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# LABOR RELATIONS NEWS

## ◆ Federal district court In New Jersey rules that teacher's in-classroom expression was not protected by the First Amendment

A federal district court in New Jersey has ruled that a school district did not violate a teacher's First and Fourteenth Amendment rights when the school district found the teacher had violated the school district's anti-harassment policy after she displayed a cell phone picture that an African-American student found racist and offensive. It rejected the teacher's First Amendment "as applied" challenge to the policy and her facial challenge that the policy was overbroad and vague. The district court also rejected the teacher's Fourteenth Amendment due process and equal protection claims.

The case is ***Melnyk v. Teaneck Bd. Of Educ.***, No. 16-0188 (D. N.J. Nov. 22, 2016).

Regina Melnyk, a Literature and Creative Writing teacher at Teaneck High School, led a class discussion of the essay "Six to Eight Black Men" by David Sedaris. The essay concerns the Dutch holiday tradition of people dressing up as the Zwarte Piete character, a black man, who accompanies Santa Claus. Melnyk told her class that this tradition still persists in the Netherlands. She showed them a picture on her cell phone of her relatives dressed in black face.

An African-American student, R.C., responded that she found the picture to be racist and offensive. Melnyk responded that it was more a reflection of "cultural differences." When the student reiterated that the picture was offensive, Melnyk responded "in defense of her family . . . that it was a culture difference," and that the Dutch had abolished slavery long before the United States.

In response to the student's complaint, Superintendent Barbara Pinsak assigned Naomi Conklin, the Teaneck School District's anti-bullying specialist, to conduct a formal investigation to determine if Melnyk had violated the district's Harassment, Intimidation, and Bullying Policy (HIB Policy). Conklin issued a report finding that Melnyk had displayed a picture that was "reasonably perceived as motivated by race or color," and that it "created a hostile environment for [the student]."

Superintendent Pinsak informed Melnyk (the teacher) via letter that she was found to have violated the HIB Policy. The letter noted in particular that "[t]he depiction of your 3 relatives in 'black face' . . . is reasonably perceived as being motivated by race or color, took place in school, substantially interrupted the student(s) school day, and interfered with the rights of African-American students." The consequence for this violation was a written reprimand to be placed in Melnyk's personnel file.

Melnyk filed a grievance under the collective bargaining agreement which went to binding arbitration. The arbitrator's decision in favor of the teacher was upheld by the New Jersey Superior Court, which ordered the District to remove the reprimand from Melnyk's file.

Not entirely satisfied, Melnyk subsequently filed suit in federal district court against the Teaneck Board of Education (TBOE). Her suit challenged the HIB Policy on First and Fourteenth Amendment grounds. Melnyk argued that the policy "as applied" to her violates her First Amendment free speech rights. She also asserted that the policy is facially unconstitutional because it is overbroad and vague. In addition, she claimed that the policy violated her Fourteenth Amendment due process and equal protection rights.

The district court granted TBOE's motion to dismiss Melnyk's suit. Addressing Melnyk's "as applied" challenge to the policy, it indicated that TBOE was arguing that Melnyck's speech was not a matter of public concern and, therefore, was not speech protected by the First Amendment. It stressed that while the content of speech may address a public concern, the form and context of such speech is vital to the determination of whether the speech addresses a matter of public concern and would be entitled to First Amendment protection. It emphasized that Melnyk's expressions took place in the non-public setting of her classroom, which "was a private forum engaged in the exclusive purpose of educating her students."

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**Federal district court in New Jersey**

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The court noted that courts have found that speech made in a private forum is not protected speech. In particular, they have found, taking form and context into consideration, "that in-classroom speech made by an educator pursuant as part of a curriculum is not speech on a matter of public concern."

The court also rejected Melnyk's suggestion that it consider "academic freedom" in determining whether her free speech rights were violated. It pointed out "[i]t is well accepted that a state has a greater interest in regulating K-12 education than universities." It concluded: "Because the Court finds that Melnyk's expressions did not constitute speech on a matter of public concern, the Court does not consider the *Pickering* balancing test."

The district court, likewise, rejected Melnyk's claim that the policy is facially invalid because it is overbroad and vague. The court looked at two factors in particular: "the nature of the activity or conduct sought to be regulated," and "the nature of the state interest underlying the regulation."

