School Law Matters

January 2014

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

Remember the 1,250 Hours of "Actual Work" Threshold for FMLA Eligibility

By Elizabeth H. Marris, Esq.

As you are all probably aware, the Family and Medical Leave Act of 1993 ("FMLA") grants employees up to twelve weeks of leave per year for certain family-related and/or medical-related reasons and prohibits employers from retaliating against employees for exercising this right. Unfortunately, as many school districts are finding out, some employees are abusing the leave rights granted by this law. In order to combat this problem, it is critical for school district officials to be familiar with who actually qualifies for FMLA leave. A recent First Circuit Court of Appeals case highlights an important and often confusing criterion for eligibility: i.e., an employee must have worked at least 1,250 hours during the twelve-month period immediately preceding the commencement of leave. See McArdle v Town of Dracut/Dracut Pub. Schools, 732 F.3d 29 (1st Cir., 2013).

The McArdle case reminds us of the importance of this criterion, especially for school districts, where it can be difficult to calculate the hours worked by teachers and other employees. Raymond McArdle was a middle school English teacher in the Dracut School District, where he had taught since 1997. During the 2008-2009 school year, he missed about 100 days of the 180-day school year due to personal hardships and a resulting battle with alcoholism. McArdle managed to work out the absences with his principal and superintendent through sick leave, personal leave, medical notes, and deduct days. However, he again failed to appear at school on the first day of the 2009-2010 school year. Instead, he called his principal and requested FMLA leave. The principal sent him the requisite forms to apply for FMLA leave and reminded him that school policy required him to notify the superintendent in writing of his desire to take the leave. McArdle failed to complete and return the forms, failed to contact his superintendent in writing, and continued to be absent from school for 27 more days without arranging for a substitute teacher. After hearing nothing from McArdle, the District took steps to terminate his employment.

Upon losing his job, McArdle sued the School District, alleging that it had violated his rights under the FMLA by firing him in retaliation for his attempt to utilize FMLA leave. The First Circuit Court of Appeals ultimately decided that McArdle's FMLA rights had not been violated.

The crux of the Court's opinion hinged on the fact that McArdle was not eligible for FMLA leave because he had not worked 1,250 hours in the immediately preceding twelve months. During the preceding year, McArdle had only worked 82 days, or 615 hours. The Court held that the days McArdle was paid for but did not actually work (such as personal days, sick days, vacation days, and holidays) did not count toward his total hours for FMLA purposes. The Court did, however, take into account the hours he worked outside of the school day in preparation for his classes. Nevertheless, the Court determined that, given his attendance record, it was implausible that he worked 635 hours outside of school during the relevant timeframe. Thus, he was not eligible for FMLA leave.

The Court contrasted this situation with a Second Circuit case where an employee was deemed to have worked 1,250 hours where she had worked 1,247 documented, in-school hours. In that case, the Court decided it was probable that she worked at least three additional hours outside of the school day to make her eligible for the FMLA leave.

Remember, to be eligible for FMLA leave, an employee must actually work at least 1,250 hours both during school and after hours during the preceding twelve-month period. Moreover, the burden of proving that an employee worked fewer than 1,250 hours falls on the school district.

If you have any questions about this subject or need assistance determining if an employee is eligible for FMLA leave, please feel free to contact us.

In This Issue …

Law Firm Developments

Ferrara, Fiorenza Law Firm Announces Naming New Partner and New Associate


Katherine E. Gavett, Esq.

The law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. takes great pleasure in announcing that **Katherine E. Gavett** has been named a Partner of the firm.

Ms. Gavett is a graduate of Syracuse University and received her law degree from Hofstra University. Her practice is dedicated to the representation of private and public sector employers in federal and state actions, administrative audits and proceedings, special proceedings, mediations and arbitrations. Ms. Gavett's primary practice areas are labor and employment law, transportation law, real property tax law, and education law. She also represents municipalities in construction contract negotiations and disputes.

Ms. Gavett is a member of the New York State Bar Association, the Onondaga County Bar Association, the Transportation Lawyers Association and Women in Tax Assessment.

The firm is also pleased to announce that **Elizabeth H. Marris** has become associated with the firm. Ms. Marris is a 2010 *magna cum laude* graduate of Hamilton College and a 2013 *magna cum laude* graduate of Syracuse University College of Law. She also received a Master of Public Administration from the Maxwell School in 2013. Ms. Marris will serve the firm in the representation of school districts in general education matters as well as all public and private sector clients in employment and labor relations matters.


