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Decisions Featured in This Issue:

United Educators

U.S. Court of Appeals for the Ninth Circuit

A College's Nonrenewal of a Contract May Be an Adverse Employment Action for a Title IX Retaliation Claim

The Ninth Circuit clarifies that the nonrenewal of an expired employment contract could constitute an adverse employment action — even if the employer is under no legal obligation to renew it — because the refusal to renew could deter a reasonable employee from reporting discrimination.

GOLF COACH ALLEGES HIS EMPLOYMENT CONTRACT IS NOT RENEWED IN RETALIATION FOR REPORTING TITLE IX VIOLATIONS

Between 2006 and 2016, Bennett MacIntyre was employed as head coach of Carroll College's golf team on a stipend basis. In 2016, while also serving as Associate Athletics Director, MacIntyre complained to the Director of Human Resources and Title IX coordinator about possible gender inequity in the athletics department in violation of Title IX and alleged workplace harassment, hostile work environment, and discrimination involving the interim athletics director and the college's President.

A month later, after receiving a poor performance review from the interim athletics director, MacIntyre filed a formal grievance restating his prior allegations. As part of the resolution of his grievance, the college agreed to hire him as a full-time golf coach under a two-year employment contract, effective from July 1, 2016, to June 30, 2018. The agreement didn't discuss renewal.

In 2017, the college began to experience budget problems, resulting in a proposal from the new Athletics Director for a $200,000 cut in the department budget, including a recommendation to make golf coach a stipend-only position. The board of trustees' budget committee adopted the recommendations; this resulted in a significant pay cut and loss of some benefits for MacIntyre.

After learning his contract wouldn't be renewed, MacIntyre filed another grievance, alleging his contract nonrenewal was in retaliation for his prior complaints about Title IX violations.

MacIntyre's lawsuit in federal district court in Montana asserted a single cause of action for retaliation under Title IX. After discovery, the college moved for summary judgment on various grounds. The district court granted summary judgment, finding that the nonrenewal of the employment contract was not an adverse employment action and, therefore, MacIntyre failed to allege a *prima facie* case of retaliation under Title IX. MacIntyre appealed the decision to the Ninth Circuit Court of Appeals.

DISCRETIONARY DECISIONS BY A COLLEGE MAY RISE TO THE LEVEL OF AN ADVERSE EMPLOYMENT ACTION

In reviewing *de novo* the district court's granting of summary judgment, the Ninth Circuit articulated the elements of a retaliation claim under Title IX, which is the same framework it applies to decide retaliation claims under Title VII. A plaintiff who lacks direct evidence of retaliation must first make a *prima facie* case by showing the following occurred:

- He engaged in protected activity.
- He suffered an adverse action.
- There is a causal nexus between the two.

Once a plaintiff has made this showing, the defendant must articulate a legitimate, non-retaliatory reason for the challenged action. If defendant does so, then plaintiff must show the reason is pretextual.

Applying this framework, the Ninth Circuit determined the district court erred in concluding the nonrenewal of MacIntyre's two-year contract was not an adverse employment action even though the contract contained no right to renewal. In contrast to due process claims, employment actions can be adverse in retaliation claims, even if they relate to purely discretionary decisions; the action does not need to rise to the level of an entitlement.

In an opinion for publication, the court held that even if the employer is under no legal obligation to renew an employment contract, its decision to nonrenew may be an adverse employment action because it is reasonably likely to deter an employee from reporting discrimination.

The court remanded the case to the district court to rule on the college's alternative grounds for summary judgment, including the following:

- Inadequate pleading of protected activity
- A lack of causal link between any alleged protected activity and the nonrenewal of MacIntyre's employment contract
- A failure to bring forward evidence that the college's legitimate, nondiscriminatory reason for the nonrenewal was pretextual

THE BOTTOM LINE

In this decision, the Ninth Circuit expands on an already broad body of case law regarding what can constitute an "adverse employment action" in a retaliation case. The standard in a retaliation case (conduct "reasonably likely to deter an employee from engaging in protected conduct") is lower and easier to satisfy than in a discrimination case, which requires a materially adverse change in the terms of employment (such as termination, demotion, salary reduction, or promotion denial). Because even simple workplace slights might qualify as an adverse employment action in a retaliation case, UE is seeing more litigation and potential liability involving retaliation claims under Title VII or Title IX.

MacIntyre v. Carroll College, 48 F.4th 950 (9th Cir. Sept 8, 2022).

RELATED UE RESOURCES

- Guide to Preventing Retaliation on Campus
- Title IX and Collegiate Athletics Under the Biden Administration

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Program Eliminations and Associated Faculty Terminations Do Not Violate College's Internal Procedures

Academic institutions facing declining enrollments must implement difficult cost-cutting measures, which sometimes include eliminating unprofitable programs. A recent New York appellate decision emphasizes the importance of clearly worded processes for terminating faculty affected by program eliminations.

