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Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

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LESSONS FROM RECENT SUPREME COURT PATRONAGE HIRING DECISIONS

The United States Supreme Court has prohibited public entities from discharging independent contractors, or even regular service providers, based on political considerations. In *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996) (political affiliation case), and in *Wabaunsee County v. Umbehr*, 116 S. Ct. 2342 (1996) (political speech case), the Supreme Court established that government officials must refrain from making employment, and now contractual, decisions based on a contractor's political party affiliation or political speech. In doing so, the Supreme Court explicitly rejected the distinction made by courts in Illinois, including the Seventh Circuit Court of Appeals, between independent contractors and public employees. With regard to the protection offered by the First Amendment, the government must now treat service providers and independent contractors in the same manner as full-time

public employees.

Background

During the 1970s and 1980s, the Supreme Court established that a public employee may not be discharged based on that employee's political party affiliation or political speech, unless the governmental employer can show that political party "affiliation is an appropriate requirement for the effective performance of the task in question," *i.e.*, if the position regularly engaged in "policymaking." Subsequently, in 1990, the Court extended that prohibition against patronage firing to include other adverse employment decisions, such as failure to promote, demotion, refusal to recall an employee from layoff or transfers and reassignments, where those decisions were based on political considerations.

Facts of the Two Cases

In *O'Hare*, the city of Northlake maintained a list of towing companies which it would use in rotating order, and it would only remove a company from the rotation list for cause. However, the city removed the plaintiff's towing company from the list shortly after the company's owner refused to contribute to the mayor's reelection campaign and instead supported the mayor's opponent. The only justification offered by the city was to insist that it had a right to condition its contractual relationships on political loyalty. Similarly, in *Wabaunsee*, a service provider who was under contract to the county as its exclusive trash hauler was fired after the owner of that company publicly criticized the County Board for high taxes. Allegedly, his contract was terminated in retaliation for those criticisms.

In both cases, the Supreme Court held that the governmental employers violated the contractors' First Amendment rights: in *O'Hare*, by terminating the tow-truck operator for his political affiliation, and in *Wabaunsee*, by terminating or failing to renew the trash hauler's contract in retaliation for his political commentary. The Supreme Court recognized that, had those contractors been public employees whose jobs were to perform the same tasks they had performed as contractors, the government would not have been able to discharge them for political reasons. Therefore, the Court rejected such a distinction for the purposes of the First Amendment. While the Court acknowledged that the

distinction between employees and independent contractors had "deep roots in our legal tradition," it stated that to do otherwise would invite government manipulation, avoiding constitutional liability simply by attaching different labels to particular jobs.

Options for the Governmental Employer After These Decisions

A government entity may still terminate its affiliation with an independent contractor or service provider for reasons unrelated to political association or speech. However, the government should be able to offer a satisfactory, non-political justification for doing so. For example, it remains permissible to terminate a contractual relationship with a service provider where that provider is unreliable or where political affiliation is an appropriate criterion for that provider's duties. Further, the government may permissibly terminate a contract in order to "maintain stability, reward good performance, deal with known and reliable persons, or insure the uninterrupted supply of goods or services."

In addition, independent contractors will, presumably, have to make the same showings as employees to assert the protection of the First Amendment, *i.e.*, that the position for which the adverse employment or contract decision was made is nonpolicymaking in nature or, even if a policymaking position, that First Amendment protections appropriately attach to the position, and that the adverse employment action was legally caused by a political affiliation, *i.e.*, that the political affiliation or speech was a substantial motivating factor in the adverse contracting decision.

It is important to note, however, that while government officials may continue to terminate at-will contractual relationships, this discretion cannot be exercised to impose conditions on expressing or not expressing specific political views, nor as a pretext for political patronage.

Future Developments and Recommendations

The Supreme Court has not addressed whether independent contractors will now be able to bring First Amendment claims based on adverse employment decisions other than contractual termination, such as, failure to hire or failure to utilize a contractor's services. In

light of these two recent decisions, however, such an extension seems likely. Therefore, a governmental entity should document all decisions related to independent contractors and service providers in order to establish that such decisions were made according to proper, nonpolitical criteria. Such documentation should show that the employer utilized all available data before reaching a conclusion as to which specific candidate should provide a contract service. In addition, should the candidate selected be one who does not, at first glance, demonstrate the highest overall qualifications for the job, the justification for the selection should be sufficiently well documented so as to be subject to objective verification.

Specifically, with regard to contractors and service providers, the safest method of making decisions is the straight bidding process. Whatever process a government employer ultimately selects to evaluate candidates for service contracts, it should be structured to produce information corresponding to job-related hiring criteria, as well as to ensure that appropriate procedures exist to create and retain necessary documentation. Similarly, the hiring authority should never discuss political affiliation with contractors, so as to avoid the impression of making politically based decisions. In addition, should the governmental agency utilize or maintain a rotating list of service providers, the method of rotation should be unbiased. If the rotation is not equal, the agency should carefully document the permissible criteria used, such as performance, geographic area served or staff size.

