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AUTHOR Sorenson, Gail Paulus; Mawdsley, Ralph D.
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ABSTRACT

This chapter covers the nearly 250 cases reported in 1987 involving precollegiate public-sector employees. Those cases where purely procedural issues are involved are omitted, and procedural issues in the remaining cases are deemphasized. Although no United States Supreme Court cases in 1987 related to school employees, those from prior years are mentioned if necessary for an understanding of current cases. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains a large number of cases, with many revolving around the issue of board compliance with district and state policies. Legal issues covered by the review include the following: (1) discrimination in employment by race, sex, age, or handicap; (2) substantive constitutional rights including freedom of speech and association, along with issues of privacy and substantive due process; (3) procedural process; (4) issues of dismissal, nonrenewal, demotion, and discipline (for insubordination, unprofessional conduct, immorality, or incompetence); (5) reduction in force and involuntary leaves of absence; (6) contractual disputes; (7) tenure; and (8) certification, decertification, revocation, and suspension. (MLH)

EMPLOYEES

Gail Paulus Sorenson and Ralph D. Mawdsley*

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INTRODUCTION

This chapter covers the nearly 250 cases reported in 1987 involving precollegiate, public-sector employees. The review excludes only those cases analyzed in other sections of the *Yearbook*—tort and collective bargaining cases—and criminal cases. Those cases where purely procedural issues are involved also are omitted, and procedural issues in the remaining cases are deemphasized. Unlike the last few years, 1987 saw no Supreme Court cases related to school employment; however, where Supreme Court cases from prior years were necessary for an understanding of current cases, they were mentioned. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains a large number of cases, with many revolving around the issue of board compliance with district and state policies.

DISCRIMINATION IN EMPLOYMENT

Allegations of employment discrimination can be based on a number of factors, with the most egregious types of discrimination being forcefully prohibited by federal law. Title VII of the Civil Rights Act of 1964[1] is the preeminent statute concerning employment discrimination. It prohibits both public and private institutions from discriminating based on race, color, religion, sex, and national origin. Sex discrimination is further prohibited by title IX of the Education Amendments of 1972,[2] which protects employees and others associated with those educational institutions that receive federal aid. Gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3]

Federal law also protects "otherwise qualified handicapped individuals" from the discriminatory actions of federally aided employers under a statute known as section 504 (Rehabilitation Act of 1973).[4] Age

1 42 U.S.C. § 2000 *et seq*
2 20 U.S.C. § 1681 *et seq*
3. 29 U.S.C. § 206(d)(1)
4 20 U.S.C. § 794 *et seq*

discrimination is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA), which protects workers age forty and over. And those discriminated against because of alienage are protected by a civil rights statute known as section 1981.[5]

Employment discrimination is also prohibited by a wide variety of state laws, some of which overlap considerably with federal provisions, and some of which go substantially beyond what federal law requires. State and federal constitutional provisions may also be useful to employees alleging discrimination, especially where federal and state statutory law is silent regarding the particular basis for the alleged discrimination. For example, the fourteenth amendment to the United States Constitution was used as the basis for a claim of discrimination where a licensed teacher, whose probationary appointment previously had been terminated, was not rehired by his former district.[6] The implicit allegation that the former employee was discriminated against relative to other potential employees did not amount to a constitutional violation: the school board's directive not to rehire those who had previously failed in their probationary appointments was said to be "rational." In another interesting case, a teacher sought on equal protection grounds to be released from a teaching contract with one school district so he could contract with another district in the same state. State statute prohibited school districts contracting with teachers under contract to another district. In denying the teacher's claim, the court found rational the district's refusal to release the plaintiff, even though it had done so for three other teachers, because "the district has a right to receive services from a teacher of the same quality as those given by the plaintiff."[7]

The above case also illustrates the most lenient standard of review in equal protection cases—the rational relationship test, a standard of review that is applicable when the alleged discrimination is not based on race, alienage, or national origin (which requires a compelling state interest), or gender (which requires a substantial relationship to an important governmental objective).

In a case that illustrates how state law can be combined with principles developed under federal law, a teacher-applicant alleged that he was discriminated against based on marital status (his wife was a teacher in the same school to which he applied).[8] While the district's nepotism policy was held discriminatory on its face, the applicant did

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5 42 U.S.C. § 1981.

6 Lombard v. Board of Educ., 645 F. Supp. 1574 (E.D.N.Y. 1986).

7 Straver v. Rensen-Union Community School, 668 F. Supp. 1275, 1277 (N.D. Iowa 1987).

8 Johnson v. Bozeman School Dist., 734 P.2d 20 (Mont. 1978).

not make out a prima facie case of discrimination.[9] When standards developed under title VII were applied, the applicant did not prove he was qualified for the position (he had a four rating on a one-to-five scale, and the district had never hired anyone with less than a two rating). The standards applied in the case were developed by the Supreme Court in *McDonnell Douglas Corporation v. Green*,[10] which requires complainants to show that they are members of a protected class, that they applied for and were qualified for the position, that they were rejected despite being qualified, and that the position remained open to persons of comparable qualifications.

Occasionally cases arise where state and federal discrimination claims may be in conflict or where state claim resolution of disputes is alleged to be dispositive of federal claims. In one case, language in ADEA that it "shall supersede any state action" was held not to prohibit a state human rights commission from attempting to stir plaintiff or his attorney into responding.[11] In two other cases, neither a referee's nor an arbitrator's decisions at the state level could be the basis for collateral estoppel[12] or *res judiciata*[13] so as to prohibit plaintiff-teachers claims under section 1983 or title VII.

Finally, two education cases involved discrimination claims and federal or state law of a more derivative nature. In one case, a federal court held that under a title VII and section 1983 sex discrimination settlement agreement back pay was subject to withholding for taxes and FICA; the portion for interest was taxable but not subject to withholding, and the portion for personal injury was not taxable.[14] In a second case a wife's teacher certification and master's degree earned during marriage were assets entitling the husband to a portion of the wife's pension.[15]

Race

In a decision that tracked the 1986 Supreme Court decision in *Wygant v. Jackson Board of Education*,[16] the Seventh Circuit ruled that

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9 For a case where marital status claim based on nepotism was successful under state law, see Hulet v. Bozeman School Dist. No. 7, 740 P.2d 1132 (Mont. 1987).

10 411 U.S. 792 (1973).

11 Mares v. Santa Fe Pub. Schools, 743 P.2d 110 (N.M. 1987).

12 Salida School Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987).

13 Kirk v. Board of Educ. of Bremen Community High School Dist. No. 228, 811 F.2d 347 (7th Cir. 1987).

14 Melani v. Board of Higher Educ. of City of N.Y., 652 F. Supp. 43 (S.D.N.Y. 1986).

15 McGowan v. McGowan, 518 N.Y.S.2d 346 (Sup. Ct. 1987).

16 106 S. Ct. 1842. See *The Yearbook of School Law 1987* at page 3 for a discussion of this case.

a collective bargaining agreement that protected black teachers from layoffs until their percentage in the work force reached the percentage of black students was not narrowly tailored.[17] "In light of *Wygant*, it is clear that a court may only uphold an affirmative action plan that is adopted by a public employer, and challenged under the [e]qual [p]rotection [c]lause, if the court first determines that the employer adopted the plan to achieve a 'compelling purpose.'"[18] According to the court, the plan was not narrowly tailored because it created an absolute preference for black teachers at the expense of white teachers, which forced the latter to bear too great a burden. The plan, therefore, violated the fourteenth amendment rights of the white teacher-plaintiffs.

Black teachers were unsuccessful in several employment discrimination cases reported in 1987. A black teacher who was not hired for a high school teaching position was unable to prove discrimination when the district showed the applicant selected had more teaching experience than the plaintiff, a valid nondiscriminatory reason for the selection.[19] Another valid nondiscriminatory reason can be seen in a case where a district declined to rehire two former black teachers who were not renewed following a strike (in which they had participated).[20] The district hired instead a white teacher who was clearly more qualified and another white teacher who was equally well-qualified and who had not participated in a strike against the district. A black teacher whose teaching contract was nonrenewed at the end of his second year failed to prevail in his section 1983 action when race was not found to be "a determining factor" in his nonrenewal (reasons given were parental concerns and lack of care of band equipment).[21]

While general allegations of race discrimination will not support a claim for employment discrimination, especially in light of affidavits from a majority of the defendants (several of whom were black) that their decision to fire a black teacher was based only on the evidence,[22] neither can needed evidence be shielded from a court. In a case where a black assistant principal was passed over four times by white applicants for a principalship, a court ruled that employment files must be opened if a pattern or practice of racial discrimination might be revealed.[23] The history of hiring patterns may be important in establishing race

17 Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir. 1987)
18 *Id.* at 773
19 Boudreaux v. Helena-West Helena School Dist., 819 F.2d 854 (8th Cir. 1987)
20 Daniels v. Board of Educ., 805 F.2d 203 (6th Cir. 1986)
21 Tyler v. Hot Springs School Dist., No. 6, 827 F.2d 1227 (8th Cir. 1987)
22 Lee v. Albemarle County School Bd., 648 F. Supp. 744 (W.D. Va. 1986)
23 Dixon v. Sanderson, 728 S.W.2d 878 (Tex. Ct. App. 1987)

discrimination. In one case a black carpenter employee of the board of education, who scored slightly lower in a civil service exam than a white employee chosen for an administrative position, but who had a college degree and teaching certificate and who had completed a management course (none of which the white employee had), was successful in proving race discrimination because of a serious history of racial imbalance in his division and because of disregard of an affirmative action mandate.[24]

Sex

A federal court of appeals held that a school district violated the Equal Pay Act when it paid female coaches less than male coaches.[25] After examining the federal provision that employees must receive equal pay for work requiring equal "skill, effort, and responsibility," the court determined that the Act was not intentionally violated and so denied backpay to the female coaches. In another case, a state court, referencing the federal Equal Pay Act, found no violation under the state Human Rights Act when a female coach who had coached junior and senior high volleyball teams was paid disproportionate to those coaching boys' sports.[26] Not only did plaintiff not prove that the different jobs required "equal skill, effort and responsibility" but the fact that men occasionally coached women's sports, and vice versa, indicated the pay differentials "were based not on the sex of the coaches but rather on the sex of the participants . . . [which] is a valid basis for a disparity in coaching salaries." However, a female coordinator not promoted to assistant principal who was able to prove under title VII and section 1983 that her jobs, salary, and salary range were set below those of men for comparable tasks and responsibilities and who was able to prove retaliation, was able to recover back pay and damages against the individual administrators and the school board.[27] Another physical education teacher-coach was held not a victim of sex discrimination when her appointment as head high school football coach was later rescinded.[28] The court said that "technically a vacancy existed," but "no actual vacancy existed" because the previous coach had been led by the principal and the deputy superintendent to believe that he would remain in the position for three years. In the court's opinion the case illustrated

