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■ HEALTHCARE REFORM

Healthcare Reform Rings In The New Year!

A reminder that, effective January 1, 2012, the Patient Protection and Affordability Care Act (“Act”) requires most employers to begin reporting the cost of health care coverage on all employees’ W-2 forms. While the Act is subject to change through judicial, regulatory, or legislative action, Downes Fishel will provide continual updates as portions of the Act are phased-in.

For more information pertaining to this topic or any other information in this newsletter, please contact Brad E. Bennett at bbennett@downesfishel.com.



■ FMLA AND RETALIATION CLAIMS

United States District Court Dismisses Former Employee's FMLA and Retaliation Claims

The United States District Court for the Southern District of Ohio recently dismissed FMLA and retaliation claims brought by a former employee of the Fairfield County Board of Developmental Disabilities. The Board employed Evette Fields as an executive assistant to the Superintendent. In 2006, Fields received a non-disciplinary sick leave usage notification informing Fields of her sick leave usage during the previous twelve months. Fields complained, contending that the notification included leave that should have been designated as FMLA rather than sick leave. Fields had not requested FMLA leave nor provided FMLA Certification for the dates in question. However, the Board informed Fields that it would retroactively designate the leave as FMLA if she could provide FMLA Certification. After the Board received FMLA Certification from Fields' doctor, the Board retroactively designated the leave FMLA. The Board did not renew Fields' employment contract in 2007 due to poor work performance and Fields' strained relationship with the Superintendent.

Fields brought a lawsuit in federal court claiming that she was disciplined for using family medical leave. She also argued that she was terminated for complaining about the sick leave usage notification, which she perceived as discipline. Fields alleged the Board interfered with her FMLA rights by allowing her to work at home while on FMLA leave. Finally, Fields claimed she was terminated for complaining about workplace discrimination through emails she sent to a friend. Fields' work email was monitored by the Superintendent during the final months of Fields' employment.

The Court granted Defendant summary judgment on each of Fields' claims. The Court ruled that



the sick leave usage notification Fields received was not discipline and therefore Fields was never disciplined for using FMLA leave. Further, the Court determined the Board did not interfere with Fields' FMLA rights because Fields herself offered to work while on FMLA leave and later took time off to make up for the time spent working while on leave.

Finally, the Court found no evidence that the Board non-renewed Fields' contract because she complained of workplace discrimination. The Court determined the Board had a legitimate non-discriminatory reason for non-renewing Fields' employment contract due to poor work performance and Fields' strained relationship with the Superintendent. Both Fields and the Superintendent acknowledged they did not get along nor trust each other, despite Fields being the Superintendent's executive assistant. Accordingly, the Court dismissed each of Fields' claims.

“Fields also alleged the Board interfered with her FMLA rights by allowing her to work at home while on FMLA leave.”

It should be noted that Fields brought her FMLA claims two and a half years after the Board non-renewed her contract. Generally, a two year statute of limitations exists for FMLA claims. However, the statute of limitations is extended to three years if a plaintiff can prove a willful violation. The court stated that the three year statute of limitations applies in all FMLA retaliation cases because retaliation, by its very nature, is willful. Nevertheless, despite the applicable three year statute of limitations, Plaintiff was unable to prove a FMLA retaliation violation.

For more information about this case or to receive a copy of the decision, please contact Paul Bernhart at pbernhart@downesfishel.com.



■ CRUEL AND UNUSUAL PUNISHMENT

DFHK Wins Summary Judgment Against Prisoner Claiming Cruel and Unusual Punishment in County Jail.

On December 21, 2011, Ohio's Northern District Court granted the Allen County Sheriff's Office's Motion for Summary Judgment against James L. Bridgmon, a former inmate in the Allen County Jail. Mr. Bridgmon claimed the Sheriff's Office violated his Eighth Amendment right against cruel and unusual punishment by denying him medical treatment during his time in the jail. Without delving into a factual argument regarding Mr. Bridgmon's claims, DFHK had the case dismissed based on Bridgmon's failure to comply with the Prison Litigation Reform Act. The PLRA requires inmates to file grievances regarding prison conditions using any available grievance system in the jail prior to filing an action in court regarding those conditions. The Allen County jail has a grievance system in place and the procedures for that system are posted on the walls of every living unit in the jail. Because Mr. Bridgmon never filed a grievance regarding the alleged failure to provide medical treatment, he failed to comply with federal law and his suit was dismissed. This case demonstrates the importance for all jails to have written grievance procedures and to distribute those procedures to the inmates.

