

Overly Long Paid Administrative Leave Can Be Evidence of Unlawful Motive

by Dennis J. Merley - Wednesday, July 31, 2019



The Minnesota Court of Appeals recently ruled that placing a grievance-filing employee on administrative leave for nine months with pay can be considered a penalty that triggers coverage under the Minnesota Whistleblower Statute.

Steven Moore was a long-time patrol sergeant for the New Brighton Police Department. His duties included supervising other patrol officers.

In March 2015, Moore filed a union grievance over the fact that he and other officers were not paid overtime for attending a mandatory training session outside of working hours. The City initially denied the grievance but ultimately agreed to pay overtime to all of the employees who attended the training.

Don't Call Us, We'll Call You...Maybe

A few weeks later, the department initiated two investigations of Moore's behavior on the job. The first involved allegations that Moore improperly approved an officer's unscheduled work hours; the second looked into whether Moore had fraudulently called in sick because he attended a concert on the evening of a work day he missed for medical reasons. Moore was placed on paid administrative leave requiring him to remain in his house every day from 8:00 a.m. to 4:00 p.m.

After two months, the City ruled against Moore on the unscheduled time approval and ordered him to serve a five-day unpaid suspension. As for the sick leave issue, the City determined that

the injury that kept Moore off work would not have prevented him from attending the concert so they found no wrongdoing. However (and this is a really big however), they never told Moore that they had completed their investigation or that they had exonerated him. Instead, he remained on ~~house-arrest~~ administrative leave for another seven months.

When Moore was finally reinstated, he was assigned to an administrative desk job instead of his regular role supervising the other patrol officers. He also received a performance evaluation for the year indicating that he performed unsatisfactorily in all facets of his job and needed to follow a performance improvement plan. He remained on the job for more than a year thereafter without incident until he received an oral disciplinary warning for insubordination. At that point, Moore sued under **Minnesota's Whistleblower Statute** which provides that an employer may not "discharge, discipline, threaten, otherwise discriminate against, or penalize an employee" for reporting violations of law.

Is Nine Months Off With Pay a Bad Thing?

The trial court granted the City's motion to dismiss. Moore then appealed to the Minnesota Court of Appeals who **reversed the dismissal**, reinstated Moore's lawsuit and remanded the case back to the lower court for a jury trial.

In ruling for Moore, the Court explained that employees seeking relief under the Whistleblower Statute must first demonstrate that they have suffered some sort of adverse action (or penalty, the term actually used in the statute) sufficient to justify a claim. If so, the employer has the chance to articulate a legitimate, lawful reason for that action. Doing so tosses the ball back to the employee who must demonstrate that the articulated reason for the adverse action is just a pretext to cover up the employer's retaliatory motive.

In evaluating these respective burdens of proof, the Court focused almost entirely on the seven-month extension of the administrative leave after the underlying charges against Moore had been resolved. The City argued that as a matter of law, a paid ~~vacation~~ administrative leave is not a penalty. The Court disagreed, noting that the statute defines the term "penalize" to include conduct "that might dissuade a reasonable employee from making or supporting a report." They then surmised (without ever touching on whether the leave was paid or unpaid) that there are circumstances when keeping an employee out of the workplace for an extended period might dissuade that person from speaking up. As such, they concluded that "administrative investigatory leaves are not categorically excluded from constituting adverse employment actions under the Minnesota Whistleblower Act."

The Court of Appeals then turned from the abstract to the specific in evaluating whether in this case, a reasonable jury could conclude that the City's actions were penalizing in nature. Again, they answered "yes." They found that a jury would be justified in deciding that a reasonable employee "might" be intimidated about reporting a violation knowing that the employer's response could be to "commence an investigation and place him on leave for nine months—far longer than it takes to investigate any plausible misconduct claim..." Therefore, they concluded that being forced to remain on administrative leave for seven months after the conclusion of the investigation (and exoneration) met Moore's initial burden of showing adverse action under the

Whistleblower Statute.

Is That All You Have to Say?

Once Moore carried his initial burden, it was incumbent upon the City to articulate a legitimate reason for their actions. The City justified the extended administrative leave by offering evidence that they were in discussions with the union regarding a ~~way to get rid of Moore~~ possible early retirement and severance package for Moore.

The analytical burden then shifted back to Moore to establish that that City's proffered reasons were a pretext for retaliation. The Court concluded that Moore met this burden in two ways. First, Moore never told the City that he wanted to retire so their reliance on this premise for delaying Moore's reinstatement could be viewed dubiously by a jury.

In addition, the Court observed that the City never adequately explained why the retirement discussions necessitated Moore's continuing absence, or why it took seven months to conclude those discussions. The absence of a better rationale than this for Moore's extended leave would allow a jury to conclude that the City's reasons were in fact a pretext for retaliation. That is all that was needed for the Court to rule in Moore's favor and give him the chance to present his case to a jury.

Bottom Line

While the Court indicated that administrative leaves pending legitimate investigations are still quite legitimate, it appears that under the ~~right~~ wrong circumstances, an extended involuntary paid leave can still be a hardship on an employee that will allow a lawsuit to go forward.