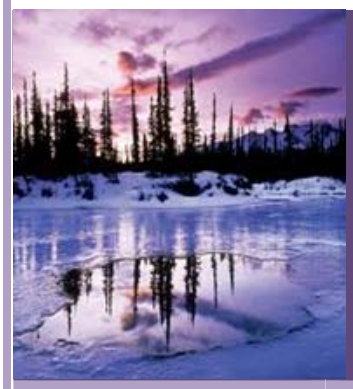

Labor and Employment Law Reporter

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

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This Volume Includes:

Personal Notes Not Subject to FOIA

In *Hopkins* v *Township of Duncan*, Mich App No. 30017 (2011), the Michigan Court of Appeals examined the scope of the term "public record" for purposes of the Freedom of Information Act ("FOIA"). Simply stated, FOIA requires that all public bodies disclose all public records within the public body's possession, custody or control, unless otherwise exempt. A public record is defined as a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it was created." MCL 15.232 (e).

What makes *Hopkins* unique is that the dispute arose over notes taken by a member of the Board of Trustees. *Hopkins*' FOIA request sought copies of any notes taken by any elected official during any township board or zoning board of appeals meetings over the last twelve months. No documents were provided to him, although videotape of the meetings showed various board members taking notes. One trustee in particular testified that he took notes simply to help him remember things that happened at the meeting. At his deposition he indicated that things "stick with him better" if he jots them down.

The Court held that these particular notes were not within the definition of a public record as contemplated by FOIA. Because the handwritten notes were not considered by other members of the board and they were retained and disposed of at the discretion of the note taker, the notes were personal in nature. They were taken solely to assist the

trustee with personal memory retention and were not used for substantive decision making by the board or for record keeping by the township. The Court held that since the notes do not meet the performance of an official function element of the definition of a public record, they were not subject to FOIA.

It must be noted that if the notes were shared with other board members or given to officials for safekeeping at the township, then the Court may have found them to be public documents subject to FOIA. Accordingly, to the extent members of public bodies take notes, if they intend to keep them private they truly must remain private and not be shared with other individuals.

"Cat's Paw" in Workplace

On March 1, 2011, the U.S. Supreme Court decided *Staub* v *Proctor Hospital*, 131 S.Ct. 1186 (2011), holding that an employer is liable to an employee under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), if a supervisor performs an act motivated by anti-military animus whereby the supervisor intends to cause an adverse employment action against the employee, and if that act proximately causes the ultimate employment action.

In April 2004, Proctor Hospital's Vice President of Human Resources, Linda Buck, fired technician Vincent Staub. Buck was informed by Staub's supervisor, Michael Korenchuk, that Staub violated a disciplinary warning he had received in January of 2004 that directed him to stay in his work area whenever he was not working with a patient. Buck investigated the complaint by reviewing Staub's personnel file and thereafter issued Staub a termination notice explaining that his discharge was a result of violating his January 2004 disciplinary warning.

Staub filed a grievance, claiming that the disciplinary warning that he supposedly violated was wrongly issued by his then supervisor, Janice Mulally, who allegedly was hostile towards his military obligations as a United States military reserve. Rather than discuss this allegation with Mulally, Buck spoke with another personnel officer and decided Staub's termination should stay in effect.

Staub brought a discrimination claim pursuant to USERRA, claiming he was fired because of his military obligations. USERRA provides in relevant part:

> A person who is a member of…or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,…or obligation…An employer shall be considered to have engaged in actions prohibited…under subsection (a) if the person's membership…is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership. 38 U.S.C. §4311(a) (c).

Staub's case proceeded under a "cat's paw" theory, alleging that Proctor Hospital was liable for the biased actions of Staub's supervisor, Mulally, who did not make the actual decision to fire him, but did induce Buck, the decision maker, to fire him based on the animosity she had towards Staub from his membership in the Army Reserves. The term "cat's paw" refers to Jean de la Fontaine's *The Monkey and the Cat*. In the fable, a monkey persuades a cat to take chestnuts from a fire. As a result, the cat burns its paws, while the monkey eats the chestnuts from the cat unscathed.

A jury found in Staub's favor and awarded him damages. The United States Court of Appeals for the Seventh Circuit reversed, holding that the hospital was entitled to judgment as a matter of law, because the only claimed animus was attributable to a supervisor who did not make the ultimate

employment decision and did not exercise such singular influence over the decision maker that the decision to terminate was the product of blind reliance.

