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

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

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INTRODUCTION

In its Brief, the Plymouth Public Schools ("District") advances four principal arguments. First, it argues that, even though they were paid and "excused or sanctioned by the contract," Kristen Bilbo's ("Ms. Bilbo") maternity leaves in school years 2008 – 2009 and 2011 – 2012 constitute a break in service requiring the exclusion of the entirety of those years as service toward professional teacher status ("PTS"). Appellee's Brief at 3 – 13.

Second, the District asserts that, despite the requirement of the Family and Medical Leave Act ("FMLA") that taking FMLA leave "shall not result in the loss of any employment benefit accrued prior to the date upon which the leave commenced," 29 U.S.C. § 2614(a)(2) ("the hold harmless clause"), no time actually worked in an academic year may ever count as "service" toward PTS unless the entire school year is completed. Appellee's Brief at 15 - 19.

Third, the District calls for the partial reversal of Turner v. School Committee of Dedham, 41 Mass. App. Ct. 354 (1996), which holds that questions of PTS status should be decided by an arbitrator appointed under G.L. c. 71, § 42, by urging the Court

to carve out an exception for cases of pure statutory interpretation where the facts are not in dispute. Appellee's Brief at 26 – 34.

Finally, the District argues that the position advanced by the Appellants will deprive it of an opportunity to adequately evaluate teachers before they attain PTS. Appellee's Brief at 13 - 14.

For the reasons detailed below, these claims are without merit.

I. BECAUSE MS. BILBO'S PAID MATERNITY LEAVE DID NOT BREAK AN ONGOING EMPLOYMENT RELATIONSHIP AND WAS SANCTIONED BY THE CONTRACT AND FEDERAL LAW, IT DOES NOT WEIGH AGAINST HER ENTITLEMENT TO PTS

Contrary to the District's assertion, Fortunato v. King Philip Regional School District Committee, 10 Mass. App. Ct. 200 (1980) has not been eroded by Matthews v. Sch. Comm. of Bedford, 22 Mass. App. Ct. 374 (1986). This is because Matthews, like Solomon v. Sch. Comm. of Boston, 395 Mass. 12 (1985), never reached the question of whether portions of years in which a paid and statutorily protected maternity leave is taken count as service toward PTS. Matthews at 379 ("The question of combining separate periods of service to make up a full school year was left open as it relates to a maternity leave taken under G.L.

c. 149, § 105D, by Solomon v. School Comm. of Boston, 395 Mass. at 19. We do not consider the issue as it was not before the Superior Court" (emphasis added).)

Fortunato elaborates a comprehensive framework to analyze the question of "who has served in the public schools of a school district" for acquisition of PTS status under G.L. c. 71, § 41. The Fortunato Court's observation that there are at least some absences that are "excused or sanctioned by the contract," which "do not weigh against the teacher's entitlement to tenure," Fortunato at 206, cannot plausibly be denied as a general matter.[1] An analysis of the kinds of absences in the appellate cases that lead to a break in the acquisition of PTS reveals that the guiding principle is whether there is an ongoing employment relationship. Ms. Bilbo's absences on contractually (and statutorily) protected maternity leave did not break her employment relationship with the District and therefore did not "weigh against" PTS under the framework in Fortunato. Thus, as described in the Appellants' Principal Brief, the entirety of school

[1] Common examples of this would be ordinary, paid sick leave or paid personal days.

year 2008 – 2009 was service toward PTS and Ms. Bilbo acquired PTS at the end of 2010 – 2011.

The default for acquisition of PTS is "to have served" in a public school system for "the entire period" of three consecutive school years, "render[ing] professional services of a substantial character." Fortunato, supra at 202 - 203, citing Frye v. Sch. Comm. of Leicester, 300 Mass. 537 (1938) and Nester v. Sch. Comm. of Fall River, 318 Mass. 538 (1945). The touchstone of "to have served" is "continuous employment of a substantial character." Frye at 540. "[T]o have served" is not constrained by requiring a teacher to be physically present, on-site, each day of the academic year or even a requirement that an educator work literally the entirety of a teacher's full-time work year. To the contrary, teachers employed on a regular, part-time schedule attain PTS after three years of part-time work, although obviously they would not have "rendered professional services" for the same amount of time as a full-time teacher. Ryan v. Superintendent of Sch. of Quincy, 363 Mass. 731, 739 (1973), citing Frye at 540. While Frye holds that regular, part-time work

constitutes service toward PTS,[2] the Court specifically reserved the question of "what might be the bearing of long or repeated absences from work." Id.

