VEDDER PRICE

Public Employer Bulletin

A review and analysis of emerging developments
affecting public sector employees

© 1998 Vedder, Price, Kaufman & Kammholz. *Public Employer Bulletin* is published by the law firm of Vedder, Price, Kaufman & Kammholz. It is intended to keep our clients and interested parties generally informed on developments in the public sector. It is not a substitute for professional advice. Reproduction of this bulletin is permitted only with credit to Vedder, Price, Kaufman & Kammholz. For an electronic copy of this newsletter, please contact Mary Pennington, Marketing Coordinator, at her e-mail address: mpennington@vedderprice.com.

If you have questions regarding any article in this bulletin, please contact James A. Spizzo (312/609-7705), Lawrence J. Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

In This Issue:

New Sexual Harassment Standards Applied

No Religious Discrimination In Refusal to Exempt Police Officer From Guarding Abortion Clinic

School Law Update:

Court Finds FOP Contract Language Waives *Weingarten* Rights

October 1998

NEW SEXUAL HARASSMENT STANDARDS APPLIED

A federal court in California recently applied the Supreme Court's decisions in *Faragher v. City of Boca Raton* (June 26, 1998) and *Ellerth v. Burlington Industries* (June 26, 1998) and determined that an employer was not liable for a supervisor's sexual harassment because the employer maintained, distributed, and enforced a sexual harassment policy and the employee unreasonably failed to take advantage of it.

Faragher and *Ellerth* together held: (1) As a general rule, employers are vicariously responsible for sexual harassment engaged in by their supervisors who have immediate or successively higher authority over the employee; (2) when the harassment results in a tangible employment action such as discharge, demotion, or undesirable reassignment, the employer's liability is absolute; and (3) when there is no tangible action, the

employer can defend itself by proving (a) that it has taken reasonable care to prevent and promptly correct sexually harassing behavior (such as by adopting an effective policy with a complaint procedure), and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided. The *Ellerth* and *Faragher* decisions were discussed in the July issue of the Vedder Price Labor Law newsletter.

In *Faragher*, the Court examined the defense available to employers when there is no tangible employment action, and found that although the employer had a sexual harassment policy, it did not adequately disseminate the policy, and the policy did not make clear that the complaint procedure allowed supervisors to be bypassed. Thus, the Court determined that the employer could not avail itself of the defense.

In *Montero v. AGCO Corp.* (August 12, 1998), a federal district court in California found that the employer successfully established the defense. Carrie Ann Montero was employed by AGCO from April 1993 until July of 1995 when she resigned. Montero claimed that shortly after she was hired her supervisors subjected her to a pattern of offensive sexual behavior, and that AGCO was vicariously liable for their conduct. AGCO had a policy against sexual harassment which was set forth in its employee handbook and several internal memoranda. The policy stated in part that (1) employees should file any complaints of sexual harassment through the Human Resource Department or their supervisors; (2) the allegations would be investigated thoroughly; (3) substantiated acts of sexual harassment would be met with appropriate disciplinary action up to and including termination; and (4) no reprisals against the employee reporting the allegation of sexual harassment would be tolerated.

Montero had received and was aware of the policy. But she did not report the alleged harassment to the Human Resource Manager until March 16, 1995. Shortly thereafter, an investigation was conducted which resulted in immediate termination of one supervisor and severe warnings for the others involved that any like conduct would result in their termination. Montero was told of the results of the investigation and that retaliation against her for complaining of the conduct she found inappropriate would not be tolerated. Montero resigned on July 17,

1995. Montero expressed her subsequent unhappiness by filing suit alleging that the Company violated her Title VII rights notwithstanding its prompt handling of her complaint.