The court indicated that under *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503 (1969), it is well established that schools may regulate speech that "would substantially disrupt school operations or interfere with the right of others." The court said , "[t]his is precisely what the HIB Policy does. It is difficult to think of any protected speech that would fall under this construction, and Melnyk has pointed to none." As a result, the district court concluded: "In short, the HIB Policy falls within the *Tinker* test.

*-Adapted from December 7, 2016, NSBA Legal Clips*

## ◆ Who's insured? Muncie Community Schools sued by dozens of retired teachers

Dozens of retired teachers are suing Muncie (Indiana) Community Schools because of issues with their insurance. The former teachers say the school district went back on its word and left them without coverage.

According to the lawsuit, many high-paid Muncie teachers were encouraged to retire early to save the district money. Muncie Community Schools offered these early retirees the same insurance benefits as active teachers as an incentive. The insurance coverage for early retirees is listed in the teachers' contract.

But, the school board voted to do away with the incentive at a November 15 meeting.

Retired teacher Mary Bedel said she's now paying triple the amount of money for coverage. Bedel had a small window to find new insurance through the federal marketplace since her coverage through MCS expired January 1.

"I would certainly not have retired early," Bedel said. "This was not in the plans. It's a big hit where we didn't have much time to do much planning for it."

Bedel reached the highest level of teacher pay after working for Muncie Community Schools for 39 years. Bedel said while she was making $59,960 a year, a first-year replacement teacher would cost around $34,600.

"The school corporation saved $25,000 for every year I retired early," Bedel said.

Bedel and other early retirees have joined a lawsuit filed in December against the school corporation. Attorney Jason Delk is representing retired teachers, administrators and others affected by the board's decision. He says MCS is in breach of contract.

"With the cost of healthcare, it's simply become unaffordable and puts them in a very serious predicament," Delk said.

FOX59 reached out to MCS about the lawsuit. A spokesperson said they will not comment on litigation matters. Minutes from the November 15 meeting state the district will save around $1.6 million by no longer providing insurance supplements for early retirees. The minutes also state this will "align MCS with most other districts across the state."

*-FOX 59 TV*, Indianapolis, IN, January 3, 2017, by Gabby Gonzalez

## ◆ Lawsuit targets New Jersey district that continues to pay teachers' salaries while they perform full-time union work

The Conservative "watchdog" Goldwater Institute (GI) has brought suit, on behalf of two taxpayers, against Jersey City Public Schools (JCPS) and the Jersey City Education Association (JCEA). The suit is challenging the school district's policy of allowing two teachers to devote all of their time to teachers union activities, while paying the salaries of those teachers.

The suit, filed in Hudson County Superior Court, contends that the practice, known as release time, is an unconstitutional and illegal subsidy to JCEA courtesy of New Jersey taxpayers.

"Jersey City taxpayers are spending millions to pay two people who should be in schools preparing students for their future to sit at a union desk and do work that benefits a private organization, not children," Jon Riches, GI's director of national litigation and general counsel, said in a statement. "Fortunately, the New Jersey Constitution prohibits the government from spending taxpayer money for purely private purposes."

The New Jersey Constitution prohibits local governments from giving "any money or property, or loan[ing] its money or credit, to or in aid of any individual, association or corporation." Release time, the Goldwater Institute says, is a violation of that clause. GI acknowledges that release time is common nationwide but calls JCPS' policy "particularly egregious" because it pays the salaries of two full-time union officers, not one.

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**Lawsuit targets New Jersey district**
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Jersey City's school district, the second largest in the state, is largely funded with state tax dollars. The policy has cost taxpayers $1.2 million, over the last five-years, in pay and benefits for the two union officials, JCEA President Ron Greco and JCEA Second Vice President Tina Thorp. Payroll records show Greco makes $106,580 annually as a crisis intervention teacher. Thorp earns about $99,000 as an elementary school teacher.

-*NJ.com, January 4, 2017,* by Terrence T. McDonald

## ◆ Parents in Minnesota teacher tenure suit plan to appeal dismissal of lawsuit

Four parents who claim Minnesota's teachers' union rules protect bad educators asked an appellate court to review their lawsuit against the state after it was dismissed last year.

Attorneys for Tiffini Forslund, the lead plaintiff in the case against Gov. Mark Dayton, Education Commissioner Brenda Cassellius, St. Paul Public Schools and three other districts, filed a notice Monday they'll appeal a decision by Ramsey County District Court Judge Margaret Marrinan in October to dismiss their suit.

