

employment law report

The Significant Expansion of Rights and Remedies Under State Law for Public Employees



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Introduction¹

Unfortunately, public employees have been demonized in recent years—often evidently for political reasons. Thus, recent developments under State law for public employees are as timely as they are necessary.

During the last legislative session, the Minnesota Legislature augmented the protections and avenues of recourse for public employees who experience adverse action by public employers. To that end, the Minnesota Legislature expanded the rights under State law, the Public Employment Relations Act (“PELRA”)², consistent with those codified under Federal law, the National Labor Relations Act (“NLRA”)³. In addition, public employees and their representatives now have a more efficient and cost-effective process for filing and pursuing legal claims under State law.

I. The New and Robust Protection for Public Employees Under State Law When Engaging in Concerted Activity

The PELRA amendments explicitly establish, for the first time, that employees in the public sector have the right to engage in “concerted activities” for the purpose of improving or otherwise addressing employment terms or conditions.⁴ This particular amendment tracks the right of employees in the private sector under the NLRA.⁵ Consequently, public employees are now

protected from discharge and other adverse action when making complaints about compensation, safety problems, or otherwise seeking to address employment terms or conditions.

The concerted activity rights now established under the PELRA have been construed to be exceedingly broad under the analogous NLRA. As illustrated by recent cases as to concerted activity rights, this change in the law has caused substantial shift in the balance of power in the workplace.

In *Costco Wholesale Corp.*, for example, the Federal agency charged with enforcing the NLRA, the National Labor Relations Board (“NLRB”), held that the employer’s employee handbook violated concerted activity rights because the handbook prohibited employee discussion about leaves of absence under the Family and Medical Leave Act,⁶ accommodations under the Americans with Disabilities Act,⁷ workers’ compensation issues, and comparative compensation.⁸ The NLRB also held that the employer violated concerted activity rights of its employees by barring them from posting statements on social media platforms or elsewhere that “damage the Company . . . or damage any person’s reputation.”⁹

Similarly, in *Hispanics United of Buffalo, Inc.*, the NLRB held that the employer violated concerted activity rights when firing employees for posting comments on Facebook that were critical of the company.¹⁰ In ordering reinstatement of the



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employees, the NLRB reasoned that an alleged violation of an anti-harassment policy by the terminated employees is not a defense to the charge that the employer violated concerted activity rights: “legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of [concerted activity] rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity.”¹¹

Like the NLRA, the PELRA now makes it an unfair labor practice (“ULP”) for an employer to interfere with an employee’s concerted activity rights. In that regard, an employee or his or her representative can pursue legal action against the employer to seek reinstatement, back pay, and other make-whole relief.¹²

II. The Expansion of PELRA Enforcement Via Enhanced Administrative Proceedings

Pursuant to the PELRA amendments, the Minnesota Legislature created a Public Employment Relations Board (“PERB”) that, like the NLRB under the NLRA, has the authority to investigate and remedy ULP charges. Before the amendments, the only recourse for violations of the PELRA consisted of costly and time-consuming court litigation. Beyond making enforcement of the law more efficient, the PERB offers the advantage of specialized expertise in the interpretation and application of the PELRA as well as related ULP provisions.

The PELRA amendments impose a six-month statute of limitations on filing a ULP charge with the PERB.¹³ The PELRA also provides that, after investigating a ULP charge, the PERB “shall promptly issue a complaint” unless the charge has no reasonable basis in law or fact.¹⁴ The PERB’s designated investigators conduct investigations into the merits of ULP charges, and the PERB’s designated hearing officers hold hearings and issue recommended decisions and orders.¹⁵ Importantly, the PERB and its designees have the power to issue subpoenas for documents and testimony.¹⁶

As in court litigation, the party bearing the burden of proof must sustain the burden by a preponderance of the evidence.¹⁷ The PERB will review a hearing officer’s recommended decision and order as to a given ULP charge if a party timely files exceptions to the decision and order or the PERB decides to review the same *sua sponte*.¹⁸ Decisions and orders not reviewed by the PERB will be binding only on the parties and, thus, have limited precedential value.¹⁹