DECLINING ENROLLMENT PROMPTS PROGRAM ELIMINATIONS AND TERMINATION OF ASSOCIATED FACULTY

The College of Saint Rose, an independent college in Albany, N.Y., ran a recurring and growing deficit for years due to decreasing enrollment. The college initially bridged the gap by drawing down its cash reserves. By the 2019-20 academic year, those reserves were depleted, and the college began drawing from its unrestricted endowment funds to pay operating expenses. This was unsustainable. Although numerous cost-cutting efforts — including freezing salaries, eliminating over 50 staff positions, and furloughing staff — achieved about $8 million in anticipated savings, the college also sought to further reduce costs by eliminating academic programs.

The college's faculty manual governs its retrenchment process and provides that tenured faculty can be terminated "under extraordinary circumstances, because of necessary program reductions" and sets forth a preference system for retaining faculty when a program is eliminated, stating: "If faculty in the eliminated program must be laid off, preference will be given to retaining faculty according first to tenure, then to seniority at the College, and then to rank. Any variation due to special needs and circumstances must be clearly demonstrated."

Consistent with the requirements of the faculty manual, the college's President advised the Representative Committee of the Faculty ("RepCom") that the board of trustees had directed it to review the college's academic programs and identify reductions that would result in $6 million in savings. A RepCom working group reviewed voluminous financial data, enrollment data, and reports each academic department prepared.

At the time, the Music department offered four degree programs: a B.A. in Music, a B.S. in Music Education, a B.M. in Music Performance, and a B.S. in Music Industry. During the working group's review, the Music Industry program submitted a proposal, separate from the department's report, that recommended new degree offerings to enable the Music Industry program to continue without relying on the "core" music courses offered by the department and in the absence of the other music programs.

The working group's report subsequently recommended eliminating 25 undergraduate and graduate programs, 33 full-time tenure and tenure-track faculty positions, and eight visiting faculty positions, with a projected savings of $5.9 million. The recommended changes, which were reviewed and accepted by the board of trustees, preserved only the Music Industry program.

As a result of the discontinuance of the other three Music department programs, 10 full-time and three visiting faculty positions were eliminated from the department and all tenured, tenure-track, and visiting faculty who were not part of the Music Industry program either opted to retire or received notices of layoff. The layoff notices issued Dec. 8, 2020, were to take effect one year later and were issued based on the college's interpretation that the faculty manual preference system applied on a program-by-program basis and not on a department-wide basis.

When several faculty members challenged their terminations, the college's Faculty Review Committee conducted informal hearings and issued a report to the President, finding the college had not appropriately applied the preference rule the faculty manual articulated and that the college had assumed more senior faculty in the department who were not currently teaching in the Music Industry program were unqualified to do so. The President rejected many of the recommendations and upheld the faculty terminations.

Four faculty members laid off because of the music program eliminations filed suit in New York Supreme Court against the college and its President, asserting their terminations violated their employment contracts and that the faculty handbook's preference system should have been interpreted to apply department-wide, not program-wide.

The Supreme Court granted the faculty members' request to annul the college's decision to terminate them, holding that the college violated the faculty manual by applying the preference system program-wide rather than department-wide and, therefore, the termination decisions were arbitrary and capricious and in violation of a state law enabling them to challenge termination decisions. The court thus restored the faculty to the status they enjoyed before receiving their layoff notices.

LOWER COURT ERRED BY SUPPLANTING JUDGMENT OF COLLEGE WITH ITS OWN

On appeal to the New York Supreme Court, Appellate Division, the college argued the lower court erred because it had "substantially complied" with its internal rules in making its determination to eliminate faculty positions. The applicable standard in New York requires courts to evaluate only whether the college substantially complied with its internal rules and whether its decision was arbitrary and capricious or made in bad faith. Applying this standard, the appellate court found there was substantial compliance because there were "no procedural rule violations."

It also found the lower court did not give appropriate deference to the college's interpretation of the termination preference provision and explained that the arbitrary and capricious test chiefly relates to whether a particular action — in this case, application of the rule setting the order of preference for retaining faculty when a program is eliminated — is supported by a rational basis. The college argued its application of this rule on a program-wide basis rather than on a department-wide basis was consistent with the plain language of the faculty handbook. It further argued the rule necessarily functioned this way because not all faculty members in one department are qualified to teach courses in every program that falls within that department (for example, a French professor likely can't teach a German class). The appellate court agreed, explaining the plain language of the rule states that "[i]f faculty in the eliminated program must be [terminated], preference will be given to retaining the faculty according first to tenure, then to seniority at the College, and then to rank." Because the term "program" was used throughout the relevant sections of the faculty manual, the court found the college's actions were supported by a rational basis.

THE BOTTOM LINE

When an institution's finances require a program elimination and faculty retrenchment, a school's decisions should be informed by a careful analysis of its internal rules. However, at least in New York, courts will give significant deference to an institution's interpretation of its own internal rules if there is a rational basis underpinning that interpretation.

Matter of Hansbrough v. College of Saint Rose, No. 534551, New York Sup. Court, App. Div. (3rd Dept. Oct. 20, 2022).

