FILED
April 15, 2019
OFFICE OF APPELLATE COURTS

NO. A18-0398

State of Minnesota
In Supreme Court

Firefighters Union Local 4725 and
Mark Turner, Its President,

Respondents,

vs.

City of Brainerd,

Appellant.

REPLY BRIEF OF APPELLANT CITY OF BRAINERD

MEYER NJUS TANICK, PA
Marshall H. Tanick (#0108303)
Teresa J. Ayling (#0157478)
330 Second Avenue South
Suite 350
Minneapolis, MN 55401
Tel: (612) 341-2181
Fax: (612) 337-5894
mtanick@meyernjus.com
tayling@meyernjus.com

Attorneys for Respondents Firefighters Union Local 4725 and Mark Turner, Its President

EVERETT & VANDERWIEL, PLLP
Pamela L. VanderWiel (#305960)
William J. Everett (#207275)
Anna L. Yunker (#392551)
2930 – 146th Street West
Suite 115
Rosemount, MN 55068
Tel: (651) 209-9692
Pam@e-vlaw.com
anna@e-vlaw.com

Attorneys for Appellant City of Brainerd

(Additional counsel for amici appear on following page)

2019 - BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 OR 1-800-715-3582

CHESTNUT CAMBRONNE PA
Cort C. Holten (#46826)
Jeffrey D. Bores (#227699)
17 Washington Avenue North
Suite 300
Minneapolis, MN 55401
Tel: (612) 339-7300
Fax: (612) 336-2940
cholten@chestnutcambronne.com
jbores@chestnutcambronne.com

Attorneys for Amicus Curiae
Minnesota Police and Peace Officers Association Legal Defense Fund

LEAGUE OF MINNESOTA CITIES
Susan L. Naughton (#0259743)
145 University Avenue West
St. Paul, MN 55103-2044
Tel: (651) 281-1232
snaughton@lmc.org

Attorneys for Amicus Curiae
League of Minnesota Cities

MILLER O'BRIEN JENSEN, P.A.
M. William O'Brien (#130229)
Timothy J. Louris (#391244)
Emily L. Marshall (#396597)
120 South Sixth Street
Suite 2400
Minneapolis, MN 55402
Tel: (612) 333-5831
Fax: (612) 342-2613
tlouris@mojlaw.com

Attorneys for Amici Curiae
Amalgamated Transit Union Local 1005, Int'l Brotherhood of Electrical Workers, Local 160, Int'l Brotherhood of Electrical Workers, Local 949, Int'l Union of Operating Engineers, Local 49, and Int'l Union of Operating Engineers Local 70

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ARGUMENT

I. PELRA SETS FORTH THE RIGHTS OF THE PUBLIC AS PARAMOUNT TO THOSE OF THE UNION, AND MATTERS OF INHERENT MANAGERIAL POLICY NEED NOT BE NEGOTIATED.

The foundation of the Respondents' position contains a logical fault. Respondents Firefighters Union Local 4725 and Mark Turner (hereinafter referred to collectively as "Local 4725") argue that PELRA allows a public employer to exercise its inherent managerial rights only insofar as doing so does not interfere with the existence or administration of a union. Local 4725 bases this argument on an erroneous reading of the statute's legislatively-declared policy. On pages 34 and 35 of its brief, Local 4725 describes PELRA's policy as follow:

> It declares, in its preamble that it is the "public policy of this state and the purpose of [the statute] to promote orderly and constructive relationships between all public employees and their employers." Minn. Stat. § 179A.01(a). It further emphasizes the paramount right of Minnesotans to band together to protect their interest in labor unions.

(Respondents' Br. at 34-35 (alteration in original).) In these two sentences, Local 4725 provides the lens through which all its arguments must be viewed—from Local 4725's perspective, PELRA's sole purpose is to protect the rights of unions and their members. This logic leads to the conclusion that a public employer is prohibited from exercising any inherent managerial right that has a negative effect on a union or its members, regardless of the employer's intent or the benefit to the public.

The problem with Local 4725's interpretation of PELRA's policy is that it can only be reached by taking dramatic editorial liberties with the statute's plain language.

Local 4725's brief quotes only half of PELRA's policy statement. Section 179A.01(a) reads, in its entirety:

> It is the public policy of this state and the purpose of sections 179A.01 to 179A.25 to promote orderly and constructive relationships between all public employers and their employees. **This policy is subject to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety, and welfare**.

Minn. Stat. § 179A.01(a) (2018) (emphasis added). By leaving the second sentence of the policy statement out of its quotation, Local 4725 left the public's interest on the cutting room floor. In so doing, Local 4725 flipped PELRA on its head. The rights of unions, while important, are not the most important rights recognized by PELRA. Rather, the paramount right recognized by PELRA is to keep inviolate the guarantees for the public's health, education, safety, and welfare.

Local 4725's mangled view of PELRA's policy is inherent in its arguments. Local 4725 makes no pretensions to having the public's interests in mind. In fact, it cavalierly shrugs off the City's concerns about its failure to keep up with its capital needs, the fact that its debt service fund had gone into the negative, and its declining cash flow. Local 4725 suggests that the City could have solved these difficulties by raising taxes, thereby placing a further financial burden on the City's residents, or by issuing additional debt, thereby worsening the deficit in the debt service fund. (Respondents' Br. at 29.) It is clear that under Local 4725's perspective, both the taxpayers' financial interests and the City's fiscal health are subsidiary to Local 4725's interests. All of Local 4725's arguments flow from this erroneous view of the law.

Local 4725's principal argument is that section 179A.13, subdivision 2(2), prohibits employers from exercising their discretion on matters of inherent managerial policy, if the result is the impairment of the existence or administration of a union. This argument clearly places union interests over those of the public. Its result is to limit the "powers a [public employer] must possess to effectively administer" its operations, s*ee* *Laird v. Indep. Sch. Dist. No. 317, Deer River, Minn.*, 346 N.W.2d 153, 155 (Minn. 1984), in favor of preserving positions or services that are obsolete or too expensive to maintain. Local 4725's argument directly conflicts with PELRA's stated policy, as well as this Court's articulated understanding of the Legislature's intent.

Local 4725's alternate position, that the City should have been required to negotiate its decision to reorganize the BFD, is inconsistent with PELRA's statutory language, as well as with well-established case law. Under the statute, a city's organizational structure, overall budget, and number of personnel are matters of inherent managerial policy that the employer is not required to negotiate. Minn. Stat. § 179A.07, subd. 1. This Court has determined that the right to make policy decisions without first negotiating them with the union is absolute, even when the decision "impinge[s] upon negotiable terms and conditions of employment." *St. Paul Fire Fighters, Local 21 v. City of St. Paul*, 336 N.W.2d 301, 302 (Minn. 1983). It has never required employers to negotiate decisions regarding matters of inherent managerial policy. To the contrary, the rule is that only the *impact* of the decision is negotiable, but only if "the decision and its implementation are [not] so inextricably interwoven that requiring the public employer to meet and negotiate the method of carrying out its decision would require the employer to

negotiate a basic policy decision." *Id*. In other words, where negotiating a term or condition of employment hampers employers' ability to make policy decisions, the interest of the unions must yield—not, as Local 4725 here contends, the other way around.[1]

II. THE CITY DID NOT WAIVE ITS DISCRETION TO MAKE DECISIONS REGARDING MATTERS OF INHERENT MANAGERIAL POLICY IN ITS CONTRACT WITH LOCAL 4725.

Local 4725's argument that the City violated the collective bargaining agreement, requires a determination that the City's prerogative to make decisions regarding matters of inherent managerial policy was either waived or relinquished through the collective bargaining agreement. This is, however, not the case. Public employers may waive their right not to negotiate over matters of inherent managerial policy. *See Arrowhead Pub. Serv. Union v. City of Duluth*, 336 N.W.2d 68, 71 (Minn. 1983). However, a waiver will be found only if the intention to waive the right is found in the contract in "clear and unmistakable language." *Id*. at 71-72. Nothing in the contract between the City and Local 4725 demonstrates the intention to waive the City's right to exercise sole discretion over matters of inherent managerial policy. To the contrary—the contract clearly preserves that right. The contract states:

> Employer Authority. The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; including

[1] Moreover, as Local 4725 concedes, in the case of essential employees, such as firefighters, the failure to reach an agreement likely would result in the matter being decided in binding arbitration. (Respondents' Br. at 28.) This conflicts with the longstanding view that matters of inherent managerial discretion are not arbitrable. *Arrowhead Pub. Serv. Union v. City of Duluth*, 336 N.W.2d 68, 71 (Minn. 1983).

> contracting out for or the transfer, alteration, curtailment or discontinuance of any services; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this Agreement.

(Doc. 45 Ex. H at Art. I, § 2.) Far from waiving the right to make decisions regarding its organizational structure and number of personnel, the contract specifically reserves to the City the "full and unrestricted right" to alter, curtail, or discontinue services; to "contract out . . . or transfer" any services; to modify the organizational structure; and to determine the number of personnel. Even if it were not clear that the reorganization falls within one of the rights expressly reserved by the employer in the contract, it is clearly reserved, as the contract also indicates that the employer retains the right "to perform any inherent managerial function not specifically limited by this Agreement."

Contrary to Local 4725's assertion, the clause setting forth the duration of the contract does not limit the rights the City reserved to itself. The clause states:

> Section 1. This Agreement shall become effective January 1, 2015, and shall continue in effect through December 31, 2017, and from year to year thereafter, unless notice of intention to change, modify or terminate is given by either party sixty-one (61) days prior to January 1st of the year in which the change, modification or termination is to take place.

