

KAHN, DEES, DONOVAN & KAHN, LLP
ATTORNEYS & COUNSELORS AT LAW

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Public Question #1

By Todd Barsumian

This November 7th, you will have the opportunity to vote for Public Question #1 before you vote for judges. Public Question #1 states:

Shall article 7, Section 4 of the Constitution of the State of Indiana be amended so that criminal appeals from a sentence of life imprisonment or a prison term of more than fifty years follow the same path through the court of appeals to the Indiana Supreme Court that civil appeals do ? (This question concerns Article 7, Section 4 of the Constitution of the State of Indiana.)

Criminal cases generally follow the same course as a civil case. They are appealed first to the Indiana Court of Appeals and then to the Indiana Supreme Court. However, the Indiana Constitution currently provides that every criminal defendant who receives a sentence greater than 50 years is entitled to appeal straight to the Supreme Court (a/k/a a direct criminal appeal). What then is the problem with the Indiana Constitution as it currently stands ?

The problem is that the number of mandatory direct criminal appeals have increased dramatically. In 1986, direct criminal appeals made up 93% of the Indiana Supreme Courts docket. In 1988, the Constitution was amended to increase the direct criminal appeal from those with a sentence of over ten years to fifty years. By 1992, the direct criminal appeals accounted for just 31% of the Courts docket. During the mid 1990's, however, the number of direct appeals was on the rise. This was likely caused by the legislature's changing of the standard sentence for a murder conviction to 55 years. Whatever the reason for the increase, the Indiana Supreme Court's docket once again became clogged with direct criminal appeals and remains that way today. In 1995, that court heard 41 civil cases, 29 criminal transfer cases, and 39 direct criminal appeals for a total case load of 108 cases. Thus, 35% of the Indiana Supreme Court's caseload was consumed by direct criminal appeals. By the year 1999, that court heard 47 civil cases, 24 criminal transfer cases, and 106 criminal direct appeals for a total of 177 cases. Direct criminal appeals consumed almost 60% of the Indiana Supreme Court's docket in 1999. It is important to note that the Indiana Supreme Court has increased the number of cases it hears.

The honorable Randall T. Shephard, Chief justice of the Indiana Supreme Court has openly asked for the publics support of Public Question #1. He recently wrote, "It has become increasingly difficult for citizens with ordinary legal problems to gain access to the Indiana Supreme Court. We have to change that". Like Chief Justice Shephard, we would encourage you to vote "Yes" on Public Question #1 and to encourage others to vote "Yes" as well on this important measure.

HEALTH CARE DIRECTIVES

By Alan N. Shovers

When preparing Powers of Attorney it is now commonplace to include a Health Care Directive. This directive designates a person to act in your place, if you cannot act on your own behalf in making healthcare decisions. The question arises, "Why isn't the Living Will that I signed when I recently went into the hospital sufficient ?" The answer is that a Living Will is limited in its application. It may not be adequate if you wish to have very clear directions concerning your treatment in the event of serious illness. A Living

Will only states your desires and intentions when an emergency arises and you are unable to give directions on your medical care – it does not empower anyone.

By contrast, a Health Care Directive designates a specific person who has the power to make healthcare decisions in the event that you are unable to do so because, either on a temporary basis or permanent basis during a serious illness or injury, you can't act. In other words, you empower a person who will carry out your wishes, whose direction the hospital must follow as though you were giving those directions.

A Living Will applies only to decisions near the end of life. A healthcare directive applies more broadly, when you can't act on a medical decision such as, perhaps being unconscious after an accident.

If we can help, we would be pleased to assist with adoption of a healthcare directive.

of his national origin and in retaliation for filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Ghosh had been hired by IDEM in 1985 as an environmental Engineer III in the Office of Water Management. Though he was eventually promoted to Engineer II, Ghosh filed suit after failing to receive promotions to several other positions he had sought during the course of his employment.

COURT'S DECISION

Ghosh filed his suit under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, color, sex, or national origin. In its defense, IDEM argued that Ghosh failed to receive the requested promotions because he lacked the proper experience, had inadequate writing skills, did not submit the proper application, and did not score within the top 20 % of the candidates during the initial resume evaluation. In analyzing Ghosh's claim, the Court stressed that it would not "sit as a super-personnel department to review a company's honest business decisions" and would limit its analysis to whether the decisions to deny Ghosh the promotions in question were unlawfully motivated. Thus, even if the process by which Ghosh was evaluated for the promotions was poorly devised or executed, that fact alone would not be enough to create a presumption that the reasons IDEM offered as supporting this decision were pretextual, and that national origin discrimination was the true motivating factor.

Ghosh's claim ultimately failed because he made no effort to demonstrate that one of the reasons proffered by IDEM in support of the decisions not to promote him were pretextual. To prevail, the Court held that Ghosh would have to show that all of the reasons were pretextual; by failing to address one, he could not meet this burden.

IMPORTANCE

The Court's holding in Ghosh underscores the importance of evaluating employees using objective criteria so that any court reviewing that decision will be more easily convinced that, whether right or wrong, it was honestly made.

SUPREME COURT AGREES TO REVIEW DECISION REINSTATING REPEAT DRUG OFFENDER

The U.S. Supreme Court recently agreed to take up an employer's appeal of a lower court's decision which upheld an arbitrator's ruling reinstating a worker who twice tested positive for marijuana use.

FACTS

In Eastern Assoc'd Coal Corp. V. United Mine Workers, the employee was reinstated to his safety-sensitive position as a heavy equipment operator. The employee tested positive for drug use twice in a 16 month period and was discharged. An arbitrator; however; ordered Eastern to reinstate the employee. The company appealed the arbitrator's decision, but the 4th Circuit (covering Maryland, North Carolina, South Carolina, Virginia and West Virginia) ruled that the arbitrator could have rationally found that there was no just cause for firing the employee because neither the collective bargaining agreement, nor the company's drug abuse policy, mandated the firing of workers who tested positive for illegal drugs.

The Supreme Court's decision will hopefully settle a current split among the courts regarding whether; as Eastern argues, there is a public policy against enforcing an arbitration award ordering reinstatement to a safety sensitive position of an employee who has tested positive for illegal drug use.

IMPORTANCE

This case highlights the importance of clearly informing employees in writing the disciplinary actions that an employee will face if he or she tests positive for drugs in violation of an employer's anti-drug policy. If you have any questions about your company's drug policy, give us a call.