

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 120827-U
NO. 4-12-0827
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
August 28, 2013
Carla Bender
4th District Appellate
Court, IL

PETER WAGNER,)	Direct Review of
Petitioner,)	the Illinois
v.)	Labor Relations
THE ILLINOIS LABOR RELATIONS BOARD, STATE)	Board, State Panel
PANEL; JOHN F. BROSNAN, Executive Director of Said)	No. S-CA-12-072
Board in His Official Capacity Only; THE DEPARTMENT)	
OF CENTRAL MANAGEMENT SERVICES; and THE)	
DEPARTMENT OF COMMERCE AND ECONOMIC)	
OPPORTUNITY,)	
Respondents.)	

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, concluding that the Illinois Labor Relations Board did not err by rejecting the petitioner's unfair-labor-practice claim.
- ¶ 2 In June 2012, a unanimous Illinois Labor Relations Board, State Panel (ILRB), affirmed the decision of defendant, John F. Brosnan, the Executive Director of the ILRB, which dismissed the unfair-labor-practices claim filed by petitioner, Peter Wagner. Wagner had claimed that co-defendant, the Illinois Department of Central Management Services (CMS), on behalf of his employer, the Illinois Department of Commerce and Economic Opportunity (DCEO), improperly fired him at the end of his probationary period of employment.
- ¶ 3 Wagner appeals, arguing that the ILRB erred by affirming Brosnan's decision to dismiss Wagner's unfair-labor-practices claim. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 Wagner began working for DCEO in June 2010 as a program manager (senior public service administrator option 1). At that time, Wagner began a mandatory six-month probationary period. In August 2010, Wagner received his first probationary evaluation (June 1, 2010, through September 1, 2010), which showed that he had performed in an unsatisfactory fashion in every evaluation category, as well as in his overall job performance. Beginning on September 27, 2010, and continuing through January 18, 2011, Wagner was absent from his job, using a combination of benefit time and time under the Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 (2006)). (Wagner did not return to work after that time because on January 19, 2011, he requested, and received, an indefinite non-service-connected medical leave.)

¶ 6 On June 10, 2011, DCEO notified Wagner that he was being considered for discharge for failure to satisfactorily complete his duties during the probationary period. DCEO also notified Wagner of his opportunity to respond and attached a statement of charges relating to his unacceptable job performance. On June 30, 2011, DCEO formally discharged Wagner.

¶ 7 In September 2011, Wagner filed with the ILRB a "Charge Against Employer," seeking reinstatement and back pay from DCEO for "wrongful discharge." Wagner alleged that DCEO had "unlawfully restrained" him from participating in a case involving the American Federation of State, County, and Municipal Employees (AFSCME) in violation of sections 10(a)(1), (2), and (3) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/10(a)(1), (2), (3) (West 2010)). Wagner claimed that he had petitioned for entry into AFSCME and had offered to testify at the hearings in that case, but he was discharged from his employment before he could do so. In response, DCEO explained that Wagner was discharged solely because of his

unacceptable job performance, noting that Wagner's negative evaluation predated his claimed initial contact with AFSCME. DCEO also noted that Wagner provided no evidence that it knew of his purported communications with AFSCME, adding that Wagner had not attended work during most of the time at issue.

¶ 8 In April 2012, Brosnan entered an order dismissing Wagner's charge. *Peter J. Wagner & State of Illinois, Department of Central Management Services*, No. S-CA-12-072 (ILRB State Panel Apr. 26, 2012) (Director's dismissal order). Following an investigation, Brosnan found no evidence to support Wagner's claims. Indeed, AFSCME's supervising counsel explained that "Wagner's name was not on eligibility lists provided to [them] by DCEO," Wagner "did not sign an authorization card," and Wagner "did not actively participate in any organizing campaign either prior to or after the December 2010 filing." Moreover, AFSCME's organizer for the proposed unit explained that "neither she nor anyone else involved in organizing the unit had knowledge of any involvement by Wagner."

¶ 9 Wagner appealed to the ILRB, claiming that Brosnan's dismissal was improper because the evidence indicated that the dismissal was based upon "misinformation" provided by DCEO and AFSCME. Wagner maintained that he had contacted AFSCME several times by telephone beginning September 30, 2010, regarding "organizing his position title" and asked to participate in working with AFSCME to organize a campaign. Wagner also posited that DCEO knew about his communications with AFSCME. DCEO responded by reiterating that Wagner had not been engaged in significant activity with AFSCME, DCEO was unaware of his communications with AFSCME, and the sole reason for Wagner's discharge was his poor job performance during the probationary period.

¶ 10 In August 2012, the ILRB issued a written order upholding Brosnan's dismissal of Wagner's charge. *Peter J. Wagner & State of Illinois, Department of Central Management Services*, 29 PERI ¶ 36 (ILRB State Panel 2012). The ILRB found "no evidence [that DCEO] knew of [Wagner's] protected activity prior to its determination to begin the termination process, and consequently no issue of fact or law warranting a hearing on whether Section 10(a)(1) [of the Act] had been violated [exists]." *Peter J. Wagner & State of Illinois, Department of Central Management Services*, 29 PERI ¶ 36, at 150 (ILRB State Panel 2012). Specifically, the ILRB found that a June 23, 2011, letter provided by Wagner in support of his claims actually supported DCEO's position because the letter confirmed that DCEO "had taken significant steps toward discharge *before* Wagner informed [DCEO] that he, like, numerous others, has signed up to join the union." (Emphasis in original.) *Id.* On this point, ILRB added the following:

"The process to terminate Wagner, while not completed, had clearly begun and was nearly completed before Wagner informed [DCEO] of his protected activity. Indeed, the timing suggests the beginning of the termination proceedings precipitated his informing [DCEO], not the other way around." *Id.*

¶ 11 As for Wagner's claims related to sections 10(a)(2) and (3) of the Act, the ILRB found that those claims failed to raise an issue of fact or law regarding unfair labor practices as well. The ILRB explained that Wagner's section 10(a)(2) claim lacked any merit because he failed to make the required showing that DCEO was motivated by antiunion animus. *Id.* The ILRB also rejected Wagner's section 10(a)(3) claim because "there [was] no evidence that he testified or filed an affidavit, petition or charge, or provided information that might have

precipitated his discharge[.]" *Id.*

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Wagner argues that the ILRB erred by affirming Brosnan's decision to reject his unfair-labor-practices claim. Specifically, Wagner contends that the ILRB erred by finding that sections 10(a)(1), (2) and (3) of the Act (5 ILCS 315/10(a)(1), (2), (3) (West 2010)) did not support his claim that he was discharged from his job because he participated in union activities. We disagree.

¶ 15 A. Charges of Unfair Labor Practices and the Standard of Review

¶ 16 In *Michels v. Illinois Labor Relations Board*, 2012 IL App (4th) 110612 ¶¶ 44-45, 969 N.E.2d 996 this court outlined charges of unfair labor practices and the standard of review we utilize when reviewing challenges to ILRB determinations, as follows:

"Section 11(a) of the Act (5 ILCS 315/11(a) (West 2008)) requires the [ILRB] to investigate charges of unfair labor practices. When investigating such a charge, the [ILRB] is analogous to a grand jury. [Citation.] Like a grand jury, the [ILRB] assesses the credibility of witnesses; draws inferences from the facts; and, in general, decides whether there is enough evidence to support the charge. [Citation.] If the [ILRB] finds an issue of law or fact sufficient to warrant a hearing, the [ILRB] will issue a complaint setting forth the issues that warrant a hearing. 5 ILCS 315/11(a) (West 2008); 80 Ill. Adm. Code 1220.40(a)(3) (2012). However,

the [ILRB] will dismiss the charge if the charge fails to state a claim on its face or the investigation reveals no issue of law or fact sufficient to warrant a hearing. 80 Ill. Adm. Code 1220.40(a)(4) (2012).

When deciding whether there is enough evidence to justify a hearing, the [ILRB] must exercise its discretion or judgment. It is within the sound discretion of the [ILRB] to dismiss an unfair labor practice charge. [Citations.] Thus, if the [ILRB] decides there is not enough evidence and dismisses the charge, we ask whether it abused its discretion. [Citations.] The [ILRB] abuses its discretion only where its decision to dismiss the charge is clearly illogical. [Citation.] The fact we may have reached a different decision than the [ILRB] is not, by itself, sufficient to justify reversing the [ILRB's] decision. [Citation.]"

¶ 17 B. The Pertinent Sections of the Act

¶ 18 Section 10(a) of the Act defines the following action by an employer as unfair labor practices:

"(a) It shall be an unfair labor practice for an employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the

formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization. ***

(3) to discourage or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act." 5 ILCS 315/10(a)(1), (2), (3) (West 2010).

¶ 19 C. The ILRB Did Not Abuse Its Discretion

¶ 20 Here, Wagner filed the charge against DCEO for reinstatement and back pay because he was wrongfully discharged. Wagner complained that DCEO had "unlawfully restrained" him from participating with AFSCME in violation of sections 10(a)(1), (2), and (3) of the Act. Having reviewed Wagner's claims under section 10(a) of the Act, the ILRB dismissed Wagner's claims as meritless. That determination was not an abuse of discretion. We briefly address Wagner's statutory allegations in turn.

¶ 21 To establish a violation of section 10(a)(1) of the Act, the claimant must show that (1) he was engaged in a protected activity; (2) the employer was aware of the activity; and (3) the employer took adverse action against the complainant for engaging in that activity. *Pace Suburban Bus Division of the Regional Transportation Authority v. Illinois Labor Relations Board, State Panel*, 406 Ill. App. 3d 484, 494-95, 942 N.E.2d 652, 662 (2010). Assuming *arguendo* that Wagner was engaged in protected activity, we agree with the ILRB that the June 23, 2011, letter provided by Wagner in support of his claims, in fact, supported DCEO's position rather than Wagner's because the letter confirmed that DCEO had taken significant steps toward discharge *before* Wagner informed DCEO that he was involved with the union.

¶ 22 Wagner's claims under sections 10(a)(2) and (3) fail as well, because he failed to produce a shred of evidence that his discharge was motivated by antiunion animus as required by section 10(a)(2) of the Act. Similarly, Wagner has failed to show that he "signed or filed an affidavit, petition or charge or provided any information or testimony" under section 10(a)(3) of the Act.

¶ 23 In short, DCEO discharged Wagner during his probationary period because his performance was unsatisfactory—indeed, the record shows that Wagner barely appeared at his job for most of his time with DCEO. Accordingly, we do not consider the ILRB's decision to affirm the dismissal of his unfair-labor-practices claim to be an abuse of the ILRB's discretion.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the ILRB's decision.

¶ 26 Affirmed.