To a significant degree, that question has been answered in the series of cases after Frye. A review of those cases shows that the absences which break service for the entire period of a school year are all absences with the effect of interrupting an ongoing contractual employment relationship. The cases divide into two broad patterns.

The first pattern involves cases where the absence in a given year is attributable to non-employment in the position for which PTS is claimed. Nester, supra at 540 (intermittent employment as substitute teachers followed by being "assigned for full time employment to elementary schools until further notice (internal quotations omitted)"),[3] Brodie

[2] For the sake of simplicity, the status that would be referred to as "tenure" or "serving at discretion" in the pre-Education Reform Act (St. 1993, c. 71) cases is sometimes referred to as PTS here.

[3] The Nester Court never precisely characterized the plaintiffs' full-time employment as separate from their earlier, intermittent substitute work because that was unnecessary to its decision. The applicable point is that the Nester Court made a distinction between work in assignments or positions in which the duties amounted to separate positions (intermittent,

v. Sch. Comm. of Easton, 3 Mass. App. Ct. 141, 142 (1975) (employment at the beginning of the school year as an intermittent substitute with 11 days service followed by hire as a regular, full-time teacher in November), Fortunato, supra at 201 - 202 (initial employment on October 8, when the school year for teachers began on September 8).

The second pattern involves cases where, although there is some colorable connection to continued employment through the collective bargaining agreement, the absence from work is unpaid and for such a prolonged period of time that it nevertheless breaks service for purposes of retaining or acquiring PTS, Matthews, supra at 374 - 375 (absence on unpaid childrearing leave provided for in the collective bargaining agreement for almost two continuous years); Goncalo v. Sch. Comm. of Fall River, 55 Mass. App. Ct. 7 - 9, 11 (2002) (nine year absence following employment as a tenured teacher amounted to resignation breaking PTS status, although teacher was apparently carried on contractual seniority rolls for part of that period); see also, Woodward v. Sch. Comm.

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part-time, substitute work versus full-time continuous work).

of Sharon, 5 Mass. App. Ct. 84, 86, 88 (1977) (continuous performance of the same duties for four consecutive years establishes tenure regardless of changes in title).

The statement in Fortunato that "absences which are excused or sanctioned by the contract . . . [do] not weigh against the teacher's entitlement to tenure," Fortunato at 206, recognizes this distinction, which emerges from the case law outlined above, between absences which are either prior to, or break or terminate, an ongoing employment relationship, and other, literal absences from the full work year for teachers which nevertheless do not break an ongoing employment relationship and thus do not break service for purposes of attaining PTS.

Ms. Bilbo's FMLA-protected maternity leave of 60 days in 2008 – 2009 was not an absence interrupting an ongoing employment relationship. Every relevant factor points toward this conclusion: (a) she left and returned to her position as a teacher; (b) the absence was for a time-limited and specific purpose; (c) she remained on the payroll for the entirety of the leave; (d) the leave and the provision for payment under the sick leave bank is specifically provided for in the

collective bargaining agreement; and finally (e) the leave was taken pursuant to a federal statute, the FMLA, an express purpose of which is to permit women to leave and return to their jobs without penalty for purposes of childbirth.

Because Ms. Bilbo's FMLA leave was not taken prior to her employment as a full-time teacher or an absence effectively ending an ongoing employment relationship, it fell well within the scope of "absences which are excused or sanctioned by the contract," which do not "weigh against the teacher's entitlement to tenure." Thus, as argued in the Appellants' Principal Brief at 15 – 19, the entire period of Ms. Bilbo's 60 day FMLA leave in 2008 – 2009 counts as having "served" for purposes of acquiring PTS and she attained PTS when she completed the 2010 – 2011 school year.

II. TIME WORKED IN A YEAR FMLA LEAVE IS TAKEN IS PART OF A "BENEFIT ACCRUED PRIOR TO THE DATE UPON WHICH THE LEAVE IS COMMENCED," AS PART OF THE SYSTEM OF SERVICE TOWARD PTS, WHICH MAY NOT BE LOST AS A RESULT OF TAKING LEAVE

The District argues that "[r]eading the Fortunato and Solomon lines of cases together, Massachusetts law provides that . . . a teacher who takes maternity

leave cannot count the partial year in which she took leave toward the three complete years required for PTS." (emphasis added). Appellee's Brief at 9; cf., Appellee's Brief at 10 – 12. This assertion is the foundation of the District's argument that the FMLA "hold harmless" clause does not preserve the time actually worked in a year that FMLA leave is taken as service toward PTS. The District argues that time actually worked in a FMLA leave year is not "accrued prior to the date upon which the leave commenced" under 29 U.S.C. § 2614(a)(2) because under Massachusetts law partial years "cannot" count as service toward PTS. Appellee's Brief at 15 – 19.

