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A recent PSEBA decision: Lifetime benefits they are not!

By Carlos Arévalo

In a welcome, yet surprising development, a court in Illinois finally issued a favorable ruling for municipalities last Fall. The Appellate Court for the Fifth District held in *Pyle v. City of Granite City*[1] that a firefighter was not entitled to the so-called "lifetime" health insurance benefits from his employer, the City of Granite City.

James Pyle was employed as a City firefighter for Granite City from 1977 to 2000. While responding to emergencies between March 1998 and September 1999, he sustained injuries to his right shoulder and lower back while moving a water hose at two separate residential fires. He submitted himself to the typical treatment for this type of condition, commencing with physical therapy and epidural injections. Ultimately, however, he underwent surgery in November 1999 and March 2006. Following his surgery, Pyle pursued a line-of-duty disability pension, alleging that the effects of his injuries prevented him from returning to work as a firefighter. His disability pension was properly awarded effective November of 2000, the date he was deemed disabled. In addition, Pyle sought benefits pursuant to the Public Safety Employee Benefits Act.[2] This Act, referred to as PSEBA, provides that a safety employee who suffers a "catastrophic injury" is entitled to have his health insurance premiums paid by his employing municipality so long as the injuries have been sustained in a defined set of circumstances. These benefits extend to his spouse and children under 25 years of age. When

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Illinois Human Rights Commission decision summaries

By Laura D. Mruk, WilliamsMcCarthy, LLP

***Nancy Carrasquillo and Brite Site and Mark Jaczynski*, Charge Nos. 2007CF0719, 2007CN0721 (Feb.1, 2012) (Judge Reva S. Bauch, Presiding) Decision after Public Hearing**

Respondent Brite Site provides cleaning services to commercial and retail establishments. Respondent Mark Jaczynski was the Operations Manager employed by Brite Site and acted as the supervisor of cleaning jobs. Complainant was hired on or about March 14, 2005, as the Accounting Manager. She was terminated on August 16, 2006.

On November 20, 2006, Complainant filed a complaint against Jaczynski alleging sexual harassment. On that same day, Complainant also filed a complaint against Brite Site alleging that it was liable for Jaczynski's harassment and that Brite Site terminated Complainant after she reported the sexual harassment to her boss.

Although Complainant believed she was proficient in using Peachtree software, a program used by Brite Site in its accounting, Complainant was not and had difficulties using this software throughout her employment with Brite Site. In other areas, however, Complainant's performance was praised and she received a significant raise her first year of employment.

As part of its defense, Brite Site asserted that the Illinois Human Rights Act ("the Act") did not apply to it because it employed fewer than 15 employees during the relevant time period. Judge Bauch, however, found that Brite Site misinterpreted the Act as it pertains to sexual harass-

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A recent PSEBA decision: Lifetime benefits they are not!

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Granite City denied his request, Pyle filed suit in Madison County asking the trial court to compel Granite City to pay PSEBA benefits.

In its defense of Pyle's claims, Granite City challenged Pyle's definition of "catastrophic injury." Indeed, Granite City argued that the Illinois Supreme Court's definition of "catastrophic injury," as set forth in *Krohe v. City of Bloomington,*[3] should be revised for public policy reasons and made consistent with common understanding and legislative intent. The City also asserted that if required to make payment for Pyle's health insurance premiums, its duty to make such payments was limited to doing so only until Pyle reached age 65 and became eligible for Medicare. In other words, Granite City believed that PSEBA was not a lifetime benefit requiring it to pay health insurance premiums until Pyle's death. The trial court in Madison County was not persuaded by Granite City's defense. Granite City lost and Pyle was awarded the PSEBA benefits. Granite City appealed to the Fifth District Court.[4]

In the appeal, Granite City's arguments regarding the definition of "catastrophic injury" went nowhere. The Court was not about to override the Supreme Court's definition. Indeed, the Court very clearly stated that it did not the authority to change a Supreme Court's decision in *Krohe* and that after the Supreme Court "has declared the law with respect to an issue, [we have to] follow that law because only the supreme court has authority to overrule or modify its decisions."[5] As for the alternative theory that payments would cease when Pyle reached age 65, the Court did, from this author's perspective, the right thing.

