Labor and Employment Law Reporter

Newsletter for the clients of The Williams Firm, P.C.

Winter, 2010

This Volume Includes:

APRIL 1, 2010 is Census Day! Every ten years the U.S. Government takes a formal count of its population. These figures are then used for a variety of purposes. Most importantly, redistricting for representation of our region in Lansing, as well as in Washington, D.C., will take place based on the population in our region. Billions of dollars will also be allocated, both on the State and Federal levels, to certain areas based solely on the figures tabulated by the U.S. Census Bureau. Therefore, it is imperative that everyone be counted.

It was determined that during the census of 2000, Genesee County was drastically undercounted and money coming into the area was cut as a result. During these difficult economic times, and considering the number of people who have left our area due to economic strain, it is imperative that every person be accurately counted. Genesee County has lost enough.

YOU CAN HELP! Please share with your employees, coworkers, neighbors, fellow church-goers, family members, etc. that:

If you receive a form in the mail or are contacted by a Census worker, please answer the questionnaire or the Census worker's questions. **YOUR ANSWERS WILL REMAIN CONFIDENTIAL.**

(continued on Page 2)

If you need help completing the questionnaire, there will be many Census Assistance Centers set up throughout Genesee County.

IF YOU DO NOT RESPOND AND ARE NOT COUNTED, GENESEE COUNTY WILL HAVE ONE LESS VOICE!

YOU ARE IMPORTANT: BE COUNTED

IMPROPERLY DECLARING IMPASSE CAN BE EXTREMELY COSTLY

The National Labor Relations Board ("NLRB") just closed the books on a case lasting more than a decade, which ultimately resulted in a $41 million back pay award. The NLRB held that five beer distributers created an illegal pact to negotiate with the Teamsters Union, concerning working conditions for some 2,000 employees. The NLRB concluded that the employers had a plan to "bust the union" by negotiating their contracts to impasse.

According to the NLRB, the employers colluded to declare impasse and impose a new contract on its unionized employees. Those new contracts provided "substantially lower income and reduced benefits for employees." Since impasse was improperly declared, the unilaterally imposed agreements were invalidated. Accordingly, the employees were entitled to the wage and benefits that they should have been receiving under the old contracts. In total, the NLRB determined that the employers owed $41 million in back pay.

Four out of the five employers settled the claims over six years ago, but one distributor continued to fight the formula by which the back pay award was calculated. The appeals on that issue failed and final settlement payments were made this past August. The NLRB closed the case in September.

Employers are routinely cautioned that getting to the point of "impasse" is extremely difficult. This case serves to emphasize that not only is impasse difficult to reach, but that the NLRB is likely to seriously scrutinize any unfair labor practice charge surrounding same. It is, therefore, imperative that employers seek legal advice before concluding they are at impasse in any labor negotiations. NLRB 7-CA-43505 and 6.

BARRING REPETITIVE PUBLIC COMMENT DOES NOT VIOLATE THE FIRST AMENDMENT

Jeff and Lisa Lowery and Randy Giles are parents of children who used to play on the Jefferson County (Tennessee) High School football team. In October 2005, the coach dismissed their sons from the team for challenging his leadership. The parents' complaints to various school officials were unsuccessful, so they decided to bring their concerns to the attention of the school Board.

The Jefferson County Board of Education allows individuals to apply to speak for five minutes at Board meetings, so long as their appearance is "not frivolous, repetitive, nor harassing." That restriction is contained in a formal Board of Education policy. Mrs. Lowery contacted the appropriate school officials to request, and was granted, time to speak to the school Board. At the appointed Board meeting, the Lowerys and Mr. Giles had their attorney address the Board about the students' dismissals from the football team. During the presentation, the attorney was critical of several school officials and threatened legal action if the parents' concerns were not addressed.

