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PELRAS UPDATE
Public Employer Labor Relations Advisory Service

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Common Pleas Court Holds that Private Right of Action Exists Under Medical Marijuana Act

by Brad J. Betack, Esq.

In a case of first impression, the Lackawanna County Court of Common Pleas has recently held that the Medical Marijuana Act includes a private cause of action for aggrieved employees to bring discrimination claims against employers. Specifically, in *Palmiter v. Commonwealth Health Systems Inc.*, the Court held that although the Medical Marijuana Act does not explicitly permit a private right of action by an employee who is allegedly discriminated against because of medical marijuana use, it does so implicitly.

The Medical Marijuana Act was passed on May 17, 2016, authorizing individuals with a "serious medical condition" to utilize medical marijuana obtained from a licensed dispensary in the Commonwealth. The list of conditions that constitute a "serious medical condition" are included in the Act and range from cancer, PTSD, autism, to chronic pain and anxiety. In support of its authorization to use medical marijuana, the Act protects registered users by prohibiting employers from taking any adverse employment action against an employee "solely on the basis of the employee's status as an individual that is certified to use medical marijuana."

The Plaintiff, Pamela Palmiter, was hired as a medical assistant in January 2017. At the time of hire, she advised her employer that she was prescribed medical marijuana for treatment of various medical conditions including chronic pain, chronic migraines and fatigue. While her employer was in the process of being acquired by another company, Palmiter claims that she was told she would be "grandfathered in" related to her use of medical marijuana off the job site. After her original employer was taken over by Commonwealth Health, Palmiter applied for a promotion as a certified medical assistant and underwent a medical exam at the employer's request. A short time later, Palmiter was told that she could not work for the employer because of the results of her drug test.

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Palmiter filed the present lawsuit, alleging that the employer's termination of her was discriminatory and a violation of Section 2103(b)(1) of the Act, which prohibits an adverse employment action being taken as a result of an employee's certified status as a medical marijuana user.

The employer, Commonwealth Health, argued that the Medical Marijuana Act does not authorize a private right of action by individuals and that the PA Department of Health has the exclusive authority to enforce the Medical Marijuana Act's provisions. Under Commonwealth Health's argument, the sole remedy for an aggrieved employee under the Medical Marijuana Act would have been an assessment of a civil penalty by the Department of Health.

The Common Pleas Court examined the Medical Marijuana Act and noted that Section 2103, unlike the other provisions in the Act, does not grant any state agency, including the Department of Health, the power to enforce the employment protections provided in the Act. Because of the absence of any grant of enforcement power, the court found that an implied right of action exists because there is no indication of any legislative intent in the Act to deny a wrongfully discharged employee a private cause of action under Section 2103(b)(1).

While many other questions still remain with regards to the scope of the protections provided by the Medical Marijuana Act, this recent Court of Common Pleas decision clarifies that employees can bring their own private cause of action against employers for alleged violations of the Act, thereby increasing potential liability concerns for Pennsylvania employers under the Act. It is noted that *Palmiter* is not an appellate decision and therefore is not yet binding throughout the Commonwealth. *Palmiter* also did not involve a government employer and does not address questions regarding application of the Federal Drug Free Work Place Act and local governments that receive federal funds. Lastly, it should also be noted that the *Palmiter* decision does not mean that CDL drivers or law enforcement officers in Pennsylvania are permitted to use off duty medical marijuana. Public employers should be proactively working with labor counsel to review and amend, if necessary, their employee handbooks and policies and procedures to ensure compliance with the restrictions and requirements of the Pennsylvania Medical Marijuana Act.

Social Media Policies: What Can and Can't an Employer Prohibit?

by Hobart Webster, Esq.

Can a government employer discipline a public employee because of their social media post? The answer to this question is that famous lawyerly phrase, it depends. Luckily, three U.S. Supreme Courts can help us answer that question: *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Pickering remains the Supreme Court's seminal case on the First Amendment rights of public employees. *Pickering* established the principle that public employees do not relinquish their right to speak on matters of public importance, or "public concern," simply because they have accepted government employment. In *Pickering*, school board officials terminated high school science teacher Marvin Pickering for writing a letter to the editor critical of the school board's allocation of funds. He wrote, "To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."

In its decision, the Supreme Court rejected the school board's argument that public employees relinquish their constitutional rights when accepting government employment. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an

employer, in promoting the efficiency of the public services it performs through its employers." *Id*, at 568.

The Supreme Court explained that the subject matter of Pickering's letter — money spent by the school board on athletics and academics — was a matter of public concern and thus entitled to protection. *See also*, *Baldassare v. New Jersey*, 250 F.3d 188, 195 (3d Cir.2001) ("A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community.") The Supreme Court then conducted a balancing test to determine whether Pickering's free speech rights outweighed the school board's interests in a disruption-free workplace, and found in Pickering's favor.

In *Connick*, New Orleans assistant district attorney, Shelia Myers, objected to being transferred to another section of her office. After receiving notice of the transfer, she prepared and distributed a questionnaire to the office staff that, in part, questioned whether their office was poorly run. District Attorney, Harry Connick Sr., (yes, it's the musician's father), terminated her for refusing the transfer and for undermining his authority with the questionnaire. Myers challenged her dismissal, arguing that she was fired because she had expressed her opinion of how Connick ran the office and that such a termination violated her First Amendment rights.

The Supreme Court held that Myers's dismissal was constitutional. The Supreme Court applied the two prong *Pickering* test to determine whether Myers' First Amendment rights were violated. In applying the first prong, the Supreme Court held that Myers was primarily speaking about matters that were not of public concern, because her questionnaire focused almost exclusively on the internal workings of the district attorney's office. Essentially, the Supreme Court held that only one question — whether Connick forced office staff to perform political campaign work — was a public concern. The remaining questions were considered to be non-public concerns about the internal operations of the government functioning as an employer.

Applying the second prong, the Supreme Court concluded that Myers's questionnaire had the potential to hinder the efficient operation of the district attorney's office by questioning Connick's authority. In addition, because Myers circulated the survey as a reaction to receiving an unfavorable assignment, the Supreme Court held that Connick had legitimate reasons to fire her.

In *Garcetti*, the Supreme Court ruled that public employees do not have First Amendment protection for speech made as part of their official duties. In *Garcetti*, California prosecutor, Richard Ceballos, alleged that his employer had retaliated against him after he criticized the handling of a search warrant affidavit that he believed contained untruthful statements. Ceballos claimed that his transfer was a direct result of his critical speech in the memo, his testimony at a court hearing, and a speech he gave at a conference.

The federal district court ruled that Ceballos had no First Amendment claim for speech delivered in the memo prepared as part of his routine job duties. The Ninth Circuit Court of Appeals reversed, determining that Ceballos's memo concerning lack of veracity by law enforcement officials constituted speech on a matter of public concern within the meaning of *Pickering*. The U.S. Supreme Court, however, reversed the Ninth Circuit, and held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Synthesizing *Garcetti* with *Pickering* and *Connick*, the Supreme Court has given us a useful three-part test to help us determine whether a public employer can discipline a public employee for their social media post. 1) Was the social media post an issue made pursuant to the employee's official duties as a government employee or in the employee's capacity as a private citizen?; 2) Did the employee's post address a matter of larger societal significance or importance?; and 3) Does the employee's social media post materially harm the government employer's interests in an efficient, disruption-free workplace?

Finally, employers must also be aware that portions of the National Labor Relation Act (NLRA) and the Pennsylvania Labor Relations Act (PLRA) may also impact whether an employer can discipline an employee for their social media posts. Even if the employee is not in a union, these protections may apply to union organizing efforts. Section 7 of the NLRA protects employees' rights to engage in "concerted activities" that are for "mutual aid and protection," and the National Labor Relations Board has expressly held that this provision applies to social media posts. For example, where employees discuss working terms or conditions via social media, those discussions are in most circumstances protected under the PLRA or NLRA.

Employers should have a carefully drafted social media policy in place that takes into account employees' limited rights to speak as a private citizen on a matter of public concern, as well as the right to engage in "concerted activity" for "mutual aid and protection," but which also prohibits employees from violating other policies, such as anti-harassment, discrimination and workplace violence policies. As always, before taking action because of an employee's social media activity, consult labor counsel.

Don't Forget to Renew Mandatory Background Clearances Under the CPSL!

by Julie A. Aquino, Esq.

In late 2014, the Pennsylvania General Assembly made sweeping changes to the Child Protective Services Law (CPSL), largely as a response to the Jerry Sandusky case. These changes impacted, among others, all paid employees and unpaid volunteers in Pennsylvania who have "direct contact with children" or who are responsible for the welfare of a child. 23 Pa.C.S. §§6344(a)(4), 6344.2(a). The law defines "direct contact with children" as "[t]he care, supervision, guidance or control of children and routine interaction with children." The law defines "child" as an individual under 18 years of age. 23 Pa.C.S. §6303.

The CPSL requires that employees who have "direct contact" with children obtain certain background clearances prior to beginning work, and those clearances must be renewed within sixty (60) months from the last clearance. If an organization elects to renew all clearances at the same time, the date of the oldest clearance, rather than the most recent, is the date to be used for the renewal date. Therefore, if your organization began requiring clearances for certain employees when the CPSL was amended in 2015, it is time for your organization to be looking at compliance with the sixty (60) month deadline for employees to submit renewed clearances.

The following three clearances are required: (1) criminal history record obtained by the Pennsylvania State Police ($22); (2) child abuse clearance obtained through the PA Department of Human Services ($13); and, (3) federal criminal history record obtained by submitting a full set of fingerprints for submission to the FBI ($23.85). Volunteers living in Pennsylvania consecutively for ten (10) years can be exempted from the federal criminal history check if they have not been convicted of any disqualifying offense. Clearances obtained for volunteer purposes cannot be used for employment purposes, although clearances for employment purposes may be used for volunteer purposes.

The CPSL was again amended in 2019 (effective December 31, 2019) and the amendment removed the provisional period for employees who have direct contact with children to work for up to ninety (90) days prior to obtaining the required clearances. This ninety (90) day provisional period was removed from the law, meaning that employers must be in possession of the required clearances at

the time an employee with direct contact with children begins employment, and **not** afterward. (See Act 47 of 2019). If your organization operates a child day care center, there is a limited exception for the Department of Human Services to grant a waiver for provisional hires upon request.

While it is the employee who is obligated to submit the clearances to the employer, the employer must require the employee to produce the original prior to employment or service, and must retain a copy in a separate file. An employer, including administrators, supervisors or other persons responsible for employment decisions, who intentionally fails to require an applicant to submit the required information before the applicant's hiring commits a third degree misdemeanor. The CPSL does not require employers to pay the cost of the clearances, although employers may opt to do so.

Your organization should ensure that it has identified all employees and volunteers who have "direct contact with children" or are responsible for the welfare of a child. Municipalities with recreation programs surely employ such individuals, and school crossing guards may also fall into this category. (Employers should also consider whether they employ minors during the summer months and which adult employees supervise, and have routine interaction with, those minors). Questions about which employees are required to submit clearances under the CPSL should be directed to legal counsel. These clearances are to be maintained confidentially under the CPSL and are not subject to the Right to Know Law.

Lastly, what happens if an employee has a conviction in their record, or is arrested for a particular offense? The CPSL enumerates certain convictions that constitute grounds for denying an applicant employment or volunteer work. The CPSL does not directly address discipline or termination for a current employee, and, therefore, that presents a more difficult question. The CPSL requires employees and volunteers to self-report certain arrests, convictions and child abuse investigations by written notice within seventy-two (72) hours. An individual who willfully fails to report this information commits a third degree misdemeanor and shall be subject to discipline up to and including termination. Convictions or arrests of current employees must be addressed by the employer on a case-by-case basis, e.g., investigated by the employer as would be done with any personnel matter potentially resulting in discipline.