Prior decisions regarding PSEBA had already established that the premium payment benefits begin as of the date on which the safety employee is disabled. In this case, the court was asked to determine when the employer's obligation ends. To answer, this question, the court examined a portion of Section 10 of the Act, which provides as follows:

> (a) An employer who employs a full-time * * * firefighter, who * * * suffers a catastrophic injury or is killed in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority * * *. The term 'health insurance plan' does not include supplemental benefits that are not part of the basic group health insurance plan. If the injured employee subsequently dies, the employer shall continue to pay the entire health insurance premium for the surviving spouse until remarried and for the dependent children under the conditions established in this Section. However:
>
> (1) Health insurance benefits payable from any other source shall reduce benefits payable under this Section.[6]

The Court noted that to interpret PSEBA, it had to determine and give effect to the intention of the legislature when it enacted it. According to PSEBA's plain language in Section 10(a), "health insurance benefits payable from any other source shall reduce benefits payable under this section." Because Medicare benefits are guaranteed to working individuals in the United States who reach a designated retirement age and have paid Medicare taxes, they are "health insurance benefits payable from any other source", and require that PSEBA benefits payable by Granite City be reduced. In addition, PSEBA's definition of "health insurance plan" clearly excludes "supplemental benefits that are not part of the basic group health insurance plan." Medicare benefits are primary benefits for an individual. Any additional or secondary benefits would be deemed "supplemental" and therefore outside the scope of the benefits granted by PSEBA. Accordingly, Granite City's obligation to pay PSEBA benefits ended with Pyle reaching Medicare eligibility at age 65.

As additional support for this finding, the Court pointed to Section 367f of the Illinois Insurance Code. Disabled firefighters who do not qualify for PSEBA benefits, may nevertheless qualify for continuation of coverage pursuant to section 367f of the Illinois Insurance Code, the firemen's continuance privilege, and pay the premiums for continued group insurance coverage. Indeed, the Court's basis for examining the Insurance Code in a PSEBA case stems from a well-established rule that statutes related to the same subject matter are to be read in conjunction with each other. Section 367f provides that a municipality's group accident and health insurance for firemen employed by said municipality shall provide "for the election of continued group insurance coverage for the retirement or disability period of each fireman who is insured under the provisions of the group policy."[7] Section 367f also provides as follows:

> If a person electing continued coverage under this Section becomes eligible for [M]edicare coverage, benefits under the group policy may continue as a supplement to the [M]edicare coverage upon payment of any required premiums to maintain the benefits of the group policy as *supplemental coverage*.[8]

Any employee reaching Medicare eligibility would have to take Medicare as his primary coverage. The coverage offered by the employing municipality would become a secondary, "supplemental coverage." Accordingly, the Court concluded that when Pyle became Medicare eligible, Granite City no longer had to pay PSEBA premiums on his behalf.

So what is the impact of the *Pyle* decision and how does it affect our municipal clients? PSEBA provides benefits beyond those provided in the Illinois Insurance Code. As a result, an employing municipality, rather than the safety employee, is responsible for paying the insurance premiums on the employee's behalf. However, once the employee becomes Medicare eligible, the group insurance benefits may continue only as a "supplement" to the Medicare coverage, but it is not the health insurance plan for which the employing municipality has to pay premiums. ■

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1. 2012 IL App (5th) 110472, 978 NE 2d 1086 (Fifth Dist. 2012).
2. 820 ILCS 320/1 *et. Seq.*
3. 204 Ill.2d 392 (2003).
4. For purposes of convenience, the Fifth District Court will be referred to as the "Court."
5. 978 NE 2d at 1091.
6. 820 ILCS 320/10(a).
7. 215 ILCS 5/367f.
8. *Id.*

Illinois Human Rights Commission decision summaries

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ment in that an employer need only have one or more employees during the relevant time period in order for the Act to apply.

Although a claim for sexual harassment does not involve a system of shifting burdens because there can never be a legitimate reason for sexual harassment, Judge Bauch found that Complainant did not present a *prima facia* case for sexual harassment. Judge Bauch pointed out "that there is no bright line test for determining what behavior will lead to liability under a sexual harassment theory. In each case, the administrative law judge, as the trier of fact, must assess not only what was done but how it was done, and relate the specific behavior of the individuals involved to the total working environment." *Robinson and Jewel Food Stores, Inc.,* IHRC, ALS No. 1533, April 15, 1986. Judge Bauch further noted that "whether or not a complainant can prove sexual harassment often depends on whose testimony is considered more credible."