The Court held that AGCO met its burden of establishing by a preponderance of the evidence that (1) it exercised reasonable care to prevent and correct promptly the sexually harassing behavior, and (2) Montero unreasonably failed to take advantage of the preventive and corrective measures provided by AGCO. In so ruling, the Court noted that AGCO exercised reasonable care to prevent sexual harassment by maintaining and distributing a policy prohibiting sexual harassment and by providing a mechanism for employees to report such conduct directly to the Human Resources Department. However, Montero unreasonably failed to take immediate advantage of the policy, and when she did, AGCO immediately investigated Montero's complaints and acted to end the harassment.

Montero illustrates that employers can take steps to avoid liability for sexual harassment. Specifically, employers should have a written sexual harassment policy that contains an accessible and effective complaint procedure. This procedure must allow the employee to bring complaints to someone other than their immediate supervisor, or anyone else who may be responsible for the harassment. A human resource official is an option. The policy should affirmatively state that retaliation for bringing complaints and cooperation in investigations is prohibited. Finally, the policy must be widely disseminated to all employees.

Any questions concerning this case should be directed to Larry Casazza (312/609-7770) or any Vedder, Price attorney with whom you have worked.

Return to Top of Document

NO RELIGIOUS DISCRIMINATION IN REFUSAL TO EXEMPT POLICE OFFICER FROM GUARDING ABORTION CLINIC

The City of Chicago's refusal to exempt a police officer from an assignment to stand guard outside an abortion

clinic was not religious discrimination violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Seventh Circuit has held. In *Rodriguez v. City of Chicago*, 1998 U.S. App. LEXIS 23305 (7th Cir. Sept. 21, 1998), the court found the Chicago Police Department ("CPD") had fulfilled its obligation to reasonably accommodate Rodriguez by allowing him to use his accumulated seniority to transfer to a district without an abortion clinic, even if he ultimately chose not to transfer.

Officer Rodriguez sued the City after he was refused a requested exemption from assignments to guard two abortion clinics in his district when demonstrators were present. Officer Rodriguez opposed abortion on religious grounds. He believed his presence at the clinics facilitated the work there, and he objected to the assignments because they conflicted with his religious beliefs. While his commanding officers agreed to try to avoid giving him the assignments, they refused to grant him a formal exemption from such duty, concluding that would conflict with CPD policy that officers are not free to refuse assignments.

The district court rejected Officer Rodriguez's assertion that the CPD discriminated against him on the basis of his religion by refusing his request for exemption from clinic duty. It found that, while Rodriguez had established a prima facie case of religious discrimination, CPD had met its burden to show it had made a reasonable accommodation of his religious beliefs. The court found that Officer Rodriguez had a variety of options available to him under the collective bargaining agreement ("CBA") by which he could have avoided clinic duty and the resulting conflict with his religious beliefs. For example, he could have requested transfer to any of six other districts on the north side of Chicago where there were no abortion clinics. Moreover, due to his seniority, he could have transferred districts with no reduction in pay or benefits. Thus, the court concluded, the CPD had reasonably accommodated Rodriguez's religious beliefs as required by Title VII.

The Seventh Circuit agreed, rejecting Rodriguez's arguments he should have been allowed to stay in the same district, noting that "Title VII…requires only 'reasonable accommodation,' not satisfaction of an employee's every desire." Because at least one reasonable accommodation was offered through the CBA provisions

permitting transfer, the CPD had discharged its obligations under Title VII.

In an interesting concurring opinion, Judge Posner argued the CPD was not required to accommodate Rodriguez's religious objection to protecting an abortion clinic even to the limited extent that it did. Posner urged that the case should have been decided on broader grounds than it was, by holding that granting any rights of refusal to public safety officers would be an undue hardship for the CPD and thus not required by Title VII. Providing such rights of refusal would undermine public safety agencies' effectiveness by eroding public confidence in the neutrality of the officers, Posner argued. Posner would apply to all public safety personnel including the U.S. Marshals Service, the FBI, the Secret Service, and firefighters, the principle that public safety officers have no right to pick and choose whom to protect on religious or other personal grounds.

