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NON-RENEWAL/DISMISSAL POINTERS, THE IMPACT OF OFF-DUTY BEHAVIOR ON EMPLOYMENT, AND HANDLING COMPLAINTS AND INVESTIGATIONS REGARDING EMPLOYEE MISCONDUCT

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NON-RENEWAL/DISMISSAL POINTERS

A. STATUTORY REQUIREMENTS

1. Removal

The superintendant may remove a teacher for cause. RSA 189:31. After a teacher is removed, the school board must decide whether to dismiss the teacher or reinstate the teacher to a teaching position. *Id.* Between removal by the superintendent and the school board's decision, the teacher remains an employee of the school district. *Id.*

2. Dismissal

The school board may dismiss a teacher before the teacher's contract expires if the board finds the teacher: (1) is immoral; (2) has failed to satisfactorily maintain the competency standards established by the school district; or (3) does not conform to regulations prescribed. RSA 189:13. A school board must terminate a teacher who has been convicted of homicide, child pornography, aggravated felonious sexual assault, felonious sexual assault, or kidnapping. 189:14-d. RSA 189:13 states that a teacher cannot be dismissed without having been previously notified of the cause of the dismissal and "without having previously been granted a full and fair hearing." This language entitles the teacher to a formal hearing, on the record, with an opportunity to cross-examine witnesses. The teacher may choose to have either a public or private hearing. RSA 91-A:3, II(a).

Customarily, the Rules of Evidence do not apply to the hearing. Following the hearing, the school board provides the teacher with a written decision. A teacher dismissed by the local school board under RSA 189:13 may file a breach of contract (*assumpsit*) claim in state court to recover wages lost during the remainder of his/her contract period. RSA 189:14

Under RSA 189:14, the teacher's recovery is limited to contractual damages, as the statute does not appear to permit reinstatement as a remedy. Additionally, the New Hampshire State Board of Education has recently refused to hear an appeal of a dismissal by a local school board under RSA 189:13.

3. Non-Renewal

A teacher with a professional standards certificate who has taught for one or more years in the same district must be notified in writing of the school district's decision not to renew the teacher's contract for the upcoming school year. RSA 189:14-a(I)(a). The school district must notify the teacher of its decision not to renew the teacher on or before April 15th or within 15 days of adoption of the school district's budget, but not after the second Tuesday in May. *Id.*

A teacher who has been notified of non-renewal can request a hearing if the teacher has taught for five consecutive years in the teacher's current school district, or the teacher taught for three or more consecutive years in any school district in the state and for two consecutive years in the teacher's current school district before July, 1, 2011. RSA 189:14-a (II). A leave of absence does not disrupt the computation of consecutive service. *Id.* Time that a teacher works counts towards the computation of consecutive service, even if the teacher worked without a contract. *McDonough v. Kelly*, 329 F. Supp. 144, 147 (D.N.H. 1971).

A teacher who has been notified of non-renewal and who is entitled to a hearing may request, in writing within 10 days of receipt of said notice, a hearing before the school board and the reasons for the non-renewal. RSA 189:14-a, I(c). Upon such request, the school board must provide a hearing to be held within 15 days, and must issue its decision within 15 days of the close of the hearing. *Id*. N.H. Admin. Rules, Ed 204.02 set forth the procedure for teacher non-

renewal hearings. In a non-renewal hearing, the burden of proof is on the superintendent. RSA 189:14-a (IV). To prevail, the superintendent must prove the case by a preponderance of the evidence. *Id*. at IV; Ed 204.02(e)(20). The teacher may choose to have either a public or private hearing. RSA 91-A:3, II(a) & Ed 204.02(e). Except for cases of non-renewal due to a reduction in force (which may not be based solely on seniority), the grounds for non-renewal are determined at the sole discretion of the school board. RSA 189-14-a, III, IV.

Rule Ed.204.02 requires, among other things, that testimony be presented under oath, each party is afforded the opportunity to cross-examine witnesses, and the hearing is recorded. *Id.* Either party may be represented by counsel. *Id.* However, prior to the hearing, a party is not entitled to the other party's expert witness reports. *Appeal of Sch. Admin. Unit 44*, 162 N.H. 79, 86-87 (2011). The rule also specifies that the Rules of Evidence do not apply to the hearing. Ed 204.02(e)(12)(c).

All board members who vote on a teacher's termination must be present at the hearing. *See McDonough*, 329 F. Supp. at 150. The school board must provide the teacher with a written decision after the hearing. Ed 204.02(e)(22).

B. OVERVIEW OF SIGNIFICANT EMPLOYMENT LAWS THAT COULD IMPACT TEACHER DISMISSALS OR NON-RENEWALS

1. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees with up to 12 weeks of unpaid leave within a 12 month period for a qualifying circumstance. 29 C.F.R. § 825.200(a). The FMLA applies to all educational institutions.[1] 29 C.F.R. §825.600(b). Special rules apply to schools when determining when employees may take

[1] However, the employee must work at a site with at least 50 employees in a 75 mile radius to be an eligible employee.

FMLA leave. *See* 29 C.F.R. §§ 825.600-04. An employer may not refuse an eligible employee from taking FMLA leave, discourage an employee from taking FMLA leave, or discriminate against an employee for taking FMLA leave. *See* 29 C.F.R. §825.220(a).

Employees are eligible for FMLA leave if they have worked more than 1,250 hours within the last 12 months, and they have been employed for at least 12 months. 29 C.F.R. §825.110(a). There is no requirement that the 12 months are consecutive if the break between periods of employment is not more than seven years. *See* 29 C.F.R. §825.110(b). Circumstances that qualify for leave include birth of a child and care for a newborn child, placement with the employee of a child for adoption or foster care, care of a spouse, child, or parent with a serious health condition, a serious health condition that makes the employee unable to perform the job, exigency arising from a family member's military service, or care for a family member who is an injured service member. *See* 29 C.F.R. §825.112(a).

When an employee takes FMLA leave, an employer is required to maintain the employee's health benefits, return the employee to an equivalent position with equivalent pay when the employee returns to work, and is prohibited from depriving an employee of a benefit that accrued prior to taking FMLA leave. *See* 29 C.F.R. §825.100. An employer who violates an employee's rights under the FMLA may be liable for compensation and benefits lost by the employee as a result of the violation, and other monetary losses due to the violation. 29 C.F.R. §825.200(b). In addition, a court may award equitable relief in the form of reinstatement or promotion. *Id.* Finally, a court may award attorneys' fees and costs to a prevailing employee.

2. <u>Americans with Disabilities Act</u>

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) is a federal law that requires an employer to make reasonable accommodations for an employee with a

qualifying disability, and prohibits an employer from terminating a qualified employee because of an actual or perceived disability. To comply with the ADAAA an employer should: (1) determine whether the employee is disabled. and (2) determine whether the employee can perform essential job functions with or without reasonable accommodation.

An employee is disabled under the ADAAA if the employee has a physical or mental disability that substantially limits one or more of the following activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, or working. 42 U.S.C. §12102(1). An employer may require a medical examination and/or inquiry of a current employee to the extent it is "job-related and consistent with business necessity." 29 C.F.R. §1630.14(c).

Once an employer determines that an employee is disabled, the employer is obligated to engage in an "interactive process" to determine whether the employee can perform essential job functions with or without reasonable accommodation. Appendix to 29 C.F.R. §1630.1(c). An employer's failure to engage in this process may give rise to liability. *Id.*

An employee cannot be discharged because of disability discrimination or failure to reasonably accommodate, in retaliation for an employee's request for accommodation, or for raising a disability complaint. Damages include lost pay and benefits, compensatory damages, punitive damages, and attorneys' fees and costs.

3. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, or retaliating after an employee asserts a right under the statute. 42 U.S.C. §2000e-2. An employer may be liable for

lost wages, court costs, compensatory damages, punitive damages, and attorneys' fees and costs. *See* 42 U.S.C. §2000e-5(g),(k). In addition, a court may order equitable relief such as reinstatement or promotion of the employee. *Id.*

4. Uniformed Services Employment and Reemployment Rights Act

Under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), an employer may not discriminate or retaliate against an employee on the basis of an employee's service or application to serve in the armed forces. 20 C.F.R. §1002.18. USERRA applies to all employment positions with covered employers, including employees employed in a brief and/or non-recurrent position. 20 C.F.R. §1002.21. If an employer violates an employee's rights under USERRA, the employer may be liable for lost wages and benefits, liquidated damages, and attorneys' fees and costs. 43 U.S.C. §4323(d). In addition, the court may require the employer to comply with the USERRA. *Id.*

5. New Hampshire Employment Discrimination Statute: RSA 354-A

RSA 354-A is the state law equivalent of Title VII and the ADAAA. Like Title VII, it prohibits discrimination on the basis race, color, sex, or national origin. *See* RSA 354-A:7 (I). In addition, it prohibits discrimination on the basis of age,[2] marital status, sexual orientation, and physical or mental disability. *Id.* The statute also prohibits an employer from requiring an employee to retire at a certain age or after a certain number of years of service. RSA 354-A:7 (IV).

The statute's definition of the word "sex" includes pregnancy and related medical conditions. RSA 354-A:7 (VI)(a). In addition to prohibiting discrimination based on pregnancy, our state law also requires an employer to allow a female employee to take a leave of absence for

[2] The ADEA is the federal law that prohibits age discrimination.

"temporary disability resulting from pregnancy, childbirth, or related medical conditions." *Id.* at 354-A:7(VI)(b). The length of the leave is not a set time; it depends on the doctor's opinion of the employee's period of temporary disability. Upon return from a pregnancy-related leave, an employer must make the employee's original position or an equivalent position available to her unless business necessity makes this impossible or unreasonable. Unlike FMLA leave, the pregnancy leave provisions under 354-A:7 only protect female employees.

An employer who violates this statute may be liable for back pay, front pay, compensatory damages, administrative fine, enhanced compensatory damages, and attorneys' fees and costs. RSA 354-A:21(II)(f).

6. <u>New Hampshire's Whistleblower Statute/Free Expression</u>

Under New Hampshire law, it is unlawful to discharge, threaten or otherwise discriminate against an employee who, in good faith: (1) reports what the employee has reasonable cause to believe is a violation of a law; or (2) participates in a hearing or investigation which concerns a violation of law by the employer. *See* RSA 275-E:2. It is also unlawful to discharge, threaten or otherwise discriminate against an employee for refusing to execute a directive which, in fact, violates the law. RSA 275-E:3. Additionally, the statute protects public employees who report activities or information that, in the employee's reasonable belief, show a gross mismanagement or waste of public funds, property, or manpower, or evidence of an abuse of authority or a danger to the public health and safety. RSA 275-E:9. If an employer is found to be in violation of the whistleblower statute, the labor commissioner may order reinstatement, back, pay, fringe benefits, and seniority rights, and/or injunctive relief. RSA 275-E:4. In addition, a whistleblower case may be filed in a New Hampshire Superior Court, and the prevailing employee may recover attorneys' fees and costs. RSA 275-E:2(II).

In 2008, N.H. RSA 98-E was amended to expand protection from state employees to all public employees, including school district and school administrative unit employees. N.H. RSA 98-E:1 provides:

> Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

Interference with this right of freedom of expression is prohibited by N.H. RSA 98-E:2. Employee remedies include injunctive relief and civil action. N.H. RSA 98-E:3. Case law analyzing the statute pre-amendment made clear that the law is broader than federal or state First Amendment protections, and would protect an employee who speaks publically in his or her personal capacity (on or off-duty) about the school district and/or its policies. *Appeal of Booker*, 139 NH 337 (1995) (NH Personnel Appeals Board disciplinary warning reversed because statements employee made to newspaper regarding the failures of DCYF were protected under N.H. RSA 98-E).

In the case of *Mark Bellerose v. SAU #39*, Case No. 13-cv-404-PB, Opinion No. 2014 DNH 265 (2015), the Federal District Court for the District of New Hampshire analyzed NH Whistleblower and RSA 98-E protections (as well as disability discrimination claims) in the school context. Mark Bellerose, a former Custodian at the Mont Vernon Village School, sued SAU #39 after his employment contract was not renewed. Bellerose made a number of oral reports to various people about the conditions at the school (including the school's alleged failure to shut off the water supply when the power was out and concerns about mold, ice dams, inadequate response to many maintenance problems, and alleged failure to inspect the smoke

alarm system, in violation of building rules and the health code). Bellerose voiced his concerns to his supervisors, to selectmen, parents, teachers, and members of the Fire Department and School Board. Bellerose's supervisor reprimanded him for bypassing the chain of command and "cho[osing] to directly voice any thoughts regarding disagreement or criticism" and the school's conditions and maintenance practices to people outside the school. Bellerose had never before been told about the chain of command. The supervisor subsequently issued Bellerose a second written warning which reprimanded him for failing to complete the task of snow removal (but there had been no snow, so there was no need to shovel). The supervisor issued a final warning stating that Bellerose had used profanity with a hostile tone in front of a citizen and his children when Bellerose was helping the citizen unload furniture at the school. The evidence from two witnesses (that Bellerose submitted to the Principal at the time) suggested that he had not used profanity or said anything inappropriate. The Principal informed Bellerose that his contract would not be renewed and his employment ended on June 30, 2010.

By Order dated December 29, 2014, the Court (Barbadoro, J.) denied the defendant's Motion for Summary Judgment on the Whistleblowers' Protection Act claim, finding that Bellerose had established his prima facie case with evidence that he verbally reported his supervisor's placement of a fan in front of a moldy wall and failure to inspect the smoke alarm system, which he reasonably believed were violations of state law, that his contract was not renewed, and evidence that his failure to follow the "chain of command" was "[t]he material motivation" for SAU #39 not renewing his employment six months later. SAU #39 offered evidence that it did not renew Bellerose's contract because he failed to respond to criticism of his performance in a constructive manner. The Court, however, found that there was sufficient evidence of pretext to avoid summary judgment. The Court also denied the defendant's Motion

for Summary Judgment on the Public Employee Freedom of Expression claim (for the non-renewal, but not the no rehire), finding that there was sufficient evidence to support Bellerose's claim that SAU #39 interfered with his freedom of expression. Specifically, Bellerose was reprimanded for voicing his criticisms "to outside parties." And, although the school had consistently renewed his contract in prior years, it did not renew his contract six months after the chain of command letter. Finally, the Court denied the Motion for Summary Judgment on the Wrongful Termination claim, finding that there was sufficient evidence that SAU #39 terminated his employment to retaliate for his oral reports. Interestingly, the Court stated:

> Although the New Hampshire Supreme court has not yet conclusively decided whether a wrongful termination claim can be based on a failure to renew a contract, it has suggested on more than one occasion that such claims are allowable under New Hampshire law.

Citing Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 260 (1998); *Short v. Sch. Admin. Unit No. 16*, 136 N.H.; 76, 85-86 (1992). Therefore, the Court refused to dismiss the claim merely because it was premised on non-renewal of a contract rather than on the termination of an existing contract. The jury returned a verdict finding for the defendant on the ADA claim, but for the plaintiff on the Whistleblower Protection Act, Public Employee Freedom of Expression Act and Wrongful Termination claims. The jury awarded $52,681.50 in back pay, $187,312.00 in front pay, and $100,000.00 in emotional distress damages (total award of $339,993.50, plus attorneys' fees, costs and interest to be determined by the Court).

7. <u>New Hampshire Common Law Wrongful Termination</u>

An employee may claim wrongful termination if he or she was terminated from employment in violation of public policy for refusing to take actions that public policy would condemn or for taking action that public policy would encourage. *Cloutier v. Great Atlantic & Pac. Tea Co., Inc.*, 121 N.H. 915 (1981). This type of claim may be brought in conjunction with

a whistleblower claim if the employee claims the termination was because the employee complained of illegal activity (taking action that public policy would encourage). In addition, a wrongful termination claim may be based on other types of public policy acts including, but not limited to, reporting safety concerns/refusing to work in unsafe work environment, reporting/refusing to participate in unethical conduct, and/or filing a workers' compensation claim. Damages for wrongful termination include lost wages and benefits, emotional distress, and potential enhanced compensatory damages.

C. CONSIDERATIONS THAT SCHOOL DISTRICTS SHOULD EXPLORE BEFORE ENDING A TEACHER'S EMPLOYMENT

1. FMLA, ADA, Title VII, and NH RSA 354-A Considerations

- Is the termination due to absences that could be related to FMLA leave or ADA disability?
- Is the employee pregnant, on a maternity leave, or recently returned from maternity leave?
- Has the employee asked for any change of duties or other accommodations due to alleged disability (remember plain English requests count)?
- Is the employee in a protected class due to age, sex, race, creed, color, marital status, disability, national origin or sexual orientation? If yes, is there evidence of unfair treatment based upon protected class?
- Has the employee recently raised a complaint of discrimination or harassment?
- Has the employee recently participated in a discrimination/harassment investigation?

2. USERRA Considerations

- Is the employee a member of the armed services?
- Has the employee recently applied to become a member of the armed services?
- Has the employee recently been on military leave?

3. Whistleblower Considerations/98-E

- Has the employee recently complained of alleged unlawful practices or refused to perform a task that the employee believed to be illegal?

- Has the employee recently publicly discussed and/or given opinions as an individual on a matter concerning the district and/or its policies?

4. Wrongful Termination Considerations

- Has the employee recently had a work-related injury and/or filed a workers' compensation claim?

- Has the employee recently complained about, or refused to do work, citing a safety or ethics concern?

5. General Considerations

- Did the employee raise any of the above issues at the time of termination?

- Does the employee's personnel file support the reason(s) for the termination? If termination is due to poor performance, have the performance issues been previously raised and documented? Documentation of poor performance helps avoid claims that the real reason is something illegal or against public policy.

- Is there a statute, school district policy, contract or collective bargaining agreement that covers the performance issue?

- Have other employees been terminated for the same or similar offenses?

When considering ending a teacher's employment, decision-makers must be careful to comply with the requirements set forth in RSA 189. In addition, there are several other employment laws that must be considered when making termination decisions. Discussing a termination decision with legal counsel and noting any recent legally-protected activity will greatly reduce a school district's risk of litigation.

THE IMPACT OF OFF-DUTY BEHAVOR ON EMPLOYMENT

A. TYPES OFF-DUTY BEHAVIOR THAT IMPACT EMPLOYMENT

- Homicide, child pornography, aggravated felonious sexual assault, felonious sexual assault, or kidnapping. RSA 189-14-d.

- Other illegal or unethical conduct that affects the employee's ability to perform his/her job.[3]

- Communications or contact with student(s) that violate boundaries so as to affect the employee's ability to perform his/her job.

- Communications or contact with student(s) or employee(s) that could lead to the creation of *quid pro quo* sexual harassment or a hostile environment at work.

- Possibly disrespectful/insubordinate behavior (but *see* section below).

B. LIMITS ON A SCHOOL DISTRICT'S ABILITY TO DISCIPLINE FOR OFF-DUTY BEHAVIOR

1. Concerted Activity. Although the National Labor Relations Board (NLRB) does not have jurisdiction over public schools, the NLRB's decisions about employer discipline of off-duty conduct are relevant to school districts because the Public Employee's Labor Relations Board (PELRB), the entity that does have jurisdiction over public school districts, often looks to NLRB decisions for guidance. In addition, 273-A:5, the law that the PELRB enforces, has a provision similar to the NLRA's "concerted activity" provision, making it unlawful for a public employer to dominate or to interfere in the formation or administration of any employee organization. Finally, as described below, because New Hampshire offers very broad protection to public employees' freedom of expression under RSA 98-E, the New Hampshire Supreme Court is likely to look at these decisions to assess appropriate employee conduct.

[3] For example, in *Appeal of Morrill*, 145 NH 692 (2001), the New Hampshire Supreme Court found sufficient nexus between a teacher's outside conduct, assault of a minor victim who attended his church, and the teacher's fitness and ability to teach in the classroom to support the Board of Education's revocation of the teacher's certificate.

The NLRB has taken a keen interest in reviewing employee discipline cases that involve off-duty use of social media. The NLRB has reviewed over 130 social media cases and filed many complaints against employers and issued several written decisions. It remains unclear whether or not the courts will support the NLRB's broad view of employee protection.

While the National Labor Relations Act primarily addresses union-related activities, one provision applies to all employers, even those without unionized workforces.[4] This is the "concerted activity" provision, which states:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.**[5]

In *Meyers Industries, Inc.*, 28 NLRB 882, 885 (1986), *affd.*, 835 F.2d 1481 (D.C. Cir. 1987), the NLRB defined concerted activity to include activity that is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Concerted activity can include individual action if the employee "seeks to initiate, induce or prepare for group action," or raises "group complaints to the attention of management." *Id.* However, even concerted activity can lose its protection if the conduct is "so disloyal, reckless, or maliciously untrue as to lose protection." *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007), *affd*, Fed.Appx. 783 (9th Cir, 2009). Thus, a sharp public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income, is unprotected. *Id*. However, the employee's public criticism must evidence a malicious motive; the mere fact that the statements are false, misleading or inaccurate, is insufficient to lose protection. *Id.* Finally,

[4] School districts, obviously, cannot discipline employees for protected union activity – whether it is on or off duty conduct.
[5] 29 U.S.C. 157 (emphasis supplied).

when an employee is expressing only his frustration, but not initiating a call to action by other employees, the NLRB is unlikely to consider it concerted activity. *Advice Memorandum, Wal-Mart*, 17-CA-25030 (July 19, 2011).

In *Hispanics United of Buffalo, Inc.*, 3-CA-27872 (Sept. 2, 2011), the NLRB found that an employee who asked how other employees felt about the work performance of another employee on Facebook was engaging in concerted activity. The conduct was found to be protected (and not "so opprobrious as to lose protection") based, in part, because the conduct was not during working hours and did not involve any "outbursts."

In *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 13-CA-46452 (Sept. 28, 2011), the employee sold BMW cars. The employee posted to Facebook his displeasure with the food served at the "Ultimate Driving Event" (after he had raised his disagreement at a meeting). The employee also posted his comments regarding a 13-year old son of a customer who had driven a dealership vehicle into a lake. The NLRB found the posts regarding the inadequate food to be concerted activity, but the comments regarding the accident to be unprotected activity. The Judge found that the employee had been terminated for unprotected activity.

In *Sears Holdings (Roebucks)*, Case 18-CA-19801 (Dec. 4, 2009), Sears adopted a social media policy that included prohibiting employees from discussing confidential information, making sexual comments, using obscenity, and disparaging a person based on a protected status. The policy also prohibited employees from criticizing Sears' products, series, executive leadership, and other employees. Although this portion of the policy could potentially chill concerted activity, the NLRB found that the policy must be given a "reasonable reading," and concluded that the policy was lawful. The NLRB noted that the policy prohibited a number of activities, most of which were clearly not protected.

In *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 13-CA-46452 (Sept. 28, 2011), the company policy prohibited employees from giving unauthorized interviews and responding to outside inquiries, "behaving disrespectfully, using profanity, and engaging in conduct that injures the company's reputation," and "displaying a bad attitude." The NLRB Judge found the policy unlawful because if employees complied with the dictates of the policy, "they would not be able to discuss their working conditions with union representatives, lawyers, or [NLRB] agents." The Administrative Judge was particularly troubled by the prohibition on "disrespectful" behavior because it could lead employees to believe that their protected rights were prohibited, since defining respectful behavior was subjective. The Administrative Judge did, however, uphold the restriction on "bad attitude" at work because it could be read to protect the company's relationship with its customers.

Similarly, in *American Medical Response of Connecticut, Inc.*, 34-CA-12576 (Oct. 27, 2010), the company prohibited employees from making disparaging comments when discussing the company, supervisors, or other employees, and from engaging in offensive, rude or discourteous behavior. An employee requested, but was not given, a union representative to help complete a report regarding a customer complaint. Later that day (while off-duty and at home), the employee posted a comment on Facebook, calling her supervisor a "dick" and "scumbag" and stating, "Love how the company allows a [psychiatric patient] to be a supervisor." The NLRB found that the Facebook post was concerted activity because "protest of supervisory actions is protected." The NLRB also found that the employee's conduct was not "so opprobrious" as to lose protection because it occurred outside of the workplace and during non-work time, and was made in the course of engaging in protected activity and was "provoked by the supervisor's unlawful" conduct. The NLRB asserted that the company policy was unlawful

because it did not contain language informing employees that the policy did not apply to concerted activity. The settlement involved revision of the policy to ensure that they did not improperly restrict employees from discussing their working conditions with coworkers and others while at work, and that they would not be disciplined or discharged for engaging in such discussions.

The NLRB has further protected employees' concerted activity rights. In July 2012, the NLRB ruled that an employer routinely prohibiting employees from discussing an ongoing internal investigation violated the NLRA. *Banner Health System d/b/a Banner Estrella Medical Center and James Navarro*, Case 28-CA-023438 (July 30, 2012). The NLRB found that in order to prohibit employees from discussing an ongoing investigation, an employer must show that it has a legitimate business justification that outweighs employees' §7 rights. *Id.* The employer's generalized concern with protecting the integrity of its investigations is insufficient. *Id.* Rather, the employer must show that in any given investigation, confidentiality is necessary to protect witnesses, prevent the destruction of evidence, prevent the fabrication of testimony, or to prevent a cover-up. *Id.*

Similarly, in *Flex Frac Logistice, LLC and Silver Eagle Logistics, LLC, Joint Employers and Kathy Lopez*, the NLRB ruled that an employer's confidentiality policy which prohibited employees from disclosing personnel information and documents to persons outside of the organization was unlawfully overbroad, because employees would reasonably believe that they are being prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives. Case 16-CA-027978 (September 11, 2012). *See also Chipotle Services LLC d/b/a Chipotle Mexican Grill and Pennsylvania Workers Organization Committee*, Cases 04-CA-147314 and 04-CA-149551 (August 18, 2016)

(employee's public tweets about hourly workers having to work on snow days, low hourly rates, and comparison of competitor charges were protected activity; policy prohibiting disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle was overbroad – finding that an employer may not prohibit employee postings that are merely false or misleading, but may prohibit statements made with malicious motive, and may prohibit harassing or discriminatory statements).

The case of *Richmond District Neighborhood Center and Ian Callaghan*, Case 20-CA-091748 (October 28, 2014), shows there are some limits. The NLRB found that employees who had their rehire offers rescinded based upon their Facebook communications with each other were not entitled to NLRA concerted activity protection, because their statements advocated insubordination. Specifically, the employees referenced refusing to obtain permission as required by the school district's policies before organizing youth activities ("ordering shit, having crazy events…I don't want to ask permission…" LLet's do some cool shit and let them figure out the money: "field trips all the time to wherever the f__k we want!"), disregarding specific school district rules ("play music loud"; "teach the kids how to graffiti up the walls…", undermining leadership ("we'll take advantage"; "I would hate to be the person takin your old job"), neglecting their duties ("I ait gobe neve be there") and jeopardizing the future of the program (they start loosn kids I aint help"; "Let's f__k it up"). The Board found that pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection and render the employees unfit for further service.

However, these issues are still very dangerous. In *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, Cases 02-CA-068612 and 02-CA-070797 (March 31, 2015), where the NLRB

found that an employee's posting about his boss , "Bob is such a NASTY MOTHER F____R don't' know who to talk to people!!!!!! F__k his mother and his entire f____g family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!" was protected, finding that the Facebook comments were part of a sequence of events involving the employees' attempts to protest and ameliorate what they saw as rude and demeaning treatment on the part of the managers, and the comments were not sufficiently egregious so as to lose the Act's protection. The Board noted that the discussion took place on the employee's own Facebook page and not in direct face-to-face workplace discussion that would have immediately disrupted the work environment, there was no direct confrontational challenge to any particular manager's authority in the workplace, and there was no evidence that the comments interfered with or disrupted the employer's relationships with its customers. Finally, the Board found that the use of obscenities and offensive language did not cause a loss of protection and noted that the comments were not made directly to the manager, did not involve insubordination or physically threatening or intimidating conduct, and that profanity was regularly used at the company. *See also Three D, LLC d/b/a Triple Play Sports Bar and Grille and Jillian Sanzone and Vincent Spinella*, (Cases 34-CA-012915 and 012926 (August 22, 2014) (employees who discovered they owed more in taxes than they expected had Facebook discussion off-duty that included suggesting that the owner had not done the taxes correctly and that the owner was an asshole were engaged in protected concerted activity because the comments were not "so disloyal as to lose the Act's protection").

2. **Pubic Employee Freedom of Expression.**[6] As discussed above, pursuant to RSA 98-E (and the First Amendment to a lesser degree), public employees are protected from

[6] Public employees are also protected by the First Amendment of the U.S. Constitution and the N.H. Constitution. However, because RSA 98-E currently provides broader protection, I have focused on this law.

adverse employment actions that are based on their public discussion of matters concerning any governmental entity and its policies.

HANDLING AND INVESTIGATING COMPLAINTS OF EMPLOYEE MISCONDUCT

1. Why Investigate?

- Identify misconduct and remedy the situation
- Avoid or minimize liability
- Reduce harm to complainant
- Protect potential future victims

2. Complaints of Misconduct that Must be Investigated

a. Child Abuse (whether on-duty or off-duty if allegations involve abuse of a student).

b. N.H. RSA 189:14-d Crimes. New Hampshire law, RSA 189:14-d, requires that employees of a school administrative unit or school district in New Hampshire who have been convicted of homicide, child pornography, aggravated felonious sexual assault, felonious sexual assault, or kidnapping, in this state or under any statute prohibiting the same conduct in another state, territory or possession of the United States, shall have their employment terminated after the SAU or school district receives notice of the conviction.

c. Sexual or other Unlawful Harassment or Discrimination. Complaints of sexual or other unlawful harassment or discrimination must be investigated. Two opinions from the United States Supreme Court give employers incentive to employ risk management strategies in preventing and correcting workplace sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998). *See* further discussion at Section IV *infra*.

Therefore, in order to defend an unlawful harassment or discrimination claim, a school district must demonstrate that it properly investigated the complaint and took appropriate remedial action.

3. **Privacy Issues.** There is generally no reason for the school district to inform anyone other than the complainant and the accused (and people in administration who have a need to know) of the general results of an investigation, unless criminal issues are involved. Unnecessary communications of allegations and/or findings could lead to invasion of privacy and/or potential defamation claims. The general rule is to observe confidentiality to the greatest extent possible.[7]

In addition, in conducting investigations, it may be necessary to review computer files or e-mails. In order to avoid liability for invasion of privacy claims for this type of review, the school district's computer usage policy should note that computer access is monitored and is not private. In addition, it is advisable to have the computer usage policy reference the anti-discrimination policy for prohibited uses.

Finally, if the complaint involves a student's conduct, a student alleged victim and/or student witnesses, the privacy requirements of FERPA must be observed, and the NH Department of Education ("DOE") regulations regarding harassment should be reviewed.[8]

[7] However, please note that the NLRB has recently ruled that an employer routinely prohibiting employees from discussing an ongoing internal investigation violated the NLRA. *Banner Health System d/b/a Banner Estrella Medical Center and James Navarro*, Case 28-CA-023438 (July 30, 2012).

[8] The DOE must be notified of the allegations involving education misconduct. DCYF must be notified of allegations involving child abuse.

INVESTIGATING COMPLAINTS OF SEXUAL HARASSMENT OF EMPLOYEES[9]

1. Background. An employer may be liable for sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, and NH RSA 354-A, when an employee makes unwelcome sexual advances, requests sexual favors and/or participates in other verbal, non-verbal or physical conduct of a sexual nature when: (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (b) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or (c) such conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank v. Vinson*, 477 US 57, 65, 91 L.Ed. 2d 49, 106 S.Ct. 2399 (1986); RSA 354-A:7. The standards for employer liability are different, depending on whether or not the plaintiff's alleged harasser held a supervisory position with a higher standard imposed, when a supervisor is the harasser. *See White v. New Hampshire Dep't of Corrections*, 221 F.3d 254, 261 (1st Cir. 2000).

When no tangible employment action has been taken against the plaintiff, an employer may avoid vicarious liability for the misconduct of its employee by establishing that it is entitled to the affirmative defense set forth in the cases of *Faragher* and *Ellerth, supra*. The affirmative defense requires that the employer prove that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. When the harassment is by a non-supervisory coworker, an employer is

[9] Title IX governs sexual harassment of students.

liable if it knew or should have known of the harassing conduct and failed to take "prompt, appropriate remedial action." *Madeja v. MPB Corp. db/a Split Ballbearing*, 149 N.H. 371 (2003).

Remedial action under Title VII is adequate if it is reasonably calculated to prevent further harassment. The focus is not upon whether the remedial action ultimately succeeded in stopping further misconduct. *See Moore v. Dartmouth College*, 2001 DNH 180, 2001 U.S. Dist. LEXIS 17415, *26-27 (September 28, 2001). In *Madeja*, the New Hampshire Supreme Court found that, "Whether the defendant's remedial action is reasonable and adequate depends upon the remedy's ability to stop the individual harasser from continuing to engage in such conduct and to discourage other potential harassers from engaging in similar unlawful conduct. An effective remedy should be assessed proportionately to the seriousness of the offense." 149 N.H. at 377.

In addition to sexual harassment, other forms of actionable, unlawful harassment include conduct that targets a person based upon the protected categories of race, color, religion, sex (including pregnancy), national origin, age, physical or mental disability, sexual orientation, marital status, and veteran status.

2. <u>Harassment/Discrimination Investigation Checklist</u>

- All complaints of unlawful harassment and/or discrimination should be investigated.
- Even if there is no complaint, the employer must investigate if the conduct is so pervasive that the employer has constructive knowledge of the harassment.
- Investigations should be conducted promptly (within one-to-two days of the complaint, if possible).
- Select an investigator who has been trained and who can be unbiased. Consider whether any conflicts of interest or other issues exist that should disqualify the investigator.
- Notify legal counsel and possibly the insurance carrier of the complaint.

- If the complaint concerns a high-level employee or member of HR, consider whether legal counsel should conduct the investigation rather than HR.

- Take interim measures, if necessary, to prevent any potential further harassment/ discrimination and to prevent retaliation pending the investigation. Be careful not to appear to punish the alleged victim by putting him/her on leave or transferring him/her without consent pending the investigation.

- Review the school district's anti-discrimination policy.

- Review the personnel file of the alleged victim and the alleged harasser.

- Identify the individuals to be interviewed and prepare an outline of questions.

- Consider having a third party present to take notes during interviews or set up a format for the investigator's note-taking.

At the beginning of each interview, tell the interviewee:

- What is being investigated and why he/she is being interviewed.

- Explain to interviewee that the school district is committed to neutral and impartial investigation. Also, the school district is committed to compliance with the law and its policies, and if inappropriate conduct is found, appropriate disciplinary action will follow.

- Information provided will be shared with others on a "need-to-know" basis.

- Emphasize that retaliation against anyone who participates in the investigation is prohibited.

- If the interviewee is covered by a CBA and requests union representation, such representation should be allowed if a CBA requires and/or if it may lead to discipline.

- Tell the accused that no judgments have been made about the validity of the complaint. Reiterate that retaliation is prohibited.

During the Interviews:

- Ask the interviewee to list others who may have knowledge of the events.

- Use open-ended questions and do not suggest the expected answer by the way the question is asked.

- Ask the interviewee to give as much detail as possible (dates, times, locations, witnesses).

- Ask the alleged victim (and other witnesses) to put a statement in writing if he/she is comfortable doing so (do not insist on written statement).

- Ask for notes and/or diaries from the time period in question.

- Do not make any promises, but ask the alleged victim how he/she would like to see the issue resolved.

- At the end of each interview, have the witness review the statements contained in the notes to confirm accuracy and to determine if the interviewee has anything to add. Consider having the witnesses sign the investigator's notes to confirm accuracy. Focus on the facts or matters of which the witness has personal knowledge.

After the Interviews:

- Do not store investigation notes in the personnel file; keep them in a separate confidential investigation file (disciplinary measures taken after the investigation can be part of the harasser's personnel file).

- Review all documents (including computer files) relating to the alleged events, prior investigation files, or other documentation of any previous complaints against the alleged harasser.

- Determine if the alleged victim can continue to work with the alleged harasser.

- After all interviews are done and documents reviewed, analyze the results to evaluate credibility of each witness. Do not reach conclusions until all witnesses have been interviewed and all relevant documents have been reviewed.

- Make a determination as to whether the alleged conduct did occur. Use credibility assessments and any other evidence to make a fair determination, even when there is a "he said/she said" situation.

- Write an investigation report that states the date(s) of the complaint, names of the complainant and the accused, list of all individuals interviewed, documents reviewed,

statement of allegations, accused response, policies at issue, factual findings, conclusion, and recommendation.

- If law/policy has been violated, assess the severity of conduct and determine the appropriate disciplinary measure designed to punish the conduct and prevent such conduct by any employee in the future. Avoid making findings of legal violations. Instead, determine whether the school district's policy has been violated.

