COMMONWEALTH OF MASSACHUSETTS

Appeals Court

NO. 2015-P-0906

PLYMOUTH COUNTY

THE PLYMOUTH PUBLIC SCHOOLS,
PLAINTIFF-APPELLEE,

v.

EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER
AND KRISTEN BILBO,
DEFENDANTS–APPELLANTS**.**

ON APPEAL FROM ALL DECISIONS, ORDERS AND JUDGMENTS
OF THE SUPERIOR COURT

**BRIEF FOR THE DEFENDANTS-APPELLANTS,
EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER
AND KRISTEN BILBO**

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INTRODUCTION

A fundamental error in this case is that the Superior Court asserted subject matter jurisdiction over a question for which it clearly lacks jurisdiction under the holding of Turner v. School Committee of Dedham, 41 Mass. App. Ct. 354 (1996), which held that arbitration under G.L. c. 71, § 42 is the appropriate forum in which to determine whether a teacher has attained Professional Teacher Status ("PTS"). Second, assuming the Superior Court properly asserted jurisdiction, it erred when it concluded that Kristen Bilbo ("Ms. Bilbo") had not attained PTS prior to receiving notice of non-renewal, purportedly as a non-PTS teacher, on May 31, 2013.

ISSUES PRESENTED

I. Whether the Superior Court erred when, contrary to Turner, it asserted jurisdiction over the question of whether the teacher had acquired PTS status under G.L. c. 71, § 41 and denied the Defendants' Motion to Dismiss in its Order entered on June 12, 2014?

II. Whether a paid maternity leave, sanctioned under a collective bargaining agreement during the course of a school year, does not weigh against the teacher's acquisition of tenure under G.L. c. 71, § 41?

III. Whether the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et seq., requires that, in a year in which a teacher takes FMLA leave, the periods that she worked in that year count toward attaining PTS?

IV. Whether the Superior Court erred when it declared that the Defendant, Kristen Bilbo, did not have professional teacher status pursuant to G.L. c. 71, §§ 41 and 42?

STATEMENT OF STIPULATED FACTS AND PROCEDURAL HISTORY

A. General Background

Ms. Bilbo was employed by the Plymouth Public Schools ("District") as a special education teacher at Plymouth North High School ("Plymouth North") from March 10, 2008 through the end of the 2012 – 2013

school year. During that time, Ms. Bilbo was a member of the bargaining unit represented by the Education Association of Plymouth and Carver ("Union"). (A. 116, ¶¶ 1 & 2.)

The Massachusetts Department of Elementary and Secondary Education ("DESE") requires that public schools operate at least 180 days per school year. (A. 117, ¶ 3.) Under the applicable collective bargaining agreements, teachers in the District were required to work 181 days each school year. (A. 117, ¶ 4, Article VI (B)(1), A. 134, 198 & 257.)

B. Ms. Bilbo's Employment History

During the 2007 – 2008 school year, Ms. Bilbo worked as a teacher for less than half of the school year, from March through June 2008. (A. 177, ¶ 5.) During the 2008 – 2009 school year, Ms. Bilbo took 60 work days of maternity leave under the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., ("FMLA") and was absent from February 23, 2009 to May 23, 2009. (A. 177, ¶ 6.) In connection with that maternity leave, Ms. Bilbo accessed a "sick-leave bank," established and administered pursuant to Article XIV of the collective bargaining agreement

then in effect. (A. 117, ¶ 7, Article XIV, A. 145 – 146, 207 – 208 & 266 - 267.) By accessing the sick leave bank, Ms. Bilbo was paid during her February through May 2009 absences for work days for which she had not accumulated sick leave. (A. 117, ¶ 8.)

Ms. Bilbo taught full school years at Plymouth North during 2009 – 2010 and 2010 – 2011. (A. 117, ¶ 9.) Ms. Bilbo took another maternity leave under the FMLA during the 2011 – 2012 school year. (A. 177, ¶ 10.) That second maternity leave was for 56 work days (not including school vacations), from February 1, 2012 through April 27, 2012. (A. 117, ¶ 11.) Ms. Bilbo again accessed the "sick-leave bank" to be paid during her maternity leave in 2011 – 2012. (A. 118, ¶ 12.) Ms. Bilbo returned to work a full school year as a teacher at Plymouth North for the 2012 – 2013 school year. (A. 118, ¶ 13.)

Ms. Bilbo's employment history can be summarized according to the following chart:

Academic Year	Dates of Service	Dates of Leave
2007-2008	March -June	
2008-2009	Sept. 1 – Feb. 22 May 24 – June 30	Feb 23 – May 23
2009-2010	FULL SCHOOL YEAR	
2010-2011	FULL SCHOOL YEAR	
2011-2012	Sept 1 – Jan 31; April 28- June 30	Feb 1 – April 27
2012-2013	FULL SCHOOL YEAR	

C. Issuance of the Non-Renewal Letter

The District notified Ms. Bilbo by letter dated May 31, 2013 from the Superintendent of Schools, Gary Maestas, that she would not be employed by the District the following year. (A. 118, ¶ 15, A. 305.) The May 31, 2013 letter would satisfy the requirements to not renew a teacher without professional teacher status ("PTS") under G.L. c. 71, § 41, as well as meet the requirement of the collective bargaining agreement for a non-PTS teacher non-renewal. (A. 118, ¶ 16.) The non-renewal letter never purported to satisfy the requirements for a written

notice of intent to dismiss under G.L. c. 71, § 42, because the District maintained that Ms. Bilbo lacked PTS and could be non-renewed under the provisions of § 41. (A. 118, ¶ 17.) For the same reason, no meeting was held to "review the [dismissal] decision with the principal or superintendent," as provided in § 42 for professional status teachers. (Id.) Pursuant to the May 31, 2013 letter of non-renewal, Ms. Bilbo was separated from employment with the District at the end of 2012 – 2013 school year. (A. 119, ¶ 18.)

D. Petition for Arbitration and Subsequent Litigation

By letter dated June 17, 2013, Ms. Bilbo, through counsel, petitioned the Commissioner of Elementary and Secondary Education ("Commissioner") for arbitration "to determine her professional teacher status" pursuant to G.L. c. 71, § 42. (A. 119, ¶ 19, A. 307 - 308.) The District objected to the petition for arbitration by letter dated June 25, 2013, on the grounds that Ms. Bilbo was not entitled to arbitration under G.L. c. 71, § 42 because she did not have PTS. (A. 119, ¶ 20, A. 311 - 312.) The Commissioner forwarded the petition for arbitration

to the American Arbitration Association on January 9, 2014. (A. 119, ¶ 21, a. 314.)

On February 18, 2014, the District brought the action below in the Plymouth Superior Court. (A. 119, ¶ 22.) The District simultaneously moved for a preliminary injunction against arbitration, which was heard and denied by the Court on March 4, 2014. (Id.) On March 27, 2014, the Defendants moved to dismiss the Superior Court action and the District opposed. (A. 119, ¶ 24.) After hearing, the Court denied the motion to dismiss on June 12, 2014. (A. 120, ¶ 26.) While the Defendants' motion to dismiss was pending, the parties proceeded to arbitration and submitted the matter to the arbitrator on a statement of agreed facts on May 30, 2014. (A. 119 – 120, ¶ 25.) No arbitration decision had issued by the time the Court denied the motion to dismiss, and, in view of the Court finding that it had jurisdiction over the dispute, the arbitrator agreed to hold any decision in abeyance pending final resolution of the lawsuit. (A. 120, ¶¶ 26 – 28).

Cross motions for summary judgment were filed and, after hearing, the Court issued a Memorandum of Decision and Order, concluding that Ms. Bilbo had not

acquired PTS and was properly non-renewed. (A. 4, 223 – 348.) Judgment to this effect entered on April 30, 2015. (A. 4, A. 349.)

SUMMARY OF THE ARGUMENT

Under the relevant provision of G.L. c. 71 as interpreted by Turner v. School Committee of Dedham, 41 Mass. App. Ct. 354 (1996), the Superior Court lacked subject matter jurisdiction over the question of Ms. Bilbo's PTS status. The Court therefore erred when it denied the Defendants' motion to dismiss. Pages 9 to 14.

Ms. Bilbo had attained PTS at the time of her purported non-renewal and the non-renewal was therefore a nullity for two reasons.

First, because the leaves were paid under a provision of the collective bargaining agreement, they were "excused or sanctioned" by the contract and fully count as "service" toward PTS. Fortunato v. King Philip Regional School District Committee, 10 Mass. App. Ct. 200, 206 (1980). Therefore, the entirety of school year 2008 – 2009 (the year of the first leave) counts toward professional status and Ms. Bilbo

attained PTS at the end of her third full year of employment in 2010 – 2011. Pages 15 to 19.

Second, because the absences in question were protected by the FMLA's "hold harmless" clause, 29 U.S.C. § 2614(a)(1), the portions actually worked in the years in which FMLA leave was taken must count as service toward tenure. Ms. Bilbo alternatively attained PTS on the sixty-first workday of the 2011 – 2012 school year, the day upon which she "made up" the period of the 2008 – 2009 FMLA leave. Pages 20 to 27.