Please direct questions or comments to Jim Spizzo (312/609-7705) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

SCHOOL LAW UPDATE:

Circuit Court of Cook County Upholds State Board's Conditional Approval of Charter School

In the first challenge to a charter school under Illinois' newly enacted Charter School Law (105 ILCS 5/27A-1 *et seq.*), the Circuit Court of Cook County upheld the determination of the Illinois State Board of Education that it could conditionally approve a school's charter. In a September 29 ruling in the case of *Board of Education of Community Consolidated School District No. 59 v. Illinois State Board of Education,* No. 98 CH 09609, Judge Thomas A. Hett agreed with the Board's grant of conditional approval to the Thomas Jefferson Charter School.

The School District had previously rejected the school's application for a charter because the application was deficient in two respects: it lacked adequate budget

documentation to show that it had ongoing support, and it failed to identify two potential sites that would be available at the time the school was supposed to open. The foundation which sought the charter appealed the District's rejection of its application to the State Board of Education. The State Board approved the charter, but conditioned its approval on the foundation's correcting the deficiencies in its application. The School District filed a complaint in administrative review, asking the Circuit Court to overturn the State Board's grant of the charter, arguing that the Charter School Law did not contemplate charters granted over the objection of school districts. But the court agreed with the School Board, ruling that although conditional approval of charters is not explicitly mentioned in the law, it is implicit in the law.

The importance of this decision is clear: a charter school can be granted a charter even if the district rejects its application. As a practical matter, this means a school district should consider attempting to work with a party applying for a charter rather than rejecting the application outright. And if a school district does decide to reject a charter school application, it should clearly enumerate and explain all reasons for the rejection.

Appellate Court Rules on What Constitutes Denial of Due Process in Expulsion Hearings

An Illinois appellate court recently enunciated standards regarding a student's due process rights in expulsion hearings. In *Colquitt v. Rich Township High School District No. 227*, 1998 Ill. App. Lexis 566 (Ill. App. 1st Dist. Aug. 14, 1998), a student challenged his expulsion following incidents of harassment and intimidation of other students, and an allegation that he threatened other students with a gun during a school basketball game. A six-hour hearing was held before a hearing officer appointed by the School Board, at which the student, his parents, and their attorney were all present, in addition to the School Board's attorney and numerous witnesses. Testimony was offered in the form of live witnesses and written statements. Following the hearing, the hearing officer provided a 36-page summary of the evidence which had been introduced, and the Board expelled the student. He thereafter challenged his expulsion, arguing that he was not afforded due process. The Circuit Court reversed the Board's order, finding that the student's due process rights had been violated, and the School Board

appealed.

On appeal to the Appellate Court for the First District, the student argued that his due process rights had been violated in two ways. First, he contended that the fact that no transcript was made of the expulsion hearing violated his due process rights. The court rejected that argument, finding that the hearing officer's report was sufficiently detailed so that the lack of a transcript could not have deprived the student of his rights. In reversing the Circuit Court on this argument, the court explained that "there is no requirement to provide a stenographer's transcript in every case as long as there is some other means to allow for adequate and effective review."

Second, the student argued that a written statement from an anonymous student witness was hearsay. In spite of the fact that the assistant principal vouched for the anonymous student, calling him "reliable," the court held that the lack of opportunity to confront and cross examine this witness against him did deprive the student of his due process rights, and so it affirmed the Circuit Court's decision in that regard. Relying on factors set forth by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 337 (1976), the Court concluded that "in expulsion proceedings, the private interest is commanding; the risk of error from the lack of adversarial testing of witnesses through cross-examination is substantial; and the countervailing governmental interest favoring the admission of hearsay statements is comparatively outweighed."

Please direct questions or comments on school law issues to Larry Casazza (312/609-7770), Tom Abram (312/609-7760), or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

COURT FINDS FOP CONTRACT LANGUAGE WAIVES *WEINGARTEN* RIGHTS

In *Ehlers v. Jackson County Sheriff's Merit Commission*, the Illinois Supreme Court ruled that a collective bargaining agreement may waive a public employee's right to have a union representative present during an informal

inquiry.

