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SCHOOL CORNER

The Massachusetts DESE has issued an Advisory on the Extended Evaluations. Administrative Advisory SPED 2019-2 answers questions about the use of extended evaluations and the process when the Team has determined an extended evaluation is appropriate. Along with the Advisory, DESE issued an updated Extended Evaluation Form aligned with the guidance in the Advisory. <http://www.doe.mass.edu/sped/advisories/2019-2.html>

In Retaliation Cases, Timing, Communication And Specificity Matter The Most

In University of Massachusetts Dartmouth, 45 MLC 136 (March 19, 2019) Hearing Officer Kendrah Davis found that UMASS Dartmouth retaliated against Donald King (King) for engaging in protected, concerted activity including filing a grievance and trying to enforce his contractual right to take FMLA leave. One day after filing a demand to arbitrate his FMLA leave grievance, King received an evaluation with “marginal” and “unsatisfactory” ratings. In all of his prior evaluations, King had received “very good” and “outstanding” reviews. King was also subject to scrutiny by the new director. The director questioned King’s use of FMLA calling it “disgusting” and “disrespectful” to his co-workers, and told him she was not a “fan of unions.” UMASS also deviated from its own past practice of having evaluations completed by King’s direct supervisor.

The hearing officer determined UMASS retaliated against King by giving him negative evaluation ratings which disqualified him from receiving a salary increase. Although UMASS provided legitimate, non-discriminatory reasons for conducting the evaluation, the Union was able to show that but for filing of the grievance, King would not have received the negative ratings. The hearing officer based her findings on: (1) the lack of notice to King that he was in danger of receiving a negative evaluation; (2) the timing of the negative evaluation in relation to King’s FMLA grievance; (3) the Employer’s deviation from its practice for conducting evaluations; and (4) the additional scrutiny applied to King’s request for FMLA leave.

Employers must proceed with caution when evaluating an employee who has engaged in concerted activity. Do not over scrutinize. Identify and document specific concerns, and communicate to employees if they are at risk of receiving a negative evaluation. This evidence can be extremely helpful in rebutting allegations of retaliation.

Disabled Teacher Can Bring Suit Over Denial Of Part-Time Work

In Incutto v. Newton Public Schools, 2019 WL 1490132 (2019), a full-time elementary school teacher (Incutto) sued the Newton Public Schools (Newton) under the Americans with Disabilities Act for failing to accommodate her fibromyalgia by denying her requests to work on a part-time basis. Newton moved for summary judgment on the basis that the ability to work full-time is an essential function of Incutto’s job, and her request to work part-time was unreasonable. Newton did not dispute that Incutto was able to perform the other essential functions of her position. The District Court denied Newton’s motion for summary judgment. The Court determined that Newton failed to present evidence that the job always requires the full-time presence of the same teacher in each classroom, and that a reasonable jury could find that working full-time was not an essential function of Incutto’s job. Further, a jury could find the requested accommodation was reasonable because other teachers in the school district—including Incutto herself—were permitted to job share or work part-time (for instance, teachers returning from maternity leave).

Accommodations should be granted consistently. Employers may be obligated to provide an accommodation under the ADA if, in other situations, that accommodation has been provided. If you are faced with this type of situation, be sure to reach out to your NMP attorney for guidance on providing accommodations.



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