(Doc. 45 Ex. H at Art. XX, § 1.) This provision defines how long the agreement serves to set the terms and conditions under which FEOs employed by the City will work. It does not, however, operate as a promise to employ FEOs until the expiration of the contract. The purpose of a collective bargaining agreement is to set forth the terms and conditions of employment when or if employees in the bargaining unit are hired. *J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334-35 (1944); *Fraser v. Magic Chef-Food Giant Markets, Inc.*,

324 F.2d 863, 856 (6th Cir. 1963). It is not, however, an employment contract. *See J.I. Case Co.*, 321 U.S. at 334-35. It is not a promise that the employer will employ any members of the bargaining unit, it does not create an employer-employee relationship, and it does not guarantee the continuance of an employer-employee relationship if one is formed. *Id.* at 335; *Fraser*, 324 F.2d at 856 (holding that employer did not breach contract by terminating its business and laying off its employees prior to the expiration of the collective bargaining agreement); *Hill v. Ralphs Grocery Co.*, 896 F. Supp. 1492, 1945 (C.D. Cal. 1995) (employer did not violate term of agreement clause in collective bargaining agreement when it laid off employees, because collective bargaining agreement is not a contract of employment); *Hotel & Rest. Emp. Alliance, Local No. 237, of Hotel & Rest. Emp. Int'l. Union & Bartenders' Int'l League of Am., AFL-CIO v. Allegheny Hotel Co*., 374 F. Supp. 1259, 1261 (W.D. Pa. 1974) (same); *Am. Bakery & Confectionery Workers Int'l Union, Local Union No. 12, AFL-CIO v. Liberty Baking Co*., 242 F. Supp. 238, 245 (W.D. Pa. 1965) (same). The United States Supreme Court has explained the distinction between collective bargaining agreements and employment contracts as follows:

> Collective bargaining between employer and representatives of a unit, usually a union, results in an accord as to the terms which will overn [sic] hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationship

> but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.

J.I. Case Co., 321 U.S. at 334-35.

The collective bargaining agreement does not dictate whom the employer may choose to hire or discharge; however, once the employer decides to hire someone, it need not negotiate the terms of employment with the employee, because "the terms of the employment already have been traded out." *Id*. Thus, the City did not clearly waive its right to cease to employ FEOs for the duration of the contract. It agreed only that if it employed FEOs during the duration of the contract, the terms and conditions contained therein would apply.

Nor does the recognition clause act as a waiver of the City's rights. The recognition clause states:

> Section 1. The EMPLOYER hereby recognizes the UNION as the exclusive bargaining representative of the Fire Equipment Operators of the Brainerd Fire Department, exclusive of the Chief.

(Doc. 45 Ex. H at Art. I, § 1.) This recognition clause acts only as an agreement that Local 4725 represents all the Fire Equipment Operators employed by the City, exclusive of the Chief. Its only functions are to describe the unit's membership and to recognize the unit as the exclusive bargaining agent for its members. *King Soopers, Inc. v. N.L.R.B.*, 254 F.3d 738, 743-44 (8th Cir. 2001). It does not confer any other rights upon the unit or its members. *Id.*; *see also Boeing Co. v. N.L.R.B.*, 581 F.2d 793, 798 (9th Cir. 1978) (recognition clause is not an "implied jurisdictional clause" and does not define the work to be performed by members of the unit); *Milwaukee Spring Div.*, 268 NLRB 601, 602

(1984) (recognition clause did not prevent employer from transferring operations from plant where workforce was unionized to one that was not); *Univ. of Chicago v. N.L.R.B.*, 514 F.2d 942, 498 (7th Cir. 1975) (recognition clause could not be read as a jurisdictional clause). Neither the recognition clause nor the contract in effect clause obligated the City to continue to employ FEOs throughout the term of the contract, and it did not require the City to bargain before exercising any of its inherent managerial rights.

III. *ISD NO. 88* DOES NOT SUPPORT THE COURT OF APPEALS' HOLDING IN THIS CASE.

Local 4725 is incorrect in arguing that *Independent School District No. 88, New Ulm v. School Services Employees Union Local 284*, 503 N.W.2d 104 (Minn. 1993), stands for the proposition that the City breached the collective bargaining agreement by exercising its inherent managerial right to reorganize the BFD in such a way that resulted in the layoff of Local 4725's membership. A careful reading of *ISD No. 88* demonstrates that the issues of law considered therein were different than those presented by this case, and Local 4725's reliance on it is misplaced.

The parties in *ISD No. 88* were ISD No. 88 and School Services Employees Union Local 284, the collective bargaining agent for food services workers employed by the school district. *Id*. at 105. The collective bargaining agreement between the parties stated that the agreement would remain in effect until June 30, 1988, but that it would be continued until modified by the parties. *Id*. On February 18, 1988, the union gave notice of its intent to modify the agreement. *Id*. After the parties were unable to reach an agreement, the union filed for mediation. *Id*. On July 13, 1989, after six mediation

sessions, the school board determined that the parties had reached impasse, awarded the contract for food services to a private entity, and laid off the members of ISD No. 88. *Id*. at 105-06. The union filed a grievance, alleging that the food service workers had been terminated without just cause, in violation of the collective bargaining agreement. *Id*. at 106. The school district refused to submit to arbitration, arguing that its decision to contract out the positions was a matter of inherent managerial policy, and therefore not grievable. *Id*. The union sued, but the district court held that the matter was not grievable and dismissed the lawsuit. *Id*. The court of appeals reversed, however, holding that the arbitrator should consider the issue of arbitrability. *Id*. The matter proceeded to arbitration, and the arbitrator awarded the food service workers reinstatement with back pay and full seniority. *Id*.