Elizabeth H. Marris, Esq.

She is a member of the New York State Bar Association, the Onondaga County Bar Association, and the CNY Women's Bar Association.

Retiree Health Benefits

N.Y. High Court Rules: Certain Changes to Retiree Health Benefits May be Permissible

The New York State Court of Appeals recently issued a decision regarding health insurance for retirees that mainly favored retirees. See Kolbe v. Tibbetts, 2013 WL 6499307 (12/12/13). However, the directions that the high court gave the lower court upon remanding the case for further development of the facts are potentially helpful to school districts.

A school district negotiated a change in the prescription drug co-payment structure for active employees in a unit of non-instructional employees represented by the CSEA. Specifically, it went from two tiers to three tiers with higher copayments. The District applied this change to retirees.

The collective bargaining agreement in effect when the plaintiffs retired said that "the coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires". The Court of Appeals held that this means that, under this particular contract, retirees have a vested right to the same coverage during retirement as they had when they retired, until they reach age 70.

The plaintiffs had argued that there should be a presumption or inference that retiree health insurance rights are vested at the time of retirement and may not be changed by the employer after that. The Court of Appeals said that since this collective bargaining agreement was clear on its face, it would not rule on this issue.

This is the aspect of the decision that is particularly significant for school districts. If the court had held that such a presumption exists in New York State law, it would be very difficult to make any changes in retiree health insurance, even if the contract did not expressly grant retirees the right to continuation of particular benefits that they had as active employees.

The "Retiree Health Insurance Moratorium Law" prohibits school districts from diminishing benefits or contributions for retirees, unless the district makes a corresponding change for active employees. However, the Court of Appeals rejected the District's argument that this law gives a district the right to make the same changes for retirees as it does for active employees.

The Court of Appeals found that there were issues of fact about what the phrase "same coverage" means and remanded the case. The lower court will have to determine what is meant by the phrase in order to decide whether the increase in prescription drug co-payments for retirees violated the contract under which they retired.

The outcome will depend on the specific evidence the parties submit to the trial court. However, the Court of Appeals recognized that a reduction in one benefit could potentially be offset by increases in other benefits. The court indicated that, depending on the evidence, it is possible that "same coverage" means coverage that is equivalent, not absolutely identical in every way. The court also indicated that it would be appropriate to look at the effect of the changes on retirees as a group, not on individual plaintiffs in isolation.

We will keep you informed on the outcome of this case as it becomes available. Meanwhile, if you have any questions regarding the foregoing, please feel free to contact our office.

Students with Disabilities

OCR Clarifies Guidance with Respect to Involvement in Extracurricular Activities by Students with Disabilities

The U.S. Department of Education's Office of Civil Rights ("OCR") recently issued guidance clarifying some confusion over their January 25, 2013, "Dear Colleague Letter" regarding the involvement of students with disabilities in extracurricular athletics under Section 504 of the Rehabilitation Act of 1973. The guidance was issued in response to inquiries from the National School Boards Association General Counsel and elucidates the sometimes murky standards for Districts to follow under Section 504.

OCR reiterated that a student's "equal opportunity to participate" in and benefit from extracurricular athletic activities under 34 C.F.R. § 104.37 hinges on equal access, not a right to make the team or be provided separate activities. A district must consider the actual capabilities of the student as an individual rather than stereotypes or assumptions about students with disabilities in general or about specific students with disabilities. This individual inquiry may dictate that the district make reasonable modifications or provide aids or services to afford otherwise qualified students equal opportunities to participate. Modifications, aids, and services need not be provided, however, if the district can show that they would fundamentally alter the activity or would result in an undue burden on the district.

OCR calls for a "reasonable, timely, good-faith effort by individuals with the appropriate knowledge and expertise" to be a part of the inquiry. This may entail a consultation among a coach or athletic staff members, the student, and the student's parents. Other individuals can be brought into the discussion as needed, such as athletic officials to discuss possible adaptations to competition rules and practices, or the student's classroom teacher, to provide advice on coaching modifications for a learning-disabled student.

Finally, OCR urges, but does not require, school districts to create separate or different activities for students who cannot participate in existing extracurricular athletics even with reasonable modifications, aids, or services. If the district does choose to provide such different activities, they must be supported equally to the district's other athletic activities. Ultimately, equal support will be determined based on how the similar activities are funded by the district.