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24 Richards v. New York City Bd. of Educ., 668 F. Supp. 259 (S.D.N.Y. 1987)

25 EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987)

26 McCullar v. Human Rights Comm'n, 511 N.E.2d 1375, 1383 (Ill. App. Ct. 1987)

27 Kitchen v. Chippewa Valley Schools, 825 F.2d 1004 (6th Cir. 1987)

28 Oates v. District of Columbia, 647 F. Supp. 1079 (D.D.C. 1986), *aff'd*, 824 F.2d 87 (D.C. Cir. 1987)

sloppy procedures, possibly violating a collective bargaining agreement, but did not amount to sex discrimination. In another case with an interesting fact situation a female teacher not hired for a newly opened third grade position was unsuccessful in her claim under the Pregnancy Discrimination Act because at the time the administrators decided not to reemploy plaintiff, she did not know she was pregnant.[29]

An additional case was remanded for a determination as to whether the retroactive application of a collective bargaining agreement limiting the seniority credit earned during maternity leave was discriminatory.[30] Women guidance counselors in New York City were successful in certifying a class of women to challenge alleged discriminatory practices in the process of promotion to supervisory and administrative positions.[31] In a title VII reverse discrimination case a male was unsuccessful in his claim that a female was hired because of an affirmative action plan rather than because of her better qualifications.[32] In another title VII case a nontenured female teacher was successful in rebutting the school administrator's reasons for nonrenewal because the court considered the administrator's testimony "evasive and contradictory."[33]

Two final cases suggest the difficulty of burden of proof under title VII. In one case, a female teacher was successful under title VII when she was discharged for two acts of insubordination with relation to her supervisor's conservative dress code ("Brooks Brother" look) by wearing excessive makeup.[34] In a second case, a female plaintiff failed in her sex discrimination claim with regard to one position when all members of the selection committee rated the male candidate more highly, and she failed in her retaliation claim with regard to a second position filled by another female because of the superiority of the candidate in experience and understanding of the relationship between curriculum development and staff development.[35]

Only two cases involving national origin were reported, and only one dealt with substantive matters. In the more significant case, a teacher transferred to another school because of her vocal support for

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29 Todhunter v Cullman County Comm'n on Educ , 665 F Supp 890 (N D Ala 1987)

30 Carlson v North Dearborn Heights Bd of Educ , 403 N W 2d 598 (Mich Ct App 1987)

31 Selzer v Board of Educ , 112 F R D 176 (S D N Y 1986)

32 McQuillen v Wisconsin Educ Ass'n Council, 830 F 2d 659 (7th Cir 1987)

33 Tye v Board of Educ of Polaris Joint Vocational School Dist , 811 F 2d 315, 320 (6th Cir 1987).

34 Wislocki-Gain v Mears, 831 F 2d 1374 (7th Cir 1987)

35 Yatrin v Madison Metro School Dist , 653 F Supp 945 (W D Wis 1987)

Hispanic students prevailed against the school board's motion for summary judgment. The court considered it irrelevant whether plaintiff considered herself a "white Hispanic" rather than "nonwhite Hispanic" because "[w]hat matters is whether defendants discriminated against plaintiff because of her 'ethnic characteristics,' as opposed to her country of origin [Cuba]."[36] In a less significant decision, a plaintiff who had lost a title VII action for national origin discrimination did not have to pay attorney's fees when the OCR had found that probable cause for discrimination existed.[37]

Age

The Eleventh Circuit remanded a case where bus drivers had been forced to retire at age sixty-five, in order to determine the feasibility of testing older employees individually for their ability to drive safely.[38] Applying a test developed by the Supreme Court in *Western Airlines v. Criswell*,[39] the court said that employers must demonstrate, first, the existence of job qualifications reasonably necessary to accomplish the business purpose and, second, that the employer is compelled to rely on age as a proxy determinant to assess a safety-related job qualification. Because the second prong was not demonstrated in this case, remand was necessary. In a case decided under a state law prohibiting discrimination "between the ages of forty and seventy inclusive" a school bus driver discharged on reaching his seventieth birthday prevailed because the employer had no factual basis for believing all persons within the class would be unable to perform the job safely or efficiently.[40]

Handicap

The leading case in this category decided by the United States Supreme Court is *School Board of Nassau County, Florida, v. Arline*[41] where an elementary teacher who had been hospitalized in the past for tuberculosis had a "record of impairment" within the Handicapped Act and was therefore a handicapped person. In including contagious diseases within the scope of the Act, the Court observed: "The fact that *some* persons who have contagious diseases may pose a serious health

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36. Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987).
37. *In re* Ruben, 825 F.2d 977 (6th Cir. 1987).
38. Childers v. Morgan County Bd. of Educ., 817 F.2d 1556 (11th Cir. 1987).
39. 472 U.S. 400 (1985).
40. Montour School Dist. v. Commonwealth of Pa. Human Relations Comm'n, 530 A.2d 957 (Pa. Commw. Ct. 1987).
41. 107 S. Ct. 1123, 1130 (1987).

threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases."

Section 504 was applicable to a case where a school bus driver who had undergone bypass surgery had his license revoked.[42] He believed that corrective surgery, rehabilitation, and a stress test proved he was "otherwise qualified." The case was remanded for a determination as to whether the driver was an appreciable safety risk and whether individual assessment of risk through stress tests and/or other medical tests would present an "undue burden" or were, instead, required "accommodations."

Another employee brought suit under a state human rights law when he was denied an extension of his provisional license as an ESL teacher (allegedly because he had multiple sclerosis—which is typically an intermittently disabling or benign condition).[43] By its determination that an older definition of "disability" applied to the case, the court was able to reverse the state division of human rights and the education commissioner's determinations that the provisional license should be renewed. Because the condition was not a disability under the applicable law, there had been no authority to decide whether the candidate was able to teach despite his condition. However, in another case decided under the same state human rights law a school bus driver discharged as medically unfit because she had multiple sclerosis was ordered reinstated, paid backpay, and awarded $5,000 for mental anguish.[44] The court accepted the testimony of plaintiff's physician that the disease is not a danger to bus driving because symptoms come on gradually over a one-to-two week period.

Finally, recovery under section 504 depends on whether the complainant is "otherwise qualified" to perform the work. Thus a teacher terminated while hospitalized for mental and physical problems and who testified she would not be able to work in the foreseeable future, had no section 504 remedy because she was not able to perform the job in question with reasonable accommodation.[45]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

The constitutional rights that are the subject of this section include the first amendment rights of freedom of speech, freedom of association

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42. *In re* Stober, 524 A.2d 535 (Pa. Commw. Ct. 1987).

43. New York City Bd. of Educ. v. Division of Human Rights, 515 N.Y.S.2d 543 (App. Div. 1987).

44. Bayport-Blue Point School Dist. v. State Div. of Human Rights, 517 N.Y.S.2d 209 (App. Div. 1987).

45. Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987).

(an implicit right), and free exercise of religion, the right to privacy, and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion—i.e., the right to substantive due process under the fourteenth amendment (where state government is concerned) or under the fifth amendment (where the federal government is concerned). Although there are fewer cases in this section than last year, cases on free speech predominate, as is usual.

Speech

Employees sometimes attempt to claim a right to freedom of speech when it is really their conduct or its effect that is the subject of dispute. A case that illustrates this type of allegation occurred after a tenured teacher was fired for showing in her class an uncut "R" rated movie which contained violence and nudity.[46] The court held that the teacher's actions could not be held "expressive or communicative," making the first amendment inapplicable. A situation that appears even less a matter of communication involved a tenured teacher's claim that his refusal to perform hall duty was protected by his right to free speech or academic freedom under the state constitution.[47] Instead of upholding the dismissal purely on the grounds of insubordination, the court unanimously stated that the teacher's speech was not a matter of public concern under the *Connick* doctrine.[48]

Even where speech activities of the employee might appear more likely to be the subject of retaliatory action, employees will not be successful if it is clear that the adverse employment action was motivated entirely or largely by other factors. A case illustrating this principle concerned a school librarian, whose poor performance of newly assigned duties as audio-visual coordinator, and *not* the grievance she filed concerning these new duties, was the reason for her nonrenewal.[49] Although filing a grievance was held to be protected first amendment activity, in general, it was not a substantial or motivating factor in this case. Similarly, a probationary teacher and president of the state teachers' association presented insufficient facts to demonstrate that her nonrenewal, as part of a reduction-in-force, was based on her

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46 Fowler v. Board of Educ., 819 F.2d 657 (6th Cir. 1987).

47 Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986).

48 *See* Connick v. Meyers, 461 U.S. 138 (1983), where it was held that an employee's speech, in order to receive first amendment protection, must first be determined as a matter of law to be on a subject of public concern.

49 Robinson v. Lebanon City School Dist. Bd. of Educ., 503 N.E.2d 541 (Ohio Ct. App. 1985).

association or speech activities.[50] A "naked and unsupported statement of opinion" that she was not renewed because of her husband's support of a tax reduction and her own union activities would not suffice.

Among employees who successfully asserted free speech claims was a high school principal who was not rehired because he criticized the superintendent's treatment of the principal's wife, a high school English teacher active in union affairs.[51] Under *Connick*, it was held that, as a matter of law, the principal's speech was a matter of public concern as evidenced by substantial community involvement in the issue of Mrs. Lewis' proposed transfer to the junior high school and by the transfer's motivation—her union activities. Because the speech was not only a substantial or motivating factor, but was the sole factor for the principal's nonrenewal, it violated the first amendment. Significantly, the court also held that the individual board members and school officials involved were not entitled to qualified immunity because they violated clearly established constitutional rights of which a reasonable person would have known.[52] Involvement with a union as a form of free speech led a federal appeals court to accord nonrenewed probationary teachers limited access to the personnel files of forty-five probationary teachers who had been renewed to determine whether the school district's reasons for nonrenewal were pretextual and based on the teachers' active union involvement.[53]

The importance of the *Connick* doctrine is reflected in two federal appeals court decisions from separate circuits. In one, a letter from five teachers to the State Department of Education enumerating instances of failure to follow established procedures under the Education for All Children Handicapped Act was a legitimate area of public concern giving "effect to the statutory policy and established educational procedures for the welfare of handicapped children."[54] In a second case, a teacher won her suit for retaliatory discharge where she testified for plaintiffs in a suit against the school district regarding school board hiring procedures and implementation of a reading program.[55] The court found that truthfulness in trial testimony, especially when it does not criticize school officials but only describes school operations, is a matter of public concern under *Connick* and is protected speech.

