



# LABOR & EMPLOYMENT LAW

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

## Specialty healthcare: The NLRB rewrites rules on bargaining units

By Michael D. Gifford, Howard and Howard Attorneys PLLC, Peoria, IL

*Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction.*

*Specialty Healthcare and Rehabilitation Center of Mobile*, 191 LRRM 1137, 1152 (NLRB 2011) (dissenting opinion).

**N**LRB Board Member Brian Hayes characterized the sweep of the Board's *Specialty Healthcare* decision, issued August 26, 2011, in his dissenting opinion. The NLRB has been a political focal point in recent years, from

its complaint against Boeing to its proposed notice posting regulations. *Specialty Healthcare* does nothing to dispel the perception that the Board is aggressively pro-union, bent on achieving by regulation and decision what the administration has been unable to achieve legislatively. As a result of this decision, unions will be able to organize a minority share of an employer's workforce although a majority of workers may disfavor the union.

Specialty Healthcare and Rehabilitation of Mobile operates a nursing home and rehabilita-

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## Public employees and free speech

By Matthew Feda

**W**ith the Supreme Court yet to decide whether the determination of official job duties is a factual or legal question, the issue of public employee free speech is of timely concern, especially when public employment is also a major issue in the national political debate. Public employee free speech is an important issue because it affects the First Amendment rights of over 20 million public workers.<sup>1</sup> Also, the general public has an interest in the government working transparently, and punishing employees for speech may have adverse effects such as suppressing useful speech or deterring whistle-blowing.<sup>2</sup> In other words, "public employees will speak out on matters of government abuse, waste, or fraud, but only if they are assured that they do not risk those very jobs every time they speak."<sup>3</sup> This article provides background information on the issue of public

employee free speech through brief analyses of the seminal cases heard by the Supreme Court, those being *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1967), *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Next, I'll bring your attention to legal trends in the different Circuits, focusing primarily on the Seventh and Ninth since these provide the most insight into the how the issue of official job duties can be determined as a question of law or a question of fact. Lastly, this article concludes with practice advice for attorneys, including when and how to bring a claim. In all, this article provides practical insight into this particular area of employment law.

*Pickering* dealt with a teacher being fired from his position after sending a letter to a local news-

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## Specialty healthcare: The NLRB rewrites rules on bargaining units

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tion center where the United Steelworkers petitioned to represent employees in only one job classification, certified nursing assistants (“CNA”). The petitioned for bargaining unit differed from standard units, where the unit is comprised of all workers with a “community of interest” and reaches across job descriptions. Often referred to as “wall to wall” unit, prior practice included all similarly situated employees, such as “all production and maintenance workers” in a single unit. The “wall to wall” unit provided for a representative sampling of the workforce, supported majority rule, and avoided fracturing the workplace into numerous small units which likely would present conflicting demands and multiply the employer’s bargaining burden. Here, the union sought to represent only the CNAs, and the employer argued that the smallest appropriate unit would include excluded service and maintenance employees.

The Board declared “obsolete” existing precedent (*Park Manor Care Center*, 305 NLRB 872 (1991)) and imposed on the employer challenging the petitioned for unit the burden to “demonstrate that the excluded employees share an overwhelming community of interest with the included employees.” The dissent notes that the adopted test allows the union to determine the bargaining unit by the extent of its organization and is indistinguishable from one previously rejected by the appellate court in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995). The majority argues that Lundy had been explained and clarified in a subsequent ruling by the District of Columbia Circuit, *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

The Board held that the petitioned for unit need not be the most appropriate unit, but only one of potentially many appropriate units and not one arbitrarily carved from the work force.

If the proposed unit here consisted of only selected CNAs, it would likely be a fractured unit: the selected employees would share a community of interest but there would be “no rational basis” for including them but excluding other CNAs. If the proposed unit here consisted of only CNAs working on the night shift or only CNAs working on the first floor of the facility,

it might be a fractured unit.... In other words, no two employees’ terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit’s boundaries. But the proposed unit of all CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit *or even a more appropriate unit*.

191 LRRM at 1150 (Internal citations omitted) (Emphasis added).

The dissent notes the burden this Board’s new standard imposes on employers: “this test obviously encourages unions to engage in incremental organizing in the smallest units possible. In the present case, it seems quite clear that, if petitioned for, under the majority’s test there could at least be separate appropriate units found for RNs, LPNs, CNAs, cooks, dietary aides, business clericals, and residential activity assistants.” 191 LRRM at 1157.

