

Independent Report in the Matter of Larry Hedlund

On July 25, 2013, I received a letter from Governor Terry E. Branstad (Governor) in which he wrote the following: “On the afternoon of April 26, 2013, Larry Hedlund, a supervisor with the Department of Criminal Investigation (DCI), reported a speeding vehicle on Highway 20. A State Trooper located the vehicle and determined it was traveling at 84 mph in a 65 mph zone. I was a passenger in the vehicle. An unrelated complaint was filed against Mr. Hedlund prior to the afternoon of April 26th. The Professional Standards Bureau (Internal Affairs) investigated the complaint against Mr. Hedlund. On July 17, 2013, the Internal Affairs investigation concluded and the Department of Public Safety terminated the [employment of] Mr. Hedlund.”

Later in the letter, the Governor stated: “All of the requested information that can be released pursuant to our Open Records law has been released to the public. Iowa law prohibits me from providing the public full access to all information related to the complaint filed against Mr. Hedlund, including the investigative file. This complaint led to his eventual termination [of employment] by the department....Iowa law prevents all Iowans from having all the facts and evidence surrounding Mr. Hedlund’s termination [of employment]; therefore, I ask you to fully review the Internal Affairs investigation and provide the public with your own independent conclusion as to whether Mr. Hedlund’s termination [of employment] was in any way related to retaliation for reporting my vehicle for speeding on April 26, 2013.”

The letter concludes: “I have asked that the Department of Public Safety, and all state employees, fully cooperate with you. I ask that they provide you all documents you request. It is my understanding that the Attorney General’s office has prepared a Non-Disclosure Agreement to ensure compliance with all laws regarding confidentiality and that you are bound by the same compliance with all laws regarding confidentiality and that you are bound by the same confidentiality obligation as the State. You have full discretion to interview anyone you choose to interview on a voluntary basis. It is important to me that you have complete autonomy and full authority over your independent review and how you choose to conduct it. Your independent conclusion will be made available to the public.”

I did sign the Non-Disclosure Agreement, attached as Exhibit A, mentioned in the letter. Later I received the Internal Affairs’ report entitled “State of Iowa Department of Public Safety Professional Standards Bureau Confidential Case File.”

At the outset, I want to make clear that my review is restricted to whether Mr. Hedlund’s termination of employment was in any way related to retaliation in connection with the speeding incident of April 26, 2013. My report in no way reaches any conclusion as to whether Mr. Hedlund’s termination of employment was justified. That issue must necessarily be left up to the appeal process and ultimately, perhaps, the courts.

Because of the confidentiality issues, my report cannot be as fact specific that one would normally expect in a report. What facts I may relate must necessarily be limited to what has already been made public.

Before a former employee may succeed in a claim for retaliation, the employee must typically satisfy a three-part test: First, the employee must show that he or she engaged in a protected activity. Second, the employee must prove that the employer acted adversely against the employee. Last, the employee must prove that the protected activity was the cause of the employer's adverse action. *Channon v. United Parcel Services, Inc.*, 629 N.W. 2d 835, 861 (Iowa 2001). The issue whether the employee was engaged in a protected activity is for a judge to decide. *Teachout v. Forest City Community School District*, 584 N.W. 2d 296, 300 (Iowa 1998). The second step, adverse action, and the third step, causation, are fact questions for a jury. Termination of employment has been recognized as adverse action. *Id.* The proof required for the third step, causation, is high. *Id.* "The employee's engagement in protected conduct must be the determinative factor in the employer's decision to take adverse action against the employee....A factor is determinative if it is the reason that 'tips the scales decisively one way or the other,' even it is not the predominant reason behind the employer's decision." *Id.* (citation omitted).

In his petition, attached as Exhibit B, Mr. Hedlund is alleging that his employment was terminated because he reported the speeding violation to his superiors and threatened to report the violation to outside authorities including the Attorney General's office and the county attorneys for the two counties where the speeding violation occurred. What Mr. Hedlund will have to prove is that reporting a speeding violation and a threat to report it to outside authorities are protected activities. A second element he will have to prove is that his employer acted adversely against him. Termination of employment certainly qualifies as an adverse action. Last, he will have to prove that reporting the speeding violation in this case and the threat to report it to outside authorities were the cause of his termination of employment. These are issues that will have to be decided by a court of law after exhaustive discovery, including written interrogatories, motions to produce documents, requests for admissions, and depositions. And before a jury will be allowed to decide the issues, Mr. Hedlund's case must survive pre-trial motions.

Retaliation is seldom readily apparent because it depends on motive. In simple terms, the gist of a retaliation claim is that the employer "got mad and got even." Courts therefore expect employers to "hit back quickly." That explains why courts have thrown out cases based on adverse actions taken months after the protected activity has taken place. *Retaliation in the Work Place* by Neil Klingshim.

Direct evidence, such as an admission or documents squarely confirming a motive to retaliate, is seldom available because retaliatory employers rarely memorialize their retaliatory motives. Without such "smoking gun" evidence, most retaliatory claims must of necessity rely on circumstantial evidence. And the most crucial circumstantial evidence is what is known in the law as "temporal proximity." Temporal proximity simply means that a short interval of time between the employee's protected activity and

the employer's adverse action is usually a powerful inference of retaliation. Justin P. O'Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C.L. Rev. 741 (2002). However, temporal proximity—standing alone—is not enough to establish retaliation. *Teachout*, 584 N.W. 2d at 301. There must be some evidence other than timing that gives a jury reason to believe that the timing is an indication of improper motive. *Id.* at 302.

Because I was given wide discretion in this interview process, I decided not to limit my review to the Internal Affairs' report but to broaden that review to personnel in the Department of Public Safety (DPS) as well to personnel in the Governor's office. As a first step, I wanted to satisfy myself as best I could whether the Governor's office played any part in Mr. Hedlund's termination of employment. I also asked for all documents and electronic messages concerning Mr. Hedlund during the critical time line (June 26, the date of the speeding incident, to July 17, the date of Mr. Hedlund's termination of employment). However, some of my review included information that went as far back as February 15, 2013. I conducted all interviews with no one present except the person I was interviewing.

No one in the Governor's office nor anyone in the DPS refused to be interviewed. In addition, I was provided with a host of documents and electronic messages by both the Governor's office and the DPS. I read the Internal Affairs' report, some 500 pages, as well as the documents and electronic messages.

I afforded Mr. Hedlund an opportunity—through his attorney—to be interviewed. That offer was declined.

As far as the Governor's office is concerned, I interviewed everyone employed in his office, including the Governor and Lt. Governor. From these interviews and the documentation that I reviewed, I conclude no one in the Governor's office directed or interfered with the Internal Affairs' investigation or took part in the decision to terminate Mr. Hedlund's employment. The Governor's position, which I determined was painstakingly followed by his staff, was to have a "hands off" approach to the investigation and decision to terminate Mr. Hedlund's employment.

I was able to corroborate that no one in the Governor's office directed or interfered with the Internal Affairs' investigation or took part in the decision to terminate Mr. Hedlund's employment. I did this through interviews with Brian London, the Commissioner of the DPS, and with parties who conducted the investigation and who recommended termination of his employment. Moreover, there was nothing in the Internal Affairs' report or documents and electronic messages that the DPS provided me that indicated any one in the Governor's office had directed or interfered with the investigation or took part in the decision to terminate Mr. Hedlund's employment. Notably, Mr. Hedlund's petition, lists no one in the Governor's office as defendants. Nor are there any allegations in the lengthy petition that the Governor's office was interfering with or directing the investigation or taking part in the decision to terminate Mr. Hedlund's employment.

In my interview of the people conducting the investigation of the charges against Mr. Hedlund and those responsible for the decision to terminate his employment, I found no direct evidence of retaliation related to his actions regarding the speeding incident. Nor did I find any such evidence in the Internal Affairs' report or in any documents or electronic messages that I was provided.

However, as I alluded to earlier, the fact that I found no such direct evidence does not end the inquiry. As I mentioned, a party alleging retaliation must in most cases rely on circumstantial evidence. In the end, a jury, if the case gets that far, must decide this issue.

