

Ottosen Britz Kelly Cooper & Gilbert, Ltd.  
**Legal Insights**

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for School Districts

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**Seventh Circuit rules on FMLA leave  
for substance abuse treatment**

**by David Zafiratos**

On January 11 2008, the U.S. Seventh Circuit Court of Appeals issued its opinion in the case of *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008). *Darst* addressed the issue of the Family Medical Leave Act ("FMLA") in the context of alcohol abuse and dependency. The court decided that under the FMLA and Department of Labor regulations, employees are entitled to FMLA leave for the treatment of substance abuse, but not for absences caused by the use of unlawful substances.

The case involved Krzysztof Chalimoniuk, a fifteen-year employee of Interstate Brands Corporation, who was terminated for excessive absenteeism. Chalimoniuk was hospitalized for treatment of alcohol dependency and acute withdrawal syndrome from August 4, 2000 through August 11, 2000. However, he was absent from work three days prior to his hospitalization. Those three days brought Chalimoniuk's total absences over the employer's threshold for termination, and he was fired.

The case centered on the court's interpretation of the FMLA as it applied both to Chalimoniuk's hospitalization for treatment and his three-day absence prior to being hospitalized. Specifically the court considered whether an FMLA "Serious Health Condition" includes substance abuse. In addressing that question, the court explained that FMLA leave for substance abuse may only be taken for treatment, and that treatment must be on the referral of a physician. Citing a Department of Labor regulation, the court stated that "absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave." 29 C.F.R. 825.114(d)

Chalimoniuk first telephoned his physician requesting a referral for in-patient

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**New legislation deters outsourcing by school districts**

**by Matt Roeschley**

The game has changed for public school districts in Illinois when considering subcontracting for non-instructional services, and the change is not for the better. Public Act 95-241, enacted on August 17, 2007, creates substantial new requirements that school districts must meet in order to lawfully contract with third-party providers of non-instructional services. In many cases, the requirements are so prohibitive that subcontracting no longer remains a viable or cost-effective alternative for school boards. Not surprisingly, this new legislation has created numerous questions from school districts concerning the types of outsourcing affected by this law and whether the law applies to both contract renewals and new contracts.

Previously, the Illinois School Code, 105 ILCS 5/1 *et seq.*, did not prevent a school board from entering into contracts with third-party providers of non-instructional services or from laying off educational support personnel (ESPs) upon thirty (30) days written notice. However, with the enactment of Public Act 95-241, many new conditions now exist that impact both school boards and third-party non-instructional service providers, making outsourcing for non-instructional services a virtual impossibility in many cases.

Now, in addition to submitting a bid to a school board, third-party providers of non-instructional services also must submit the following:

- A) Evidence of liability insurance that is greater than or equal in scope and amount to the liability insurance provided by the school board;
- B) Employee benefits comparable to those provided to employees of the school board;
- C) A complete list of the number of employees who will provide the non-instructional services, their job classifications, and the wages they are paid by the third party;
- D) A minimum three (3)-year cost projection for each and every expenditure category and account for the performance of non-instructional services; such projection may not be increased if the third party's bid is accepted;
- E) Upon the request of the school board, composite information including: criminal and disciplinary records, DCFS complaints and investigations, traffic violations, license revocations and other license problems; and

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treatment on July 29, 2000. To support his argument that treatment starts with a phone call, Chalimoniuk's physician submitted an affidavit stating that treatment for alcoholism begins with the first step towards seeking professional help. If the court ruled that a phone call to a physician constituted treatment for substance abuse, the outcome of the case would have been different. Chalimoniuk's earlier absences would have been excused as FMLA leave and his total absences would not have exceeded the employer's threshold for termination. However, the court disagreed with that theory, instead holding that treatment did not begin until Chalimoniuk actually entered the hospital on August 4th.

Chalimoniuk's physician believed his treatment began with the first phone call on July 29<sup>th</sup>, and stated so in his affidavit on Chalimoniuk's behalf. Again, the court disagreed, stating that for purposes of the FMLA, it did not matter whether the physician considered the condition to have commenced prior to the hospitalization - Chalimoniuk's treatment did not qualify as an FMLA Serious Health Condition until he was actually under the care of professionals, upon referral by his physician.

