**RASHRM**

**EMPLOYMENT LAW UPDATE**

**APRIL 2014**

**DISCRIMINATION**

Federal Circuit Courts

*Bass v. Joliet Public School District No. 86*, (7th Circuit March 26, 2014)

***Facts***: Plaintiff worked the second shift as a custodian for the school district. Due to growth at the school, a second floor was added to the school. A second employee was added to second shift and Plaintiff continued to be responsible for the first floor cleaning while the second employee was responsible for the new floor. Several years later, a consultant was hired to evaluate various custodial tasks and make recommendations on how to improve efficiency. The consultant determined that the tasks associated with the new floor took more time to complete than those tasks on the first floor. As such, certain tasks for the second floor were assigned to Plaintiff. Plaintiff complained that the reallocation of work was unfair. About this time, Plaintiff also started having performance issues which led to two suspensions without pay. Plaintiff did not contest the suspensions and admitted not having completed all of her assigned cleaning duties. Prior to her termination, Plaintiff had taken all of her allocated leaves of absences. Due to an injury on the job, she sought an additional leave. She was told that her leave had been exhausted and if she failed to report to work, she would be terminated. When she failed to report to work, she was terminated. Plaintiff subsequently filed a claim for sex discrimination.

***Summary***: Initially, the Court found that any claim based on the original reassignment of work was time-barred because the Complaint was filed in excess of 300 days from the date the reassignments took place. The Court rejected her claim that the school district’s conduct constituted “continuous harm”. The reassignment of duties is a discrete and separate act, triggering the 300 days filing period. A “new violation” does not occur each day the reassignment remains in effect.

Moreover, the reassignments were based on a legitimate non-discriminatory reason---the consultants report. Plaintiff failed to present any evidence to suggest that legitimate business reason was pretextual. Plaintiff also failed to present any evidence that her termination was due to her being a woman. Plaintiff bears the burden of presenting some evidence that would allow a rational jury to infer intentional discrimination (direct method). Under the indirect method, she failed to present evidence that she had been performing her job satisfactorily and further failed to present evidence that similarly situated male employees were treated differently.

**PENSIONS**

Illinois Appellate Courts

*Swanson v. Board of Trustees of Flossmoor Police Pension Fund*, 2014 Ill.App. 130561 (March 3, 2014)

***Facts:***Plaintiff was a detective for the Flossmoor Police Department. On the night following a poor performance evaluation, he had trouble sleeping. On the drive to work the following day, he had to return home because of numbness in his arm and his mouth was drooping. His wife also detected slurred speech. He was taken to the hospital and treated for a transient ischemic attack (TIA). His discharge diagnosis was an unspecified cerebral arterial occlusion and hypertension. He had been treating for hypertension for the four years prior to his hospital admission. He was released to return to full duty approximately 20 days later. Over the next several months, the Plaintiff suffered several incidents of light-headedness, numbness in his arm and anxiety while at work. He was placed on FMLA leave. He returned to work, but two days later had additional similar symptoms. He then applied for disability benefits claiming he had suffered a stroke in the line of duty.

***Summary:*** The Pension Board denied his “in-line of duty” pension on the basis that there was insufficient proof that the Plaintiff’s disability was the result of a stroke suffered as a result of the performance of his duties as a police officer. Instead of receiving a 65% pension, he was awarded a 50% pension pursuant to the Illinois Pension Code. In affirming the Pension Board’s ruling, the Appellate Court noted that in order to get the higher pension, it was Plaintiff’s burden to prove that his disability was the result of a stroke suffered as a result of the performance of his duties as a police officer. Given the fact that several medical providers noted that the stroke had an “unclear etiology”, the Board’s assessment of the medical evidence could not be overturned.

*Scepurek v. Board of Trustees*, 2014 IL App 131066 (First Dist., March 4, 2014)

***Facts:*** The Plaintiff was a firefighter/paramedic for the Village of Northbrook. He filed a duty disability pension under Section 4-110 of the Illinois Pension Code as a direct result of a back injury he suffered while on the job in May of 2010 while performing CPR after responding to an emergency call. The Plaintiff’s initial treating physician told him that he was permanently disabled to work as a firefighter/paramedic, and the opinion of a second physician declared the same. The Plaintiff filed his application for a disability pension in April of 2012.

