VEDDER PRICE

Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

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:

January, 1999

CAN NON-HOME RULE ENTITIES BARGAIN AWAY STATUTORY DISCIPLINARY REVIEW PROCEDURES?

A hot topic of continuing interest in interest arbitration is whether a non-home rule jurisdiction can bargain away otherwise mandatory statutory procedures for reviewing disciplinary actions of police or fire employees. Recent decisions by an Illinois Appellate Court and Arbitrator Elliott Goldstein reached different conclusions in cases involving the City of Markham and Jefferson County.

By way of background, the Illinois Municipal Code provides that police officers in non-home rule jurisdictions may appeal disciplinary decisions to the Board of Fire and

Police Commissioners (commonly called the Merit Commission). If a disciplined police officer disagrees with the Merit Commission's decision, the Municipal Code provides that he or she may seek judicial review of the decision under the Illinois Administrative Review Law.

Despite similar statutory disciplinary review procedures, the unions in the City of Markham and Jefferson County cases both tried to negotiate provisions into their collective bargaining agreements whereby disciplined piece officers could choose to challenge disciplinary decisions through grievance arbitration or the Merit Commission. Both jurisdictions insisted that they could not agree to such a contract provision because it would circumvent statutory authority. In both cases, the parties agreed to submit the issue to interest arbitration.

In the Jefferson County case, Arbitrator Elliott Goldstein rejected the County's plea to hold his decision in abeyance until the courts provided more definitive guidance on this issue. Rather, the Arbitrator accepted the union's proposal, but with modifications. He fashioned a compromise contract provision whereby police officers can choose grievance arbitration or Merit Commission review for discipline up to a 29-day suspension, but discipline beyond a 29-day suspension can be appealed only to the Merit Commission.

In the City of Markham case, the arbitrator adopted the union's proposal in full, so that police officers could challenge any discipline through grievance arbitration or the Merit Commission. However, the City filed an action in the circuit court to vacate the arbitrator's award (a step apparently not taken in the Jefferson County case). The City claimed that (i) the Illinois Public Labor Relations Act (the "Act") prohibited the parties from bargaining over review procedures for police officer discipline, and (ii) the contract provision was unlawful because, as a non-home rule municipality, the City lacked the authority to disregard the disciplinary review procedures contained in the Municipal Code.

The City of Markham case ultimately came before the Illinois Appellate Court, which agreed with the City on both points and vacated the arbitrator's award. Because the Act gives parties the authority and duty to bargain only over wages, hours, and other conditions of employment that are not specifically provided for in any other law, the

Appellate Court found that the Act prohibits bargaining over appeal procedures for police officer discipline. Since the Municipal Code specifically addresses review of police officer discipline, the Appellate Court determined that the parties were not authorized to bargain over it.

The Appellate Court also agreed with the City that, as a non-home rule municipality, the City lacked the authority to circumvent the specific review procedures in the Municipal Code. The Appellate Court reasoned that since non-home rule municipalities lack the power to abolish or amend any statutory mandates, a non-home rule municipality, such as the City of Markham, cannot avoid its statutory obligations by contracting with a labor union. *City of Markham v. Teamsters Local No. 726,* 701 N.E.2d 153 (1st Appel. Dist. 1998).

The union petitioned to appeal the Appellate Court's ruling to the Illinois Supreme Court, but the petition was denied.

In the wake of the decision in *City of Markham*, appeals on this issue are pending in at least two other cases before the 4th Appellate District, County of Adams and PBPA and 5th Appellate District, County of Williamson and AFSCME.

The City of Markham case arms non-home rule jurisdictions with two arguments against the ongoing efforts of unions to circumvent the Merit Commission for review of police officer discipline. First, the Illinois Public Labor Relations Act does not authorize bargaining over procedures for reviewing police officer discipline. Second, non-home rule municipalities lack the authority to ignore or amend the Municipal Code, including its provisions for review of police officer discipline. These arguments should be helpful in persuading unions to abandon their efforts to inject grievance arbitration into police officer discipline in non-home rule municipalities.

