Winter 2014

FISHEL HASS KIM ALBRECHT LLP™
Attorneys at Law

# PERSPECTIVES

A Periodic Publication of Fishel Hass Kim Albrecht LLP

## Inside this Issue…




## Unlawful Retaliation Claims Could be Tougher to Prove for Employees, but are on the Rise.

Title VII states that an employer may not take an adverse action against the employee on account of an employee having opposed, complained of, or sought remedies for, unlawful workplace discrimination. These "retaliation" claims have been on the rise for the last decade. EEOC Charge statistics show that 31.4% of all charges of discrimination filed against employers in 2012 were for retaliation under Title VII, which is up nearly 10% in the last decade. Information gathered from http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

The recent U.S. Supreme Court decision in *University of Texas Southwestern Medical Center v.* Nassar, 133 S.Ct. 2517 (June 24, 2013) established a standard that may result in fewer retaliation claims succeeding. The Court held that the retaliatory action must have been taken "because of" the employee's protected complaints. In other words, the action would not have been taken "but for" the employee's complaints. For example, the employee in *Nassar* alleged he was essentially discharged for complaining about harassment in the workplace. The Court held that it was not sufficient that his complaints were one "motivating factor" for his treatment at work. Instead, he had to show that his treatment at work would not have occurred "but for" his complaints about unlawful harassment. This standard is different, and more difficult to meet, than the "motivating factor" test used for cases of discrimination. As a result, employers should have a greater opportunity for success in retaliation claims. Even so, employers must be mindful to consider and properly document a legitimate, non-retaliatory business reason for their decisions.

For more information regarding retaliation actions or about proper employment policies, please contact our office at info@fishelhass.com.

## Whistleblowers Have New Tool Against Employers

The U.S. Occupational and Health Safety Administration ("OSHA") recently made it easier for disgruntled employees to file whistleblower complaints against their current or former employers. Now, employees who believe they have been subjected to retaliation for complaining about an alleged violation of one of the twenty-two statutes for which OSHA enforces whistleblower protections can file complaints online at OSHA's website. www.osha.gov.

Generally, an employee may have a claim against their employer if the employee has engaged in protected conduct by refusing to engage in unlawful or unsafe work activity or complaining about a work activity she reasonably believes violates the law and is subsequently discharged or subjected to some other adverse employment action. Depending on the statute pursuant to which a claim is made, an employee may have as little as 30 or as many as 180 days to file a complaint. Previously, employees who believe they have been subject to retaliation for engaging in protected activity under one of the statutes for which OSHA has responsibility for investigating, could report retaliation by filing complaints in person at a local OSHA office, over the phone, or in writing. However, with the creation of the arguably streamlined online reporting process, employers should expect an increase in the number of retaliation complaints received each year.

Employers should take time to reevaluate their current policies and procedures to avoid whistleblower retaliation complaints. The following can help reduce the potential for retaliation claims going forward: review anti-retaliation policies, conduct training, communicate with the complaining employee, document all steps taken relative to the complaint, and maintain confidentiality of complaints to the extent possible.

## Federal Judge Upholds Seizure of Firearms Seized Pursuant to Narcotics Search Warrant

A Federal Judge recently upheld the seizure of nearly 300 firearms seized by law enforcement officers pursuant to a narcotics search warrant that did not specifically mention firearms. *Six v. Beegle et al. U.S.D.C., Southern District of Ohio*, Case No.: 2:11-cv-698. The firearms were seized during a joint task force operation at a residence in Meigs County, Ohio. Officers made a controlled delivery of a package containing nearly 40 pounds of marijuana which was intercepted being shipped through U.S. Mail to the Meigs County residence. Officers obtained a search warrant allowing them to search the package if accepted and opened by the occupant of the residence. The package was accepted and officers entered the residence and arrested Robert Six. Officers executed the search warrant and seized the marijuana.

In addition to seizing marijuana, officers seized nearly 300 firearms and other contraband found at the residence.

Mr. Six subsequently filed a lawsuit alleging, among other things, that the search warrant did not allow the officers to seize his firearms and the seizure of this property violated the Fourth Amendment. Mr. Six alleged these firearms were part of his historic gun collection and not related to drugs. He placed great emphasis that the majority of guns were "old collector's items". The officers claimed they seized the firearms as "tools of the drug trade".

Although no express term in the search warrant directly mentioned the seizure of specific firearms, the warrant permitted the seizure of, "various too[l]s, devices, objects or things used in the cultivation, preparation/processing or sale of Marijuana and/or the processing of the same. . ." It also permitted the seizure of, "evidence of possession, distribution and cultivation of marijuana and drugs in violation of 2925 of the Ohio Revised Code, along with any related evidence."

In granting the officers summary judgment on this claim, the Court found that the search warrant permitted the officers to seize Mr. Six's firearms. The Court noted that firearms are tools of the drug trade and evidence of drug trafficking. The Court refused Mr. Six's attempt to distinguish "modern" firearms versus "old" firearms during the execution of a search warrant related to narcotics trafficking. The Court found no evidence that Mr. Six's "old" guns were non-operational. The Court approved the seizure of firearms during the execution of a narcotics search warrant because drug traffickers frequently possess guns for protection.

If you have any questions regarding this case, please contact Paul Bernhart, pbernhart@fishelhass.com.

## Award of over $300K to City Upheld by Appeals Court in Public Records Case

The Ohio Fourth Appellate District Court has upheld an award of sanctions, attorney fees and costs to the City of Marietta against a party suing it under the Public Records Act. The case is *State ex rel. Edward Verhovec, State ex rel. Dorthy Verhovec v City of Marietta, et al*, 2013 Ohio 5414 (4th App. Dist. Dec. 4, 2013).

*Continued on pg. 3…Public Records*

*Public Records…Continued from pg. 2*

The sanctions were in an amount slightly over $300,000. This case illustrates that public records should not be requested for the sole purpose of seeking a civil forfeiture and civil awards.

Mr. Verhovec entered into contracts with a Cleveland attorney for the purpose of requesting and obtaining public records from various cities. Under the contract Mr. Verhovec was to be paid $1,000 to $4,000 per city. Accordingly, Mr. Verhovec requested several thousand cable television survey cards maintained by the City of Marietta. The records were not made available for approximately four months. As a result, Mr. Verhovec filed a mandamus action seeking production of the records and civil forfeiture. Shortly thereafter the City made the records available and the trial court granted the City judgment on the pleadings dismissing Mr. Verhovec's mandamus action. Following dismissal Mr. Verhovecs moved for damages, court costs and attorney's fees. Likewise, the City moved for sanctions, attorney's fees and costs.

The trial court determined that appellants acted frivolously because "[t]heir objective is to prove the destruction or loss of the documents so that they can collect forfeiture payments and attorney fees under the Public Records Law." The Court found that such action constitutes frivolous conduct which warrants the award of attorney fees and costs. The court's lengthy decision also details the City's diligent efforts to comply with public records law. Accordingly, the trial court awarded the City attorney's fees, sanctions and costs and denied Mr. Verhovec's motion for damages, court costs and fees. For more information on this case and how to comply with Ohio's Public Records Act, contact Frank Hatfield at fhatfield@fishelhass.com.

## No Civil Service Bonus Points Permitted for Residency in City

A charter city cannot award preference points on a competitive examination based on residency within the city. Ohio Revised Code (R.C.) §9.481 prohibits residency requirements as a condition of employment by a political subdivision. The Ohio Supreme Court held in *Lima v. State*, that R.C. 9.481 prevails over conflicting local residency laws because R.C. 9.481 was enacted pursuant to Section 34, Article II of the Ohio Constitution. This decision reversed a prior Ohio Eighth District Court of Appeals decision which held that R.C. 9.481 does not supersede a city's home-rule authority to enforce a residency requirement.

In March, 2012, the City of Cleveland amended its charter to provide that a resident of Cleveland who passes a promotional exam shall have five points added to his raw score. The Association of Cleveland Firefighters, IAFF Local 93, filed a declaratory judgment against the City, seeking a judicial determination that the charter violates the Article XV, Section 10 of the Ohio Constitution, R.C. 9.481 and R.C. 124.45. The trial court held that the charter does indeed violate the Ohio Constitution, R.C. 9.481 and R.C. 124.45.

Upon review, the Eighth District Court of Appeals upheld the decision of the trial court in *Cleveland Firefighters Assn. v. Cleveland*. The City argued that the five preference points are a "reasonable ingredient in the calculation of a passing candidate's merit and fitness for a supervisory position within the civil service of the City" because supervisors who are residents can respond faster to emergencies and have a better knowledge of the community. However, the Court found that these preference points are arbitrary and not allied to appropriate qualification, and therefore the charter violates the Ohio Constitution.

Furthermore, the Court found that the charter "grossly offends the spirit and legislative intent of R.C. 9.481 and creates a 'de facto' residency requirement." The City argued that the charter does not require an employee to reside in the City as a condition of employment and an employee's continued employment is not conditioned upon satisfying the charter provision. The Court disagreed, finding that as a practical matter, the charter establishes a residency requirement as condition of employment for positions requiring promotion by competitive exam.

If you have any questions regarding this Opinion, please contact Annee McNab and amcnab@fishelhass.com.

## Arbitrator Can Convert a Termination into a Compelled Resignation

The Supreme Court recently refused to review an Ohio Twelfth District Court of Appeals decision upholding an arbitrator's award that converted a termination of a police sergeant into a compelled resignation. *Ohio Patrolmen's Benevolent Ass'n v. City of Trenton*, 2013-Ohio-3311.

In July 2011, Sergeant Michael Matala ("Grievant") was terminated from his employment with the City of Trenton's Police Department. His termination was based on a number of charges arising out of his issuance of a traffic citation. Grievant and his supervisors disagreed over the legality of this ticket citation and Grievant subsequently initiated an investigation into his supervisor's possession of a car. Grievant did so without the knowledge of either his supervisor or the Police Chief. As a result, Grievant had multiple charges of Code of Conduct violations brought against him and he was ultimately terminated.

Grievant filed a grievance concerning his termination pursuant to the grievance procedure outlined in the parties' collective bargaining agreement. The issue submitted by the parties to the Arbitrator was: "Did the employer's termination of Michael Matala violate the just cause provision of the collective bargaining agreement or otherwise violate the collective bargaining agreement? If so, what shall the remedy be?"

The Arbitrator found that the Grievant was insubordinate, which warranted disciplinary action, but found that there was not sufficient cause to support a termination. The Arbitrator found that Grievant should serve a thirty-day suspension without pay, but that "the issue of remedy, however, is further complicated in this case." The Arbitrator then engaged in a lengthy analysis of the effects of Grievant's actions which created distrust in a Police Department "in which trust, respect and obedience are all imperatives." Thus, she found the appropriate means to remedy his actions was to issue a thirty-day suspension and order a resignation effective the date of her award.

The trial court held that she exceeded the scope of her authority as Arbitrator by compelling a resignation when she found no just cause to support a termination. The Twelfth District disagreed and reversed. In finding that the Arbitrator's award was within her authority, the Twelfth District found that because she found that the Grievant's conduct constituted insubordination, and the collective bargaining agreement listed "insubordination" as a dischargeable offense, her ordering the Grievant's resignation is within the essence of the Agreement. The Twelfth District went on to find that the ordered resignation was within the Agreement's statement that a "punishment fit the crime."

This case emphasizes the point that when the parties to arbitration submit the typical "What shall the remedy be?" question to arbitrators in discipline cases, arbitrators have wide latitude to state what the remedy shall be. Courts do remain deferential to arbitration decisions.

For a copy of the Twelfth District decision in this case, please contact Stacy Pollock at spollock@fishelhass.com.

## Bill Proposes to Carve-Out Police and Fire from the *Armstrong* Case in Workers' Compensation

Last summer, the Ohio Supreme Court held that to fall within coverage of workers' compensation, an employee's psychiatric condition must be caused by a physical injury sustained within the course and arising out of employment. *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58 (2013). This holding clarified the Supreme Court's similar holding in *McCrone v. Banc One Corp.*, 107 Ohio St.3d 272 (2005), which held that psychiatric conditions, without an accompanying physical injury or occupational disease, is not compensable under workers' compensation. In *Armstrong*, an employee, a dump truck driver, sustained physical injuries upon being rear-ended by a motorist. Immediately following the accident, the employee exited the truck only to witness the motorist's death. As a result, the employee suffered post-traumatic stress disorder ("PTSD"). Although his PTSD accompanied his physical injuries sustained in the accident, there was no nexus between the physical injury and his PTSD. Rather, there was testimony that the PTSD was caused by Armstrong witnessing the accident and the death of the other motorist. As such, his psychiatric condition was not compensable under workers' compensation.

On December 4, 2013, a bill (SB 252) was introduced in the Ohio Senate to exempt Police and Fire employees from the effects of the *Armstrong* decision. The purpose of the bill is "To amend [the Ohio Workers' Compensation Act] to make peace officers and firefighters diagnosed with post-traumatic stress disorder arising from employment without an accompanying physical injury eligible for compensation and benefits under Ohio's Workers' Compensation Law."

*Continued on pg. 5…WC*

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If passed, this bill would create a category of workers' compensation for police officer and firefighters that does not exist for all other workers in Ohio. We will monitor any legislative activity on this bill and provide further updates. If you have any questions regarding the *Armstrong* case, SB 252, or any other workers' compensation matters, please contact David Riepenhoff at driepenhoff@fishelhass.com.

## Informational Picketing Does Not Fall Under Ten-Day Statutory Notice Requirement

In *Mahoning Education Association of Developmental Disabilities v. State Employment Relations Board et al.*, the Ohio Supreme Court found that R.C. 4117.11(B)(8), the Ohio statute requiring public employees to provide ten days' notice for picketing or striking, does not apply to informational picketing. Informational picketing occurs when a union holds a picket for reasons other than a strike. For example, an informational picket may include a union holding signs or distributing leaflets outside the workplace to raise awareness and gain support for the union's position during collective bargaining negotiations or regarding an employer's practice with which the union disagrees.

In this case, the union peacefully picketed outside the building during a Board meeting, holding signs which read, "Settle Now," "MEADD Deserves A Fair Contract," and "Tell Superintendent Duck to Give us a Fair Deal.", The union was "engaged in picketing related to the successor contract negotiations," and the picketers "were expressing their desire for a fair contract and their dissatisfaction with the progress of negotiations.". The union had not engaged in a strike or given written notice of intent to strike.

The Mahoning County Board of Developmental Disabilities filed a claim of unfair labor practice with the State Employment Relations Board (SERB) against the Mahoning Education Association of Developmental Disabilities (MEADD) for failure to file the required ten days' notice under R.C. 4117.11(B)(8) before holding an informational picket. The Union then appealed SERB's finding in favor of the employer. The trial court upheld SERB's decision. The Court of Appeals reversed the trial court's judgment and held that the provision at issue in R.C. 4117.11(B)(8) is unconstitutional.

The Ohio Supreme Court did not address the constitutional issues argued by the parties. Instead, the Court affirmed the judgment of the Court of Appeals based upon it's reading of the statute. The Court determined the plain language of the statute indicates that "the notice requirement of R.C. 4117.11(B)(8) does not apply to picketing that is merely informational in nature, as opposed to picketing related to a work stoppage, strike or refusal to work." Accordingly, the Court found that the statute did not apply to the picketing activity in this case and therefore the union did not commit an unfair labor practice by failing to give a ten-day notice.

This Opinion will have considerable implications for Ohio's public employers. Unions no longer have the obligation to provide advanced notice to public employers for an informational picket under R.C. 4117.11(B)(8). Consequently, public employers will not have the opportunity to prepare for these informational pickets, from a security standpoint or a public relations perspective.

Should you have any questions regarding this Decision, please contact Anne McNab at amcnab@fishelhass.com

## Free Fridays to Continue in 2014!

Do you have a legal question you've been itching to ask? Now is the time. We are continuing our "Free Fridays" in 2014 and Frank Hatfield will be on standby in February to answer your calls - on the house. You can submit your questions to Frank Hatfield on Friday, February 7, 2014 from 9am-4pm by calling (614) 221-1216. Please no emails as we will only be accepting phone calls. Be sure to check out our Events calendar on our website for future "Free Friday" dates.

## CONGRATS!!!

Fishel Hass is happy to announce that several of its attorneys have been selected as 2014 Ohio Super Lawyers and Ohio Rising Stars by *Super Lawyers* magazine. Congrats to Marc Fishel and Daniel Downey for being named Ohio Super Lawyers. Congrats to Benjamin Albrecht, David Riepenhoff and Stacy Pollock for being named as Ohio Rising Stars. Also, Fishel Hass Kim Albrecht was once again named to the Best Law Firms list by U.S. News Media Group and Best Lawyers® for 2014. The firm's employment, labor and litigation practice areas were recognized. Marc Fishel and Benjamin Albrecht were also named as Best Lawyers in their respective practice areas.