Not satisfied with the results of that meeting, the parents applied to the Board again at the next regular school Board meeting. However, school administrators believed that the speech would be harassing and repetitive, so the request was denied. The parents filed suit under §1983 alleging that their First Amendment rights were violated from the refusal to allow them to make a second appearance before the Board of Education. A jury found in favor of the school Board and the Sixth Circuit Court of Appeals affirmed. *Lowery, et al. v Jefferson County Board of Education, et al.*, _____ F2d _____ (CA 6, 2009).

(continued on Page 3)

Section 1983 gives individuals the right to sue a governmental actor who, under color of state law, "subjects…any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 USC §1983. All agreed that the school Board and individual administrators were "persons" who acted under color of state law. The issue in this case was whether the Board's denial of the Plaintiffs' second request to speak to the Board violated their First Amendment rights.

The Sixth Circuit began by recognizing that the right to free speech is not absolute. A school Board meeting is the type of venue which allows citizens the chance to express their views, but it cannot accommodate entirely uninhibited or unstructured speech. In such a "limited public forum," the governmental body may regulate the time, place, and manner of speech, so long as the regulation is content neutral, narrowly tailored to serve a significant governmental interest, and amply allows alternative channels for communication.

The court agreed with the lower court's decision that the school Board policy was content neutral and served a significant governmental interest. The policy did not limit the content of any presentation and ensured that there were no unstructured, chaotic school Board meetings that would serve no public purpose. The court then concluded that the policy was sufficiently narrow and only prohibited speech that was repetitive, harassing, or frivolous. Moreover, the Plaintiffs had a previous opportunity to address the Board, and they also brought their concerns to the attention of the athletic director, principal, the director of schools, four Board members, and four county commissioners. The Plaintiffs had many alternative channels of communication, such that limiting them from speaking at another meeting of the full Board was not actionable under §1983.

This case serves as a very good example of how well-crafted policies can protect a governmental body. Since the policy was narrowly tailored to establish a significant governmental interest, denying the Plaintiffs' request for a second "bite of the apple" did not violate the parents' constitutional rights. If the school Board did not have a policy such as this in place, the outcome of the case could very easily have been quite different. If you have any doubts whether your public body's policies would pass muster, please do not hesitate to contact The Williams Firm, P.C.

EMPLOYEES NOT PROTECTED FOR REPORTING VIOLATIONS OF SUSPECTED LAWS

In *Debano-Griffin v Lake County*, the Michigan Court of Appeals refused to broaden the scope of the Whistleblowers' Protection Act ("WPA") beyond its express language. Debano-Griffin was the director of the Lake County 911 Department and began expressing concern about a shortage of ambulances in the county to respond to emergencies. She also voiced concern relating to the transfer of funds from one County account to another account. She brought these concerns to the attention of the emergency telephone system committee and informed the Board that she had done so. Several weeks later, her position was eliminated. The stated reason for the elimination of her position was that it was combined with the duties of another post. Debano-Griffin filed suit claiming that she had been retaliated against for bringing her concerns to light, in violation of the WPA. *Debano-Griffin v Lake County*, Mich App No. 282921 (10/15/09).

Lake County appealed the trial court's refusal to dismiss the lawsuit. The County argued that Debano-Griffin failed to establish that she was engaged in "protected activity," as defined by the WPA. The WPA only protects an employee who reports, or is about to report, a violation or suspected violation of a law or regulation to a public body. MCL 15.362. The Court of Appeals reversed the trial court's decision and dismissed the action, finding that the activity in this case was not protected.

The Court of Appeals looked to the precise language of the WPA, which provides that an employer shall not discharge, threaten, or otherwise

(continued on Page 4)

discriminate against an employee, because the employee reports, or is about to report, a violation or suspected violation of law to a public body. The protection of the WPA exists only for those who report a violation or a suspected violation of a law or regulation. Debano-Griffin could not articulate any law, regulation, or rule which she believed was violated. She knew of no law, rule, or regulation which requires a certain number of ambulances in the County, or prohibited the transfer of funds from one County account to another. In essence, she was asking for protection under the WPA for reporting a suspected violation of a ***suspected*** law, regulation, or rule; essentially, her personal concerns.

The Court reasoned that the clear language of the WPA protects only an employee who reports, or is about to report, a violation or suspected violation. It does not protect an employee who reports, or is about to report, "a suspected violation of a suspected law." There must actually be a law that was violated or was suspected of being violated. Had the legislature intended to broaden the protection of the statute to that degree, it certainly could have done so expressly. Her claim failed, so her case was dismissed in its entirety.

OMA PLAINTIFF MUST STILL ESTABLISH STANDING TO FILE SUIT

In *Myerscough v Chippewa County Bd. of Comm'rs*, Mich App No. 288076 (unpublished, 2009), the Michigan Court of Appeals clarified that general "standing" principles apply to all claims brought under the Open Meetings Act ("OMA"). Derek Myerscough filed suit against the Chippewa County Board of Commissioners to redress a number of procedural irregularities at several board meetings in early 2008. Myerscough contended that the meetings were illegal because, allegedly, the meeting notices were not properly posted and the Board did not allow public comments. Myerscough filed suit under the Open Meetings Act, which specifically states "if a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, **or a person** may commence a civil action to compel compliance or to enjoin further non-compliance with the act." (emphasis added). MCL 15.271(1). Myerscough argued that he was entitled to bring the action, as he was "a person" contemplated by the act.

The Court of Appeals acknowledged that Myerscough was "a person," for purposes of the OMA, but that was not enough to allow him to proceed. He still had to demonstrate that he had "standing" before he could pursue a lawsuit. To have standing, a potential plaintiff must demonstrate that he suffered an "injury in fact." An injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, (b) actual or imminent, and (c) not conjectural or hypothetical. There must also be a connection between the injury and the complained-of misconduct. Finally, it must be likely, as opposed to speculative, that the injury will be rectified by a favorable decision. *Lee v Macomb County Board of Commissioners*, 464 Mich 726, 739-40 (2001). The Court of Appeals held that the Michigan legislature has no authority to confer standing to persons who do not meet the constitutional standing requirements articulated in *Lee*. In other words, even though legislature allows any "person" to bring suit under the OMA, they must still show they have standing before the court in an attempt to have their injuries addressed.

This decision is helpful for municipal bodies covered by the OMA, as it emphasizes that all potential claimants must meet these standing requirements. This clarification may serve to restrict claims against municipal bodies for alleged violations of the OMA. After all, if the individuals cannot demonstrate that they themselves sustained injury beyond the generalized injuries suffered by any member of the public, their claims cannot be pursued.

ONLY THOSE ENGAGED IN PROTECTED ACTIVITY MAY BRING A RETALIATION CLAIM UNDER TITLE VII

In *Thompson v North American Stainless,* _____ F2d _____ (CA 6, 2009), the entire Sixth Circuit Court of Appeals examined the scope of the non-retaliation provision contained in Title VII of the Civil Rights Act of 1964. The sole issue in the appeal was whether Title VII's non-retaliation clause creates a cause of action for those who have not personally engaged in protected activity. The Sixth Circuit joined the Third, Fifth, and Eighth Circuits by holding that only people who were personally engaged in protected activity under the Act may file a claim for relief under its anti-retaliation provisions.

Thompson was a metallurgical engineer at North American Stainless from 1997 to 2003. In 2000, North American Stainless hired Miriam Regalado, who Thompson began dating shortly thereafter. At the time of Thompson's discharge, he and Regalado were engaged to be married, and their relationship was common knowledge in the company.

Regalado filed a charge with the EEOC claiming that she was a victim of gender discrimination. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Barely three weeks later, on March 7, 2003, North American terminated Thompson's employment. Thompson filed suit claiming that he was terminated in retaliation for the EEOC charge filed by his then-fiancé. North American countered by saying Thompson was let go for performance reasons.

The Court began by focusing specifically on the language in Title VII. The Act expressly states that it shall be unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 USC §2000e-3(a). The Court reasoned that if Congress had intended to protect a broader class of individuals, it easily could have done so. The Court chose to rely on the plain language of the statute and limit the non-retaliation provision to only those who actually oppose a practice, make a charge, or participate in an investigation. Since Thompson never claimed that he personally engaged in any statutorily protected activity, he is not protected under the Act. The Court found the decisions from other circuits which reached the same conclusion to be compelling.

Retaliation in any form is not a sound business practice. That aside, this decision is important because it still allows employers to discharge staff for performance problems, even if they should coincidentally have some relationship with other employees who have availed themselves of the protections of federal civil rights laws. If an employer knows that an employee scheduled for discipline or discharge has a relationship with another employee who has sought to invoke his or her statutory rights, the employer should seek legal advice before making any final employment decisions.

SUBJECTIVE DISLIKE FOR A PARTICULAR POSITION DOES NOT EQUATE TO DISCRIMINATION

In *Knight v Ford Motor Co*, Mich App. No. 284996 (unpublished, 2009), the Court of Appeals reiterated that simply because one is not transferred to a position which the employee believes is better is not evidence of discrimination. A basic rule of employment discrimination law is that in the absence of direct evidence of discriminatory intent a plaintiff must proceed by using the standard burden shifting approach. Under this approach, the plaintiff must present a rebuttable, *prima facie* case of discrimination on the basis of evidence from which a trier of fact could infer that the plaintiff was a victim of unlawful discrimination.

(continued on Page 6)

To establish this *prima facie* case, the plaintiff must present evidence that he or she (1) belongs to a protected class, (2) suffered adverse employment action, (3) was qualified for the position, and (4) being denied the position occurred under circumstances giving rise to an inference of unlawful discrimination. If the plaintiff presents a *prima facie* case, then the burden shifts to the employer to show legitimate non-discriminatory reasons for the adverse employment action.

Obviously, integral to this entire analysis is that the employee actually suffered an adverse employment action. That is where Knight's claim failed. Knight was a hi-lo driver for Ford Motor Company since 1977. In 2007, she claimed she was discriminated against when she was denied a hi-lo driver position in a new building despite being qualified for the job. However, Knight readily admitted that the position she sought paid the same, and received the same benefits as her current position. The only difference between the two was that she perceived the working conditions of her current position to be less desirable. The court concluded that such conditions amounted to mere inconveniences that were subjective in nature and in no way rose to the level of adverse employment action. She was not disciplined, discharged, demoted, punished, or in any other way adversely affected by Ford, so her case was dismissed.

This case emphasizes that simply because an employee may not like his or her job, and wants to be assigned elsewhere, does not mean that an employer must do so. Mere inconveniences or subjective dislikes of the job do not necessarily rise to the level of adverse employment action for purposes of a discrimination claim.

GENETIC NON-DISCRIMINATION POSTERS WILL BE REQUIRED

On November 21, 2009, the federal Genetic Information Nondiscrimination Act ("GINA") became law. The EEOC has approved proposed final rules to implement the employment section of GINA. One proposed regulation requires covered entities to post notices in conspicuous places describing GINA's applicable provisions. Employers covered by GINA are the same as those covered by Title VII of the Civil Rights Act of 1964, regardless whether the employer conducts genetic testing.

GINA prohibits employers from using genetic information to make decisions on hiring, firing or promotions, and prohibits health insurers and plan administrators from requesting or requiring genetic information or using such information for discussions regarding coverage, rates or pre-existing conditions.

It is anticipated that the EEOC will publish final rules pertaining to GINA, as well as recommended language for use in the notice that must be posted, in the near future. We recommend that you regularly monitor the EEOC website and/or human resource management websites on the availability of this particular poster.

2010 WILL BRING SIGNIFICANT CHANGES TO ROTH IRA RULES

Since its creation more than a decade ago, the Roth IRA has been one of the best tax breaks around, but it has excluded higher-earning taxpayers. The Roth IRA provides no deduction for contributions, but instead provides a benefit that isn't available for traditional retirement accounts: if you meet certain requirements, all earnings are tax free when you or your beneficiary withdraw them. Other benefits include avoiding the early distribution penalty on certain withdrawals, and eliminating the need to take minimum distributions after age 70½.

Beginning January 1, 2010, regardless of your income or filing status, you will be able to roll over (convert): (1) your traditional individual retirement ("IRA"), SEP IRA or SIMPLE IRA; or (2) an eligible rollover distribution ("ERD") from your or your deceased spouse's employer-sponsored retirement plans (such as 401(k) or 403(b) plans) to a Roth IRA. Under the current rules, you can roll

(continued on Page 7)

over your traditional IRA or ERD to a Roth IRA only if your modified adjusted gross income for Roth IRA purposes is $100,000 or less and you are not married filing a separate return. See, I.R.C. Sec 408A (c)(3)(B)

Also, in 2010, if you are the non-spouse beneficiary of an employer sponsored retirement plan, you can do a direct trustee-to-trustee transfer of an ERD from the plan into an inherited Roth IRA regardless of your income or filing status.

A special 2-year option will apply for conversions and rollovers in 2010 only. Under this 2-year option, you will report half the taxable portion of your rollover in your gross income for 2011 and half in 2012, unless you elect to include the entire amount in gross income for 2010.

EXPANDED LOSS CARRYBACK AVAILABLE TO MOST BUSINESSES

Most businesses may use losses incurred during the economic downturn to reduce income from prior tax years, under a revenue procedure recently issued by the Internal Revenue Service. The relief provided under the Worker, Homeownership, and Business Assistance Act of 2009 differs from similar relief issued earlier this year, in that the previous relief was limited to small businesses.

The current relief is applicable to any taxpayer with business losses, except those that received payments under the Troubled Asset Relief Program ("TARP"). The relief also applies to a loss from operations of a life insurance company.

Under the procedure, taxpayers may elect to carry back a net operating loss ("NOL") for a period of three, four or five years, or a loss from operations for four or five years, to offset taxable income in those preceding taxable years. A taxpayer may make the election under IRC Sec. 172(b)(1)(H) by attaching a statement to the taxpayer's federal income tax return for the taxable year in which the applicable NOL arises which states that the taxpayer is electing to apply IRC Sec. 172(b)(1)(H) or IRC Sec. 810(b)(4) under Rev. Proc. 2009-52, and that the taxpayer is not a TARP recipient, nor, in 2008 or 2009, an affiliate of a TARP recipient. In addition, the statement must specify the length of the NOL carryback period the taxpayer elects (three, four, or five years).

An NOL or loss from operations carried back five years may offset no more than 50 percent of a taxpayer's taxable income in that fifth preceding year. This limitation does not apply to the fourth or third preceding year.

Section 172(a) allows a deduction equal to the aggregate of the NOL carryovers and carrybacks to the taxable year. Section 172(b)(1)(A)(i) provides that an NOL for any taxable year generally must be carried back to each of the two years preceding the taxable year of the NOL. Section 172(b)(3) provides that any taxpayer entitled to a carryback period under Section 172(b)(1) may make an irrevocable election to relinquish the carryback period for an NOL for any taxable year.

The procedure applies to taxpayers that incurred an NOL or a loss from operations for a taxable year ending after Dec. 31, 2007, and beginning before Jan. 1, 2010.

LABOR AND EMPLOYMENT LAW REPORTER

for the clients of:

THE WILLIAMS FIRM, P.C.

ATTORNEYS AND COUNSELORS AT LAW

KENDALL B. WILLIAMS
JOAN N. PIERSON
TIMOTHY R. WINSHIP
SEAN M. SIEBIGTEROTH

8263 S. Saginaw Street
Grand Blanc, Michigan 48439
Telephone: 810-695-7777 * Toll Free: 888-695-7887
Facsimile: 810-695-9549

www.TheWilliamsFirm.com
Email: Info@TheWilliamsFirm.com

Of Counsel:
ABNER J. TANSIL
NIKAYELA D. LOCKETT