Three members form the PERB, which features one representative of public employee unions appointed by the Governor, one representative of public employers appointed by the Governor, and one at-large representative appointed by the other two members.²⁰ The PERB’s primary responsibility is to investigate and decide cases in connection with contested hearings.²¹ Moreover, the PERB can file complaints and pursue enforcement actions at its own initiative.²² The PERB, like the NLRB, can also promulgate rules to implement the underlying legislation and to take appeals.²³

III. The Supplementation of Recourse and Review Through Court Action Regarding PELRA Rights

Upon the PERB’s final order finding that a ULP has been committed, either the PERB or the charging party may petition the district court for enforcement of the PERB’s order—including for temporary injunctive relief.²⁴ The PERB’s General Counsel represents the PERB in all enforcement proceedings before the district court.²⁵

Notably, the PERB must petition the district court for an order directing compliance whenever it appears that any party has violated a final order of the PERB.²⁶ PERB decisions may be reviewed by the Court of Appeals via a petition for certiorari filed within thirty days of the PERB decision mailing date.²⁷

Conclusion

Recent amendments to the PELRA provide a welcome and warranted reprieve for public employees that have too often been targeted for unfair attacks, especially during electoral campaign seasons. The Minnesota Legislature updated and

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upgraded State law to harmonize it with the analogous Federal law. In short, the PELRA amendments dramatically expand protection for public employees engaged in concerted activity and, furthermore, make the enforcement proceedings more accessible and cost-effective in vindicating employee rights. ¹

¹An earlier version of this article appeared in the 2014 Labor & Employment Law Institute manual.

²Minn. Stat. §§ 179A.01, *et seq.*

³29 U.S.C. §§ 151, *et seq.*

⁴Minn. Stat. § 179A.06, Subd. 7.

⁵29 U.S.C. § 157.

⁶29 U.S.C. §§ 2601, *et seq.*

⁷42 U.S.C. §§ 12101, *et seq.*

⁸358 NLRB No. 106, *2 (2012).

⁹*Id.*

¹⁰359 NLRB No. 37, *4 (2012).

¹¹*Id.* (citations omitted).

¹²Minn. Stat. § 179A.13, Subd. 2(1).

¹³Minn. Stat. § 179A.13, Subd. 1(b).

¹⁴*Id.*

¹⁵Minn. Stat. § 179A.13, Subd. 1(b), 1(c), 1(d).

¹⁶Minn. Stat. § 179A.13, Subd. 1(e).

¹⁷Minn. Stat. § 179A.13, Subd. 1(g).

¹⁸Minn. Stat. § 179A.13, Subd. 1(k).

¹⁹*Id.*

²⁰Minn. Stat. § 179A.041.

²¹Minn. Stat. § 179A.041, Subd. 5; Minn. Stat. § 179A.13.

²²*Id.*

²³Minn. Stat. § 179A.041, Subd. 7.

²⁴Minn. Stat. § 179A.13, Subd. 1(m).

²⁵*Id.*

²⁶Minn. Stat. § 179A.13, Subd. 1(n).

²⁷Minn. Stat. § 179A.052.

AVENUES FOR HOMELESS YOUTH

March 12, 2015

Carla Ferrucci, Executive Director
Minnesota Association for Justice
706 2nd Avenue South
140 Baker Building
Minneapolis, MN



Dear Ms. Ferrucci:

On behalf of the youth, board and staff of Avenues for Homeless Youth (Avenues), it our privilege to thank the Minnesota Association for Justice and all its members for its generous gifts totaling \$5,850.00 to purchase a new stove/range for our kitchen at our North Minneapolis site. We acknowledge that no goods or services were received in return for these gifts.

Every year, we serve over 25,000 meals to homeless youth in our North Minneapolis Shelter and Transitional Housing Program. The Minnesota Association for Justice's quick response to this pressing need was greatly appreciated!

Thank you for your continued dedication and commitment to Minnesota's homeless youth. Your support makes it possible to help the young people we touch through our programs find stability, begin to trust and plan for their futures.

Once again, we are deeply grateful for your leadership and commitment to helping homeless youth transition from surviving the streets to thriving young adults.

Warm regards,

Deborah Loon
Executive Director

Terry Ann Velasquez
Director of Development