The Board addressed its assignment of the burden of proof in a footnote.

While prior Board decisions do not expressly impose the burden of proof on the party arguing that the petitioned-for unit is inappropriate because the smallest appropriate unit contains additional employees, allocating the burden in this manner is appropriate for several reasons. First, because it is well established that “the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board’s inquiry ends,”...., the Board should find the proposed unit to be an appropriate unit under the circumstances here unless the employer both contends and proves that a larger unit is the smallest appropriate unit. Second, as when the petitioned-for unit is presumptively appropriate, after there has been a showing that the petition describes employees who are readily identifiable as a group and share a community of interest, the Board can and should find the proposed unit to be an appropriate unit unless an opposing party proves otherwise. .... Finally, the allocation of the burden is appropri-

ate because the employer is in full and often near-exclusive possession of the relevant evidence.

191 LRRM at 1150, n. 28. (Internal citations and formatting omitted).

Although the majority limits its decision to non-acute health care organizations, Hayes sees its reach as much broader. “[T]he majority accepts as the definitive standard for unit determinations in all industries an “overwhelming community of interest” test that will make the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances.” 191 LRRM at 1153.

Hayes also sees the decision as part of a pro-union political plan, adopted together with proposed rule changes which limit an employer’s ability to respond to an organizing petition.

It is not difficult to perceive my colleagues’ overall plan here. First, in this case, they define the test of an appropriate unit by looking only at whether a group of employees share a community of interest among themselves and make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included. This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units. Next, by proposing to revise the rules governing the conduct of representation elections to expedite elections and limit evidentiary hearings and the right to Board review, the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation. 191 LRRM at 1157.

The Board acted on November 30, 2011, to move to final rule making on a reduced portion of the election proposals Hayes referenced. Regardless of the reader’s political persuasion, it cannot be disputed that this Board has acted aggressively to expand a union’s ability to organize workers. Whether that is good or bad will be decided in the political arena. ■

## Public employees and free speech

*Continued from page 1*

paper that was critical of the decisions made by the school board.<sup>4</sup> Pickering's letter was critical of the way in which the school board allocated funds between the educational and athletic programs.<sup>5</sup> Basically, Pickering argued that too much money was spent on athletics rather than education.<sup>6</sup> The Court decided in Pickering's favor and found that his freedom of speech rights were violated when he was terminated for writing the letter.<sup>7</sup> In deciding the case for Pickering, the Court balanced the interests of Pickering with those of the school's administration and found that since the speech touched on matters of public concern, Pickering's and the public's interests outweighed the administration's interests in suppressing the speech.<sup>8</sup> This has come to be known as the *Pickering* balancing test in which the Court balances the employee's interest, as a citizen, speaking on matters of public concern with the government's interest, as an employer, in providing the particular public services efficiently.<sup>9</sup> So for the *Pickering* test to be applicable, the employee must be addressing a matter of public concern, the speech cannot interfere with the employee's job duties, and the employee must be speaking as a private citizen.<sup>10</sup>

*Connick* was the next major public employee free speech case taken by the Supreme Court. In *Connick*, a prosecutor brought a First Amendment claim challenging her termination and alleging that it was in response to her circulating a questionnaire about office policies to her coworkers.<sup>11</sup> The fired prosecutor had solicited the opinions of her coworkers on issues such as office morale, the transfer policy, faith in the supervisors, whether or not there should be a grievance committee, and whether any workers felt compelled to assist political campaigns.<sup>12</sup> The Court applied the *Pickering* balancing test and found that the employer's interest outweighed the interest of the employee as a citizen since the questionnaire was not directly related to matters of public concern.<sup>13</sup> In other words, the questionnaire was not protected by the First Amendment because it was very limited in how it addressed issues of public concern.<sup>14</sup> Therefore, *Pickering* and *Connick* illustrate that the Court is willing to give the government greater authority to

control the speech of its workers than the speech of the general public.

