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FREDERICK L. DORSEY, EDITOR

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FURLOUGH ISSUES: UNEMPLOYMENT BENEFITS AND EXEMPT EMPLOYEE STATUS

BY FREDERICK L. DORSEY

Negotiation season is again upon us. During this especially difficult economic climate, public and private employers are seeking voluntary and/or mandatory reductions in employees' hours, wages and other benefits. Furloughs often are included in this mix. Two of the most common furlough issues are addressed herein: unemployment compensation benefits and the status of exempt employees after a furlough.

Unemployment Benefits

In Connecticut, an employee may apply for unemployment if he is unemployed or "partially" unemployed. Partial unemployment is defined as anything less than the number of hours considered full-time for that job.

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UPCOMING SEMINARS

October 2009 **Effectively Bargaining Innovative Compensation, 2009 School Law Practice Seminar**

Attorney Fred Dorsey is on the faculty for this afternoon seminar in Seattle, Washington.

October 2009 **Shared Services Between Boards of Education and Municipalities; Interplay Between ADA and FMLA, American Association of School Personnel Administrators Annual Conference**

Attorney's Fred Dorsey and Dan Murphy are on the faculty for these morning conferences in Hartford, Connecticut.

November 20-21 2009 **Restructuring Schools to Control Costs; Shared Services Between Boards of Education and Municipalities, CABE Conference**

Attorney's George Kelly, Fred Dorsey and Dan Murphy are on the faculty for this conference in Groton, Connecticut.

For more information: Visit our website at www.siegeloconnor.com or contact: Marta Santiago at 860-727-8900 or msantiago@siegeloconnor.com.

150 TRUMBULL STREET
HARTFORD, CT 06103
(860) 727-8900

SIEGEL, O'CONNOR, O'DONNELL & BECK, P.C.
www.siegeloconnor.com

14 EUGENE O'NEILL DRIVE
NEW LONDON, CT 06320
(860) 442-4747

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There is no minimum number of hours an employee must work before he can apply for unemployment. Therefore, an employee who is laid off for only 1 day, or an employee whose hours are reduced from 40 hours per week to 39 hours (or lower), can apply for unemployment.

"An employer cannot furlough an exempt employee for less than one full week because doing so would cause the employee to lose his exempt status."

If you are considering a furlough of employees, understand that impacted employees are eligible to apply for unemployment regardless of how small the reduction in hours or length of layoff.

The State calculates the employee's weekly unemployment benefit rate through a formula that considers the average wages earned over the highest two quarters worked during the employee's "base period," which is normally comprised of the first four of the last five quarters worked.

The maximum weekly unemployment benefit an employee can receive is $519.00 per week. To receive the full amount of $519.00 per week, an employee must take home wages of $13,494.00 per quarter, or approximately $54,000.00 per year. However, an employee who is partially unemployed is only eligible for benefits if two-thirds of his weekly earnings total less than his weekly benefit rate. Therefore, an employee who makes at least $777.50 per week after furloughs is ineligible for unemployment.

Exempt Employee Status

The State exempts employers from the payment of overtime to employees who are considered executive, administrative or professional employees. This overtime exemption is narrowly construed against the employer. Exempt employees are not entitled to overtime payment for hours worked, no matter how many hours are worked during the week.

To protect exempt employees, the overtime exemption also prevents an employer from reducing the exempt employee's salary if the employee works any part of a workweek. For example, an exempt employee may work 80 hours in one week and only 10 hours the next week. The employer must pay him the same salary for both weeks, regardless of the disparity in the number of hours worked. If an employer does not pay the exempt employee his full salary for the week, regardless of the number of hours worked, the employee loses his exempt status and becomes eligible for overtime pay, i.e., time and one-half for hours beyond 40 in any workweek.

The exception exists when the employee works no hours in a workweek. An employer need not pay an exempt employee any money if the employee does not work any hours during a particular workweek. This creates an issue for employers wishing to furlough exempt employees. An employer cannot furlough an exempt employee for less than one full week because doing so would cause the employee to lose his exempt status. Employers must furlough exempt employees for one full week. Anything less jeopardizes the employee's exempt status.