Ultimately, this Court upheld the arbitrator's award. *Id*. The Court determined that the *decision* to contract out was an inherent managerial right that need not be negotiated. *Id*. at 107-08. However, the *effects* of the decision, such as severance pay and pension, were still subject to negotiation. *Id*. at 107-08. The school board argued that the six mediation sessions (during which the parties were attempting to reach an agreement, not on the effects of contracting out, but rather on proposed modifications to the collective bargaining agreement) were sufficient to satisfy the requirement that it negotiate the effects of the decision. *Id*. The Court rejected the school board's contention, however. It determined that, even if the mediation sessions could be considered to constitute negotiations over the effects of contracting out, the school district had not negotiated the matter to impasse. *Id*. at 108. Because the contract remained in effect (even though its

term had lapsed), the school district breached the contract by failing to negotiate the *effects* of its decision with the union. *Id*.

ISD No. 88 stands for the proposition that, when an employer makes a decision regarding a matter of inherent managerial policy, it must negotiate the effects on the terms and conditions of employment, if the effects are severable from the decision. This is not a unique holding—it has been applied by this Court in several contexts. *See St. Paul Fire Fighters v. Local 21 v. City of St. Paul*, 336 N.W.2d 301, 302 (Minn. 1983); *see also City of West St. Paul v. Law Enforcement Labor Servs., Inc.*, 481 N.W.2d 31, 33-34 (Minn. 1992); *Law Enforcement Labor Servs., Inc. v. City of Luverne*, 463 N.W.2d 546, 548-49 (Minn. 1990); *Law Enforcement Labor Servs., Inc. v. Hennepin Cnty.*, 449 N.W.2d 725, 728 (Minn. 1990); *Univ. Educ. Ass'n v. Regents of Univ. of Minn.*, 353 N.W.2d 534, 539 (Minn. 1984). The court of appeals, however, misinterpreted *ISD No. 88* and misapplied it to the current case. The court of appeals held that because the City's contract with Local 4725 was still in effect at the time that the City reorganized the BFD, the City's decision to reorganize the BFD without first negotiating with Local 4725 was an unfair labor practice, because it interfered with the administration and existence of the union. This holding was erroneous for two reasons.

The first reason the court of appeals' decision is erroneous is that it amounts to a determination that the mere existence of an active contract can require a public employer to negotiate regarding a matter of inherent managerial policy. *ISD No. 88* does not, however, stand for that proposition—in that case, the Court held that the employer *was not required* to negotiate the decision to contract out, because the decision was a matter

of inherent managerial policy. Rather, the Court held that the school district had breached the contract by not negotiating *the effects* of the contracting out. The court's misapplication of *ISD No. 88* is tantamount to saying that an employer waives the rights to make certain policy decisions simply by entering into a collective bargaining agreement. This holding is, however, contrary to this Court's direction that waivers are not to be implied, but must be supported by "clear and unmistakable language." *Arrowhead Pub. Serv. Union*, 336 N.W.2d at 71-72.

The second reason that reliance on *ISD No. 88* is misplaced is that *ISD No. 88* was a breach of contract case, and made its way to the Supreme Court after the union filed a grievance and the matter was arbitrated. Here, Local 4725 did not seek arbitration, and it did not allege breach of contract or that the City engaged in an unfair labor practice by refusing to negotiate with Local 4725 (Minn. Stat. § 179A.13, subd. 5).[2] Rather, Local 4725 filed an unfair labor practices lawsuit in district court, where it argued that the reorganization was a per se violation of subparts 1 through 3 of Minnesota Statutes section 179A.13, subdivision 2. (*See* Brief of Petitioner City of Brainerd at 30 n. 10.) The result is that the court of appeals reached an erroneous and potentially far-reaching determination. Rather than confining its determination to whether the City failed to meet

[2] The only issue properly before the district court was whether the City's decision to reorganize was permissible under PELRA. Local 4725 had not alleged that the City had failed to negotiate the reorganization in its Complaint; it raised the argument for the first time in its memorandum in support of its own motion for summary judgment, and it provided insufficient evidence to support the claim. Accordingly, the district court determined that the claim did not comply with the requirements of Minnesota Rule of Civil Procedure 56.05. (*See* Brief of Petitioner City of Brainerd at 30 n. 10.)

a contractual obligation to negotiate terms and conditions of employment, the court of appeals determined that an employer engages in an unfair labor practice if it fails to bargain with a union over any decision it makes (including those pertaining to inherent managerial policy), if the decision results in the impairment of the administration or existence of a union. This holding, if affirmed, muddies an already opaque area of law by either prohibiting employers from exercising inherent managerial rights or making inherent managerial rights into matters of mandatory bargaining under ill-defined circumstances.