Should you have any questions regarding the involvement of students with disabilities in extracurricular athletics, please feel free to contact our office.

Search and Seizure

Supreme Court Case about Drug-Sniffing Dogs Provides Opportunity for Review of Proper Procedures

In a case with potential implications for school districts, the United States Supreme Court recently addressed the question of whether there are specific performance/accuracy standards for drug-sniffing dogs assisting law enforcement in the detection of illegal drugs. The Supreme Court held that there should be no standard "checklist" of a particular dog's performance in detecting illegal drugs in order for a court to issue a warrant based on a dog's alert to its handlers that it detected illegal drugs in a particular area. Thus, school districts who work with local law enforcement in the use of drug-sniffing dogs to search school property have another Court decision upholding the validity of that use.

While the dog's performance in this regard will likely no longer come into question in disputes regarding the search and seizure of illegal drugs by school officials and law enforcement officials utilizing such dogs, the performance of the officials involved will always be a subject to debate and dispute. Thus, the Supreme Court's review of this issue provides us with a general opportunity to review the proper use of drug-sniffing dogs in the school setting.

First, it must be remembered the Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. When law enforcement desires access to areas in which an individual has an expectation of privacy, such as a person's home, law en-

Continued on the next page

SCHOOL LAW MATTERS is published by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Search and Seizure

Supreme Court Case about Drug-Sniffing Dogs Provides Opportunity for Review of Proper Procedures (cont'd)

forcement must have "probable cause" to access the area. Schools, however, are subject to a lesser standard known as "reasonable suspicion" when searching areas in which students have a reasonable expectation of privacy. Students do not have a reasonable expectation of privacy in school lockers or desks, or even in cars parked on school grounds. Thus, reasonable suspicion is not necessary to search those areas.

Accordingly, a school may use drug-sniffing dogs to detect for the presence of illegal drugs in lockers, desks, and cars. As a practical matter, however, schools should only use drug-sniffing dogs to detect drugs in these areas when there is a generalized reasonable suspicion that illegal drugs are present in the school. Generalized reasonable suspicion means that the school has reason to believe that illegal drugs are present in the school, as opposed to individualized reasonable suspicion which means that the school believes that a particular student possesses the contraband.

Schools must remember that in order to use a drug-sniffing dog to detect for the presence of illegal drugs *on a student's person*, one court has held that a school must have individualized reasonable suspicion that the particular student possesses illegal drugs. As a practical matter, if the dog alerts to the presence of illegal drugs on a student and the student is unwilling to voluntarily empty his or her pockets or reveal the location of the drugs, it is recommended that law enforcement be contacted to complete the search. In any situation, if a dog alerts to the presence of illegal drugs, the student's parents should be contacted immediately.

Schools should be sure to follow their own procedures and protocols when utilizing drug-sniffing dogs, and should be prepared to field questions from concerned parents who learn that drug-sniffing dogs have been, or may be, used. Schools should also be cognizant of the discomfort (or worse, allergic reactions), and disruption that will be caused when drug-sniffing dogs are present. To minimize these effects, dogs should be used when students are not in the immediate vicinity.

If you have any questions about your District's use of drug-sniffing dogs, please do not hesitate to call us.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Joseph Bufano	**2/13/14**	**Client In-Service Program on** *"The Dignity for All Students Act"*
Henry Sobota	**3/3/14**	**NYCOSS 2014 Winter Institute Sunrise Café: "***Recent Developments in Personnel/Labor Relations and Do's and Don'ts for Effective Investigations of Employee Misconduct,"* **Albany Hilton, Albany, NY**
Donald Budmen **Eric Wilson**	**3/3/14**	**NYCOSS 2014 Winter Institute Skill Building Session:** *"When Does Student Off-Campus Misbehavior Also Become Your District's Problem?"* **Albany Hilton, Albany, NY**
Susan Johns **Joseph Shields**	**3/3/14**	**NYCOSS 2014 Winter Institute Legal Session:** *"Some Modest Proposals for Realistic and Practical Reforms to Assist Your District,"* **Albany Hilton, Albany, NY**
Susan Johns	**3/19/14**	**Annual CSE Chairpersons Technical Assistance Meeting (sponsored by Board of Cooperative Educational Services - Sole Supervisory District - Franklin-Essex-Hamilton Counties)** covering *"Issues of Harassment Involving Students with Disabilities"* and *"Implementing the New Section 504,"* **Crowne Plaza Resort, Lake Placid, NY**

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.