Facts

Plaintiff, Kate Ehlers, was discharged following a visit by her husband to the jail where she was working. Upon learning of the visit, Ehlers' immediate supervisor informed Ehlers that the Sheriff wanted a written report from her concerning how many times her husband had visited the jail and how long he had stayed. The Sheriff had heard rumors that Ehlers had been out of the jail for lengthy periods of time. In response to the supervisor's request Ehlers submitted a short report which simply stated that her husband had come to the jail one time during the afternoon hours.

The Sheriff then instructed the Plaintiff's supervisor to obtain a more detailed report from her. Ehlers' second statement provided the specific times she was out of the office, noted that the times were entered in a log, and further noted that the portion of the log from which she obtained the times had been "scribbled through several times." At the bottom of the statement, Ehlers wrote, "I am making these statements under duress."

Ehlers testified that after writing the second statement, she attempted to contact her union representative by telephone, but he was unavailable. She felt that disciplinary action was going to be taken against her and she was concerned for her job. The Sheriff then called Ehlers and requested that she bring the second statement to his office. She asked the vice president of her local union to accompany her to his office.

When Ehlers and her union representative arrived, the Sheriff asked Ehlers to sit down and speak with him, and asked the union representative to leave. Ehlers said she wanted her union representative to remain. The union representative was again asked to leave, and he did so. Ehlers then told the Sheriff that she would not speak to him without her representative present. As she turned to leave, the Sheriff told her he would fire her if she left. Ehlers left, remarking that only the Merit Commission could fire her. The Sheriff told Ehlers to go home.

The Sheriff then suspended Ehlers without pay and filed a complaint seeking her dismissal, on the grounds that:
1) Ehlers failed to fully or truthfully comply with an order

About Vedder Price

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

The Vedder Price Public Sector Group

Vedder Price provides a broad range of services to its public sector clients, including:

- labor and employment law;
- general public sector law property transactions;
- public finance;
- contract law; and
- litigation.

to produce a report regarding her husband's jail visit; 2) Ehlers provided a second untruthful or inaccurate report regarding the visit; and 3) Ehlers refused to obey the Sheriff's verbal order to remain in his office and discuss the foregoing matters.

The Merit Commission Determination

After conducting a hearing on the three charges, the Merit Commission determined that there was insufficient evidence to sustain the first two charges. However, the Merit Commission found sufficient evidence concerning Ehlers' refusal to obey the Sheriff's order to discuss the matter with him. In a subsequent hearing, on the issue of discipline, the Merit Commission found that discharge was the appropriate penalty. The Sheriff had lawfully ordered Ehlers to sit in his office and speak with him, and Ehlers' refusal constituted insubordination. The Merit Commission also found that Ehlers displayed no remorse for the insubordination, and she had been disciplined on a prior occasion for failing to obey an order.

Administrative Review

Ehlers filed a complaint for administrative review with the circuit court. The court confirmed the Merit Commission's decision, finding that Ehlers' discharge was not arbitrary or unreasonable.

The appellate court reversed. Relying on *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975), the appellate court held that Ehlers had the right to have a union representative present with her at the meeting with the Sheriff. Consequently, the court reasoned that the Sheriff's order to Ehlers that she speak with him without a union representative was unlawful, and Ehlers could not be discharged solely for disobeying an unlawful order. The appellate court ordered that Ehlers be reinstated.

The Supreme Court's opinion began with an analysis of *Weingarten*, which held that a private sector employee covered by the National Labor Relations Act has the right to have a union representative present during an employer's investigatory interview when the employee requests such representation and reasonably fears that disciplinary action may result. In a later case, the Illinois State Labor Relations Board ("the State Board") extended

Vedder Price represents a considerable number of public bodies, including counties, cities, villages, school districts and townships, with respect to the myriad day-to-day problems they face. Firm attorneys also work with elected officials and administrators in preparing and presenting in-house workshops tailored to the needs of the individual public body. The firm keeps its public sector clients abreast of breaking developments through frequent newsletters, bulletins and firm-sponsored seminars.