Judge Bauch found that the complained of conduct was sexual in nature and was unwelcomed. Judge Bauch, however, did not find that the conduct was of the kind that a reasonable person would find offensive, intimidating or hostile. The conduct included comments made by Jaczynski that he liked Latino women, that Complainant looked beautiful, an invitation for Complainant to visit Jacynski while his wife was out of town, and a comment that Complainant's husband was not "taking care of her." Although Complaniant offered testimony that Jaczynski also placed a condom in an envelope intended for Complainant, Judge Bauch found that Complainant could not establish that Jaczynski was the one who placed the condom in the envelope or that it was even intended for Complainant.

Unlike a claim for sexual harassment, however, a claim of retaliation does involve a burden shifting paradigm as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). In a retaliation claim, "[f]irst, the Complainant must establish a *prima facia* showing of retaliation against her by Respondent. If she does, Respondent must articulate (not prove) a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext." *Citing Zaderak v. Human Rights Com'n,* 131 Ill.2d 172 (1989) (emphasis in original).

After Complainant reported the condom incident to her boss, she overheard a conversation between her boss and another coworker that she, Complainant, was going to be a problem and they should get rid of her. Her boss replied to the coworker's comment "yeah, I think so." Shortly after Complainant overheard this conversation, she was terminated. This conversation, according to Judge Baugh's holding, evinced a retaliatory intent, combined with the temporal proximity of Complainant's termination, showed a causal connection between her protected activity (complaining about the condom incident) and termination.

Although Brite Site articulated several non-discriminatory reasons for Complainant's termination, Judge Bauch found that *but for* Complainant reporting the condom incident, she would not have been discharged. Accordingly, Judge Bauch found that Complainant sustained her burden for a retaliation claim. Although reinstatement is the preferred remedy under the Act, because Complainant did not request reinstatement, Judge Bauch did not recommend it. Judge Bauch did, however, award Complainant back pay through 2009. Judge Bauch did not award back pay for 2010, 2011 or 2012 because Complainant failed to produce financial documentation for those years. Because Complainant did not provide any indication that she was unable to work or that she will be unable to replace her former income, Judge Bauch did not award front pay.

***Shirley Mood and Take Care Employer Solutions*, Charge Nos. 2010SF1183, 2010SF0118, 2010SF0775 (Dec. 7, 2012) (Judge William J. Borah, Presiding) Decision on Motion for Summary Decision**

Respondent is a provider of healthcare service employees who perform their tasks at customers' work sites. In order to fulfill some of her job responsibilities, Complainant was required to enter into areas of a customer's workplace that involved the manufacturing of ethyl alcohol, which is flammable. As part of its safety policies, the customer required

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employees entering areas of the workplace manufacturing ethyl alcohol to wear pants or coveralls made of a flame-retardant fabric. Complainant, however, had religious convictions that prohibited her from wearing pants or coveralls.

Complainant proposed, as a reasonable accommodation, either that she be allowed to "sew two NOMEX [the flame-retardant fabric] lab coats together to create an ankle-length, open bottom NOMEX dress," or have employees from the plant that manufactured the ethyl alcohol come to an administrative area where the wearing of NOMEX was not required. Respondent's expert witness testified during his deposition that a "floor length dress design" would require testing with a qualified lab," "would allow a flash fire to reach the skin," and "could cause a static charge ignition."

Respondent offered to accommodate Complainant by allowing her to service other plants/customers that did not have a pants or coverall safety requirement, but these customers were all out of state, so Complainant turned down these positions.

In addition to its safety policies, Respondent also had an e-mail policy prohibiting the use of e-mail for derogatory comments about customers. Complainant used her company e-mail to e-mail several employees regarding sudden changes that now required Complainant to wear pants or coveralls in contradiction to her religious beliefs. The e-mails also stated that Complainant was "let go" and forced to resign due to her religious beliefs.

Judge Borah found that Respondent satisfied its duty to reasonably accommodate Complainant's religious beliefs by offering her employment at other locations at which pants or coveralls were not required. "Once the employer has offered an alternative (idea) that reasonably accommodates the employee's religious needs, 'the statutory inquiry is at an end.' The employer need not also show that other accommodations preferred by the employee would cause it undue hardship." *EEOC v. Ilona of Hungary, Inc.,* 108 F.3d 1569, 1576 (7 Cir. 1997). Respondent established that Complainant's request to sew together two pairs of NOMEX pants would result in undue hardship for Respondent. Respondent articulated a legitimate, non-discriminatory reason for terminating Complainant, thus defeating Complainant's retaliation claim.