Finally, the Defendants' application of the FMLA requirements will be administratively practicable, even given the statutory structure where non-renewals of non-PTS teachers are normally issued at the end of a school year. A school district would simply have to flag the personnel record of non-PTS teachers who took protected FMLA leaves so that they could give timely notice of non-renewal. Pages 27 to 29.

ARGUMENT

I. THE SUPERIOR COURT LACKED JURISDICTION OVER THE QUESTION OF MS. BILBO'S PROFESSIONAL TEACHER STATUS AND THEREFORE SHOULD HAVE ALLOWED THE MOTION TO DISMISS

Under Turner v. School Committee of Dedham, 41 Mass. App. Ct. 354 (1996), the Superior Court lacked

jurisdiction over the question of Ms. Bilbo's professional teacher status. Therefore the Court should have allowed the motion to dismiss for lack of subject matter jurisdiction.

Turner squarely presents and resolves the question of whether the Superior Court or an Arbitrator is properly charged with determining a teacher's professional teacher status. Both the Superior and Appeals Court in Turner held that, where the PTS of an educator is in question, an Arbitrator should determine whether the educator has PTS.

The teacher in Turner was laid off as part of a reduction-in-force. She first filed a declaratory action in Superior Court, claiming that she was entitled to be regarded as a PTS teacher in order to take advantage of the right in G.L. c. 71, § 42 to "bump" another teacher without PTS. Id. at 354 – 355. The teacher claimed that the Education Reform Act of 1993, St. 1993, c. 71, which instituted substantive changes to § 42 and eliminated § 43A, did not prevent her from seeking a declaration in Superior Court as to whether she attained professional teacher status. The Appeals Court definitively rejected this interpretation:

> Turner argues . . . that it was not the Legislature's intent, in repealing G.L. c. 71, § 43A, and inserting arbitration as a mechanism to resolve disputes concerning teacher termination, to deprive a dismissed teacher whose status as a professional teacher is questioned, from filing a complaint in the Superior Court seeking a declaration that he or she has attained professional teacher status. We disagree with Turner's argument because such an action would result in a Superior Court judge having to first make a declaration as to the status of the dismissed teacher, and then, if the judge declares that the teacher has acquired that status, the matter being remanded for arbitration as to his or her "bumping rights." We do not think that the Legislature intended to establish two successive forms of review in two different forums for dismissed teachers with professional status.

Id. at 358.[1]

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[1] The District may argue that, because the Supreme Judicial Court has held that "[a] dismissal is not the same as the nonrenewal of a contract," Laurano v. Superintendent of Sch. of Saugus, 459 Mass. 1008, 1009 (2011), arbitration in this case is improper because Ms. Bilbo lacked PTS and therefore was not "dismissed" within the meaning of G.L. c. 71, § 42. That dismissal is not the same as non-renewal is undoubtedly true as a general proposition, but the District's argument is flawed because it assumes precisely the question in dispute here: that Ms. Bilbo lacked PTS. The Plaintiff in Laurano did not dispute that she lacked PTS, and only asserted that she was nevertheless entitled to procedures under § 42 for written notice of intent to dismiss and a meeting with the principal or superintendent. Id. at 1008. In contrast, Ms. Bilbo asserts that she had attained PTS and therefore was entitled, as a PTS teacher, to the procedural and substantive protections of § 42. The threshold question of whether Ms. Bilbo was a PTS teacher

– footnote cont'd –

Arbitral jurisdiction over the threshold question of PTS status has been affirmed more recently by both the Appeals and Supreme Judicial Courts. In Goncalo v. School Committee of Fall River, 55 Mass. App. Ct. 7 (2002), the Appeals Court held that an Arbitrator's ruling concerning whether a teacher attained PTS was not reviewable by the court. Consistent with Turner, there was no question in Goncalo that arbitration under § 42 was the appropriate forum in which to resolve the dispute over Ms. Goncalo's PTS status.

Similarly, in Lyons v. School Committee of Dedham, 440 Mass. 74 (2003) (a companion case to Turner issued following the Arbitrators' award), the Supreme Judicial Court held that arbitration under G.L. c. 71, § 42 was the proper forum to determine whether instructors, who were certified to teach, were "teachers" for purposes of determining whether they had "professional teacher status" and accompanying seniority and layoff rights under § 42. Again, the Court was clear that all preliminary questions surrounding whether a teacher is subject to § 42 are

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exclusively lies with the arbitrator appointed under § 42, as Turner holds.

within the jurisdiction of an Arbitrator. Id. at 79 - 80.

As discussed in Turner, there are practical and legal reasons to assign preliminary questions of PTS status to an Arbitrator. Practically, Massachusetts courts would be excessively burdened by litigation over the issue of professional status of dismissed teachers, which would then be followed by a separate arbitration over the substance of the discharge if PTS status were found. Legally, it would create a dual forum system expressly rejected in Turner, and more fundamentally, by the Legislature in enacting § 42 as a forum for review of PTS teacher dismissals. Cf., Turner, supra at 358.

The rationale for the Legislature establishing arbitration as the appropriate forum for review of PTS teacher dismissals, including situations where PTS status itself is in dispute, remains as valid today as when § 42 was enacted and Turner was decided. The public policy of the Commonwealth strongly favors arbitration, in part because of the specialized expertise of labor arbitrators and the comparative efficiency and expedition of arbitration. Cf., Bureau of Special Investigations v. Coal. of Pub. Safety, 430

Mass. 601, 603 – 604 (2000). This was the policy advanced by the Legislature in enacting the ERA, as the Court in Turner recognized, and there is no reason to pursue a contrary policy and accept the District's invitation to partially reverse Turner today.

In sum, consistent with Turner, an Arbitrator should determine whether Ms. Bilbo attained professional teacher status.[2] Because it lacked jurisdiction over the subject matter of the complaint, the Superior Court erred when it denied the Defendants' motion to dismiss.[3]

II. MS. BILBO ATTAINED PTS BY THE TIME OF HER PURPORTED NON-RENEWAL AND THEREFORE HER NON-RENEWAL IS A NULLITY

Any colleague of Ms. Bilbo who started in the 2008 - 2009 school year and who served as a teacher for the next three years acquired PTS at the end of that period. Ms. Bilbo, however, was denied PTS

[2] Arbitration awards are subject to judicial review pursuant to G.L. c. 150C.

[3] The Appeals Court recently held that arbitration under § 42 is the exclusive forum to litigate the merits of PTS teacher dismissals, as opposed to arbitration under a collective bargaining agreement. Groton-Dunstable Reg'l Sch. Comm. v. Groton-Dunstable Educators Ass'n, 87 Mass. App. Ct. 62 (2015). A petition for further appellate review is pending in that case. See, Groton-Dunstable Reg'l Sch. Comm. v. Groton-Dunstable Educators Ass'n, FAR-23661.

simply because she took a contractually-sanctioned maternity leave which was also protected by the FMLA. Assuming the Superior Court had jurisdiction to decide the issue of PTS status, it erred in concluding that Ms. Bilbo had not attained PTS by the date of her non-renewal either because: (1) the 2008 - 2009 school year in its entirety, including the period of paid maternity leave, should have counted as her first of three school years of consecutive service toward acquiring PTS; or (2) the periods she actually worked in 2008 - 2009 school year must be credited toward PTS under the requirements of the FLMA.

A. Ms. Bilbo's paid absence during her contractually-sanctioned maternity leave constituted "service" under G.L. c. 71, § 41

Massachusetts General Law c. 71, § 41 provides that:

> a teacher . . . who has served in the public schools of a school district for the three previous consecutive school years . . . shall be entitled to professional teacher status as provided in section forty-two [of G.L. c. 71].

(Emphasis added.)

The threshold question here is whether Ms. Bilbo "served" in the Plymouth Public Schools for the full

school year in each of the school years during which she exercised her right to maternity leave, and notwithstanding the corresponding absence that resulted from that maternity leave. Although minimal absences are permitted, in general teachers must serve an entire school year in order for the year to count toward PTS acquisition. See, Nester v. School Comm. of Fall River, 318 Mass. 538, 542 - 543 (1945) (two day absence still constituted regular and continuous service); Woodward v. School Comm. of Sharon, 5 Mass. App. Ct. 84, 88 (1977) (one day absence constituted regular and continuous service). The probationary year is credited toward PTS despite these absences because the service was "regular and continuous" as opposed to "intermittent and irregular." Id.

For a teacher who takes a leave of absence, the question whether she "has served" in the public school within the meaning of G.L. c. 71, § 41 for that year hinges on whether the absence is "excused or sanctioned by the contract or by the school committee." See, Fortunato v. King Philip Regional School District Committee, 10 Mass. App. Ct. 200 (1980). In Fortunato, the Appeals Court carefully distinguished between a teacher who started employment

after the year began, id. at 201, and a teacher whose "absences . . . are excused or sanctioned by the contract." The Court noted that the latter "does not weigh against the teacher's entitlement to tenure." Id. at 206.