In short, *ISD No. 88* is inapplicable to the case before the Court. Application of *ISD No. 88* to this case results in a decision that is directly contrary to PELRA's purpose and intent, and that directly contradicts longstanding law established by this Court. When the City reorganized the BFD, it exercised its inherent managerial right. It was not required to negotiate its decision, and it did not breach its contract with Local 4725. For these reasons, the court of appeals' decision must be reversed.

IV. THE DISTRICT COURT PROPERLY DISMISSED LOCAL 4725'S CLAIM THAT THE CITY IMPERMISSIBLE ALTERED ITS WORK JURISDICTION.

The district court properly dismissed Local 4725's work jurisdiction claim because Local 4725 did not raise the issue in its Complaint, and it did not support its argument with sufficient facts to survive summary judgment. Work jurisdiction disputes arise when a union claims the exclusive right to perform certain work functions and either the employer attempts to transfer the work to non-union employees or another union also lays claim to the same work functions. *See, e.g.*, *Boeing Co. v. N.L.R.B.*, 581 F.2d 793

(9th Cir. 1978) (cited with approval by *Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51*, 353 N.W.2d 917, 924 (Minn. 1984)).[3]

As a threshold matter, this issue was not properly raised at the district court level. Local 4725 did not plead in its Complaint that the City improperly altered its work jurisdiction; the first time Local 4725 brought up the issue was in the reply brief in support of its motion for summary judgment. In its reply brief, Local 4725 made the averment, without presenting any evidence, that the City altered its work jurisdiction by assigning duties that belonged to members of its unit to the POCs. The district court initially held that a fact issue regarding work jurisdiction prevented it from granting the City's motion for summary judgment. The City moved for reconsideration, arguing that the issue was not properly before the court, because it had not been pleaded in the Complaint and because Local 4725 had failed to support the claim with sufficient evidence to defeat summary judgment, under Minnesota Rule of Civil Procedure 56.05.[4] The district court agreed, and dismissed the claim.

---

[3] *See also* NAT'L LABOR RELATIONS BOARD, *Jurisdictional Disputes (Section 8(b)(4)(D) & 10(k))*, https://www.nlrb.gov/rights-we-protect/whats-law/unions/jurisdictional-disputes-section-8b4d-10k (last visited Apr. 15, 2019, 2:52 PM) (defining a "jurisdictional dispute" as competing claims by bargaining units over assigned work); Charles W. Heidenreich, *Jurisdictional Disputes and the Labor Management Relations Act of 1947*, 45 MARQ. L. REV. 143, 144 (1961), *available at* https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2746&context=mulr (defining a "jurisdictional dispute" as a dispute between two or more labor organizations over "the right to be assigned certain work by an employer").

[4] The parties' cross motions for summary judgment were decided under the former version of Minnesota Rule of Civil Procedure 56, since the motion was decided before the new version of Rule 56 went into effect on July 1, 2018. (*See* Petitioner's Add. 28-

Local 4725 argues that the Complaint put the City on notice that it intended to raise a work jurisdiction argument because the Complaint alleged "that the way the City abolished their jobs transgressed their PELRA rights by interfering with the work jurisdiction rights of the Union members; interfering with the Union's 'existence and administration' and by discriminating against the hiring or tenure of Union members." (Respondents' Br. at 40.) Local 4725's assertion that the Complaint alleged "that the way the City abolished [the FEOs'] jobs transgressed their PELRA rights by interfering with the work jurisdiction rights of the Union members" is untrue. The Complaint does not refer to work jurisdiction; it does not allege that Local 4725 laid claim to any particular duties that were transferred to employees outside Local 4725; and it does not allege that the City improperly transferred job duties away from union members without first negotiating with Local 4725. And while Local 4725 argued in its brief supporting its motion for summary judgment that the City had interfered with Local 4725's existence and administration and discriminated against the hiring and tenure of Local 4725 members, neither of these allegations raises the issue of work jurisdiction or reasonably put the City on notice that this argument was at issue in this case.

While it is true that the Rules of Civil Procedure do not require "absolute specificity in pleading," the Rules do require "information sufficient to fairly notify the opposing party of the claim against it." *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 917-18 (Minn. 2012) (holding that it was not error to grant summary judgment on

---

29.) Petitioner has cited the former version of the rule in this brief when discussing the district court's orders.

retaliation claim when allegations in plaintiff's complaint that that she was fired on a pretextual basis did not put defendant on notice that plaintiff was raising a retaliation claim). Local 4725 failed to meet even this low standard—nothing in its Complaint, or even in its brief supporting its motion for summary judgment was sufficient to put the City on notice that it intended to raise a work jurisdiction claim. Local 4725 now argues that the Court should overlook its failure to plead the work jurisdiction claim, because a party may move to amend a complaint at any time during a lawsuit. (Respondents' Br. at 41.) This argument fails because, while it is true that plaintiffs may amend a complaint during the course of a lawsuit, Local 4725 did not move to amend the Complaint, even after having been informed of the pleading defect by the City. Having failed to seek permission to amend its Complaint, Local 4725 can hardly fault the district court for failing to allow it to do so.