***Debra Buchman and State's Attorneys Appellate Prosecutor*, Charge No. 2002SF0158 (Oct. 17, 2007) (Judge Michael R. Robinson, Presiding) Decision after Public Hearing**

Complainant was employed by the State's Attorneys Appellate Prosecutor as a staff attorney. As a staff attorney, she represented the State of Illinois in criminal appeals. Complainant's contention was that she suffered discrimination and retaliation based on her disability. Complainant alleged that Respondent discriminated against her in refusing her accommodation requests for her physical handicap of multiple sclerosis and ultimately terminated her after she had failed to come back to work following a medical leave of absence.

At some point, Complainant voluntarily left the State's Attorneys office and got a new a job as an ALJ for the Human Rights Commission. For reasons not identified in the record, Complainant left her position as an ALJ and returned to her position with Respondent as a staff attorney. At the time Complainant was rehired, the State's Attorneys office was involved in an arbitration proceeding involving a terminated employee who was accused of sexual harassment. Complainant was able to provide some testimony with respect to the allegations of sexual harassment and when asked to testify on behalf of Respondent, Complainant agreed to testify, but only if she was rehired as a staff attorney. Respondent reluctantly agreed.

Throughout her employment with Respondent, Complainant had several incidents in which she had fallen in Respondent's bathroom. Complainant requested some additional bars in the bathroom and Respondent obliged. Complainant also requested, at one time, that automatic doors to the entrance of the office be installed. Although Respondent agreed to this request, some weather and construction issues delayed this installation and Complainant did not make further requests for this accommodation.

Complainant also requested to be able to work from home and Respondent agreed to a limited duration, but informed Respondent that if she was going to need to work from home more permanently she would need to provide medical documentation to support her request. Respondent did request that when Respondent was working from home she call in and report the hours she worked the previous day. Respondent failed to comply with this requirement and demonstrated increasingly poor performance. Complainant did eventually provide medical documentation requesting a work-at-home accommodation, but due to her inability to comply with her previous requirement of calling in her hours worked, Respondent denied Complainant's request to work from home.

Complainant then requested a medical leave of absence. The collective bargaining agreement her employment was under, however, allowed Respondent to terminate an employee for failure to return to the worksite within one year of having gone on medical leave. After being gone for one year, Complainant informed Respondent that she was ready to return to work, but requested the accommodation of working from home. Respondent denied this request and terminated Complainant.

Just a few months prior to her termination, Respondent signed under oath an application for Social Security benefits in which she stated she could not work without an accommodation due to her disability. Respondent argued that due to her statements in her Social Security application, Complainant was estopped from prosecuting her Human Rights Act claim. Complainant's argument was that she could return to work if she was accommodated as she requested. Judge Robinson found that although Complainant's representations in her Social Security application were relevant, she was not estopped from pursuing her claim because Complainant's entire Social Security record was not in the record before him and because Complainant did not have a financial motive to misrepresent her medical condition. Although Complainant would potentially qualify for Social Security, since she was receiving a disability benefit from the State Employees Retirement System (SERS), upon receiving any Social Security benefits her current SERS benefits would be reduced by whatever amount she received from Social Security; accordingly, Judge Robinson found that she had no financial motive to misrepresent her medical condition on her Social Security application.

Judge Robinson found, however, that Complainant did not show that she could perform her job with or without reasonable accommodation. Declining performance reviews prior to Complainant's various requests for accommodation, including her request to work from home, demonstrated that even with the accommodations she was request-

ing, Complainant was not performing her job to her employer's expectations. The quality and quantity of the briefs produced by Complainant prior to her requested accommodations was simply not up to par.

Judge Robinson further found that Respondent's reason for terminating Complainant, i.e., her failure to return to the workplace within one year of her departure on medical leave, constituted a sufficient, non-discriminatory reason for her termination.

Although Judge Robinson did find that Complainant had established a *prima facia* case for retaliation because she was terminated shortly after requesting an accommodation, Complainant failed to show that her excessive use of medical leave as defined by the collective bargaining agreement was not the true reason for her termination.