The suit claims Minnesota's system of seniority-based layoffs and other union protections for teachers plays a key role in the state's academic achievement gap between students of color and their white classmates. The lawsuit said these rules result in a large number of minority students attending failing schools with bad teachers.

Marrinan wrote in her decision that the suit failed to show a connection between teacher union rules and the achievement gap or establish a criteria to identify ineffective teachers. Marrinan wrote that the issues raised by the lawsuit should be tackled by the Legislature rather than a court.

Denise Specht, president of state teachers union Education Minnesota, said union protections are earned by educators after probationary periods and ensure teachers can speak out about the condition of their schools.

"These laws don't prevent bad teachers from getting fired, they prevent good teachers from being fired for bad reasons," Specht said in a statement. "The vast majority of Minnesota teachers do a good job under difficult circumstances."

Forslund's lawsuit is supported by the Partnership for Educational Justice, a national education reform group that works with local partners across the U.S. The details of Forslund's challenge are expected in court filings due next month.

"Like all parents, the plaintiffs in this case want their children's rights upheld. The constitution in Minnesota guarantees a quality public education for children," said Jesse Stewart, one of Forslund's attorneys. "We are appealing so that we may return to the district court and show how these laws operate to deprive far too many schoolchildren of this right."

The appeal of the teacher tenure case comes as the new Republican-led Minnesota Legislature is expected to debate policy and spending changes to help close the state's achievement gap. In past years, Republicans have pushed to reform Minnesota's teachers union protections, but they have faced stiff opposition from Democrats including Gov. Mark Dayton.

In 2012, Dayton vetoed a bill passed by the Republican Legislature to eliminate seniority-based layoffs, also known as "last in, first out," or LIFO. Dayton has said school leaders are already able to negotiate changes to layoff policies and that the state's system of teacher evaluations is the best way to remove ineffective educators.

-*Pioneer Press*, January 9, 2017, by Christopher Magan

## ◆ Blind teacher's suit accuses Ohio district of discriminating based on his disability

Kyle Conley, a blind music teacher, has filed suit against three Butler County, Ohio schools alleging he was not allowed to substitute teach at those schools because of his disability. The lawsuit claims that in September 2014, a Fairfield teacher complained that "she did not want Mr. Conley to substitute teach for her classroom because of his disability."

Fairfield officials felt Conley could not keep his students safe in the event of an emergency, the lawsuit says, and would require a full-time assistant. Conley argues in the lawsuit that he does not need an assistant. Roger Martin, the assistant superintendent for Fairfield, wrote a letter about this to the superintendent of the Warren County Educational Services Center and Southwest Ohio Council of Governments, according to the lawsuit. "It is the District's judgment that utilizing [Mr. Conley] as a substitute teacher without significant assistance creates safety issues for our students, particularly in emergency events, and would adversely affect the quality of the instruction and assessment which take place in the classes," Martin said in the letter.

The next year, Conley says Lakota and Ross schools also blocked him from teaching because of his blindness. Scott Gates, the Ross Local Schools Superintendent, said the "allegations against Ross Local Schools are unfounded." Billy Smith, Fairfield Superintendent, said that school officials were not aware of the lawsuit and do not comment on pending litigation.

Conley's attorney Robert Klinger said Conley was still accepted by other Butler County schools but couldn't get enough work. Klinger contends the Butler County schools failed to accommodate Conley under the Americans with Disabilities Act, resulting in lost wages, benefits and other compensation, as well as emotional distress.

-*Cincinnati,com.*, December 6, 2016, by Keith Biery Golick

## ◆ Workplace Discrimination: EEOC releases guidance on mental health conditions in the workplace

On December 12, 2016, the Equal Employment Opportunity Commission (EEOC) published a resource document titled, "*Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*," which summarizes the rights of individuals with mental health conditions under the Americans with Disabilities Act of 1990 (ADA). The resource document, drafted in a basic Q&A format, addresses workers' rights to protection against discrimination and harassment because of mental health conditions, privacy regarding mental health information, and reasonable accommodation in the performance of job functions. Although the guidance is geared to employees, it provides insight for employers as to the EEOC's position on protections provided for employees under the ADA.

