**RASHRM**

**EMPLOYMENT LAW UPDATE**

**JULY 2014**

**PENSIONS**

Illinois Supreme Court

*Kanerva v. Weems*, 2014 IL 115811 (July 3, 2014)

***Facts***: The plaintiffs were members of three state employees’ retirement systems who brought class action lawsuits challenging the constitutionality of Public Act 97-695 which amended Section 10 of the State Employees Group Insurance Act (5 ILCS 375/) by eliminating the statutory standards for the state’s contributions to health insurance premiums for the members of the three state retirement systems. Prior to the implementation of Public Act 97-695, the state was required under the Group Insurance Act to pay the full cost of health benefits for pre-1998 members and to make specified contributions for the post-1998 members. Pursuant to Public Act 97-695, the Group Insurance Act was amended and the administrative rules that promulgated the Public Act, altered the state’s contribution obligation for all members, and gave the state the right to charge the members a portion of the premiums for the health insurance benefits.

The plaintiffs contended, among other things, that Public Act 97-695 violated the pension protection clause of the Illinois Constitution (art. XIII, §5) because the state contribution obligations under the pre-amended Group Insurance Act constituted a benefit of membership in those pension systems and the Public Act diminished or impaired that benefit.

***Summary***: The Circuit Court of Sangamon County dismissed all of the complaints, finding that the plaintiffs failed to state a cause of action under the pension protection clause. Agreeing with the state defendants, the Circuit Court found that the pension protection provision protects only traditional pension benefits and does not encompass the state’s obligations to contribute toward the cost of health care benefits for retired employees and their survivors. The Illinois Supreme Court reversed and remanded.

Although the plaintiffs brought other claims under the Illinois Constitution, as well as claims of promissory estoppel and for injunctive relief, the central issue before the Illinois Supreme Court was whether the Circuit Court erred in dismissing plaintiffs’ claims that Public Act 97-695 violated the pension protection clause. The question of whether the pension protection clause applies to an Illinois public employer’s obligation to contribute to the cost of health care benefits for employees covered by the public employer’s retirement systems presented an issue of first impression for the Supreme Court.

On appeal, the state defendants asserted that the state contributions to retiree health insurance premiums are not included within the protections afforded by the pension clause because they are fundamentally different from pension annuities. They are not codified in the Pension Code and are not paid from the assets of the retirement funds established in the Pension Code. The state defendants maintained that the reach of the pension clause is confined to the retirement annuity payments authorized by the Pension Code.

The Illinois Supreme Court, however, disagreed with the state’s assertion. The Court determined that, given the pension provision’s plain and ordinary meaning, all of the benefits that are limited to, conditioned on, and flow directly from membership in the state’s public pension system must be considered to be benefits of membership in a state pension or retirement system and, therefore, within the provision’s protections. If the drafters of the Illinois Constitution of 1970 had intended to protect only core pension annuity benefits and to exclude the various other benefits public employees were and are entitled to receive as a result of membership in the pensions systems, the drafters would have so specified, but they did not.

Illinois Appellate Courts

*Board of Trustees of the Riverdale Police Pension Fund v. Village of Riverdale*, 2014 IL App (1st) 130416 (June 27, 2104).

***Facts:*** The village’s police pension board filed an action against the village, claiming the village breached its statutory funding obligations under Sections 3-125 and 3-127 of the Pension Code by failing to levy the appropriate taxes for police pension contributions. Section 3-125 of the Code requires municipalities to levy a tax upon property sufficient to fund police pension obligations and to forward those funds to the pension board’s treasurer within 30 days of receiving those funds. Section 3-127 of the Code requires the pension board to establish and maintain a reserve to ensure the payment of all obligations. In addition, because the Illinois Department of Insurance regulates public pension funds, the Department issues an annual report to the pension board indicating the tax amount necessary to meet the municipal contribution requirements of the Code for each year. The pension board in turn passes those recommendations onto the municipality. The pension board claimed that the village breached its funding obligations because the village did not follow the actuarial recommendations. This, the pension board sought a declaratory judgment ordering the village to follow those recommendations and to turn over all pension contributions in its possession. The village admitted that it did not follow those recommendations. The village additionally admitted that it owed money to the pension fund due to an accounting practices oversight. The village mistakenly deposited the funds owed to the pension fund into its general fund.

