

# Beyond the Collective Bargaining Agreement: Legal Challenges in Employment-Related Decisions

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Although the collective bargaining agreement is most often the source of protections and requirements governing school districts as employers, legal challenges may arise from a plethora of statutes, administrative rules, and constitutional provisions, especially when the district is considering dismissal or discipline. Here are some to watch out for:

## **Discrimination Claims**

Both state and federal statutes and constitutional provisions prohibit differential treatment on the basis of “protected class” status: race, national origin, religion, age, gender, disability.

Additional protected classes under state law: sexual orientation, marital status, family status.

Examples of discrimination claims:

- Retired employees bring age discrimination complaint under EEOC, then proceed to federal court, when they were no longer automatically rehired following retirement, but instead considered alongside other applicants, and where board policy allowed their rehire only if other qualified applicants couldn't be found.
- Employee files ADA and state disability discrimination claim after school district refused to provide her with a half-time job although her doctor said she could not work full-time until she had lost weight and reduced her stress level.
- Custodian contends that discipline for tardiness and absenteeism was discriminatory based on his minority race because white custodians had not been disciplined or dismissed for similar records on attendance.
- Male PE high school teacher claims *per se* discrimination because he was transferred to a middle school vacancy, rather than the less senior PE high school teacher, because the middle school “needed” a male teacher to team with the existing female PE teacher.

## **Retaliation Claims**

Both state and federal statutes prohibit retaliation against an employee because the employee had taken issue with, reported to authorities, or publicized a position or issue that is controversial or adversarial to district leaders' position.

- ESD psychologist placed in school district became unwelcome after six weeks because of her talking during inservice, disrespectful demeanor and alienation of her co-workers. When the district told the ESD to replace her, she filed retaliation complaints, alleging that she was being punished because she had opined that the building special education teacher wasn't properly conducting a manifestation meeting in a single instance.
- Secretary claims she was dismissed, not for performance reasons, but due to retaliation for her use of family medical leave during a critical time of the pre-school start-up period.
- Female employee complained when she was given a less desirable assignment after she had reported alleged sexual harassment by her supervisor.
- Business manager claims he was dismissed because of "whistle-blowing" after he reported questionable travel expenses by the superintendent to the board chair and auditor.

## **Harassment Claims**

While claims of "harassment" are becoming commonplace, most problematic is when the harassment is based on protected class status or arises from the employee's engagement in some protected activity.

- Probationary teacher/coach quit his job but then filed claims based on the alleged harassment by other senior coaches over the probationary's refusal to join a prayer group and his resistance to prayers in the locker room,
- Transgender employee claims harassment from co-workers after she changed gender identity from male to female during a vacation period and was the subject of various crude "cat-calls" and jokes as a result. In addition she was required to use a single stall locking bathroom exclusively.
- Teacher claims that supervisor harassed her by observing her much more frequently than other teachers, by questioning whether she "had what it takes to stay in this business," and by speaking to her in a loud and demeaning manner, including one instance of standing and leaning over his desk while addressing her problems.

## **Wage and Hour Claims**

While non-supervisory classified employees, but not licensed, managerial or supervisory employees, are covered by state and federal minimum wage and overtime provisions, some wage and hour provisions in state law cover all types of employees:

- Where laid-off teacher received her final three paychecks on the 4<sup>th</sup> Friday in June, which was seven days after her final day of work, she filed a wage claim. CBA language that specified this payment schedule for all teachers was not judged sufficient to “waive” under ORS 652.140(5) the state requirement for payment by the end of the next business day after termination.
- Where the superintendent’s secretary in a small district was dismissed, she filed a wage claim based on the district’s failure to pay her overtime wages for work in excess of 40 hours a week. Despite signing off on payroll reports showing 40 hours of work, the secretary claimed that she was not an exempt managerial employee under the federal Fair Labor Standards Act, and therefore the extra hours she worked (which she had documented on a calendar at home) had to be paid , and at time and a half – for the prior two years.

## **Claims of violation of constitutional due process protections**

Both state and federal constitutions have been interpreted to require “due process” before an employee is deprived of a “property interest” (anticipated continuation in employment) and/or a “liberty interest” (interest in a good reputation, right to pursue a career). The minimum due process includes:

- (a) a pre-termination hearing before the decision to dismiss is finalized, in front of the legally-empowered decision-maker or one who effectively recommends dismissal to the ultimate decision-maker. This is a simple hearing but the employee must have notice of potential charges with enough specificity that he/she can respond, right to counsel, and right to respond.
  - (b) a full post-termination hearing that gives the employee the right to call and cross-examine witnesses before the decision-maker or a neutral third-party decision-maker, the right to counsel, and the right to specific notice of reasons for dismissal.
- A teacher dismissed for misconduct near the end of his second year, after being renewed for a third year, was given a post-termination hearing in front of the school board under ORS 342.835, which provides for dismissal of probationary teachers and administrators for any cause deemed in good faith sufficient by the board. The employee contends he was denied due process because the just cause provisions in

the CBA were violated – even though the local association decided not to take his grievance to arbitration.

- A contract principal whose dismissal was sustained by the FDAB filed suit in federal district court, claiming violation of his constitutional due process rights because, he alleged, the school board holding a pre-dismissal hearing was not neutral because individual board members grilled him over some of his actions and because he wasn't allowed to call witnesses in the pre-term hearing.

#### OPTIONS:

1. Negotiate a comprehensive settlement that includes a clause in which the employee waives rights to pursue any claims against the district.

PRO: Eliminates possibility of litigation months or years later, reduces legal costs, ends disruption and possible community upheaval, saves time and focus of senior management.

PRO: Eliminates the possibility of a very costly jury verdict where damages and possibly punitive damages can be sought.

CON: Waivers usually not obtained unless financial consideration is part of the settlement. This may inspire additional litigation by others in the same protected class group, by the same attorney, or against school districts generally.

CON: Workers compensation and unemployment compensation generally cannot be waived.

2. Employ “protective” strategies and document steps taken to address any possibility of discrimination, retaliation, or harassment and to eliminate the possibility that dismissal or discipline could result from any improper motive not reason not in good faith.

--Train supervisors to consult with Human Resources Director about any situation where an employee might later bring a claim not specifically related to the reasons given for dismissal. (employees in protected class, dealing with protected populations, history of whistle-blowing or exercise of first amendment rights, etc.)

--“Kill'em with due process”: Ensure an extra pre-termination hearing before an administrator who has not been involved in the evaluation or investigatory process; remove from decision-making any administrator who may have a personal issue or conflict; do not hurry through process but seriously consider information presented by employee and consider options such as transfer, additional time on a POA, etc.

--“Pick your battles” carefully and settle cases where there are weaknesses in due process, CBA compliance, witness viability.

