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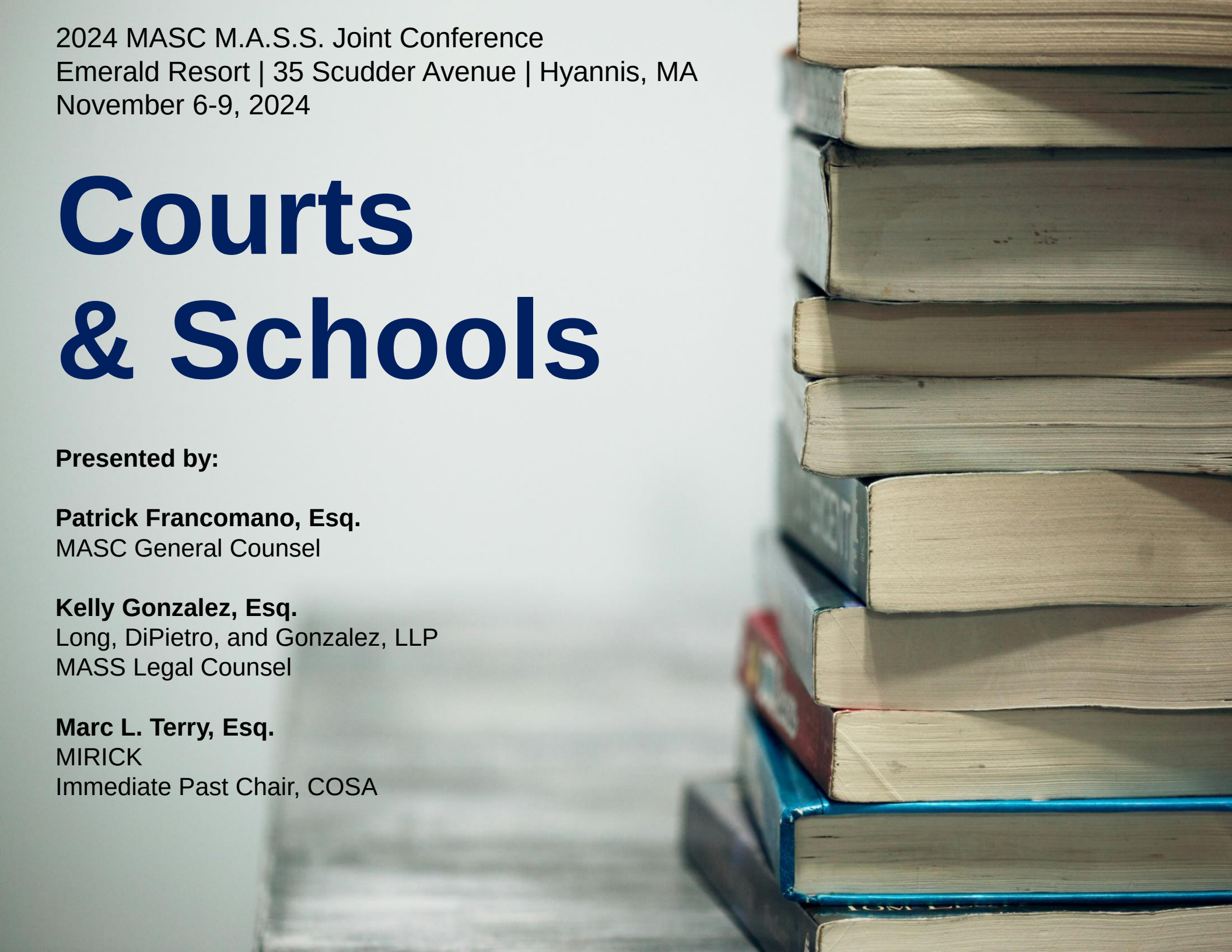
Courts & Schools



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*SCOTUS * Choose Your Social Media Hat Carefully*
Lindke v. Freed, 144 S.Ct. 756 (2024)

- Was a municipal employee's act of blocking another user from commenting on his Facebook posts "state action" in violation of that individual's 1st Amendment rights?