For more information on this case or the Prison Litigation Reform Act, contact Matt Whitman at mwhitman@downesfishel.com



■ CIVIL SERVICE WAIVER

Civil Service Waiver in Township's Collective Bargaining Agreement Inapplicable to Lieutenant Promotional Examination.

On August 19, 2011, the Seventh District Court of Appeals issued an opinion addressing the interaction between Ohio's collective bargaining law and Ohio's civil service law. *State ex rel. Cochran v. Boardman Twp. Bd. of Trustees*, 2011 WL 3806157 (Ohio App. 2011).

Ohio's civil service law provides that a public safety employer in an urban township "may appoint to a vacant position any one of the three highest scorers on the eligible list for a promotional examination." See R.C. 505.49(C). Conversely, Boardman Township's local civil service rules stated: "If there is a valid eligibility list, the Commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating and the Appointing Authority shall appoint such person within thirty (30) days from the date of such certification."

When the sergeant with the highest rating on a lieutenant's promotional list was passed over for promotion, he filed a writ of mandamus contending that the Township had a legal obligation to follow its own civil service rule establishing a "Rule of One." The Township argued that its collective bargaining agreement ("CBA") expressly waived application of civil service law with regards to safety forces promotional exams. Upon reviewing the CBA language, the court concluded that the CBA waiver only applied after reaching a "baseline staffing level". Since it was undisputed that the parties never reached the baseline staffing level, the CBA was inapplicable. In short, the court found that civil service law applied.

According to the Court, since R.C. 505.49(C) applied to the facts of this case, the Township was well within its lawful discretion to promote any of the top three names on the promotional list regardless of its own local civil service "Rule of One." The sergeant's writ was denied.

Public employers can take some valuable lessons from this decision. First, in order for a CBA to waive application of civil service law, the waiver needs to be express and unqualified. Second, other than cities with home rule authority, local civil service rules may not be inconsistent with State law.



■ CIVIL SERVICE LAYOFFS

Cases Provide Guidance Regarding Civil Service Layoffs

Recently, DFHK received a Report and Recommendation from an Administrative Law Judge recommending that the State Personnel Board of Review (“SPBR”) affirm a civil service layoff. Wahlers v. Ottawa County Department of Job and Family Services, 11-ABL-05-0171 (2011). Previously, SPBR affirmed a similar civil service layoff in Smith v. Harrison County DJFS, 09-ABL-09-0403 (2010). Both cases involve challenges to the abolishment of positions and subsequent layoffs. The laid off employees claimed their employer acted in bad faith. These cases illustrate the importance of employers supporting their reasons for a job abolishment with objective evidence.

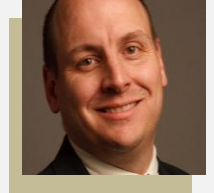
In both *Wahlers* and *Smith*, the public employer incurred a budget reduction of approximately 40%, necessitating a reduction in staff and reorganization. The hearing focused on the impact of reduced funding, the cost savings of the staff reductions, efficiency; and adherence to civil service layoff procedures. Undoubtedly, these are difficult times for public employers and many face the possibility of reducing staff. Civil service laws set forth the specific reasons a job abolishment may occur and the procedure by which a position may be abolished and employees laid off. R.C. §§124.321 to 124.327 and OAC §123:1-41 et seq. Generally, abolishment of positions and layoffs of civil service employees take place due to lack of funds, reasons of economy, lack of work, and/or reorganization. Likewise, very specific timelines, notice requirements, and displacement rights, must be followed.

When faced with a possible reduction of civil service staff, employers are well-advised to meticulously review their operation, prepare objective documentation demonstrating the need to reduce staff, prepare cost evaluations of proposed reductions, prepare employee notices, and to take other appropriate planning measures.

Employers should also consider contacting agencies that have performed civil service layoffs as well as legal counsel. Only after

thorough analysis and preparation should a public employer initiate a reduction of civil service staff.

For more information pertaining to this topic or for copy of the decision please contact Frank Hatfield at fhatfield@downesfishel.com.



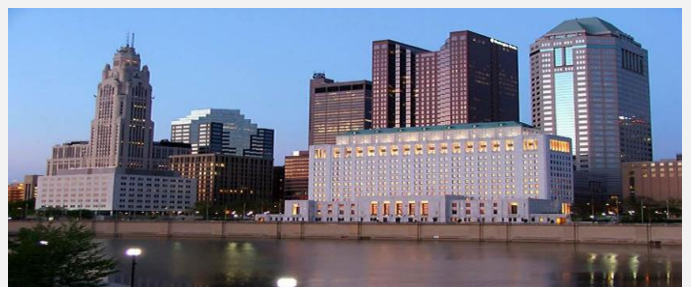
■ PUBLIC POLICY

Ohio Supreme Court Finds that Public Policy Requires Clear Identification of a Specific Law.

When all else fails, “at-will” employees who have been terminated will often allege a claim of wrongful discharge “in violation of public policy”. While such a claim legally must stem from a clear legal source found in Ohio law, employees routinely assert that the source stems from a “general” rule of law. On September 15, 2011, the Ohio Supreme Court addressed whether this practice is sufficient to state a claim for relief. Dohme v. Eurand Am., Inc., 2011-Ohio-4609.

Dohme, an at-will employee, was a facilities administrator responsible for maintaining the employer’s fire protection system. Dohme filed a wrongful discharge in violation of public policy claim alleging that he was fired after he expressed concerns about safety to an insurance adjuster during an on-site evaluation at his place of employment. However, prior to the

(Con’t on pg 5...Public Policy)



(Cont't from pg 4...Public Policy)

insurance adjuster's visit, Eurand, the employer, sent an intra-office e-mail to all employees explaining that only certain employees, excluding Dohme, would be permitted to talk with the adjuster. Dohme ignored the e-mail and talked to the adjuster anyway. Eurand found Dohme's actions constituted insubordination and fired him.

The trial court granted summary judgment to the employer on Dohme's claim of wrongful discharge in violation of public policy after finding that Dohme failed to articulate a clear public policy. The appellate court reversed, finding a "general" clear public policy favoring "fire safety in the workplace." The employer appealed to the Ohio Supreme Court. The Supreme Court reversed the appellate court and affirmed summary judgment for the employer.



The Ohio Supreme Court held that, in order to articulate a clear public policy under Ohio law, an employee must cite to a, "specific statement of law, drawn from federal or state constitutions, federal or state statutes,

administrative rules and regulations, or common law in either the complaint or in response for a motion for summary judgment by the employer. A generally described public policy of workplace safety is insufficient." The Supreme Court was clear that a court may not presume to identify a source of public policy for the employee. Instead, the plaintiff in a public policy case has the burden of setting forth the legal basis for their public policy claim.

This decision may result in public policy complaints being disposed of in a quicker and more cost-effective manner. While Dohme was decided at the summary judgment stage of litigation, the decision reaches much further and may be cited as authority to support a motion to dismiss whenever an employee fails to cite to a specific area of law in the complaint itself.

■ PUBLIC RECORDS

Detailed Law Firm Invoices Are Not Public Records

In a 7-0 decision announced on November 29, 2011, the Supreme Court of Ohio declined to issue a writ of mandamus compelling a school district to provide copies of requested documents to a parent involved in a lawsuit against the district. The Court based its ruling on a finding that the requested documents were not subject to disclosure under the Public Records Act as they were subject to the attorney-client privilege between the district and its lawyers.

Ms. Dawson was involved in litigation against the Bloom-Carroll Local School District ("District"). Ms. Dawson subsequently submitted public records requests to the District demanding copies of detailed invoices sent to the District by the law firm it had retained to defend it against Dawson's lawsuit. Ms. Dawson also requested copies of all correspondence the District received from its insurance carrier describing the liability and exposure related to the claims asserted in Dawson's lawsuit.

In reply to Ms. Dawson's request, the District provided summaries of the law firm invoices noting only the attorney's name, the invoice total and the matter involved. On the grounds of privilege, the District refused to provide copies of the monthly billing statements which described the specific work performed and detailed communications among the attorneys, the District and its insurer.

Dawson filed suit in the Supreme Court seeking a writ of mandamus to compel the District to disclose the requested documents. In denying the requested writ, the unanimous Court stated, "... [t]he withheld records are either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure. Therefore, the school district properly responded to Dawson's request . . . No further access to the detailed narratives contained in the itemized billing statements was warranted."

(Con't on pg 6...Public Records)

(Con't from pg 6...Qualified Immunity)

Delia sued, alleging that Filarsky, the City, and others violated his Fourth Amendment rights. The U.S. Court of Appeals for the Ninth Circuit determined that the “warrantless compelled search” of Delia’s home violated the Fourth Amendment, but ruled that all defendants were protected by qualified immunity, except Filarsky.

The Ninth Circuit’s decision conflicts with the Sixth Circuit’s opinion in Cullinan v. Abramson, 128 F.3d 301 (6th Cir. 1997), which holds that qualified immunity should protect a city’s outside attorney, as well as its in-house counsel. The Sixth Circuit covers Ohio.

The specific question the Supreme Court will address is whether a lawyer retained to work with government employers in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a “private” lawyer, rather than a “government” employee.

In accepting case, the justices said that a “bare majority” in Richardson v. McKnight, 521 U.S. 399 (1997), declined to extend qualified immunity to private prison guards, but noted a historical basis for providing qualified immunity to private lawyers

working “at the behest of the sovereign.” This decision will be critical for Ohio public employers and their outside legal counsel. DFHK will continue to monitor and report on this case.

For more information about this case or to receive a copy of the decision, please contact Brad E. Bennett at bbennett@downesfishel.com



■ MINIMUM MANNING

Fire Minimum Manning Provision Removed from Contract

On November 4, 2011, a Conciliator ordered the removal of the minimum manning provision in the contract between the City of Newark and the IAFF Local 109. This provision had been in the contract for almost 20 years. The Conciliator’s ruling was

based on the shift of services from fire to EMS (now 85% of calls) and on the Chief’s management responsibility to determine the City’s ability to “use personnel in an efficient and efficacious manner.” The City’s presentation included the need for the efficient assignments of EMS squads and apparatus as well as budget and economic considerations. Dozens of other City employees, none of them firefighters, had already been laid off.

The Conciliator rejected the Union’s argument that minimum manning was necessary in order to guarantee staffing at the scene of a fire. The testimony and evidence indicated that the Chief, through his management right of assignment and with mutual assistance, would be able to secure sufficient personnel at the scene of a fire and yet be able to address the overwhelming City need for EMS services.

In recommending removal of the minimum manning clause, the Fact Finder concluded that “the needed services have changed somewhat over the years and what may have been at one time practical, cost effective and efficient in serving citizens of Newark no longer is.” The Employer needs the flexibility to determine the level of service and assign staff in order to provide services to the extent possible within available economic resources.”

At least four other fact-finding or conciliation decisions have removed minimum manning from fire contracts. These include the City of Upper Arlington, February 11, 2011; the City of Marion, January 29, 2010; the City of Mentor, October 21, 2005; and the City of Campbell, December 20, 2004.

Issues of staffing and management rights have long been a concern for many jurisdictions. For questions regarding minimum manning generally, or the Newark conciliation decision specifically, please contact

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What's new at Downes Fishel Hass Kim LLP...

Downes Fishel Hass Kim LLP is pleased to announce that David A. Riepenhoff has been named Partner in the firm. Mr. Riepenhoff, who joined Downes Fishel in 2001, is a member of the Federal, Ohio State and Columbus Bar Associations and focuses his practice in management side labor and employment law, collective bargaining, arbitration, workers' compensation and civil litigation.



Also, DFHK is proud to announce the addition of Anne (Annee) E. McNab as an associate to our firm. Annee received her law degree from the Case Western University School of Law, and graduated *cum laude* with a Bachelor of Science in English Education from Miami University. Prior to joining the firm, Annee represented non-profit organizations through the Milton A. Kramer Law Clinic Center, handling commercial real estate transactions and employment-related matters. Following law school, Annee completed a Post-Graduate Fellowship with the Honorable Edmund A. Sargus, Jr. of the U.S. District Court for the Southern District of Ohio.

DFHK Receives Recognition in the 2011-2012 U.S. News - Best Lawyers® "Best Law Firms" Rankings.



Downes Fishel Hass Kim was named to the 2011-2012 Best Law Firms list by *U.S. News Media Group and Best Lawyers®*. The firm's employment, labor and litigation practice areas were distinguished as a national second-tier firm. Our very own Jonathan J. Downes, Marc A. Fishel and Cheri B. Hass were recognized as Best Lawyers in Employment Law-Management, Labor Law-Management, and Litigation- Labor & Employment.

- We recently launched a new website to better serve our current and future clients. Please visit and check out our website to receive the latest news and updates relating to DFHK. If you have any questions, feedback or suggestions please contact Kari France at kfrance@downesfishel.com or Beth Hoeft at bhoeft@downesfishel.com
- As always, our Firm welcomes information from interested individuals regarding court decisions, arbitration decisions, and other matters. If you have any Information which you believe to be of interest, please feel free to contact us. This newsletter is information only and should not be construed as legal advice.



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