
Michigan Supreme Court Broadens Schools' Immunity for 1230b Reports of Unprofessional Conduct

By Mark W. McInerney / Aug 02, 2016

Under Section 1230b of the School Code (MCL §380.1230b), a school or district that formerly employed a teacher is required upon request by a prospective employer to furnish information about "unprofessional conduct" in which that teacher might have engaged during his or her employment. The school or district required to disclose the information is protected by a statutory provision that "an employer, or an employee acting on behalf of the employer, that discloses information under this section in good faith is immune from civil liability for the disclosure." "Good faith" is presumed unless the employer knows the information it discloses is false, or the disclosure is made with reckless disregard for the truth or contrary to statute. Despite this language, districts generally have two questions with respect to the disclosure requirement: whether the immunity from civil liability will really hold up if push comes to shove, and what is meant by "unprofessional conduct," a term not defined in the statute.

In *Hecht v National Heritage Academies, Inc.*, decided on July 26, the Michigan Supreme Court has answered the first question, although the second remains a bit uncertain. In *Hecht*, the teacher was accused of making racially insensitive comments - observing that white tables in the cafeteria were always better than brown tables, and that brown tables should be taken out and burned. The remarks were construed as a veiled assertion that white people were better than brown people (an implication that the teacher ultimately admitted). The teacher nevertheless contended that he should not be disciplined because racial banter by African-American teachers was not punished, and thus similar comments by a white teacher should likewise be ignored. The teacher was nevertheless discharged, both for his comments and for interfering with the investigation by asking witnesses to be untruthful.

After his discharge, the teacher attempted to obtain other jobs, but his efforts ended when his prospective employers received a 1230b disclosure indicating he had been discharged for his insensitive comments and for interfering with the investigation.

The teacher sued for racial discrimination, and ultimately prevailed on that claim before the jury, a result that was upheld on appeal. During the trial, he was permitted to introduce the fact that his employer had sent 1230b notices, not as a basis for liability, but to support his claim for damages for future wage loss (since he had been, and expected to continue to be, unable to find new work due to the disclosures). The employer appealed to the Court of Appeals and then to the Supreme Court, arguing that permitting evidence of the 1230b notices permitted the jury to punish the employer for sending the notices, contrary to the statutory immunity provision. The teacher argued that he sought liability only for discrimination, and that the 1230b notice was relevant only to damages.

After unanimously affirming the verdict for the teacher on his discrimination claim, the Supreme Court, by 5-2, held that evidence of the 1230b notices should not have been permitted, and thus vacated the award of future damages premised at least in part on those notices. The Court interpreted the immunity provision as absolving employers of "all legal responsibility" for making the 1230b disclosures, and concluded that the introduction of evidence of the disclosures "allowed the jury to impose 'legal responsibility arising from' the disclosure." Such a result is specifically contrary to the statute. The teacher's future damages award - 90% of what the jury gave him - was vacated, and the case was remanded for a new trial on that issue alone.

The parties did not litigate whether the 1230b notice in this case was appropriately sent, and thus the Supreme Court did not address what constitutes "unprofessional conduct" that must be disclosed under 1230b. The term is defined in the statute as "acts of misconduct . . . immorality, moral turpitude, or inappropriate behavior involving a minor, or commission of a crime involving a minor." Although 1230b has been in place for 20 years, no reported decisions have addressed what constitutes "unprofessional conduct." "Moral turpitude" has been defined in the tenure context as intentional fraud, deceit, dishonesty, harm to a specific victim, illegal activity undertaken for personal gain, or sexual activity. But neither "unprofessional conduct" nor "misconduct" as used in 1230b has been defined. In *Hecht*, it would not be difficult to classify the teacher's interference with the investigation of his conduct by asking witnesses to lie as "misconduct" or "unprofessional conduct;" but it is not clear whether his racially insensitive comments, standing alone, could be so classified. The resolution of such questions will have to await another case.

In any event, *Hecht* confirmed that schools or districts will be protected from liability or damages for making the statutorily required 1230b disclosures in good faith. If you have questions about this or other issues, please contact Mark McInerney at (313) 965-8383 | mmcinerney@clarkhill.com, or another member of Clark Hill's Education Law group.