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# Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

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## COURT FINDS BLOOD TEST FOR PROZAC AND DISCIPLINARY PROGRAM VIOLATES FOURTH AMENDMENT AND ADA

United States District Court Judge George W. Lindberg recently held that the Chicago Police Department ("CPD") violated an officer's Fourth Amendment rights and the Americans with Disabilities Act when it ordered a test to determine the level of Prozac in the officer's blood. *Krocka v. Bransfield*, No. 95 C 627, 1997 WL 348929 (N.D. Ill. June 24, 1997). A CPD policy of automatically

placing all officers on Prozac into a disciplinary program was also found to violate the ADA.

After learning that the plaintiff was being treated with Prozac for depression, the CPD placed him in its "Personnel Concerns Program," which is described by the CPD as a "vehicle by which the CPD can correct an officer exhibiting unacceptable behavior that is contrary to the goals of the CPD." In this disciplinary program, the officer was under heightened supervision while on duty and was told he would remain in the program as long as he was taking Prozac. Additionally, a CPD physician ordered a blood test to determine the level of Prozac in the officer's blood when the officer returned from a short hospital stay after he experienced chest pains, tension, anxiety and light-headedness while on duty.

In resolving the Fourth Amendment claim, the court balanced the officer's privacy interests against those of the CPD in conducting the blood test. While acknowledging the important interest of the CPD in ensuring that its officers are fit to serve, the court found the blood test failed to further this goal by providing information that the officer posed a danger to himself or the public. Because the blood test merely showed the presence of Prozac in the officer's blood, the court found no required "nexus" between the test and the CPD's interest in safety. The court emphasized that no evidence had been presented about the side effects of Prozac or any increased risk of such effects from higher levels of the drug in the blood.

In addition to the Fourth Amendment violation, the court also found the blood test violated the ADA, which bars employers from inquiring into the nature or severity of a disability absent a job-related reason for the test. The court found no such reason for the test, rejecting the CPD's assertion that it was concerned the drug would affect the officer's judgment while on duty. The court again emphasized that the test revealed only that Prozac was present in the officer's blood, not whether or how the medication would impair the officer's perception or judgment.

The court also held that the officer's placement into the disciplinary program violated the ADA. Although such a placement might be justified where an individual poses a direct threat to the health or safety of others, here the CPD, through a psychological exam, determined that the officer

did not pose a threat but placed him in the program anyway pursuant to its policy of automatically placing in the program any officer known to be using Prozac. The court found this policy impermissible, noting that it "is based only on broad-based assumptions" about people on Prozac. The court also concluded that the CPD had not shown that placement in the disciplinary program accomplished any safety goal because the program supervisors had no training on how to monitor the officer's behavior for side effects of Prozac. The court suggested that requiring the officer's doctor to monitor his condition and to report any problematic side effects to the CPD would more accurately address these safety concerns.

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**ILLINOIS COURT DISCUSSES SCOPE OF PUBLIC SECTOR WEINGARTEN RIGHTS**

In *Ehlers v. Jackson County Sheriff's Merit Commission*, 1997 WL 355624 (Ill. App. Ct., June 26, 1997), the court addressed the applicability of Weingarten Rights to public employees in Illinois. The appellant, Ehlers, was suspended without pay and subsequently terminated for refusing to meet with her supervisor without union representation. Ehlers claimed that she requested union representation because she feared that the meeting with her supervisor might end in disciplinary action against her. The court found that Ehlers' supervisor's order that she remain in his office and talk to him was an unlawful order and that she could not be discharged for failure to follow an unlawful order. The court held that § 6(a) of the Illinois Public Labor Relations Act ("IPLRA") provides employees with the right to refuse to submit to an investigatory interview that will be conducted without union representation where the employee reasonably fears that the interview might result in disciplinary action. These are the same rights that private employees enjoy under §7 of the National Labor Relations Act as discussed in *The National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The court noted that a public employee's right to union representation in such a circumstance arises only where the employee specifically makes a request for union representation; and that the union representative's role is

limited to assisting the employee, clarifying his or her rights and suggesting other employees who may have knowledge of the facts. The court held that an employer can deny an employee's request for union representation, but the employer must discontinue the interview at that point. Further, if an employer disciplines an employee for refusing to continue with an interview after he or she has requested union representation and it has been refused, the employer is, in effect, retaliating against the employee because he or she has engaged in protected concerted activities and thus violates §10(a)(1) of the IPLRA.

