PLUNKETT COONEY

Court Restricts Employee Access to Documents Not Part of "Personnel Record"

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A recent ruling by the MCOA places certain records off limits to employees because they are not considered part of an employee's personnel record.

Michigan's Bullard-Plawecki Employee Right to Know Act (ERKA) provides an employee with a right to review their personnel record at reasonable intervals and to request copies of the documents it contains. But not every document about an employee is part of a personnel record.

The Michigan Court of Appeals recently ruled grievance records and related notes to be excluded from the definition of "personnel record." There are few cases interpreting ERKA making *Wright v Kellogg Company* an important case for employers, not only for its holding, but the analysis used by the court in reaching its conclusion.

In *Wright*, the employee grieved a suspension he received in 2002. Several years later, he requested and received a copy of his personnel record. The employee made a follow up request for notes from the grievance meetings and other grievance documents that had not been produced by the company. His employer denied his request, claiming such documents did not fall within the ERKA's definition of "personnel record."

Wright's attorney filed a lawsuit under the ERKA to compel production of the grievance records. The trial court dismissed the suit finding that the records had not been "used as a part of any disciplinary action." The employee appealed and the appellate court affirmed.

The court began its analysis by focusing on the ERKA's definition of "personnel record." It is defined as "a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or may be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action."

The ERKA also identifies certain records that shall not be included in a personnel record, including, but not limited to, "[r]ecords limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision." It also excludes "[r]ecords kept by an executive, administrative or professional employee that are kept in the sole possession of the maker of the records and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record, if

entered not more than six months after the date of the occurrence or the date the fact becomes known."

The court emphasized that the statute expressly excluded "records limited to grievance investigations," which are maintained separately and not used for disciplinary actions.

While the employee argued that documents and notes from the grievance proceedings are not the *investigation* into the grievance, but rather the appeal of the disciplinary action, the court disagreed.

The court found that an investigation is a systematic or an official inquiry, which included the grievance process itself. Further, such records are not part of the original disciplinary documents and not used for original or new actions related to the "employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." Therefore, notes from the grievance investigation fall within the exclusion in the act as do the grievance records themselves.

Unfortunately, employers tend to be over inclusive in including records in personnel files. Such things as medical and educational records, references identifying the source of comments, documents reflecting employment actions involving several employees, employee workers' disability compensation records, unemployment records and grievance records should never be placed in a personnel record and never produced in response to an employee's request.

Whenever an employee requests their file, especially when they make specific mention to the applicable law, it should suggest that legal action may follow. Therefore, employers are wise to seek legal counsel from an employment attorney and allow the employment attorney to handle the document production.

Should you have any questions about the ERKA, please feel free to contact the author Claudia D. Orr or any member of Plunkett Cooney's Labor and Employment Practice Group. To review a practice group directory click here.