RELATED UE RESOURCES

- Guide to Manage Risks Associated With Program Change
- Checklist: General Planning for All Program Changes
- Checklist: Program Reduction or Discontinuance

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School Board's Denial of Facilities Access Did Not Violate Constitutional Rights of Religious Nonprofit Organization

The facilities of local school districts are often utilized by community organizations and other groups when not in use. When a local school board denied access for an after-school program, the organization asserted constitutional violations. The appellate court rejected the imposition of municipal liability on the school board, holding that the Superintendent lacked the requisite final policy making authority necessary to subject it to liability.

ORGANIZATION RUNS AFTER-SCHOOL PROGRAM WITHOUT PAYING FACILITIES USE FEE

For nearly a decade, Chabad Chayil, a nonprofit organization that runs programs for the Jewish community in Miami-Dade County, operated an after-school program at two local schools — the Community Hebrew Afterschool Program (CHAP). Initially, Chabad requested use of Miami-Dade County Public Schools (MDCPS) facilities, completed the forms provided by a school principal, and received approval from MDCPS. When CHAP transitioned from a part-time to full-time program in 2010, the Principal provided it with a different form than previous years: An application for a temporary use agreement (TUA).

MDCPS policy allows school administrators to approve the temporary use of school facilities for certain non-school programs. The facilities' renter must submit a TUA and prepay rental fees unless MDCPS officials waive the fee. Such a waiver only can occur if the MDCPS meeting or program is open to the public and offered for free. Chabad alleged MDCPS never communicated the fee waiver policy to it, nor communicated that it could charge fees to its students and in turn pay rental charges to MDCPS. Chabad also contended the principals requested the fee waivers for CHAP, and it was unaware its use of MDCPS facilities for free was contingent upon CHAP being offered for free. Chabad, however, continued to receive fee waivers annually until 2019.

In 2017, Miami-Dade County's Office of the Inspector General (OIG) received and began investigating an anonymous complaint that Chabad, a religious organization, had gained access to MDCPS facilities for free by fraudulently filing paperwork with MDCPS indicating it does not collect funds for its services.

During the pendency of the investigation, Chabad continued using school facilities for free. However, after the OIG published its final investigative report in September 2019, finding Chabad made misrepresentations on its TUAs, MDCPS formally denied Chabad's TUA and banned Chabad from further use of MDCPS facilities. Chabad subsequently sued, asserting claims for violations of its First Amendment right to free expression and to free exercise of religion, its Fourteenth Amendment equal protection and procedural due process rights, and its rights under the Florida Constitution and other state laws.

The district court granted MDCPS' motion to dismiss as to all federal causes of action and declined to exercise supplemental jurisdiction over the state law claims. It also denied Chabad leave to further amend its complaint, finding its request both procedurally deficient and lacking in substantive support. Chabad's appeal to the Eleventh Circuit followed.

SUPERINTENDENT DOES NOT HAVE FINAL POLICYMAKING AUTHORITY SUFFICIENT TO IMPOSE LIABILITY ON SCHOOL BOARD

Both MDCPS and the OIG are agencies of a political subdivision that may be sued for constitutional violations pursuant to 42 U.S.C. §1983. MDCPS only can be held liable where the alleged unconstitutional action implements or executes a policy, ordinance, regulation or decision officially adopted and promulgated by that governmental body's officers. Pursuant to the Supreme Court's decision in *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658 (1978), a plaintiff can establish liability for constitutional violations by governmental entities by identifying either:

- An official policy
- An unofficial custom or widespread practice such that it constitutes a custom
- A municipal official with final policymaking authority whose decision violated the plaintiff's constitutional rights

Chabad asserted that the decision by MDCPS not to permit the use of its facilities violated Chabad's constitutional rights, the Superintendent made this decision, and he had the requisite final policymaking authority over school-facility usage. The Eleventh Circuit has consistently recognized, however, that a municipal officer doesn't have final policymaking authority over a particular subject when that official's decisions are subject to meaningful administrative review.

Here, while accepting as true Chabad's allegations in its review of the motion to dismiss ruling, the court rejected Chabad's "conclusory" assertion that the Superintendent had "unreviewable" authority over school property and, after analyzing Florida's statutory scheme in relation to public schools as a whole, concluded that nearly every provision undermined Chabad's contention that the Superintendent had *Monell*-qualifying final policymaking authority. Rather, because the school board retains the ultimate authority to review and reverse any of the Superintendent's decisions, the court held that the school board is the "final policymaking authority." Accordingly, the Eleventh Circuit affirmed dismissal of Chabad's constitutional claims and the denial of Chabad's request to file a second amended complaint.

THE BOTTOM LINE

Although the Eleventh Circuit's decision in this case analyzes a state's statutory framework, its *Monell* analysis regarding the policymaking authority of a school district Superintendent is universally applicable to public K-12 schools, depending on the applicable state's statutory framework. Public institutions of higher education also should be clear in designating who has ultimate responsibility and decision-making authority to enact institutional policy.

Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cnty., 48 F.4th 1222 (11th Cir. Sept. 8, 2022).

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