This argument contorts Solomon to answer the very question that case specifically left open. In Solomon, the Supreme Judicial Court specifically reserved the question whether the portion actually worked in a year in which statutorily protected maternity leave is taken counts as service toward PTS. Id. at 19. Because the teacher in Solomon had worked three entire school years, the Court did not need to address the question of whether the portion of the maternity leave year that was worked counts toward PTS. Id. The Court never held that that time worked in a FMLA leave year

"cannot" count as service toward PTS.[4] Instead, it stated explicitly "[w]e leave open the question whether such teacher must serve an entire additional year to compensate for the incomplete school year because in this case the plaintiff did serve an entire additional year." Id. As already noted, in Matthews, the Appeals Court recognized that the question of time worked in a maternity leave year counting toward PTS had been reserved in Solomon. Matthews at 379. The Appeals Court declined to reach this question in Matthews because the point had not been argued in the court below. Id.

In short, Massachusetts law does not "provide[] that . . . a teacher who takes maternity leave cannot count the partial year in which she took leave." Rather, that is precisely the question left open by the Supreme Judicial Court in Solomon, the Appeals Court in Matthews, and is the open question presented in this appeal, should the Court find that Ms. Bilbo's service in 2008 – 2009 was not for a "complete" year

[4] Solomon was decided nearly a decade before the enactment of the FMLA. The question reserved was solely under the state maternity leave law at the time, G.L. c. 149, § 105D, and the opinion does not directly address the independent requirements of the FMLA.

and that exclusive jurisdiction over Ms. Bilbo's claim to PTS does not rest with an arbitrator appointed under G.L. c. 71, § 42.[5]

For the reasons argued in the Appellants' Principal Brief at pages 20 – 27, the time Ms. Bilbo actually worked in the FMLA leave years is time served toward PTS status and is a "benefit accrued prior to the date upon which the leave commenced," 29 U.S.C. § 2614(a)(2), which cannot be lost as a result of taking leave under the FMLA. The "hold harmless" clause does not permit any time actually worked, that would otherwise count as service toward PTS "but for" exercising FMLA rights, to simply evaporate.[6] See,

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[5] Moreover, the issue of whether a lawfully taken FMLA leave should serve to exclude the entire year in which the leave was taken from inclusion in the PTS calculation has not been formally addressed in Massachusetts.

[6] The "benefit accrued" is the system of service counting toward PTS (i.e., time worked as teacher with the proper certification counts toward PTS) and is not just the number of days prior to taking the leave. Time worked toward PTS is analogous to time worked under a seniority system, where the FMLA explicitly recognizes service for seniority only ceases to accrue during the period of the leave itself. See 29 U.S.C. § 2614(3)(A) (FMLA does not require seniority to accrue "during any period of leave") and 29 C.F.R. § 825.215 (employee must be reinstated to equivalent position, with equivalent status and benefits). Cf., 804 C.M.R. § 3.01(8)(c)(3) (Under G.L. c. 149, § 105D, upon return from maternity leave seniority must

Kolodziej v. Bd. of Educ. of S. Reg'l High Sch. Dist., Ocean Cty., 436 N.J. Super. 546, 553, 95 A.3d 763, 767 (App. Div. 2014) (loss of prior years' service toward tenure under New Jersey law because teacher was on FMLA leave in fourth year of reemployment required for tenure "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.")

The facts in this case are plain that, if Ms. Bilbo had not taken an FMLA maternity leave in 2008 – 2009 and simply worked that year, 2008 – 2009 would count toward PTS. Thus, it is equally plain that Ms. Bilbo may not be penalized as a result of taking the leave through loss of the time actually worked in 2008 – 2009 as service toward PTS status. As a result, Ms. Bilbo attained PTS on the sixty-first workday of 2011 – 2012.

III. THE DISTRICT'S SUGGESTION TO PARTIALLY REVERSE TURNER IS INCONSISTENT WITH THE ARBITRATOR'S JURISDICTION UNDER THE STATUTE AND INVITES DISPUTES OVER ARBITRATION VERSUS COURT JURISDICTION FOR QUESTIONS OF PTS STATUS

There is no reason to partially reverse Turner, supra, and carve out an exception to the holding that

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"remain the same as it was prior to her maternity leave.")

an arbitrator appointed under G.L. c. 71, § 41 should hear disputes over PTS status.

