LEGALINSIGHTS
FOR SCHOOL DISTRICTS
OTTOSEN BRITZ KELLY COOPER GILBERT & DiNOLFO, LTD.

Volume 18, No. 2 - - Spring 2011

Teacher has no legal right to union representation during remediation meetings

by Donald R. Tyer

Reversing a lower court opinion, the Illinois Supreme Court recently ruled in *SPEED District 802 v. Warning,* __ N.E.2d __ (Ill. Feb. 25, 2011), that a non-tenured teacher was not entitled to union representation at post-observation conferences or remediation meetings.

At the beginning of the 2001-2002 school year, SPEED District 802 (the "District") hired Rachel Warning as a special education teacher. Over the next four years, Warning received varied evaluations including some that identified areas of sub-standard performance. By the 2004-2005 school year, Warning's personnel file contained a mixed bag of overall satisfactory reviews and various memorandums detailing areas needing improvement. In February 2005, Warning was given an "unsatisfactory" rating. The collective bargaining agreement required that Warning be given an opportunity to correct her deficient areas under a remediation plan. She was given a "Corrective Action Plan" calling for biweekly remediation meetings.

On March 1, 2005, Warning's principal, Ben Runyon met with Warning to review her corrective action plan. Warning attended the meeting with union representative and fellow teacher, Beth Wierzbicki. Warning and Wierzbicki spent the meeting critiquing the District's evaluation instrument. At the close of the meeting, Runyon informed Wierzbicki that she need not attend the next conference. On March 4, Wierzbicki again accompanied Warning to the meeting where, rather than discussing Warning's corrective action plan, they debated the Illinois Learning Standards and whether other teachers were applying them as Runyon requested.

At the March 17 meeting, which the Superintendent attended, Wierzbicki again accompanied Warning. The Superintendent initially told Wierzbicki that she could not attend the meeting, but changed his mind and allowed her to remain provided she limited her role to note taking only. At the March 22 meeting, Runyon and Warning reviewed her lesson plans, while Wierzbicki took notes and passed them to Warning.

On March 31, Warning was notified that Wierzbicki was no longer allowed to attend the remediation meetings. After further remediation meetings, the District performed a final evaluation of Warning on April 22, 2005, which indicated that the District would not be renewing her contract because of her lack of improvement in communication and her inability to engage in the remediation process in a constructive manner.

Warning filed an unfair labor prac-

Continued on page 2

Employers must affirmatively protect employee genetic information

by Maureen Anichini Lemon

Under new regulations effective January 10, 2011, employers that require post-offer or fitness-for-duty physical and mental examinations must expressly request that an individual's family medical history or any other genetic information be *excluded* from the exam. The Genetic Information Nondiscrimination Act ("GINA") is designed to prevent the misuse of certain genetic information for employment purposes and employment discrimination based on genetic information. The United States Equal Employment Opportunity Commission ("EEOC") promulgated the new regulations which impact employers' post-offer or fitness-for-duty examinations.

Genetic information, as defined by the EEOC, includes information about (1) an individual's genetic tests; (2) genetic tests of an individual's family; (3) the manifestation of a disease or disorder in an individual's family member (family medical history); (4) an individual's request for, or receipt of, genetic services; (5) an individual's participation in a clinical research program or study that includes genetic services by the individual or a family member; and (6) the genetic information of a fetus that is carried by an individual / pregnant woman who is a family member of an employee and the genetic information of an embryo that

Continued on page 3

Student free speech after Zamecnik and Nuxoll v. Indian Prairie School District #204

by Meganne Britton

The United States Court of Appeals for the Seventh Circuit held that prohibiting a student from wearing a t-shirt that read "Be Happy, Not Gay" in school was a violation of the student's First Amendment rights in *Zamecnik v. Indian Prairie School District #204*, 2011 WL 692059 (7th Cir. 2011). Zamecnik and Nuxoll, two Neuqua Valley High School students were prohibited from wearing shirts that displayed the slogan "Be Happy, Not Gay." The students did not support homosexuality and wanted to wear the shirts one day after a "Day of Silence" to support gay rights occurred at the school. Zamecnik's shirt displayed the statement "My Day of Silence, Straight Alliance" on the front and "Be Happy, Not Gay" on the back. Zamecnik was sent to the Dean's office and the words "Not Gay" were crossed off the shirt. Although Nuxoll did not wear the shirt that day, he filed for a preliminary injunction which would allow him to wear the controversial shirt to school.

In *Nuxoll*, the district court denied a preliminary injunction that would allow the plaintiffs to wear the shirts to school. The Seventh Circuit reversed that decision and held that the plaintiffs could wear the shirts on school grounds during school hours because the slogan did not consist of fighting words, an exception to protected speech. Additionally, the school district did not offer facts to indicate that the school reasonably forecasted a substantial disruption in the school. Finally, the court stated that "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality."

On remand, in *Zamecnik*, the district court granted summary judgment to the plaintiffs and awarded them $25 in damages. Furthermore, the district court issued a permanent injunction allowing any student to display the slogan on clothing or other personal items. When the school district appealed, the Seventh Circuit affirmed the district court's grant of summary judgment to the plaintiffs, the damages award, and the permanent injunction.

On appeal, the school district argued that it reasonably believed the shirt would cause a substantial disruption. A

Continued on page 3

Union representation

Continued from page 1

tice charge, alleging that the District violated her rights under the Illinois Educational Labor Relations Act ("Act") and the collective bargaining agreement. Warning claimed that (1) because she could ultimately be dismissed if she did not satisfactorily remediate her performance, she had the right to have union representation at her remediation meetings; and (2) the District did not renew her contract because she exercised that right. The Illinois Educational Labor Relations Board ("IELRB") agreed, adopted the findings of its administrative law judge ("ALJ") to reinstate Warning, and awarded her back pay. The Appellate Court upheld the IELRB's decision; however, the Illinois Supreme Court reversed the lower court's decision.

The central question for the Supreme Court was whether Warning had engaged in an activity protected by Section 14(a)(3) of the Act; specifically, whether Warning was entitled to protection under the Act for bringing union representation to remediation meetings. The collective bargaining agreement in this case mandated union representation at any meeting that might lead to disciplinary action. The collective bargaining agreement also specifically provided that "disciplinary action is not performance based." Yet, Warning argued she was entitled to union representation because her remediation meetings could lead to termination by the District. The IELRB agreed, reasoning that the remediation meetings were "investigatory" in the sense that they could lead to disciplinary action.

The IELRB distinguished its past ruling in *Summit Hill School District 161*, 4 PERI 1009 (IELRB December 1, 1987) by declaring that even though dismissal was a possible ultimate outcome of a post-observation conference / remediation meeting, *tenured* teachers do not have a right, as a matter of law, to union representation during such meetings. However, in *Warning,* the IELRB and, subsequently the Appellate Court, declined to extend the *Summit Hill* holding to non-tenured teachers reasoning that non-tenured teachers needed greater protection against unjust dismissal.

The Illinois Supreme Court concluded that the *Summit Hill* ruling applies to non-tenured teachers as well as tenured teachers. As a matter of law, Warning was not entitled to union

Continued on page 4

GINA

Continued from page 1

is legally held by the individual or family member by the use of assisted reproductive technology.

The EEOC defines "requests for medical information" broadly; i.e., searching the internet in a manner that would allow an employer to uncover genetic information, listening to third party conversations, searching an individual's current health status in a way that may result in the discovery of genetic information. In general, no genetic information may be used by a health care provider or employer to determine an individual's ability to perform a job. The EEOC recommends that the following GINA notice paragraph be added to all forms submitted by employers to health care providers who conduct the post-offer or fitness-for-duty examinations:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information" as defined by GINA includes an individual's family medical history, the results of an individual's or family members genetic tests, the fact that the individual or family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assisted reproductive services.

An employer who affirmatively uses this notice to inform health care providers that they should not violate GINA's requirements falls into a 'safe harbor' that will protect the employer from a claim of violating GINA. Yet, in addition to this notice, employers must take all reasonable measures within their control to correct or prevent a GINA violation if one does occur. Reasonable measures, as outlined by the federal regulations, include no longer using a health care provider that requests or requires genetic information.

Several specific and narrow exceptions exist to the general rule that employers may not acquire an employee's genetic information for any reason. Exceptions to the new regulations include an employer's lawful request for medical information under federal and state laws such as the ADA and FMLA. For example, family medical history needs to be released in order to certify the serious health condition of an employee's family member under the FMLA. Forms provided by employers to a health care provider should state that the health care provider <u>may</u> request family medical history to the extent it is necessary to certify the serious health condition of an employee's family member, and that such limited request does not violate GINA. Another exception to the general rule against the acquisition of genetic information is the inadvertent acquisition of such information; i.e., when an employer overhears an employee openly discussing his genetic information or family medical history with other employees around the water cooler. Even in these lawful circumstances, employers are obliged to keep confidential any genetic information they receive.