For further information on this topic please contact Jim Spizzo (312/609-7705), Tom Wilde (312/609-7821) or any VPKK attorney with whom you have worked.

Return to Top of Document

COURTS CLARIFY THE AFFIRMATIVE DEFENSE

IN SEXUAL HARASSMENT CASES

In June of this past year, the United States Supreme Court issued two landmark opinions in the sexual harassment arena, *Burlington Industries v. Ellerth* and *Faragher v. Boca Raton*. These cases chipped away at the traditional division of sexual harassment cases into the "quid pro quo" and "hostile environment" categories, looking instead to see whether the alleged harassment resulted in a "tangible employment action." Under these new cases, employers are liable for sexual harassment by a supervisor that results in a tangible employment action, such as demotion or discharge. Such a situation would arise, for example, if a supervisor fired an employee for rejecting the supervisor's sexual advances.

However, if the supervisor's sexual harassment does not result in a tangible employment action, the employer may avoid liability if it can prove a two-pronged affirmative defense: (1) that it took reasonable measures to prevent and promptly correct any harassment, and (2) that the alleged victim unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer, or otherwise unreasonably failed to avoid the harm. Subsequent federal court decisions have helped clarify this defense.

When faced with a sexual harassment case, an employer must determine first whether the affirmative defense is available to it. At least one court has held that, although the affirmative defense arose in the context of supervisor-to-subordinate sexual harassment, the same analysis can apply in situations where a supervisor becomes aware of co-worker harassment and fails to take action. *Coates v. Sundor Brands, Inc.,* 160 F.3d 688 (11th Cir. 1998).

If there is supervisor involvement or inaction, the next step is to determine whether the alleged victim suffered a tangible employment action. Generally, such situations involve discharge or demotion. On the other hand, an employee being assigned extra work may not constitute a tangible employment action. *Reinhold v. Commonwealth of Virginia,* 151 F.3d 172 (4th Cir. 1998). Even where an employee has been discharged, the affirmative defense may still apply if a supervisor other than the one accused of sexual harassment terminated the employee.

Assuming the alleged victim has not suffered a tangible

employment action, the employer must prove that it took reasonable steps to prevent and promptly correct any harassment. The Supreme Court suggested that having an effective anti-harassment policy can demonstrate a reasonable effort to prevent harassment. However, it is not enough simply to promulgate a policy; employers should ensure that it is widely distributed, contains a complaint procedure that does not limit an employee to complaining only to his or her supervisor, and is supplemented by training for managers in what constitutes sexual harassment and how to respond when an employee does complain. Employees should be assured that complaints will be handled confidentially to the extent consistent with a thorough investigation, and that they will be protected against retaliation for good-faith reports of sexual harassment. Employers should investigate and take appropriate action immediately after receiving a complaint.

Even if an employer has an effective policy, it also must show that the employee unreasonably failed to take advantage of it. Recent court decisions have held that employees acted unreasonably when they failed to make use of the complaint procedures contained in sexual harassment policies because they were too ashamed to report the conduct, or because they did not trust that the employer would respond appropriately (without a sound basis for this belief). *Montero v. AGCO,* 19 F. Supp.2d 1143 (E.D. Cal. 1998); *Landrau Romero v. Carribean Restaurants, Inc.,* 14 F. Supp.2d 185 (D.P.R. 1998). Similarly, an employee unreasonably failed to take advantage of the employer's complaint procedures when she waited until she transferred out of the harassing environment before complaining. *Duran v. Flagstar Corp.*, 17 F. Supp.2d 1195 (D. Colo. 1998). However, when the employer's complaint procedures require him or her to complain to the harassing supervisor, the Equal Employment Opportunity Commission has taken the position that an employee need not complain if there is a reasonable risk of retaliation, or if the harassment was severe.