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YOUR SEXUAL HARASSMENT POLICY MAY CONSTITUTE A CONTRACT

An Illinois appellate court recently held that an employer's sexual harassment policy constituted a contract and that an employee could base a breach of contract claim on his employer's policy. In *Corluka v. Bridgford Foods of Illinois*, Case No. 1-95-3116 (1st Dist. Sept. 30, 1996), an employee was demoted and subsequently terminated after reporting sexual harassment by his supervisor. The employee sued his employer, alleging that he had been terminated in retaliation for reporting sexual harassment and that his termination constituted both a breach of

contract and a retaliatory discharge.

The employee's breach of contract claim was based on the employer's sexual harassment policy which was contained in a memorandum distributed to employees. The policy stated that the employer would not tolerate sexual harassment, that harassment was a major offense and that employees who believed they were being harassed should report it immediately. The policy also included an assurance that employees "will not be penalized in any way for reporting harassment concerning [themselves] or any other person."

The appellate court ruled that the sexual harassment policy constituted an enforceable contract between the employer and the employee because the policy contained a promise clear enough that the employee would reasonably believe that an offer was being made, the policy was distributed to the employee and the employee accepted this offer by his continuing employment. Thus, in reporting harassment, the employee was carrying out his contractual obligations. Under the terms of that same contract, the employee could not be penalized in any way for his report. The court further held that the breach of contract claim was not preempted by the Illinois Human Rights Act. Therefore, the breach of contract claim was not barred by the employee's failure to timely file a charge of retaliation with the Illinois Department of Human Rights.

Corluka effectively extends from 300 days to five years the time period in which an employee may file a claim alleging that he was terminated in retaliation for reporting sexual harassment. Under the Illinois Human Rights Act, the employee must file a charge with the Department of Human Rights within 300 days of the retaliatory action. However, a discharged employee has five years to file a breach of contract claim based on an employer policy. To minimize the likelihood of liability for breach of contract, employers should review their sexual harassment policies to ensure that the policy does not rise to the level of a contract. If the sexual harassment policy is contained in an employee handbook, employers should ensure that the handbook contains a clear and conspicuous disclaimer stating that the employment relationship remains "at will" and may be terminated at any time for any reason.

Other Claims Preempted by the Illinois Human Rights Act

In *Corluka*, the court held that, unlike the breach of contract claim, the employee's common law retaliatory discharge claim was preempted by the Illinois Human Rights Act because the Act specifically prohibits retaliation against employees who oppose sexual harassment. Thus, because the employee had not filed a timely charge with the Illinois Department of Human Rights, his retaliatory discharge claim was barred.

In another recent decision concerning common law tort claims preempted by the Act, an appellate court ruled that all intentional tort claims based on allegations of sexual harassment are preempted. In *Maksimovic v. Tsogalis*, 668 N.E.2d 166 (Ill. App. 1st Dist. 1996), an employee sued her employer for assault, battery and false imprisonment. The employee alleged that her employer had verbally assaulted her and made unsolicited sexual advances, grabbed her leg and buttocks and attempted to kiss her, and confined her in a walk-in cooler while he made sexual advances and touched her body, refusing to allow her to leave although she attempted to do so.

The court held that the employee's intentional tort claims were based only on touching and other conduct which occurred as part of the employer's sexual harassment. The court noted that the employee did not contend that the touching was anything but sexual in nature. Because the allegations of the employee's claim were offensive touchings of a sexual nature and because the employee could not state a cause of action in the absence of these allegations, the claim was barred by the Illinois Human Rights Act. The court further held that the result would be the same whether the claims were against the employer or an individual supervisor. Thus, because the employee failed to file a timely charge with the Illinois Department of Human Rights, the employee's claims of assault, battery and false imprisonment based on sexual touching were barred.

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MISTAKEN BELIEF IS NO DEFENSE IN HIV CASE

In a recent case, *Raintree Health Care Center v. Illinois Human Rights Commission*, Case No. 80075 (Ill. October 18, 1996), the Illinois Supreme Court held that a

nursing home violated the Illinois Human Rights Act by constructively discharging a cook-employee who tested positive for the HIV virus. In so holding, the court ruled that a good-faith, but mistaken, belief that state law prohibited the continued employment of the cook-employee was not a defense under the Illinois Human Rights Act.