Alternatively, an employer could allow an exempt employee to take unpaid days off (less than one full week) on a voluntary basis. Employers using this option must be careful. Asking an employee if he would like to take an unpaid day off is likely to be considered coercion, *i.e.*, a mandate, by the employer, not a voluntary act of the employee.

Employers with questions regarding these or other furlough issues may contact the labor and employment law attorneys at Siegel, O'Connor, O'Donnell & Beck, P.C. at (860) 727-8900 or by visiting us at www.siegeloconnor.com.

U.S. Supreme Court Exhibits Support for School Board In Student Strip Search Case

By Daniel P. Murphy

On April 21, 2009, the U.S. Supreme Court heard oral argument in the case of *Safford Unified School District v. Redding*, --S.Ct.--, Case No. 08-479. Savana Redding was 13 years old when her middle school administrator received a tip from another student that she was handing out prescription-strength ibuprofen in school. District policy bans prescription and over-the-counter drugs. The vice principal searched Redding's backpack. When nothing was found, she was taken

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to the nurses' office and ordered to remove her clothes and shake out her underwear. Specifically, Redding was told to move her bra to the side and to stretch her underwear waistband, exposing her breasts and pelvic area. No pills were found.

In 1985, the U.S. Supreme Court held school officials only need reasonable suspicion - not the higher probable cause standard used by police - to search a student's purse. The court warned, however, that the search of a student cannot be "excessively intrusive."

In July 2008, the 9th Circuit in California ruled that the strip search of Redding to her underwear was "an invasion of constitutional rights." The court also said the vice principal who ordered the search could be found personally liable. The school district appealed the decision to the U.S. Supreme Court.

During Supreme Court oral argument, the student's lawyer claimed that an "intrusive and traumatic" search of Redding's underwear is unconstitutional. School officials should need location-specific information before putting the child through such an embarrassing search, i.e., being directly told the contraband was in the student's underwear. The school would need reasonable suspicion the drugs were located in the student's clothes in order to search there, not just that the student was in possession of drugs.

"The Supreme Court seemed sympathetic to the school's arguments and indicated they did not see it wise to tie the hands of school officials looking for drugs and weapons on campus."

The school's lawyer argued that school officials have historically had broad authority to search students and the Court should not limit school officials' ability to search out dangerous items on school grounds. He also indicated that more intrusive searches are not likely to become an issue because there would be no legal basis for a school official to conduct a body cavity search.

The Supreme Court seemed sympathetic to the school's arguments, indicating they did not see it wise to tie the hands of school officials looking for drugs and weapons on campus. Interestingly, Justice Stephen G. Breyer added he too hid things in his underwear as an adolescent. The Court agreed it is reasonable to allow potentially embarrassing searches of a student's person to avoid the possibility of having other children die from ingesting illegal or prescription drugs while in the care of school officials.

Chief Justice Roberts also said school officials should be shielded from being sued since the law governing school searches was unclear and courts had previously protected public officials from liability unless they violate a "clearly established" right. These musings, however, are not a guarantee of a decision.

Supreme Court to Consider School Funding Requirements in Arizona English Language Learner Case

By Daniel P. Murphy

The U.S. Supreme Court recently heard arguments examining state requirements to comply with federal laws mandating the teaching of English to public school students. The litigation underlying *Horne v. Flores* began in 1992 when a group of parents whose children attend the Nogales, Arizona public school district filed suit against the State of Arizona, claiming that the state had failed to meet the requirements of the Equal Educational Opportunities Act (EEOA). The EEOA provides that no state shall deny educational opportunity to a student on the basis of race, color, sex, or national origin by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The EEOA was enacted as a response to the U.S. Supreme Court decision of *Lau v. Nichols*, holding that schools have an affirmative obligation to address the needs of students with limited English proficiency to the extent necessary for those students to participate meaningfully in the school district's instructional programs. Notably, the EEOA includes an express private right of action, meaning the individually aggrieved students may sue the state directly for its failure to comply with this law. The class action pending before the Supreme Court concerns whether Arizona's school finance system adequately funds its school districts' English Language Learner (ELL) programs.