In a slightly different case a principal of a middle school was vindicated when a court held that evidence existed from which a jury

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50 Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987).

51 Lewis v. Harrison School Dist. No. 1, 805 F.2d 310 (8th Cir. 1986).

52 This standard comes from Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

53 Missouri Nat'l Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 810 F.2d 164 (8th Cir. 1987).

54 Southside Pub. Schools v. Hill, 827 F.2d 270 (8th Cir. 1987).

55 Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096 (5th Cir. 1987).

could conclude that he was dismissed in retaliation for his criticism of the district's finances and the lack of trust between teachers and the board. However, the compensatory damage award was vacated because it improperly had been based, in part, on the abstract value of a constitutional right. This had been ruled inappropriate in the Supreme Court's 1986 decision in *Memphis Community School District v. Stachura*.[56]

In a federal case with free speech implications, a tenured English teacher who had been dismissed as advisor to the school newspaper was held to have third party standing under *Singleton v. Wulff*[57] to represent the students. The court's rationale was that the students' enjoyment of their first amendment rights was inextricably bound up with plaintiff's role as faculty advisor.[58]

Association

Although freedom of association is not mentioned in the first amendment, it has long been held an essential, implicit freedom. Among the cases where freedom of association was vindicated was a case where summary judgment was precluded because of the possibility that a principal's associational activity—being present with others at public meetings where school closings were considered—was a substantial or motivating factor in the decision, following her lay off, not to offer her a comparable position in the district.[59] On the other hand, a teacher who was president of the state teacher's association presented no facts to support her allegation that an adverse employment action was in derogation of her associational rights.[60]

In two cases arising out of similar sets of facts, employees, who were dismissed after a new secretary of public instruction from the opposing political power was appointed, were able to recover substantial damages.[61] In addition to protecting employees' rights of association with a political party, the courts labored to find constitutionally protected property interests to continued employment to bolster plaintiffs' claims.

Privacy

Two quite different cases involving privacy were reported this past

56 106 S. Ct. 2537 (1986)
57 428 U.S. 106 (1976)
58. Romano v. Harrington, 664 F. Supp. 675, 681 (E.D.N.Y. 1987)
59 Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987)
60 Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987)
61 Kercado-Melendez v. Aponte-Roque 829 F.2d 255 (1st Cir. 1987), Marin Plazza v. Aponte-Roque, 668 F. Supp. 63 (D.P.R. 1987).

year. In one case, a school directive that all probationary teachers submit to urinalysis was held to violate both state and federal constitutional guarantees against unreasonable searches and seizures which are "designed to protect the personal privacy and dignity of the individuals against unwarranted intrusions by the state."[62] In the second case, a school psychologist suspended for not promptly reporting suspected sex abuse was held to have no cognizable section 1983 action for violation of due process and privacy.[63] The court observed that while "the federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information," the state reporting scheme does not pose a threat to right of confidentiality as a constitutional violation; and even if there were a federal right to confidentiality, the state has a compelling interest in protecting abused children.

Substantive Due Process

Although technically, plaintiffs are not entitled to substantive due process rights under the fourteenth amendment unless they are able to show they were deprived of a liberty or property interest (see next section), one case nevertheless held that a nontenured school employee had not shown proof that his nonrenewal was "arbitrary and capricious" (typical language in substantive due process cases).[64] Nor was the dismissal of a tenured administrator violative of substantive due process rights, because the findings of a fact-finding panel were supported by substantial evidence and, thus, not arbitrary.[65] In a section 1983 action by a high school student against school officials for the sexual abuse and harassment by the high school band director, a federal court denied defendant's motion for summary judgment relying in part on *Ingraham v. Wright*[66] which the court claimed recognized "a substantive right to be free from bodily abuse" that can be remedied through section 1983.[67]

PROCEDURAL DUE PROCESS

Except in the case of emergency suspensions with pay, the Constitution requires that employees who have "liberty" or "property"

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62 Patchogue-Medford Teachers Congress v. Board of Educ., 517 N.Y.S.2d 456, 460 (N.Y. 1987)

63 Pesce v. J. Sterling Morton High School Dist. 201, 830 F.2d 789, 797 (7th Cir. 1987)

64 Housley v. North Panola Consol. School Dist., 656 F. Supp. 1087 (N.D. Miss. 1987)

65 Lee v. Albemarle County School Bd., 648 F. Supp. 744 (W.D. Va. 1986)

66 430 U.S. 651 (1977)

67 Stoneking v. Bradford Area School Dist., 668 F. Supp. 1088 (W.D. Pa. 1987)

interests must be afforded procedural due process before adverse employment actions affecting those interests are implemented.[68] Although the type of due process provided will vary with the nature and severity of the anticipated consequences, the essence of due process is notice and a fair opportunity to respond to the charges.

Before it is determined that due process is required, it must be demonstrated that the employee had a legitimate claim of entitlement to, for example, her job as a principal or his position as head football coach. An employee at will has no legitimate claim of entitlement to a position, and neither does an employee who is simply not rehired at the end of a term contract. An additional basis upon which to assert a claim to procedural due process arises when what the government is doing to an employee threatens to damage his reputation, honor or integrity, or standing in the community, particularly if it may foreclose future employment opportunities.

Liberty and Property Interests

In a classic case finding no property interest, first year probationary teachers were not rehired at the end of their contracts.[69] Property interests were also not shown in cases where a ROTC instructor had never applied for nor received the teaching certificate that might have entitled him to continuing contract status;[70] where a nontenured principal was not renewed (despite local policy suggesting a property interest),[71] where a seven-year board employee was not a "career service employee" under state law;[72] where a school custodian was a probationary employee;[73] where a teacher claimed a property right in her seniority, which was held modifiable under a collective bargaining agreement;[74] where the mere possession of a license was held not to entitle one to obtain a job,[75] where a principal's certificate was conditioned upon passing both written and oral exams;[76] and where school board records and minutes revealed inaction regarding authoriza-

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68 *See* Cleveland Bd of Educ v Loudermill, 105 S Ct 1487 (1985)

69. Grimsley v Board of Trustees, 235 Cal Rptr 85 (Ct App 1987) *See also* Housley v North Panola Consol School Dist, 656 F Supp 1087 (N D Miss 1987) (nontenured director of vocational technical center had no property right that prevented his nonrenewal)

70 Montez v South San Antonio Indep School Dist, 817 F 2d 1124 (5th Cir 1987)

71 Burk v Unified School Dist No 329, 646 F Supp 1557 (D Kan 1986)

72 Lyman v Strasburg, 647 F Supp 887 (N D Ill 1986)

73 Bonacci v Quinones, 508 N Y S 2d 42 (App Div 1986)

74. Carlson v North Dearborn Heights Bd of Educ, 403 N W 2d 598 (Mich Ct App 1987)

75 Lombard v Board of Educ., 645 F. Supp 1574 (E D N Y 1986)

76. Thomas v Board of Examiners, Chicago Pub Schools, 651 F Supp 664 (N D Ill 1986)

tion of sick days in excess of the statutory limit.[77]

Courts did find property interests in cases where a probationary teacher was dismissed during the contract year;[78] and where an elementary school principal had been reassigned to the position of media specialist/librarian and was later being considered for a position comparable to her former position.[79] In the latter case, after an examination of state law, the court concluded that statutes gave rise to a "legitimate claim of entitlement" that prevented demotion without due process to a position with less responsibility, prestige, and salary. In another case once a property right had been created under a state statute requiring that suspension, demotion, or termination be "only for cause," an employee was entitled to a hearing to determine whether "cause" existed.[80] And likewise, a teacher who has been appointed for one and a half years as a principal was entitled to a hearing as to whether his status was permanent, temporary, or substitute.[81]

Where the existence of a liberty interest was at issue, courts held that none existed where there was no evidence of public disclosure of information that could affect the employee's good name or reputation;[82] where a former principal's personnel file contained the statement that he had failed to communicate effectively with faculty;[83] and where a teacher received unsatisfactory student performance ratings.[84] In the latter case, it was also held that the former principal did have a liberty interest in an ancillary charge that he had made inappropriate sexual comments to a female student—something that, if proven, could seriously affect his good name and future employment prospects.

In a case that illustrates the importance of a name-clearing hearing, an employee was granted such when he alleged the falsity of charges that he engaged in sexual misconduct with students.[85] A federal court of appeals reversed a district court's summary judgment, ruling that allegations that the charges were false, along with a showing of potential disclosure, were sufficient to implicate a liberty interest and to necessitate a hearing:

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77 Sublette v Board of Educ of Fulton County, 664 F Supp 265 (W D Ky 1987)

78 Matthews v Harney County School Dist No 4, 819 F 2d 889 (9th Cir 1987)

79 Hatcher v Board of Pub Educ, 809 F 2d 1546 (11th Cir 1987)

80 Goudeau v Independent School Dist No 37 of Okla County, 823 F 2d 1429 (10th Cir. 1987)

81 Botti v Southwest Butler County School Dist, 529 A 2d 1206 (Pa Commw Ct 1987)

82 Bonacci v Quinones, 508 N Y S 2d 42 (App Div 1986), Noel v Andrus, 810 F.2d 1388 (5th Cir 1987)

83 Burk v Umfred School Dist No 329, 646 F Supp 1557 (D Kan 1986)

84 St Louis Teachers Union, Local 420 v Board of Educ of City of St Louis, 652 F Supp 425 (E D Mo 1987)

85 Brandt v Board of Coop Educ Servs, 820 F 2d 41 (2d Cir 1987)

Occasionally, both property and liberty claims may be actionable. In one case, a tenured principal discharged for misconduct was entitled to a jury trial on issues of defamation, intentional infliction of emotional distress, and economic harm caused by coercion to resign.[86]

Aspects of Notice

Although employees subject to adverse employment decisions often will be entitled to actual notice that is sufficient to allow the preparation of a defense, the following cases illustrate that notice will be deemed adequate if it does not prejudice the employee. Notice was held not prejudicial when the notice of the hearing also purported to immediately dismiss the employee,[87] and where written notice received more than twenty days prior to a hearing did not list the witnesses, as required by state law: the plaintiff nevertheless knew of the witnesses.[88] Likewise, a discharged school security guard who had checked "No" on his application regarding conviction for a felony had adequate notice when he knew at first meeting with his supervisor the application falsehood was at issue.[89]

A dismissed custodian was held to have received inadequate notice when it did not specify the nature of the complaint against him and when he was not given the statutory eight days to prepare a defense.[90] In another case, notice was simply not provided as required by law: notice, reasons, and witnesses were held necessary before an employee demoted as part of a reduction-in-force could be denied appointment to a position comparable to that which she had held previously.[91]

Aspects of Hearing

Hearings were held legally adequate in cases where a school board adopted the findings of a fact-finding panel (convened pursuant to state law) because the board was not holding a second hearing, nor was the plaintiff entitled to such;[92] where seven hours of recorded testimony (including witnesses for the plaintiff) effectively negated the claim that plaintiff did not have a right to be heard,[93] and where evidence showed

86 Sullivan v Board of Educ of the Eastchester Union Free School Dist , 517 N.Y.S.2d 197 (App Div 1987)

87 Combs v. Board of Educ , 498 N E 2d 806 (Ill App Ct 1986)

88 Meyers v Sabine Parish School Bd , 499 So 2d 690 (La Ct App 1986) *See also* Covert v Bensalem Township School Dist , 522 A 2d 129 (Pa Commw Ct 1987) (adequate notice was given to teacher convicted of criminal offense)

89. Loudermill v Cleveland Bd of Educ , 651 F Supp 92 (N D Ohio 1986)

90 Rudy v Board of Educ , 513 N Y S 2d 804 (App Div 1987)

91. Hatcher v Board of Pub Educ., 809 F 2d 1546 (11th Cir 1987)

92. Lee v. Albemarle County School Bd , 648 F Supp 744 (W D Va 1986)

93 Westley v. Terrebonne Parish School Bd., 656 F Supp 499 (E.D La 1987)

that a hearing officer based the dismissal decision on evidence independently assessed.[94] In the latter case, it also was held that rendering the decision within a thirty day time period was not a mandatory provision of state law. In addition, a hearing was proper where one member of a law firm represented the school district in opposing plaintiff's unemployment claim and a different member of the firm served as legal counsel to the committee that held his termination hearing;[95] where the hearing officer (also the school district attorney) had general information on the charges, but no specific facts, and there was no evidence of bias;[96] where a teacher was given an opportunity to explain his side of the facts prior to being suspended for three days;[97] and where a teacher discharged as a police officer under city charter prohibiting multiple employment was entitled only to an informal hearing since the city charter was unequivocal and nondiscriminatory.[98]

In another case, lack of documentary support for the decisions and irregularities in the hearing procedures rendered a hearing inadequate.[99] However, in the same hearing, it was held that the fact that one board member excused herself without explanation and another did embroidery throughout the hearing did not violate plaintiff's due process rights. Hearings were violative of due process in two additional cases where evidence suggested that board members were biased or had prejudged the case.[100] And in a final case, a hearing was mandated that would give the plaintiff the opportunity to respond orally and in writing in order to rebut the failure to place her in a position comparable to one she had previously held.[101]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges

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94 Combs v. Board of Educ., 498 N.E.2d 806 (Ill. App. Ct. 1986)

95 Cortes v. Western Montgomery County Vocational-Technical School, 530 A.2d 1029 (Pa. Commw. Ct. 1987)

96 Groe v. Board of Educ. of East Williston School Dist., 511 N.Y.S.2d 129 (App. Div. 1987)

97 Jones v. Board of Educ. of Township High School Dist. No. 211, 651 F. Supp. 760 (N.D. Ill. 1986)

98 Williams v. City of Pittsburgh, 531 A.2d 42 (Pa. Commw. Ct. 1987)

99 Taborn v. Hammonds, 350 S.E.2d 880 (N.C. Ct. App. 1986)

100 Ferrario v. Board of Educ., 395 N.W.2d 195 (Mich. 1986) (board's participation in investigating or accusing teacher prior to hearing suggested bias); Alabama State Tenure Comm'n v. Conecuh County Bd. of Educ., 495 So. 2d 1105 (Ala. Civ. App. 1985) (board had prejudged employee in wake of community unrest concerning performance)

101 Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987)

or penalties that may be levied when employees are subjected to many types of adverse employment actions. Not all actions that an employee may consider "adverse," however, will be covered under these statutes, policies, and contracts. For example, transfers that do not amount to a demotion (where there is less prestige, responsibility, and a lower salary), and reprimands that are placed in an employee's file, often will not be the subject of state or local provisions. Assuming that these actions implicate no liberty or property interests (or claim that procedural due process has not been afforded), state and local law will govern.

In the case of dismissal, state law usually specifies that tenured teachers may be dismissed for insubordination, unprofessional conduct, unfitness, willful neglect of duty, immorality, insubordination, incompetence, or "other good cause." While the language may vary from state to state, the grounds and procedures for dismissal will be stated in law.

Unless provided for at the state or local level, decisions not to renew an employee's contract do not require due process procedures and no reasons need be given. In the unusual case where a nontenured employee provides evidence that the nonrenewal was in retaliation for the exercise of constitutionally protected rights, or where the employee can demonstrate another liberty interest, due process will be necessary.

Because adverse employment actions, especially dismissals, can be based on a number of overlapping charges, the cases in the following sections have been grouped according to the major charge involved and generally are not repeated in other sections. As has been true for a number of years, there are more cases in the section on compliance with state and local policies than in any one other section, suggesting the need to review these policies before implementing adverse employment actions.

Insubordination

The dismissal of tenured teachers for insubordination was upheld in cases where a teacher refused to take part in hall duty (claiming a right to free speech),[102] where a male teacher refused the superintendent's directive to stop living with a male student who attended school in the district (an additional charge in this case was "conduct unbecoming"),[103] where a teacher refused to meet requirements of a remediation plan to produce reports on a specified time schedule,[104] and where a coach used

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102 Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986)

103 Weaver v. Board of Educ., 514 N.Y.S.2d 473 (App. Div. 1987)

104 de Oliveira v. State Bd. of Educ., 511 N.E.2d 172 (Ill. App. Ct. 1987)

volunteer noncertified coaches on sidelines during games contrary to school rules.[105]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

In almost all of the cases where tenured teachers were dismissed for the type of conduct considered in this section, their dismissals were upheld. Teachers in separate cases arising in New York State were dismissed for altering their students' scores on state-wide examinations.[106] Other in-class conduct for which terminations were upheld included showing an uncut R-rated movie;[107] and striking children "about the head" instead of on the "fleshy posterior" and in the presence of the principal, as required by board policy.[108] In addition, a licensed practical nurse employed at a state facility for orthopedically handicapped persons was properly fired for unauthorized use of an aversive behavior-control technique, *viz.*, spraying a client with cold water.[109] A school employee terminated and arrested for using the school phone to make nonreimbursed personal long distance phone calls did not have a claim for malicious prosecution.[110] Similarly school employees' terminations were upheld for making personal purchases using the school's tax exempt status[111] and for mismanagement of public school funds.[112] On the other hand, a teacher absent due to legitimate, involuntary illness and who had exhausted her sick leave benefits could not be terminated for willful violation of school policies.[113]

With regard to conduct outside of the educational realm, teacher dismissals were upheld for failure to pursue graduate work in English during a leave period;[114] for reporting by means of a notarized affidavit that a teacher was sick when he actually drove a coal truck from Kentucky to Ohio,[115] for improprieties with two minor students and

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105 King v. Elkins Pub. Schools, 733 S.W.2d 417 (Ark. Ct. App. 1987).

106 Carangelo v. Ambach, 515 N.Y.S.2d 665 (App. Div. 1987); Carlan v. Lawrence Union Free School Dist. Bd. of Educ., 513 N.Y.S.2d 202 (App. Div. 1987) (additional charges included insubordination, failure to prepare and grade certain tests, and neglect of duty).

107 Fowler v. Board of Educ. of Lincoln County, 819 F.2d 657 (6th Cir. 1987).

108 Shepard v. South Harrison R-II School Dist., 718 S.W.2d 195 (Mo. Ct. App. 1986).

109 Juneau v. Louisiana Bd. of Elementary and Secondary Educ., 506 So. 2d 756 (La. Ct. App. 1987).

110 Herrold v. State School for Deaf and Blind, 732 P.2d 379 (Idaho Ct. App. 1987).

111 Foderaro v. School Dist. of Philadelphia, 531 A.2d 570 (Pa. Commw. Ct. 1987).

112 Marcotte v. Acadelles Parish School Bd., 512 So. 2d 538 (La. Ct. App. 1987).

113 Equi v. Board of Educ. of Grand Rapids Pub. Schools, 412 N.W.2d 296 (Mich. Ct. App. 1987).

114 Stansberry v. Argenbright, 738 P.2d 478 (Mont. 1987).

115 Board of Educ. v. McCollum, 721 S.W.2d 703 (Ky. 1987).

inviting them to an adult party and then having them drink beer and smoke marijuana;[116] and for being convicted in the hit-and-run death of a teenager who was riding a bicycle.[117] In the latter case, it was held that evidence that the accident was a result of negligent rather than intentional action was nevertheless sufficient to support a dismissal for "conduct unbecoming" (even though the court suggested that it *might* not have been sufficient for a charge of moral turpitude). Termination of a teacher who pleaded guilty to embezzling from a corporation formed with two other teachers was upheld because the court reasoned that his continued presence in the small school system would result "in faculty disorder and an unsatisfactory learning environment."[118] A teacher's resignation with the school providing one month severance pay after pleading guilty to a theft charge was upheld as a valid contract when the teacher later withdrew the plea and the theft charge was dismissed.[119]

Nonteaching employees fared better in adverse employment actions in this section. A school secretary who left school an hour early to attend a football game with the band director, whom she was dating, was held not guilty of "flagrant misconduct."[120] Also, the conviction of a custodian for petty theft committed off school grounds was held not to provide a sufficient "rational nexus" to school duties to support dismissal, although it was sufficient to sustain a two-year suspension.[121] The last case involved several mitigating factors, including the custodian's voluntary admission of his crime, the return of the stolen property, and his good work record.