***Summary:*** The pension board filed a motion for partial summary judgment as to liability, arguing that it was entitled to summary judgment where it was undisputed that the village failed to follow the actuarial recommendations and submit the funds owed to the pension fund. The trial court denied the pension board's motion for partial summary judgment and entered judgment for the village. The trial court determined that the relevant Sections of the Pension Code did not give the pension board a vested contractual right to the pension funding level in the pension fund. None of these sections mention any right to enforce any statutory funding levels, and they do not expressly give the pension board final decision making authority to determine the amount needed to ensure the pension fund's reserve. The pension board appealed.

The appellate court affirmed in part and reversed in part. The appellate court agreed with the village in that the relevant sections of the Pension Code did not create a vested contractual right to the pension funding level. According to the appellate court, the village was entitled to summary judgment on this issue because: (1) the statutes at issue provide the village with discretion in implementing the funding recommendations; (2) the pension board failed to satisfy its burden of providing statutory language to establish a contractual right to specified funding; and (3) there was no evidence that the fund was at risk of denying benefits.

The appellate court determined, however, that the village was liable for the money it collected by levying taxes for the pension fund but failed to remit to the pension fund, pursuant to Sections 3-125, 3-132, and 22-403 of the Pension Code. Based on the language of these statutes, the village was required to forward the money collected to the treasurer of the pension board. Thus, the appellate court remanded the matter back to the trial court for a determination of the amount the village was required to remit.

Federal Circuit Courts

*Maine Assoc. of Retirees v. Board of Trustees,* No. 13-1933 (1st Cir. June 27, 2014)

***Facts:*** The plaintiffs were members of the state’s teacher retirement system who alleged that their contractual rights were impaired by certain amendments to the retirement system. Prior to 2011, all retirees received an annual COLA (cost-of-living adjustment) increase that matched the Consumer Price Index up to a maximum of four percent. In 2011, the state legislature amended the statutes governing the calculation of COLAs by prohibiting COLA payments for three years, and reduced the maximum COLA to three percent and only on the first $20,000 of the retirement benefit. The plaintiffs claimed that the amendments violated the Contract and Taking Clauses of the U.S. Constitution because they had the effect of decreasing their cost-of-living adjustments (COLSAs). The district court granted the state board’s motion for summary judgment and the First Circuit Court of Appeals affirmed.

***Summary:*** The legislature amended the terms of its retirement system in 1999, providing that certain enumerated protections “constitute solemn contractual commitments of the State protected under the contract clauses of the” state and federal constitutions. The enumerated provisions all relate either to the eligibility qualifications for particular benefits or to the computation of those benefits. Additionally, subsection (2) of the 1999 amendment specifies that the “solemn contractual commitments” only apply to those enumerated provisions. The amendment further provided that any provision not specifically identified may be increased, decreased, changed or eliminated by the legislature as to any member regardless of whether the member has or has not met any creditable service requirement for eligibility to receive a service retirement benefit.

Therefore, the courts divided their analysis into two parts, the pre- and post-1999 retirees. In either instance, however, the state legislature did not “unmistakably intend” to create contractual rights to COLA increases. As for the post-1999 retirees, they were entitled only to the “solemn contractual commitments” contained in the enumerated provisions, and COLA increases were not on that list. Therefore, their COLA increases were subject to change pursuant to subsection (2).

**RETALIATORY DISCHARGE**

Illinois Appellate Courts

*Taylor v. Board of Education of City of Chicago*, 2014 IL App 123744 (1st Dist. May 6, 2014)

***Facts:***Plaintiff, an assistant principal, claimed he was discharged in retaliation for reporting abuse allegedly perpetrated on a student by a special education teacher. Another teacher had reported the incident of alleged abuse, but refused to report the incident to DCFS out of fear for retaliation from the school principal. After checking with the school’s legal department, the assistant principal reported the incident to DCFS and the local police department. Thereafter, the principal downgraded the assistant principal’s performance evaluation and, eventually, failed to renew the assistant principal’s contract. Plaintiff filed an action for retaliatory discharge and an action under the Illinois Whistleblowers Act. The jury returned a verdict in plaintiff’s favor in the sum of $1,000,500. The trial court also awarded plaintiff his attorney’s fees.