Because I could find no direct evidence that the termination resulted from Mr. Hedlund's actions in reporting the speeding incident and threatening to report it to outside authorities, he will have to rely on circumstantial evidence. The most critical event that Mr. Hedlund might rely on occurred on May 1, 2013, five days after the speeding incident. On that date, Internal Affairs issued Mr. Hedlund a Notice of Investigation, attached to this report as Exhibit C, which alleged violations of the following rules of the State of Iowa Employee Handbook: "12-02.01—Duty Periods—Leave of Absence; 16-01.01(III)(C)—Unbecoming or Prohibited Conduct; 16-01.01(III)(D)—Performance of Duties; and 16-01.01(III)(I)—Courteous Behavior."

The Notice lists the details of the allegations as follows: "It is alleged that SAC Hedlund was disrespectful and insubordinate during a conference call with DCI leadership on 04/18/2013. It is also alleged that SAC Hedlund had operated his state vehicle during a period of approved leave status without updating his supervisor on any change in duty status or assignment on 04/26/2013. In addition, it is alleged that SAC Hedlund failed to request and receive approval for leave before taking the leave on 04/30/2013. Finally, SAC Hedlund is alleged to have engaged in conduct that impairs the operations of the Department."

The complaint relating to "unbecoming or prohibited conduct," "performance of duties," and "courteous behavior" was filed on the day of the speeding incident but shortly *before* the incident. Obviously, the motive for filing this complaint could not have been the result of retaliation relating to the speeding incident.

The balance of the charges having to do with operation of Mr. Hedlund's state vehicle, failing to request and receive approval for leave, and engaging in conduct that impairs the operations of the Department were filed as stated on May 1, 2013, five days *after* the speeding incident. On the same day, he was placed on administrative leave and taken out of service. The termination of employment occurred on July 17, 2013, some 82 days following the speeding incident. The temporal proximity here is certainly crucial to Mr. Hedlund's retaliation charge and will probably be a factor in this case. However, as I mentioned, that alone is not enough to establish retaliation. Mr. Hedlund must show other circumstances along with the temporal evidence to prove his claim.

The defendants listed in Mr. Hedlund's lawsuit will undoubtedly rely on these charges—both before and after the speeding incident—and the evidence to support these charges to establish that they had legitimate nonretaliatory reasons for the termination of employment. In my interviews with the parties involved in the investigation and in the decision to terminate Mr. Hedlund's employment, I asked them why they acted so quickly after the speeding incident. I also asked them why they did not consider any lesser discipline like demotion or suspension. Unfortunately, their responses will have to wait until the responses are a matter of public record. But their responses will also play a part in a jury's determination whether there actually was retaliation in connection with the speeding incident.

Other circumstantial evidence besides the temporal evidence that might play a role on the issue of retaliation in connection with the speeding incident includes, among other things, the following: (1) the charges that were filed on May 1 include Mr. Hedlund's activities that put him at the time and place when he saw the Governor's vehicle speeding, (2) his 25 years of service with no prior discipline, (3) the severity of the discipline, (4) whether there was unequal treatment for similar conduct, (5) the fact that Commissioner London serves at the pleasure of the Governor, and (6) several months before the speeding incident, Mr. Hedlund had complained about the actions of his superiors.

In summary, I again want to make it clear that this report in no way passes judgment on whether Mr. Hedlund's termination of employment was justified. The issue for me was very limited: Was there any retaliation for Mr. Hedlund's activities in reporting the speeding violation and his threat to report the violation to outside authorities? On this point, I am convinced no one in the Governor's office directed or interfered with the Internal Affairs' investigation or took part in the decision to terminate Mr. Hedlund's employment.

Moreover, I found no direct evidence that those who took part in the investigation and in the decision to terminate Mr. Hedlund's employment retaliated against him for his activities in reporting the speeding violation. Nevertheless, I cannot and do not reach a conclusion on this issue because retaliation is seldom established directly but in most cases must depend on circumstantial evidence.

I am not acting as a judge in this matter. I have neither legal authority nor power to determine whether Mr. Hedlund's action in reporting the speeding violation was a protected activity and whether circumstantial evidence supports his claim. The legal authority and power to make the decision regarding protected activity rest with a judge. And if a judge does decide Mr. Hedlund's actions constitute protected activities, then it is for the jury to decide whether Mr. Hedlund has proven his claim of retaliation.

Dated this ²⁷ day of August, 2013.



Louis A. Lavorato
Former Chief Justice of the Iowa Supreme Court