Even if Local 4725 had properly pleaded the work jurisdiction issue, its claim fails. The record shows that before the reorganization, FEOs, POCs, and the Fire Chief served as firefighters for the City. Local 4725 did not proffer evidence that the FEOs had any duties that were performed exclusively by members of its bargaining unit.[5] As such, Local 4725's allegation that the City assigned work that was within its work jurisdiction

[5] It is also for this reason that Local 4725's reliance on the *Foley* case is misplaced. *Foley* does not stand for the proposition that an employer impermissibly alters a union's work jurisdiction whenever it lays off a class of employees. *Foley* involved a school district's decision to hire non-union employees to supervise its study halls. *Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51*, 353 N.W.2d 917, 923 (Minn. 1984). Prior to hiring these workers, study hall supervision had been performed solely by teachers, who were members of a union. *Id*. *Foley* differs from the case currently before the Court, because there is no evidence that the FEOs exclusively performed any work that later was transferred to non-union employees.

to those who had not previously performed the work was mere averment, and was unsupported by sufficient evidence to support summary judgment. For that reason, the district court properly granted the City's motion for summary judgment.

V. PUBLIC POLICY SUPPORTS THE CITY'S INTERPRETATION OF PELRA.

Much of Local 4725's and its amici's briefs are devoted to predicting the death knell of unions if the Court accepts the City's position that the reorganization of the BFD was a matter of inherent managerial policy that the City was not required to negotiate. One of the reasons Local 4725 advances for its dire predictions is that it believes that the City's interpretation of section 179A.13, subdivision 2(2), as prohibiting managerial policy decisions that are motivated by anti-union animus is unworkable, because courts are not allowed to inquire into the motivations of public officials.

Local 4725's argument is disproven by this very lawsuit. In addition to the PELRA claim currently before the Court, Local 4725 claimed that the City retaliated against it and its members for exercising their free speech rights, in violation of both the federal and Minnesota constitutions. Since motive is an essential element to a retaliation claim, and because there was no direct evidence of retaliation, the district court employed the *McDonnell-Douglas* burden-shifting test. Once Local 4725 made a prima facie case of retaliation, the City was required to show it had a legitimate business reason for its decision, after which the burden shifted to Local 4725 to show that the proffered reason was pretextual. This test has long been used in both federal and state courts to determine

whether employers have engaged in wrongful conduct in a myriad of circumstances, including a wide variety of discrimination and retaliation cases.

A variant of the *McDonnell-Douglas* burden-shifting test has long been employed to evaluate unfair labor practices under the National Labor Relations Act (NLRA). Section 8 of the NLRA identifies employer conduct that constitutes unfair labor practices. 29 U.S.C. § 158 (2018). The prohibited conduct includes: (1) interfering with, restraining, or coercing employees in the exercise of their right to organize and collectively bargain; (2) discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in a labor organization; and (3) discrimination against an employee because he or she has filed charges against the employer. *Id.* § 158(a)(1), (3)-(4). The National Labor Relations Board (NLRB) and the courts analyze claims that an employee has been discriminated against for participation in protected union activities by using a test called the *Wright Line* test. *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), *abrogated in part on other grounds by Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276-77 (1994). The *Wright Line* test is applied "when an employer articulates a facially legitimate reason for its . . . decision, but that motive is disputed." *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). The question, therefore, "is whether the employee's termination was motivated by protected activity." *Id.*

To determine whether an employer has unlawfully discriminated against an employee pursuant to this test, the court first determines whether the general counsel of the NLRB has established a prima facie case of discrimination by setting forth evidence

that the employee's protected activities were a substantial or motivating factor in the employer's decision. *Id.*; *see also, e.g.*, *FiveCAP, Inc. v. N.L.R.B.*, 294 F.3d 768, 777 (6th Cir. 2002). The elements of a prima facie case are as follows: "(1) the employee was engaged in protected activity; (2) . . . the employer knew of the employee's protected activity; and (3) . . . the employer acted as it did on the basis of anti-union animus." *RELCO Locomotives, Inc.*, 734 F.3d at 780 (quoting *N.L.R.B. v. Rockline Indus.*, 412 F.3d 962, 966 (8th Cir. 2005)). If the NLRB general counsel meets this burden, the burden shifts to the employer to prove that "it would have taken the same action absent the protected activity." *Id.* (quoting *N.L.R.B. v. MDI Commercial, Servs.*, 175 F.3d 621, 625 (8th Cir. 1999)). The existence of a nondiscriminatory motive, however, is not sufficient on its own to establish the employer's affirmative defense. *Id.* To satisfy its burden, the employer must prove that the rationale is not "only a potential or partial reason for the termination, it must be '*the* justification.'" *Id.* (quoting *Rockline*, 412 F.3d at 970) (emphasis in original).

There is no reason to believe that the *McDonnell-Douglas* test, the *Wright Line* test, or variants thereof, would be insufficient to analyze claims of anti-union animus under PELRA. Courts have ample tools at their disposal to evaluate whether anti-union animus converts an otherwise discretionary act, such as changing organizational structure, into an unfair labor practice. Local 4725's predictions that adopting such an approach would result in widespread misconduct are hyperbolic and fantastical.

VI. LOCAL 4725'S ALLEGATIONS THAT THE CITY ENGAGED IN "UNION-BUSTING" IS AN IMPROPER ATTEMPT TO INVITE THE COURT TO RE-EXAMINE THE LOWER COURTS' DETERMINATION THAT THE CITY DID NOT HAVE A WRONGFUL MOTIVATION FOR REORGANIZING THE BRAINERD FIRE DEPARTMENT.

The issue before the Court is the purely legal question of whether section 179A.13, subdivision 2(2), requires a public employer to negotiate matters of inherent managerial policy with unions if their decisions have the effect of impairing the administration or existence of a union. Despite the limited scope of the issue before the Court, and despite the fact that Local 4725 expresses doubt that courts may inquire into a public employer's motive for exercising its inherent managerial rights, Local 4725 vehemently accuses the City of "union-busting." (Respondents' Br. at 21-23.) It is unclear, however, what Local 4725 means by using this term. "Union-busting" is not, on its own, a legal term or claim.[6] If Local 4725's claim is that the City acted out of anti-

[6] The term "union-busting" is not often used by federal courts in the United States—indeed, a Westlaw search for the term reveals only 104 cases, nationwide, that use the term. The term is employed even less frequently by state courts, appearing in only 27 cases nationwide. A review of those cases reveals that there is no single accepted definition of the term; instead, it may refer to a wide variety of conduct, including lawful conduct. One court defined the term to mean simply "converting previously unionized operations over to non-unionized workers," *Adolph Coors, Co, v. Wallace*, No. C 82-0656 SW, 1984 WL 2944, at *1 (N.D. Cal. Feb. 17, 1984), which in some circumstances does not violate any laws. *E.g.*, *In re Tinti Const. Co., Inc.*, 29 B.R. 971, 974 (E.D. Wis. 1983) (concluding that filing for bankruptcy to enable rejection of the union contract was not "union-busting"). In another case, the D.C. Circuit concluded that a lockout followed by the hiring of temporary workers was a lawful tactic, even though similar tactics had been described by commentators as "union-busting." *Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, Local 88 v. N.L.R.B.*, 858 F.2d 756, 769 (D.C. Cir. 1988); *see also Int'l Paper Co. v. N.L.R.B.*, 115 F.3d 1045, 1051 n.5 (D.C. Cir. 1997) (further discussing *Boilermakers* case).

The phrase is also used to describe allegations of unfair labor practices or other violations of the NLRA. *E.g.*, *N.L.R.B. v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)

union animus when it reorganized the BFD, the claim was evaluated and rejected by the lower courts. Both courts determined, after employing the *McDonnell-Douglas* burden shifting test, that the reorganization was motivated by financial concerns—a legitimate business reason for the undertaking. When the City petitioned the Court for review of the court of appeals' decision, Local 4725 filed a cross petition, seeking review of the lower courts' resolution of its retaliation claims. The Court denied Local 4725's cross petition; nevertheless, Local 4725 continues to challenge the lower courts' determination that the reorganization was undertaken out of legitimate business concerns. In essence, Local

---

("The National Labor Relations Act is concerned with protecting workers against unwanted unions as well as against union-busting."). For example, in *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381, 1384 (E.D. Mich. 1984), the court interpreted the plaintiff's use of the phrase as an allegation that the employer had committed an unfair labor practice pursuant to section 8(a)(1) of the NLRA. *See also Sch. Crossing Guards Ass'n of City of New York, Inc. v. Beame*, 438 F. Supp. 1275, 1280 (S.D.N.Y. 1977) (characterizing "union-busting" as a synonym for "unfair labor practice"); *Clemente v. New York State Civ. of Parole*, 684 F. Supp. 2d 366, 370 (S.D.N.Y. 2010) (employee described his transfer to another borough as a "union-busting" technique because it was retaliation for engaging in protected activities). Similarly, in *Bio-Science Labs. v. N.L.R.B.*, the court characterized an employer's attempt to eliminate a union by holding elections while employees were on strike as "union-busting" that is prohibited by section 9(c)(3) of the NLRA. 542 F.2d 505, 507 (9th Cir. 1976).