***Summary*** The Appellate Court reversed the trial court as it related to the retaliatory discharge claim. Since the Plaintiff was not an “at-will” employee, he could not state a claim for retaliatory discharge. Under Illinois law, retaliatory discharge claims are limited to cases involving the discharge of an at-will employee. Since the assistant principal had a 4-year contract, he was deemed not to be an at-will employee.

However, the Appellate Court affirmed the trial court’s finding of liability under the Illinois Whistleblowers Act. The court, however, remanded the case for a new trial on damage because the jury was allowed to consider evidence of retaliatory acts prior to the statute’s limitations period and the jury was given improper instructions by the Court when the instructions combined the retaliatory discharge and Whistleblower Act violation into a single verdict form.

Federal Circuit Courts

*Barrett v. Salt Lake County*, Nos. 13-4084, 13-4125 (10th Cir. June 13, 2014)

***Facts:*** A county employee was demoted, following the mandatory administrative procedures and optional internal process, after he helped a co-worker pursue a sexual harassment claim. He subsequently filed a lawsuit against the county under Title VII, alleging the county demoted him in retaliation for helping the co-worker pursue that claim. The jury returned a verdict in favor of the plaintiff, finding that if it wasn’t *but for* his protected activity of helping his co-worker in her sexual harassment claim, the plaintiff would not have been demoted. Since the plaintiff’s position was filled by a replacement, the district judge ordered equitable relief by ordering the plaintiff’s previous pay to be reinstated. The district judge also awarded the plaintiff attorney fees.

***Summary:*** On appeal, the county argued that it was entitled to judgment as a matter of law (JMOL) because the plaintiff failed to prove a *prima facie* case of retaliation under the doctrine of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The appeals court determined, however, that the *McDonnell Douglas* doctrine does not create a pleading requirement or in post-trial JMOL motions, as the doctrine applies to the examination of summary judgment motions. Nevertheless, viewing the evidence in the light most favorable to the jury’s verdict, the court found ample evidence to sustain a *prima facie* case of retaliation in violation of Title VII.

In the alternative, the county claimed that it was entitled to a new trial because of a problem with the jury instructions. According to the county, the district judge improperly gave both “but for” and “mixed motive” causation jury instructions because the U.S. Supreme Court has since held that only the “but for” causation standard can be employed in Title VII retaliation lawsuits. The appeals court determined, however, that the county was not entitled to a new trial because the jury in the present case specified that it employed that “but for” standard and rejected the “mixed motive” standard.

The county then challenged the district court’s award of equitable relief. The county thought it was unfair to require it to reinstate the plaintiff’s pre-retaliation pay grade while remaining in his demoted position due to the filling of his previous position. The appeals court determined, however, that the district court’s ruling was appropriate, because Title VII authorizes a district court broad discretion to bring a Title VII plaintiff back to the position prior to a violation, which is what the district court did.

However, the appeals court found a problem with the award of attorney fees. The plaintiff was entitled to attorney fees for every aspect of the mandatory administrative and judicial processes, but not for the optional internal grievance process. Therefore, the appellate court vacated the attorney fees award and remanded the matter solely on that issue.

**WORKERS COMPENSATION**

Illinois Appellate Courts

*Tolbert v. Illinois Workers’ Compensation Commission*, 2014 IL App (4th) 130523 WC (4th Dist. June 5, 2014)

***Facts:*** An employee for a grain elevator sought workers compensation benefits after contracting respiratory problems from being exposed to airborne dust particles, including dried bird droppings. His doctor diagnosed him with a lung condition, histoplamosis, after he had quit working. The employee filed his claim more than 45 days after he left his employment.

***Summary:*** The issue on appeal was whether an accidental injury occurred that arose out of and in the course of employment. The Commission had determined that although the evidence confirmed the employee had histoplamosis, there was no evidence to suggest that the workplace presented an environment that could cause histoplasmosis. Although the Commission’s determination of factual issues is given great deference, the Appellate Court overturned the Commission’s finding because the employee had in fact presented evidence that histoplasmosis can be caused by dried bird feces and such an environment was present in the grain bins where the plaintiff worked.

*Levato v. Illinois Workers' Compensation Commission,* 2014 IL App (1st) 130297WC (June 30, 2014).

***Facts:*** The claimant, who was an employee for the City of Chicago, filed a workers' comp claim for permanent and total disability after he injured his lower back while on the job. Following a hearing, although the arbitrator found that the claimant sustained an accidental injury arising out of and in the course of his employment, the claimant was only entitled to permanent partial disability (PPD) and ordered the city to pay him 75 weeks of PPD for 15% loss of use of a person as a whole. The arbitrator further found that the claimant was not permanently and totally disabled and that he was not entitled to wage differential benefits.

Before the commission, the claimant filed a petition to supplement his prayer for relief to include a request for wage differential benefits. The commission agreed with the arbitrator on all counts, except: (1) the commission increased the claimant's PPD benefits to 35% of loss of a person as a whole; and (2) the commission did not comment on the claimant's eligibility for wage differential benefits. The circuit court confirmed the commission's decision.

***Summary:*** The appellate court determined that the commission's decision that the claimant was only permanently partially disabled instead of permanently totally disabled was not against the manifest weight of the evidence, as there was sufficient evidence in the record to support the commission's determination. Thus, the appellate court affirmed that portion of the circuit court's confirmation of the commission's decision.

The appellate court, however, reversed the circuit court's confirmation of the commission's award of PPD benefits for 35% loss of use of a person as a whole. As noted, the claimant requested the wage differential benefits, but the commission denied the request without comment and awarded the 35% PPD benefits. The appellate court determined, however, that the commission was obligated to resolve the question. Therefore, the appellate court vacated the commission's PPD award and remanded the matter to the commission, directing it to decide the claimant's entitlement to a wage differential award on the merits.

**AMERICANS WITH DISABILITIES ACT**

Federal Circuit Courts

*Cohen v. City of Culver City,* No. 13-55079 (9th Cir. June 6, 2014)

***Facts:*** The plaintiff, an elderly man suffering from dementia who required a cane for mobility, filed suit against the city for allegedly violating Title II of the ADA after he was injured at a car show. The plaintiff was injured when he tripped and fell as he tried to walk around a vendor’s display that was blocking a sidewalk curb ramp. The plaintiff claimed that the city was liable by allowing the vendor’s display to completely block the curb ramp, impeding disabled access to the public sidewalk, and failing to post signs identifying alternative disabled access routes.

***Summary:*** The district court granted summary judgment for the city. Although it ruled a genuine dispute of material fact existed as to whether the plaintiff was disabled under the ADA, it found that he could have accessed the public sidewalk by traveling a “marginally longer route” to another disabled access curb ramp 20 yards down the street. On this basis, the district court determined that the city did not deny the plaintiff access to the public sidewalk under Title II of the ADA.

The Ninth Circuit determined that the district court erred in granting the city’s summary judgment. The district court’s “marginally longer route” standard was in error because that standard applies when a city is modifying its sidewalks to come into compliance with the ADA. Here, the sidewalk was already in compliance and the city allowed it to be inaccessible to the disabled. In addition, there was a genuine dispute of material fact as to whether the city denied the plaintiff access to a public service or otherwise discriminated against him under Title II. The Ninth Circuit, however, agreed with the district court that a genuine dispute of material fact existed as to whether the plaintiff was disabled under the ADA. Thus, the Ninth Circuit reversed in part and remanded.

**FAIR LABOR STANDARDS ACT**

Federal Circuit Courts

*Rosano v. Township of Teaneck,* No. 13-1263 (3d Cir. June 10, 2014)

***Facts:***The plaintiffs were 88 current and former police officers for the township claiming violations of the FLSA. The officers claimed that the township violated the FLSA by failing to (1) pay proper overtime; (2) provide compensation for time spent attending daily roll calls (muster time); and (3) provide compensation for time spent putting on and taking off uniforms and equipment each day (donning and doffing time). The district court granted the township’s motion for summary judgment.

***Summary:*** The district court found that the township was exempt from the general overtime requirements of §207(a) of the FLSA because the officers were engaged in law enforcement and the township established a qualifying work period as required under §207(k). Therefore, the township could raise the overtime threshold for its employees.

Regarding muster time, the district court concluded that the collective bargaining agreement between the township and the officers’ bargaining unit contemplated such time as part of the normal hours in any tour of duty and was already a component of the officers’ salaries.

Finally, the district court concluded that the conning and doffing times were not compensable under the FLSA because these are “preliminary and postliminary activities principal to the activity of police work.” In addition, the officers had the option of donning and doffing their uniforms and gear at home, and the option to change at work benefitted the officers more than the township.

The Third Circuit determined that the township qualified for an exemption to the general overtime provisions pursuant to §207(k) because the officers were engaged in law enforcement within the meaning of the FLSA, and the record supports a finding that the township adopted a valid §207(k) work period. Contrary to the officers’ contention, there is nothing in the language of the statute that required the township to express its intent to qualify for or operate under the exemption.

The court then determined that the officers failed to meet their burden in establishing damages. The only evidence submitted by the officers of alleged overtime damages was a spreadsheet, which based its calculations on the assumption that overtime accrued for any time worked beyond an eight-hour tour. Such a framework, however, does not provide any basis for discerning whether the hours worked exceeded the necessary threshold for overtime under the FLSA, which defines overtime entitlement based upon a work period and not a work day. In addition, the officers’ spreadsheet failed to account for the township’s exemption under §207(k).

The court then determined that the officers were compensated for muster time as a component of their salaries. According to the officers, muster time added approximately 20 minutes to each eight-hour work day, and they were entitled to compensation for that extra time. The court concluded, however, that the collective bargaining agreement clearly contemplated muster time as a component of the officers’ base salary.

Finally, the court determined that §203(o) of the FLSA forecloses the officers from seeking compensation for donning and doffing because (1) the facts indicate that there is a custom or practice under a bona fide collective bargaining agreement of not compensating township officers for time spent donning and doffing; and (2) the officers’ donning and doffing of the uniforms and equipment at issue qualifies as “changing clothes” within the meaning of §203(o).

**DISCRIMINATION**

Federal Circuit Courts

*Garofalo v. Village of Hazel Crest*, Nos. 12-1668, 12-1681 (7th Cir. June 12, 2014)

***Facts:*** The plaintiffs were sergeants on the village’s police force who challenged the village’s promotion process. The plaintiffs were white officers who claimed the defendants discriminated against them on the basis of race when they were turned down for the promotion of deputy police chief, and the position was given to what they considered to be a less qualified, African-American, who was never a candidate for the position. The district court granted the defendants’ motion for summary judgment, finding that the plaintiffs failed to present evidence that they had any significant chance of being the one selected to the position.

***Summary:*** The Seventh Circuit determined that the plaintiffs failed to provide sufficient evidence of racial discrimination under either the direct or indirect method. Under the direct method, even though there was evidence to suggest that race was a factor in the position, the plaintiffs failed to show that they had a chance of being the one selected even if race wasn’t a factor. Under the indirect method, even though the plaintiffs stated a *prima facie* case of race discrimination, the defendants articulated non-discriminatory reasons for the decisions not to promote the plaintiffs and the plaintiffs did not present evidence to counter that explanation.

*Hildebrand v. Allegheny County*, No. 13-1321 (3d Cir. June 27, 2014)

***Facts:*** The plaintiff brought a discrimination charge against his employers, the county and the county district attorney’s office, claiming he was terminated on the basis of his age. The plaintiff filed his claims under the Age Discrimination in Employment Act (ADEA) for age discrimination, and under §1983 for violations of his equal protection rights and for retaliation.

The timing of the relevant events are as follows: The plaintiff was terminated on February 18, 2011. On December 1, 2011, he filled out the EEOC Intake Questionnaire and authorized the EEOC to investigate his charge of discrimination. On January 11, 2012, the plaintiff completed a “Charge of Discrimination” with the EEOC, naming the DA as the only respondent. The EEOC issued a right-to-sue letter on May 7, 2012, and the plaintiff filed suit on August 7, 2012.

The district court granted the respondents’ motions to dismiss, finding that it was not filed with the EEOC within the requisite 300 days of the last date of discrimination. According to the district court, the last day of discrimination was February 18, 2011, and the plaintiff filed the charge of discrimination on January 11, 2012, which was more than 300 days. Additionally, the district court dismissed plaintiff’s §1983 claims against the county, finding that the plaintiff failed to plead sufficient facts to support a plausible inference that the county had adopted a custom or practice of age discrimination.

***Summary:*** The Third Circuit Court of Appeals first affirmed the district court’s dismissal of plaintiff’s §1983 claims. The court determined (1) the ADEA is the exclusive remedy for claims of age discrimination in employment, and (2) the plaintiff failed to point to any facts demonstrating the existence of a custom in the county to retaliate against employees. The court then determined, however, that the plaintiff’s ADEA claim against the DA’s office should not have been dismissed because the revise EEOC Intake Questionnaire, which the plaintiff submitted within the 300-day limitations period, constituted a “charge of discrimination” as defined by the ADEA.

**PUBLIC EMPLOYMENT – DUE PROCESS**

Federal Circuit Courts

*Kvapil v. Chippewa County*, No. 13-2658 (7th Cir. June 9, 2014)

***Facts:*** The plaintiff – a seasonal employee for the county’s highway department – challenged his suspension and termination, claiming that he had a protected property interest in his seasonal work, and that the county violated his due process rights when he was suspended and terminated without notice or a hearing. The plaintiff was suspended without pay for repeatedly threatening the County Planning and Zoning Administrator. The plaintiff was subsequently terminated after trying to run someone off the road in a county vehicle. The reasons for his termination cited in his termination letter were for disrespect to clients or the public; willful or negligent use of county equipment; and repeated poor work performance. The district court granted the county’s motion for summary judgment, and the Seventh Circuit affirmed.

***Summary:*** On appeal, the plaintiff argued that he had a protected property interest in his seasonal employment and, thus, his suspension and termination without notice or a hearing violated his Fourteenth Amendment due process rights. The Seventh Circuit determined, however, that he did not have a protected property interest in his seasonal employment because (1) he was clearly an at-will employee as outlined in the employee manual; and (2) the county ordinance entitled “Work Rules,” which provides that an employee “may be disciplined for just cause,” did not create a property interest. The ordinance did not contain language providing for the benefit of continued employment not does it create a system of nondiscretionary rules governing the revocation or renewal of that benefit.

*Freeze v. City of Decherd*, No. 12-6160 (6th Cir. June 4, 2014)

***Facts:*** Two city police officers -- the chief of police and a patrolman -- filed suit against the city after they were terminated during a public meeting. Relevant here, they claimed that their termination violated due process because they possessed a property interest in their continued employment pursuant to departmental policy, and they were terminated without notice, explanation, or an opportunity to respond. The city admitted that it did not provide them with written notice that their terminations were to be considered at the public meeting, but that it did provide oral notice that their general job performance may be discussed. In addition, the officers were not provided with an opportunity to present witnesses or evidence at the meeting, and the city board did not provide them with a hearing on the merits. The district court granted the city's motion for summary judgment, finding that the officers did not have a property interest in continued employment. The Sixth Circuit reversed.

***Summary:*** Two city resolutions played heavily in the Sixth Circuit's decision. According to the first, all city employees are at-will employees. According to the second which was enacted later, however, police officers can only be disciplined for cause and any discipline is required to follow "the basic concepts of due process." The resolution also provides for an agency policy to "avoid terminating an otherwise productive member when conduct, behavior or performance problems occur, if possible." When a situation does call for discipline, the resolution directs "the agency" to follow five steps of "a progressive system when practicable." In addition, it allows for termination resulting from economic conditions, performance failure, or for "substantial impairment of the employment relationship." Finally, according to the terms of the Police Resolution, "[w]henever disciplinary action is used," an employee must be informed in writing of the "exact offense violated." The latter resolution was enacted as the city Police Departmental Employee Policies and Procedures Manual.

The Sixth Circuit determined that despite the former resolution showing that all city employees are at-will employees, the latter meets the high standard for an employee manual to create a property right to termination only for good cause. The latter resolution contains unequivocal language demonstrating the city's intent to be bound by the handbook's provisions. It also contains unequivocal terms demonstrating an intent to be bound to an agreement prohibiting termination without good cause. Therefore, the officers did have a property interest in their continued employment and were, thus, entitled to process due pursuant to the employee manual.

Submitted by:

Clayton L. Lindsey

VP of Gov’t Affairs-RASHRM

Attorney at Law

WilliamsMcCarthyLLP

[clindsey@wilmac.com](mailto:clindsey@wilmac.com)

G:\Wpdocs\_bev\CLL\R\RSHRM\july2014.docx