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Labor & Employment Alert

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MacIntyre v. Carroll College: The squeaky wheel gets the grease

By Robert Pepple and Andrea Chavez

Ninth Circuit holds that non-renewal of Employment Agreement may be actionable under Title IX.

What's the Impact

- The threshold to establish a prima facie case for Title IX retaliation is low, and courts seem determined to make more conduct qualify as an adverse employment action, leading to more litigation and potential liability.
- Employers should treat the current employee seeking a renewal of an employment similar to a prospective employee, allotting the current employee the same statutory protections under Title IX.
- If an employee has complained about discrimination, employers should continue to be careful that their subsequent employment actions are not retaliatory, and are supported by a legitimate non-retaliatory reason.

What is Title IX, "McDonnel Douglas Burden-Shifting" & an adverse employment action?

Title IX (of the Education Amendments of 1972) prohibits discrimination based on sex in education programs or activities that receive federal financial assistance ("Title IX"). Title IX applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the U.S. Department of Education.

Like other federal discrimination statutes (e.g., the federal Americans with Disabilities Act and Age Discrimination in Employment Act), the question of liability is determined through a three-step process, colloquially called McDonnell Douglas Burden-Shifting. McDonnell Douglas Burden-Shifting is used when a plaintiff lacks direct evidence of discrimination (which is the vast majority of cases). The framework's namesake arises from the U.S. Supreme Court decision that created it, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Traditional McDonnell Douglas burden-shifting operates as follows:

- Step 1: Plaintiff establishes the "prima facie" case, which has three elements
  - Plaintiff is a member of a protected class (which is almost everybody).
  - Plaintiff suffers an "adverse employment action"
    - Note: the original test defined an "adverse employment action" as having three parts: (a) plaintiff is qualified for and applied for an available position; (b) despite being qualified, plaintiff was rejected for the position; and, (c) the position remained available after the plaintiff's rejection, and the defendant employer continued to seek applicants from persons of plaintiff's qualifications.
- Step 2: Employer articulates a legitimate, non-discriminatory reason for the employment action (e.g., lack of qualifications, budgetary constraints, etc.).
- Step 3: Plaintiff proves that employer's reason was pretext for discrimination (i.e., the given reason is a "cover story" for the real, discriminatory, reason for employer's decision).

The framework was created for claims arising out of alleged failure to hire on the basis of unlawful racial bias, under Title VII of the Civil Rights Act of 1964. However, the analysis has been expanded to employment claims arising under different statutes, including Title IX, as well as to other theories of unlawful conduct, such as retaliation.

The Upshot of *MacIntyre v. Carroll College*: Non-renewal can be actionable

MacIntyre v. Carroll College is a Title IX retaliation case that expands on an already broad body of case law regarding what can constitute an "adverse employment action" in such cases. The Ninth Circuit has previously held that the following conduct may constitute an adverse employment action in the context of Title IX retaliation:

- forcing an employee to use a grievance procedure to get overtime work assignments that were routinely awarded to others;
- transferring away an employee's job duties and assigning undeserved poor performance ratings; and
- intentionally assigning a teacher a subject that the teacher disliked.

It was against this backdrop that the Ninth Circuit decided *MacIntyre v. Carroll College*, which decided whether the non-renewal an expired employment ("Non-Renewal") contract could constitute an "adverse employment action"—which (as explained above) is essential to making the "prima facie" case. Reversing the district court, the Ninth Circuit held that Non-Renewal could constitute an adverse employment action even if the employer is under no legal obligation to renew the contract, because it could deter a reasonable employee from reporting discrimination.

The facts of MacIntyre v. Carroll College

Carroll College employed Bennett MacIntyre ("MacIntyre") in various positions for over a decade, including head of the Carroll College Golf Team. In January 2016, MacIntyre informed the College's Title IX Coordinator about potential Title IX violations, as well as alleged workplace harassment, hostile work environment, and discrimination by the Interim Director of Athletics ("Int. Director"), among others. The next month, the Director submitted a performance review of MacIntyre, giving him the lowest possible score in each category. MacIntyre then filed a formal grievance, alleging (among other things) discrimination and hostile work environment.

To resolve MacIntyre's complaints informally, Carroll College and MacIntyre signed a settlement agreement in which the school agreed to (1) remove Baker's negative review from MacIntyre's file, (2) pay MacIntyre $15,000 in back pay, (3) and hire MacIntyre as a full-time golf coach under a two-year employment contract ("Contract"). The Contract was effective from January 1, 2016, through June 30, 2018, and provided that MacIntyre's employment would expire at the end of the term. The Contract was silent on renewal.

In the meantime, the College obtained a full-time Athletic Director ("FT Director"), who learned of MacIntyre's Title IX complaints and grievances. The College also began experiencing budget problems because of declining enrollment. The FT Director put forward a proposal calling for a nearly $200,000 reduction in the athletic department budget, including making the position of golf coach a stipend only position ("Proposal"). The Board of Trustees adopted the Proposal, which led to the non-renewal of MacIntyre's Contract, which reduced his compensation from $38,000 to $14,000 and cut some of his employment benefits. Following a grievance that was investigated by a third-party consultant and resolved against MacIntyre on the issue of whether the alleged violations occurred, MacIntyre sued.

The district court granted summary judgment for the College after determining that MacIntyre failed to allege a prima facie case of retaliation under Title IX. Specifically, the district court held that the nonrenewal of the Contract was not an adverse action.

The Ninth Circuit reversed, reasoning that such an action is comparably likely to deter a reasonable employee from reporting discrimination as the conduct already addressed by them in prior cases (see above). The court noted that the evidentiary standard for making a prima facie case for Title IX is low, requiring only a "minimal threshold showing." As such, retaliation claims may be brought against a much broader range of employer conduct than substantive claims of

discrimination. The court found that its reasoning holds true even if the employer is under no legal obligation to renew the contract.

What's the Impact?

Carrol College reinforces the proposition that employers must be cautious when making decisions that impact the employment of individuals who have made protected complaints—because the threshold to establish a prima facie case for Title IX retaliation is low. An employee need only show that the employment decision would dissuade a reasonable person from reporting discrimination, and Carrol College expands the body of "actionable theories" to non-renewal of an employment agreement that naturally expired and contains no obligation to renew.

What's Next?

At some point, almost all employers will have to deal with an employee making a protected complaint. Even if the complaint is meritless (which is often the case), the employer could face liability solely on the basis of how it responds. This often places employers in a situation where they feel as if their hands are tied with respect to an underperforming or insubordinate employee. However, with the guidance of experienced employment counsel, employers can make a detailed and persuasive record of the legitimate, non-discriminatory reason(s) for employment decisions concerning the complaining employee.

Nixon Peabody's lawyers have extensive experience in assisting employers with Title IX complaints internally, providing advice and defending against such claims in court. If you have questions about Title IX, or any other employment matters, please feel free to contact the authors of this article.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Robert H. Pepple
213.629.6140
rpepple@nixonpeabody.com

Andrea Chavez
213.629.6089
andrea.chavez@nixonpeabody.com