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Michigan Employer's Personnel File-Requirements

Questions Presented

1. What information must or should be included in a Michigan employer's personnel file?
2. What information should not be included in a Michigan employer's personnel file?

Short Answers

1. A "personnel record" should include records that identify the employee "to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action."
2. Those records that should not be included in a personnel record are set forth in MCLS § 423.501(2)(c), MCLS § 423.509 and MCLS § 423.508 and are discussed more fully below.

Discussion

I. Information that should be included in a Michigan employer's personnel file

The law governing personnel files in Michigan is the Bullard-Plawecki Employee Right to Know Act, MCL § 423.501 et. seq. The Act defines "Employer" as "an individual, corporation, partnership, labor organization, unincorporated association, the state, or an agency or a political subdivision of the state, or any other legal, business, or commercial

entity which has 4 or more employees and includes an agent of the employer.” MCLS § 423.501(2)(b). According to MCLS § 423.501(2)(c), a personnel record is “a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record....” MCLS § 423.501(2)(c).

The Act further defines a “Personnel record” 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 be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.” MCLS § 423.501(2)(c). See also *Mich. Prof'l Employees Soc. v. Dep't of Natural Res.*, 482 N.W.2d 460, 467 (Mich. Ct. App. 1992) (handwritten notes that were taken during employment interview were “personnel records” that identified the employee and were used relative to the employee’s qualifications for promotion).

II. Information that should not be included in a Michigan employer’s personnel record

Pursuant to MCLS § 423.501(2)(c), a personnel record should not contain the following:

- (i) Employee references supplied to an employer if the identity of the person making the reference would be disclosed.
- (ii) Materials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, promotions, and job assignments.
- (iii) Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.
- (iv) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
- (v) Information that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9.
- (vi) Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.
- (vii) Records maintained by an educational institution which are directly related to a student and are considered to be education records under section

513(a) of title 5 of the family educational rights and privacy act of 1974, 20 U.S.C. 1232g.

(viii) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, 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 6 months after the date of the occurrence or the date the fact becomes known.

MCL § 423.501(2)(c). See also *Muskovitz v. Lubbers*, 182 Mich. App. 489, 496 (Mich. Ct. App. 1990) (a personnel record shall not include the employee references supplied to an employer if the identity of the person making the reference would be disclosed and shall not include materials relating to the employer’s staff planning with respect to more than one employee, including salary increases, management bonus plans, promotions and job assignments); *Mich. Prof’l Employees Soc. v. Dep’t of Natural Res.*, 482 N.W.2d 460, 467 (Mich. Ct. App. 1992).

In *Muskovitz*, 182 Mich. App. at 492, an employee who was unhappy with his pay increase sought copies of confidential peer evaluations and a letter from the dean to the provost regarding faculty merit salary increases. The court held that “under subsection (2)(c)(ii)... a letter from the dean to the provost setting forth salary increase recommendations is plainly exempted from disclosure as a ‘staff planning’ document as it sets forth recommended increases for every member of plaintiff’s department.” *Id.* at 497. The court reached the same conclusion for the chairperson ballots as it referred to faculty members other than the plaintiff. *Id.*

On the issue of confidential peer evaluations, the court held that they were exempt from disclosure to the employee as “employee references supplied to an employer” under subsection (2)(c)(i). *Muskovitz*, 182 Mich. App. 497. However, this was only to the extent that the identity of the person making the reference would be revealed. *Id.* The Court held that the purpose of the reference exemption was to protect the identity and privacy of the

person supplying the reference and that the peer evaluations could be disclosed in such a way that the identities would not be disclosed. *Id.* at 498. Therefore, the Court concluded:

We find that the trial court's decision to prevent identification of the makers of the references, yet still allow discovery of the substance of those references, is the most "reasonable" construction possible of subsection (2)(c)(i). In this way, plaintiff receives as much information as possible concerning the basis for the university's salary decision without violating the legislative intent manifest in subsection (2)(c)(i) to protect the privacy of those making the evaluation. This interpretation of the statute also protects the integrity and effectiveness of the university's peer evaluation system. Such a system is necessarily dependent on the maintenance of strict confidentiality without which meaningful participation of the faculty would be chilled.

Id.

Pursuant to MCLS § 423.501(2)(c)(v), "personnel record" also does not include "[i]nformation that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9." Section 9 (MCLS § 423.509) provides that

(1) If an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it shall be destroyed.

(2) If the employer is a criminal justice agency which is involved in the investigation of an alleged criminal activity or the violation of an agency rule by the employee, the employer shall maintain a separate confidential file of information relating to the investigation. Upon completion of the investigation, if disciplinary action is not taken, the employee shall be notified that an investigation was conducted. If the investigation reveals that the allegations are unfounded, unsubstantiated, or disciplinary action is not taken, the separate file shall contain a notation of the final disposition of the investigation and information in the file shall not be used in any future consideration for promotion, transfer, additional compensation, or disciplinary action.

MCLS § 423.509.

An employee will not be allowed access to the records of the employer's internal investigations. *Newark Morning Ledger Co. v. Saginaw County Sheriff*, 204 Mich. App. 215, 223 (Mich. Ct. App. 1994). In *Newark*, the court considered the intent of the legislature in defining “personnel record” under the Act. *Id.* at 222. The court held that under MCLS § 423.501(2)(c)(v) and (vi) the legislature clearly expressed an intent to prohibit access by an employee to any internal investigations related to that employee. *Id.* at 223.

This was reiterated by the court in *Davis V. United American Healthcare Corp.*, 1999 Mich. App. LEXIS 2734 (Mich. Ct. App. Nov. 23, 1999) (unpublished). In *Davis*, the plaintiff was suspended and eventually terminated from her employment without being given a reason by her employer after the employer has conducted an internal investigation regarding purported criminal activities of the employee. *Id.* at 1-2. The employer refused plaintiff’s request to provide the report prepared as a result of the internal investigation. *Id.* at 2-3. It was undisputed that the investigation affected the defendant’s decision to terminate the plaintiff. *Id.* at 6. The court held that the intent of the legislature as expressed in MCL 423.501(2)(c)(v) prohibited access by the employee to internal investigations and severely restricted access to such records. *Id.* The evidence suggested the report was generated as a result of the employee’s suspected criminal activity. *Id.* Further, the affidavits reflected that the report was maintained in a separate file and was not included in the individual’s employment records. *Id.* Therefore, the court concluded that the report was not a “personnel record” under MCL 423.501(2)(c)(v) and was not subject to disclosure under the Act. *Id.* at 6-7.

III. Information that the employer is prohibited from gathering

Pursuant to MCLS § 423.508, the gathering or keeping of certain information is prohibited, with limited exception. That section states:

- (1) An employer shall not gather or keep a record of an employee's associations, political activities, publications, or communications of

nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees.

(2) A record which is kept by the employer as permitted under this section shall be part of the personnel record.

IV. Dispute as to contents of personnel record

Pursuant to § 423.505, if there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position. *Id.* The statement shall not exceed 5 sheets of 8- 1/2-inch by 11-inch paper and shall be included when the information is divulged to a third party and as long as the original information is a part of the file. *Id.* If either the employer or employee knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged. *Id.*