

**INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE**

DATE: December 18, 2012

TO: Marina Dimitrijevic, County Board Chairwoman

FROM: Kimberly R. Walker, Corporation Counsel
Mark A. Grady, Deputy Corporation Counsel *MAG*

SUBJECT: Kenneth Kraemer v. County of Milwaukee
ERD Case No. CR200800323

We request that this matter be referred to the Committee on Judiciary, Safety and General Services to be placed on the agenda for a special committee meeting in order to approve payment by the Wisconsin County Mutual Insurance Corporation of \$70,587 to Mr. Kraemer's attorneys, Tricia Knight and Horizons Law Group, and payment of \$8,698.25 to Kraemer in back wages, as ordered by the State of Wisconsin, Labor and Industry Review Commission ("the Commission") in its October 11, 2012 Order and Memorandum Opinion.

In its Memorandum Opinion, the Commission found that Milwaukee County discriminated against Mr. Kraemer, a former Milwaukee County employee who served as the Deputy Director of Operations/Maintenance for General Mitchell International Airport, based upon his arrest record, within the meaning of the Wisconsin Fair Employment Act. An individual's arrest record is a prohibited basis of discrimination under Wis. Stat §111.321. However, it is not employment discrimination because of an arrest record to suspend from employment any individual who is subject to a pending criminal *charge* if the circumstances of the *charge* substantially relate to the circumstances of the job. See Wis. Stats §111.335(1)(6). The Commission determined that Kraemer had an arrest record and was protected under Wis. Stats §111.321 because he was never charged with a crime. Moreover, even if there had been pending charges against him, the Commission found that the record did not establish a substantial relationship between those alleged crimes (alleged sexual abuse of a child) and the circumstances of his job as a Deputy Director at the Airport.

However, although the Commission found that Kraemer's suspension was illegal, it found that Kraemer's discharge was not. Consequently, the Commission did not order the County to reinstate Kraemer to his position and did not order additional back pay. If an employee is discharged solely because of an impermissible motivating factor, he normally would be awarded a cease and desist order, reinstatement, back pay and interest and attorney's fees. However, if an employee is discharged in part because of an impermissible motivating factor and in part because of other legal motivating factors (a so-called "mixed motive"), and the termination would have taken place in the absence of

the impermissible motivating factor, the employee should be awarded only a cease and desist order and attorney's fees. See *Hoell v. Narada Productions, Inc.* (LIRC, Dec. 18, 1992) *aff'd.*, Waukesha County Circuit Court, 05/27/1993.

The Commission found that Kraemer was discharged for both an impermissible reason (his arrest record) and a permissible one (his violation of the County's Use of Technologies Policy). Thus, the suspension prior to discharge based on his arrest record was unlawful, but the discharge based on a mixed motive was lawful. Therefore, Kraemer's remedy was limited to the award of attorney's fees and the back pay for the time he served an unlawful suspension before he was discharged. The Commission ordered that he receive \$8,698.25 in wages for the period of his unlawful suspension from February 27, 2007, the day on which he was notified he was suspended, through April 2, 2007, the day on which he was notified of his discharge from County service. The Commission denied Kraemer any back wages for the period after his discharge on April 2, 2007 through its decision on October 11, 2012.

Kraemer also sought recovery of \$130,740 in attorneys' fees. The Commission reviewed those fees and found that a large portion were not appropriate for recovery. The Commission ordered payment of \$70,587 in fees.

Kraemer recently appealed the Commission's decision to circuit court, arguing primarily that he should be entitled to all of the back pay he sought, that he should be reinstated to his County job and that he should be paid all of the attorney fees he requested. Kraemer filed this petition *pro se* (without his attorney). Milwaukee County cross-appealed the Commission decision, in order to preserve its potential litigation rights and arguments. The County's cross-appeal was the subject of a notification to the Judiciary Committee that was discussed at the Committee's meeting on December 6, 2012.

Subsequently, our office has discussed this matter with outside counsel, Al Levy of Lindner & Marsack S.C., and with Kraemer's prior attorney. Our office and outside counsel believe that it is in the County's interest to pay the order of the Commission. Among other things, doing so will eliminate any potential liability for interest and will satisfy the current attorney's fee claims. If the attached resolution is adopted, Kraemer's attorney will not be involved in the circuit court petition for review and Kraemer will represent himself. The County will also align itself with the Attorney General's office, which represents the Commission, and will seek the circuit court's affirmation of the Commission order.

Payment of the \$70,587 in attorneys' fees will be made by the Wisconsin County Mutual and will be applied to the County's deductible. Payment of the \$8698.25 in wages to Kraemer will come from the Airport budget and will not have any tax levy impact.

cc: Janelle Jensen
Jennifer Collins
Amber Moreen