Immorality

Cases reported in 1987 overwhelmingly supported the dismissal of tenured teachers for immorality and related charges. Sexual misconduct with students continued to be a problem, as did drug-related activity. One male teacher was dismissed for fondling two elementary school students, and another was dismissed for behaving in a sexually suggestive way toward female students.[122] In the former case, the court held the effect of the teacher's conduct to be irremediable, even if the

116 Barcheski v Board of Educ of Grand Rapids Pub Schools, 412 N.W 2d 296 (Mich Ct App 1987)

117. Ellis v Ambach, 508 N Y S.2d 624 (App Div 1986)

118. *In re* Shelton, 408 N W 2d 594 (Minn Ct. App 1987)

119. Booth v Argenbright, 731 P 2d 1318 (Mont 1987)

120 OSEA v. Pendleton School Dist 16R, 736 P 2d 204 (Or Ct App 1987)

121 Waugh v Board of Educ., 350 S E 2d 17 (W Va 1986)

122 Fadler v Illinois State Bd of Educ , 506 N E 2d 640 (Ill App Ct 1987), Scott County School Dist 2 v Dietrich, 499 N E 1170 (Ind Ct App 1986)

conduct itself would not be repeated. The teacher had effectively damaged the reputation of the faculty and the district and had caused psychological harm to the students. In another case, a tenured teacher was dismissed for touching girls, initiating conversations with girls they found embarrassing, and attempting to arrange meetings with female students after school hours.[123] In a drug case, two brothers who were teachers were properly dismissed for smoking marijuana at their apartment with two teenage, female students.[124] The court held that although "[i]t was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might come to the attention of the Board . . . but have no relation to the teacher's involvement or example to the school community," in this case a "nexus" was shown.[125]

Other in-school activity supporting dismissal occurred when a fifth grade teacher used an "obscenity" (F--- Y--) in class, and when a basketball coach struck team members with a stick and a paddle, in violation of the district's corporal punishment policy, and knowingly began basketball practice prior to the official start of the season.[126] In the former case, it was held that the use of the language in question created an inappropriate role-model, violated community standards of conduct, and damaged the teacher's effectiveness (six out of twenty-four children testified that they heard the language).

Other dismissals were supported based on evidence of conviction for harassment by communication or address and a plea of nolo contendere to charges of possession of $500 worth of stolen materials used to build a house.[127] In two other cases involving immorality, courts upheld school board terminations after there had been "a blizzard of oral and written communications" on behalf of the teachers' character[128] and where a public outcry led to a teacher's "resignation" because of an alleged homosexual relationship with another teacher.[129]

Incompetence

Among several miscellaneous cases of incompetence were cases

123 Graziano v. Board of Amherst Exempted Village School Dist., 513 N.E.2d 282 (Ohio 1987).

124 Board of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986).

125 *Id.* at 840.

126 Fiscus v. Board of School Trustees, 509 N.E.2d 1137 (Ind. Ct. App. 1987); Alabama State Tenure Comm'n v. Birmingham Bd. of Educ., 500 So. 2d 1155 (Ala. Civ. App. 1986).

127 Covert v. Bensalem Township School Dist., 522 A.2d 129 (Pa. Commw. Ct. 1987).

128 Melrose Mun. School Bd. of Educ. v. New Mexico State Bd. of Educ., 740 P.2d 123, 124 (N.M. Ct. App. 1987).

129 Conway v. Hampshire County Bd. of Educ., 352 S.E.2d 739 (W. Va. 1986).

where a school librarian's poor performance of newly assigned duties as the audiovisual coordinator (rather than the grievance she filed) was the reason for her nonrenewal;[130] where a teacher failed to prepare daily written lesson plans and develop a general semester outline of courses in two week blocks;[131] where one custodian was dismissed for sleeping on a shop table while on duty[132] and another was dismissed for failure to maintain the boilers;[133] where a teacher's classroom was "littered with sunflower seeds, paper, and junk and whose classroom walls and furniture were . . . covered with graffiti;"[134] and where a teacher under state law was totally disabled and unable to work because of a work-related injury.[135]

In one additional case an instrumental music teacher was "transferred" to a position as a full-time proctor, after several attempts had been made to help him remediate his teaching and after two negative outside reviews of the instrumental music program.[136] Although the court held that the transfer was in fact a dismissal requiring due process, it upheld the action of the board in freezing the teacher's salary for a five-year period. Reducing the salary was not unreasonable nor was it a "reduction" requiring notice and a hearing.

Compliance with School Board Policies and State Statutes

Most of the cases in this section illustrate the importance of considering and abiding by state statutory law in the implementation of adverse employment decisions, in the case of school boards, or in defending against such actions, in the case of the employees affected. Among the relatively few cases where boards were successful in defending their procedures were cases where an administrative evaluation was held not to amount to a "formal reprimand" subject to state due process requirements;[137] where a teacher was held properly nonrenewed, despite the fact that the statutorily required written evaluation was received twelve days late (held not a condition precedent to nonrenewal);[138] where a bus driver was properly fired by the district's

130 Robinson v. Lebanon City School Local Bd. of Educ., 503 N.E.2d 541 (Ohio Ct. App. 1985)

131 Rogers v. Department of Defense Dependents Schools, 814 F.2d 1549 (Fed. Cir. 1987)

132 Smith v. Board of Educ., 510 N.Y.S.2d 29 (App. Div. 1986)

133 Crillo v. Board of Educ., 508 N.Y.S.2d 784 (App. Div. 1986)

134 Board of Educ. of School Dist. of Philadelphia v. Kushner, 530 A.2d 541 (Pa. Commw. Ct. 1987)

135 State v. Lillard, 521 A.2d 1110 (Del. Super. Ct. 1986)

136 Hansen v. Board of Educ., 502 N.E.2d 467 (Ill. App. Ct. 1986)

137 Tebordo v. Cold Springs Harbor Cent. School Dist., 510 N.Y.S.2d 665 (App. Div. 1987)

138 Moran v. Board of School Trustees, 501 N.E.2d 472 (Ind. Ct. App. 1986)

director of business services because authority to fire was held to be delegable by the board when accompanied by specific standards;[139] where only four of eleven charges against a teacher met statutory criteria for termination but were sufficient to support insubordination,[140] where a school bus driver failed to report a bus accident;[141] where a sixty-day statutory notice for nonrenewal of a nontenured teacher was met by counting a teacher institute day;[142] and where six teachers ignored the principal's warning about "no water" on a field trip where a sixth grade student drowned.[143] A school board was not prohibited from proceeding to terminate a teacher for the same act of misconduct even though a prior effort at termination had been set aside because of a procedural error.[144]

State law was violated in the majority of cases where issues of this type were considered. Illustrating the importance of abiding by statutory procedures is a case where a "long-term substitute" teacher, who had been employed for a year as a teacher and track coach, was reinstated in both positions because of the board's failure to give notice of nonrenewal by April 13th.[145] Additional cases concerned the necessity of a hearing before a demotion from language arts coordinator to classroom teacher;[146] the attempted nonrenewal of a principal who had the statutory procedural rights of a teacher,[147] the preclusion of immediate dismissal for behavior insulting and demeaning to students because of the lack of a written warning (and, thus, an opportunity for remediation),[148] the invalidation of suspension of a school nurse where the one charge was remediable under state law;[149] the necessity of a hearing before a reduction in a lunchroom worker's hours from thirty-five to thirty, which the court considered a partial termination of employment;[150] the invalidation of a three-day suspension that was held

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139 Fremont RE-1 School Dist v Jacobs, 737 P 2d 816 (Colo 1987)
140 Smith v Normandy School Dist, 734 S W 2d 943 (Mo Ct App 1987)
141 Sutherland-Wagner v Brook Park Civil Serv Comm'n, 512 N E 2d 170 (Ohio 1987)
142 Howard v Board of Educ of Freeport School Dist, 513 N E 2d 545 (Ill App Ct 1987)
143 Westbrook v Board of Educ of City of St Louis, 724 S W 2d 698 (Mo App Ct 1987)
144 Board of Educ of Santa Fe Pub Schools v Sullivan, 740 P 2d 119 (N M 1987)
145 State v Board of Educ, 503 N E 2d 748 (Ohio 1986)
146 Ellis-Adams v Whitfield City Bd of Educ, 356 S E 2d 219 (Ga Ct App 1987)
147 Littky v Winchester School Dist, 529 A 2d 399 (N H 1987)
148 Beranek v Joint Indep School Dist No 287, 395 N W 2d 123 (Minn Ct App 1986)
149 Board of Educ of City of Chicago v Illinois State Bd of Educ, 513 N E 2d 845 (Ill. App Ct 1987)
150 Ledbetter v Jackson County Bd of Educ, 508 So 2d 244 (Ala 1987)

beyond the power of the superintendent acting apart from the board,[151] and the necessity of a proper hearing when two female school principals were accorded a hearing but were not given specific instances to support the general charges against them and were not permitted to present witnesses or cross-examine witnesses.[152] In yet another case, the dismissal of a teacher for engaging in a general strike was reversed because of improper reliance on the civil service regulations instead of the education regulations.[153] In two other cases, a teacher could not be prosecuted under the state child neglect and abuse statute because she was not a "custodian,"[154] and a tenured teacher given one year to improve her teaching, and four evaluation dates, could not be terminated when she was granted health leave before the four dates expired.[155]

In addition to relying on the appropriate state law, it is important to be assured that local policies are not inconsistent with state law. Illustrating the application of this principle is a case where a school board attempted to discharge a teacher for missing over ninety school days, beyond accumulated sick leave, over a two-year period.[156] The court held that application of the board's policy was inconsistent with state law protecting teachers who were temporarily physically incapacitated. Although the board had the right to define "temporary illness," it could not "define it out of existence." Whether a superintendent was authorized by the school board to dismiss an employee is a factual question for the jury when only the board has authority to dismiss.[157] A school board which could offer no evidence that it had adequately published its new policy against school employees working while on sick leave could not enforce that policy against a teacher.[158]

Two cases illustrate that employees also may ignore state statutory provisions at their peril—one where a custodian's dismissal was upheld for not following the administrative review process, and another where a teacher's dismissal was upheld for not seeking a hearing within thirty days of her dismissal (proffered physical and emotional problems were not sufficiently demonstrated).[159]

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151 North East Community Bd. of Educ. v. North East Community School Dist., 402 N.W.2d 765 (Iowa 1987).