The United States Supreme Court reversed. Although declining to "aggregate" the discriminatory animus of Staub's supervisor with the act of Buck, the Court held that "[a]nimus and responsibility for the adverse action can both be attributed to … Staub's supervisor … if the adverse action is the intended consequence of that agent's discriminatory conduct." The Court noted that the ultimate decision maker's own exercise of judgment does not negate either the intention of the earlier discriminatory act by a supervisor or its causal link to the ultimate action in firing Staub. The Court also declined to adopt a rule immunizing an employer from liability merely because the employer conducts an independent investigation before taking the adverse employment action.

This case serves as a reminder to employers that employee allegations of illegal bias in their treatment by managers and supervisors should be independently investigated, regardless when and at what point in the discipline process the allegations are raised.

NLRB "Employee Rights" Poster Requirements

Effective January 31, 2012, under a rule recently adopted by the National Labor Relations Board ("NLRB"), most private sector employers will be required to post the NLRB's new "Employee Rights" poster in their workplaces.

This requirement mirrors other employee rights poster hanging mandates already in place by federal and state statutes or regulations regarding subjects such as equal employment opportunity, minimum wage, job safety and health, and family medical leave. The poster must be posted conspicuously where other notifications of employee rights or employment policies are posted for employees to view. Additionally, translated versions must be posted at workplaces where at least twenty percent (20%) of employees are not proficient in English.

The "Employee Rights" poster advises employees as to some of their rights under the National Labor Relations Act ("NLRA"), including the right to form, join or assist a labor union, to bargaining collectively through representatives, to engage in protected and concerted activities including striking and picketing in protest of employment conditions, as well as the right to refrain from engaging in such activities.

The poster also advises employees of employer actions that may constitute "unfair labor practices" in violation of the NLRA. These include maintaining or enforcing rules that unlawfully limit the employees' rights under the NLRA, interrogating employees regarding union support or activities and retaliating or discriminating against employees for engaging in protected activities, among others.

Prior to this new rule, employers were generally only required to post notices regarding employee rights in cases where the employer was found to have violated the NLRA or voluntarily settled allegations of such violations.

The notice can be obtained at no charge from NLRB regional offices, or downloaded from the Board website and printed. Employers must post the notice on intranet or internet sites if other rules and policies are typically posted there.

Failure to post the notice is an unfair labor practice and, if an unfair labor practice charge is filed by a person or union, will trigger an investigation and adjudication by the National Labor Relations Board that could then lead to the investigation of other issues. Additionally, failure to post the notice may have the effect of extending the time in which one may file an unfair labor practice charge on unrelated issues (i.e. permit the prosecution of an otherwise time-barred unfair labor practice charge). This will then allow the NLRB to infer that a knowing and willful refusal to post the notice is evidence of an unlawful motive in cases where motive is an issue.

PERA Amended to Prohibit Collective Bargaining on Certain Issues

House Bill 4628, which amends Section 15 of the Public Employment Relations Act ("PERA"), was signed by the governor on July 19, 2011. This Bill was part of a four bill package of legislation that created many new provisions in public employment in general, and employment of teachers in particular. The purpose of House Bill 4628 (Public Act 103 of 2011) is to establish that public employers are prohibited from collectively bargaining on the following subjects:

1. Policies governing teacher placement or personnel decisions;
2. The content of an employer's performance evaluation system;
3. Policies involving the discharge or discipline of teachers subject to the Tenure Act, as well as the discharge or discipline of an individual teacher;
4. Classroom evaluation decisions; and
5. A performance based method of compensation.

As these issues are prohibited subjects of bargaining, they are within the sole authority of the public school employer to decide. Consequently, to the extent your collective bargaining agreements touch on any of these issues, they are no longer items which may be discussed during future negotiations and should be deleted from future labor agreements.

14th Amendment Does Not Protect Right to Share Opinions Privately

The 3rd Circuit Court of Appeals recently addressed the scope of the 14th Amendment, and whether it creates a right to share one's opinion about others privately. In *Malleus* v *George*, 2011 U.S. App. *LEXIS* 10724 (3rd Cir. 2011), Plaintiff brought a claim under 42 USC § 1983, commonly referred to as Section 1983, which allows one to sue for the deprivation of a Constitutional right.

The events leading up to this lawsuit began in 2006, when a student reported to her teacher that she had seen another teacher hugging a minor student. This student also reported the incident to her parents and her great-aunt, Malleus, who was a school board member. After meetings between school administrators, the reporting student, and her parents, the district began an investigation into the allegations. During the investigation, Malleus expressed concerns to administrators, other school board members, and faculty about her great-niece's credibility. The district ended the investigation after the teacher and minor student denied the allegations.

The 2006 investigation was re-opened in 2008, when the teacher was arrested after a police officer encountered the teacher and a minor student engaging in sexual activity. Malleus agreed to cooperate with the new investigation based on assurances from the school board and the attorney conducting the investigation that the resulting report would be kept confidential. During the investigation, Malleus again expressed concerns about her great-niece's credibility and said she had a vivid imagination and was known to exaggerate her conclusions about the behavior of others. When the investigation concluded and a report was issued, Malleus was upset with the conclusions, but still believed that it would remain confidential.

Before the 2008 school board election, two other school board members leaked a copy of the report to the head of the local Republican Party who was running for a school board position. This school board candidate then provided the report to the press; and local papers released articles based on the report. Malleus claimed these articles harmed her, so she filed suit under Section 1983.

Malleus sued those who released the report alleging they violated her Constitutional right to privacy. She claimed that because she expressed her opinions of her great-niece for a limited purpose and with the understanding that they would be kept confidential, she had a legitimate expectation of privacy under the 14th Amendment. The District Court dismissed her lawsuit, holding the

communication was not protected by the 14th Amendment. Malleus then appealed to the 3rd Circuit Court of Appeals.

The 3rd Circuit explained that for Malleus to be successful in her lawsuit, she must show that the defendants "acted under color of state law to deprive plaintiff of a right secured by the Constitution." So, in order to prove her Section 1983 claim, it must first be true that the 14th Amendment establishes a right to share opinions about other individuals privately. The 14th Amendment provides a right to confidentiality and a right to autonomy. Confidentiality provides protection against disclosures of certain intimate personal information; and autonomy provides an interest in independence in making certain kinds of important decisions.

The 3rd Circuit held that her claim does not fit within the confidentiality concept, because this privacy right is limited to an individual's interest in not disclosing facts about herself. Additionally, her decision to participate in an investigation about how a previous investigation was handled does not qualify as the type of important decision protected by the 14th Amendment's right to autonomy. Malleus asked the 3rd Circuit to add a third category of privacy protected by the 14th Amendment. This third category would state that if someone shares her opinion about someone else, with the expectation that the opinion would be kept confidential, then that opinion must remain confidential. The Court declined to recognize this category and affirmed the District Court's dismissal of the case.

Associational Discrimination Under The ADA Narrowly Construed

In the recent case *Stansberry, et al* v *Wisconsin Airlines Corp,* 2011 US App LEXIS 13659, the 6th Circuit addressed the protections given to a disabled person's spouse under the Americans with Disabilities Act ("ADA"). Plaintiff Eugene Stansberry was fired from defendant Air Wisconsin Corporation and claimed that it was a discriminatory action based on his wife's rare neurological disorder, Polyarteritis Nodosa. The Court held that the plaintiff did not show that his termination was "associational discrimination," and also stated the plaintiff was not entitled to reasonable accommodation on account of his wife having a disability.

Stansberry managed Air Wisconsin's operations at Kalamazoo Airport from 1999 until he was fired on July 26, 2007. Prior to his termination, Stansberry supervised twenty-five employees. Between February and May, six of Stansberry's employees received a total of nine security violation letters from the Kalamazoo Airport director. In violation of company policy, Stansberry did not notify Air Wisconsin of the violations. In June, Marvin Mulder, Stansberry's supervisor, received a notice regarding the security violations and asked Stansberry why he did not report them. Stansberry responded that he was unaware that he needed to report them. On July 26, 2007 Mulder fired Stansberry. Air Wisconsin stated that Stansberry's termination was due to his poor performance including his failure to stay in budget, failure to report security violations, and improper supervision of employees.

Stansberry filed a claim against Air Wisconsin asserting, in part, that his termination was a violation of the ADA. The District Court granted summary judgment for Air Wisconsin, finding that Stansberry did not establish associational discrimination as required under the ADA. It also held that his poor performance was a legitimate reason for his termination. Stansberry appealed.