Pursuant to Section 3-115 of the Code, the pension board selected three physicians to perform independent medical evaluations of the Plaintiff. The three physicians unanimously declared that the Plaintiff was permanently disabled and the disability was caused, at least in part, by the injury he suffered in May of 2010. Despite the unanimous opinions of the physicians, the board concluded that Plaintiff’s disability was permanent but was not in any way caused by any activity performed by him on the job. According to the board, the evidence showed that the Plaintiff fully recovered from the back injury from May of 2010, and that the sole cause of his disability was the preexisting degenerative changes in his lower back. Therefore, the board denied Plaintiff’s application for a duty-related disability. The trial court affirmed the board’s decision and the Plaintiff appealed.

***Summary:*** The appellate court determined that the board’s decision was against the manifest weight of the evidence, as there was nothing in the record to support the board’s conclusion. Five physicians unanimously agreed that the Plaintiff was permanently disabled and his disability was due, at least in part, by the injury that occurred in May of 2010. The Court found that the board had improperly ignored the medical evidence and substituted its own evidence of the Plaintiff’s credibility, which had no basis in fact.

**RETALIATORY DISCHARGE**

Federal Circuit Courts

*Reid and Davis v. Neighborhood Assistance Corp. of America,* (7th Cir. No. 13-1768, April 1, 2014)

***Facts:*** Plaintiffs were at-will mortgage consultants for NACA, a nationwide not-for-profit entity that assisted potential homeowners in obtaining mortgages. During their employment, Plaintiffs made complaints that they were not being paid minimum wage in accordance with Illinois law and also complained that NACA violated state and federal mortgage laws. Several other NACA employees made similar complaints, but none were terminated. Plaintiffs were terminated, according to the employer, for violating policies related to paperless files and timely submission of information related to pending mortgage applications. The employer conceded that there were other employees that also violated the paperless file policy that had not been terminated.

***Summary:*** To survive a Motion for Summary Judgment in a retaliatory discharge claim, the Plaintiff must offer sufficient evidence to find that (1) the employer discharged the employee (2) in retaliation for the employee’s protected activities, and (3) that the discharge was in contravention of a clearly mandated public policy. For the element of causation, the ultimate issue is the employer’s motive in discharging the employee. This motive may be shown by circumstantial evidence that includes factual scenarios that give rise to a reasonable inference that the employer’s motive was retaliatory. Here, Plaintiffs asserted that the employer’s later explanation of additional reasons for Plaintiffs’ termination should be viewed as evidence of pretext which could give rise to an inference of retaliatory intent. In affirming summary judgment, the court rejected Plaintiffs argument of suspicious timing explaining that suspicion does not create an inference. Moreover, although shifting and inconsistent reasons for termination can give rise to an inference of retaliatory intent, here, the employer’s reasons for termination (paperless file) was always the principal reason. The fact that additional reasons were added, simply explained how the employer differentiated the Plaintiffs from other employees that had violated the policy and were not terminated.

**UNEMPLOYMENT**

Illinois Appellate Courts

*Baker v. The Illinois Dept. of Employment Security*, 2014 Ill.App. 123669 (First Dist. March 14, 2014)

***Facts:*** Plaintiff was an electrician for the Chicago Park District for 14 years. Two weeks after the Arizona shooting in which a U.S. Congresswoman and 18 others were shot, the Plaintiff was in a meeting with his foreman and another co-worker when he said “I don’t want this to turn into an Arizona thing” and directed the comment to each of the employees that were present. The Plaintiff was terminated for violating the District’s policy prohibiting violence in the workplace. His application for unemployment benefits was denied because he had been discharged for misconduct connected with his work. In the appeal, the employer presented evidence that the Plaintiff had received at least three prior warnings for violent threats in the workplace.

***Summary:*** During the administrative review proceeding, Plaintiff admitted that the “going Arizona” comment referred to the killings in Arizona. However, he stated the comments were not credible and could not be considered as threatening. The Court defined “misconduct” as used in the unemployment context as (1) a deliberate and willful violation of (2) a reasonable rule or policy (3) that harms the employer or other employees or has been repeated by the former employee despite a warning or the employer’s explicit instructions. An employee is deemed to have willfully violated a work rule or policy when he is aware of and consciously disregards the rule. The Court upheld the denial of benefits

*C.R. England, Inc. v. The Dept. of Employment Security*, (1st Dist. March 21, 2014)

***Facts:*** An over-the-road truck driver hauled freight for CRE, a national trucking company, pursuant to an independent contractor operating agreement. During a delivery, the trucker pulled into the Walmart parking lot and struck a utility pole causing thousands of dollars of damages to Walmart’s trailer. CRE’s safety department disqualified the trucker from further driving for CRE and terminated his contract. Thereafter, the trucker applied for unemployment benefits. At the hearing, CRE claimed it was not the “chargeable last employer” because the trucker’s services for CRE should be excluded from the definition of employment because the trucker was an independent contractor and not an employee of CRE. CRE further claimed that the trucker was not eligible for unemployment benefits because he had been discharged for employment-related misconduct. Administratively, the Department found the trucker to be an employee for purposes of unemployment benefits and, as such, CRE was the chargeable employer. Additionally, the Department found the trucker had been terminated for being involved in an accident, not for employment-related misconduct.

***Summary:*** In determining whether an entity is a chargeable employer, the Court is not bound by traditional definitions or analysis of employer versus independent contractor. Rather, the Court is bound to follow the definitions of the Unemployment Insurance Act. Since the trucker clearly performed services for CRE (who met the statutory definition of an employing unit) who had a base of operations in Illinois, CRE was the chargeable last employer. CRE could not establish all three statutory factors to meet the independent contractor exemption: (1) that the trucker was free from CRE’s control or direction over performance of the services (2) the services were outside the usual course of CRE’s business, and (3) the trucker was engaged in an independently established trade or business.

In considering whether the trucker had been discharged for employment-related misconduct, the Court focused on the “deliberate and willful” violation of a company rule or policy. To the contrary, the trucker attempted to drive to the best of his ability. He was involved in an accident and there was no indication that he deliberately or willfully caused damage to Walmart’s trailer. As such, the trucker was not discharged for employer-related misconduct and was entitled to unemployment benefits.

*Farris v. The Dept of Employment Security*, 2014 IL App 130391 (4th Dist., March 11, 2014)

***Facts:*** Plaintiff worked as a farmhand in the breeding barn of a pork production facility. Pursuant to a biosecurity policy contained within the employee handbook, employees were required to remove all clothing, shower and walk through the shower area into the “clean area” and put on clothing supplied by the farm before entering the breeding facility. The policy was designed to prevent the spread of disease easily carried on shoes, clothing, fingernails, hair and jewelry. A supervisor could not locate Plaintiff and received a report that he may be sleeping in the bathroom located outside of the “clean area.” The supervisor went to bathroom and heard snoring coming from the bathroom. Upon knocking, the snoring stopped, the Plaintiff then stated he was using the bathroom, flushed the toilet and then came out. He was wearing the farm-provided clothing which had been soiled with pig manure from activities Plaintiff had been involved in within the “clean area.” Plaintiff was terminated for violating the biosecurity policy. Plaintiff claimed he would have showered before reentering the clean area, but was terminated prior to being given the opportunity.

***Summary:*** Terminations for misconduct that are job related preclude a person from being eligible for unemployment benefits. Plaintiff conceded that he had violated the biosecurity policy by using a restroom in the dirty area of the facility after having been in the clean area. However, he contended that no harm had been caused by his violation because he had been terminated before reentering the clean area. The Court noted, however, that harm to the employing unit must be measured in the context of potential harm, not in the context of actual harm. In this case, had the supervisor not intervened, the Plaintiff would have reentered the clean area without showering. This would have exposed the pigs to bacterial contaminants. This potential harm was sufficient to constitute misconduct that was employment-related. Thus, unemployment benefits were properly denied.

**WORKERS’ COMPENSATION**

Illinois Appellate Courts

*Compass Group v. Illinois Worker’s Compensation Commission*, 2014 Ill. App 121283 (2nd Dist., March 28, 2014)

***Facts:*** Claimant injured his back while picking up a case of pop in the course of his employment. He continued to work, although in considerable pain. He continued to work over the next several days during which time he also received medical treatment. Approximately one week later, while coming down a flight of stairs at home, his left foot gave way and he fell. Although paramedics were called to his residence, he denied treatment and went to work instead. He attempted to do paperwork most of the day, but eventually have into the pain and called an ambulance. In addition to the original back pain, he also received treatment for abrasions to his head, knees, elbows and fingers. X-rays confirmed bursitis in both elbows. A blood test revealed a blood infection. He was moved to ICU and he began bleeding in his gastrointestinal system. Several other medical conditions developed in the hospital and he was eventually transferred to a long-term care facility.

***Summary:*** The Court initially deferred to the Commission as to the issue of causation. Since there was no evidence to suggest that the blood infection had been long-standing, the Commission’s finding in support of causation was upheld. All of the medical conditions and corresponding medical bills were causally connected to the original injury to claimant’s back. Claimant also successfully argued that he should be entitled to compensation for modifications he made to his home that had been recommended by his physical therapist. These included a chair lift and modifications to his bathroom. The Court held that a physician’s order was not necessary, but that the recommendation of the physical therapist was sufficient.

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