Maternity leaves protected under state law are explicitly "excused or sanctioned" under the Fortunato principle. In Solomon v. Sch. Comm. of Boston, 395 Mass. 12 (1985), the Supreme Judicial Court specifically endorsed and expanded upon the Fortunato distinction, holding that a maternity leave under G.L. c. 149, § 105D is "a similarly excused absence," id. at 18, and therefore does not interrupt the "consecutiveness" of a teacher's service in attaining professional status. Id. at 19.[4]

[4] The Appeals Court's suggestion in Matthews v. Sch. Comm. of Bedford, 22 Mass. App. Ct. 374, 378 n.9 (1986) that the "excused or sanctioned principle" was "confined in application to consideration of the consecutiveness of a teacher's service" by the SJC in Solomon is therefore an overstatement to the extent that it suggests that the "excused or sanctioned" status of an absence could not preserve the entirety, or at least the portion actually worked, of a school year in which maternity leave is taken as counting toward PTS. The facts in this case are dramatically different from the facts in Matthews where the teacher had an unpaid absence of about two years. While the extended maternity leaves in Matthews were provided for in the collective bargaining agreement, their

– footnote cont'd –

Neither Fortunato nor Solomon addressed the issue of whether the period of an excused or sanctioned leave during which all pay and benefits continue is a period of "service" under G.L. c. 71, § 41. The logical extension of these two cases suggests that a teacher like Ms. Bilbo who is on a fully paid, statutorily sanctioned leave is entitled to have the entire year, including the period of that leave, count toward PTS acquisition. As the Court in Solomon noted, tenure, now PTS, is a critical component in a bundle of employment rights. Id. at 18. During periods of a paid absence sanctioned by contract or law, other benefits are maintained (e.g., health insurance) or continue to accrue (e.g., retirement benefits).[5] No less should apply to the rights that accrue under G.L. c. 71, § 41.

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extended length, their apparent extension from the original periods contemplated, and the fact they were unpaid, tipped the balance to finding that the periods of the leaves were not "service" for purposes of attaining tenure, notwithstanding the fact that the leaves were provided for in the contract. Id. at 378. Here, there are no similar indications that Ms. Bilbo's maternity leaves were, functionally, an end to or break in her service in the Plymouth Public Schools.

[5] For retirement purposes, a teacher's "service" includes "any period of . . . continuous absence with

– footnote cont'd –

Here, Ms. Bilbo's absences were explicitly "excused or sanctioned by the contract": pursuant to the bargaining agreement, she remained on the payroll for the entirety of her maternity leaves.[6] The absences therefore do "not weigh against [her] entitlement to tenure," id., because they constitute "service" under G.L. c. 71, § 41.[7]

In sum, Ms. Bilbo's FMLA leaves in 2008 – 2009 and 2011 – 2012 do not count as breaks in service or non-service for purposes of time served toward attaining PTS. The entirety of school year 2008 – 2009 (the year of the first leave) counts toward professional status and Ms. Bilbo attained PTS at the end of her third full year of employment in 2010 – 2011.

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full regular compensation." G.L. c. 32, § 4. In the area of municipal health insurance, a teacher remains insured by the municipal health insurance plan during the term of a paid leave. G.L. c. 32B, § 7(b).

[6] Article XVII of the relevant collective bargaining agreements contractually sanctions FMLA leaves. (A. 116, ¶ 2, A. 152, Art. XVII; A. 212, Art. XVII; A. 271 - 272, Art. XVII.) Ms. Bilbo was paid during her maternity leave pursuant to a "sick leave bank" provision of the bargaining agreement. (A. 117, ¶ 7, A. 118, ¶ 12.)

[7] In Solomon, the teacher apparently exhausted her sick leave prior to going on an unpaid maternity leave. Solomon at 14. The Court did not question that paid leave was "excused or sanctioned."

B. The gaps in Ms. Bilbo's service were protected under the Family and Medical Leave Act and therefore do not preclude achieving PTS

Ms. Bilbo's absences were for maternity leaves that are protected under the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601 – 2654 (2008)("FMLA"). The FMLA, passed in 1993 (well after the key decisions defining entitlement to tenure) provides that the "taking of leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced" and, further, that at the completion of the leave, the employer must restore the employee to her former position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)-(2). Refusing to credit a teacher with time already worked toward PTS in the year in which an FMLA leave is taken is plainly inconsistent with this mandate.

The FMLA imposes two basic requirements on employers: (1) they must permit their employees to take an unpaid leave of absence of up to twelve weeks per year if such leave is requested for one of a specified list of reasons, which includes "the birth

of a son or daughter of the employee," 29 U.S.C. § 2612(a)(1)(A); and (2) at the completion of the leave, the employer must restore the employee to his or her former position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1). This "hold harmless" clause is limited only by § 2614(a)(3)(B), which states: "Nothing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave (emphasis added)." 29 U.S.C. § 2614(a)(3)(B). In other words, an employer need not place an employee returning from leave in a better position than the employee would have been in were the leave never taken but an employer may not deny a benefit to the employee that the employee would have been entitled to had the employee not taken the leave. In effect, the leave functions as a pause for the purpose of accruing rights and benefits and the employee must be restored to the position she was in on the date she took leave (which includes the accrual of time toward PTS) with

"equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1) & (a)(3)(B)).

The regulations promulgated by the Department of Labor pursuant to the FMLA set forth a two-part standard of equivalency: (1) the positions must be "virtually identical" with respect to "pay, benefits and working conditions, including privileges, perquisites and status," 29 C.F.R. § 825.215(a) (emphasis added); and (2) the positions must be "substantially similar" in terms of "duties . . . skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(e).

Here, the District denied Ms. Bilbo any credit toward PTS for the two years in which she exercised her right to maternity leave, despite the fact she worked for well more than half the school year in each of them. In doing so, the District denied Ms. Bilbo the "right, benefit or position to which [she] would have been entitled to, had [she] not taken the leave." See 29 U.S.C. § 2614(a)(3)(B). Moreover, as specified in the regulations, being returned to a position that sets a teacher back in obtaining PTS, by not counting any of the time already worked in the year in which an

FMLA leave is taken as creditable toward PTS, incontrovertibly reinstates the teacher to a position that is not "virtually identical" to a position held prior to FMLA-qualifying leave. This is because the time actually worked would have counted toward PTS had the FMLA leave not been taken.

The Department of Labor agrees. In an opinion letter issued on April 24, 1996, the U.S. Department of Labor stated the following:

> [I]t is the position of the Department that a probationary teacher who takes a period of unpaid leave subject to FMLA may not be required, upon returning to work, to begin the probationary period again. To do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to FMLA.

Wage and Hour Division, Opinion letter at 1 (1996 WL 1044777 (DOL WAGE-HOUR)).[8]

Although not binding here, the Appellate Division of the Superior Court of New Jersey also agrees. That Court recently addressed the intersection of FMLA and the New Jersey teacher tenure statute, when deciding

[8] Opinion letters of the Federal Department of Labor are treated as having persuasive authority by the Federal Courts. See, e.g., Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc., 204 F.3d 673, 677 (6th Cir. 2000).

the effect of an FMLA maternity leave on a teacher's attainment of tenure.

Under the New Jersey teacher tenure statute, a teacher must have three consecutive years of employment "together with employment at the next succeeding academic year" or "[t]he equivalent of more than three academic years within a period of any four consecutive academic years." N.J. Stat. Ann. § 18A:28-5 cited in Kolodziej v. Bd. of Educ. of S. Reg'l High Sch. Dist., Ocean Cnty., 436 N.J. Super. 546, 550, 95 A.3d 763, 766 (App. Div. 2014). The question arose whether the teacher's FMLA leave in her fourth year would meet the statutory requirements for employment or service in the fourth year to attain tenure. Id. In determining the teacher's tenure status under New Jersey law, the Court was required to decide the same question presented here (albeit under the requirements of a somewhat different statute): whether the "hold harmless" provision of the FMLA requires that the period of an FMLA leave count as "service" toward tenure under the applicable state law.

The New Jersey Court held that denying the teacher tenure by not counting the FMLA leave in the

fourth year as "service" violates the FMLA's "hold harmless" requirement:

> The FMLA was developed "to entitle employees to take reasonable leave . . . for the birth or adoption of a child. . . ." 29 U.S.C.A. § 2601(b)(2). Recognizing that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men[,]" one of its explicit goals is "to promote . . . equal employment opportunity for women and men [.]" 29 U.S.C.A. § 2601(a)(5) & (b)(5). The FMLA specifically provides that a returning employee is "to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C.A. § 2614(a)(1). And, importantly, the leave "shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced." 29 U.S.C.A. § 2614(a)(2). Thus, it is clear that the FMLA seeks to return the employee to the same position that he or she was in before the leave, treating the leave itself not as a cessation, but instead as a temporary pause in the ongoing working relationship. To therefore punish an employee by denying her tenure she had earned over three years of continuous employment and satisfactory evaluations simply because she took the leave that her employer granted her, would not serve the purpose of the FMLA.
>
> The Board argues that the FMLA itself contains language which prevents petitioner from acquiring tenure while on leave citing 29 U.S.C.A. § 2614(a)(3)].

. . .

> However, this section merely prevents the FMLA from establishing new or increased rights other than those specifically enumerated; it does not supersede state statutes that provide other rights nor does it prohibit states from guaranteeing those rights separately. See 29 C.F.R. § 825.215(d)(2) ("An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave."). Thus, by adopting the Board's interpretation of the statute, we would be adopting a position that penalizes pregnant employees by returning them not to the same position as of the day they went on leave, but rather to a new, worsened position, one for which the tenure clock must reset. This would utterly defeat the purpose of the FMLA, which is to preserve the rights of employees granted leave, not to penalize them for taking such leave.