The resource document provides guidance regarding an employer's obligation not to discriminate against an individual on the basis of their mental health condition, and the employer's right to not hire or retain an employee if the employee cannot perform the essential functions of the job or if the employee poses a "direct threat" to safety (*i.e.*, a "significant risk of substantial harm to self or others"). Importantly, the EEOC warns against the reliance on "myths or stereotypes" about mental health conditions when making employment decisions and advises employers to collect *objective evidence* of an employee's inability to perform essential job functions or any direct threat to safety before making an employment decision.

The resource document also provides details regarding the EEOC's position with regard to an employee's right to keep their mental health condition(s) private. The guidance asserts that employers cannot ask medical questions, including ones about mental health conditions, unless one of following scenarios applies:

- The employee requests a reasonable accommodation.
- After the employee receives a job offer, but before employment begins (so long as this practice is used for all applicants in the same job category).
- The employer is engaging in affirmative action for individuals with disabilities (in which case a response is optional).

There exists objective evidence that an employee may be unable to perform their essential job functions or may pose a safety risk to themselves or others.

With regard to an employee's right to seek a reasonable accommodation, the EEOC explains that employees may be entitled to a reasonable accommodation when their mental health condition, if left untreated, would "substantially limit" a "major life activity." While the definition of "substantially limit" is not made entirely clear, the resource document indicates that the EEOC intends to adopt a very liberal interpretation of the phrase. For instance, the guidance points out that a condition does not need to be permanent or severe to be substantially limiting under the ADA; a condition that makes activities more difficult, uncomfortable, or time-consuming to perform (when compared to the general population) may be substantially limiting, according to the EEOC. And even if symptoms come and go, the guidance notes that "what matters is how limiting they would be when the symptoms are present." It also notes that mental health conditions like major depressions, PTSD, bipolar disorder, and obsessive compulsive disorder "should easily qualify." It advises that an employer should not conduct an extensive analysis of whether a condition qualifies as a disability, but should instead focus on complying with the ADA's antidiscrimination and reasonable accommodation requirements.

The resource document provides various examples of accommodations the EEOC considers "reasonable," including:

- Altered break and work schedules (e.g., scheduling work around therapy appointments)
- Quiet office space or devices that create a quiet work environment
- Changes in supervisory methods (e.g., written instructions from a supervisor who does not usually provide them)
- Specific shift assignments
- Telecommuting

The guidance advises employees that they may ask for a reasonable accommodation at any time, but that it's generally better to ask before any workplace problems occur because employers are not required to excuse poor job performance—even if it's caused by a medical condition or the side effects of medication.

The guidance notes that an employer may ask an employee to put an accommodation request in writing and may ask for documentation from the employee's healthcare provider about the condition and the need for accommodation. The EEOC suggests that employees bring to their medical appointment a copy of the EEOC publication, *"The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation,"* which provides mental health providers with information for understanding the documentation necessary for submitting reasonable accommodation requests to an employer.

The guidance adds that an unpaid leave may be a reasonable accommodation if the leave will help the employee get to a point

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**Workplace Discrimination**

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where he or she can perform a job's essential functions. And if an employee is permanently unable to do his or her regular job, the guidance explains that the employee can request reassignment to another job, if one is available.

The EEOC, in press release, noted that the agency's "charge data" shows that charges of discrimination based on mental health conditions are on the rise. During fiscal year 2016, preliminary data shows that EEOC resolved almost 5,000 charges of discrimination based on mental health conditions, obtaining approximately $20 million for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations.

"Many people with common mental health conditions have important protections under the ADA," said EEOC Chair Jenny R. Yang. "Employers, job applicants, and employees should know that mental health conditions are no different than physical health conditions under the law. In our recent outreach to veterans who have returned home with service-connected disabilities, we have seen the need to raise awareness about these issues. This resource document aims to clarify the protections that the ADA affords employees."

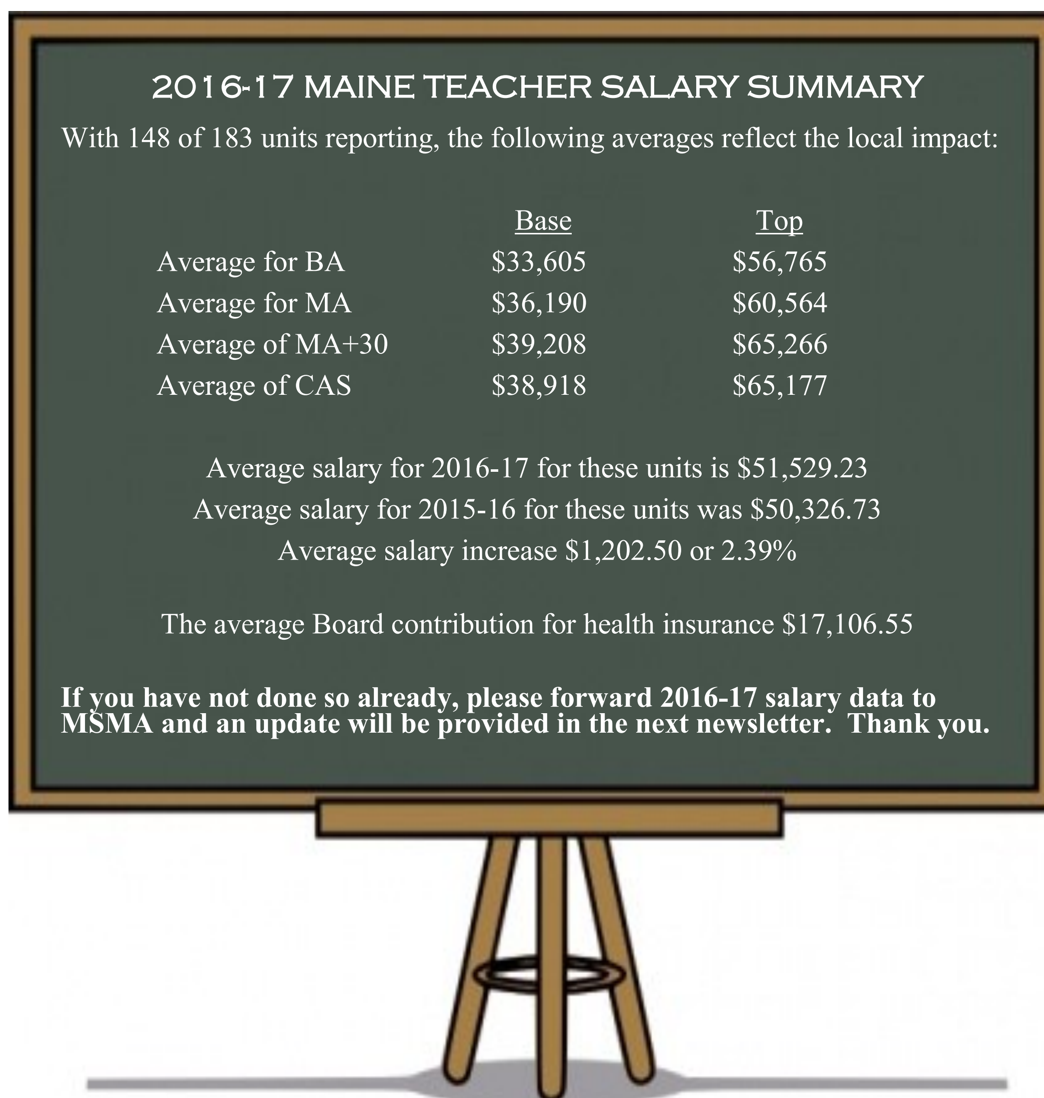
The resource document can be accessed here: *https://www.eeoc.gov/eeoc/publications/mental_health.cfm*.

*-cb, multiple sources*

## CPI—December

CPI– W This index, which is commonly used to adjust wage contracts increased 0.1% from November 2016 to December 2016 and is 2% higher than in December 2015.

CPI– U This index for all urban consumers was unchanged from November 2016 to December 2016 and is 2.1% higher since December 2015.



2016-17 MAINE TEACHER SALARY SUMMARY

With 148 of 183 units reporting, the following averages reflect the local impact:

| | Base | Top |
|---|---|---|
| Average for BA | $33,605 | $56,765 |
| Average for MA | $36,190 | $60,564 |
| Average of MA+30 | $39,208 | $65,266 |
| Average of CAS | $38,918 | $65,177 |

Average salary for 2016-17 for these units is $51,529.23

Average salary for 2015-16 for these units was $50,326.73

Average salary increase $1,202.50 or 2.39%

The average Board contribution for health insurance $17,106.55

**If you have not done so already, please forward 2016-17 salary data to MSMA and an update will be provided in the next newsletter. Thank you.**