

December 17, 2015

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Letter Decision and Order

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Re: HF No. 5 U, 2014/15 – AFSCME Council 65 v. Aurora County

Dear Counsel:

Submissions:

This letter addresses the following submissions by the parties:

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| August 17, 2015 | [Respondent's] Motion for Summary Judgment;
Statement of Undisputed Material Facts;
Brief in Support of Motion for Summary Judgment;
Affidavit of Meghann M. Jayce, dated August 17,
2015, in Support of Motion for Summary Judgment;
Affidavit of Jonnie "Skip" Guindon;
Affidavit of Commissioner Dennis Degeest;
Affidavit of Commissioner Tom Schoeder;
Affidavit of Commissioner Jeff Sauvage;
Affidavit of Stan Johnson; |
| January 12, 2012 | Petitioner's Response to Respondent's Motion for
Summary Judgment;
Affidavit of Roger "Ace" Hanten; and |
| January 24, 2012 | [Respondent's] Reply Brief in Support of Motion for
Summary Judgment. |

Background:

The facts of this case are as follows:

1. In June 2001, Aurora County hired Andy Espedal as a blade operator for highway maintenance.
2. Espedal was an at-will employee.
3. Espedal was expected to follow the personnel manual for Aurora County.
4. In early 2014, Aurora County Commissioner's passed a resolution and sent notices to the townships that the trees needed to be removed from the right-of-ways by November 1, 2014. If the trees were not removed the townships would no longer have services including snow removal, grading, and maintenance of the roads.
5. The November 1, 2014 deadline of tree removal from right-of-ways was extended until December 2014.
6. An Aurora County Commissioners meeting was held on December 2, 2014. At the meeting Attorney John Steele stated, "The County's obligation to maintain the township is based on the agreement signed by the township. If the agreement is not fulfilled by the township, the county's policy will be to not maintain the roads within that township that are not compliant with the agreement."
7. An Aurora County Commissioners meeting was held on December 30, 2014. A number of residents at the meeting expressed concerns about the maintenance of Aurora County's roads and the attitudes of the County's highway maintenance workers.
8. County Commissioner Johnnie "Skip" Guindon stated, "I'd like to fire a couple of them, but right now, I don't have enough people to even work as it is."
9. During the December 30, 2014, meeting the County Commission changed its stance on maintaining township roads in which tree removal had not been complied with.
10. Prior to the December 30, 2014 meeting the Aurora County Highway Department employees were not told to disregard the previous order to not service the township roads where trees remained in the right-of-ways.

11. On January 6, 2015, Espedal contacted Petitioner, AFSCME Council 65 about his interest in forming a collective bargaining unit for the employees of the Aurora County highway department.
12. On January 8, 2015, Commissioner "Skip" Guindon was at the Aurora County highway department shop speaking with highway superintendent, Roger Konechne. Espedal had read an article in the newspaper about the commission meeting on December 30, 2014 and asked Guindon about the article. Espedal confronted Guindon about the comments he had made at the December 30, 2014, Aurora County Commission meeting stating, "Well, I see you want to fire somebody. Does that include me?" Guindon answered "yes." Espedal then said, "If you want to fire me, Skip, go ahead and fire me."
13. Espedal was agitated when he spoke to Guindon about the article, so on January 9, 2015 Espedal went to Chairman Guindon's house to apologize for his behavior.
14. On January 19, 2015, the employees decided that they wanted to move forward with the process to unionize their workplace.
15. On January 20, 2015, Espedal received his annual performance evaluation. Unlike previous years, the commissioners sat in on the evaluation with the highway superintendent Roger Konechne. During the evaluation, Konechne talked to Espedal and marked "X's" on the evaluation form while they had their evaluation. Espedal was given superior, excellent, and good ratings in all the categories except the attitude and professional/personal categories he received a needs improvement rating.
16. On January 21, 2015, Petitioner sent a letter to the Aurora County States Attorney and every member of the Aurora County Commission. The letter informed them, inter alia, that a majority of the employees in the appropriate bargaining unit in the Aurora County highway department have authorized Council 65 to be their representative and requested voluntary recognition. The letter did not mention Espedal's role in the union organization activities.
17. The Aurora County States Attorney and the Aurora County Commissioners received this letter on January 22, 2015.
18. On January 26, 2015, highway maintenance employees were heating tar for a crack sealing project. Commissioner Stan Johnson arrived at the shop and directed the highway maintenance employees to blade roads instead. Espedal informed Johnson that they could not blade roads because Konechne (who was out sick) had directed them to get the tar kettle ready and start tarring the

cracks on the road. Espedal eventually told Johnson that if he wanted the roads graded that day he could take the maintainer and blade the roads himself.

19. On January 27, 2015, at the Aurora County Commission meeting the County Commissioners terminated Andy Espedal.
20. On January 27, 2015, all five Aurora County Commissioners voted to recognize AFSCME Council 65 as the exclusive bargaining unit for the Aurora County highway department.
21. At the January 27, 2015 Commission meeting Espedal was given a termination letter informing him that the reason for the termination was the “two recent incidents of insubordination and belligerence by you directed towards county commissioners.”
22. On January 29, 2015, after Espedal was discharged from employment he received a copy of his January 20, 2015 evaluation. The evaluation he was given had been changed to show lower marks in 5 of the categories, indicating “Skip” as each mark. Sometime after January 29, 2015, Commissioner Guindon again altered Espedal’s January 20, evaluation to show “needs improvement” in the categories of acceptance of responsibility, customer service, communication, teamwork, and flexibility.
23. Additional facts may be discussed in analysis below.