The District invites the Court to create an exception for cases of statutory interpretation where the facts are not in dispute.[7] As argued in the Appellants' Principal Brief at pages 9 – 14, Turner holds that arbitration under G.L. c. 71, § 42 is the exclusive forum in which to decide questions of PTS status. Id. at 357-59. The District argues that, unlike this case, the PTS of the teacher in Turner was not in dispute. Appellee's Brief at 27. However, it is clear that the teacher's PTS status was in question. Turner was decided on a motion to dismiss. Id. at 354. The teacher's PTS status was only asserted "according to her complaint," id., and one of the theories the plaintiff advanced was that, notwithstanding the enactment of G.L. c. 71, § 42, the Superior Court had jurisdiction over "whether a teacher has professional teacher status." Id. at 356. This is apparent in the appeal of the action to vacate

[7] A partial reversal would also be contrary to Lyons v. Sch. Comm. of Dedham, 440 Mass. 74 (2003), where the Supreme Judicial Court explicitly rejected a claim that the arbitrators lacked jurisdiction over the question of PTS status in the subsequent arbitration of the PTS claim raised in Turner. Lyons at 79 – 80.

the arbitration award resulting from Turner to the Supreme Judicial Court. Lyons, supra at 76 (2003) ("The superintendent declined to recognize that Turner had professional teacher status" and "the arbitrators concluded that Turner and Lyons were not 'teachers' within the meaning of G.L. c. 71, §§ 41 and 42, and therefore did not have 'professional teacher status'.") Thus, whether the Superior Court had jurisdiction over the threshold question of disputed PTS status through a declaratory judgment under G.L. c. 231A was squarely before the Court in the Turner appeal.

The District argues that arbitration is appropriate in cases involving interpretation of a collective bargaining agreement, citing Lyons and Goncalo, supra, and that courts appropriately hear questions of statutory interpretation. Appellee's Brief at 29. This argument overlooks the fact that Turner, Lyons, and Goncalo all recognize that the Legislature specifically assigned cases of contested PTS status under the statute to an arbitrator appointed under G.L. c. 71, § 42. Indeed, Goncalo could not be more explicit that the arbitrator has jurisdiction over disputed questions of PTS status,

including the interpretation and application of the statute itself. The Appeals Court modified the framing of arbitrator's award and the court's judgment from lack of jurisdiction to a substantive finding about PTS status, which was then confirmed. Id. at 11.

Finally, pointing out that the facts here are not in dispute does not provide a workable principle to determine which cases would be heard by a court and which cases would be assigned to an arbitrator. Questions of PTS status are, by definition, mixed questions of fact and law. Identification of cases where the facts are not in dispute is hardly transparent and it is not difficult to imagine cases where the facts of a teacher's service material to PTS status are in dispute.[8]

[8] See Nester and Woodward (where attainment of PTS was predicated on the fact intensive inquiry surrounding whether the teachers' respective service was in the same position, although the teachers were continuously employed by the same school system); see also Luz v. Sch. Comm. of Lowell, 366 Mass. 845 (1974); Rantz v. Sch. Comm. of Peabody, 396 Mass. 383, 387 – 388 (1985)(teacher must be properly certified for the position they hold to acquire PTS). The issue of proper licensure is a fact intensive inquiry in its own right. See 603 C.M.R. § 7.15(9)(a); Memorandum from Commissioner of Elementary and Secondary Education to Superintendents, Principals, and Personnel Administrators dated June 2007 at

Partially reversing Turner on the basis urged by the District simply invites litigation over the question of whether a given case is one of pure statutory interpretation with undisputed facts. Not only does this have the inverse consequence of inviting the Court's consideration of the facts (to determine if there is a dispute) it also lends to "forum shopping." By enacting § 42, the Legislature did not intend "to establish two successive forms of review in two different forums for dismissed teachers with professional status." Turner at 358; cf., Atwater v. Comm'r of Educ., 460 Mass. 844, 854 (2011)("[I]t necessarily also falls within the Legislature's authority to specify the grounds under which a teacher may be dismissed, who makes the dismissal decision, as well as the process for review of that dismissal decision. . . .")

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http://www.doe.mass.edu/news/news.aspx?id=3542
(Commissioner provides guidance "to assist districts in determining which Pre K-12 license may be the most appropriate for roles assigned to your personnel.")

IV. SCHOOL DISTRICTS WILL HAVE AMPLE OPPORTUNITY TO ASSESS PERFORMANCE; THE DISTRICT'S POSITION EFFECTIVELY NULLIFIES PTS STATUS ALTOGETHER FOR TEACHERS WHO TAKE FMLA AND OTHER PROTECTED LEAVES

The District argues that the construction of FMLA protections the Appellants advance will deprive it of its "three year look" for assessment and evaluation before a teacher attains PTS.[9] Appellee's Brief at 13.

To the contrary, the Appellants advance an argument that would ensure the District is provided the equivalent of three school years for its review and assessment or, minimally, the opportunity to negotiate such a review.[10] Yet, even without specification in the relevant collective bargaining agreement, FMLA leave is limited in both length and

[9] The District exaggerates consequences of achieving PTS and how PTS may limit the District's managerial flexibility. While G.L. c. 71, § 42 does confer arbitration rights, it does not confer traditional "just cause" protection as the District suggests. Appellee's Brief at 13, 24 – 25. Rather, while PTS provides certain procedural safeguards to unfair dismissal, the statute protects the substantial discretion of school administrators in dismissal of PTS teachers. Sch. Comm. of Lexington v. Zagaeski, 469 Mass. 104 (2014); Groton-Dunstable Reg'l Sch. Comm. v. Groton-Dunstable Educators Ass'n, 87 Mass. App. Ct. 621, 623 - 624, review denied, 40 N.E.3d 553 (Mass. 2015).

[10] Here, Ms. Bilbo's FMLA leaves total 116 days over a period of about 5 1/3 school years (965 days), meaning that her service, excluding her FMLA leaves with the District, was about 849 school days or almost 4 ¾ school years based on a 181 day work year.

scope and has strict eligibility requirements. 29 U.S.C. § 2612(a)(1). The employee must be employed by the District for at least twelve months and for at least 1,250 hours of service during the previous twelve-month period before the employee is eligible for FMLA. 29 U.S.C. § 2611(2)(a). Effectively, the prerequisite of 1,250 hours ensures that the employee must return to work for a long enough period that, over the course of three years, an employer will have the opportunity to observe the educator during different times of the year, with different students, in different academic settings.[11]

[11] The employer also has options for determining what the twelve month period will be, which can be calculated by: (a) calendar year; (b) a fixed twelve month "leave year" such as a fiscal year, a year required by State law, or a year starting on the employee's anniversary date; (c) the twelve month period measured forward from the date any employee's first FMLA leave begins or (d) a "rolling" 12 month period measured backward from the date an employee uses FMLA. 29 C.F.R. § 825.200. Finally, the employer may also require that FMLA leave and the employee's paid sick leave run concurrently. 29 U.S.C. § 2612(d). Thus, there are adequate safeguards in place to permit adequate time for the District's evaluation of an educator. The employer is free to negotiate these and other details with the union and include them in the collective bargaining agreement. This is precisely what the regulations provide as one of the "Special Rules Applicable to Employees of Schools." 29 C.F.R. § 825.604.

Finally, the view advanced by the District risks eviscerating PTS in its entirety as it would give the District authority to deem all but the shortest leaves — statutorily or contractually sanctioned or both — grounds for exclusion of the entire year in which the leave was taken from the calculation of PTS. This is not an issue that will be limited to teachers who exercise their constitutional right to have children. It will be extended to any teacher who needs to remain home to care for a sick child or family member; it will be extended to the shop teacher who is out on leave for five days for an injured hand; it will be extended to the teacher who takes contractual sick or personal leave for a week, defeating the purpose of statutory and contractually protected leaves. PTS will become attainable only by the rare employee who is physically present for virtually every day of each school year for three consecutive years.

CONCLUSION

For the reasons above and in the Appellants' Principal Brief, this Court should find that the Superior Court lacked jurisdiction over the dispute. A declaratory judgment should enter that arbitration

under G.L. c. 71, § 42 is the exclusive forum to decide the question of Ms. Bilbo's PTS status, dismissing the Complaint, and compelling the parties to complete the proceedings in the arbitration held in abeyance. See, A. 101 – 102.

Alternatively, the Court should find that Ms. Bilbo had PTS status on May 31, 2013. A declaratory judgment should enter that the District's purported non-renewal was legally ineffective, and consequently Ms. Bilbo has remained employed by the District and is entitled to all salary and benefits from the date of her purported non-renewal.

Respectfully submitted,

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Dated: December 11, 2015

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*

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