The *Darst* case offers employers guidelines to ensure compliance with the FMLA. First, employers should be aware that, under certain circumstances, employees are entitled to FMLA leave for the treatment of substance abuse. Second, *Darst* establishes boundaries for entitlement, namely employees may take FMLA leave for professional treatment, when referred by a physician. Conversely, employers are not required to provide FMLA leave for an employee to plan admission to a treatment program. Treatment for substance abuse under the FMLA, as interpreted in *Darst*, does not begin until an employee personally receives in-patient or out-patient treatment from a physician. This interpretation is important as employers decide whether an employee's substance abuse related absence constitutes an FMLA leave. If you have any questions with respect to an employee's absence, please contact David Zafiratos at 630-682-0085 or dzafiratos@obkcg.com. ■

## Outsourcing by school districts

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- F) A notarized affidavit from the president or CEO of the third party attesting that, within the three (3) months immediately preceding the submission of its bid, each of its employees has completed a criminal background check that complies with the requirements of the School Code. (105 ILCS 5/10-22.34c(a)(3))

The law also requires that all bids by third party providers be reviewed by school boards in open session at regular meetings, unless otherwise agreed to in writing by the exclusive bargaining representative of the district's employees who are currently performing non-instructional services. If an agreement is made in writing, the school board may review and consider bids at a special meeting. Additionally, a school board must hold at least one public hearing to discuss the board's outsourcing proposal. The hearing must be held before the board may enter into a third-party contract, and public notice of the hearing must be provided before bids are solicited or at least thirty (30) days before entering a third-party contract, whichever time period is greater. (105 ILCS 5/10-22.34c(a)(5) and (6))

Along with the meeting and notice requirements, the contents of a third-party contract for non-instructional services are affected. Third party contracts must now require that a contractor offer any available positions to qualified school personnel who have lost their jobs because of the contract and must contain provisions that require the employer to ensure non-discrimination and equal employment opportunity for all persons. (105 ILCS 5/10-22.34c(a)(7) and (8)) Of course, these requirements would only apply in situations where the school is entering a new contract to outsource non-instructional services and is not currently outsourcing those services.

In addition to the substantive requirements of the new law, school districts must be concerned about when and under what circumstances the new requirements apply. Under Public Act 95-241, school districts may not enter into a contract to outsource non-instructional services during the term of an existing collective bargaining agreement. One positive note for school districts, however, is that the conditions imposed by the new law do not apply to non-instructional services that already were being performed under third-party contracts in existence at the time the law took effect on August 17, 2007. Therefore, school districts that have an existing contract for third party non-instructional services that became effective prior to August 17, 2007, will not be required to meet the conditions of the new law until the current contract expires.

While the new law may not apply retroactively to existing contracts, if a school district decides to outsource under the new law it would clearly affect future third-party contracts for non-instructional services. Moreover, if there is an existing collective bargaining agreement for non-instructional employees, a new third-party contract

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**Recent decision muddies the water concerning  
the protection of closed session tapes**

**by Matt Roeschley**

The U.S. District Court for the Northern District of Illinois recently issued a decision distinguishing an earlier opinion that exposed the closed session audiotapes of public bodies to discovery in federal civil litigation. In the earlier case, *Kodish v. Oakbrook Terrace Fire Protection District*, 235 F.R.D. 447, 451-452 (N.D. Ill. 2006), a firefighter brought a civil rights claim against his former employer and sought to gain access to the public body's closed session tapes. The fire district argued that the Illinois Open Meetings Act precluded the release of the tapes. The court disagreed because the principal claims in the case were brought under federal law, and thus federal common law, not state law privileges, should apply. Ultimately, the *Kodish* court held that, under federal common law, the closed session tapes should be discoverable by the former employee because "the interest served by the open meetings privileges are overcome by the need for probative evidence." *Id.*

In *Tumas v. Board of Education of Lyons Township High School Dist. No. 204*, 2007 WL 2228695 (N.D. Ill. July 31, 2007), however, the U.S. District Court distinguished *Kodish* and found the closed session transcripts to be privileged under both federal and state law. The plaintiff in *Tumas* sued her former employer, Lyons Township High School, in federal court, alleging sex discrimination and age discrimination, among other claims. To support her claims, the plaintiff sought to discover the minutes and transcripts of closed session meetings at which the Lyons Township Board of Education discussed the plaintiff or her case.