Employers should take the following

Continued on page 4

Student free speech

Continued from page 2

school official testified about the harassment of homosexual students; however, the Seventh Circuit court found this evidence negligible because it contained a handful of unconfirmed incidents or statements that occurred several years before the shirts in question were worn to the school. Additionally, the school district offered evidence of harassment *against* Zamecnik to show that the school reasonably believed the shirts would cause a substantial disruption. The court disagreed, finding this evidence to fall within the legal doctrine of the "heckler's veto" whereby the fact that Zamecnik was harassed by homosexual students and their sympathizers was not a grounds for banning her speech.

The school district also put forth an expert report which classified the slogan "Be Happy, Not Gay" as "particularly insidious." The court found the expert's opinion lacking because there was no indication that the expert knew anything about the school and the school was never referenced in the report. Because the school's evidence did not corroborate a reasonable belief that it faced a threat of "substantial disruption," the Seventh Circuit Court upheld the ruling in favor of Zamecnik.

Balancing a student's First Amendment rights with a school district's responsibility to maintain discipline and order within the school is a challenging task. A school district should remember that student speech must be reasonably believed to cause a substantial disruption in the school before it can be disciplined or stifled. In addition, school districts cannot use evidence that the speech caused threats or other retaliatory conduct against the speaker (the 'heckler's veto') to ban the speech.

Because this decision may seem to contradict your goal to eliminate bullying and harassment in school, please consult with us as you venture to balance students' competing rights. ■

Union representation

Continued from page 2

representation at her post-observation conference / remediation meeting. For this reason, she could not . . . and was not . . . engaged in protected union activity in demanding union representation at those meetings. Furthermore, the right to union representation was not created by the mere fact that the District allowed Warning to be accompanied by a union representative at their initial meetings. The District was within its rights to limit the involvement of that representative when it believed she was subverting the remediation process. Warning failed to show any proof that she had a right to have Wierzbicki present in those meetings either by law or as a result of the collective bargaining agreement.

In light of the *Warning* opinion, school districts should take steps to insure that their tenured and non-tenured teachers do not claim a right to union representation at post-observation conferences and remediation meetings. These steps should include:

- Careful review of proposals during contract negotiations so that the right to union representation for teachers at post-observation and remediation conferences is not explicitly written into a collective bargaining agreement.
- To the extent possible, separate disciplinary discussions from performance evaluations in meetings with teachers, and create written agendas for those meetings that detail what topics will be discussed.
- Do not allow union representatives to be present during post-observation and remediation conferences with teachers as this could create a "past practice" that could entitle them to union representation at future conferences despite the Court's decision in *SPEED v. Warning.*

If you would like to review your practices and contract language in light of this ruling, please contact Don Tyer at (630) 682-0085. ■

SAVE THE DATE

You are invited to attend the
Tenth Annual School Law Conference

Hosted by
Ottosen Britz Kelly
Cooper Gilbert & DiNolfo, Ltd.

Tuesday, September 20, 2011
Registration – 7:30 a.m.

Hilton Lisle / Naperville
Lisle, Illinois

GINA

Continued from page 3

steps to make sure they are in compliance with GINA and the new regulations. First, they should add the notice/ safe harbor paragraph contained in this article to all forms that request medical information and adjust the language as needed to reflect any applicable exceptions to GINA. Second, the employer should notify health care providers, especially those that perform post-offer and fitness-for-duty examinations, of the GINA regulations and require that providers not collect genetic information from their employees.

Employers should educate supervising employees and Human Resource personnel about GINA regulations.

Lastly, employers should educate supervising employees and Human Resource personnel about GINA regulations to ensure that their internal policies and personnel comply with the new regulations.

If you have any questions regarding your obligations under GINA, please contact us at (630) 682-0085. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights for School Districts,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.
1804 North Naper Boulevard, Suite 350 Naperville, Illinois 60563
(630) 682-0085 www.ottosenbritz.com FAX (630) 682-0788
Maureen Anichini Lemon, Editor mlemon@ottosenbritz.com

Copyright 2011 by **OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.**
All rights reserved. Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

Printed on recycled paper.