Based on the *Ehlers* decision, it is clear that if an employee reasonably fears that an informal or formal interview might result in discipline against her, she may refuse to submit to the interview unless provided with union representation upon request. Public employers should ensure that their supervisory personnel understand that, in instances when an employee could reasonably believe that an interview will lead to disciplinary action and the employee requests union representation, the supervisor must either stop the interview or provide the employee with the requested representation. To do otherwise would subject the employer to liability for violating §6(a) of the IPLRA. Moreover, in such a circumstance, a supervisor may not discipline an employee for refusing to submit to an interview without union representation. To do otherwise would subject the employer to liability for violating §10(a)(1) of the IPLRA.

Public employers should also be mindful that Weingarten Rights can be expanded through the collective bargaining process. Check your contract to clearly ascertain what additional rights, if any, to which your employees may be entitled.

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**ARE YOU A JOINT EMPLOYER?**

A recent Illinois Appellate Court decision sheds light on the vexing question of joint employer status. In *The Village of Winfield v. The Illinois State Labor Relations Board*, 678 N.E.2d 1041 (Ill. 1997). Appellee, the Village of Winfield (the "Village"), claimed that it was exempt from the Illinois Public Labor Relations Act ("IPLRA")

because it did not employ 35 employees as required by §20(b) of the IPLRA. The Appellant union claimed that the Village did in fact employ the requisite number of employees because it was, among other things, the employer of the employees of the local library. The court found that the Village was not the employer of these employees.

The court identified the test for the existence of joint employers as being "whether two or more employers exert significant control over the same employees — where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." The court noted that an employer's role in hiring, firing and promotions; setting wages, work hours and other terms or conditions of employment; and discipline and actual day-to-day supervision and direction of employees on the job are important considerations in determining whether an employer is a joint employer.

In finding that the Village did not employ the employees in question, the court noted that:

1. The library had its own board of trustees which was selected by the public;

2. None of the library trustees were also village trustees;

3. The library board prepared its own budget, which was separate from the Village budget;

4. Under the local library act, the library board had the power to appoint and fix the compensation of a librarian, and that librarian had the authority to hire other employees, fix their compensation and discharge them;

5. None of the library employees were also employees of the Village;

6. While the Village processed payroll checks for the library as a courtesy, the library paid its bills and employees' salaries from its own budget;

7. The library maintained its own employment policies;

8. The Village did not provide library employees with benefits;

9. The Village did not play a role in the decision to hire, fire or discipline any library employee; and

10. There was no Village oversight of the library's expenditures.

The court contrasted the library in this case from one in which the library's board of trustees was appointed and could be removed by the mayor and city council; the city played a role in the selection of certain library employees; and the library, on occasion, received financial assistance from the city.

Public employers may want to reexamine the roles that they actually play in the employment of employees who report to separate boards or political subdivisions in their localities. Depending upon the amount of discretion and control an employer exercises, groups of employees may be erroneously included or excluded as employees of a particular employer, which could affect your obligations and rights under the IPLRA.

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**CONGRESS SETS NEW EMPLOYMENT ELIGIBILITY DOCUMENTATION REQUIREMENTS**

Beginning September 30, 1997, the new employment eligibility documentation requirements of the Illegal Immigration Reform and Immigrant Responsibility Act (the "Act") become effective. The Act was signed into law in September 1996 in an effort to reduce the financial and employment incentives to illegal immigration.

As part of that effort, the Act reduces the number of documents employers must accept as proof of a job applicant's identity and employment eligibility. The current list of 29 documents which may be used, alone or in combination, to establish identity and employment eligibility will be reduced to fewer, less easily counterfeitable documents.

The Act limits acceptable documents to the following:

1. For proof of both identity and employment eligibility, employers may accept a United States passport, a resident alien card or an alien registration card; or

2. Employers may establish identity and employment eligibility by means of a state-issued identification card or driver's license in combination with a Social Security card.

The Act provides that additional documents to be named by the Attorney General will also be acceptable. A new INS Form I-9 (on which employers document employment eligibility) will be issued to reflect these changes. However, although the Act becomes effective at the end of this month, the Attorney General has yet to designate any additional documents. Moreover, the Attorney General's office has not decided whether employers should continue to follow the list of documents shown on the current Form I-9 or limit themselves to the documents specified in the Act until a new list of acceptable documents is issued. The Attorney General expects to announce its decision before September 30. In the meantime, employers should continue to use the documents listed on the current Form I-9.

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**SEVENTH CIRCUIT LIMITS DUTY TO ACCOMMODATE DISABLED EMPLOYEES WHO THREATEN VIOLENCE**

In *Palmer v. Circuit Court of Cook County*, the United States Appellate Court for the Seventh Circuit recently held that the Cook County Circuit Court did not violate the Americans with Disabilities Act (the "ADA") when it discharged a social service caseworker, who had been diagnosed with major depression and paranoia, for verbally abusing and threatening her co-workers and supervisor. The employee's threats included telling her supervisor, "Your ass is mine, bitch."

The court first examined whether the caseworker had a disability covered by the ADA. The employer had argued

that she merely had a personality conflict and referred to prior court decisions that had held that a personality conflict with other employees is not an ADA-covered disability even if it produces anxiety and depression. The Seventh Circuit distinguished those cases and ruled that where, as here, a "personality conflict triggers a serious mental illness that in turn is disabling," then the sufferer is disabled under the ADA.

Despite this finding, the Seventh Circuit held that the employer had no obligation to accommodate the caseworker. Although an employer has a duty to reasonably accommodate an employee's disability unless it would cause undue hardship, the court held that this duty should not be extended to an employee who threatens violence because it would be "unreasonable to demand of the employer either that it force its employees to put up with this or that it station guards to prevent the mentally disturbed employee from getting out of hand." Thus, the court concluded that the employer lawfully discharged the caseworker for her verbal abuse and threats.

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## SUPREME COURT RULES ON DISCIPLINARY PAY DOCKING

In a recent decision, the United States Supreme Court clarified when a public employer's maintenance of a policy calling for disciplinary suspensions and pay docking jeopardizes the exempt status of its employees. *Auer v. Robbins*, 117 S.Ct. 905 (1997).

Under the Fair Labor Standards Act ("FLSA"), certain professional, executive and administrative employees are exempt from the overtime pay requirements of the FLSA if they are paid on a salary basis. However, making deductions from an otherwise-exempt employee's salary for violations of rules other than major safety violations have led courts to hold that the employee is not salaried and, therefore, not exempt, exposing the employer to up to three years' retroactive overtime pay liability. Some courts had taken this even further, ruling that the mere maintenance of a policy calling for such deductions eliminated the exempt status of all otherwise exempt employees covered by the policy, even where no

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Vedder, Price, Kaufman & Kammholz, is a national, full-service law firm with approximately 180 attorneys in Chicago, New York City and Livingston, New Jersey.

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deductions had actually been made. *See, e.g., Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).

In *Auer*, however, the Supreme Court clarified that an employee's exempt status is lost only if the particular policy "effectively communicates" that pay deductions are an anticipated form of discipline for employees in the otherwise exempt category. *Auer* involved a police manual which listed 58 possible rule violations and the penalties associated with each, including pay deductions. All police department employees were covered by the manual. Police sergeants sued the city, claiming past-due overtime pay because the disciplinary pay deduction policy defeated their exempt status.

