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Felony Conviction, Other Misconduct Did Not Limit Back Pay Award

Welcome David J. Riewald ▾

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By Domenick Carmagnola and R. Shane Kagan

Even when an employee is convicted of a felony, resigns from interim employment and takes extended medical leave, she may still be entitled to back pay for the time following her misconduct, according to the 6th U.S. Circuit Court of Appeals.

Jackson Hospital Corp. employed Melissa Turner as an X-ray technician. In 2000, the United Steelworkers represented a bargaining unit that included Turner and at least seven other employees in labor negotiations with Jackson Hospital. That year, before a collective bargaining agreement could be reached between the union and Jackson Hospital, the eight employees went on strike and Jackson Hospital terminated them.

The National Labor Relations Board found that Jackson Hospital violated the National Labor Relations Act (NLRA) because it fired the employees due to their participation in the strike and for their support of the union. Consequently, the board ordered Jackson Hospital to pay back wages to Turner in the amount of \$79,577, for the money she would have earned had the company not violated the law. Jackson Hospital refused to pay Turner the amount she was awarded based on three specific legal defenses. The board sought to enforce its decision and order in the 6th Circuit.

First, Jackson Hospital argued that Turner's felony conviction in 2002 for attempting to solicit a controlled substance by fraud effectively severed her right to back pay because the hospital would have fired her for this misconduct had she been an employee at the time. The board reviewed prior conduct of the hospital in similar circumstances and rejected this defense. It determined that Jackson Hospital would not necessarily have terminated Turner in 2002, since it previously continued the employment of another felon and dozens of substance abusers.

Second, Jackson Hospital noted that Turner obtained employment as a radiology technologist with another employer in 2001, but then resigned from this position in 2002. It argued that Turner's resignation constituted a "willful loss of earnings" which tolled and reduced its back pay liability. The board reviewed the circumstances surrounding Turner's resignation and held that she resigned from this position because an increase in work hours prevented her from caring for her child. Under those circumstances, the board agreed with Turner that her resignation was not "gross" or "egregious" conduct and did not constitute a willful loss of earnings. As such, the board concluded that Turner's resignation did not limit or reduce any back pay awarded to her.

Finally, Jackson Hospital maintained that from 2005 to 2006, Turner took an eight-month medical leave from her interim employment at a medical center. It asserted that any back pay liability should cease from the commencement of her leave. It argued that Turner was not entitled to paid leave and her extended leave would have resulted in her termination from Jackson Hospital. The board engaged in a review of Jackson Hospital's written leave policy and concluded that, as written, it did not foreclose the potential for its employees to take an eight-month leave. Based on that conclusion, the board ruled that Jackson Hospital did not meet its burden of proving that it would not have reinstated Turner based upon its policy.

On review, the 6th Circuit noted that the board's remedial powers were broad and legal precedent limited its review on appeal to whether the board had abused its discretion in fashioning its remedial order. In this regard, the burden was on the employer to establish facts that would negate the existence of liability to a given employee or that would mitigate that liability, the appeals court held. Further, the board's decision as to whether an employer successfully demonstrated that it was not liable for back pay can be overturned on appeal only if there was no "substantial evidence to support the board's findings," the court added.

Accordingly, the 6th Circuit found that the board did not abuse its discretion in awarding \$79,577 in back pay to Turner. "[S]ubstantial evidence support[ed] the board's conclusion that Jackson Hospital did not meet its burden to negate back pay" liability, the court concluded.

NLRB v. Jackson Hosp. Corp. d/b/a Ky. River Med. Ctr., 6th Cir., No. 10-2101 (Jan. 31, 2012).

Professional Pointer: Employers should be clear in their written policies and procedures with regard to expected employee conduct and any potential grounds for termination. Such clear policies may demonstrate that an employer lawfully terminated an employee in the first instance, or may ultimately serve to mitigate back pay liability when an employee engages in subsequent misconduct.

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