In other cases, the term is used as a pejorative. For example, the Third Circuit concluded that accusing an employer of "busting unions" was incapable of supporting a defamation claim, because the phrase is "merely a vituperative outburst." *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 187 (3d. Cir. 1999). Similarly, the Fifth Circuit described the term as "words . . . [that] are emotional." *N.L.R.B. v. Roywood Corp.*, 429 F.2d 964, 969 n.5 (5th Cir. 1970). In many cases, the courts place the phrase in quotation marks, indicating that it was the allegation made by the plaintiff, but is not itself a legal claim. *E.g.*, *Butcher's Union Local 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 537 (9th Cir. 1986) ("The complaint charged eighteen defendants with 'union-busting' activities."); *see also Ahmed v. New York Health & Hosp. Corp.*, No. 06 Civ. 6685(LAP), 2008 WL 918830, at *3 (S.D.N.Y. Mar. 31, 2008) (noting that plaintiff accused employer of "union-busting" for ordering her to do something outside her job description).

4725's arguments are an attempt to persuade the Court to invalidate a decision that it has already declined to review.

Putting aside the procedural impropriety, Local 4725's claims are without merit. There is no evidence in the record that the City simply "replaced" the FEOs with non-union employees without making accompanying change to operations or staffing. Prior to the reorganization, the City employed five FEOs, each of whom worked at the fire stations on 24-hour shifts. (Doc. 54 Ex. 1 at 45-46.) Local 4725 concedes that the POC firefighters work on an on-call basis. (Respondents' Br. at 4.) By definition, they do not staff the fire stations 24 hours a day. Indeed, there is no evidence that anyone has replaced the 24-hour staffing previously supplied by the FEOs. Additionally, the City created a new position that serves as both the Deputy Chief and Fire Marshal. Local 4725 alleges, without pointing to any evidence in the record, that an FEO had previously performed Fire Marshal duties. Even if Local 4725 had supported that allegation with admissible evidence, Local 4725 does not dispute that the creation of this position also resulted in the addition of a command-level officer to the department. In short, Local 4725 has not shown that the City simply exchanged the FEOs for non-union employees.

Finally, Local 4725 mischaracterizes the deposition testimony of Connie Hillman, the Finance Director, in an attempt to discredit the City's estimate that the reorganization would save the City $275,000 a year. In her deposition, Hillman stated that she was nervous about providing a cost estimate to the City Council, because she did not want to be wrong. This statement is evidence that Hillman was nervous about making a prediction, not that the data she provided to the Council was false. Hillman knew that the

Council would rely on her estimate, and that it was an important decision. (Doc. 68 ¶¶ 7-8.) Hillman could not guarantee that the reorganization would result in her estimated savings. (*Id.* ¶ 9.) Nevertheless, she thought that the estimate she provided to the Council was a reasonable prediction, and that it was based on the most accurate and complete information available to her at the time. (*Id.*) As it turned out, Hillman's calculations were accurate. The BFD's personnel costs were approximately $280,000 less in 2016 than in 2015. (*Id.* ¶ 10; *see also* Doc. 69 Exs. 6-7; Doc. 70 Ex. 1 at 88 (indicating that the City estimated a savings of approximately $275,000, which it placed into the City's capital equipment fund).) Local 4725's attempt to bring the reason for the reorganization into doubt by discrediting the Finance Director's savings estimate fails. Except for speculation and accusations unsupported by evidence, Local 4725 has offered the Court no basis to believe that the City engaged in a "sham" restructuring for the purpose of harming Local 4725.

CONCLUSION

For the foregoing reasons, as well as those set forth in its opening brief, the City respectfully requests that the Court reverse the decision of the court of appeals, and affirm the district court's dismissal of this lawsuit in its entirety.

Respectfully submitted,

Dated: April 15, 2019

EVERETT & VANDERWIEL, P.L.L.P.

/s/Pamela L. VanderWiel

William J. Everett, No. 207275
Pamela L. VanderWiel, No. 305960
Anna L. Yunker, No. 392551
2930 146th Street West, Suite 115
Rosemount, MN 55068
Telephone: (651) 209-9692
Email: pam@e-vlaw.com

Attorneys for Petitioner City of Brainerd

A18-0398
STATE OF MINNESOTA
IN SUPREME COURT

Firefighters Union Local 4725 and Mark Turner, its President,

Respondents,

vs.

City of Brainerd,

Petitioner.

CERTIFICATION OF LENGTH OF DOCUMENT

Appellate File No. A18-0398

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional font, and the length of this document is 6,807 words. This document was prepared using Microsoft Word 2010.

Dated: April 15, 2019

EVERETT & VANDERWIEL, P.L.L.P.

s/Pamela L. VanderWiel

William J. Everett, No. 207275
Pamela L. VanderWiel, No. 305960
Anna L. Yunker, No. 392551
2930 146th Street West, Suite 115
Rosemount, MN 55068
Telephone: (651) 209-9692
Email: pam@e-vlaw.com

Attorneys for Petitioner City of Brainerd