The last Supreme Court case to focus on this issue was *Garcetti*. *Garcetti* dealt with the First Amendment challenge of a deputy district attorney who alleged retaliatory employment actions due to his having relayed concerns of potential police misconduct to his supervisors in a memorandum.<sup>15</sup> The Court focused on whether the speech was made pursuant to the district attorney's official job duties, and by doing so, the Court expanded the employers' power over employee speech.<sup>16</sup> In finding that the memo was made pursuant to Ceballos's official job duties, the Court found that he was not speaking as a citizen on matters of public concern and the First Amendment does not protect his speech.<sup>17</sup> Thus, in *Garcetti*, the Court added a new threshold inquiry in determining public employee free speech cases.<sup>18</sup> After *Garcetti*, courts must first determine whether the speech was made pursuant to the employee's official job duties, and if so, the First Amendment claim fails.<sup>19</sup> If the speech was not made pursuant to official job duties, the court then continues in applying the *Pickering* test.<sup>20</sup> Therefore, there is no First Amendment protection to public employee speech as long as a court determines it to have been made pursuant to official duties.<sup>21</sup>

Most Circuits have determined the issue of speech pursuant to official job duties post-*Garcetti* as being only a question of law.<sup>22</sup> However, the Third and Ninth Circuits have found this to be a question of fact and have allowed it to be determined by a jury.<sup>23</sup> For instance, in *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121 (9th Cir. 2009), the Ninth Circuit held that official job duties should be determined through fact-finding, and until the facts are determined, the courts should reserve judgment on the issue.<sup>24</sup> The Seventh Circuit offers a good example of a Circuit that handles the issue as a question of law.<sup>25</sup> This results in courts determining whether speech was made pursuant to official job duties without necessarily knowing what the job duties were.<sup>26</sup> In other words, plaintiffs may lose the opportunity to argue whether or not their speech was made pursuant to official job duties when courts treat the issue as purely legal at summary judgment.

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*Published at least four times per year.*

*Annual subscription rate for ISBA members: \$20.*

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ment.<sup>27</sup> Therefore, in practice, it is important to introduce evidence that argues that the official job duties of the position did not actually include the speech in question.<sup>28</sup>

First Amendment claims of public employees are brought under 42 U.S.C. § 1983.<sup>29</sup> In practice, there are six things to consider when pursuing a First Amendment claim for a public employee. First, ask whether the employee is actually on the government's payroll.<sup>30</sup> If not, the public employee is left to only possible statutory or contract remedies.<sup>31</sup> Second, find out whether the employee has actually received retaliatory action or has been substantially punished, such as being transferred or terminated.<sup>32</sup> If the client has not been punished in these ways, courts are very unlikely going to hear a First Amendment claim.<sup>33</sup> Third, make sure that the speech was the actual but for cause of the employee's punishment.<sup>34</sup> In other words, inquire into whether any additional reasons given by the employer for the punishment that don't involve the speech would bring about the same punishment.<sup>35</sup> Fourth, determine whether the employee's speech actually touched on a matter of public concern.<sup>36</sup> And when making this determination, look at the content, form, and context of the speech to decide whether it touched on a matter of public concern.<sup>37</sup> If the speech wasn't of public concern, courts won't consider First Amendment claims.<sup>38</sup> Fifth, apply the *Pickering* balancing test and determine whether the government's ability to efficiently provide services was adversely affected in a substantial way.<sup>39</sup> If so, the employee will lose on the claim.<sup>40</sup> Lastly, it is important to note that if political affiliation is not a requirement for the position, it is against the First Amendment for a public employer to consider it and use it as a basis for employment actions.<sup>41</sup>

Since *Garcetti*, government employers have much more power and control over the speech of their employees. This is seen mostly in the issue of speech made pursuant of official job duties. However, while courts have given the government more authority as employers, attorneys for the public employees can present evidence to determine what the job duties actually were and hopefully push the case past the *Garcetti* threshold inquiry and into the *Pickering* balancing test. This would help preserve plaintiffs' claims that otherwise would have been thrown out at the summary judgment phase. By discussing

some of these key issues and providing some brief practice guides, this essay highlights that even after *Garcetti*, there are still ways to litigate these cases for the employees, with a focus on job duties being a question of fact as an important tactic. ■

