Does Not Renewing A Teacher's Contract Risk An Employment Lawsuit?

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Before deciding to terminate a teacher's employment contract, a school is likely to take several steps. The school's administrator will carefully review the contract to ensure that the school complies with any provision that requires "good cause" for termination. The human resources director will scrutinize the articulated reason for termination in order to confirm that the decision does not appear to be based on unlawful discrimination or retaliation. The Head of School may even consult with legal counsel about the termination decision.

But what about the decision *not to renew* a teacher's contract at the end of the school year? The same administrators who painstakingly examine a decision to terminate a teacher's contract, often view the decision not to renew the contract as risk-free. What's to worry about when the school simply elects not to renew a teacher's contract? The school has fulfilled its legal and contractual obligations, right? *Right?* Not necessarily.

There is some disagreement among courts as to whether the non-renewal of a teacher's contract is an "adverse employment action" that could give rise to liability for wrongful termination, discrimination or retaliation under federal and state anti-discrimination laws. But those courts that view a claim for non-renewal of a contract as a basis for a discrimination or retaliation lawsuit are increasingly in the majority.

In a recent case, a Court of Appeals held that non-renewal of a contract alone *could* constitute an adverse action where the teacher sought renewal. *Leibowitz v. Cornell University.*

What Is An "Adverse Employment Action" Anyway?
Employees who claim unlawful discrimination must first establish that: 1) they are a member of a protected class; 2) qualified for the position; 3) ***suffered an adverse employment action***; and 4) the adverse action occurred under circumstances that give rise to an inference of discrimination.

Though courts may differ in their views of what is "materially adverse," it's clear that not everything that makes an employee unhappy is an actionable adverse action. The overall trend has been to expand the definition of adverse action, thereby effectively diminishing an employee's burden in establishing claims of unlawful discrimination or retaliation.

In discrimination cases, an adverse employment action generally means a material change in terms or conditions of employment. This includes failure to hire, discharge, demotion, wage cut, a material loss of benefits, denial of a promotion or a transfer, or a material change in job duties. Courts that define adverse action broadly consider other employment actions to be actionable as well. For instance, the 10th Circuit has found a significant change in benefits to be an adverse employment action, and the 9th Circuit considers decisions negatively affecting compensation to be adverse employment actions.

In retaliation cases, the standard is even more broad. The U.S. Supreme Court has held that an employee's burden to establish a "materially adverse employment action" is merely to show that he or she suffered some action that would dissuade a reasonable worker from exercising protected rights. *Burlington Northern & Santa Fe Ry. Co. v. White* 548 U.S. 53, 68 (2006).

Facts Of The Case

Margaret Leibowitz was first employed by Cornell University pursuant to a term employment contract in 1983. Leibowitz's position was never tenured. Under the school's rules, the contract term could be no more than 5 years, and in truth, the length of the term varied. The school renewed Leibowitz's term contract several times.

When Leibowitz's contract expired on October 31, 2002, the school elected not to renew it, citing budgetary reasons. Although there were other vacant positions around the time Leibowitz's contract was to end, the school did not consider Leibowitz for any other positions for which she might have been qualified.

Leibowitz sued in federal district court, claiming that the decision not to renew her contract constituted gender and age discrimination. The school asked the court to dismiss the claims. It argued that Leibowitz failed to establish her case because non-renewal of her term contract was ***not*** an adverse employment action since the contract merely expired by its own terms. The district court agreed that Leibowitz failed to show that the school had a policy of granting tenure to term employees, and since Leibowitz did not have a guarantee of lifetime employment, she suffered no material adverse change in the terms of her employment when her contract expired and the school did not renew it. Leibowitz appealed.

The U.S. Court of Appeals for the 2nd Circuit saw the case differently and held that the school's decision not to renew Leibowitz's contract *could* constitute an adverse employment action. In reaching this conclusion, the 2nd Circuit defined "adverse employment action" for purposes of both the Age Discrimination in Employment Act and Title VII as "more disruptive than a mere inconvenience or an alteration of job responsibilities" to include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." The Court explained that where renewal of an employment contract is sought by an employee, non-renewal *alone* could constitute an adverse action.

Many – But Not All – Courts Agree: Non-Renewal Is The Same As Termination

In the *Leibowitz* case, the Second Court cited decisions of the 3rd, 6th, 7th and 10th Circuits, and several district court decisions, where those courts expressly concluded that non-renewal of an employment contract satisfies the adverse-action requirement. Some circuit courts, such as the 9th circuit, have yet to consider this precise issue. Other courts have simply adopted with little analysis the parties' express or implicit agreement that non-renewal of a contract *is* an adverse employment action.

Only a few courts have found non-renewal of an employment contract ***not*** to be an adverse employment action. For instance, in California, an employee whose fixed-term contract is not renewed cannot state a common law tort claim for wrongful termination in violation of public policy. Illinois state courts have held similarly. Significantly, these cases did not concern statutory discrimination or retaliation actions.

What Does This Mean For Your School?

In light of the trend to expand the definition of adverse employment action, schools should exercise care when deciding not to renew an employment contract. Don't just assume that because a contract is ending, the school's legal obligations are fulfilled and the decision not to renew is risk-free. Take the same steps to evaluate the potential risks of a decision *not to renew* an employment contract as to evaluate a decision to *terminate* an employment contract. Carefully screen decisions not to renew an employment contract in order to ensure that such decisions are based on lawful, legitimate, non-discriminatory and non-retaliatory criteria in order to mitigate the risk of claims of wrongful termination, discrimination or retaliation.