

Labor and Employment Law **Notes**

THE END OF 2009 WAS A BUSY TIME FOR EMPLOYMENT LAW DECISIONS IN ILLINOIS AND THE SEVENTH CIRCUIT, AND IT DOESN'T LOOK LIKE IT WILL EASE UP IN 2010

The following are a selection of key decisions in Illinois and the Seventh Circuit Court of Appeals that touch upon a number of issues that insurers and employers should be aware of in anticipation of an increased number of EPLI-related claims and applications for EPLI policies in 2010. Corporate counsel expect a tsunami of labor and employment related lawsuits in 2010 as will be discussed in more detail below.

O'Neal v. The City of Chicago

In plaintiff's second employment discrimination suit against the Chicago Police Department ("CPD") she claimed retaliation and sex discrimination. Summary judgment in favor of the CPD was affirmed where: (1) the plaintiff provided insufficient evidence that she suffered an adverse employment action because she engaged in a statutorily protected activity by direct method of proof in that neither of her two actionable transfers occurred because of her prior lawsuit or her 2006 grievance; (2) plaintiff did not provide sufficient evidence to establish a causal connection under the indirect method of proof; and (3) the plaintiff failed on her sex discrimination claim for the same reason as her retaliation claim, as she failed to adduce any evidence indicating that her actionable transfers were because of her sex.

Kasten v. Saint-Gobain Performance Plastics Corp.

The Seventh Circuit Court of Appeals declined to hear a workplace retaliation case *en banc*, letting stand the panel's decision that the Fair Labor Standards Act does not protect "unwritten purely verbal complaints." Three judges dissented stating their colleagues were wrong not to hear the case because the decision departs from other circuits' decisions and the "long-standing view of the Department of Labor." The dissent wrote: "Oral inquiries...to an agency representative play no less an important role in the statutory scheme than do letters, emails, and

sworn statements.” Last year U.S. District Judge Barbara Crab dismissed Kasten’s 2007 lawsuit. The judge concluded that the employer had not retaliated under the Fair Labor Standards Act when it fired him after he failed repeatedly to comply with policies for punching in and out on a time clock. Kasten alleged that he was being retaliated against for complaining verbally to supervisors on many occasions that the placement of the clock was illegal because it did not allow workers to be paid for time spent donning and doffing protective work clothing. The Seventh Circuit panel affirmed the lower court ruling, saying the statute does not protect against retaliation for verbal complaints. The panel also disregarded a Department of Labor *amicus* brief on Kasten’s behalf, which urged the court to read the phrase “to file [complaints]” broadly as “to submit” complaints.

Long v. Teachers Retirement System of the State of Illinois

The Court of Appeals held that a memorandum from a direct supervisor documenting an employee’s absences did not show that the supervisor held a retaliatory animus towards the employee’s use of the Family and Medical Leave Act (“FMLA”). Any retaliatory animus of a supervisor could not be imputed to the executive director who made the ultimate discharge decision. The supervisor’s oral recommendation that the employer discharge the employee did not permit the inference of retaliation. The decline in the employee’s performance evaluations could not provide circumstantial evidence of the employer’s retaliatory intent. A memorandum from a direct supervisor documenting an employee’s absences, and negative comments the supervisor made about the toll the employee’s excessive absenteeism was taking on her performance, failed to demonstrate that her supervisor held a retaliatory animus towards the employee’s use of FMLA leave, as would support a *prima facie* FMLA retaliation claim. This is especially true where the employee had not even applied for FMLA leave when the supervisor drafted the memorandum and provided it to management or made the negative comment about the excessive absenteeism. Statements by subordinates normally are not probative of an intent to retaliate by the decision maker in an FMLA retaliation case. Although the direct supervisor recommended that the employer terminate the employee, there was no showing that the executive director knew that the employee had taken FMLA leave when he made the decision to discharge her, and the director conducted an independent investigation and relied on multiple sources of information regarding the employee’s poor performance before arriving at the decision to discharge the employee.