1. Helen Norton, "Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression," 59 *Duke L.J.* 1, 1 (2009).
2. *Id.* at 1-2.
3. Paul M. Secunda, "Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law," 48 *San Diego L. Rev.* 907, 923 (2011).
4. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 564 (1968).
5. *Id.* at 566.
6. *See id.* at 571.
7. *See id.* at 565.
8. *See id.* at 573.
9. *Id.* at 568.
10. Secunda, 48 *San Diego L. Rev.* at 923.
11. *Connick v. Myers*, 461 U.S. 138, 140-42 (1983).
12. *Id.* at 141.
13. *Id.* at 154.
14. *Id.* at 154.
15. *Garcetti v. Ceballos*, 547 U.S. 410, 413-15 (2006).
16. *Id.* at 421-22.
17. *Id.* at 421-22.
18. *See Norton*, 59 *Duke L.J.* at 13.
19. *Id.* at 13.
20. *Id.* at 13.
21. Secunda, 48 *San Diego L. Rev.* at 914-15.
22. Sarah R. Kaplan, Note, "Public Employee Free Speech after *Garcetti*: Has the Seventh Circuit

been Ignoring a Question of Fact?" 5 *Seventh Circuit Rev.* 459, 470 (2010), at <<http://www.kentlaw.edu/7cr/v5-2/kaplan.pdf>>. (Last visited Dec. 3, 2011).

23. *Id.* at 470.
24. *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1129-31 (9th Cir. 2009) (high school security specialist wrote a letter complaining of inadequate safety at the school and the Court reverses summary judgment and decides that the issue of job duties is a question of fact), *See also Kaplan*, Note, 5 *Seventh Circuit Rev.* at 471.
25. Kaplan, Note, 5 *Seventh Circuit Rev.* at 477, *See also Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007); *Davis v. Cook Cnty.*, 534 F.3d 650 (7th Cir. 2008); *Biven v. Trent*, 591 F.3d 555 (7th Cir. 2010).
26. Kaplan, Note, 5 *Seventh Circuit Rev.* at 482.
27. *Id.* at 484.
28. *See id.* at 487.
29. *See Garcetti*, 547 U.S. at 415.
30. Doug Linder, *Exploring Constitutional Conflicts: Free Speech Rights of Public Employees* (2011), <<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm>>. (Last visited Dec. 3, 2011).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See Connick*, 461 U.S. at 147-48.
38. Doug Linder, *Exploring Constitutional Conflicts: Free Speech Rights of Public Employees* (2011), <<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/publicemployees.htm>>. (Last visited Dec. 3, 2011).
39. *Id.*
40. *Id.*
41. *Id.*

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# Avoiding “blanket prohibitions” on competition in employment agreements

By Arthur Sternberg

Court decisions on noncompetition restrictions under Illinois law often seem contradictory. One court enforces a broad restriction, while another strikes a similar one as an unenforceable “blanket prohibition” on competition. The decisions seem contradictory, like the competing clichés of “a stitch in time saves nine” and “haste makes waste.” Both can be true, but not simultaneously. Understanding the line between a reasonable restriction and a blanket prohibition one is needed to draft an enforceable employment restriction.<sup>1</sup>

Courts applying Illinois law have held the following restrictions overbroad and completely unenforceable:

- Not manufacture, market, or sell shrink-packaging machinery in the United States (except in four non-contiguous states),<sup>2</sup>
- Not engage in competition with employer,<sup>3</sup>
- Not take any position at a competing business in the U.S.,<sup>4</sup>
- Not be connected in any manner with any business competitive with the employer or its affiliates.<sup>5</sup>
- Not own or work in any capacity for any competitive business,<sup>6</sup>
- Not work for any competitor in North America,<sup>7</sup>
- Not sell competing products to anyone,<sup>8</sup>
- Not associate with a business whose activities are competitive in continental U.S.,<sup>9</sup> and
- 60-day prohibition on affiliation with a competitor.<sup>10</sup>

On the other side, the following restrictions have been held enforceable under Illinois law:

- Not compete with employer or its subsidiaries in any of the specifically described lines of business,<sup>11</sup>
- Not provide services to anyone making or selling products or services if doing so would involve the actual or threatened unauthorized use or disclosure of confidential information,<sup>12</sup>
- Not compete within the U.S. during the time severance is paid,<sup>13</sup> and
- Not compete within 50-mile radius of

company headquarters or any store in or for which employee worked in preceding 12 months.<sup>14</sup>

While specific facts and equities (for example, theft of confidential information) may affect a court’s interpretation in a case,<sup>15</sup> the drafter should write restrictions that the courts recognize as valid. That requires avoiding one-size-fits-all restrictions and instead tailoring restrictions to be appropriate for different levels and types of employees.

