Hodges, Loizzi, Eisenhammer, Rodick & Kohn

EDUCATION EDITION

July 2008

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

Supreme Court Rejects Equal Protection "Class-of-One" Argument for Public Employees--The United States Supreme Court recently held in *Engquist v. Oregon Department of Agriculture et al.,* 128 S.Ct. 2146 (2008) that a public employee could *not* state a claim under the Equal Protection Clause of the U.S. Constitution alleging discriminatory treatment at the workplace when the employee is not a member of a protected class.

The plaintiff in this case, an employee of the Oregon Department of Agriculture, argued that she was discriminated against and eventually fired not because she was a member of an identified class (e.g. race or age) but for "arbitrary, vindictive and malicious reasons." The plaintiff argued that the Constitution prohibits public employers from irrationally treating one employee differently from another, regardless of whether the employer's treatment is based on the employee's membership in a particular class. This argument is also known as the "class-of-one" equal protection claim.

While Justice Roberts noted that the Court had previously recognized the "class-of-one" argument in terms of the government's regulation of property and treatment of private citizens, the Court concluded that public employers must retain significant discretion in making employment decisions.

The Court stated that inherent in

Continued on Page 2

Consumer Price Index

Percent change for the month of **June, 2008,** for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.4	0.3
12 Mth	4.7	4.9
St. Louis-6 Mth	2.0	2.3
12 Mth	3.2	3.6
U.S. Mthly	1.0	1.1
12 Mth	5.0	5.6

July CPI figures will be released August 18, 2008. For the most recent CPI, visit our website at: www.hlerk.com

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Registration forms are now available for the IASA sponsored *Regional Conferences on Recent Developments in School Law.* Visit www.hlerk.com or www.iasaedu.org to download the form. As space is limited at all three locations, early registration is recommended.
- Online registration for the upcoming HLERK/MEDS-PDN programs on the *Open Meetings Act, Freedom of Information Act* and *Electronic Records* issues is now available at www.hlerk.com or www.meds-pdn.com. Again, space is limited so please register early.
- Attached is a form to receive *The Extra Mile* by email. Join hundreds of your fellow administrators in receiving news of important school legal developments as soon as it becomes available.

Ten/Twelve Month Pay Period Election for School Employees Modified by IRS--On July 2, 2008, the Internal Revenue Service ("IRS") issued Notice 2008-62, describing a rule that the Treasury Department and the IRS "anticipate" will be included in regulations to be proposed under *Internal Revenue Code* section 457(f) which virtually eliminates the need for notices and election forms for school employees working less than twelve months, but seeking to spread their pay over twelve months (i.e. "annualizing" pay).

The Notice states that, until further guidance is issued, taxpayers may rely on the rule described in the Notice beginning with the current 2008 tax year. Districts should consult with their legal counsel regarding the impact of this Notice on their pay procedures.

This Notice is published nearly a year after the issuance of an August 2007 IRS news release that provided initial guidance on annualization of pay for school employees.

In a change of position from that initial guidance, the proposed rule in Notice 2008-62 provides that annualization of pay will *not* constitute deferred compensation if both of the following apply:

1) The compensation arrangement does not defer payment

Continued on Page 2

Offices:
Arlington Hts. 847-670-9000
Springfield 217-546-9200
Belleville 618-355-7850

Pay Period Election Cont.

of any of the recurring part-year compensation beyond the last day of the 13th month following the beginning of the service period. (For example, if the service period begins in August 2008, all compensation must be received by September 30, 2009); and

2) The total amount deferred is less than a dollar amount provided under IRC 402(g)(1)(B) for that year. (For 2008, this amount is $15,500, but this amount will change annually).

Contact Heather Brickman or Barbara Erickson with questions concerning this Notice. Given the substantial new regulatory and tax requirements regarding employee benefits, HLERK is preparing an all new program with MEDS-PDN on employee benefits for schools and municipalities. Dates/locations for these seminars will be published in The Extra Mile and on www.hlerk.com as they become available for Fall 2008.

Class of One Cont. the employer-employee relationship is the employer's ability to treat employees differently and make at-will employment decisions. In rejecting the "class-of-one" argument in the public employment context, the Court noted a wronged employee could make an allegation of differential treatment after every personnel decision, on the theory that other employees were treated differently. As such, every decision made by a public employer could become the basis for an equal protection claim under the "class-of-one" theory.

This decision provides public employers with further protections in making adverse employment decisions. But public employee discipline and discharge continue to present challenges for public employers. ***Contact Cindi DeCola or Athena Christofalos with your employment inquiries or with questions concerning Engquist.***

U.S. Supreme Court Rules Kentucky Retirement System is *Not* Age Discriminatory--On June 19th the U.S. Supreme Court issued its opinion in *Kentucky Retirement Systems v. the Equal Employment Opportunity Commission*, 128 S.Ct. 2361, ruling that a plan that makes age a condition of pension eligibility and that treats employees differently because of their pension status does not automatically violate the *Age Discrimination in Employment Act* ("ADEA")*.*

This case arose because the Kentucky Retirement System treats employees who retire for disability reasons differently than those employees who retire after serving the requisite length of time, which in Kentucky is either 20 years of service or age 55 with 5 years of service. Under Kentucky's system, normal retirement benefits are calculated based on years of service. Disability benefits are calculated by adding the number of years the employee would have had to work in order to be eligible for normal retirement benefits to the employees actual years of service.

In this case, the plaintiff was an employee who continued to work after becoming eligible for retirement at age 55 and then became disabled at age 61. Because he was already eligible for normal retirement benefits at the time he became disabled, no additional years of service were used in calculating his disability benefits. As a result, the employee claimed that the system refused to impute years of service solely because he became disabled after age 55.

The U.S. Supreme Court reversed the decision of the Appellate Court, concluding that the system treats employees differently because of their pension status and not because of their age, which the Supreme Court had previously held is permissible under the ADEA. In reaching this conclusion, the Court found that "the disability rules clearly track Kentucky's normal retirement rules" and that the Kentucky system is not based on "the sorts of stereotypical assumptions that the ADEA sought to eradicate," such as the work ability of "older" workers compared to "younger" workers.

This case may be important to Illinois school districts that are developing systems based on an employee's pension status in an effort to limit its exposure to the TRS 6% excess salary contribution that went into effect in 2005.

Please contact Mike Loizzi or Tony Loizzi for more information about this decision or to discuss your district's retirement plan issues.

CONTACT US:
info@hlerk.com

3030 Salt Creek Lane . Suite 202 . Arlington Heights, Illinois 60005
3048 Spring Mill Drive . Springfield, Illinois 62704
23 Public Square . Suite 260 . Belleville, Illinois 62220