice Scalia, writing on behalf of Justice Thomas, agreed that parents may proceed *pro se* in cases involving IDEA's procedural protections specifically afforded to them, but not in substantive cases dealing with the right to a free appropriate public education. Justice Scalia rejected the majority's broader holding stating, "[t]he Court's spraying statutory sections about like buckshot cannot create a substantive parental right to education where none exists."²⁶

This decision may increase IDEA-related litigation by parents as they no longer need to be represented by a lawyer. Moreover, it may increase protracted litigation by parents with marginal cases because parents with more solid claims should be able to retain an attorney. Litigating such cases may be challenging for courts and school attorneys as many non-attorney parents are not well-versed in the rules of civil procedure and are not bound by a code of ethics applicable to attorneys. Finally, it is not clear whether lower courts, and ultimately the Supreme Court, will allow non-attorney parents successfully litigating IDEA cases to receive attorneys' fees.

School District Funding

In *Zuni Public School District No. 89 v. Department of Education*,²⁷ the Court decided whether the Secretary of Education's formula used to determine whether a state has equalized expenditures among its school districts is consistent with the federal Impact Aid Act.²⁸ The Act provides federal funding to school districts that are adversely affected by government presence, such as a district that includes a large portion of government land that cannot be taxed. In a 5-4 decision, the Court held the Secretary's calculation, which takes into account the size of school districts, was proper.

Pursuant to the Act, states are not allowed to take into account the amount of federal aid given to a school district under the Act when determining each district's amount of state aid. The Act includes an exception to this prohibition when the Secretary finds the state has equalized expenditures among districts. States equalize expenditures if the difference between the per-pupil expenditure of the wealthiest and poorest school is less than 25% of the per-pupil expenditure of the poorest school. The provision of the Act at issue in this case allows the Secretary to "disregard [school districts] with per-pupil expenditures ... above the 95th percentile or below the 5th percentile"²⁹ when determining if a state is equalized.

For 30 years, the Secretary ranked school districts in order of per-pupil funding and eliminated schools whose student population accounted for five percent of the statewide student population at the high and low ends of the spending distribution. Two New Mexico school districts brought a lawsuit against the Secretary claiming that the Act requires the Secretary to disregard 10% of the school districts instead of 10% of the students. The school districts' calculation method would mean New Mexico would not be equalized. The Tenth Circuit found for the Department of Education twice, first in a 2-1 panel decision, then in a split en banc rehearing.

Justice Breyer, writing for the majority, first concluded that the legislative history and the reasonableness of the Secretary's calculation method supported the Secretary's interpretation of the Act. Regarding legislative history, the Court noted the Secretary's calculation has been used for over 30 years, and when the present statutory language was added in 1994, no one suggested the calculation method be changed. Regarding the reasonableness of the Secretary's calculation, Justice Breyer discussed how the Secretary

choose this method to eliminate statistical outliers, and gave examples of how in this case and in other circumstances the Secretary's method would do so.

The majority opinion concluded by holding that the Secretary's method falls within the scope of the Act's plain language. The Act fails to articulate which *population* (students, districts, or others) falls between the 5th and 95th percentile of per-pupil expenditures. The Court suggested five methods based on different populations, including the Secretary's method, and concluded "the statute's literal language covers any or all of these methods."³⁰

This case does not directly affect many states or school districts, as only a few states claim to equalize state aid under the Impact Aid Act. Perhaps this case, particularly as a 5-4 decision, is more relevant to administrative law than school law. The dissent concluded the plain language of the Act precluded the Secretary's interpretation. Meanwhile, Justices Kennedy and Alito in a concurring opinion chastised Justice Breyer for reversing the order of *Chevron*³¹ analysis and focusing first on the agency's policy concerns and then on the statute's ambiguity. Finally, Justice Stevens, also concurring, opined that Congress adopted the statute in this case to adopt the rule the Secretary administered. For this reason, he would have "affirmed the judgment of the Court of Appeals even if I thought that [the school districts'] literal reading of the statute was correct."³²

Title VII Time Limits

In *Ledbetter v. Goodyear Tire & Rubber Co.*,³³ the Court held 5-4 that a pay-setting decision is a "discrete act" of discrimination that triggers the time limit for filing an Equal Employment Opportunity Commission (EEOC) charge under Title VII.³⁴

The plaintiff claimed that over the course 19 years she was given poor evaluations because of her sex, which resulted in lower pay increases in violation of Title VII. A jury ruled in her favor, and Goodyear appealed. The Eleventh Circuit held that a Title VII pay discrimination claim cannot be based on any pay decision that occurred before the last pay decision that affected the employee's pay during the EEOC's 180-day charging period. In this case, the court concluded there was insufficient evidence that the two pay decisions that occurred within that time span were discriminatory.

Justice Alito, writing for the majority, stated that the plaintiff "should have filed an EEOC charge within 180 days after each

allegedly discriminatory pay decision was made and communicated to her."³⁵ The Court rejected Ledbetter's arguments that (1) even though Goodyear lacked discriminatory intent, each paycheck issued during the EEOC charging period was unlawful because it would have been larger had the previous acts of discrimination not occurred and (2) a denial of a raise in 1998 could be considered discriminatory because it reinforced the previous discriminatory acts. Justice Alito opined that these arguments were "squarely foreclosed by our precedents,"³⁶ that have held that "current effects alone cannot breathe life into prior, uncharged discrimination."³⁷ The court also focused on the purpose of Title VII's statute of limitations, citing Congress' intent to have discriminatory acts dealt with swiftly and the time-sensitive nature of evidence relating to an employer's discriminatory intent.

This decision is favorable to all employers, including school districts. As the dissent points out, in most instances it will be difficult for employees to determine within 180 days of a pay decision that they have been discriminated against. This may be less true in a school district where salaries and pay increases are available to the public. Regardless, school districts might be less likely to face pay based Title VII cases because in many instances raises are given across-the-board by job category rather than individually based on subjective factors. It is possible the *Ledbetter* decision will be short lived. Justice Ginsburg, in her dissent, urged Congress to overturn the decision, and Senators Kennedy and Clinton have already proposed legislation to this effect.³⁸

Athletic Association Recruiting Rules

In *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*,³⁹ the Court unanimously held that an interscholastic athletic association's rule prohibiting undue influence in recruiting middle school students was not an unconstitutional restriction of a private school's free speech rights.

Tennessee Secondary School Athletic Association (TSSAA) regulates interscholastic sports among public and private schools, and Brentwood academy is a private school member. TSSAA prohibits schools from using "undue influence" in recruiting middle school students onto high school athletic teams. Brentwood's football coach violated the undue influence rule by sending a letter to incoming eighth-grade boys inviting them to attend spring practice sessions before these boys were considered "enrolled" under the TSSAA guidelines. This case has been to the Supreme

Court before.⁴⁰ However, the issue before the Supreme Court this time was whether the anti-recruiting rule violated the First Amendment.

Justice Stevens, writing for the Court, stated that Brentwood's voluntary decision to join TSSAA supported the conclusion that the anti-recruiting rule did not violate Brentwood's First Amendment rights. While TSSAA cannot make members give up all constitutional rights, it can impose conditions "that are necessary to managing an efficient and effective state-sponsored high school athletic league."⁴¹ According to the majority, the restrictions placed on Brentwood's speech are necessary to prevent "exploitation, distort[ion] of competition between high school teams, and foster[ing] an environment in which athletics are prized more highly than academics."⁴²

In a part of the opinion joined only by Justices Souter, Ginsburg, and Breyer, Justice Stevens further relied on *Ohralik v. Ohio State Bar Ass'n*,⁴³ in which the Court upheld an Ohio State Bar Association rule prohibiting lawyers from soliciting clients in-person. He compared the individual recruitment of middle school students banned in this case to the facts of *Ohralik* stating, "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader."⁴⁴

The Court's decision in this case is favorable to districts in all jurisdictions that are members of an athletic association that has adopted similar anti-recruiting rules.

Use of Union Fees

In *Davenport v. Washington Education Ass'n*,⁴⁵ the Court unanimously held that a Washington state law requiring public sector labor unions to receive affirmative authorization from a nonmember before using the nonmember's fees for election-related purposes is constitutional.

Washington state statute § 72.17.760 (§ 760) requires unions to obtain affirmative authorization from nonmembers to use their fees when contributing to electoral campaigns. The Washington Education Association notified all nonmembers twice a year of the option to opt-out of giving their fees to political campaigns. The State of Washington and nonmembers of the union brought lawsuits claiming this process violated § 760. The Supreme Court of Washington held that although the notification did not meet the requirements of § 760, this statute violated the First Amendment. The court opined the affirmative



authorization requirement imposed a burden upon the unions that was not consistent with prior Supreme Court opinions in *Abood v. Detroit Board of Education*⁴⁶ and *Teachers v. Hudson*.⁴⁷

Justice Scalia, writing for the Court, began by noting that "it is undeniably unusual for a government agency to give a private entity the power, in essence to tax government employees."⁴⁸ He described § 760 as a "modest limitation," recognizing that Washington could have eliminated agency fees as a whole, but instead opted for a "far less restrictive limitation."⁴⁹ The Court then rejected the Washington Supreme Court's reasoning that Supreme Court precedent mandates that nonmembers must bear the burden of objecting to fees used for political activity. According to the Court, its precedent set a floor, not a ceiling, for procedural safeguards a union must use in the collecting and spending agency fees.

The Court next rejected the union's argument that the Court's campaign-finance cases apply, stating these cases were not on point because they deal with money that was obtained "without the assistance of government coercion of its employees."⁵⁰ Finally, the Court rejected the argument that the statute is an unconstitutional content-based restriction because it only requires affirmative consent for election-related expenditures. According to the Court, this statute is a "reasonable, viewpoint-neutral limitation" that would not suppress ideas particularly "since the union remains ... free ... to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."⁵¹ Finally, the Court stated its holding only applies to public-sector unions. The Court did not address whether § 760 is constitutional as applied to private-sector unions.

Justice Breyer, writing a concurrence on behalf of Chief Justice Roberts and Justice

Alito, would have limited the Court's analysis to rejecting the reasoning of the Washington Supreme Court. The other arguments the Court addressed were raised for the first time.

It is probably safe to assume that on remand, the Washington Supreme Court will not change its mind that the union's notification process in this case violated the statute. In theory, this case weakens a union's ability to collect fees for election-related purposes because obtaining affirmative consent is generally difficult. However, how big an impact this decision will have nationally depends on how many states have statutes similar to Washington's and how many employees choose to not join the union.

2007-2008 TERM

Reimbursement Under IDEA

The issue in *Board of Education of the City School District of New York v. Tom F.*⁵² is whether IDEA requires a school district to reimburse parents of a child with disabilities for private school tuition when the child has not previously attended public school.

In kindergarten, Gilbert Freston was unilaterally placed in a private school for children with special needs. The New York City school district paid for Gilbert's tuition until it offered him a public school placement which it believed would provide Gilbert a free appropriate public education. Gilbert's father challenged the placement, and the district court⁵³ held he was "barred from tuition reimbursement under IDEA because his child did not previously receive special education under the authority of a public agency."⁵⁴ The Second Circuit vacated the district court's ruling in light of its decision in *Frank G. v. Board of Education of Hyde Park*,⁵⁵ which stated denying reimbursement when a child with a disability has never attended public school is unfair because it requires parents to first place

their child in an inappropriate placement in order to receive 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 placement 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.

"Me Too" Evidence of Discrimination

In *Mendelsohn v. Sprint/United Management Co.*,⁵⁶ the Court will decide whether testimony of nonparty employees, who have different supervisors than the plaintiff, and claim they too have been discriminated against is admissible to prove a violation of the Age Discrimination in Employment Act (ADEA).⁵⁷

Ellen Mendelsohn claimed she was terminated as part of a company-wide reduction in force (RIF) because of age. At trial, Mendelsohn sought to introduce testimony of five other Sprint employees, none who had the same supervisor as Mendelsohn, who believed they were terminated in the same RIF based on age. The district court excluded the testimony, and Mendelsohn appealed.

The Tenth Circuit held that the district court abused its discretion in not allowing the "me too" evidence. According to the court, only allowing testimony by employees with the same supervisor in cases alleging a company-wide discriminatory policy would "make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence."⁵⁸ Mendelsohn did not claim that Sprint engaged in a pattern or practice of discrimination, and a dissenting judge would have excluded the "me too" evidence because Mendelsohn made no "independent showing of a company-wide policy of discrimination."⁵⁹

Geographic proximity, public records laws, and unionization can make it easy for school district employees who believe they have been discriminated against to find other employees, who have worked for different supervisors during different time periods, with similar complaints. For this reason, if the Supreme Court adopts the Tenth Circuit's rule, school districts may have more difficulty obtaining summary judgment in employment discrimi-

nation cases. Moreover, school districts may have more difficulty defending such cases at trial as juries may be inundated with numerous witnesses claiming they too have been discriminated against.

ADEA "Charge"

The issue in *Holowecki v. Federal Express Corp.*⁶⁰ is whether an intake questionnaire submitted to the EEOC constitutes a charge necessary to institute an action in federal court pursuant to the ADEA.

Under the ADEA, a plaintiff may file a lawsuit in federal court 60 days after filing charges with the EEOC. In this case, the plaintiff first filled out an "intake questionnaire" with the EEOC. She then filed a lawsuit more than 60 days later. However, after filing the lawsuit, she filed out a "charge" form with the EEOC. The district court dismissed the plaintiff's claims as time-barred ruling that the intake questionnaire did not constitute a "charge."

The Second Circuit held that the intake questionnaire was a "charge." It included all the information the ADEA requires and recommends in a complete charge. Additionally, the court found the intake questionnaire provided sufficient notice to the EEOC that the plaintiff intended to "activate the administrative process," even though the EEOC never informed the employer of the charges or investigated the allegations.⁶¹ The court rejected FedEx's contention that because the plaintiff filled out an actual EEOC charge form after the intake questionnaire, the earlier questionnaire was not meant to be a charge, noting that the charge form supplemented the prior allegations.

If filling out of an intake questionnaire is a "charge" but doing so does not trigger the EEOC's process of notifying the employer and engaging in an investigation and mediation, an employee may file a lawsuit 60 days later without the employer having notice and the benefits of the EEOC's conciliatory process. The Second Circuit's ruling may be unfavorable to school districts because in most instances working with the EEOC to resolve allegations of employment discrimination is preferable to a lawsuit. **I&A**

End Notes

¹ 127 S. Ct. 2738 (2007).

² *Id.* at 2802 (Breyer, J., dissenting).

³ 539 U.S. 306 (2003).

⁴ *Parents Involved*, 127 S. Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330).

⁵ *Id.*

⁶ *Id.* at 2754.

⁷ *Id.* at 2755.

⁸ *Id.* at 2759.

⁹ *Id.* at 2760.

¹⁰ *Id.* at 2789 (Kennedy, J., concurring).

¹¹ *Id.* at 2790 (Kennedy, J., concurring).

¹² *Id.* at 2790-91 (Kennedy, J., concurring).

¹³ *Id.* at 2792 (Kennedy, J., concurring).

¹⁴ 127 S. Ct. 2618 (2007).

¹⁵ *Id.* at 2624.

¹⁶ *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 675 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁷ *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie City v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁸ *Morse*, 127 S. Ct. at 2629 (quoting *Tinker*, 393 U.S. at 506).

¹⁹ *Id.* at 2643 (Stevens, J., dissenting).

²⁰ *Id.* at 2644 (Stevens, J., dissenting).

²¹ 127 S. Ct. 1994 (2007).

²² 20 U.S.C. § 1400 et seq. (2000).

²³ *Winkelman*, 127 S. Ct. at 1999.

²⁴ *Id.*

²⁵ *Id.* at 1997.

²⁶ *Id.* at 2009 (Scalia, J., concurring in part, dissenting in part).

²⁷ 127 S. Ct. 1534 (2007).

²⁸ 20 U.S.C. § 7701 et seq. (2000).

²⁹ 20 U.S.C. § 7709(b)(2)(B)(i) (2000).

³⁰ *Zuni Pub. Sch. Dist. No. 89*, 127 S. Ct. at 1544.

³¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³² *Zuni Pub. Sch. Dist. No. 89*, 127 S. Ct. at 1550.

³³ 127 S. Ct. 2162 (2007).

³⁴ 42 U.S.C. § 2000e (2000).

³⁵ *Ledbetter*, 127 S. Ct. at 2169.

³⁶ *Id.* at 2167.

³⁷ *Id.* at 2196 (citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1989); *United Airlines v. Evans*, 431 U.S. 553 (1977)).

³⁸ See HR.BLR.com, Clinton and Kennedy to Propose Bill in Response to Pay-Bias Ruling, <http://hr.blr.com/news.aspx?id=76004> (last visited July 9, 2007).

³⁹ 127 S. Ct. 2489 (2007).

⁴⁰ After being sanctioned, Brentwood sued TSSAA claiming enforcement of the rule was state action in violation of the First and Fourteenth Amendments. The Supreme Court granted certiorari and held that TSSAA was a state actor, therefore, Brentwood could obtain relief under § 1983 if its rights had been violated. On remand, the district court held that the anti-recruitment rule is a content-based regulation of speech that is not narrowly tailored. The Sixth Circuit affirmed the lower court decision, and Brentwood again appealed to the Supreme Court.

⁴¹ *Brentwood Acad.*, 127 S. Ct. at 2495.

⁴² *Id.* at 2496.

⁴³ 436 U.S. 447 (1978).

⁴⁴ *Brentwood Acad.*, 127 S. Ct. at 2494.

⁴⁵ 127 S. Ct. 2372 (2007).

⁴⁶ 431 U.S. 209 (1977) (holding public-sector unions are constitutionally prohibited from using the fees of objecting nonmembers for ideological purposes that are not consistent with the union's collective-bargaining duties).

⁴⁷ 475 U.S. 292 (1986) (mandating procedural requirements that public-sector unions collecting agency fees must follow in order to ensure that an objecting nonmember can prevent the use of his or her fees for impermissible purposes).

⁴⁸ *Davenport*, 127 S. Ct. at 2378.

⁴⁹ *Id.* at 2378-79.

⁵⁰ *Id.* at 2380.

⁵¹ *Id.* at 2381-82.

⁵² 193 F. Appx. 26 (2d Cir. 2006), cert. granted, 127 S. Ct. 1393 (2007).

⁵³ *Board of Ed. of the City Sch. Dist. of New York v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005), vacated, 193 F. Appx. 26 (2d Cir. 2006).

⁵⁴ *Id.* at *2.

⁵⁵ 459 F.3d 356 (2d Cir. 2006), petition for cert. filed, No. 06-580, 75 USLW 3248 (Oct. 23, 2006).

⁵⁶ 466 F.3d 1223 (10th Cir. 2006), cert. granted, 127 S. Ct. 2937 (2007).

⁵⁷ 29 U.S.C. §§ 621-34 (2000).

⁵⁸ *Mendelsohn*, 466 F.3d at 1228.

⁵⁹ *Id.* at 1231.

⁶⁰ 440 F.3d 558 (2d Cir. 2006), cert. granted, 127 S. Ct. 2914 (2007).

⁶¹ *Holowecki*, 440 F.3d at 567.

WHAT HAPPENED TO BCI v. EEOC?

By Julie Alam, NSBA Legal Intern, Alexandria, Virginia



The Supreme Court dismissed *BCI Coca-Cola Bottling Company of Los Angeles v. EEOC*,¹ shortly before the case was scheduled for oral argument. The issue before the

Court was under what circumstances an employer may be liable for a subordinate employee's discriminatory animus, where the actual decisionmaker harbored no such bias and was unaware of the subordinate's bias.

In this case, a human resources official made the decision to terminate an employee she had never met who worked in a different city.² She relied exclusively on information provided by the employee's immediate supervisor who, unbeknownst to the human resources official, had a history of treating black employees unfavorably.³ The EEOC brought a Title VII race discrimination claim on behalf of the terminated employee, who is black.⁴ The district court dismissed the case, finding the EEOC had not demonstrated that the subordinate employee's bias had a significant influence on the decisionmaker given that the supervisor "merely provided information" to the human resources official and did not "officially recommend" that the plaintiff be terminated.⁵

The Tenth Circuit reversed, holding "because a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee."⁶ According to the court, no such investigation occurred in this case because the human resources official did not ask the plaintiff for his version of the story before terminating him. BCI's petition for certiorari to the U.S. Supreme Court was granted. However, BCI later requested a dismissal for business reasons. To date, this case has not been settled and is currently set for trial.

The theory that an unwitting employer should be liable for a subordinate's discriminating bias is called the "cat's paw" or "rubber stamp" theory. According to the Tenth Circuit, a finding of liability in this instance encourages employers "to verify information and review recommendations before taking adverse employment actions against members of protected groups—particularly if, as we have held, an employer can escape liability entirely by performing an independent investigation."⁷



The Tenth Circuit's opinion summarizes the circuit split on the test regarding when employers may be liable for the unknown discriminatory animus of supervisors. Most circuits, except the Seventh and Tenth Circuits, which have adopted an investigation standard, focus on the level of control a biased subordinate must exert over the employment decision. Some courts take a lenient approach, finding employers liable if the biased subordinate "provided factual information or other input that maybe have affected" the decision.⁸ Alternatively, the Fourth Circuit applies a strict approach holding that an employer cannot be liable even if a biased subordinate exercises "substantial influence" or plays a "significant" role in the employment decision.⁹