Id. at 95 A.3d 767.

At the time Ms. Bilbo exercised her right to FMLA maternity leave, she had already accrued credit during the maternity-leave year toward her three years of consecutive employment required for PTS. Returning her to a position where the time worked in the partial year does not count toward PTS constitutes the loss of a benefit.[9] Moreover, a position is not "equivalent" to the position left before the FMLA leave if, as a

[9] This is in contrast to accruing credit toward PTS for the period of an unpaid FMLA leave, which is not claimed by Ms. Bilbo.

result of taking the FMLA leave, additional time must be served before attaining PTS and the privileges attached to PTS. Thus, minimally, under the FMLA, Ms. Bilbo must receive service credit for the time she already worked in the years where she took FMLA leave.[10]

Considering only the protections of the FMLA as applied to Ms. Bilbo, Ms. Bilbo attained PTS on the sixty-first workday of the 2011 – 2012 school year, the day upon which she "made up" the period of the 2008 – 2009 FMLA leave.

III. ALLOWING PART-YEAR CREDIT TOWARD PTS IS BOTH LEGALLY REQUIRED AND ADMINISTRATIVELY PRACTICABLE

The District will likely argue that allowing a partial year's credit toward PTS is inconsistent with the administrative structure of non-renewals of non-PTS teachers established in G.L. c. 71, § 42, where non-renewal normally takes place at the end of the school year by notice given prior to June 15th.

[10] The FMLA preempts state law to the extent that it provides benefits less than required by the federal statute, but leaves greater benefits under state law undisturbed. 29 U.S.C. § 2651; Cf., Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 7 - 8 (1st Cir. 2009).

Entirely apart from the fact that the federal law may require the result urged by Ms. Bilbo, there is little cause to believe that this result would create insurmountable administrative problems for school districts, which already account for a teacher's other leaves, such as sick leave and personal leave. Under the Defendants' view of the FMLA's requirements, a school district would simply flag the personnel record of non-PTS teachers who took protected FMLA leaves; the school days taken for the FMLA leave would be tracked; and, upon the teacher's return, the teacher would be entitled to "make up" those days toward PTS in the following school year. So, for example, in Ms. Bilbo's case, she took a 60-day maternity leave in her her first full school year, and the district could have flagged her personnel record to give notice of non-renewal prior to the 61st day of her fourth year of employment, and her employment would then terminate at the end of that year.[11] If there were some exigency that required immediate dismissal before the

[11] This would reconcile the notice requirement in § 41 ("[a] teacher without professional teacher status shall be notified in writing on or before June fifteenth whenever such person is not to be employed for the following school year") with the "hold harmless" requirements the FMLA.

conclusion of the school year (including performance issues), the district is merely required to provide written notice of the reasons and an opportunity to meet with the Superintendent or Principal before dismissing the teacher. G.L. c. 71, § 42, ¶ 2. The dismissal would not be subject to any further arbitrable review if this were done prior to the date when the teacher achieves PTS. Id., ¶ 4.

CONCLUSION

For all the foregoing reasons, this Court should conclude that the Superior Court lacked jurisdiction over the subject matter of the PTS status and should have dismissed the Complaint. Even if the Superior Court had jurisdiction, Ms. Bilbo had attained PTS at the time of her purported nonrenewal, either because her paid leaves counted as service toward PTS, or because the FMLA "hold harmless" clause requires that the period she actually worked in the years that FMLA leave was taken count as service toward PTS. A declaration should enter that Ms. Bilbo had attained PTS by May 31, 2013, that the District's purported non-renewal was legally ineffective, and consequently that Ms. Bilbo has remained employed by the District

and is thus entitled to all salary and benefits from the date of her purported non-renewal as a result of that employment.

Respectfully submitted,

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Dated: September 18, 2015

ADDENDUM

ADDENDUM TABLE OF CONTENTS

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2612

§ 2612. Leave requirement

Effective: December 21, 2009
Currentness

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

Add. 1

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(5) Calculation of leave for airline flight crews

The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1) with respect to employees described in section 2611(2)(D) of this title.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and subsection (b)(5) or (f) (as appropriate) of section 2613 of this of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) of this section and section 2613(f) of this title, leave under subsection (a)(1)(E) of this section may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Add. 2

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3) of this section), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) of this section for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Add. 3

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to covered active duty of family member

In any case in which the necessity for leave under subsection (a)(1)(E) of this section is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer

(1) In general

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(A) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave

(A) In general

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) of this section may be limited to 26 workweeks during the single 12-month period described in subsection (a)(3) of this section if the leave is--

(i) leave under subsection (a)(3) of this section; or

(ii) a combination of leave under subsection (a)(3) of this section and leave described in paragraph (1).

(B) Both limitations applicable

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

CREDIT(S)

(Pub.L. 103-3, Title I, § 102, Feb. 5, 1993, 107 Stat. 9; Pub.L. 110-181, Div. A, Title V, § 585(a)(2), (3)(A) to (D), Jan. 28, 2008, 122 Stat. 129; Pub.L. 111-84, Div. A, Title V, § 565(a)(1)(B), (4), Oct. 28, 2009, 123 Stat. 2309 to 2311; Pub.L. 111-119, § 2(b), Dec. 21, 2009, 123 Stat. 3477.)

VALIDITY

<The United States Supreme Court has held that Congress did not, under the Enforcement Clause of Fourteenth Amendment, validly abrogate states' sovereign immunity from suits for money damages in enacting FMLA's self-care provision. Coleman v. Court of Appeals of Maryland, U.S.2012, 566 U.S. ___, 132 S.Ct. 1327, 182 L. Ed. 2d 296. >

Notes of Decisions (219)

29 U.S.C.A. § 2612, 29 USCA § 2612
Current through P.L. 114-49 approved 8-7-2015

End of Document

Add. 5

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Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2614

§ 2614. Employment and benefits protection

Effective: January 28, 2008
Currentness

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

Add. 6

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any “group health plan” (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if--

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

Add. 8

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

CREDIT(S)

(Pub.L. 103-3, Title I, § 104, Feb. 5, 1993, 107 Stat. 12; Pub.L. 110-181, Div. A, Title V, § 585(a)(3)(F), Jan. 28, 2008, 122 Stat. 131.)

Notes of Decisions (81)

29 U.S.C.A. § 2614, 29 USCA § 2614
Current through P.L. 114-49 approved 8-7-2015

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 41

§ 41. Tenure of teachers and superintendents; persons entitled to professional teacher status; dismissal; review

Effective: March 18, 2011
Currentness

For the purposes of this section, a teacher, school librarian, school adjustment counselor, school nurse, school social worker or school psychologist who has served in the public schools of a school district for the three previous consecutive school years shall be considered a teacher, and shall be entitled to professional teacher status as provided in section forty-two. The superintendent of said district, upon the recommendation of the principal, may award such status to any teacher who has served in the principal's school for not less than one year or to a teacher who has obtained such status in any other public school district in the commonwealth. A teacher without professional teacher status shall be notified in writing on or before June fifteenth whenever such person is not to be employed for the following school year. Unless such notice is given as herein provided, a teacher without such status shall be deemed to be appointed for the following school year.

School principals, by whatever title their position may be known, shall not be represented in collective bargaining, but each principal, upon the written request of the principal, shall meet and discuss the terms and conditions of the principal’s employment in the principal’s school district with the district's superintendent or the superintendent’s designee, at a time to be determined by the superintendent and may be represented by an attorney or other representative. School principals shall enter into individual employment contracts with their employing districts concerning the terms and conditions of employment. The initial contract with each individual school district shall be for not less than 1 year nor more than 3 years. The second and subsequent contracts shall be for not less than 3 nor more than 5 years unless: (i) said contract is a 1 year contract based on the failure of the superintendent to notify the principal of the proposed nonrenewal of his contract pursuant to this section; or (ii) both parties agree to a shorter term of employment. Notwithstanding the past employment conditions of a school principal, the conditions established by this paragraph shall apply to the initial contract of each school principal. Failure of the superintendent to notify a principal of the proposed nonrenewal of his contract at least sixty days prior to the expiration date of such contract shall automatically renew the contract for an additional one year period.

Except as provided herein, section forty-two shall not apply to school principals, assistant principals or department heads, although nothing in this section shall deny to any principal, assistant principal or department head any professional teacher status to which he shall otherwise be entitled. A principal, assistant principal, department head or other supervisor who has served in that position in the public schools of the district for three consecutive years shall not be dismissed or demoted except for good cause. Only a superintendent may dismiss a principal. A principal, assistant principal, department head or other supervisor shall not be dismissed unless he has been furnished with a written notice of intent to dismiss with an explanation of the grounds for the dismissal, and, if he so requests, has been given a reasonable opportunity within fifteen days after receiving such notice to review the decision with the superintendent at which meeting such employee may be represented by an attorney or other representative to present information pertaining to the bases for the decision and to such employee's status. A principal, assistant principal, department head or other supervisor may seek review of a dismissal or demotion decision by filing a petition with the commissioner for arbitration. Except as provided herein, the procedures for arbitration, and the time allowed for the arbitrator

to issue a decision, shall be the same as that in section forty-two. The commissioner shall provide the parties with the names of three arbitrators who are members of the American Arbitration Association. The arbitrators shall be different from those developed pursuant to section forty-two. The parties each shall have the right to strike one of the three arbitrator's names if they are unable to agree upon a single arbitrator from amongst the three.

A school committee may award a contract to a superintendent of schools or a school business administrator for periods not exceeding six years which may provide for the salary, fringe benefits, and other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of duties or office, liability insurance, and leave for said superintendent or school business administrator. Nothing in this section shall be construed to prevent a school committee from voting to employ a superintendent of schools who has completed three or more years' service to serve at its discretion.

Credits

Amended by St.1947, c. 597, § 1; St.1950, c. 283; St.1953, c. 372; St.1956, c. 132, § 1; St.1972, c. 464, § 1; St.1973, c. 847, § 6; St.1988, c. 153, § 2; St.1990, c. 404, § 2; St.1993, c. 71, § 43; St.1994, c. 346; St.1995, c. 209, § 3; St.1996, c. 99; St.1996, c. 450, § 127; St.2006, c. 267, eff. Oct. 22, 2006; St.2008, c. 314, § 1, eff. Nov. 12, 2008; St.2010, c. 399, eff. Mar. 18, 2011.

Notes of Decisions (161)

M.G.L.A. 71 § 41, MA ST 71 § 41
Current through Chapter 75 of the 2015 1st Annual Session

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 42

§ 42. Dismissal or demotion of teachers or other employees of school or school district; arbitration

Effective: [See Text Amendments] to August 31, 2016
Currentness

A principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent; and subject to the provisions of this section, the superintendent may dismiss any employee of the school district. In the case of an employee whose duties require him to be assigned to more than one school, and in the case of teachers who teach in more than one school, those persons shall be considered to be under the supervision of the superintendent for all decisions relating to dismissal or demotion for cause.

A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the basis for the decision and to the teacher's status. The teacher receiving such notice may be represented by an attorney or other representative at such a meeting with the principal or superintendent. Teachers without professional teacher status shall otherwise be deemed employees at will.

A teacher with professional teacher status, pursuant to section forty-one, shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause.

A teacher with professional teacher status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. The commissioner shall forward to the parties a list of three arbitrators provided by the American Arbitration Association. Each person on the list shall be accredited by the National Academy of Arbitrators. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association to be consistent with the provisions of this section. The parties each shall have the right to strike one of the three arbitrators' names if they are unable to agree upon a single arbitrator from amongst the three. The board of education shall determine the process for selecting arbitrators for the pool. The fee for the arbitration shall be split equally between the two parties involved in the arbitration.

At the arbitral hearing, the teacher and the school district may be represented by an attorney or other representative, present evidence, and call witnesses and the school district shall have the burden of proof. In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards.

Add. 12

The arbitrator's decision shall be issued within one month from the completion of the arbitral hearing, unless all parties involved agree otherwise, and shall contain a detailed statement of the reasons for the decision. Upon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof. Under no circumstances shall the arbitrator award punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement. In the event the teacher is reinstated, the period between the dismissal and reinstatement shall be considered to be time served for purposes of employment. The arbitral decision shall be subject to judicial review as provided in chapter one hundred and fifty C. With the exception of other remedies provided by statute, the remedies provided hereunder shall be the exclusive remedies available to teachers for wrongful termination. The rules governing this arbitration procedure shall be the rules of the American Arbitration Association as pertains to arbitration.

Neither this section nor section forty-one shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons. No teacher with professional teacher status shall be laid off pursuant to a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified. No teacher with such status shall be displaced by a more senior teacher with such status in accordance with the terms of a collective bargaining agreement or otherwise unless the more senior teacher is currently qualified pursuant to section thirty-eight G for the junior teacher's position.

Credits

Amended by St.1934, c. 123; St.1946, c. 195; St.1947, c. 597, § 2; St.1953, c. 244; St.1956, c. 132, § 2; St.1966, c. 185, §§ 1, 2; St.1970, c. 388, § 1; St.1972, c. 464, § 2; St.1985, c. 188, § 18; St.1988, c. 153, §§ 4 to 6; St.1993, c. 71, § 44.

Notes of Decisions (228)

M.G.L.A. 71 § 42, MA ST 71 § 42
Current through Chapter 75 of the 2015 1st Annual Session

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Add. 13

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 105D

§ 105D. Parental leave; rights and benefits

Effective: April 7, 2015
Currentness

(a) For the purposes of this section, an "employer" shall be defined as in subsection 5 of section 1 of chapter 151B.

(b) An employee who has completed the initial probationary period set by the terms of employment, not to exceed 3 months, or, if there is no such probationary period, has been employed by the same employer for at least 3 consecutive months as a full-time employee, shall be entitled to 8 weeks of parental leave for the purpose of giving birth or for the placement of a child under the age of 18, or under the age of 23 if the child is mentally or physically disabled, for adoption with the employee who is adopting or intending to adopt the child; provided, however, that any 2 employees of the same employer shall only be entitled to 8 weeks of parental leave in aggregate for the birth or adoption of the same child. The employee shall give at least 2 weeks' notice to the employer of the anticipated date of departure and the employee's intention to return, or provide notice as soon as practicable if the delay is for reasons beyond the individual's control. The employee shall be restored to the employee's previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of the leave. An employee on parental leave for the adoption of a child shall be entitled to the same benefits offered by the employer to an employee on parental leave for the birth of a child. The parental leave may be with or without pay at the discretion of the employer. If the employer agrees to provide parental leave for longer than 8 weeks, the employer shall not deny the employee the rights under this section unless the employer clearly informs the employee, in writing, prior to the commencement of the parental leave, and prior to any subsequent extension of that leave, that taking longer than 8 weeks of leave shall result in the denial of reinstatement or the loss of other rights and benefits.

(c) The employer shall not be required to restore an employee on parental leave to the previous or a similar position if other employees of equal length of service credit and status in the same or similar positions have been laid off due to economic conditions or other changes in operating conditions affecting employment during the employee's parental leave; provided, however, that the employee on parental leave shall retain any preferential consideration for another position to which the employee may be entitled as of the date of the leave.

(d) The parental leave shall not affect the employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which the employee was eligible at the date of the leave or any other advantages or rights of employment incidental to the employment position; provided, however, that the parental leave shall not be included, when applicable, in the computation of the benefits, rights and advantages; and provided further, that the employer need not provide for the cost of any benefits, plans or programs during the parental leave unless the employer provides for such benefits, plans or programs to all employees who are on a leave of absence. Nothing in this section shall be construed

to affect any bargaining agreement or company policy which provides for greater or additional benefits than those required under this section.

(e) Every employer shall post and keep posted in a conspicuous place upon its premises a notice describing this section and the employer's policies related to this section.

Credits

Added by St.1972, c. 790, § 1. Amended by St.1984, c. 423; St.1989, c. 318; St.2014, c. 148, § 1, eff. April 1, 2015; St.2014, c. 484, § 1, eff. April 7, 2015.

Notes of Decisions (14)

M.G.L.A. 149 § 105D, MA ST 149 § 105D
Current through Chapter 75 of the 2015 1st Annual Session

End of Document

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter V. Wage and Hour Division, Department of Labor
Subchapter C. Other Laws
Part 825. The Family and Medical Leave Act of 1993 (Refs & Annos)
Subpart B. Employee Leave Entitlements Under the Family and Medical Leave Act

29 C.F.R. § 825.215

§ 825.215 Equivalent position.

Effective: March 8, 2013
Currentness

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non–FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA–protected purpose also must receive the payment.

(d) Equivalent benefits. Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of

whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been

on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) De minimis exception. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

SOURCE: 78 FR 8902, Feb. 6, 2013, unless otherwise noted.

AUTHORITY: 29 U.S.C. 2654.

Notes of Decisions (26)

Current through Sept. 10, 2015; 80 FR 54441.

End of Document

Add. 18

1996 WL 1044777 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion LetterFamily and Medical Leave Act (FMLA)

FMLA-80
April 24, 1996

***

***1** This is in response to your request for an opinion with respect to the application of the Family and Medical Leave Act of 1993 (FMLA) and the implementing regulations, 29 CFR Part 825, to probationary teachers who take unpaid leave subject to FMLA. I regret that the volume of work associated with administering FMLA has delayed this response.

Statements made in this letter with regard to the applicable collective bargaining agreement (CBA) or provisions of state law are not meant as interpretations but rather as summaries to frame our response. We will assume that there are no questions with regard to the FMLA issues of employer coverage, employee eligibility, and whether the reason for the leave is covered by FMLA.

Illinois State law provides in part that a "teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested, by the employing board at least 60 days before the end of such period." The CBA provides that, should a teacher experience a "break in service" during this probationary period before either being recommended for reemployment for the second year or contractual continued service or tenure after the second year, the teacher will return to work the following year as a first year probationary teacher and be required to complete two years of uninterrupted service. A break in service for this purpose would include any period of unpaid leave.

Your specific concern is whether a probationary teacher who takes FMLA-qualifying leave that would otherwise be considered a break in service as defined in the CBA can be returned to work as a first year probationary teacher without violating FMLA's provisions for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

After carefully reviewing your questions and comments, it is the position of the Department that a probationary teacher who takes a period of unpaid leave subject to FMLA may not be required, upon returning to work, to begin the probationary period again. To do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to FMLA.