Following these drafting points will help:

- Except when essential, do not restrict being in competition. Instead, use activity restrictions such as soliciting certain customers and employees, as well as using confidential information.
- When restricting competition, narrow the range of restricted competitive activity or pay the employee while he or she is unable to find non-competing work.
- Include multiple levels of restriction, so that narrower restrictions can be enforced when broader ones are not.
- Include an express direction for the court to modify any restriction deemed unreasonable.

Some attorneys purposely draft competition restrictions broadly, believing that courts will at worst enforce them in limited form. However, the courts have repeatedly stated that the drafter’s failure to narrow tailor the restrictions preclude judicial modification.<sup>16</sup> The courts call for drafters to balance the company’s legitimate needs against the potential hardships to the employee, who has a “fundamental right to use his general knowledge and skills to pursue the occupation for which he is best suited.”<sup>17</sup>

A post-employment restriction protects customer goodwill (as limited by Illinois’ requirement of near-permanent customer relationships) and confidential information. It indirectly also protects employee goodwill. Often those interests can be adequately protected by activity restrictions such as soliciting and doing business with the customers with whom the employee dealt or has confidential information. Another restriction can prohibit soliciting and hiring at least certain

levels or types of remaining employees.<sup>18</sup> Courts are more likely to enforce activity restrictions than they are a ban on competing, though both are to be narrowly tailored.<sup>19</sup>

When a restriction on competing is needed, the agreement should reflect the specific reasons for it. The restriction is more likely to be enforced if the employee’s knowledge of company confidential information extends far beyond customer information. A restriction on competing makes more sense for a CEO than a sales representative, and a top level manager is more likely to have skills transferable to another line of business and thus be less likely to suffer hardship.

When a competition restriction is used, it should be limited to the actual lines of business where the employee poses a threat based on knowledge of confidential information or customer relationships. The drafter should also consider limiting the restriction to certain competitive roles, such as managing or selling for a competing company. While the geographic scope of the competition restriction should be limited to where the company does business,<sup>20</sup> as well as any areas it is about to enter, court decisions increasingly recognize that competition can be directed anywhere from anywhere, making tight geographic restrictions less imperative in some situations. The prospective hardship to the employee can be mitigated by including continued compensation for taking “garden leave,” i.e., the employee is paid to take no competing employment.

Finally, “blue pencil” clauses can help, but unreasonable competition restrictions are unlikely to be enforced in even limited form. The better approach is to include multiple level restrictions that go from more restrictive to less restrictive. That way, the court could enforce activity and confidentiality restrictions even if the restriction on competition is overbroad. ■

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1. The standards for noncompetition restrictions in connection with the formation or sale of a business are different for ones ancillary to em-

ployment. While the former will more readily be enforced, they are still subject to being struck as blanket prohibitions on competition. *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 405-06, 842 N.E.2d 265, 273-74 (1st Dist. 2005)

2. *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 80, 589 N.E.2d 640, 651 (1st Dist. 1992)

3. *Roberge v. Qualitek Int'l, Inc.*, 2002 U.S. Dist. LEXIS 1217 \*\* 17-18, 2002 WL 109360 \* 6 (N.D. Ill. Jan. 28, 2002); see *Allison v. CRC Ins. Svcs., Inc.*, 2010 U.S. Dist. LEXIS 61015 \*\* 11, 26-77 (N.D. Ill. June 21, 2010) (while former employer established "better than negligible" chance of success that former employees would not be foreclosed from working in their chosen field under restriction against being employed or associated with anyone in competition, court refused preliminary injunction due in part to the harm of rendering employees jobless for duration of the litigation).

4. *Oce N. Am., Inc. v. Brazeau*, 2009 U.S. Dist. LEXIS 126626 \*\* 25-26, 2009 WL 6056775 \* 12 (N.D. Ill. Sept. 4, 2009).

5. *Hay Group, Inc. v. Bassick*, 2005 U.S. Dist. LEXIS 22095 \*\* 9-10, 2005 WL 2420415 \* 3 (N.D. Ill. Sept. 29, 2005).

6. *Arcor*, 363 Ill. App. 3d at 405-06, 842 N.E.2d at 273-74.