***James Thompson, Sr. and Hoke Construction Co.*, Charge Nos. 1995 SF 0483 (Dec. 7, 2012) (Judge Michael R. Robinson, Presiding) Decision after Public Hearing**

Complainant is a laborer and union steward for Local 703. Complainant is also African American. Complainant's status as a union steward meant that he would be the first man hired on the job, and the last man to be terminated as the job was being completed. Respondent is a general contractor specializing in construction of natural gas pipeline compressor stations. Respondent was hired to perform some work for Peoples Gas Light and Coke Company and approached Local 703 for laborers.

Respondent's superintendent for the job asked management not to have Complainant work the site because the superintendent had past experiences with Complainant and felt that Complainant often wandered away from his job assignment. Respondent's superintendent is Caucasian. Local 703, however, refused to honor this request because Complainant was the union steward and the union contract required that he be the first man out on the job. Complainant ended up being the only African American on the job.

Respondent had previously requested that other union employees, including Caucasians, not be sent to certain jobs for various performance reasons.

While on the job, Complainant and all other workers were required to submit to random drug tests. Also while on the job some of Respondent's management made several racially offensive jokes and comments.

During the course of the job, Respondent complained to Local 703 that Complainant was walking off the job site. Eventually, conflict arose between Complainant and Respondent's management. Complainant and Respondent had an argument as to which union could perform which work on the site. As a result, Respondent assigned Complainant a job at a different site. Complainant refused the new assignment and left the job site. Respondent's management fired Complainant for leaving the job site. Complainant's replacement was Caucasian.

Other contractors had complained about Complainant's work in the past and about a year after being fired from Respondent's job, Complainant was fired from another contractor's job site. This time he was fired because he was arrested on an outstanding warrant while working and the contractor was unsure of when he would return to work.

Judge Robinson found that Complainant failed to establish a *prima facia* case of either racial harassment or discrimination with respect to being required to submit to drug tests and with respect to claims by Complainant that he was not being given overtime opportunities. Although Judge Robinson did find that Complainant had established a *prima facia* case of race discrimination with respect to his termination by Respondent, Judge Robinson also found that Respondent had articulated legitimate, non-discriminatory reasons for Complainant's termination and Complainant was unable to establish that those reasons were pretext.

Although a member of Respondent's management uttered racially offensive comments to Complainant, Judge Robinson found that Complainant was terminated for insubordination. All of Respondent's employees were required to submit to drug tests and Complainant could not identify a single worker who was given more hours than him.

Regarding his discharge, however, Judge Robinson found that (1) Complainant was the only African American on the site; (2) he was performing his job in an adequate manner; (3) Complainant was terminated; and (4) he was replaced by someone of a different race. Although Judge Robinson acknowledged that these findings would normally be sufficient to establish a *prima facia* case of race discrimination, the analysis was complicated by the fact that Respondent had no authority to affect either the racial composition of the union supplied workforce or the selection of Complainant's replacement. However, Judge Robinson found this evidence coupled with the evidence of racially offensive comments established a *prima facia* case regarding Complainant's termination.

Respondent articulated its non-discriminatory reasons for terminating Complainant as (1) insubordination in refusing to perform a job assignment; and (2) walking off the job site. Complainant attempts to refute these reasons by arguing that Respondent failed to personally notify him that he was terminated and failed to properly contact Local 703 to effectuate the termination. Judge Robinson found that Complainant's choice to walk off the job site and be present to be told he was fired undermined Complainant's argument. Judge Robinson also dismisses Complainant's argument that Local 703 was not properly told about his termination finding that because Local 703 did not initiate a grievance concerning this issue, even Local 703 did not find Complainant's position persuasive. Further, Judge Robinson found even if Respondent failed to comply with union contract regarding contacting Local 703 about Complainant's termination Respondent committed nothing more than a "technical violation. . . more appropriately considered a labor matter outside the jurisdiction of the Commission."

Judge Robinson distinguished *Frier and Denny's, Inc.,* 47 Ill. HRC Rep. 160 (1989) where the complainant displayed insubordinate acts *as a result of* a campaign of harassment from her supervisors. In *Frier* the complainant endured inappropriate comments about her pregnancy and walked off the job in response to those comments. Here, according to Judge Robinson, Complainant walked off the job site over a "jurisdictional dispute" as to which duties different unions were to perform.