Section 2614(a) of FMLA requires, in part, that an employee who has taken FMLA leave must be returned to either the same position or an equivalent position with equivalent employment, benefits, pay, and other terms and conditions of employment. This section also requires that the taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the leave began. A position as a first-year probationary employee is not equivalent to a position as a second-year probationary employee because additional time must be served before being granted tenure and whatever privileges attend thereto. Prior to beginning leave, the employee had accrued at least one year of service towards the completion of the two-year probationary period. Returning to a position as a first-year probationary employee constitutes the loss of this benefit. With respect to the limitation in this section that the employee is not entitled to accrue seniority during any leave period, our interpretation does not require the accrual of any additional seniority or employment benefit during the period of unpaid leave; it prevents the loss of those benefits already earned.

***2** You also ask about the application of section 2618(e) that provides in part that restorations of eligible employees of local educational agencies or private elementary or secondary schools shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements. Section 825.604 of the regulations points out, in part, that any restoration under such policies or practices "must provide substantially the same protections as provided in the Act for reinstated employees." Section 825.215, the section regarding the restoration of employees generally under FMLA, is specifically referenced. Having to return to a position as a first year probationary employee would be less protection than otherwise provided in FMLA for reinstated employees.

You also ask that, if we determine that the use of unpaid leave does not permit the reclassification of the individual as a first year employee, can the probationary period be extended for one additional school term? In this particular situation, our answer would be no. It appears that the attaining of contractual continued service is based on an employee's anniversary date, not the accumulation of a certain number of hours or days of work, and the current CBA recognizes certain situations wherein a probationary employee who takes unpaid leave would still attain contractual continued service status after the end of the second year. Were the system based on the completion of a certain number of hours or days worked, however, the employer could delay granting contractual continued service by an amount reflecting the amount of unpaid FMLA leave. This is similar to the interpretation of FMLA the Department takes with respect to production bonuses and pensions as stated in sections 825.215(c)(2) and (d)(4), respectively.

I will be glad to address any further concerns you may have if the above has not been fully responsive.
Sincerely,

Howard B. Ostmann
Office of Enforcement Policy Family and Medical Leave Act Team

1996 WL 1044777 (DOL WAGE-HOUR)

End of Document

4/30/15

18

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2014-00171

THE PLYMOUTH PUBLIC SCHOOLS

vs.

EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER
and KRISTEN BILBO

MEMORANDUM OF DECISION AND ORDER ON
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The question before the court is whether Kristin Bilbo had obtained tenure as a public school teacher in Plymouth on May 31, 2013, the date on which she received notice from the Superintendent that she would no longer be employed as a special education teacher at Plymouth North High School. Under G.L. c. 71, § 41, a teacher is entitled to professional teacher status (tenure) if the teacher serves in the school district "for the three previous consecutive school years." Bilbo contends that she was wrongfully terminated because she had attained professional teacher status by application of G.L. c. 71, § 41 due to her service from 2008 through 2013. The school district disagrees, maintaining that Bilbo had not worked the requisite number of consecutive full years due to maternity leave taken in years 2008-2009 and 2011-2012.

The parties agree that the case does not raise any disputed issues of material fact and should be resolved on summary judgment. After hearing, and for the following reasons, I conclude that Bilbo did not achieve professional teacher status because her maternity leave interrupted the statutory requirement of service for three consecutive years. The school district's

motion for summary judgment is allowed, and the defendants' cross-motion for summary judgment is denied.

BACKGROUND

The following facts are taken from the parties' Joint Statement of Uncontested Facts. Kristen Bilbo was employed by the Plymouth Public Schools ("District") as a special education teacher at Plymouth North High School from March 10, 2008 through the end of the 2013 school year. During this time, Bilbo was a member of the bargaining unit represented by the Education Association of Plymouth and Carver ("Union"). The Union has been the exclusive bargaining representative of teachers employed by the District under collective bargaining agreements dated: July 1, 2006-June 30, 2009; July 1, 2009-June 30, 2012; and July 1, 2012-June 30, 2015.

The Massachusetts Department of Elementary and Secondary Education ("DESE") requires that a public school operate at least 180 days per school year. Under the applicable collective bargaining agreements, District teachers were required to work 181 days each school year. Bilbo's work history is as follows:

- **2007-2008**: Bilbo worked for less than half the school year from March 2008 through June 2008.
- **2008-2009:** Bilbo took 60 work days of maternity leave under the Family and Medical Leave Act, 29 U.S.C. § 2801 et seq. (FMLA), and was absent from February 23, 2009 to May 23, 2009. In connection with that maternity leave, Bilbo accessed a "sick-leave bank," established and administered pursuant to Article XIV of the collective bargaining agreement. As a result, Bilbo was paid during her February through May 2009 absence for work days for which she had not accumulated her own sick leave.

- **2009-2010:** Bilbo taught special education classes for the entire school year at Plymouth North.
- **2010-2011:** Bilbo taught special education classes for the entire school year at Plymouth North.
- **2011-2012:** Bilbo took another maternity leave under the FMLA. This leave was for 56 work days (excluding school vacations) from February 1, 2012 through April 27, 2012. Bilbo accessed the District's sick-leave bank and was paid for her time off.
- **2012-2013:** Bilbo returned to Plymouth North to teach a full school year.

Prior to the end of the 2013 school year, on May 31, 2013, Superintendent Gary Maestas notified Bilbo that she would not be employed by the District for the 2013-2014 school year. The parties agree that if Bilbo did not have professional teacher status ("PTS") as of May 31, 2013, the Superintendent's non-renewal letter satisfied the District's notification obligations under G.L. c. 71, § 41 and the non-renewal provisions of the collective bargaining agreement.

On June 17, 2013, Bilbo petitioned DESE for arbitration to determine her professional teacher status. The District objected to the arbitration on the ground that Bilbo was not entitled to arbitration under Section 42 because she had not yet attained PTS. On February 18, 2014, the District filed this lawsuit and moved for a preliminary injunction seeking to stay arbitration. The court (Davis, J.) denied the request for injunctive relief.

On March 27, 2014, Bilbo and the Union moved to dismiss the case. On June 12, 2014, the court (Kane, J.) denied the defendants' motion to dismiss. Judge Kane determined that Bilbo did not establish a right to arbitration, stating: "[b]ecause the question at issue here is whether Bilbo had PTS, the statute has yet to confer upon her the right to arbitration." The arbitrator has agreed to stay his decision pending resolution of this action.

DISCUSSION

I. Summary Judgment Standard

The court will allow summary judgment where there are no genuine issues of material fact and where the record entitles the moving party to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of establishing that there is no issue of material fact on every relevant issue. See *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial by either submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See *Flesner* v. *Technical Commc'n Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). It is necessary, however, for the summary judgment movant "to show by credible evidence from . . . affidavits and other supporting materials that there is no genuine issue of material fact and that [the party is] entitled, as matter of law, to a judgment." *Smith* v. *Massimiano*, 414 Mass. 81, 85 (1993) (citations omitted).

II. Professional Teacher Status pursuant to G.L. c. 71, § 41

Under G. L. c. 71, § 41, Massachusetts public school teachers may obtain PTS, or tenure, after three consecutive years of employment within a school district. Section 41 provides in relevant part: "A teacher . . . who has served in the public schools of a school district for the three previous consecutive school years shall be considered a teacher, and shall be entitled to

professional teacher status as provided in section forty-two."[1] The purpose of the statute is "to provide some degree of protection for the tenure of teachers who have served a probationary term of three consecutive school years and who are continued in employment thereafter." *Rantz* v. *School Comm. Of Peabody*, 396 Mass. 383, 385 (1985); *Matthews* v. *School Comm. of Bedford*, 22 Mass. App. Ct. 374, 376 (1986) (internal quotations omitted).

Section 41 does not define "school year" but the term is understood to mean the time period "during which the teachers in the particular system are obligated by their contract(s) of employment with the school committee to render services in the public schools, in both teaching and non-teaching capacities." *Fortunato* v. *King Phillip Reg'l Sch. Dist. Comm.*, 10 Mass. App. Ct. 200, 204 (1980). Missing a few days of the typical 180 day school year does not result in the forfeiture of credit for an entire year. *Id.* at 206 (working 160 out of 182 days was more than minor deviation from norm and did not constitute a "school year.") See also *Nester* v. *School Comm. of Fall River*, 318 Mass. 538, 542-543 (1945) (working 178 out of 182 days sufficient to count year toward tenure); *Woodward* v. *School Comm. of Sharon*, 5 Mass. App. Ct. 84, 88 (1977) (working 181 of 182 days sufficient to count year toward tenure). In addition, the Appeals Court has stated: "absences which are excused or sanctioned by the contract or by the school committee would not weigh against the teacher's entitlement to tenure." *Fortunato* v. *King Phillip Reg'l Sch. Dist. Comm.*, 10 Mass. App. Ct. at 206.

III. The Massachusetts Maternity Leave Act (MMLA)

The Massachusetts Maternity Leave Act (MMLA) authorizes certain employees to take eight weeks of unpaid maternity leave and provides in relevant part: "Such maternity leave shall

[1] Under Section 42, a teacher with PTS cannot be dismissed except for cause and is entitled to certain procedural protections in connection with such a dismissal.

not affect the employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible at the date of leave, and any other advantages or rights of her employment incident to her employment position; provided, however, that such maternity leave shall not be included, when applicable, in the computation of such benefits, rights, and advantages. . . ." G.L. c. 149, § 105D.