In *Raintree*, a nursing home administrator, on learning that the cook was HIV positive, reviewed the Illinois Department of Public Health regulations and the City of Evanston regulations governing the licensing of nursing homes to determine if the regulations prohibited the employment of an HIV-positive cook in a nursing home. When the administrator could find nothing in the regulations specifically addressing the situation of an HIV-positive cook, he contacted the Illinois Department of Public Health and the Evanston board of health to ask if the cook could continue to work in the nursing home. The administrator testified that the Evanston board of health told him that under the rules and regulations as they then existed, the cook could not continue to work in the nursing home. The Illinois Department of Public Health told him to follow the rules and regulations and that it would check and get back to him. The administrator also called the Illinois Council on Long Term Care and received no information.

Because he was unable to obtain a definitive answer on the cook's eligibility to continue working at the nursing home, the administrator sent the cook home until the matter could be resolved and asked the cook to present a doctor's note saying that he could continue in his present job. The cook presented a doctor's note stating that his HIV status did not prevent him from performing his current job as a cook in a nursing home and that HIV was not transmitted through food preparation and service. However, the Evanston board of health told the administrator that this note was not sufficient to allow the cook to return to work under state regulations prohibiting nursing homes from employing persons with infectious or contagious diseases.

At trial, the nursing home relied on the Evanston board of health opinion and the state public health regulation prohibiting nursing homes from employing individuals "diagnosed or suspected of having a contagious or infectious disease" to justify its constructive discharge of the cook. However, the Supreme Court determined that

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HIV-positive status is not a contagious or infectious disease. Thus, the Supreme Court ruled, the regulation did not provide a defense for the nursing home's action. Moreover, the Supreme Court held that the nursing home's good-faith, but mistaken, belief that state regulations prohibited the cook's continued employment was not a defense to a disability discrimination claim under the Illinois Human Rights Act.

In light of this decision, employers should be cautious about making adverse employment decisions based solely on state regulations governing employment of disabled individuals in certain jobs. Instead, an employer should conduct an individualized inquiry into the specific employee's medical condition and his ability to perform the job in question. In particular, the employer should obtain a doctor's opinion to determine whether the individual is able to perform the job. If the employer believes that a state regulation prohibits employment or continued employment of an individual with a disabling condition, the employer should obtain verification from the agency that issued the regulation before taking any adverse employment action.

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RELIGIOUS BAN AT GOVERNMENT OFFICE RULED UNCONSTITUTIONAL

In *Tucker v. State of California Department of Education*, 97 F.3d 1204 (9th Cir. 1996), the Ninth Circuit Court of Appeals ruled unconstitutional two orders issued by the California Department of Education banning any religious advocacy by employees during work hours or in the workplace and banning the display of religious materials in any part of the workplace other than an employee's own office or cubicle. The challenge to the orders was brought by a computer analyst who placed the phrase "Servant of the Lord Jesus Christ" and the acronym "SOTLJC" on work-related materials distributed within his department because his religious beliefs commanded him to credit God for the work he performed.

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The court held that the orders were overbroad and impermissibly infringed on employees' free speech rights. The court reasoned that employee speech about religion is

a matter of public concern and, accordingly, was constitutionally protected speech. The court also concluded that the primary reason asserted by the state for regulating the religious workplace speech — avoiding the establishment of religion — did not outweigh employees' free speech rights.

As to the order banning any religious advocacy, the court rejected the state's neutrality argument because what employees may discuss in their cubicles or in the hallway with each other "clearly would not appear to any reasonable person to represent the views of the state." The court explained that the order would have the effect of barring an employee from suggesting baptism to another employee in a private conversation, although the suggestion would clearly give no impression that it was endorsed by the state.

The order prohibiting the posting of religious material other than in employees' offices or cubicles was similarly held unjustified by the state's concern about the appearance of endorsing religion. Although recognizing that a greater likelihood existed that "materials posted on the walls of the corridors of government offices would be interpreted as representing the views of the state than would private speech by individual employees walking down those same hallways," the court found no evidence that the public had access to or ever went into the office areas where the computer analyst or other employees worked. The court also ruled that it was unreasonable for the state to forbid the posting of religious information, such as a church service announcement, while allowing the posting of materials on any nonreligious subject, such as an announcement of a meeting of the local militia.

Practical Effects

The Ninth Circuit's decision exemplifies a growing trend by the federal courts to find that free speech rights trump states' concerns about endorsing religion. Broad prohibitions targeted specifically at religious speech will be found unconstitutional. A governmental entity concerned about the appearance of endorsing religion may want to consider the Ninth Circuit's recommendation that all employee postings be limited to employee bulletin boards or to building areas not ordinarily visited by the public. Governmental entities may also want to consider modifying their policies to prohibit disruptive or

insubordinate speech and disciplining employees for religious speech only when it satisfies that standard.

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