The initial 2000 decision of the U.S. District Court for the District of Arizona,

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found that Arizona's ELL funding system provided a rate of about $150 per student. This amount was considered too low for the state to meet the requirements of EEOA, as demonstrated by examples cited by the Nogales school district such as overcrowded classrooms, too few teachers qualified to teach English as a Second Language (ESL) or to teach bilingual classes, too few teacher aides, insufficient tutoring, and insufficient teaching materials for both ESL and substantive courses. In addition, the court found that Arizona's minimum base level for funding its ELL programs was arbitrary and capricious in that it was not reasonably calculated to ensure that students were mastering essential skills.

In a decision issued on April 17, 2008, the Ninth Circuit Court of Appeals denied a motion by Arizona's Superintendent of Public Instruction, and by members of the state legislature, for relief from the declaratory judgment ordering it to comply with the EEOA by the end of the 2007 legislative session. The state argued that, although to date it had not taken all of the steps required of it by the declaratory judgment, changed circumstances had made compliance with the orders inequitable to the extent they required the state to develop a cost-linked ELL funding structure. The changes cited by the state included a generalized increase in funding, changes in the management of

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the Nogales school district, and the enactment of the federal No Child Left Behind Act of 2001 (NCLB). In the alternative, Arizona argued that the passage of new legislation that reshaped the state's ELL funding system was adequate to meet EEOA requirements, and that the district court, whose approval was needed for certain components of the bill to take effect, had wrongfully declined to approve it as adequate for EEOA purposes.

The Ninth Circuit denied the motion because the state showed no changes of factual or legal circumstances that would justify excusing it from compliance. In response to the state's argument that general education funding increases made compliance irrelevant, the court observed that the EEOA does not allow states to simply divert base level education funding in order to fund ELL programs. Furthermore, the court observed that a school district, such as Nogales, "in which the majority of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding ELL programs and so warrants relief from judgment."

As for the state's argument that its success in meeting NCLB standards constituted adequate compliance with its ELL requirements, the court found that the EEOA and NCLB served two distinct purposes. Specifically, although NCLB also addresses students with limited English proficiency, it differs from the immediate, civil rights-based provisions of EEOA in that it is intended to foster gradual improvement measured annually by specific benchmarks. Therefore, compliance with NCLB's discrete annual requirements does not necessarily equal compliance with EEOA standards requiring immediate action to provide students equal educational opportunities.

As the court put it, "[a]n individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes 'adequate yearly progress' towards improving academic achievement overall, including for ELL students." The court did concede that since states are now required under NCLB to make annual submissions of progress data, it may be more practical and reasonable for a state like Arizona to fashion an ELL funding system that takes into account individual levels of need from district to district, rather than funding all districts at the same level. However, the court did not order relief on this basis, since in this case the state had not proposed such a plan, but had only moved for relief from the compliance requirements altogether.

In addition to finding that Arizona had not fully complied with the declaratory judgment to conform ELL funding to the requirements of the EEOA, the Ninth Circuit held that the district court was correct in finding that the new legislation designed to convert Arizona's ELL programs into a state-wide English language immersion program, with funding for this program cut off after two years, was inadequate. When the state's attorney general declined to appeal this decision, the House speaker and the Senate president hired their own attorneys and sought review

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by the U.S. Supreme Court, arguing among other things that state lawmakers should be accorded more discretion in determining education policy. The Superintendent of Public Instruction petitioned the Supreme Court separately, seeking review on the basis that the EEOA does not require states to do more than take "appropriate action" to ensure equal educational opportunity, and because NCLB provides specific guidance for determining what kind of action is appropriate to meet the requirements of the EEOA.

Notably, the State of Arizona and the State Board of Education opposed both petitions for certiorari, arguing that the Supreme Court should not consider the relationship between the EEOA and NCLB because Arizona's ELL funding currently does not meet NCLB standards and puts the state at risk for losing federal education funding.

The Supreme Court granted and consolidated both petitions and heard oral argument on April 20, 2009. A decision from the high court is pending.

LATEST DOE GUIDANCE CLARIFIES IDEA REQUIREMENTS IN USING STIMULUS DOLLARS

BY FREDERICK L. DORSEY

The stimulus bill signed into law in February 17, 2009, also known as the American Recovery and Reinvestment Act (ARRA), included $12.2 billion of IDEA funds for local school districts, to be distributed through state education agencies. On April 1, 2009, the U.S. Department of Education released guidance for state officials on how the districts should utilize this aid. This is the second round of such guidance, the first of which was issued in March.

"If, however, the state finds that the district that refused the funding is meeting its IDEA obligations, the state may then use that money to help other districts fulfill their IDEA duties."

Notably, the April 1 guidance includes a section on Part C spending under the IDEA explaining that districts must share the stimulus funds with private schools serving students with disabilities. Specifically, the districts must include the funds in calculating the "proportionate share" that IDEA requires local education agencies to share with private schools. Districts should remember that the proportionate share calculations are separate from their obligation to pay for private placements in cases where the districts cannot provide students with a free appropriate public education as defined by IDEA.

The guidance also explains that, in the event a local education agency declines the IDEA stimulus funds, the state has two options for using the money. If the state determines that the district that refused the funding is failing to meet its obligations under IDEA, the state must spend the funding for provision of special education and related services directly to students in that district. If, however, the state finds the district that refused the funding is meeting its IDEA obligations, the state may then use that money to help other districts fulfill their IDEA duties. Alternatively, the state may keep the refused money for use at the state level, as long as the added funds would not exceed the state's allowable amount of IDEA funding for state activities.

The ARRA also provides $39.5 billion to states, known as the State Fiscal Stabilization Fund, that is separate from the $12.2 billion of IDEA aid. The Department of Education may allow states to use some of this money to meet IDEA's "maintenance of effort" requirement, which provides that state and local education agencies must maintain current levels of spending on special education. However, the guidance suggests that states must continue to spend the same proportion of revenues for education, and that if a state reduces this proportion, the Department of Education may prevent the state from using the separate funds except under extenuating circumstances.

Another interesting aspect of the guidance addresses the use of the stimulus funds for school construction. States may use an $8.8 billion portion of the stabilization fund to renovate existing schools, but may not use this money to build new schools. However, the guidance clarifies that states may access the remaining $30.7 billion of the stabilization fund for new school construction. In addition, the IDEA funds may be used for school construction upon approval from the Department of Education, which will determine whether the program would be improved by using the funds for this purpose.

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Through the stimulus package, the Department of Education has already distributed approximately $6.1 billion in IDEA funds to state education agencies. A second disbursement of another $6.1 billion is expected by the end of September.

Municipal Bankruptcy May Lead to Voided Union Contracts

By Melanie E. Dunn

Municipalities and public employee unions are closely watching to see whether a U.S. Bankruptcy Judge's recent ruling that a bankrupt San Francisco suburb may void its existing union contracts will be upheld. In 2008, the financial troubles of the city of Vallejo, California, set the stage for a landmark decision that the usual course of protection for collective bargaining agreements in private business bankruptcies does not apply in the public sector.

Vallejo's dire straits are fortunately rare, with only 567 filings under Chapter 9, the municipal bankruptcy law, filed since the law's creation in 1937. Last year, the city claimed bankruptcy

"As evidenced by the Vallejo case, some unions will feel pressure to cut their losses early on once talks of bankruptcy begin."

protection due to high payroll expenses and declining revenue, impacted by the recession, and sought to void its four public employee union contracts. At present, the two unions that represent the police, city clerks, and managers have made concessions in their contracts, while the other two unions, representing firefighters and electricians, continue to contest the court's March 13, 2009 ruling.

What impact would municipal bankruptcy have on school budgets and teacher and administrator union contracts? It appears that Vallejo's school board budget remains unaffected by the city's pending bankruptcy, although the board reportedly made a $10.5 million cut to its budget on April 30, amidst talks of teacher layoffs and salary reductions. Nonetheless, school boards should pay close attention to the financial health of the municipalities in which they sit, and take notes should similar budgetary crises arise within the school system.

As evidenced by the Vallejo case, some unions will feel pressure to cut their losses early on once talks of bankruptcy begin. Since the city cited skyrocketing payroll costs as the primary reason for seeking Chapter 9 protection, it stands to reason that unions may begin to take heed and negotiate for lower salaries and pensions to begin with, in order to protect its employees from an abrupt end to their cash flow. However, the Vallejo fiasco also demonstrates that unions may refuse to accept the voiding of their contracts.

As with individual and corporate bankruptcy, the extreme measure of municipal bankruptcy is fraught with risk and should never be presumed as the best way to relieve financial pressure, as it may not necessarily result in the automatic dissolution of all debts. Should the unions' challenge uncover the possibility that Vallejo is not actually "broke," but perhaps unwilling to find creative ways to maneuver its budget, the city may be liable for not only those contracts but additional legal fees and costs from prolonged litigation.

Therefore, even if the court's order is upheld on appeal leading to a precedential ruling that municipalities may indeed void public employee contracts under Chapter 9, the safest course of action will continue to be to avoid bankruptcy at all costs and consider alternative cost-saving measures during the negotiation process. Most of all, both unions and government employers should use Vallejo as a cautionary tale of the need to keep public employee salaries reasonable.

Quinnipiac University May Not Cut Women's Teams Pending Outcome of Title IX Litigation

By Nicholas J. Grello

On May 22, 2009, Judge Underhill of the U.S. District Court for the District of Connecticut granted the plaintiffs in a sex discrimination lawsuit a preliminary

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injunction to bar Quinnipiac University from eliminating its women's varsity volleyball team. The complaint in *Biediger v. Quinnipiac University*, filed in April, alleges that Quinnipiac's proposal to cut the team violates Title IX of the Education Amendments of 1972, a federal law that provides in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The plaintiffs, who are student-athletes, the team's coach, and the mother of an incoming freshman, further claim that Quinnipiac has continually violated Title IX by failing to offer athletic participation in proportion to male-to-female enrollment.

Quinnipiac argued that the volleyball players would not be irreparably harmed by the elimination of their team for one season pending the outcome of the Title IX litigation, because the university would honor the students' scholarships in the meantime, and because the students could transfer to another Division I school that offers women's varsity volleyball should the university ultimately prevail.

The court was unpersuaded, finding instead that because student-athletes compete for a short period of time each school year, they could lose their competitive edge by being forced to sit out even a single season.

"The university's practice of setting "floors" to create minimum rosters does not establish genuine participation opportunities for women."

The court also found that the plaintiffs are likely to succeed on the merits of their claim that Quinnipiac has failed to offer both males and females intercollegiate level participation opportunities in numbers that are substantially proportionate to their respective enrollments.

In so finding, the court rejected Quinnipiac's argument that the university could comply with Title IX by simply eliminating men's golf and men's track along with women's volleyball, while elevating women's cheerleading to a varsity sport. However, the court remarked that plaintiffs were *unlikely* to succeed in proving that competitive cheerleading is *not* a valid competitive sport for the purposes of Title IX. The court also commented that Quinnipiac may be able to "triple count" women's track since it encompasses the distinct sports of cross country, indoor track, and outdoor track.

For the purposes of this motion, however, the court found Quinnipiac unlikely to satisfy Title IX's substantial proportionality requirement, stating that the university's practice of setting "floors" to create minimum rosters does not establish genuine participation opportunities for women.

At this point, the court has only ordered Quinnipiac to refrain from cutting or scaling back any women's varsity teams for the duration of the litigation. The plaintiffs have yet to establish the merits of their claims that Quinnipiac would violate the gender equity requirements of Title IX by eliminating women's volleyball, or that the university has continually failed to provide equal athletic opportunity to its female students.

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msantiago@siegeloconnor.com.