Many employers are legitimately concerned in the wake of the *Ellerth* and *Faragher* decisions. However, the prudent course of action for employers remains the same as before these two decisions: disseminate widely a comprehensive and effective sexual harassment policy, make sure that managers are trained in how to avoid sexual harassment

and how to treat sexual harassment complaints, and investigate thoroughly all complaints of sexual harassment, taking action where appropriate. For further information on sexual harassment, please contact Jim Spizzo (312/609-7705), or any Vedder Price attorney with whom you have worked.

Return to Top of Document

FREQUENT AND UNPREDICTABLE ABSENCES DEFEAT ADA CLAIM

The Seventh Circuit recently addressed whether a plaintiff who was frequently and unpredictably absent from work due to her disability was a qualified individual with a disability for the purposes of the Americans With Disabilities Act ("ADA"). The plaintiff in *Corder v. Lucent Technologies* (1998 WL 854421 7th Cir. 1998), suffered from severe and recurrent bouts of depression and anxiety after the death of her mother. In 1991, the plaintiff worked only 9 weeks. In 1992, the plaintiff took 19 weeks off in paid leave and failed to complete a single work week after that. In 1993, the plaintiff took another 9 weeks off in paid leave and was allowed to leave work one half hour earlier. In 1994, the last year the plaintiff actually worked, she missed 49% of her scheduled shifts. After two years of attempting to work with the plaintiff, her attorney and psychiatrist to accommodate her disability, plaintiff's employer finally terminated her employment in 1996. Plaintiff subsequently filed suit alleging that her termination violated the ADA.

Affirming a lower court's grant of summary judgment in favor of the employer, the Seventh Circuit found that, although the plaintiff possessed the necessary skills for her job, she nonetheless failed to show that she was qualified for it. Emphasizing that an employee who does not come to work cannot perform the essential functions of her job, the court held that the plaintiff could not show that she was able to attend work reliably and, therefore, was not a qualified individual with a disability for the purposes of the ADA.

The Seventh Circuit also held that even if the plaintiff could show she was a qualified individual with a disability, her refusal to accept the more than reasonable

accommodations that her employer proposed to her was fatal to her claim. In reaching this holding, the court noted that "…an employer is not obligated to provide an employee the accommodation he [or she] requests or prefers, an employer need only provide some reasonable accommodation."

If you have any questions about the implications of this case or compliance with the Americans With Disabilities Act, contact Jim Spizzo (312/609-7705), or any other Vedder Price Attorney with whom you have worked.

Return to Top of Document

ILLINOIS NURSING HOME CARE ACT IMPLIES STATUTORY PRIVATE RIGHT OF ACTION FOR RETALIATION

On December 8, 1998, in a case of first impression, an Illinois Appellate Court recognized an implied statutory private right of action for retaliation suffered by nursing home employees who make reports, participate in actions, and file complaints under the Nursing Home Care Act. In *Fisher v. Lexington Health Care, Inc.* (1998 WL 850519 Ill. App. 2nd Dist. 1998), nursing home employees alleged that they were victims of retaliatory harassment, intimidation and demotion as a result of their reporting of, and cooperation, in the investigation of an elder abuse and neglect case, pursuant to the Nursing Home Care Act. A lower court had dismissed the employees' complaint, concluding that the Nursing Home Care Act, which expressly prohibits licensees from retaliating against employees for their efforts in furtherance of the Act, provided no private right of action for retaliation.

An earlier decision, *Shores v. Senior Manor Nursing Center* (164 Ill. App. 3d 503, 3d Dist. 1988), already had recognized that the Nursing Home Care Act expresses a state public policy sufficient to sustain a common law retaliatory discharge claim. However, the *Fisher* court emphasized that, although Illinois courts have recognized a private right of action for retaliatory discharge, Illinois has not recognized a private right of action for any retaliatory injury short of discharge. The court held that the implication of a statutory private right of action based on the Nursing Home Care Act was necessary to provide

an adequate remedy for the retaliatory behavior identified by the Act.