In *Solomon* v. *School Comm. of Boston*, the SJC examined whether leave under the MMLA constitutes an interruption in the consecutive nature of service for the purpose of attaining PTS. See *Solomon*, 395 Mass. 12 (1985). In that case, the plaintiff served as a provisional teacher in the Boston public schools on a regular and continuing basis during the 1978-1979 and 1979-1980 school years. *Id.* at 14. She began the 1980-1981 school year and took maternity leave from November 20, 1980 until January 18, 1981. *Id.* Thereafter, the plaintiff worked as a provisional teacher for the entire 1982-1983 school year. *Id.* On August 16, 1983, the school committee dismissed the plaintiff from service. *Id.* at 15.

The motion judge dismissed the plaintiff's complaint, finding that her maternity leave was a significant interruption in the consecutive nature of her service. *Id.* at 16. The judge relied on the "conditional clause" of G.L. c. 149, § 105D, which does not permit the employee to include her eight weeks of maternity leave in the computation of accrued benefits. *Id.* at 17. Under this view of the interplay between PTS and the MMLA, a teacher who takes maternity leave is required to restart her consecutive years of service at year one following the interrupted year. *Id.*

The SJC determined that it was possible to harmonize the PTS statute and the MMLA to avoid this harsh result. *Id.* at 18. The court determined that in accordance with the express language of the MMLA, time spent on maternity leave may not be counted toward one of the

three full years required to achieve PTS. *Id.* However, to prevent maternity leave from weighing against a teacher's right to tenure, the court determined that "a school committee must not view such leave as interrupting the consecutive nature of a teacher's service." *Id.* Significantly, the SJC left open the question of "whether such teacher must serve an additional year to compensate for the incomplete school year." *Id.* at 19 (not reaching the issue because the plaintiff served the full 1982-1983 school year following the abbreviated year).

Thereafter, the Appeals Court addressed whether the *Fortunato* decision permits a teacher to include absences excused or sanctioned by a collective bargaining agreement in the calculation of service for a full year. In *Matthews* v. *School Comm. of Bedford*, the plaintiff worked a full year for the Bedford school system in 1974-1975 and 1975-1976. See *Matthews*, 22 Mass. App. Ct. at 375. She was reappointed for the 1976-1977 school year. *Id.* On February 15, 1977, the plaintiff went out on unpaid maternity leave, a right guaranteed by the collective bargaining agreement. *Id.* As a result, the plaintiff taught for 99 days in the 1976-1977 school year. *Id.* The plaintiff was on unpaid child rearing leave for the entire 1977-1978 school year and the beginning of the 1978-1979 school year. *Id.* She returned to teaching on January 26, 1979 and completed 91 school days that year. *Id.*

The plaintiff alleged that she acquired PTS by operation of law. *Id.* at 378. The Appeals Court disagreed, emphasizing that the plaintiff had only taught for two full years: 1974-1975 and 1975-1976. *Id.* at 378-379. The years interrupted by maternity leave were not full school years and, therefore, could not be included in the computation of PTS years of service. *Id.* Moreover, the Appeals Court retreated from the broad language in *Fortunato* which appeared to create an exception for leave sanctioned by a collective bargaining agreement. *Id.* at 378 n.9. The court determined that the dictum in *Fortunato* did not exempt this type of leave from the full year

requirement set forth in G.L. c. 71, § 41, noting that the SJC's decision in *Solomon* confined the application of *Fortunato* "to consideration of the consecutiveness of a teacher's service." *Id.* The Appeals Court stated that it had no need to decide the question left open by *Solomon*: whether separate periods of service could be combined to make up a full school year. *Id.* at 379.

IV. Bilbo's Claims for PTS

In the case at bar, Bilbo contends that she was tenured prior to the May 31, 2013 non-renewal notification because her gaps in service were excused or sanctioned by the collective bargaining agreement and protected by the FMLA. Bilbo claims that she attained PTS status either at the end of the 2010-2011 school year, or no later than the sixty-first day of the 2011-2012 school year.

The operative collective bargaining agreements defined the entire school year in the District to be 181 days. It is undisputed that Bilbo taught two full consecutive school years in 2009-2010 and 2010-2011. During the 2008-2009 school year, Bilbo was on leave for 60 days from February 23, 2009 to May 23, 2009. During the 2011-2012 school year, Bilbo took 56 days of maternity leave from February 1, 2012 to April 27, 2012.

Relying on the dictum in *Fortunato*, Bilbo contends that she "remained on the payroll for the entire period, collecting benefits from the sick leave bank. The absences therefore do not weigh against [her] entitlement to tenure." Bilbo argues that because her maternity leave was sanctioned by the union contract, she attained PTS status at the end of the 2010-2011 school year. This argument must fail, however, because the SJC has expressly ruled that maternity leave under the MMLA cannot be included in the computation of tenure, and for purposes of

G.L. c. 71, § 41, "the year in which such leave is taken is not a complete school year." *Solomon* v. *School Comm. of Boston*, 395 Mass. at 19.

Alternatively, Bilbo contends that she attained PTS no later than the sixty-first day of the 2011-2012 school year. She reaches this result by counting toward PTS the days actually worked during the year of her maternity leave and then adding 60 days, the number of maternity leave days taken, worked in her fourth year of teaching.[2] Applying Section 41 and the relevant case law, it is clear that Bilbo's maternity leave did not interrupt her consecutive years of service for purposes of attaining PTS. *Id.* at 18. She does not need to restart the three year probationary term at year one and thereby lose the 2009-2010 and 2010-2011 years worked. In this regard, Bilbo would have attained PTS at the beginning of the 2013-2014 school year, if the District had not provided timely written notice of non-renewal on May 31, 2013. This case requires the court to consider the issue unresolved in *Solomon* and *Matthews*: whether separate periods of service can be combined to make up a full school year under G.L. c. 71, § 41 or "whether such teacher must serve an additional year to compensate for the incomplete school year." *Solomon* v. *School Comm. of Boston*, 395 Mass. at 19.

A. The Statutory Scheme for Notice of Non-Renewal

The District rejects Bilbo's argument that she is entitled to receive partial credit toward a "school year" on the ground that such an interpretation of Section 41 would conflict in an unworkable manner with the statutory mandate for providing timely notice to teachers of non-renewal of their contracts.

The statute states in relevant part: "A teacher without professional teacher status shall be notified in writing on or before June fifteenth whenever such person is not to be employed for

[2] Bilbo correctly disregards her first year of teaching, 2007-2008, as she was not hired until March of that year.

the following school year. Unless such notice is given as herein provided, a teacher without such status shall be deemed to be appointed for the following school year." G. L. c. 71, § 41. See *Farrington* v. *School Comm. of Cambridge*, 382 Mass. 324, 325 (1981) (noting that a teacher may attain professional teacher status or reappointment for another year by passive means through the district's failure to provide timely notice of non-renewal). See also *Laurano* v. *Superintendent of Sch. of Saugus*, 459 Mass. 1008, 1009 (2011) ("Teachers without professional status serve on a year-to-year basis and are subject to the reappointment process each school year. Such a teacher has no guarantee of employment beyond the current school year unless and until June 15 passes without notice that the teacher will not be reappointed.").

Bilbo contends that she attained PTS on the sixty-first day of the 2011-2012 school year. "If only the portions of the year actually worked in the FMLA leave years (but not the time out on leave) count as service toward PTS, then the 60 days of the FMLA leave taken in 2008-2009 must be deducted from Ms. Bilbo's service. In that case . . . Ms. Bilbo attained PTS on the sixty-first workday of the 2011-2012 school year, the day upon which she "made up" the period of the 2008-2009 FMLA leave." Defendant's Reply Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of their Cross-Motion for Summary Judgment.

However, the notice provision is an important feature of the statutory tenure scheme. As stated above, the statute is designed to require a school district to provide timely notice of non-renewal to probationary teachers on or before June 15, close to the end of the school year. The notice provision serves two distinct purposes: it relieves the school district from the burden of notifying every non-tenured teacher of his or her reappointment, and it affords non-renewed teachers an adequate opportunity to make alternate plans. *DeCanio* v. *School Comm. of Boston*, 358 Mass. 116, 120 (1970), cert. den., 401 U.S. 929 (1971).

Bilbo's theory is inconsistent with the precise statewide system for PTS, which includes a date-specific time for notification of non-renewal. Her position would push the non-renewal decision well past the June 15 deadline and into the Fall semester. Moreover, if a school district is forced to decide whether to renew a teacher on or before June 15 of the preceding school year, the teacher would be deprived of an opportunity to demonstrate competence over the course of a full three-year period. The court agrees with the District that the defendant's proposal "would deprive school districts of the long look at [a] teacher to which G. L. c. 71, § 41 entitles them, prior to making a decision on whether to grant a teacher PTS." Plaintiff Plymouth Public Schools' Opposition to Defendant's Motion for Summary Judgment. Thus, in the view of this court, in order to effectuate the unambiguous and easily administered notice system of Section 41, a teacher who takes maternity leave is not entitled to credit for a partial school year and cannot simply make up the number of days missed to attain PTS in the middle of a year. Rather, the teacher must serve an additional school year to compensate for the incomplete year. Accordingly, Bilbo did not attain PTS on the sixty-first day of the 2011-2012 school year.

