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EMPLOYEE ACCEPTING EARLY RETIREMENT PACKAGE FOUND ELIGIBLE FOR UNEMPLOYMENT COMPENSATION BENEFITS

The Pennsylvania Supreme Court, in Diehl v. UCBR (ESAB Group, Inc.), No. 51 MAP 2011), issued on December 28, 2012, determined that an employee who accepted an early retirement package, was eligible for unemployment benefits under the Voluntary Layoff Option in Section 402(b) of the Unemployment Compensation Law, Title 43 P.S. § 802(b). In doing so, the Supreme Court overruled a long line of Commonwealth Court cases denying employees who voluntarily accept an early retirement package the right to qualify for u/c benefits.

The case arose in 2008, when the employer notified the Union and the employees of an intention to permanently lay off twenty junior employees. The employer offered a voluntary early retirement package, and the Claimant (a senior employee who would not have been affected by the reduction-in-force) accepted the early retirement package. The Claimant did so on the assumption that he would qualify for u/c benefits, and a junior employee who had been targeted for layoff was able to remain employed.

The UCBR and the Commonwealth Court found the employee eligible because the employee could not prove that his own job was threatened by the layoff. The Commonwealth Court relied on its earlier decisions to say that the Voluntary Layoff Option that applies to temporary layoffs did not apply to permanent layoffs such as an early retirement package.

Justice Max Baer, writing for a majority of the Court, found that the line of Commonwealth Court cases lacked any analysis that would justify treating permanent layoffs in a manner different from temporary layoffs. The Court also rejected the notion that the Claimant had to show that his own job was at risk. The Court relied on the plain language of Section 402(b) and the presumption in favor of eligibility to conclude that a permanent layoff would be treated the same as a temporary layoff. Thus, so long as the Claimant was otherwise eligible (meaning that he had enough earnings and that he was still actively seeking other work), the

Court ruled that the Claimant had the right to accept the early retirement package and still remain eligible for u/c benefits.

It is important to remember that an employee in this situation must still be 'otherwise eligible', meaning that the employee must have sufficient earnings and must be available and seeking other work. However, this decision brings voluntary early retirement packages in line with other voluntary layoffs.

NLRB CONTINUES TO STRIKE DOWN EMPLOYER SOCIAL MEDIA POLICIES

In response to the surge of cases involving employers issuing new social media policies governing their employees, the NLRB has taken a strong position that policies that intrude on basic employee rights under Section 7 of the Act will be found unlawful. Two recent cases illustrate the NLRB's position in regard to employer policies about electronic communications.

In Karl Knauz Motors, Inc., 358 NLRB No. 164 (2012), a three-member panel of the Board found an employer's social media policies unlawful. In that case the employer published a 'Courtesy' rule requiring employees to be courteous and respectful and refrain from any communications that would be disrespectful to, or injure the image or reputation of, the employer. An employee, who was a car salesman for the employer, posted a Facebook comment that indicated his displeasure at the employer's decision to give out free hot dogs as part of a sales promotion to sell luxury automobiles. The employee was discharged under the Courtesy policy. Although the employee's discharge was upheld for other reasons, the employer's policy was held to be unlawful.

The Board analyzes employer policies to determine whether the policy would reasonably be likely to chill employees in the exercise of their Section 7 rights. If a rule prohibits Section 7 rights the rule is unlawful. If it can be shown that: (1) employees would reasonably understand the rule to prohibit Section 7 activities, or (2) the rule was issued in response to employees engaging in Section 7 activity, or (3) the rule has been applied to prohibit Section 7 activity, then the rule is unlawful.

Applying this standard the Board specifically found that the Courtesy rule was unlawful. The rule broadly restricted any and all communications that would criticize the employer, and in the view of a majority of the Board panel this broad prohibition could be understood to include employee complaints about their working conditions or employee efforts to gain support of others to improve those conditions. The majority further noted that the policy made no effort to state that such communications were outside the coverage of the policy.

In November 2012 an administrative law judge relied upon the decision in Karl Knauz Motors, Inc. to find another employer's social media policies unlawful. In DISH Network Corp., 2012 NLRB LEXIS 783, the ALJ struck down three separate employer policies regarding employee communications.

First, the ALJ reviewed the employer's social media policy. Based on the fact that this policy prohibited all types of employee communications with other employees during work time

except communications authorized by the employer, without saying anything about such activities being permitted on breaks r during non-working time at work, the ALJ concluded that this policy was unlawful.

Second, the employer had a media policy that prohibited employees from communicating with the media about their employer without first getting the employer's permission. The ALJ noted that this policy would certainly make employees think that they were not permitted to speak out about matters protected under Section 7 (such as working conditions). Therefore this policy was found to be unlawful.

Third, the employer maintained a policy regarding contact with the government that prohibited any electronic communications with the government while at work that were not authorized by the employer. The ALF concluded that this policy clearly prohibited activities protected under Section 7 and therefore was unlawful.

These decisions represent a move by the Board away from the restrictive and punitive decisions of the Board under the prior administration. In addition, employers are constantly trying to come up with new policies regarding the explosion in social media forums. As a result, Unions should closely examine any employer social media policies to determine if there is an unlawful intrusion on the rights of the Union members to communicate about working conditions and terms of employment.

RESPECTFULLY SUBMITTED,

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