- If no violation is found, tell the alleged victim and the alleged harasser that the results of the investigation do not substantiate the complaint, reiterate the school district's anti-discrimination policy, and remind he/she of prohibition of retaliation.

- Provide summary letters to the complainant and the accused outlining the investigation, policy and results. Unless mandated by policy or law, avoid disclosing disciplinary action taken against the accused in the letter to the complainant. Instead, state that prompt remedial action is being taken to prevent future issues of harassment/ discrimination or retaliation. In addition, the summary letters do not typically list other individuals interviewed.

- Follow up with the alleged victim and witnesses to see if they have witnessed any retaliation or further instances of alleged harassment/discrimination.

3. <u>Post-Investigation Issues</u>:

- The notes made during the investigation should be retained and made part of the school district's investigation file. The notes should be succinct and objective, and should not include the interviewer's beliefs, feelings or assumptions. If the investigation included standard introductory remarks (telling interviewees what to expect, etc.), those remarks should be included in the notes. It may also be advisable to have each witness review the notes from his or her interview and sign off on their accuracy.

- The investigation file should also include final copies of any written communications from the complainant, issue confirmation memo, opening comments memo as to what was said to the witnesses, outline of general questions, documents received during the investigation, written report and recommendations, school district's conclusions and actions determined appropriate, follow-up communications with the victim, accused and others, and documentation confirming the action taken.

- Remember, a school district's internal investigation report, investigation file and related materials are generally discoverable where the employer is relying on its investigation, in whole or part, as an affirmative defense to liability. *McGrath v. Nassau Health Care Corp.*, 204 FRD 240 (EDNY 2002). In addition, documentation related to any allegations, charges or complaints of sexual harassment during the preceding five years has been permitted on the grounds that the information could be probative of whether the

employer's harassment policy was adequate. *Butta-Brinkman v. FCA International, Ltd.*, 164 FRD 475 (N.D. Ill 1995).

- If the investigation is inconclusive, assure the complainant that, although no finding could be made, the employer intends to protect him/her and all employees from unlawful harassment and retaliation. The employer should also advise the accused that, although the truth of the complaint could not be determined, all employees must comply with the company policy of anti-discrimination and no retaliation. The employer may also want to obtain the accused individual's agreement that if the conduct alleged had been found to have occurred, it would have violated the policy. It may also be advisable for the employer to republish the anti-discrimination policies, conduct training, and possibly relocate the complainant or the accused to prevent future interaction, as long as the relocation could not be viewed as punishment or a demotion.

- If it appears that the complainant has made a false accusation, proceed very carefully before deciding to discipline the complainant. Any punishment of the complainant could be viewed as retaliation and also could discourage others from coming forward with legitimate complaints.

RESOURCES AVAILABLE TO ASSIST SCHOOL DISTRICTS WITH INVESTIGATION OF CERTAIN TYPES OF MISCONDUCT (DOE, POLICE DEPARTMENT, AG'S OFFICE; INDEPENDENT INVESTIGATOR OR LEGAL COUNSEL)

The DOE must be notified of allegations of educator misconduct. The investigator for DOE is a great resource to assist school districts in investigating complaints of educator misconduct. It also may be advisable to contact the police department and/or state police or AG's Office regarding allegations that involve potential illegal conduct and/or evidence stored electronically.

DO YOU HAVE TO FORMALLY INVESTIGATE ALL COMPLAINTS OF ANY TYPE OF MISCONDUCT?

Some types of alleged misconduct will require formal investigation, while others will not. In some cases, you will be able to conduct an informal interview and prepare a simple memo to the file noting the names, dates and summary of events, and the resolution process. Some conduct will give rise to a more involved interview process, and a letter of warning placed in the

employee's file (with appropriate language to the effect that further misconduct may result in discipline or dismissal). Finally, many allegations will on their face necessitate a more formal investigation. It is not always easy to choose the right path, but these steps will help guide you in making the decision.

Step 1. Review the complaint carefully (whether verbal or written, formal or informal), and determine if it involves serious, illegal, or dangerous misconduct.

Step 2. Review board policies to see if they cover the conduct.

Step 3. Review the "just cause" language in the collective bargaining agreement and individual teacher contract. Also review the grievance process to see if it excludes certain discipline from arbitration.

Step 4. Discuss the complaint with your legal counsel if you are unsure how to proceed.

Step 5. Decide whether to conduct an informal or formal investigation, based on the guidelines below. Please speak to your legal counsel for help in making this determination.

(a) *Formal Investigation* using the district's anti-discrimination policy if the complaint alleges discrimination and/or harassment based upon sex (including pregnancy), marital status, race, religion, sexual orientation, age, national origin, veteran status, or physical or mental disability. If you are unsure, ask the complainant who alleges something like "hostile environment" or "bullying" if he or she is alleging hostility based upon one the above protected classes.

(b) *Formal Investigation* if the complainant has recently requested or taken an FMLA leave, workers' compensation injury/leave, maternity leave, military leave, or a leave related to a disability.

(c) *Formal Investigation* if the complainant alleges discrimination, harassment, intimidation, threatening, or retaliation because of his or her status as a "whistleblower" or recent complaint of discrimination.

(d) *Formal Investigation and/or Referral to DCYF, and/or DOE, and/or Law Enforcement* if complaint alleges serious, illegal, or dangerous misconduct.

(e) *Informal Investigation* if complainant raises no issues involving the previous categories, *e.g.*, the allegation concerns insubordination, unprofessionalism, other inappropriate conduct, or performance issues.