



Labor and Employment Law Reporter

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Under the Tenure Act, Arbitrary and Capricious Means "Arbitrary and Capricious."

Public Act 101, of 2011, amends the Michigan Teachers' Tenure Act to prohibit decisions to discharge or demote a tenured teacher that are "arbitrary and capricious". MCL 38.101(1). Previously, the standard for discharging a teacher required that the reasons for discharge or demotion be only for "reasonable and just cause."

In *Cona v Avondale School District* (STC 11-61), the Michigan Tenure Commission issued its first decision applying and interpreting the arbitrary and capricious standard. The evidence before the Administrative Law Judge ("ALJ") established that the teacher had: (1) been convicted of operating a motor vehicle while impaired and had subsequent probation violations including alcohol and marijuana use; (2) been jailed for 30 days, 17 of which caused him to be absent from school; (3) mislead the District as to the true reason for his absence, and; (4) made no effort to address his alcohol or illegal drug use. Because of these incidents, the school district decided to discharge the teacher.

Remarkably, the ALJ who heard the case overruled the school board's decision to discharge him. Instead, the ALJ merely imposed a 20-day unpaid suspension upon him.

The Tenure Commission concluded that the ALJ erred in that decision. The Commission explained that its duty is "...not to fashion the

penalty that we ourselves would prefer but to review the controlling board's decision for arbitrariness and capriciousness. If there is a reasoned explanation for the decision, based on the evidence, the decision is not arbitrary or capricious. If a controlling board overlooked important evidence or erred in appreciating the significance of the evidence, its decision may be determined to be arbitrary or capricious". This ruling clearly emphasizes the Commission's position that, regardless whether it likes a school board's decision, so long as it is not arbitrary or capricious it will be upheld.

This new standard is highly deferential, but it is not merely a "rubber-stamp". The Commission has a duty to review the quality and quantity of the evidence to determine whether the school board's disciplinary decision is a result of a deliberate, principled reason, supported by evidence. If not, it may still be overturned.

This is the first tenure case interpreting and applying the arbitrary and capricious standard. As intended by the legislature, the Commission agreed that so long as there is a legitimate reason for discharge or discipline, the Commission will not substitute its judgment for that of a local school district. This rule gives school districts in Michigan the tool they need to discipline or discharge tenured teachers where such action is warranted.

The NLRB Modifies its Deferral Procedures

In 2012, acting general counsel of the National Labor Relations Board ("NLRB") modified the Board's procedures for deferral of certain unfair labor practice charges. *General Counsel Memorandum #12.01*. The effect of such modification could easily result in employers being required to defend the same issue in multiple venues.

Prior to the General Counsel's Memorandum, the NLRB routinely deferred, or held in abeyance, unfair labor practice charges filed with it. Under *Collyer Insulated Wire*, 192 NLRB 837 (1971), known as *Collyer* deferral, the NLRB would allow matters to proceed to arbitration first, before becoming involved.

The arbitral deferral espoused in *Collyer* was based upon the goals of promoting collective bargaining and private resolution of disputes. So long as an alleged violation of the National Labor Relations Act was covered by the parties' contractual grievance arbitration procedure, the Board would routinely defer the dispute to arbitration, provided certain conditions are met. Those conditions include the following: that the conflict arose out of a long and productive bargaining relationship; there is no claim that the employer attempted to thwart the employees' exercise of protected rights; the arbitration clause covers the disputed issue; the employer is willing to arbitrate the dispute; and the unfair labor practice lies at the center of the dispute to be arbitrated.

The reason for the new procedure was to avoid excess delays which could frustrate the Board's efforts to provide a timely remedy under the Act. For example, if circumstances change so much at the worksite that the remedy would be meaningless, deferral did not serve the purposes of either party. Further, significant delays could result in lack of opportunity to conduct an effective trial of the alleged unfair labor practice. Thus, the new rule was implemented.

The new case handling procedures give regional offices much more discretion whether a case will be deferred. Meanwhile, the NLRB will increase its scrutiny of a case that has been deferred. The local Region will determine whether a grievance may be completed in less than a year and, if that appears likely, then that charge may be deferred. If a case is deferred under the new procedures, the Region will conduct quarterly reviews of the matter.

If the *Collyer* deferral elements exist, employers should still request deferral. Unfortunately, the potential for having such a request granted appears to have lessened considerably by the new procedures. It is now more likely that employers may be forced to defend matters in two separate venues at the same time.