B. The FMLA

Bilbo contends that requiring her to complete an additional school year before attaining PTS violates the Family Medical Leave Act (FMLA). The FMLA provides in relevant part that an employee taking leave granted under the statute shall, upon return, be restored to the position of employment held when the leave commenced or a position equivalent in benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1). In addition, the taking of leave "shall not result in the loss of any employment benefit accrued prior to the date on which leave commenced." 29 U.S.C. § 2614(a)(2). Finally, "[n]othing in this section shall be

construed to entitle any restored employee to – (A) the accrual of any seniority or employment benefits during any period of leave; or (B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3).

Bilbo argues that she must receive partial credit toward PTS under the FMLA implementing regulations, which define an equivalent position as "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and *status*." 29 Code Fed. Regs. § 825.215(a) (emphasis added). The regulations also state: "[a]t the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began . . ." 29 Code Fed. Regs. § 825.215(d). However, as of the date she left on maternity leave, Bilbo had not yet attained PTS status under Section 41, because she had not yet worked for three consecutive school years. Denying Bilbo partial credit for days worked during the 2008-2009 year in which she took her maternity leave does not cause her to lose an employment benefit earned prior to taking such leave. Under Section 41, Bilbo did not serve in the District for three consecutive school years and had not earned the benefit of PTS prior to her leave. Thus, there is no violation of § 2614(a)(2) of the FMLA.

Further, because her maternity leave did not interrupt the consecutive nature of her service for purposes of attaining PTS, Bilbo received the "hold harmless" benefit to which she was entitled under the FMLA. She retained the benefit which she had already earned under Section 41: completion of two years toward the three consecutive school years required for PTS. See U.*S. Dept. of Labor Wage and Hour Div. Opinion Letter*, FMLA-80, 1996 WL 1044777 at *1 (under FMLA, teacher who takes unpaid leave may not be required, upon return to work, to

begin probationary period anew). See also *Asadoorian* v. *Warwick Sch. Comm.*, 691 A.2d 573, 580-581 (R.I. 1997) (concluding that Rhode Island Parental and Family Medical Leave Act, which provides that taking of leave "shall not result in the loss of any benefit accrued before the date on which the leave commenced," required that teacher be given credit for the prior two years toward Tenure Act's three consecutive years requirement, even though year in which leave was taken did not count toward tenure). Cf. *Kolodziej* v. *Board of Ed. of S. Reg'l High Sch. Dist.*, 95 A.3d 763, 767-768 (N.J. Sup. Ct. App. Div.), rev. den., 103 A.3d 267 (N.J. 2014) (concluding that where New Jersey Tenure Act required teacher to work three consecutive academic years and still be employed at beginning of next succeeding year, teacher was deemed under FMLA to have tenure on September 1 of her fourth year, even though her maternity leave started on that date).

Bilbo cites to an opinion by the United States Department of Labor ("DOL") interpreting the FMLA to prohibit the extension of a probationary period for an additional school term under Illinois law "where the attaining of [tenure] is based on an employee's anniversary date, not the accumulation of a certain number of hours or days of work, and the current CBA recognizes certain situations wherein a probationary employee who takes unpaid leave would still attain contractual continued service status after the end of the second year." *U.S. Dept. of Labor Wage and Hour Div. Opinion Letter*, FMLA-80, 1996 WL 1044777 at *2. At the same time, the DOL noted that if a system of attaining tenure were "based on the completion of a certain number of hours or days worked . . . the employer could delay granting [tenure] by an amount reflecting the amount of unpaid FMLA leave." *Id.* Bilbo argues that like the Illinois tenure statute, G.L. c. 71, § 41 sets service in terms of years; therefore, she cannot be required to work an additional year to attain PTS following maternity leave. The DOL opinion is brief, addresses a different statutory

scheme for tenure, and appears to be based in part on the terms of a collective bargaining agreement. This court is not bound by the DOL's opinion, which is at most persuasive. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (opinions of DOL Wage and Hour Division are not controlling upon the courts by reason of their authority but are persuasive, depending on the thoroughness evident in their consideration, the validity of their reasoning, and consistency with earlier and later pronouncements); Lapine v. Wellesley, 304 F.3d 90, 106 (1st Cir. 2002) (DOL's views are not controlling on court, but are entitled to consideration). This court declines to follow the opinion letter, which is ambiguous in scope and would undermine the Massachusetts scheme for attaining PTS.

Bilbo further argues that a "school year" is the contractually obligated 181 days, so she is entitled to credit under the FMLA for days worked during the year in which maternity leave was taken, and can attain PTS after making up the number of days absent on leave. Under G. L. c. 71, § 41, however, service time is measured in increments of a full school year, with only de minimis deviations, not in terms of a particular number of days. See *Fortunato* v. *King Phillip Reg'l Sch. Dist. Comm.*, 10 Mass. App. Ct. at 204. A teacher in Massachusetts therefore is not entitled to PTS until she completes three consecutive full school years in which she can be evaluated for tenure. Accordingly, it does not appear to violate the FMLA to require Bilbo to serve for an additional school year following her return from maternity leave.

Because Bilbo had not attained PTS as of May 31, 2013, the Superintendent's non-renewal letter satisfied the District's notification obligations under G.L. c. 71, § 41 and the non-renewal provisions of the collective bargaining agreement. Moreover, without PTS status, Bilbo is not entitled to arbitrate her non-renewal by the District. Section 42 provides in relevant part: "A teacher with professional teacher status may seek review of a dismissal decision within thirty

days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner." G.L. c. 71, § 42. Bilbo cannot avail herself of the arbitration right conferred by this section because she is not a teacher with PTS status. See *School Comm. Of Danvers* v. *Tyman*, 372 Mass. 106, 112 (1977) (noting that non-tenured teachers are not entitled to procedural safeguards with respect to non-renewal of contract). Moreover, the non-renewal of the contract of a teacher without PTS status is not a "dismissal" which triggers the protections of Section 42. *Laurano* v. *Superintendent of Sch. of Saugus*, 459 Mass. at 1009.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff Plymouth Public Schools' Motion for Summary Judgment be **ALLOWED** and that the Defendants' Cross-Motion for Summary Judgment be **DENIED**.

Frank M. Gaziano
Justice of the Superior Court

Dated: April 27, 2015

Entered + copies mailed 4/30/15

Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET# **PLCV2014-00171B**

Plymouth Public Schools,
Plaintiff,

vs.

Education Association of Plymouth and Carver
and Kristen Bilbo,
Defendants.

SUMMARY JUDGMENT M.R.C.P. 56

This action came before the Court, Frank M. Gaziano, Justice, presiding, upon cross-motions of the parties for Summary Judgment pursuant to Mass. R. Civ. P. 56, and the Court after hearing and upon consideration of the submissions, issued a Memorandum of Decision and Order finding that there is no genuine issue as to material fact and that the plaintiff is entitled to a judgment as a matter of law,

It is **DECLARED, ORDERED and ADJUDGED:**

I. That Kristen Bilbo did not have professional teacher status pursuant to G.L. c. 71 §§ 41 and 42 at the time she was not renewed as a teacher in the Plymouth Public Schools;

II. That the nonrenewal of Kristen Bilbo did not violate the FMLA or G.L. c. 149 § 105D;

III. That the arbitration proceeding that was originally scheduled on February 7, 2014 for hearing on April 14 and May 15, 2014 be and hereby is PERMANENTLY STAYED.

Dated at Plymouth, Massachusetts this 30th day of April, 2015.

By:.....
Assistant Clerk

Entered: 4-30-15

copies mailed 4-30-15

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION NO.
PLCV2014-00171-B

THE PLYMOUTH PUBLIC SCHOOLS,

Plaintiff,

vs.

EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER and KRISTEN BILBO,

Defendants.

DEFENDANTS' NOTICE OF APPEAL

The Defendants in the above entitled action, Education Association of Plymouth and Carver and Kristen Bilbo, hereby appeal from: (a) the Court's Order entered on June 12, 2014 denying the Defendants' Motion to Dismiss; and (b) the Summary Judgment in favor of the Plaintiff, Plymouth Public Schools, entered on April 30, 2015, and from all other decisions, orders and judgments of the Court.

Date: May 18, 2015

EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER and KRISTEN BILBO,
By their attorney,

Matthew D. Jones

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL ~~(BY HAND)~~ ON 5/18/15

Matthew D. Jones

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Matthew D. Jones

Matthew D. Jones
BBO #543681

NO. 2015-P-0906

THE PLYMOUTH PUBLIC SCHOOLS,
PLAINTIFF-APPELLEE,

v.

EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER
AND KRISTEN BILBO,
DEFENDANTS–APPELLANTS.

ON APPEAL FROM ALL DECISIONS, ORDERS AND JUDGMENTS
OF THE SUPERIOR COURT

BRIEF FOR THE DEFENDANTS-APPELLANTS, EDUCATION ASSOCIATION OF PLYMOUTH AND CARVER AND KRISTEN BILBO

PLYMOUTH COUNTY

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS