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June 24, 2004

MEMORANDUM

TO: Commissioners

FROM: Robert E. Anderson  
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since  
May 27, 2004

Commission Cases

The employer has filed a notice that it will petition for certification in Hunterdon Cty. and CWA Local 1034, P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), aff'd 2004 N.J. Super. LEXIS 194. The Appellate Division upheld the constitutionality of the 2002 amendment to the representation fee statute permitting deductions of fees under certain conditions even absent a negotiated agreement. The Court also affirmed the Commission's ruling that the union was not required to go through a new round of post-amendment negotiations before petitioning to have fees deducted.

The Association has filed an appeal in Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n, P.E.R.C. No. 2004-74, \_\_\_ NJPER \_\_\_ (¶\_\_\_ 2004). The Commission dismissed certain aspects of an unfair practice charge and upheld other aspects of the charge.

The union has withdrawn its appeal in Matawan-Aberdeen Reg. Bd. of Ed. and Matawan Reg. Teachers Ass'n, P.E.R.C. No. 2004-47, 30 NJPER 38 (¶11 2004), app. pending, App. Div. Dkt. No. A-3703-03T3. The Commission had restrained binding arbitration of a grievance contesting the withholding of a computer teacher's increment based on allegations that students had hacked into district files during classes and changed data.

Judge Lehrer of the Monmouth County Superior Court has denied a motion for reconsideration of his enforcement order in Middletown Tp. and Middletown Tp. PBA Local 124, I.R. No. 2004-12, 30 NJPER 84 (¶30 2004), Dkt. No. C-115-04, enforced 5/28/04, recon. den. 6/18/04. The Court found the Township to be in violation of litigants' rights by not complying with the order and awarded attorneys' fees to the PBA.

### Other Cases

On June 14, the United States Supreme Court issued a decision setting forth the standards that apply in analyzing a constructive discharge claim in a sexual harassment case. Pennsylvania State Police v. Suders, 2004 U.S. LEXIS 4176 (2004). The second paragraph of the opinion summarizes the standards:

To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment" . . . . Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quit in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions....

The majority and dissenting opinions discuss the NLRB cases that gave rise to the constructive discharge theory. The case has been remanded for application of these standards to the facts alleged by a former police communications operator.

In Farber v. City of Paterson, CIV 03-4535 (DRD) (D.N.J. 2004), the former Assistant Director of Economic and Industrial Development brought a suit against the City alleging that her discharge violated her constitutional rights and public policy and against her majority representative alleging that its refusal to arbitrate her discharge violated its duty of fair representation. The City and the union filed motions to dismiss.

Senior District Judge Dickinson R. Debevoise granted the City's motion to dismiss Farber's claims that the City deprived her of a property interest in her job without due process; at the time of her termination, Farber was a provisional employee without any property interest in her job. However, this claim can be reinstated if DOP were to rule that Farber should have made a permanent employee before her termination. The Court denied the City's motion to dismiss the remaining claims; a public employee holding a provisional untenured position may assert that a discharge based on political reasons violated her constitutional rights and New Jersey public policy.

The Court also denied the union's motion to dismiss the duty of fair representation claim. Although the claim was brought more than six months after it accrued, the Court ruled that the six year statute of limitations for torts applied rather than the six months statute of limitations in the Employer-Employee Relations Act. The Court also held that a provisional employee can seek to arbitrate a discharge under the Act and that mere negligence in handling an arbitration claim is not enough to prove that a union violated its duty of fair representation.

REA:aat