152 DeSoto County School Bd. v. Garrett, 508 So. 2d 1091 (Miss. 1987).

153 Brown v. Civil Serv. Comm'n, 818 F.2d 706 (11th Cir. 1987).

154 West Virginia Dept. of Human Servs. v. Boley, 358 S.E.2d 438 (W. Va. 1987).

155 Perron v. Royal Oak School Dist. Board of Educ., 400 N.W.2d 709 (Mich. Ct. App. 1986).

156 School Dist. 151 Bd. of Educ. v. State Bd. of Educ., 507 N.E.2d 134 (Ill. Ct. App. 1987).

157 Smith v. Greater Amsterdam School Dist., 512 N.Y.S.2d 584 (App. Div. 1987).

158 Cowdery v. Board of Educ. of School Dist. of Philadelphia, 531 A.2d 1186 (Pa. Commw. Ct. 1987).

159 Pettway v. Mobile County Bd. of School Comm'rs., 495 So. 2d 1056 (Ala. 1986); Kimble v. Los Angeles City Bd. of Educ., 238 Cal. Rptr. 160 (Ct. App. 1987).

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Although it is commonly thought that tenure entitles one to a teaching position for life (absent the type of "just cause" for dismissal discussed in the previous section), legitimate dismissals can result from the necessary consolidation of districts, reorganization within a district, or programmatic reorganization within a school. Whether a reduction-in-force (RIF) is based on legally sufficient reasons, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state law, state tenure or other relevant statutes, local board policies, and/or collective bargaining agreements. Because of statutes, policies, and agreements governing RIF, affected employees usually do not have the legitimate claim of entitlement to positions that would necessitate the application of constitutional due process procedures, however, where state law specifies the procedures to be followed and the substantive criteria to be used, these mandates must be followed. (Several cases illustrate the further proposition that statutory law controls in case of conflict with local mandates.) In addition, in the unusual case where an employee makes a prima facie claim that RIF was a subterfuge for the exercise of constitutional rights, due process often will be necessary.

Necessity for Reduction-in-force

Illustrating legitimate and illegitimate reasons for RIF of a tenured teacher was a case where a cut in federal funding for the program in which the teacher was working was held to be insufficient justification for a RIF.[160] The only legitimate reasons, as reviewed by the court, were a substantial decrease in enrollment, the consolidation of schools or districts, the reorganization of districts, or the alteration of programs as approved by the state department of public instruction. In another case a tenured plaintiff-teacher granted under a professional agreement an honorable discharge for "discernible differences" during a reduction-in-force, while another teacher with less continuous service was retained, was entitled to reinstatement.[161] Because plaintiff had essentially been discharged for "incompetency," state law stipulated that dismissal for other than "economic necessity" required remediation, if the deficiencies were remediable, and prohibited a professional agreement from eliminating statutory dismissal procedures.

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160 Altoona Area Vocational Technical School v. Pollard, 520 A.2d 99 (Pa. Commw. Ct. 1987).

161 Schafer v. Arlington Heights Bd. of Educ., 510 N.E.2d 1186 (Ill. App. Ct. 1987).

The cases in the following subsection, in addition to dealing with the elimination of a position or positions, illustrate additional problems concerning "necessity."

Elimination of Position

In an unusual case affecting a nontenured teacher, who was not renewed for legitimate budgetary reasons following maternity leave, the court held that state statutes permitting the nonrenewal of nontenured teachers, in these circumstances, overrode the collective bargaining agreement.[162] Although the agreement said that teachers would be reinstated following maternity leave, since all nontenured teachers were laid off, the agreement was read to grant no additional rights to teachers who happened to be on maternity leave.[163] However, in another case a custodial employee, whose contract was terminated because the school district anticipated a deficit (which state law prohibited) was entitled to reinstatement.[164] The court relied on a narrow interpretation of state law which provided teacher contracts to be terminated for inability to meet financial obligations but did not require contracts for noninstructional employees; however, once a contract was issued to such an employee the school district had to abide by its terms.

A school district was justified in terminating a teacher for program elimination even though the teacher was kept on for one more year to cover for another teacher on leave of absence.[165] In another case a school board could RIF a teacher hired to teach an area that was eliminated even though teachers with less seniority were retained in other similar areas.[166]

A school board was unsuccessful in claiming a necessary RIF of a guidance counselor who "got crossways politically" with the board and superintendent (by campaigning against their retention).[167] Because no evidence suggested the need for fewer guidance counselors, the court concluded that the proffered reason for dismissal was a sham which violated the counselor's first amendment right to free speech. Also unsuccessful was a board's thinly disguised effort to save $6,000 by making a minor curriculum change, laying off a tenured teacher, and hiring an untenured teacher;[168] and the additional attempted dismissal

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162. Bovsek v. Huerfano School Dist. RE-1, 728 P.2d 325 (Colo. Ct. App. 1986)
163. *Accord* Murphy v. Pierre Indep. School Dist. No. 30-2, 403 N.W.2d 418 (S.D. 1987).
164. Calico Rock School Dist., No. 50 v. Speak, 736 S.W.2d 10 (Ark. 1987)
165. O'Connor v. Wattsburg Area School Dist., 520 A.2d 1266 (Pa. Commw. Ct. 1987)
166. Law v. Mandan Pub. School Dist., 411 N.W.2d 375 (N.D. 1987)
167. Clairborne County Bd. of Educ. v. Martin, 500 So. 2d 981 (Miss. 1986)
168. Hein v. Board of Educ., 733 P.2d 1270 (Kan. Ct. App. 1987)

of a tenured teacher, without statutorily mandated due process rights, because of a claimed bona fide elimination of a position.[169]

Selection of Employees

When employees are selected for RIF, it is necessary for the board to carefully consider applicable criteria, follow applicable procedures, and document the particular choices.[170] In a case where a less senior teacher was retained because the board believed the teacher to be more qualified, the court held that the reason was irrelevant where the statute mandated that only licensure and seniority be considered.[171] Likewise, a tenured secondary physical education teacher whose certification included both secondary and elementa physical education, but who had never taught elementary, was entitled to displace an elementary teacher.[172] A teacher nonrenewed when her reading program was discontinued was ordered reinstated by a new administrator.[173] A teacher on unpaid leave of absence who had expressed an intention to return did not create a vacancy under state law where the teacher was not shown to be suffering from a serious illness.[174]

Teachers were unsuccessful in claiming their selection was improper in a number of cases, and for various reasons. A teacher of landscape technology challenged his placement on requested leave in favor of another teacher he claimed was less senior.[175] The court held, however, that the other teacher was entitled per statute to five years seniority credit for an extended leave, despite a local collective bargaining agreement to the contrary. Similarly, a teacher suspended because of declining enrollments was unsuccessful in challenging retention of another teacher who had more seniority because military service had been applied to the front of teacher service.[176] A tenured physical education teacher, laid-off because of a necessary staff reduction, did not prove that a more senior physical education teacher (who had been on personal-professional leave for two years) had intended to give up

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169 Hillhouse v. Rice School Dist. No. 20, 727 P 2d 843 (Ariz. Ct App 1986)

170. Taborn v. Hammonds, 350 S E 2d 880 (N C Ct App 1986) (remand necessary for appropriate procedures)

171. Beste v. Independent School Dist. No 697, 398 N.W 2d 58 (Minn Ct App 1986)

172. Capodilupo v Board of Educ of Township of West Orange, Essex County, 528 A.2d 73 (N.J. Super. Ct App Div 1987).

173. Indiana Civil Rights Comm'n v Culver Educ. Found , 510 N E 2d 206 (Ind Ct App 1987).

174. Dionsio v Board of Educ. of Mahopac Cent. School Dist , 512 N Y S 2d 457 (App. Div 1983).

175. Urdahl v. Independent School Dist No. 181, 396 N.W 2d 244 (Minn Ct App 1986).

176. Rochester Area School Bd v Duncan, 529 A.2d 48 (Pa. Commw Ct. 1987).

his tenure rights.[177] A registered nurse employed by a school district for two years prior to the hiring of a second school nurse was legitimately reduced to three-fifths time because she did not possess a "school service personnel certificate."[178] Although the plaintiff eventually became certified—without statutory obligation to do so—she gained tenured status two years after certification and one year following the tenure of the other nurse. Where a third grade teacher was terminated because of budgetary considerations, the superintendent was permitted under state law, for purposes of determining seniority among elementary teachers, to segregate out a special education teacher, an art teacher, a learning disabilities teacher, a chapter I teacher and a music teacher.[179] When one school was merged with another, the black principal of the merging school who lost his job, while the white principal of the merged school was retained, failed in establishing disparate treatment under RIF criteria because the "employer did not seek another person to perform the same work."[180] In the final case, the retrenchment due to declining enrollments led to plaintiff's lay-off—an action she argued was against the state's law that "professional employees" should be laid off in reverse order of appointment.[181] Her lay-off was held proper, however, because although her appointment letter stated she was hired as a "professional employee," the school board minutes (which were controlling) said she was hired as a "permanent substitute."

Realignment/Reassignment

For purposes of realignment, supervisors are generally considered teachers and may, if they are senior, force the realignment or lay-off of less senior teachers; however, they may not force their own realignment "up" to administrative positions. Cases illustrating this proposition concerned supervisors with greater seniority than classroom teachers who properly were permitted under state statute to bump teachers despite their lack of teaching experience within the district;[182] a supervisor of special education who was not permitted to bump either of two nontenured administrators (who held noninstructional rather

177 Giordano v Ambach, 509 N Y S 2d 203 (App Div 1986)

178 Verdeyen v Board of Educ , 501 N.E 2d 937 (Ill App Ct 1986)

179 Pochahontas Community School Dist v Levene, 409 N W 2d 698 (Iowa Ct App 1987).

180 Gilyard v South Carolina Dep't of Youth Servs , 667 F Supp 266, 270 (D.S.C. 1985)

181 Clapsadlle v Bethel Park School Dist , 520 A 2d 537 (Pa Commw Ct 1987).

182 Evans v Independent School Dist No 281, 396 N W 2d 616 (Minn Ct App 1986) (it was only necessary that the supervisors be licensed in the field where they were realigned)

than supervisory positions);[183] and an employee with previous administrative experience and seniority who unsuccessfully argued that he should be promoted (he said "realigned") to the newly vacated junior high school principal's position.[184] In the latter case, the court ruled that realignment did not apply where a professional was being promoted, but only where employees were being suspended, dismissed, or demoted.

