CLIENT ALERT: Massachusetts' Highest Court Reinstates Lowell Teacher Despite School Committee's Concerns with Her English Fluency

On May 4, 2010, the Supreme Judicial Court of Massachusetts ("SJC") overturned a decision by the Superior Court vacating an arbitration award entered in favor of first-grade teacher Phanna Kem Robishaw. *School Committee of Lowell v. Robishaw*, 456 Mass. 653 (2010). Ms. Robishaw was terminated in 2005 by her employer, the Lowell School Committee, for failure to demonstrate satisfactory English fluency. The SJC unanimously held that the arbitrator properly based his decision on a number of factors, including the fact that Ms. Robishaw's scores on two tests of English fluency were not valid indicators of her fluency because she was on medical leave for post-traumatic stress disorder, a condition that impacted her English speaking-ability, at the time she took the tests.

In 2002, Massachusetts voters adopted a ballot initiative requiring that all children in public schools be taught in classrooms where the primary language of instruction is English and where the teaching personnel are fluent and literate in English. On March 27, 2003, the Commissioner of Education issued a memorandum requiring that, beginning with the 2003-2004 school year, every superintendent must sign an assurance verifying the English fluency and literacy of all teachers in English language classrooms.

Before the above law took effect, a new principal at Ms. Robishaw's school expressed concerns about Ms. Robishaw's English fluency and later gave her an unsatisfactory performance rating. Ms. Robishaw emigrated from Cambodia in the 1970s after fleeing the Khmer Rouge regime and had been teaching in the Lowell school district since 1992. Approximately half of the student enrollment at the school where Ms. Robishaw taught is Cambodian.

In 2003, Ms. Robishaw took a look of absence from teaching due to post-traumatic stress disorder. While on her leave of absence, the school principal required Ms. Robishaw to take the two approved English fluency tests. She failed both of them. In 2005, after a hearing, the superintendent terminated Ms. Robishaw based on her "demonstrated level of English fluency and the best interests of the students." The superintendent cited as grounds for his decision Ms. Robishaw's failure to pass the two tests as well as the principal's observations of her fluency.

Ms. Robishaw challenged her termination through the collective bargaining agreement. After a twelve day hearing, the arbitrator, Richard Higgins, found that there was no just cause to terminate Ms. Robishaw and ordered her reinstated with back pay and benefits. The arbitrator considered a number of factors, including the effect of Ms. Robishaw's medical leave on her ability to take the fluency tests and the availability of the test graders for cross-examination. The arbitrator found Ms. Robishaw's retention to be in the best interest of the students due to her life history as a survivor of the Khmer Rouge regime in Cambodia and her ability to serve as a role model for students.

The school committee filed an action in Superior Court, seeking to vacate the arbitration award. The

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motion judge vacated the award, finding that the arbitrator wrongly excluded Ms. Robishaw's test results. The Superior Court also held that the arbitrator exceeded his authority by issuing an award that contravened both state law and public policy. The judge based this decision in part on his own opinion of Ms. Robishaw's English fluency which he formed by listening to a tape recording of her performance on one of the fluency tests. The judge found that the arbitrator's decision prevented the superintendent from relying on the principal's observations of the teacher's fluency, in contravention of Massachusetts law.

The SJC found the Superior Court's conclusions to be in error. The SJC held that the judge failed to take into account the arbitrator's factual findings that the principal failed to inform the teacher that her fluency was being evaluated and completed the evaluation before the issuance of the Commission of Education's Memorandum. Although the arbitrator exceeded his authority by failing to accept the results of the two fluency tests, the SJC held that this error did not alter the result as the arbitrator properly considered that Ms. Robishaw's medical condition impacted the results of the tests. The SJC noted that it is bound by the arbitrator's factual finding that the school committee failed to meet its burden of establishing that Ms. Robishaw could not speak English fluently, and therefore the public policy exception did not apply.

This decision has important implications for public sector employers with fluency requirements for their employees. It demonstrates the great deference given to arbitration awards, even where arbitrators ignore the results of accepted fluency tests. When using such evaluations, employers should be careful to ensure that their employees are not on a medical leave or receiving treatment for a condition that could potentially alter the validity of the test results. It also demonstrates the need for clarity and appropriate procedures for any fluency assessments that are conducted. Finally, it shows that in a contract arbitration setting like the one at issue, an arbitrator may consider extrinsic factors to fluency, such as the life experience of an educator and the resulting impact on students. In a statutory arbitration, the arbitrator would have to consider the best interests of the students, which may require an arbitrator to place greater weight on the fluency requirement.

If you have any questions about the implications of this decision, or any other issue concerning employee testing issues, please contact your MBJ attorney.

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