Malinowski v. The Cook County Sheriff’s Merit Board and the Sheriff of Cook County

Malinowski appealed an order of the circuit court confirming the order of the Cook County Sheriff’s Merit Board discharging her from employment by the Sheriff of Cook County. Malinowski contended on appeal that the sheriff had no rule or policy requiring her to perform the acts that she was accused of failing to perform. She also contended that the Board’s findings were contrary to the manifest weight of the evidence. A sheriff’s correctional officer may not be removed, demoted, or suspended except for cause, upon written charge filed with the Board by the sheriff and a hearing before the Board where the officer has the right to present evidence and arguments. “Cause” is a substantial shortcoming that renders continuance in office detrimental to the discipline and efficiency of the service, or something that the law and sound public opinion recognize as good cause for no longer occupying office. The court held that the plaintiff violated a rule of the sheriff when she failed to inspect the inside of a laundry truck and that the Board’s findings were not contrary to the manifest weight of the evidence. It was a sheriff’s rule

or order requiring the plaintiff to search laundry baskets in trucks leaving the jail and the plaintiff failed to do that. Plaintiff failed to undertake that responsibility resulting in the escape of a jail inmate. The Cook County Sheriff's Merit Board's finding that the plaintiff could have prevented the escape was not against the manifest weight of the evidence. The evidence supports a conclusion that the plaintiff, with aid from the laundry truck crew, could have removed the laundry from the baskets and would have found the inmate.

Butler v. The Village of Round Lake Police Department

A former police officer brought an action against the Village under the Americans with Disabilities Act ("ADA"). Summary judgment was entered for the Village. The appellate court upheld the decision finding that the officer was judicially estopped from asserting that he could perform the essential functions of his job, due to his testimony before the Pension Board that his chronic obstructive pulmonary disease made it impossible to do his job, even if Village officials encouraged him to apply for pension and the Board did not consider reasonable accommodations, where plaintiff offered no satisfactory reason for his inconsistency, and no accommodation would have sufficed. The purpose of judicial estoppel is to prevent a litigant from prevailing twice on opposite theories. A person who applied for disability benefits must live with the factual representations made to obtain them, and if these show an inability to do the job, then an ADA claim may be rejected without further inquiry under the Doctrine of Judicial Estoppel.

Gunville v. Walker, Jr., Director of the Department of Corrections of the State of Ill., et al

Former state employees brought an action against state officials alleging their termination violated their rights under the First and Fourteenth Amendments. To make a *prima facie* case for violation of First Amendment rights, public employees must present evidence that: (1) Their speech was constitutionally protected; (2) They suffered a deprivation likely to deter free speech; and (3) Their speech caused the employer's action. The public employees' affiliation with a political party is protected under the First Amendment. In order to demonstrate the public officials were motivated by an employee's political affiliation in determining which employees to terminate as would support a *prima facie* claim for violation of the First Amendment, the employees must first show that the officials knew of their association with a particular political party. The employees failed to make the required showings on either count.

Laouini v. CLM Freightline, Inc.

The employee, an Arab of Tunisian descent brought a Title VII discrimination action against his employer alleging he was discharged on account of race and national origin. The district court granted summary judgment in favor of the employer. The district court's decision was vacated and remanded. The appellate court determined: (1) A fact issue barred summary judgment on the issue of whether the discrimination charge was timely received by the Equal Employment Opportunity Commission ("EEOC"); (2) A facsimile confirmation generated by the employee's counsel's fax machine was sufficient to create a factual dispute that the discrimination charge was received by the EEOC on the date shown on the confirmation; and (3) The local EEOC office's interpretation of the filing regulation was reasonable. In general, the failure to timely file an administrative charge with the EEOC is an affirmative defense in a Title VII action, and the burden of proof of summary judgment therefore rests on the defendant. In so holding the appellate court stated: "A bureaucratic officer's uninformed belief that a document was not

received by facsimile transmission is no more conclusive than a fax transmission confirmation record from the sender's machine indicating that it was." Finally, a local EEOC office's interpretation of a regulation providing that charges of discrimination could be filed with the EEOC either in person or by mail with any EEOC office thereby permitting charges of discrimination to be filed by facsimile transmission was reasonable interpretation and, therefore, was entitled to substantial deference by a federal court.

ALERT: Corporation Counsel Expect a Big Year for Labor and Employment Litigation

When asked what types of litigation are increasing for their companies in light of the economic downturn, the corporation counsel surveyed not surprisingly stated that labor and employment law actions would be on the rise in the next 12 months. Most of the nation's corporate counsel believe that the 2008 economic collapse triggered a wave of new litigation that will build to a tsunami in 2010, according to this recent survey. Fifty-two percent of America's largest corporations expect a marked increase in legal work, especially in the areas of labor and employment, as well as whistleblower litigations. Moreover, they also expect a renewed emphasis on labor and employment legislation in 2010.

Based on these facts and figures, insurance companies writing EPLI insurance should expect a wave of claims being made against their clients' insurance policies. Also, insurance companies that write Employment Practice Liability Insurance should expect an increase in the amount of applications for EPLI insurance in light of this tsunami of anticipated in labor and employment law litigation.