The National School Boards Association (NSBA) filed an *amicus* brief in support of BCI, asking the Supreme Court to reverse the Tenth Circuit. NSBA argued that an investigation standard in subordinate bias cases is problematic for school districts for a number of reasons. First, while private companies often give supervisors the authority to make employment decisions, under state statutes, school boards are

often the actual decision makers in these matters. Because school boards do not manage and supervise employees, they rely heavily on administrator recommendations. Short of holding a hearing to determine the possibility of bias before making an employment decision, school boards have little ability to uncover racial bias that is not brought to their attention. Second, NSBA's brief warned that allowing employees who have failed to report discrimination to the school district to sue discourages employees from using in-house grievance channels to resolve discrimination complaints and encourages litigation. Finally, NSBA argued requiring an investigation is burdensome and may not be productive. For example, to avoid liability under the Tenth Circuit's ruling, arguably, an employer must investigate and determine the absence of racial bias every time any adverse employment action is made, which would be particular onerous and unproductive regarding hiring decisions.

Plaintiffs have brought "cat's paw"/"rubber stamp" lawsuits against at least two school districts. Ironically, despite attempted or actual hearings where the employee could have

brought up discriminatory bias but did not, both school districts lost on the issue of liability for subordinate bias. In *Mateu-Anderegg v. School District of Whitefish Bay*,¹⁰ a teacher recommended for non-renewal declined to have a hearing before the board. After being non-renewed, she sued the district alleging sex and national origin discrimination. The Seventh Circuit held that despite a state statute granting the school board final authority to non-renew teachers, the principal was the decision maker because there was no evidence the board did not follow the principal's recommendations.¹¹

Likewise, in *Kramer v. Logan County School District*,¹² a teacher, who was represented by counsel, never presented any allegations or evidence of discrimination during a five-hour non-renewal hearing. She then sued the district for sex discrimination.¹³ Remarkably, the Eighth Circuit denied the district's motion for judgment as a matter of law saying, "[t]he question of whether the school board accurately assessed [the plaintiff's] situation or performed a perfunctory review and 'rubber stamped' the recommendation to non-renew" was for the jury to decide.¹⁴

In short, the Tenth Circuit's ruling in *BCI Cola Cola* is bad for school districts, and the *Mateu-Anderegg* and *Kramer* decisions are even worse. The latter cases illustrate that courts may see school boards as the ultimate "rubber stamp" despite their statutory responsibility to make employment decisions and despite their attempts to elicit the employee's version of the story through a hearing. The good news is that given the Supreme Court's obvious interest in this issue and the prevalence of these cases, the Court is likely to try to revisit this issue. **I&A**

End Notes

¹ 450 F.3d 476 (10th Cir. 2006).

² *Id.* at 480.

³ *Id.*

⁴ *Id.* at 482.

⁵ *Id.* at 483.

⁶ *Id.* at 488.

⁷ *Id.* at 486.

⁸ *Id.*

⁹ *Hill v. Lockheed Martin Logistics Mgmt, Inc.*, 354 F.3d 277, 291 (4th Cir. 2004).

¹⁰ 304 F.3d 618 (7th Cir. 2002).

¹¹ *Id.* at 623.

¹² 157 F.3d 620, 622 (8th Cir. 1998).

¹³ *Id.* at 622.

¹⁴ *Id.* at 624.

RECOGNIZING COUNCIL MEMBERS

The Council would like to thank **Michael E. Smith** and his team at the Fresno, California, law firm of Lozano Smith for their *pro bono* work on NSBA's *amicus* brief in *Morse v. Frederick*. They wrote briefs at both the petition and the merit levels.

Thanks also go to the following Council members for authoring the *School Law Practice* articles that are available via the eDocs Store. **Michael D. Hodge** and **Thomas A. Mickes**, from the Chesterfield, Missouri law firm of Doster, Mickes, Ullom, Benson & Guest; **A. Dean Pickett**, Mangum, Wall, Stoops & Warden, Flagstaff, Arizona; **Edward A. Sullivan** and **Amy M. Steketee**, Baker & Daniels, South Bend, Indiana; and **Julie J. Weatherly**, The Weatherly Law Firm, Atlanta, Georgia.



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