Unlike *Kodish*, the *Tumas* court applied the federal deliberative process privilege, which "protects communications that are part of the decision-making process of a governmental agency" to safeguard the confidentiality of closed session minutes and transcripts of the Board of Education. The court reasoned that the deliberative process privilege applied because the Board of Education had demonstrated that the information sought by the plaintiff was both "pre-decisional" (the case was on-going, the claims had not been resolved, and the parties had not settled) and "deliberative" (discussions centered on the Board's strategy concerning the defense of the plaintiff's legal claims).

Moreover, the *Tumas* court examined the following factors:

1. the relevance of closed session transcripts to the litigation;
2. the availability of other evidence that would serve the same purpose;
3. the government's role in the litigation;
4. the seriousness of the litigation and the issues involved in it; and

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can become effective only after the existing agreement expires. (105 ILCS 5/10-22.34c(a)(1)(2)) Not only do the requirements apply to future third-party contracts, but they also affect renewals of existing outsourcing contracts.

The new outsourcing law does contain a minor, short-term exception for emergencies. Now, in emergency situations, a school board may enter a short-term third-party contract (no longer than three (3) months) that does not comply with all of the aforementioned conditions. However, these emergency situations must be extraordinary in nature and "threaten[] the safety or health of the school district's students or staff," to warrant a short-term exception to the law's requirements. The legislature has not provided further guidance as to what might constitute an emergency situation for the purposes of temporarily deferring compliance. While the new outsourcing requirements do not outlaw third-party contracts, they undisputedly make the outsourcing of non-instructional services a very difficult undertaking for school districts. ■

**SAVE THE DATE**

**You are invited to attend the**

**SEVENTH ANNUAL  
SCHOOL LAW CONFERENCE**

**Hosted by**

**Ottosen Britz Kelly  
Cooper & Gilbert, Ltd.**

**Saturday, September 20, 2008  
8:00 a.m. to 12:00 noon**

**Registration at 7:30 a.m.**

**Hilton Lisle-Naperville  
Lisle, Illinois**

## Closed session tapes

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5. the degree to which disclosure would hinder frank and independent discussion about governmental policies and decisions.

Applying these factors, the court found the plaintiff's need to discover the closed session information was slight compared to the burden on the defendant Board of Education. The court also found that "allowing Plaintiff to discover the Board's litigation strategy would seriously hinder frank discussion" by the Board in closed session. Further, the court opined that this resultant chilling effect on open and candid discussion would hamper the Board in its ability to handle legal matters, including the present case.

In another important departure from *Kodish*, the *Tumas* court held that, even if the federal deliberative process privilege did not apply, the closed session transcripts were also privileged under the Illinois Open Meetings Act, despite the fact that the plaintiff's claims were federal. By contrast, the *Kodish* court had found that the Illinois Open Meetings Act privilege did not protect closed session tapes in the context of federal civil claims.

The *Tumas* decision merely muddies the water in the 7<sup>th</sup> Circuit concerning the discoverability of otherwise protected closed session materials in federal civil cases. *Tumas* does not overturn *Kodish*, and *Tumas* remains an unpublished decision. Thus, both decisions are possible indicators of how the 7<sup>th</sup> Circuit may eventually rule on this issue. While *Tumas* provides a legal analysis that could protect closed session meeting tapes and transcripts from discovery, Illinois public bodies must assume for now that their closed session audiotapes and minutes are potentially subject to discovery. ■

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## Firm Notes

- **OBKC&G, Ltd.** welcomes two law clerks. **Brent Eames** has completed his second year of law school at Northern Illinois University. Brent, a native of Sycamore, Illinois, majored in Political Science and was a member of the Men's Swim Team at Western Illinois University. **James Prescott** is completing his second year of law school at the University of Illinois. Jim earned his Bachelor's and Master's Degrees from Washington University in St. Louis and previously worked as an auditor for public entities. Ironically, Jim was also a member of the Men's Swim Team at Washington University. Brent and Jim will join the firm's Naperville office in May 2008. ■

### The firm's Wheaton office has moved to:

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Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, ***Legal Insights for School Districts***, is issued periodically to keep its 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:

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