Realignment may involve more than just bumping to protect seniority rights. Under one state's tenure statute "realignment involves shifting positions and reassignments of a *more* senior teacher to accommodate a *less* senior teacher so that the *least* senior teacher is eventually laid off or placed on unrequested leave of absence."[185]

A case where the positions of superintendent and secondary principal were combined resulted in a realignment problem for an elementary school administrator, who was reassigned to a teaching position while a less senior administrator was named to the new combined position.[186] The court held that state law did not require a consideration of seniority in filling the superintendent's position and that a district's needs can be considered in combining two half-time positions rather than separating them.

In a case where subject-matter seniority was relevant, according to local contract, a carpentry teacher was permitted to contest the time of his replacement's licensure in carpentry—this despite a prior decree affirming the plaintiff's placement on unrequested leave.[187]

A case illustrating the general rule that certification rather than teaching experience controls in situations involving realignment, a teacher of science was entitled by her seniority to a reading position despite her lack of experience.[188] In the same case, it was held that an English teacher with less seniority than suspended teachers was allowed to maintain her job because of her additional duties as coordinator of the gifted and talented program. The case suggests that additional duties that would make it impractical to replace teachers may sometimes insulate them from layoff, even if they are junior.

A transfer from principal of a junior high to assistant principal of a high school may be considered a demotion so as to require a hearing.[189]

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183 Wooten v DeKalb City Bd of Educ, 504 So 2d 280 (Ala Civ App 1986)

184. Gnocchi v Burrel School Dist., 522 A 2d 707 (Pa Commw Ct 1987)

185 Westgard v Independent School Dist No 745, 400 N W 2d 341, 345 (Minn Ct App 1987)

186 Buys v Independent School Dist No 891, 398 N W 2d 622 (Minn Ct App. 1986)

187 Pirrotta v Independent School Dist., No 347, Willmar, 396 N W 2d 20 (Minn 1986)

188 Dallap v Sharon City School Dist., 524 A 2d 546 (Pa Commw Ct 1987)

189 Walsh v Sto-Rox School Dist., 532 A 2d 547 (Pa Commw Ct 1987)

But an assignment to teach different subjects at the same school and to the same grade would not be a transfer necessitating a hearing.[190]

Call-back Rights

Employees who have been placed on involuntary leaves of absence usually retain, as a matter of state law, limited call-back rights (i.e., the right to return to a position for which they are qualified, within a limited period of time providing that they have preserved their rights). A laid-off teacher, who in 1977 declined a recall to his former district because he was working in a new district, was held to have abandoned his recall rights by 1980 (when he finally sought to assert them) because of his failure to annually notify the district of his continuing interest in recall.[191]

A case that illustrates the inappropriate use of the call-back concept concerned a part-time, tenured kindergarten teacher (who had never been laid-off) who claimed that the board was obligated to hire her to the first available full-time position.[192] The teacher was not "laid off" when she was not given the full-time position; thus, call-back rights did not attach and the board could hire a probationary teacher for the position.

If state statute requires a preferential hiring list to be maintained for call-back purposes then a teacher's statutory rights have been violated when available positions have occurred and the preferential hiring list has not been used.[193] Special problems may arise when call-back rights are considered in a school district under a desegregation order. In one case a federal district court tailored a remedy permitting a one-time affirmative recall of black faculty "to the extent they were disproportionately laid off."[194]

CONTRACT DISPUTES

Many types of problems can arise concerning the contract of employment including the validity of the contract; the inclusion of ancillary administrative, statutory, collective bargaining, and other provisions; and questions regarding breach of contract. A valid contract is formed when there has been an offer, an acceptance of the offer

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190. Robertson v Alabama State Tenure Comm'n, 513 So. 2d 636 (Ala Civ App. 1987)

191. Tomiak v Hamtramck School Dist., 397 N.W.2d 770 (Mich 1986)

192 Poland v Grand Ledge Pub. School Bd of Educ., 402 N.W.2d 70 (Mich Ct App 1986)

193 Randall v Hawkins, 733 S.W.2d 871 (Tenn. 1987).

194 Little Rock School Dist. v Pulaski County Special School Dist., 663 F Supp 1557, 1559 (E.D Ark. 1987)

(before the offer is withdrawn), and "consideration" (usually a promise to work for a fixed salary). Although employment contracts usually are fixed in writing, they need not be; and very often additional provisions are incorporated into the contract by reference. The cases that follow illustrate the variety of problems which arise concerning employment contracts and other contractual rights and responsibilities that arise in education.

Board Policies and Contract Stipulations

Illustrative of cases holding that no valid contract had been created was the case of a dismissed superintendent. The court held that he was eligible for an impartial hearing under the teacher tenure law, in part, because a statement in the board minutes extending his contract for three years (which would have precluded application of the hearing provisions) was not sufficient to establish a contract.[1951]

One case illustrates that, as in many other situations, it often is necessary to exhaust administrative remedies before bringing a breach of contract action. Where a school counselor received a written admonition and was transferred to a new position, the counselor's suit for breach of contract was precluded because of failure to exhaust the administrative remedies outlined in the collective bargaining agreement.[196]

A contract was held not breached, where the hours of an instructional aide were reduced from six to five; the contract was held to be subject to the district's policy manual. The manual stated that the employment contract could be terminated by either party, which the court held included the power to modify.[197] A school board's use of cumulative absence reserve days to offset a teacher's absences due to personal illness was not an arbitrary and capricious enforcement of its policies, even though such reductions had not been done for the prior three school years.[198] Also not breached was the employment contract of an English teacher who, because of problems she was having with discipline, was put "under a formal evaluation system" for her third year of teaching and subsequently not renewed. The fact that the principal had conducted three observations and made three written evaluations using a form he had developed was held sufficient to rebut a breach of contract claim (for lack of formal evaluation).[199]

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195 Mariam v School Directors of Dist 107, 506 N E 2d 981 (Ill App Ct 1987)

196. Lew v Seattle School Dist No. 1, 736 P 2d 690 (Wash Ct App 1987)

197 Ohlemeier v Community Consol School Dist No 90, 502 N E 2d 1312 (Ill App Ct. 1986).

198. Page v Macchiarola, 511 N Y.S.2d 125 (App Div 1987)

199. Borman v. Gorham-Fayette Bd. of Educ., 502 N E 2d 1031 (Ohio 1986)

In a complex, multifaceted school desegregation case, it was noted that teachers' contracts were not breached when they were reassigned to various school sites throughout the district; nothing in the contract prevented such reassignments.[200] Nor was the contract of a superintendent breached when he was dismissed, following a hearing, because the contract gave the board the express right to terminate the superintendent on ten days notice.[201] Similarly, those employed "at will" are employed for an indefinite period and can be dismissed at any time.[202]

In contrast to the cases above, a teacher was successful in proving a breach of contract where negotiated seniority rights were disregarded by the board when it placed the teacher on unrequested leave of absence.[203] Exhaustion of administrative remedies is not required where the employer has repudiated the employment contract by failing to convene the grievance committee to consider employee's grievance and by declaring that the employee is not covered by the collective bargaining agreement.[204] Also, where a purported termination was procedurally defective, a probationary teacher's contract was still in force, entitling him to reinstatement, retroactive seniority credit, backpay, and benefits.[205] Three teachers were successful in challenging a school district's use of supplemental contracts which had the effect of denying them job security under the continuing contract statute.[206] And finally, a teacher was declared to be a permanent employee under state statute despite oral and written statements to him that he was only a probationary teacher.[207]

Administrative Regulations and Statutory Provisions

State statutory provisions affecting the employment rights of school employees arose in several cases. Intervening teachers were unsuccessful in challenging a residency requirement where a legislatively ratified home rule charter required city employees hired after a future date to be or become city residents;[208] and the failure to reappoint a teacher

200. United States v. Lawrence County School Dist., 799 F 2d 1031 (5th Cir. 1986) The court also noted that the teachers should be reassigned so that more- and less-experienced teachers were distributed evenly throughout the system.

201. Palmer v. Perry County Bd. of Educ., 496 So. 2d 2 (Ala. 1986).

202. *See e.g.*, DeVico v. Roman Catholic Diocese, 508 N.Y.S.2d 886 (App. Div. 1986).

203. Jenson v. Joint Indep. School Dist. No. 287, 408 N.W.2d 203 (Minn. Ct. App. 1987).

204. Cabarga Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 822 F 2d 188 (1st Cir. 1987).

205. Fraser v. Board of Educ., 516 N.Y.S.2d 44 (App. Div. 1987).

206. Kelso Educ. Ass'n v. Kelso School Dist., 740 P.2d 889 (Wash. Ct. App. 1987).

207. California Teacher's Ass'n v. Governing Bd. of Garvey School Dist., 240 Cal. Rptr. 549 (Ct. App. 1987).

208. Local No. 799, Int'l Ass'n of Firefighters AFL-CIO v. Napolitano, 216 A.2d 1347 (R.I. 1986).

who was over age seventy for the 1983-84 school year was held not a violation of a state human rights act specifically permitting but not mandating annual reappointment after age seventy.[209] A teacher who elected in October to take off the academic year as childbearing leave was not entitled to the ten days of paid annual sick leave since those days accrued on the first of each month.[210] Teachers whose contracts had been cancelled but who had delayed in seeking a remedy were denied the remedy sought.[211] An employee who was recommended for a vacant position, but whose appointment was not affirmed, could not block readvertisement of the position two years later.[212] More successful was a nonrenewed superintendent who won the right to a sabbatical, despite the fact that he would have no duty to return to his position, because he met all the statutory requirements for a mandatory leave.[213] A teacher was successful in winning reinstatement when a part-time position in a school program created through federal funding and consisting entirely of duties formerly performed by the terminated employee was "similar" under state law.[214]