No Liability Where Tow-Truck Driver Could Not Perform Job

Keith Montgomery sued his employer, a tow-truck employee, for firing him after he apparently suffered a stroke. The trial court dismissed his action, concluding that the Plaintiff presented no evidence that his employer perceived him as being disabled in a major life activity. The Court of Appeals agreed and affirmed the dismissal. *Montgomery v Larry Ross Garage, Inc.* Mich. App. No. 30688 (unpublished, 2012).

Plaintiff was hired as a tow-truck driver. In his first evaluation, he received several poor scores, and the rest were merely average. He scored 65 out of 100 points.

Several months later, the Plaintiff had chest pains, dizziness, and numbness on the left side of his body. At the time, he believed he had suffered some sort of stroke. The employer required a return to work form from his physician before allowing him to return. Upon receiving the note, the employer contacted the physician to verify its authenticity, but the physician indicated he did not realize the strenuous nature of Plaintiff's job. A tow-truck driver position is a very dangerous job, often performed in close proximity to traffic and in hazardous weather conditions. The physician indicated he would need to do further tests before he could determine if Plaintiff was capable of returning to that position.

Before the tests were done, Plaintiff's employment was terminated. The stated reason for the discharge was the poor evaluation, and the employer claimed that the decision was made before he even suffered the medical problems.

The Plaintiff contended that he was fired because his employer believed he had suffered a stroke. Although the Defendant denied that allegation, the court interpreted the issue as if the employer had expressed the belief Plaintiff had a stroke. Under the Michigan Persons with Disabilities Act, it is illegal to take adverse employment action against an individual if they have a disability *or are perceived as* having a disability.

However, the employer's perception must be that the Plaintiff is viewed as being substantially limited in the ability to perform a major life activity. The court explained that the inability to perform a *particular* job does not constitute a substantial limitation.

Here, Plaintiff presented no evidence that Defendant perceived that his stroke prevented him from performing a wide range of jobs, merely that his stroke might impair Plaintiff's ability to perform the job of tow-truck driver. Accordingly, the dismissal of the case was affirmed.

180-Day Statute of Limitations Strictly Enforced

In *Donald v Wolverine Human Services*, Mich App No. 301184 (unpublished, 2011), the Michigan Court of Appeals examined the significance of the statute of limitations contained in an employment agreement. *Wolverine* hired Plaintiff as a health care worker on June 4, 2007. At the time she was hired, she signed an employment agreement which read, in relevant part, "Employee agrees that no action, including claims of discrimination, will be brought within 180 days after it arises and that any longer statute of limitations are waived."

According to Plaintiff, in November, 2008, she was passed over for a promotion in favor of a white woman. On July 21, 2009, she was discharged. Plaintiff, a member of a protected class, believed these incidents were motivated by her race.

Plaintiff filed suit on March 24, 2010, alleging race discrimination under the Elliott-Larsen Civil Rights Act. Defendant filed a motion to dismiss, and the trial court concluded that the complaint was untimely and dismissed it. The Court of Appeals agreed.

Plaintiff argued that the trial court's decision was erroneous because the statute of limitations in

the employment agreement was unenforceable and violated federal law. Plaintiff claimed that the contract provision violated her rights of 42 USC 1981. Plaintiff acknowledged that the language was unambiguous and that unambiguous provisions must be enforced as written, unless they violate law or public policy.

The Court of Appeals noted that there were several obvious problems with Plaintiff's argument. First, Plaintiff failed to recognize that the statute provides "equal rights" as enjoyed by others, not greater rights. Second, Plaintiff failed to acknowledge that she had the right to make a contract and is subject to its terms, just as must any white citizen. Third, the federal law said nothing about a shortened period of limitations in which to sue and that if her argument was adopted, that would be tantamount to denying her the right to make a contract. Fourth, the contract provisions are generally applicable to all persons, without reference to race. Fifth, she claims that the right to sue cannot be impaired under color of state law. If that is believed, then no statute of limitations could ever apply to her alleged claims. Such an argument is untenable in its entirety, so the trial court's dismissal was affirmed.

This case emphasizes the importance of clearly worded language in employment agreements, employee handbooks, and employer policies. It is permissible in an employment agreement to shorten a statute of limitations. They must be worded clearly and unambiguously, however. If an employer has such documents, claims by an employee must be assessed to determine whether they are timely.

Paid Time Off: To Pay or Not To Pay Upon Termination?

In *MSX International Services v Brian Hurley*, Mich. App. No. 300569 (unpublished 2012), the Michigan Court of Appeals held that paid time off (PTO) did not accrue once the former employee signed an agreement terminating his compensation at will. Defendant Hurley, an at will employee, signed an agreement acknowledging that his employer, MSX, could terminate his compensation at will, without cause

or notice. However, Hurley felt as though he was entitled to a vested contract right pertaining to MSX's written policy regarding PTO. Hurley argued he was entitled to compensation for PTO because MSX's written policy was "contractual in nature."

The Court found nothing in the record that supported "the notion of an express contract or agreement, either oral or written, concerning compensation for PTO." First, there was no evidence that Hurley, or anyone else, actually "negotiated" any aspect of the PTO policy. Second, there was no evidence that MSX actually agreed in its employee handbook to extend the PTO policy to Hurley or to anyone else. MSX specifically stated in its reservation of rights - "MSX International further reserves the right to modify, revoke, suspend, terminate or change any or all policies and procedures and employee benefits, in whole or in part, at any time, with or without prior notice."

Nonetheless, Hurley argued that the PTO served to grant him compensation independent of his at-will employment status. However, Hurley failed to establish that any consideration was given for the alleged contract regarding PTO. The PTO policy created by MSX granted all employees five days of PTO as soon as they started working. As a result, the Court found that this negated Hurley's argument that the PTO was granted in exchange for a promise to continue working for a year.

The Court compared the issues in this case with a previous decision regarding a company's severance pay policy. In the latter case, the Court held that a definitive offer of a severance policy can be considered to have been accepted by an employee through that employee's continued employment with the offering company. This results in a contract that cannot be revoked by reference to disclaimers in personnel handbooks. The Court found the present case to be distinguishable because "although the measure of the number of days of PTO was based on total years of service, employees were simply granted five days of PTO as soon as they were hired."

The Court determined MSX's policy to be gratuitous because "PTO was granted to Hurley as soon as he began work, as a gratuity, not as compensation for time spent working for MSX" and therefore, Hurley's rights were not vested.

Termination of Workers' Compensation Benefits Does Not Justify Litigation Under the WPA

In *King v City of Ann Arbor*, Mich. App. No. 303073 (unpublished, 2012), the Michigan Court of Appeals held that an adverse employment action or an alleged adverse employment action that is causally connected to the protected activity must be proven to survive a claim under the Whistleblowers' Protection Act (WPA). Dawn King, a police officer for the City of Ann Arbor (AA), filed a complaint in July 2010 alleging violation of the WPA. She claimed that she was retaliated against when she made a report to the MIOSHA about a carbon monoxide alarm that sounded at the Ann Arbor City Hall in April 2010. King alleged that AA retaliated against her, when it refused to reopen her workers' compensation case for an injury King suffered while on duty in March 2009.

After a series of work-related injuries from March 2009 – September 2009, Ann Arbor's Benefits Supervisor informed King that any treatment received after September 2009 would not be covered under workers' compensation and that King's claim could be reevaluated if she submitted additional medical documentation. On October 14, 2009, the Accident Fund, AA's third party administrator, filed a Notice of Dispute with the Workers' Compensation Agency, disputing any of King's medical claims until further review.

On October 15, 2009, King requested that her workers' compensation claim be reopened. After reviewing her medical records, a second Notice of Dispute was filed by the Accident Fund on February 10, 2010. Pursuant to the Benefits Supervisor's request, the Accident Fund sent King for an independent medical exam on February 27, 2010. The exam confirmed that King's subsequent claims were not work-related.

According to the Court, the Supervisor "appeared to support (King) by requesting that the Accident Fund provide an independent medical exam" and had no knowledge of King's MIOSHA complaint when she informed King in May 2010 that her workers' compensation claim would not be reopened.

Taking the evidence in a light most favorable to King, the Court held that she did not suffer an adverse employment action. The Court explained that [Ann Arbor] took no action against plaintiff. No term or condition of plaintiff's employment was affected by [Ann Arbor's] refusal to stand by its earlier decision not to reopen [King's] workers' compensation claim. [King] could have availed herself of the appeals process, but failed to do so." Further, King did not suffer any tangible adverse employment action.

The Court also concluded that even if the denial to reopen King's workers' compensation claim could be considered an adverse employment action, there was no evidence that it was motivated by her protected activity. "(King) failed to establish a genuine issue of material fact as to whether her MIOSHA report motivated the denial to reopen her workers' compensation claim."

Mum is Not the Word During Employer Investigations

In *Banner Health System*, 358 NLRB No. 93 (2012), the National Labor Relations Board (NLRB) held that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct. According to the Board, such a rule violates Section 7 of the National Labor Relations Act, which protects employees' rights to engage in "concerted activities" for their mutual aid and protection, regardless of whether the employees belong to a union.

Banner's human resources consultant routinely asked employees making a complaint not to discuss the matter with their coworkers while the

employer's investigation was ongoing. It was a part of the employer's standard written "introduction for all interviews." The Administrative Law Judge ("ALJ") who heard the case upheld this practice, finding that it was justified by the employer's concern for protecting the integrity of its investigations.

On appeal, however, the Board reversed the ALJ's decision. The Board stated "contrary to the judge, we find that the generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights."

The Board went on to hold that, in order to minimize the impact on Section 7 rights, an employer must have a legitimate business justification to prohibit employees from discussing ongoing investigations. Additionally, before prohibiting employees from discussing investigations, the employer must first determine whether:

- any given investigation witnesses needed protection,
- evidence was in danger of being destroyed,
- testimony was in danger of being fabricated, or
- there was a need to prevent a cover up.

The Board concluded that Banner's "blanket approach" of "maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct" failed to meet any of these requirements. Based on this decision before instructing employees not to discuss an ongoing investigation, the employer should determine if one of the four justifications outlined in *Banner* applies.

Adoption of Burden Shifting and Honest Belief Rule in FMLA Cases

In *Donald v Sybra, Inc.*, 667 F. 3d 757 (6th Cir. 2012) the Court held that Family and Medical Leave Act ("FMLA") interference claims should be evaluated under the *McDonnell Douglas* burden-shifting framework. Gwendolyn Donald worked for Sybra, Inc. at one of its Saginaw, Michigan Arby restaurants for

over two years as an assistant manager. During her employment, Donald suffered from several health problems which forced her to miss a substantial amount of work. On February 29, 2008, Sybra terminated Donald's employment with the company.

According to Sybra, the termination was a result of an investigation conducted by Sybra after suspicions were confirmed that Donald was stealing cash from her register. Donald contended her termination gave rise to two causes of action under FMLA: (1) termination while on FMLA leave; and (2) retaliation for taking FMLA leave. These matters were heard before the United States District Court for the Eastern District of Michigan. The district court held that Donald failed to show that Sybra's justification for termination was pretextual. Donald appealed to the United States Court of Appeals for the Sixth Circuit.

Under the FMLA, it is unlawful for employers to either "interfere with, restrain, or deny the exercise of or the attempt to exercise" any provision in the Act, or to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the Act. Therefore, the 6th Circuit followed the district court's reasoning that under the framework established in *McDonnell Douglas*, a successfully pleaded *prima facie* case for either FMLA interference or FMLA retaliation would shift the burden to Sybra to present a legitimate, nondiscriminatory reason for its decision to terminate Donald. If Sybra successfully carried this burden, Donald's claims could survive only if she could show that Sybra's stated reasons were a pretext for unlawful discrimination. The district court effectively gave Donald the benefit of the doubt and assumed that she could establish both *prima facie* claims. However, "the district court determined that Donald produced insufficient evidence to prove that Sybra's stated reasons, cash register and order irregularities, were pretextual."

The Court also noted that it has "adopted the *honest belief rule*, reasoning that it is not in the interests of justice for us to wade into an employer's

decision-making process” as long as the employer's decision was informed, nondiscriminatory, and reasonable in light of the facts known at the time of the decision.

Ultimately, the Court held, even if Donald could establish a *prima facie* case, she still couldn't prove pretext because Sybra had conducted a valid investigation and the results cast legitimate suspicion on Donald.

This case serves to establish the proper standard of proof in FMLA interference cases, and reaffirms the legal standard that plaintiffs have the burden of proving pretext, after the employer offers a nondiscriminatory reason for the employment action.

This client newsletter is intended to provide helpful information on topics relating to labor and employment law and is not intended to constitute legal advice or opinion relative to specific facts, matters, situations, or issues. Legal counsel should be consulted concerning the application of this information to specific circumstances or situations. ©The Williams Firm, P.C., Fall, 2012

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