Vedder, Price, Kaufman & Kammholz
A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

Weingarten to public employees covered by the Illinois Public Labor Relations Act. *NLRB v. Departments of Central Management Services & Corrections (Gerald Morgan)*, 1 Pub. Employee Rep. (Ill.) par. 2020, No. S-CA-54 (ISLRB September 13, 1985).

The Supreme Court noted that the appellate court in the *Ehlers* case adopted and applied the State Board's decision in *Morgan* and held that Ehlers had *Weingarten* rights, and the Sheriff had violated those rights. No other Illinois court has adopted *Weingarten* or *Morgan* with respect to the right to have union representation present during an investigatory interview. Without deciding the issue as to whether such a right exists for public sector employees, the Supreme Court held that Ehlers' collective bargaining agreement expressly waived whatever rights she may have had in that regard.

The Supreme Court stated that where a union contractually waives the *Weingarten* rights of its members, a court must enforce the contract as written. In *Ehlers*, the collective bargaining agreement provided that "where a law enforcement employee is under investigation, or subject to interrogation…the investigation or interrogation shall be conducted in accordance with the provision of the Uniform Peace Officers' Disciplinary Act." 50 ILCS 725/1 *et seq.* (West 1992) (the "Act"). The Act specifically addresses the presence of a union representative, providing that a representative shall be present during an interrogation unless this right is waived by the person being interrogated. 50 ILCS 725/3.9 (West 1992).

The major issue before the court, therefore, was the definition of the word "interrogation." The Act defines interrogation as "the questioning of an officer pursuant to the formal investigation procedures" but *not* "questioning (1) as part of an informal inquiry or (2) relating to minor infractions of agency rules which may be noted on the officer's record but which may not in themselves result in removal, discharge or suspension in excess of 3 days." 50 ILCS 725/2(d) (West 1992). The Act defines a "formal investigation" as "the process of investigation ordered by a commanding officer during which the questioning of an officer is intended to gather evidence of misconduct which may be the basis for filing charges seeking his or her removal, discharge or suspension in excess of 3 days." 50 ILCS 725/2(c) (West 1992). In contrast, an "informal inquiry" is a "meeting by supervisory or command

personnel with an officer upon whom an allegation of misconduct has come to the attention of such supervisory or command personnel, the purpose of which meeting is to discuss the facts to determine whether a formal investigation should be commenced." 50 ILCS 725/2(b) (West 1992). Thus, by its terms, the Act provides that law enforcement officers are not entitled to union representation during informal inquiries, but are only entitled to representation during formal investigations.

The Supreme Court opined that the language in Ehlers' collective bargaining agreement provided employees under investigation with the right to union representation at all times during an interrogation. The Court stated that in specifically providing the right to representation during interrogations, Ehlers' collective bargaining agreement necessarily withheld the right to union representation in all other circumstances. Therefore, the dispositive inquiry was whether Ehlers was being subjected to an interrogation.

The court found the evidence supported the conclusion that Ehlers was not subjected to an interrogation as defined by the Act. The court credited the Sheriff's testimony that when he called Ehlers into his office to speak with him about the events of December 26, 1994, he had no intention of disciplining her. His intention was only to find out what was going on, and the meeting was thus an informal inquiry under the Act's definition. The court further noted that Ehlers' refusal to obey the Sheriff's orders upon entering his office did not work to transform his informal inquiry of her into a formal interrogation.

Because Ehlers was involved in an informal inquiry, and not subjected to an interrogation within the meaning of the Act, she had no right to have a union representative present. Therefore, the Merit Commission's decision to discharge was confirmed.

Any questions concerning this case should be directed to Jim Spizzo (312/609-7705) or any Vedder Price attorney with whom you have worked.

- Return to: Public Employer Bulletin
- Return to the Vedder Price: Publications Page.
- Return to: Top of Page.

Search