The Supreme Court affirmed the denial of the police sergeants' claim. The Court held that because it was possible to give effect to every inference of the manual without concluding that the sergeants were subject to pay deductions, *e.g.*, by applying the disciplinary pay deductions only to non-exempt police department employees, the manual did not "effectively communicate" to the police sergeants that pay deductions were an anticipated form of discipline. Therefore, the mere existence of the policy did not eliminate the sergeants' exempt status.

In light of this decision, public employers should review their work rules and penalties for violations of those rules. Where a rule that calls for a disciplinary pay deduction applies to both exempt and non-exempt employees, employers who wish to avoid risking the loss of exempt status should ensure that an alternative penalty is available and then apply only that alternative penalty to exempt employees.

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## SUPREME COURT HOLDS NO NOTICE OR HEARING NEEDED BEFORE SUSPENDING EMPLOYEE WITHOUT PAY

Applying a three-part balancing test, the Supreme Court held that a state university did not violate an employee's due process rights when it placed him on an unpaid suspension without first affording him notice and a

hearing. *Gilbert v. Homar*, 117 S.Ct. 1807 (1997).

The employee, a public university police officer, was arrested by the state police while off-duty and charged with a drug felony. The state police informed the university, which immediately suspended the employee without pay, pending investigation. The criminal charges were dismissed subsequently, but the employee's suspension continued while the university conducted its own investigation. The university did not permit the employee to present his side of the story until over two weeks after the criminal charges were dropped, only told him that it had information of a "very serious nature" from the state police and did not reveal that the information included a report of an alleged confession the employee made on the day he was arrested. Several days after the hearing, the university informed the employee that he was being demoted to groundskeeper as a result of admissions he made to the state police.

The employee sued the university, claiming its failure to provide him with notice and a hearing before suspending him without pay violated his due process rights. The Supreme Court disagreed, stating that "the government does not have to give an employee charged with a felony a paid leave at taxpayer expense." The Court balanced three factors in reaching its conclusion: (1) the employee's interest; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest.

Comparing the unpaid suspension to situations where an employee is terminated, the Court found that the employee's interest here was small. On the other hand, the Court found that the university had a significant interest in immediately suspending employees who occupy positions of great public trust and high public visibility, such as police officers, when felony charges are filed. Finally, the Court found that the risk of erroneous deprivation and the value of any additional procedures was small because the arrest and formal felony charges by an independent body were sufficient to show that the suspension was not arbitrary.

Although the Court found no due process violation for the failure to hold a pre-suspension hearing, it expressed concern over the two-week delay in holding the post-

suspension hearing once the criminal charges were dropped because the risk of erroneous deprivation increased substantially. However, because the lower courts did not address whether the post-suspension hearing was sufficiently prompt, the Supreme Court declined to do so and remanded the case to the Court of Appeals to consider that issue.

What should public employers take from this case? First, as with any multifactor balancing test, the analysis is highly fact-specific. *Gilbert* involved particular facts that tipped the balance in the employer's favor — namely, as a police officer, the employee held a position of public trust and high public visibility and he was arrested and charged with a felony. Most cases will not involve such employer-favorable facts, and employers should not assume after *Gilbert* that notice and a hearing is never necessary prior to an unpaid suspension. To the contrary, absent exigent circumstances, public employers should give an employee an opportunity to present his or her side of the story prior to taking any adverse action. Second, *Gilbert* reiterates the importance of holding a prompt post-suspension hearing even in those limited circumstances when a pre-suspension hearing is not practical.

Additionally, employers should be aware that if its municipality has adopted the Illinois Municipal Code's procedures for the Civil Service Commission or the Board of Fire and Police Commissioners then it may have to provide notice and a hearing depending on the type of employee and the length of the suspension. Other municipal ordinances, collective bargaining agreements and personnel policies should be reviewed for similar limitations.


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