***Lindke v. Freed* The Facts**

- James Freed, created a private Facebook profile sometime before 2008, at some point converting it to a public “page,” allowing anyone to view and make comments.
- In 2014, Freed was appointed city manager of Port Huron, Michigan and revised his page to reflect that, describing himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.”
- Freed frequently updated his page posting items about his personal life and information connected to his municipal position, including communications from other city officials and requests for opinions from the public about current issues.

***Lindke v. Freed* * The Facts - Continued**

- Freed would reply to comments on his posts, including those from city residents that dealt with municipal issues. At times he would delete “derogatory” or “stupid” comments.
- During the COVID–19 pandemic Kevin Lindke, another Facebook member commented on Freed's COVID–19 related posts, disapproving of how the city was handling the pandemic. Freed deleted Lindke’s comments and then blocked Lindke from making any additional comments.
- Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated his First Amendment rights, maintaining that Freed's Facebook page was a public forum and he had the right to comment on it.

***Lindke v. Freed* * The Law & The Line**

- "Section 1983 provides a cause of action against '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State' deprives someone of a federal constitutional or *188 statutory right. (Emphasis added.)"
- This language protects individuals from actions attributable to a State as opposed to a private person. Although often easy to identify "[s]ometimes, however, the line between private conduct and state action is difficult to draw. … this case requires analyzing whether a state official engaged in state action or functioned as a private citizen."

***Lindke v. Freed* * The Law & The Line - Continued**

- "The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights—including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms. Here, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own."

***Lindke v. Freed* * The 2 Part Rule**

- A public official who prevents someone from commenting on the official's social-media page engages in state action under § 1983 only if the official both:
- (1) possessed actual authority to speak on the State's behalf on a particular matter, and
- (2) purported to exercise that authority when speaking in the relevant social-media

***Lindke v. Freed* * Part 1 * Actual Authority?**

- "Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. … the presence of state authority must be real, not a mirage."
- Potential sources of authority include: "statute, ordinance, regulation, custom, or usage." While statutes, ordinances, and regulations refer to written law, " 'Custom' and 'usage' encompass 'persistent practices of state officials' that are 'so permanent and well settled' that they carry 'the force of law.' "
- "In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action."

***Lindke v. Freed* * Part 2 * Authority Exercised?**

- "For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. [Citation omitted] State officials have a choice about the capacity in which they choose to speak. [G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." [Citation omitted] . If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice. […]" (Citations omitted).

***Lindke v. Freed* * Part 2 * Authority Exercised?**

- "Had Freed's account carried a label (e.g., "this is the personal page of James R. Freed") or a disclaimer (e.g., "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: … Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations."

***Lindke v. Freed* Some Preliminary Self Help**

- Always remember what hat you are wearing, especially when using social media.
- As a municipal official your social media account(s) should contain language indicating whether the account is official or personal.
- Do not permit crossover between accounts; use each account for its intended use.
- Confirm that your district policy is:
    1. Explicit on who has the authority to speak on behalf of the school district,
    2. Clearly understood by everyone, and
    3. Being followed consistently.

Is a public official, municipality, or committee compelled to permit the public to post on social media accounts?

- No federal court, MA state court or MA state agency has held that members of the public have a right to post on an account.
- Avoid taking any action that might allow someone to argue that you have established such an entitlement.

What is the best way for a district or school committee member to avoid trouble around public postings?

- Do not permit the public to comment on any social media page; simply disable that feature on all public and personal pages.
- If you are currently permitting the public to post comments, be sure to have a discussion with your district's legal counsel before disabling that feature.
- There are certainly a plethora of social media outlets within each community that allow others to share their best & finest thoughts on the topic of the day.
- The public is always free to contact you or the district directly on a matter of concern via whatever means you have identified on the district's website.

Social Media, Public Employment and the First Amendment - Macrae v. Hanover

- Candidate for School Committee
- Social media/TikTok account postings and repostings for election
  - Homophobic, transphobic, racist themes; shouldn't teach CRT in public schools
  - Six memes at issue
- Hanover hires after statements were made
- Students included African American and LGBTQ+ kids
- Staff and some students commenting
  - Three teachers testify about their concerns
- District's Mission: safe learning environment; respectful of differences
- Adm concern for potential negative impact on student learning/potential disruption
  - Fires the teacher

Social Media, Public Employment and the First Amendment - Macrae v. Hanover

- Hanover files motion for summary judgment
  - Pickering three-part test for adverse action based on public employee speech:
  - Is it a matter of public concern?
  - Balance interests of employee speech with employer's interest in efficiency of provision of public services, i.e., was there adequate justification for employer's action?
  - Was the speech a substantial or motivating factor in employment decision?