In reaching its decision, the *Fisher* court noted the similarity of the Nursing Home Care Act's anti-retaliation provisions with those of other laws "intended to safeguard the rights of vulnerable persons in our society." Illinois courts have yet to address whether two of those laws, the Abused and Neglected Child Reporting Act and the Elder Abuse Act, imply a statutory private right of action for retaliation.

If you have any questions about the implications of this case or common law or statutory retaliation claims, contact Jim Spizzo (312/609-7705), or any other Vedder Price Attorney with whom you have worked.

Return to Top of Document

transactions;
- public finance;
- contract law; and
- litigation.

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

"SUSPICIONLESS" DRUG TESTING OF PUBLIC SCHOOL TEACHERS UPHELD

"Suspicionless" drug testing of teachers and other public school employees in "safety-sensitive" positions does not violate the Fourth Amendment right to be free from unreasonable search or seizure, the Sixth Circuit Court of Appeals recently held.

In *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998), the Sixth Circuit examined the constitutionality of the first part of a two-pronged drug testing policy adopted by the Board of Education. The policy provided that 1) employees who occupy "safety-sensitive" positions would be tested on a one-time, suspicionless basis; and 2) other employees may be tested if reasonable suspicion supported a belief that they were using drugs or alcohol during work. "Safety-sensitive" was defined as "positions where a single mistake by the employee can create an immediate threat of serious harm to the students and fellow employees," and would include principals, assistant principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries, and school bus drivers.

Reversing the lower court, which had struck down the

suspicionless testing program as unconstitutional, the appeals court concluded that the one-time, suspicionless testing of individuals hired to serve in teaching and administrative positions is reasonable in light of the strong public interest in safe schools, and the lower expectation of privacy among employees in a heavily regulated area. The court noted that public schools are regulated with respect to teachers' roles and responsibilities in everything from drug abuse education to attendance and report cards, as well as tenure and licensing requirements, and therefore public school employees have a diminished expectation of privacy.

The Sixth Circuit also based its decision in part on the "minimally intrusive" characteristics of the drug testing policy at issue. Specifically, the program did not include a random testing component. It tested only those persons employed in or seeking jobs in a select group of positions; it restricted the process for screening and retesting positive samples; it preserved confidentiality of all aspects of the testing process; it involved a medical doctor in assessing the results of the tests; and it preserved privacy in giving samples, unless there was evidence the sample was being adulterated.

The Seventh Circuit has not ruled on the constitutionality of suspicionless testing of teachers and other public school employees under similar circumstances as those in *Knox County*. But the Seventh Circuit has upheld random testing of all students involved in extracurricular activities, in *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998); while rejecting a policy mandating a drug and alcohol test for any student who engages in misconduct. *Willis v. Anderson Community School Corp.*, 158 F.3d 415 (7th Cir. 1998).

For further information on this topic, please contact Bruce R. Alper (312/609-7890) or any VPKK attorney with whom you have worked.

Return to Top of Document

ADEA AMENDMENT EXEMPTS TENURED FACULTY FROM MANDATORY RETIREMENT BAR

Recent amendments to the Age Discrimination in Employment Act ("ADEA") carve out an exception to the law's prohibition against mandatory retirement, allowing colleges and universities to offer voluntary, age-based early retirement incentives to tenured faculty without violating the federal age bias law.

The Higher Education Amendments of 1998 include a "safe harbor" provision for institutions of higher education by clarifying that it is permissible for colleges and universities to offer tenured faculty "supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age." The exemption requires that these benefits be provided in addition to any retirement or severance benefits generally offered to employees with similar contracts.

Public employers already enjoy other exemptions from ADEA's prohibitions. Those exemptions permit state and local governments the option of setting mandatory retirement ages for public safety officers, including police and firefighters, without violating ADEA.

Return to Top of Document

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

Home | Legal Services | Attorneys | **Publications** | Recruiting | Seminars | Speakers | Alumni | Contact Us | Search