7. *Grand Vehicle Works Holdings Corp. v. Frey*, 2005 U.S. Dist. LEXIS 9509 \* 23 (N.D. Ill. May 11, 2005).

8. *Kempner Mobile Electronics, Inc. v. Southwest Bell Mobile*, 2003 U.S. Dist. LEXIS 3512, 2003 WL 1057929 \* 23 (N.D. Ill. Mar. 10, 2003).

9. *Dryvit Sys., Inc. v. Rushing*, 132 Ill. App. 3d 9, 12-13, 477 N.E.2d 35, 38 (1st Dist. 1985).

10. *Credit Suisse First Boston, LLC v. Vender*, 2004 U.S. Dist. LEXIS 24525 \*\* 6-7 (N.D. Ill. Dec. 3, 2004).

11. *Lawter Int'l, Inc. v. Carroll*, 116 Ill. App. 3d 717, 730, 451 N.E.2d 1338, 1347 (1st Dist. 1983). However, the noncompetition restriction was considered ancillary to the sale of the defendant's interest in plaintiff's predecessor company. *Id.*, 116 Ill. App. 3d at 72324, 451 N.E.2d at 1343.

12. *RTC Indus., Inc. v. Haddon*, 2007 U.S. Dist. LEXIS 67008 \* 13 (N.D. Ill. Sept. 10, 2007) (not a blanket restriction because it only applies when actual or threatened unauthorized use of confidential information applies)

13. *Aspen Mktg. Svcs., Inc. v. Russell*, 2009 U.S. Dist. LEXIS 112982 \* 14, 2009 WL 4674061 \* 4 (Dec. 3, 2009).

14. *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 432, 915 N.E.2d 862, 870-71 (4th Dist. 2009); *Tyler Enter. of Elwood, Inc. v. Shafer*, 214 Ill. App. 3d 145, 573 N.E.2d 863 (3rd Dist. 1991).

15. See *Integrated Genomics, Inc. v. Kyrpides*, 2008 U.S. Dist. LEXIS 16838 \* 24, 2008 WL 630605 \* 9 (N.D. Ill. March 4, 2008) (noting plaintiff's uphill battle on the merits, court refused to hold unenforceable on a motion to dismiss a restriction on "developing, producing, marketing or selling products or services which would compete with products or services of the kind or type developed or being developed, produced, marketed or sold by the Company")

16. *E.g., Roberge*, 2002 WL 109360 \* 7 (declining to blue pencil in hopes "to encourage employers to write contracts that are more narrowly tailored to meet their individual needs, rather than overly broad covenants which restrict competition in the

marketplace for qualified employees").

17. *E.g., Del Monte Fresh Prod., N.A., Inc. v. Knnavy*, 616 F. Supp. 2d 805, 818 (N.D. Ill. 2009); see also Restatement (Second) of Contracts § 188(1)(a), (b) (1981) ("The restriction also must not impose a hardship on the employee or injure the public more than is necessary to protect the employer's legitimate business interest.")

18. Blanket restrictions on soliciting employees have been struck down as overbroad. *E.g., Pactiv Corp. v. Menasha Corp.*, 261 F. Supp. 2d 1009, 1014 (N.D. Ill. 2003) (company to company agreement restricting the hiring of any management employee overbroad); *Hay Group*, 2005 U.S. Dist. LEXIS 22095 \* 22, 2005 WL 2420415 \* 7. The restriction should focus on remaining employees who are within the departing employee's sphere of influence, such as co-workers, a department, or those with a difficult to replace skill. See *Pampered Chef v. Alexian*, 2011 U.S. Dist. LEXIS 76135 \* 68, 2011 WL 2746460 \* 18 (N.D. Ill. July 14, 2011); *Centimark Corp. v. Vitek*, 2010 U.S. Dist. LEXIS 138302 \* 23, 2010 WL 5490662 \* 8 (N.D. Ill. Dec. 29, 2010) (no hiring of senior management held reasonable); *Zep, Inc. v. First Aid Corp.*, 2010 U.S. Dist. LEXIS 26798 \* 34, 2010 WL 1195094 \* 12 (N.D. Ill. March 19, 2010) (restriction on recruiting for competitors employees who worked concurrently with defendants not unenforceable as a matter of law).

19. *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 140, 685 N.E.2d 434, 442 (2nd Dist. 1997) ("A covenant not to solicit is subject to a lower degree of scrutiny than a covenant not to compete.")

20. *Id.*

## How similar is similar?

By Michael R. Lied, Howard and Howard Attorneys PLLC, Peoria

In a recent case, the Seventh Circuit Court of Appeals provided guidance on determining which employees may be similarly situated to the plaintiff in a discrimination case.

Autumn Eaton worked as a correctional officer for the Indiana Department of Corrections ("DOC") from April 2006 until March 2008. At one point DOC sought to reassign Eaton to the so called "E-16" assignment.

Eaton refused the E-16 assignment, stating that she could not do the job and that it violated her medical restrictions. Her supervisor, Lieutenant Bensheimer, asked for her belt and badge. Eaton sought to be reassigned and said that she did not want to quit. Eaton nevertheless eventually turned in her equipment and left the facility.

Eaton later sued, alleging that DOC's actions violated the Americans with Disabilities

Act ("ADA"), the Family and Medical Leave Act ("FMLA") and Title VII. DOC moved for summary judgment. In the course of the summary judgment proceedings, Eaton gave up her ADA and FMLA claims.

The district court granted DOC's summary judgment motion, ruling that Eaton had failed to establish a *prima facie* case of gender discrimination under the indirect method of proof. Eaton appealed, arguing the district court erred in granting summary judgment.

The primary issue presented to the appeals court was whether Eaton presented sufficient evidence that a male employee, Curtis, was similarly situated to Eaton, and received more favorable treatment.

According to the court of appeals, the "similarly situated" analysis requires a context-based examination of all relevant

factors. The comparators must be similar enough that any differences in their treatment cannot be attributed to other variables. This usually requires the plaintiff to show that her comparator had the same supervisor, was subject to the same employment standards, and engaged in conduct similar to her. In general, whether individuals are similarly situated is a factual question for the jury. The plaintiff only needs to provide evidence as to one similarly situated employee.

The district court rejected Curtis as a similarly situated comparator based on differences between Eaton's and Curtis' conduct in refusing an assignment and differences in Eaton's and Curtis' disciplinary history.

The district court's determination as to refusal of a work assignment was based on three factors: (1) unlike Curtis, Eaton never actually quit, but simply left the facility, (2)



Curtis did not turn in his belt or badge when he left, and (3) Curtis returned to work less than an hour later and resumed working. In contrast, Eaton only attempted to return at the start of her next shift.

The appeals court, however, believed that Eaton's and Curtis' actions in refusing assignment were sufficiently similar to require a jury to decide whether their different treatment was based on sex.

Eaton did not have to show that Curtis' refusal was identical to hers. Eaton and Curtis both refused a work assignment from the same supervisor and left the facility. Both returned to work or attempted to return to work promptly. In fact, according to the court of appeals, Eaton's behavior reasonably could be viewed as less culpable than Curtis'.

The district court also found that Curtis was not similarly situated because his dis-

ciplinary history was not comparable to Eaton's. Eaton had been disciplined for excessive absenteeism and for failing to attend a required training session. Curtis had been disciplined for refusing to work overtime and for disobeying a direct order to turn off a television set while inmates were being disciplined.

In this regard, the appeals court considered whether distinctions in disciplinary history render two individuals non-comparable if there is no evidence that the employer actually considered disciplinary history in making its termination decision. In the district court DOC said that its only basis for terminating Eaton was that she quit. Thus, disciplinary history played no role in DOC's decision to terminate Eaton's employment. Similarly situated employees must be directly comparable to the plaintiff in all material

respects, which includes showing that the co-workers engaged in comparable rule or policy violations.

"All material respects" means comparable experience, education and qualifications—provided that the employer actually took these factors into account when making the decision in question. A factor that distinguishes two employees does not make the employees non-comparable if the employer did not consider that factor in making the decision at issue.

The district court was mistaken in concluding that Eaton and Curtis were not similarly situated based on their disciplinary history. The court of appeals reversed summary judgment and remanded Eaton's gender discrimination claim.

*Eaton v. Indiana Dep't Corr.*, 657 F.3d 551 (7th Cir. 2011). ■

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SPRINGFIELD, ILLINOIS 62701-1779  
DECEMBER 2011  
VOL. 49 NO. 3