As to Complainant's racial harassment claim, Judge Robinson found that the racially offensive comments, although they occurred at least three times, did not occur often enough to constitute a term or condition of Complainant's employment. The comments were not directed *at* Complainant, but, rather, made during breaks in the presence of other workers in addition to Complainant. Although Judge Robinson found the comments "regrettably" too slight, Judge Robinson felt that the holdings in *Hill and Peabody Coal Co.,* 1991 SF 0123, June 26, 1996) and *Bella and Modform, Inc.* 1987CF2953, January 31, 1995) counsel that the Human Rights Act does not impose a "strict liability" on employers whose supervisors use racially offensive language in the workplace. Accordingly, Judge Robinson "reluctantly" recommended that the Complaint be dismissed.

***Kenneth Doyle and T & H Lemont*, Charge No. 2005CA1776 (Sept. 8, 2010) (Judge William J. Borah, Presiding) Decision on Motion for Summary Decision**

Complainant had been employed by Respondent, or its predecessor, since 1992. In 2002 the division Complainant was working in was "shut down," and as a result, all of the positions within it were eliminated, including Complainant's position. In 2002 Complainant was 48 years old. Although Complainant's position was eliminated in 2002, he was not laid off and instead was offered, and accepted, a newly created position.

In 2004 Respondent received a petition signed by "several key employees" complaining of Complainant's supervisory behavior as "disruptive" and a "harassing and abusive manner." Respondent conducted an informal investigation and ultimately terminated Complainant, and eliminated his position, on or around September 3, 2004. Respondent's president created the new position for Complainant and made the decision to terminate Complainant and eliminate the position. At the time, Respondent's president was in his 50s.

On Respondent's motion for summary decision, Judge Borah found that Complainant had not established a *prima facia* case of discrimination and that Respondent articulated a legitimate, non-discriminatory reason for its actions. Although Complainant alleged that at some point (without any explanation of its context or relationship to Respondent's decision to eliminate Complainant's position) Respondent's president made a comment about older workers putting the company in a less favorable insurance premium bracket, Judge Borah found that this comment was made two or three years prior to the creation of Complainant's new position and, accordingly, Judge Borah applied the indirect method to Complainant's charge.

The facts that Complainant was offered a new job just a year or so prior to his ultimate termination and that his direct supervisor, Respondent's president, and the two other supervisors who were involved in the informal investigation regarding complaints about Complainant were all Complainant's contemporaries in age, supported Respondent's motion for summary decision. Respondent's reasoning for terminating Complainant was related to Complainant's competence as a manager. Complainant's negative managerial style was a theme written in the affidavits of Respondent's president and the other supervisory employees who contributed to the internal investigation.

In support of his position, Complainant offered an example of a similarly situated employee of his assistant. According to Complainant, upon his termination his assistant (who was 28 years old) took on his old job duties. Respondent presented evidence that Complainant's assistant did not take on his duties, but remained an assistant and was transferred to another department. Upon Complainant's termination, his assistant when transferred was given a raise from $13.50 per hour to $14.50. When Complainant was employed by Respondent he was a salaried employee making $78,000 a year. Judge Borah rejected the assistant as a similarly situated employee. Judge Borah also pointed out that even if the assistant performed Complainant's duties upon Complainant's termination, the Commission and the courts have previously held that it is not age discrimination for an employer to eliminate a position held by an older worker and reassign those duties to a younger worker. *Naselli and Courtesy Manufacturing Col.,* IHRC, ALS No. 8456, October 2, 1997, *quoting Holley v. Sanyo MFG., Inc.,* 771 F.2d 1161 (8th Cir. 1985).

Judge Borah found that the case should be dismissed in its entirety, with prejudice. ■

Social media and employer liability under the NLRA

By Michael K. Chropowicz

Social media has dramatically altered the way in which we all communicate, allowing us to be constantly connected to one another. At the same time, social media has created both novel and challenging legal issues for employers when they seek to regulate employees' social media use. Employers—whether their workforce is unionized or not—must consider potential liability under the National Labor Relations Act ("Act") when promulgating social media policies.