Summary Judgment:

Respondent filed a Motion for Summary Judgment. The authority for summary judgments in unfair labor practice cases is found in SDCL 1-26-18. That provision states in part:

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

- (1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law;

SDCL 1-26-18. The South Dakota Supreme Court has discussed summary judgments on numerous occasions. The court stated in *McDowell v. Citicorp USA*, 2007 SD 53, ¶ 22, 734 N.W.2d 14, 21 the following:

The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. (Internal citations omitted). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. (Internal citations omitted). [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. (Citations omitted).

Id. at ¶ 22.

Unfair Labor Practice:

The Unfair Labor Practice Complaint was filed by Petitioner on March 25, 2015. Petitioner alleges that Respondent committed an unfair labor practice by discharging Andy Espedal for his desire and active involvement in forming a collective bargaining unit for the employees of the Aurora County Highway Department. Petitioner argues that the timing of Espedal's discharge within a short period of time after Respondent learned of the highway department employees seeking union representation, gives rise to an inference of improper motivation and interference with employee rights. South Dakota has a statutory definition of the unfair labor practices of both public employees and public employers. SDCL 3-18-3.1 sets forth the unfair labor practices of public employers as follows:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere, or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;

(5) Refuse to negotiate collectively in good faith with a formal representative; and

(6) Fail or refuse to comply with any provision of this chapter.

SDCL 3-18-3.1.

The department must consider whether Respondent's termination of Espedal was motivated by something other than the union activities. *Shore & Ocean Services, Inc.*, 307 NLRB 1051 (1992), citing *Honolulu Sporting Goods Co., Ltd.*, 239 NLRB 1277, 1280 (1979), *enfd.* 620 F.2d 310 (9th Cir. 1980) (holding that the grant of benefits during the critical pre-election period will be considered unlawful unless the Employer comes forward with an explanation, other than the pending election, for the timing of such action). Once Petitioner has shown that Respondent acted against an employee during the critical pre-election period, the Respondent must come forward with an explanation, other than the pending election, for the timing of such action.

Respondent argues that the discharge of Espedal was not in any way connected with his role in union organization activities and was instead based on his insubordination and poor attitude. The mere fact that an employee is discharged does not warrant an inference that the discharge was improperly motivated. *Lindsey v. Minnehaha Cnty.*, 281 N.W.2d 808, 811 (S.D. 1979), superseded by statute on other grounds, SDCL 1-26-36(5) (holding that evidence of deterioration in relationship between register of deeds and his deputy support finding that discharge was not intended to interfere with union activity) (citing *N.L.R.B. v. McGahey*, 233 F.2d 406 (5th Cir. 1956)). "[A]n employer has a right to hire and fire at will so long as such action is not based on opposition to legitimate union activity." *Singer Co., Wood Prod. Div. v. N.L.R.B.*, 371 F.2d 623, 624 (8th Cir. 1967). However, an employer may be subject to liability if its discharge of an at-will employee violates South Dakota's unfair labor practice law.

In the matter at hand, it is undisputed that Espedal was an at-will employee. It is also undisputed that at the December 30, 2014, commission meeting various citizens expressed concerns to the Aurora County Commissioners about behavior and attitudes of the County's highway maintenance workers, including Espedal. On January 9, 2015, Espedal confronted commissioner Johnnie "Skip" Guindon about comments made at the December 30, 2014, Aurora County Commission meeting stating, "If you want to fire me, Skip, go ahead and fire me." Petitioner does not dispute that on January 26, 2015, Espedal told Commissioner Stan Johnson that he could take a maintainer and blade the roads if he wanted it done that day. It is also undisputed that up to and including January 27, 2015, Espedal had not told any of the commissioners about his role in union organization activities, nor had any of the Commissioners discussed Espedal's role in union organization activities with Roger Konechne. Espedal stated in his June 10, 2015 deposition that he does not have any evidence either that his employment was terminated for any reason other than his insubordination and attitude, or that termination of his employment was in any way connected with his

role in any union organization activities. *McCauley v. S.D. Sch. of Mines & Tech.*, 488 N.W.2d at 56-57 (recognizing that whether the employer knew of the employee's union activity at the time of discharge is a factor to be examined in determining an employer's motivation). The reason that Respondent gave for terminating Espedal's employment were the January 8, and January 26, 2015, incidents of insubordination and belligerency by Espedal against Commissioners Guindon and Johnson.

Ultimately, the Petitioner has presented no specific facts raising a genuine issue on the question of whether Espedal's role in union organization activities actually motivated Aurora County's decision to terminate his employment.

Order:

In accordance with the analysis above, there are no material issues of fact as seen in a light more favorable to the non-moving party. For those reasons, the moving party is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is granted. Aurora County did not violate any provision of SDCL 3-18-3.1 in regards to the termination of Andy Espedal's employment.

This letter shall constitute the Order in this matter.

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge