

## **LEGAL UPDATE**

### **WCPA MID-WINTER TRAINING CONFERENCE**

**Oshkosh, Wisconsin**

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## I. DISCIPLINARY MATTERS

- A. *Eastern Assoc. Coal Corp. v. Mine Workers*, No. 99-1038 (U.S. Supp. Ct., 11/28/2000); public policy exception to overturning an arbitration award.
- B. *Mansoor v. Albermarle County*, (W.D. Va., 12/20/2000); Department rules regarding speech can be unlawful “prior restraint” on First Amendment rights.
- C. Deliberations of the Commission and Due Process – Compare *Heil v. Green Bay PFC*, Brown Co. Cir. Ct. Case No. 99-CV-1582 with *Oak Creek – Franklin S.D. v. Benson*, Milw. Co. Cir. Ct. Case No. 99-CV-008859.
- D. “Quotas” or “performance goals” revisited
  1. Section 349.025, Wis. Stats. says we may not require an officer to issue citations, etc. but that we may use comparative numbers to evaluate job performance.
  2. *Begg v. City of Park Ridge*, 99 Ill. 2d 324, (Sup. Ct., 1984) upholds discipline for failure to meet a standard as long as it is not “arbitrary or unreasonable” and special circumstances are considered. IACP filed amicus brief, among others.
- E. Agreement to withdraw charges based on the following:
  1. I hereby submit my resignation from the Police Department of the City of \_\_\_\_\_. This resignation is irrevocable until \_\_\_\_\_. The Chief in his sole discretion may accept the resignation at any time prior to that date by written notice to me. The Chief need not have any reason or cause for accepting the resignation.
  2. I also accept as appropriate discipline for the violations described above, suspension without pay for up to \_\_\_ workdays to be served in such increments and at such times as the Chief may deem appropriate in his sole discretion.
  3. I irrevocably waive any and all rights I may have under sec. 62.13 of the Wisconsin Statutes with respect to the matters set forth in this document and the attachments. In particular, but without limitation, I waive the right to a hearing on suspension or termination of my employment, which may result from this document or the incidents described in the attachments.
  4. I acknowledge that I am acting voluntarily. No threats or promises have been made to induce me to sign this document and I have not otherwise been coerced.

## II. DISCRIMINATION PROBLEMS

- A. Early retirement Incentive Programs (ERIP's) are being scrutinized by the EEOC. See for example, *Auerbach v. Bd. of Ed.*, 136 F.3d 104 (2<sup>nd</sup> Cir., 1998) (Window Plan upheld).
- B. *Lanning v. SEPTA*, 84 FEP Cases 1012 (E.D.P.A., 12/7/00) concludes running pace measured by aerobic capacity is job related for transit police despite its disparate impact on women.
- C. *Holman v. Indiana*, 211 F.3d 399 (7<sup>th</sup> Cir., 2000) Boorish behavior towards both sexes is not sexual harassment; EEO laws are not a "workplace civility code."

## III. ADA ISSUES

- A. EEOC's Enforcement Guidance on Disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act (ADA).
  - 1. Medical exams are permitted if "job related and consistent with business necessity," defined in four basic situations:
    - a. When a need arises to question whether an employee can perform his/her essential job functions;
    - b. When the employer has a reasonable belief, based on objective evidence, that the employee poses a "direct threat" because of a medical condition;
    - c. When the employee has requested a reasonable accommodation and the need for accommodation is not known or obvious; and
    - d. When a periodic medical exam or other medical monitoring is required by law, for instance, exams of truck drivers or airline pilots as required by federal safety regulations.
  - 2. In determining whether information received from others is sufficiently reliable to require a medical exam, the EEOC permits consideration of the following factors:
    - a. The relationship of the person providing the information to the employee in question;
    - b. The seriousness of the employee's medical condition;
    - c. The possible motivation of the person providing the information;

- d. How that person learned the information, e.g. directly from the employee or from someone else; and
  - e. Other evidence known to the employer which bears on the reliability of the information provided.
- 3. The ability of the employer to choose the physician is also addressed. Where the medical exam is based on a concern about whether the employee poses a “direct threat,” the employer can choose the health care professional. If the medical exam is prompted by a request for a reasonable accommodation by the employee, an exam by an employer-chosen physician is not allowed unless the information provided by the employee is insufficient to establish either
  - a. That the employee is disabled; or
  - b. That he/she needs a reasonable accommodation.
- B. *Healy v. AIG Technology Service, Inc.*, No. 00CIV 3419 (S.D.N.Y., 1/10/01) reiterates the rule there is no personal liability for supervisors under the ADA or ADEA.
- C. *Pernice v. Chicago*, No. 00-1865 (7<sup>th</sup> Cir., 1/11/01) upholds termination for drug use as not a violation of the ADA.
- D. The ADA does not grant an applicant “bonus points” in an otherwise valid hiring system according to *EEOC v. Humiston-Keeling, Inc.*, Case No. 99-3281 (7<sup>th</sup> Cir. 9/18/00).
- E. *Palesch v. Missouri Commission on Human Rights*, 2000 WL 1724979 (8<sup>th</sup> Cir., 2000); following a threat and refusal to cooperate in a medical exam, discharge for depression not an ADA violation. See also *Fritch v. City of Chula Vista*, No. 98-0972-E (SD. Calif., 2000).
- F. *Contreras v. Suncoast Corp.*, \_\_\_\_\_ (7<sup>th</sup> Cir., 1/3/01) Bad back reduced employee’s ability to have sex from twenty times per month down to two times per month; is this a substantial limitation on a “major life activity?”

#### IV. MISCELLANEOUS ISSUES

- A. Residency rules still a legitimate exercise of governmental power. Request for injunction denied in *Kiel v. City of Kenosha*, No. 00-2651 (7<sup>th</sup> Cir., 2000).
- B. FMLA substitution rules for sick leave

1. *Milwaukee Transport Services v. Griffin*, No. 00-0644 (Wis. Ct. App. 1/17/01); substitution at employee's discretion under state law but at employer's direction under federal law.
  2. *Oscar Meyer Foods*, contractual waiting period for use of sick leave does not apply to FMLA substitution rules.
- C. FLSA comp time
1. Denial of comp time based on department needs upheld in arbitration. *River Falls Police Department* (Callow, 2001)
  2. Does FLSA even cover your comp time bank? See attached worksheet.
- D. *City of Oshkosh*, Dec. No. 29971 (WERC, 10/18/00) concludes use of the employers facilities for non-work personal activities was a "fringe benefit" and a mandatory subject of bargaining.
- E. Antisdell follow up: *Kraus v. Waukesha PFC*, Case No. 00-CV-1110 (Waukesha Co. Cir. Ct., 2001).
- F. *Nichols v. Chacon*, 110 F. Supp. 2d 1099, (W.D. Ark., 2000) discusses First Amendment issues during traffic stop.