Among other things, Section 7 of the Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or mutual aid and protection.[1] Accordingly, non-unionized employees may be protected so long as their activity is "concerted" and for "mutual aid and protection."[2] That activity must relate to a term or condition of employment[3] (i.e., wages, hours, or workplace conditions). Significantly, Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.[4] Employers violate Section 8(a)(1) if the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights."[5] Policies which explicitly restrict Section 7 protected activities are clearly unlawful.[6] But even facially neutral policies may contravene Section 8(a)(1) if: (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[7]

Over the past year, the National Labor Relations Board ("Board") has provided some guidance on when an employer's social media policy violates Section 8(a)(1) of the Act. In *Costco Wholesale Corp.*, the employer maintained the following rule in its handbook:

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.[8]

The Board concluded that employees would reasonably construe this rule as one that prohibits Section 7 activity.[9] The Board reasoned that the rule's broad prohibition on defamatory statements clearly encompassed communications protesting the employer's treatment of its employees.[10] In other words, employees would reasonably construe the rule to mean that they were prohibited from making critical statements about the employer or its agents.[11] Significantly, the rule did not present any "accompanying language" indicating that the rule did not apply to protected activity.[12]

Shortly after *Costco Wholesale Corp.*, the Board issued its decision in *Knauz BMW*. In that case, the Board held unlawful a "courtesy" rule.[13] The rule stated, "[e]veryone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [employer]."[14] The Board concluded that the rule violated the Act because employees would reasonably construe its broad prohibition on "discourteous" conduct as encompassing Section 7 activity – namely, employee statements objecting to working conditions.[15] Moreover, employees would reasonably read the rule's prohibition on "injurious language" as applying to statements of protest or criticism of the employer.[16]

To be sure, the District of Columbia Circuit Court of Appeals held that President Obama's 2012 recess appointments to the Board were unlawful in *Canning v. N.L.R.B.*[17] Accordingly, the Board's decisions in *Costco Wholesale Corp.* and *Knauz BMW* are – at least in the District of Columbia Circuit – invalid. But management and their counsel should be aware of these cases regardless, since the Board will likely confirm these rulings once new appointments are made or will revisit these issues later.

The Acting General Counsel has also weighed in on the legality of social media policies under the Act. In a May 2012 Memorandum, the Acting General Counsel discussed several social media provisions that it found to be unlawful. Among those: (1) restrictions on releasing "confidential" information about guests, team members, or the company; (2) instructions that employees' online posts be "completely accurate and not misleading"; (3) proscriptions on releasing information related to "the financial performance of the company"; and (4) instructions to not disclose "personal information" about other employees or customers.[18] While these positions are not binding on the Board, they serve to illustrate the types of policies that will be highly scrutinized.

What types of employee speech on social media can employers safely regulate? Employers surely have legitimate interests in regulating employees' social media use to the extent that the policy proscribes abusive and profane language, harassment, conduct that is injurious, offensive or coercive of coworkers or clients, *inter alia*. This much has been made clear by the Board.[19]

As social media continues to grow and operate in the shadows of the workplace, management and their counsel must be acutely aware of how the Board applies the Act to social media policies. The law affords the same protection to employees who discuss work-related issues online just as if those employees discussed such issues around the proverbial "water cooler." Accordingly, what should management and their counsel know in light of the Board's recent decisions? First, policies which explicitly restrict Section 7 protected activity are categorically invalid. Second, any social media policy should be narrowly tailored, avoiding overly broad or ambiguous language. Ambiguous rules will be construed against the employer.[20] Third, employers should consider the inclusion of a "savings clause" when drafting social media policies. While such clauses will not invariably insulate a social media policy from invalidation, a well-tailored savings clause can save a social media policy that is otherwise unlawful. Finally, consult the Office of the General Counsel's model social media policy, available at <http://www.nlrb.gov/reports-guidance/operations-management-memos>.[21] ■

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1. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).
2. *Meyers Indus.,* 268 N.L.R.B. 493 (1984).
3. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978).
4. 29 U.S.C. § 158(a)(1) (2006).
5. *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998).
6. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).
7. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).
8. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).
9. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).
10. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).
11. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).
12. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).
13. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).
14. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).
15. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).
16. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).
17. *Canning v. N.L.R.B.*, Nos. 12-1115 & 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).
18. DIV. OF OPERATIONS MGMT. OF THE OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM OM 12-59 (2012), *available at* <http://www.nlrb.gov/reports-guidance/operations-management-memos>.
19. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012); *Lutheran Heritage Village-Livonia* 343 N.L.R.B. 646 (2004); *Palms Hotel & Casino*, 344 N.L.R.B. 1363 (2005).
20. Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127 (Sept. 11, 2012).
21. The model social media policy is contained in Memorandum OM 12-59 (2012).

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