Social Media, Public Employment and the First Amendment - Macrae v. Hanover

- Potential disruption? No evidence of actual
  - Reasonable predictions of disruption entitled to “significant weight” even if matter is of public concern
  - Given mission, strong interest in preventing speech rising to level of harassment

Social Media, Public Employment and the First Amendment - Macrae v. Hanover

- District Court: no jury could conclude employer not focused on actual or potential impact on school environment
    - Administration's belief in potential disruption supported by training and experience
    - Reasonable inferences can be drawn
    - Ample evidence of potential for disruption
- Focus on second Pickering prong: balancing interests favors employer
- School Committee wins

Social Media, Public Employment and the First Amendment - Macrae v. Hanover

- In June 2024, the First Circuit affirmed the District Court's decision.
  - Agreed with District Court's analysis
  - Notably, relied, in part, on testimony from administrators that students would not feel safe or comfortable learning from the teacher given the potential to perceive some of the posts at issue as transphobic, homophobic or racist.
  - Also looked to actual disruption in community where employee served as school committee member
  - Cert filed with Supreme Court

Social Media, Public Employment and Section 42 – An Arbitration Decision

- Termination of middle school adjustment counselor
- Mix of issues
  - Frequent misgendering of transgender students
  - Repost of transphobic Facebook post on employee's public page
  - Comments to students on caseload about following employee's religion
- **Significant** public outcry

Social Media, Public Employment and Section 42 – An Arbitration Decision

- Arbitrator only analyzed the Facebook post issue

  The post has a picture depicting a hand with a stigmata underneath a rainbow and above children. The text states:

  My opinion is obvious:

  If my 4-year old son tells me that he wants to dress as a princess, I will tell him no, because he was born a child and the children are princes; I will try to get my daughter to prefer to play a sport of her liking or violin, but I will not support mail behaviors as well Since I'm not going to endorse someone telling you that there is a third gender, I'm going to teach you that no, that there are only two chromosomes, that yes, that God created man in the beginning was Adam and Eve.

  "Ahhhh but" "you're square, authoritarian, legalistic, closedminded, you can't force the creature."".

  Sorry (for you) but the answer is yes

  Just like I force him to eat vegetables, do his chores, brush his teeth and go to the dentist, I also force him to sleep at a certain time, I can also choose what clothes to buy him. Why is it difficult for me, Because in life there are rules, you can't do everything you want, when you want, as you want at the time you want; and that's not why I love you less, quite the opposite! Because I love him I do.

Social Media, Public Employment and Section 42 – An Arbitration Decision

Now if later I'm an adult.

(because that was the example my parents gave me and because that is the legal age where one acquires ability in fact) my son comes and says to me: Dad, from today I want to be Muslim, Buddhist, vegetarian, dress as a woman, change sex, be spiritualist, cannibal, vampire or vampire Tree… well, there will be another story, but BEFORE me you enter this under my roof no. First, I will not run away from my responsibility as a father/mother and my duty to teach them things as they are.

If you think the same, I invite you to express it and don't be silent if others scream their rights I scream mine.

I've said!

Although they are outraged!

Social Media, Public Employment and Section 42 – An Arbitration Decision

- We argued employee could no longer effectively perform his duties because his post undermined his ability to support LGBTQIA+ student and violation of anti-discrimination policies
- Arbitrator held inappropriate and “best interests of the students were not served when [Employee] reposted on his public Facebook page a post that he, when questioned, recognized would be offensive.”
- Concluded that employee engaged in conduct unbecoming a teacher within the meaning of the law and upheld the termination

So much for the right to transfer (sort of)…

- Employment discrimination claim focused on whether a transfer constitutes an “adverse action,” which must be shown to make out a claim
- Previously, employers would argue that if hours of work, compensation, benefits and opportunities were the same, there is no adverse action

So much for the right to transfer (sort of)…

- In Muldrow v. City of St. Louis, Supreme Court addressed this issue and held that an employee must only show "some harm," which could be as limited as the perceived stature of the position held
- Schools must now be more careful to consider potential discrimination claims when transferring employees
  - More or less desirable school?
  - More or less desirable program?
  - More or less desirable classes (AP v. CP1)?
  - More or less of a commute?
  - More or less responsibility?
  - More or less opportunity for responsibility?
- Important to remember, however, that this analysis applies to claim of discrimination

THE "TWO GENDERS" T-SHIRT CASE

L.M. v. Middleborough P.S.

The T-Shirt Case: L.M. v. Middleborough

- L.M. v. Town of Middleborough, Nos. 23-1535, 23-1645 (1st Cir. June 9, 2024)
- Summary of most relevant facts:
  - L.M. – middle school student. Wore to school t-shirt stating "There Are Only Two Genders"
  - School asked him to change shirt, citing dress code, but not disciplined
  - Student announced and later wore the same shirt with "Only Two" covered in tape. Same outcome
  - Significant media attention, protests, and other students wearing same shirt
  - Student not asked to remove other political shirts, like "Lets Go Brandon" and "Don't Tread on Me"
  - School administrators aware of concerns that school environment not welcoming to LGBTQ+ students, and overall potential for harm of transgender students who are not supported

Procedural Background and Status

- L.M. sued in federal court
- D. Mass. denied restraining order and preliminary injunction (in favor of MPS)
    - Parties agreed final judgment/record complete – procedural maneuver
- L.M. appealed to First Circuit.
    - Note: M.A.S.S. submitted amicus brief with GLAD
- 1st Circuit affirmed D. Mass., ruled in favor of MPS, but on different grounds
- L.M. filed for cert at Supreme Court 10/9/24. Response due 11/12/24.
    - SC decides whether to hear the appeal.

New 2-Prong Test Announced

- Long-standing precedent (Tinker): school authorities may restrict student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."
- Many cases on how to apply in practice, with various permutations
- 1st Cir in LM: Schools may bar **passive and silently expressed** messages by students at school that do not target a specific student if:

  "(1) the expression is reasonably interpreted to **demean** one of those **characteristics of personal identity**, given the common understanding that such characteristics are 'unalterable or otherwise deeply rooted' and that demeaning them 'strikes a person at the core of his being'" and

  "(2) the demeaning message is **reasonably forecasted to 'poison the educational atmosphere'** due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to 'symptoms of a sick school – symptoms therefore of substantial disruption.'" Slip Op. at 38 (emphasis added).

Deference to Administrators

- 1st Cir.: Important to give deference to administrators
  - Framed question as not whether the t-shirt should be banned but whether school officials or courts should decide. (Here, school officials.)
- Forecast must be reasonable; no need to wait for actual disruption and need not be an accurate forecast
  - School officials "must have some margin to make high-stakes assessments in conditions of inevitable uncertainty."
  - Courts should not "second-guess" school districts' assessments relative to the forecast of material disruption.

Applying Standard to Facts

- Shirt demeans characteristic of personal identity (even when taped – everyone knew what it said)
    - Not unreasonable in MS setting that suggesting genders other than "male" and "female" are invalid demeans non-binary and transgender students
    - Means mattered – on a t-shirt; no nuance and not fleeting
- Reasonably forecasted to cause serious negative psychological impact on LGBTQ+ students, leading to symptoms of a sick school (e.g., students distracted, afraid to go to school) = substantial disruption
    - Evidence from surveys; known mental health concerns of LGBTQ+ students in district; knowledge of administrators
- 1st Cir.: District did not violate student free speech rights when enforcing the dress code w/r/t the shirts

PTS AND EXTENDED LEAVE

Chaloff v. Westwood P.S., No. 23-P-693
(Mass. App. Ct. Oct. 25, 2024)

PTS Overview

- Teachers who have worked in "a school district for the **three previous consecutive school years**" are entitled to professional teacher status ("PTS") if they are not notified by June 15 of their year that they are non-renewed. M.G.L. c. 71, § 41 (emphasis added).
- PTS = "just cause" protection & arbitration if dismissed. M.G.L. c. 71, § 42.
- SJC held in 1985 case that maternity leave does not "break" consecutiveness of service for purposes of PTS. *Solomon v. Sch. Comm. of Boston*, 395 Mass. 12, 19 (1985).
- Solomon did not address partial year worked. Older cases said years with absences other than "minor" deviations from the full school year did not count toward PTS. See *Fortunato v. King Philip Reg. Sch. Dist. Comm.*, 10 Mass. App. Ct. 200, 203-05 (1980).
- Post-ERA (1993) – largely decided by arbitrators = inconsistent
    - *Plymouth v. Bilbo* (Boulanger 2014) – "tack on" days equal to leave; full year not required
    - *Chaloff v. Westwood* (Holden 2021) – years of partial service do not count toward PTS

MA Appeals Court Westwood Decision

- Teacher appealed and Superior Court upheld arbitration decision.
- MA Appeals Court reversed and vacated, finding arbitrator violated public policy failing safeguard length of service credit.
    - *Note: arbitrators typically given substantial deference; less here b/c interpreted statute, not contract*
- MA Appeals Court held:
    - *Protected leave does not interrupt consecutive nature of service but does not count as service time*
    - *Teacher who took 56 days of parental leave in year 2 could not be required to complete entire 4th year to attain PTS; attained PTS after completed 56 days in 4th year*
    - *Requiring a complete extra year violates parental leave law (M.G.L. c. 149, § 105D) which safeguards length of service credit and violates public policy/law by penalizing employee for taking parental leave.*
    - *PTS after three years "mandatory" and schools cannot change length of probationary period.*
    - *Court rejected District's concerns about administering system with varying PTS eligibility dates and conflict with teacher evaluation cycle.*
    - *Reversed Superior Court and vacated arbitration award; remanded to arbitrator for remedy.*

Open Questions/Concerns Post-Westwood

- Finally have a court decision on this topic. BUT many open questions, e.g.:
  - *How does the June 15 notice deadline apply if no longer using full school years?*
  - *Note, some contracts have earlier deadlines.*
  - *How much leave warrants "tacking on?" Does this only apply to "protected leave?" What about partial years due to being hired mid-year?*
  - *How to handle teacher non-renewed at the start of the school year (e.g., before end of tacked-on period)? Keep them on? Dismiss them?*
- Work with administrators on logistics, e.g.,:
  - *How to keep track of start dates, leave, and possible PTS eligibility dates.*
  - *Ensure contractual requirements met, e.g., w/r/t evaluations and procedure.*
- Consult local counsel regarding, e.g.,:
  - *Compliance with non-discrimination obligations.*
  - *Collective bargaining obligations, if any, e.g., evaluation timeline changes.*

TITLE IX UPDATES AUGUST 2024

2024 Title IX Regulation Revisions

- August 1, 2024 Implementation
  - Update policies/grievance procedures (again)
    - Broader applicability but less burdensome overall than 2020 updates
  - Training for Title IX Coordinator and staff
- Uncertain Future
  - Injunctions from a number of federal courts (some apply to certain MA schools)
    - Note: if enjoined, maintain 2020 version BUT remember MA law still applies and prohibits discrimination on basis of gender identity
  - Loper Bright Ent. v. Raimondo, 603 U.S. __ (2024)
    - SC scrapped “Chevron” deference to federal agencies; courts will use own discretion
    - Upends 40 years of administrative law
    - Expect onslaught of challenges to agency actions (not just in education) and patchwork results

A Few Highlights

- Broader net cast – Regs will cover more situations
  - Sex-based harassment, includes hostile environment and harassment based on gender identity and orientation (in addition to the typical quid pro quo, retaliation, violence, etc.)
    - Note: for hostile environment, need only be severe OR pervasive (historically, both)
  - Applies to “off-campus” and outside-of-U.S. behavior (beware the field trip to Europe)
  - “Knowledge” standard broadened to “knowledge of conduct that reasonably may constitute sex discrimination”
    - Requires ALL employees notified Title IX Coordinator of possible sex-based discrimination
    - Requires prompt and effective response; including supportive measures
    - Identify and take measures to address barriers to reporting
    - Title IX Coordinator track “trends”

A Few Highlights continued

- Grievance procedure – many of same elements but more flexible and streamlined
  - E.g., supportive measures, informal resolution (except teacher on student), notice and information to parties, fair and transparent process, preponderance of evidence (unless adopt higher standard)
  - BUT, investigator can be decision-maker and more flexible process, including considering age; affirming parents to act on student's behalf and informal resolution has impartial facilitator
  - DOE model/guidelines available
- No discipline for Title IX violations unless specific finding that accused was responsible for the conduct
  - Continued conflict with timelines applicable to employee/student discipline
  - Underlying misconduct otherwise warrant discipline?