On appeal, the Sixth Circuit Court first looked to the relevant statute for Stansberry's claim, section 12112(b)(4) of the ADA. The section prohibits, "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of the individual with whom the qualified individual is known to have a relationship or association." The Court outlined three theories into which "association discrimination" plaintiffs usually fall: (1) "Expense" situations where an employee suffers adverse employment action because of an association with a

disabled person whose insurance coverage is provided by the employer; (2) "Disability by Association" where the employer fears that employee will contract the disability from the associated person, or where the employer fears the employee is genetically predisposed to a disability due to employee's relatives; or (3) "Distraction" where the employee is somewhat inattentive at work because of the disability of the associated person. Stansberry abandoned the expense theory, and acknowledged that his claim did not fit into "Disability by Association." So, he was left with the "Distraction" theory.

Stansberry was unable to show that Air Wisconsin was fearful that his wife's disorder would cause him to be inattentive, and was unable to show that her disability was a determining factor in his termination. Moreover, there was abundant evidence that Stansberry was not satisfactorily performing his job. Even if Stansberry could have shown that his wife's disability was a determining factor in his termination, his poor performance would still serve as a legitimate non-discriminatory reason for Air Wisconsin to terminate him. Additionally, the Court noted that although his poor performance was likely due to his wife's illness, it does not make his termination a prohibited action under the ADA. A husband is not entitled to a reasonable accommodation due to his wife's disability under the ADA.

Meaning of Non-Disparagement Clause in Separation Agreement Clarified by Court

In *Sohal* v *Michigan State University*, Court of Appeals No. 295557 (2011), the Court was called upon to examine a non-disparagement clause in a Separation Agreement. Plaintiff was in his third year of residency at the Michigan State University ("MSU") School of Medicine. Over a period of time, complaints arose regarding Plaintiff's demeanor and interaction with supervisors and coworkers. As he was unable to correct his conduct, Plaintiff was dismissed from the residency program. Subsequently, Plaintiff and the University entered into a Resignation Agreement and Release. Pertinent here is the provision which required the parties not to "knowingly disparage" the other.

Plaintiff ultimately sought admission to other residency programs. When those programs contacted MSU to inquire about reasons why the Plaintiff left, they were told that Plaintiff was not competent to practice medicine and that his rotation and residency semesters were wholly or partially non-creditable. He was not accepted to any other residency program.

Plaintiff filed suit claiming that the information MSU shared with the other programs violated the non-disparagement clause. The Court was asked to determine whether, under the circumstances, the agreement not to knowingly disparage the other was violated. The Court began by stating that the phrase not to "knowingly disparage" the other was not ambiguous. As an unambiguous term, the Court was required to give it plain and ordinary meaning. To do that, the Court utilized a typical dictionary definition of disparagement as; "to speak of in a slighting or disrespectful way… to reduce esteem or rank." Using that definition, the Court held that Defendant did not disparage Plaintiff.

Because MSU was required to provide information regarding Plaintiff's competency to inquiring residency programs and accreditation bodies, the statements were not disparaging. Plaintiff was only able to point to two instances where MSU communicated with those other programs and nothing, under those circumstances, rose to the level of disparagement. Plaintiff suggested that in light of the non-disparagement clause, Defendant had the duty to remain silent regarding his alleged poor performance. However, Plaintiff ignored the fact that institutions were required to obtain information on his past education and abilities. As such, providing the information was permissible.

This case demonstrates that non-disparagement clauses in agreements of any sort do have legal significance. It also shows that providing information which is legally required is not a violation thereof.

A Leave of Absence Does Not Cure Incompatible Offices

In *Oakland County Prosecutors Office* v *Barr,* Mich App No. 296743 (2011), the Court was asked to decide an issue of first impression. Defendant Barr, a teacher in the Pontiac School District, was elected as a trustee to the Pontiac Schools Board of Education. The Incompatible Offices Act, MCL 15.181 *et seq.* contains a general prohibition against a public employee or a public officer holding two or more incompatible offices. Incompatible offices mean multiple public positions held by one person which, when performing the duties of the jobs, results in either the subordination of one office to another or supervision of one public office over another.

It was undisputed that Defendant held two incompatible offices. Case authority makes clear that one cannot serve as both a teacher and a board member in the same district. Defendant contended, however, that she could merely take a leave of absence in order to avoid holding incompatible offices. She hoped that she could take a leave of absence from her teaching position during the period of time that she served on the board. Both the trial court and the Court of Appeals held that a leave would not cure the incompatibility.

The Court began by looking at the purpose of the Incompatible Offices Act. It was designed to ensure faithful performance, prescribe standards of conduct, and prohibit the holding of incompatible public offices. The Court held that the language is unambiguous. The plain language was contradictory to the Defendant's assertion that the legislature intended to allow leaves of absence to avoid a violation of the Act. Instead, the Court concluded that the clear language of the Incompatible Offices Act mandates that an individual must vacate one of the two positions that create the incompatibility. The Court did not agree that a leave of absence would cure the incompatibility. Due to the incompatibility, Defendant was required to vacate one of the two positions.

The Demise of Project Labor Agreements

On July 19, 2011, Governor Snyder signed legislation PA 98 which dramatically alters the landscape of Project Labor Agreements. Project Labor Agreements are contracts by which state, local and educational governmental entities execute contracts for the construction, repair, remodel or demolition of a facility and requires contractors to be parties to collective bargaining agreements. The notion is that these Project Labor Agreements ensure the existence of a unionized workforce with established wages, benefits, and conditions of employment on construction projects.

Act 98 now prohibits state, local, and educational entities from expending funds under such agreements. It also prohibits governmental entities from discriminating against bidders, contractors, or subcontractors, based on their status as parties or non-parties to, or willingness or refusal to enter into, labor contracts covering the underlying construction project. It prohibits governmental entities from awarding a grant, tax abatement, or tax credit conditioned on the execution of a Project Labor Agreement or the recipient's status as a party or non-party to a collective bargaining agreement.

The Act is prospective, only. It has no impact on publicly-funded construction projects, grants, tax abatements, or tax credits that pre-date its enactment. This act should increase the bidding on and participation in publicly-funded construction projects by contractors who are not parties to labor contracts. It may also force contractors and subcontractors who are parties to such agreements to seek more cost effective methods of doing business, and seek cooperation of building trade unions to maintain competitive pricing. Please note that the Act excludes projects which are required to pay prevailing wages. Those prevailing wages are typically established via reference to wages and benefits of certain building trade labor organizations. If you have any questions or

concerns if a project or contract would violate this legislation, please contact The Williams Firm, P.C.

NLRB Overturns Decertification Election

In a 2-1 decision, the National Labor Relations Board ("NLRB") set aside the results of a decertification election that the employer won by a 47-46 vote. At issue was whether certain employee handbook policies were permissible.

The disputed decertification election was held in September, 2006. However, two years earlier, the employer modified its employee handbook and distributed it to bargaining unit employees. The employees signed forms acknowledging that they agreed to read the material in the handbook. The handbook was discussed at employee orientation sessions, attended by a union representative. The union also received copies of the handbook but never objected to any of the policies therein.

At issue were three policies in the handbook which covered employee solicitation, employee loitering, and wearing of emblems and buttons in the workplace. It was not until six weeks after the decertification petition was filed, and nine weeks before the election, that the union filed an unfair labor practice charge alleging that the handbook policies were unlawful. Despite the unfair labor practice charge, the NLRB proceeded with the decertification election. After the union lost, it filed an objection seeking to overturn the results, in part, because of the disputed handbook provisions.

The NLRB acknowledged that there was no showing that the handbook rules were enforced against protected activity and no employees were hired or given the handbook during the critical election period. The policies were not promulgated in response to union activity, yet the NLRB concluded that the provisions in the handbook were unlawfully overbroad. The NLRB found that merely maintaining three overbroad and unlawful policies, when considered in conjunction with the closeness of the vote, was enough to set aside the election results and order a new election. The NLRB concluded that the provisions may have had a chilling effect on the ability employees to exercise a free vote concerning union representation.

This case, *Jurys Boston Hotel*, 356 NLRB 114 (2011), underscored the importance of insuring that employers adopt lawful handbook policies which comply with the National Labor Relations Act. As demonstrated by *Jurys Boston Hotel*, where the results of a representation election are very close, the mere existence of overbroad handbook policies may be enough to overturn the results.

NOTES

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