State and local provisions affecting appointment decisions were also seen in a number of cases. Where state law gave teachers seniority in the district priority in filling vacant positions, a court held that the superintendent and board acted arbitrarily in selecting a teacher with no seniority. Evidence showed that the superintendent did not interview the plaintiff nor investigate her qualifications, but rather recommended the appointment of his sister-in-law.[215] On the other hand, where there is no express provision for preferential treatment in hiring and promotion, such a right cannot successfully be claimed.[216] A contract between a superintendent and a school board "for a period of no less than one year" was a one-year contract and not an "open-ended" contract under state law.[217] A final case concerned a city's civil service provisions, which were construed not to require competitive exams for appointment to positions in educational administration.[218]

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209. Duval County School Bd v State, 500 So. 2d 158 (Fla Dist Ct. App 1986).
210 Grim v. West Chester Area School Dist., 529 A.2d 71 (Pa Commw Ct 1987).
211. Taylor v Dothan City Bd. of Educ., 513 So 2d 623 (Ala Civ App 1987)
212 Purris v Board of Educ of City School Dist. of City of N Y., 512 N Y S 2d 874 (App Div 1987)
213. United School Dist. v. Rushkin, 525 A 2d 868 (Pa Commw. Ct 1987)
214 Anderson v. Board of Coop Educ Servs., 512 N Y S 2d 870 (App. Div 1987).
215. Dillon v. Board of Educ., 351 S.E.2d 58 (W. Va 1986)
216 *See, e.g.*, Meade v Mingo County Bd of Educ., 356 S E.2d 479 (W Va 1987) (substitute custodian had no right to preferential appointment to a permanent position)
217. Nordlund v. School Dist No 14, 738 P 2d 1299 (Mont. 1987)
218. Board of Educ. v. Bridgeport Educ. Ass'n, 518 A.2d 394 (Conn App. Ct. 1986).

TENURE

After teachers, and in some cases administrators, successfully have served a probationary period of from two to four or more years, state law awards them "tenure" or a "continuing contract" or the right to be employed "at discretion." The importance of gaining tenure is that it provides for automatic renewal and vastly limits the legitimate reasons for nonrenewal or dismissal, which must be specified in state law. While teachers in some states gain a general tenure, in other states they are tenured in a particular discipline or job. Administrators who are awarded tenure as teachers usually preserve their right to tenure *as a teacher* when they subsequently assume administrative responsibilities, though they may be required to serve another probationary period to gain tenure as an administrator; however, administrators who acquire tenure only as administrators usually do not have the right to later assume a teaching position. Additionally, certain tenure rights often are preserved when employees move from one district within a state to another, but tenure is lost when one moves to a different state.

Tenure Status

That tenure provisions and their application vary dramatically from state to state is illustrated by several cases reported in 1987. In a significant Alabama case, Dr. Oden received tenure as a teacher and later as a principal before being promoted to the position of director of transportation. After he had served over two years in the latter position, the board voted not to reemploy him. An appeals court held that Dr. Oden, having most recently held a support position not requiring "supervisory" work with students and teachers, was not tenured as a supervisor; additionally, he was not tenured as a teacher or principal because he had resigned those positions.[219] On later review, the Alabama Supreme Court held that the term "supervisor" in the tenure law should be construed broadly, in favor of teachers, and that Dr. Oden therefore retained tenure in his transportation position.[220] Similarly, a tenured classroom teacher who served as advisor and assistant director for two years at a magnet school operated as a consortium by three school districts had acquired tenure as advisor and assistant director, both of which were certificated positions, in all three school districts.[221] In another case, a career teacher who subsequently became a probationary principal was held not to have relinquished tenure as a

219 Oden v Alabama State Tenure Comm'n, 495 So 2d 664 (Ala Civ. App 1985), *rev'd*, 495 So 2d 664 (Ala. 1986).

220. *Id.*

221 Imbrunone v. Inkster Pub Schools, 410 N.W 2d 300 (Mich Ct. App. 1987)

teacher upon assuming the administrative position.[222] And in a case illustrating an unusual effect of achieving tenure in a particular position, a guidance counselor who had obtained tenure in his position, as prescribed by state law, could not lawfully be reassigned to teach reading even though he was certified in reading.[223]

Questions regarding tenure status often arise in situations of attempted lay-off, nonrenewal, or dismissal. A teacher was held to have tenure who had completed two years of teaching with four satisfactory ratings (despite the state's late issuance of certification to which he was entitled);[224] a certified teacher employed for the fourth year as a counselor in a federally funded program met the statutory requirements for "teacher" tenure;[225] and a teacher who had received tenure in another district and had been employed for two years in a new district also achieved tenure.[226] However, a teacher employed for approximately twenty-six days a year for ten years under a "supplemental service contract" did not attain tenure where a tenure statute (as construed with reference to other relevant statutes) required more than 120 days a year.[227] Illustrating the consequences of failing to note tenure eligibility is a case where a court not only awarded tenure to a teacher who had been nonrenewed, but two years backpay and benefits.[228] In another case, a principal notified in the third year of his contract that he would not be renewed was tenured under state law and entitled to reinstatement and back pay.[229]

In an unusual case, an appellate court found "good and sufficient reason" to revoke a continuing contract in favor of an annual contract, where evidence showed that the teacher was unlikely to be able to improve her attendance.[230]

Tenure by Default or Acquiescence

Tenure by default or acquiescence arises when employees who have successfully completed the applicable probationary period are not notified of their nonrenewal in a timely manner or are merely permitted

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222. Rose v Currituck County Bd. of Educ., 350 S E.2d 376 (N.C. 1986)
223. Silavent v Buckeye Cent Local School Dist. Bd of Educ , 500 N E 2d 315 (Ohio Ct. App. 1985).
224. Altoona Area Vocational Technical School v. Pollard, 520 A.2d 99 (Pa. Commw Ct. 1987).
225. Hillhouse v Rice School Dist. No. 20, 727 P.2d 843 (Ariz. Ct. App 1986).
226. Carpenter v Board of Educ., 514 N Y S 2d 264 (App. Div. 1987)
227. Selmeyer v. Southeastern Indiana Vocational School, 509 N E 2d 1150 (Ind. Ct. App. 1987).
228. Maxfield v. Board of Educ., 525 A 2d 727 (N.J Super. Ct. App. Div 1986).
229. Cooper v Alabama State Tenure Comm'n, 511 So. 2d 209 (Ala Civ App. 1987).
230. MacPherson v School Bd., 505 So 2d 682 (Fla. Ct. App. 1987).

to teach beyond the probationary period. Several cases in the above section also illustrate how tenure can be gained by default or acquiescence when, because of complex rules for determining tenure, the acquisition of tenure was not verified until nonrenewal was attempted.

CERTIFICATION

The criteria and procedures for certification (sometimes called licensure) of teachers, supervisors, and administrators vary from state to state; the same is true for standards governing re-certification and decertification, revocation, or suspension. Permanent, probationary, or emergency certification is required in all states in order for an employment contract to be legally valid; where there is no valid certification or contract, even the obligation to pay the employee is negated.

Certification Standards

In a situation where the reissuance of a provisional license was denied to an English as a second language teacher who had multiple sclerosis, an appeals court ruled that the state division of human rights had used the wrong standard in overruling the initial decision.[231] Under the state law in effect in the late 1970s, when the case arose, disability protection extended only to conditions that were totally unrelated to the ability to work; subsequent law, which bars discrimination against one who can reasonably (but not necessarily perfectly) perform the job did not apply retrospectively.

Two cases arose where denial of certification was upheld. In one case, refusal of the state board of examiners to accept one and one-half years employment with a state hospital as substitution for a statutory requirement of six months college-supervised internship in the field of clinical psychology was not "irrational, arbitrary, or capricious."[232] In the second case, a teacher who was given one year to complete certification requirements as a middle school mathematics teacher and who was given a one year provisional elementary education certificate was not entitled to reinstatement to a mathematics position when he failed to meet the certification requirements.[233]

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231 New York City Bd of Educ v Division of Human Rights, 515 N Y S 2d 543 (App Div 1987)

232. Wagschal v Board of Examiners of Bd of Educ, 503 N Y S 2d 434 (App Div 1986).

233 Smith v. Andrews, 504 N Y S 2d 286 (App Div 1986)

Decertification, Revocation, or Suspension

In a situation where the revocation of a teacher's license was being considered, because of alleged sexual misconduct with a fifteen-year-old student, an appeals court remanded the case for a determination based on the "preponderance of the evidence" rather than on the higher "clear and convincing evidence" standard.[234] The court also noted that the alleged victim's testimony need not be corroborated for an effective license revocation. Not so lenient was another court's determination in a case involving a male teacher who had pled guilty to a charge of indecent exposure to a child: because the record from the board's (unsuccessful) dismissal hearing was exempted from disclosure under the state's public records law, it could not be used in the board's subsequent action to decertify the teacher.[236] Similarly, procedural protections were afforded a teacher accused of "incompetency, gross insubordination, immorality, and misconduct," because failure to inform him that his license might be permanently rather than temporarily revoked precluded the more severe penalty (even if the evidence justified it).[236] Another case involved a controversy over an agreement a teacher had made to surrender his certificate if he was convicted of pending criminal charges; when the charges were reduced to a misdemeanor, the teacher believed the agreement was no longer valid.[237]

Three cases arose which did not turn on procedural questions. In one case an ROTC instructor whose contract was cancelled when the Army withdrew his authorization to teach ROTC won reinstatement when the Army subsequently reversed its decision.[238] In a second case, a school bus driver who was convicted of DWI and lost her coverage with the school district's insurance carrier could be discharged because certification by the school board to drive a bus depended upon insurance coverage.[239] And finally, the Texas literacy test for teachers was upheld against equal protecton and due process challenges because the test had a rational purpose and decertification after failing the test was not automatic.[240]

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234 Turlington v. Ferris, 496 So. 2d 177 (Fla. Ct. App. 1986)

235 Vander Ayl v. Iowa Professional Teaching Practices Comm'n, 397 N.W. 2d 751 (Iowa 1986)

236 Williams v. Turlington, 498 So. 2d 468 (Fla. Ct. App. 1986)

237 Jones v. Turlington, 504 So. 2d 811 (Fla. Ct. App. 1987)

238 Greene County Bd. of Educ. v. Perry, 510 So. 2d 257 (Ala. Civ. App. 1987)

239 Mayes v. Board of Review, Ohio Bureau of Employment Servs., 513 N.E. 2d 818 (Ohio Ct. App. 1986)

240. State v. Project Principle, Inc., 724 S.W. 2d 387 (Tex. 1978)