Some DOE Title IX Resources

- U.S. DOE Fact Sheet: https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf
- U.S. DOE Summary of Key Provisions: https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf
- U.S. DOE Resources for Drafting Policy: https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf

COLLECTIVE BARGAINING 2024

Collective Bargaining Overview

- On the whole – more difficult than in recent history
  - Some Districts are business as usual (not making news)
  - Many others need to take new approach
- Concerted effort by MTA (and AFT)
  - Singular focus (teachers) and really good at their job
  - Lobbying to make teacher strikes legal
  - Large war chest (money and shared resources)
- To-date, Union efforts have been largely successful, at least for short-term goals
  - No silver bullet for response (yet)
  - Are tides changing?

Preparing for the Bargaining Table

- Consider beginning preparations well before coming to the table
- Gather your team
    - Whole SC or sub-committee? Town/city involvement?
    - Which administrators (typically, at least Superintendent and business manager needed)
    - “Comms” team/PR Firm
    - Attorney, if using
- Educate your team on what to expect
    - If new members, explain how collective bargaining works, “rules of the road,” common tactics, good faith bargaining, regressive bargaining, who speaks when
    - Typically, Unions have more and larger “asks” than the employer
        - They also usually get more out of the bargain
        - But don’t underestimate the value of positive (or even neutral) labor relations

Develop a Strategy (Revise as Needed)

- Develop strategy and gather information
  - What are your priorities? Are they realistic? What are you willing to exchange?
    - Expect you will need to “pay” with time or money for big ticket items
  - How do your proposals compare with other districts? *E.g.,* regional comps
  - Determine what you can afford
    - Consider using modelling or creating spreadsheets with formulas for easy comparisons
    - Budget development and planning largely public - it should not be a surprise at the table
- Develop communications plan
  - Hire a PR firm, if you have not already
    - Note: particularly important if “open” bargaining or no limit on reporting to media/public
  - Revisit and revise, as needed, as bargaining progresses
- Contingency planning
  - Plan for possible Union activity, *e.g.,* work-to-rule, picketing, strikes
  - Be prepared to pivot

Common Union Proposals

- Significant increases in money (some well above 2/2/2%)
- Increased leave and non-teaching time, with fewer restrictions on use
- "Safety" provisions - often related to students with disabilities or behaviors
    - *See* Department of Labor Standards "Workplace Violence in Public Schools"
    - Temperature in schools without A/C and other air quality issues
- Limits on management rights/discretion
    - *Oversight of PD, credits for step/lane increase, assignments, meetings*
    - *Beware chipping away one piece at a time*
    - *Beware past practice arguments (consult with local counsel)*
    - *Beware of language that you cannot promise to implement, that will require frequent changes, or that is confusing/inconsistent*

What Happens If Do Not Agree?

- Impasse → DLR Mediation → Fact finding
- Expect concerted activity
  - Buttons, signs, picketing, work to rule, grievances, ULP
  - Alignment from parent groups/other stakeholders
  - “No Confidence” votes – *see* MASC/MASS letter
  - Strikes (local/regional) – ILLEGAL in MA
- Plan for what comes next
  - Fund/implement new contract
  - Relationship repair, if needed

Food for Thought

- Expect that whatever goes into the contract, you will need to “pay” to get out (with money, time, or some other benefit)
- Something may work today but will it come back to bite you tomorrow?
  - Often, terms limited by LCD
- Pick your battles
  - Does it matter? Is it fair? Good for kids? What if you don’t fight it?
  - Even if you “win,” is the win worth it? Something you actually want? Can do?
  - Is there a win/win?
- Only so much in your control – it takes two to tango
- These are your colleagues. Lawyers and MTA leave – you see them tomorrow.

QUESTIONS?