2017 IL App (1st) 152845-U

No. 1-15-2845

FIFTH DIVISION
March 10, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MORAINE VALLEY COMMUNITY COLLEGE, Plaintiff-Appellant, v. ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD and COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, IFT-AFT, AFL-CIO, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2014 CA 0017 C The Honorable Ellen Maureen Strizak, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: The decision of the Illinois Educational Labor Relations Board that plaintiff improperly terminated the employee in violation of sections 14(a)(3) and 14(a)(1) of the Illinois Educational Labor Relations Act was not clearly erroneous where the employee engaged in speech protected by the Act.

¶2 Plaintiff, Moraine Valley Community College (College), appeals the order entered by defendant, the Illinois Educational Labor Relations Board (IELRB), adopting the

findings of fact and recommended decision and order of the Administrative Law Judge (ALJ), that plaintiff impermissibly terminated the employment of adjunct faculty member Robin Meade for having engaged in protected activity under the Illinois Educational Labor Relations Act (115 ILCS 5/1 *et seq.* (West 2012)) (Act). Based on the following, we affirm.

¶3 FACTS

¶4 Defendant, the Cook County College Teachers Unions, Local 1600, IFT-AFT, AFL-CIO (Union), represents a bargaining unit composed of adjunct faculty members employed at plaintiff College. Meade was employed by plaintiff as an adjunct faculty member beginning in 2003 and was a member of defendant Union, and served as the president of the local union for adjunct faculty known as the Moraine Valley Adjunct Faculty Organization (MVAFO) during the relevant time period.

¶5 In 2012, plaintiff replaced its president. As a result, plaintiff was required to reapply for membership in the League for Innovation in the Community College (League), a consortium of colleges that promotes excellence and innovation in community colleges. In doing so, Margaret Lehner, one of plaintiff's vice presidents, coordinated letters of support from various persons and businesses, including defendant Union. Lehner contacted Meade to provide a letter of support, but Meade refused, stating she did not feel comfortable providing the requested letter.

¶6 Then, in December 2012, the MVAFO's board created a survey to learn whether its members felt plaintiff was innovative toward its adjunct faculty. The survey was conducted in January and February of 2013. It was sent to all of the MVAFO members, was available on the website, and appeared in a newsletter. 137 out of 340 MVAFO members completed

the survey. The survey results revealed that 58.4% of participants felt plaintiff was not innovative toward its adjunct faculty, while 41.6% of participants felt plaintiff was innovative toward them. Some of the survey participants stated that plaintiff did not treat adjunct faculty members with respect.

¶7 On August 20, 2013, Meade sent a letter to the League. A draft of the letter had been circulated to other MVAFO board members and suggested edits were offered. In particular, Meade spoke with fellow MVAFO board members about the letter during meetings held in December 2012, May 2013, and August 2013. The MVAFO board members did not sign the final letter. The parties agree that Meade acted in her capacity as MVAFO president when she sent the letter. In relevant part, the letter stated:

> "[A] request was made for me and other union leaders by the administration at [the College] for a letter supporting the college ***. At the time I declined because it is the position of the MVAFO that the college is not innovative toward adjuncts.
>
> Not only is the college not innovative toward adjuncts, the college considers the adjuncts a disposable resource to such extent: adjuncts are considered a separate, lower class of people. [The College] concentrates on building beautiful facilities and having carefully manicured grounds and throwing gala events with fabulous food. Everything looks wonderful but there is an insufficient amount of substance underneath.
>
> Contrary to what was reported in the letter from the support staff union, the administration works hard to divide and conquer between union chapters. There is a limited amount of collaboration as a result. Consistently decisions are made to

allocate resources to the administration, full time faculty and staff while the adjuncts are often left to fend for themselves. ***.

Adjuncts easily teach 60% of the classes at [the College]. Practically speaking, this means that the student success rates depend more on the adjuncts than on the full time faculty. The administration consistently treats adjuncts as a disposable resource despite 12 year average adjunct length of service. Adjuncts who have taught innovatively for years are refused classes with no justification. This attitude has created a chilling effect which affects adjunct performance and erodes the confidence the idyllic atmosphere and beautiful buildings and grounds strive to project.

Last spring, during Earth Week the administration reported that [the College] provides sustainability socially by 'providing a living wage and access to health care' for all employees. Adjunct faculty neither make a living wage nor have access to health care at [the College]. In fact, as of Fall 2012, the long standing adjunct discount for access to health care was discontinued by the administration. The [C]ollege is currently cutting hours for adjunct faculty to avoid providing health benefits to adjuncts under the Affordable Care Act. Adjuncts are no longer being allowed to teach and work hourly; meaning for example that a developmental math instructor will no longer be able to tutor his own students in the tutoring lab. How will that affect student success? Developmental classes already experience a high failure rate, making it difficult for students to achieve completion in an area of study."

¶8 On August 20 or 21, 2013, plaintiff decided to terminate Meade's employment as a result of the August 20, 2013, letter. Andrew Duren, another of plaintiff's vice presidents, contacted Meade to schedule a disciplinary meeting on August 22, 2013. Meade was unable to arrange for a Union representative to accompany her to the meeting at the scheduled time. Instead, Meade received written notification of her immediate termination on August 22, 2013. In the termination letter, plaintiff stated that her August 20 letter went far beyond responsible advocacy on behalf of the MVAFO, and instead was a personal attempt to falsely discredit plaintiff and undermine its relationship with the League. Meade responded by filing a grievance to contest the termination. A meeting was held, during which time Meade said she decided to send the August 20 letter after plaintiff rejected two grievances related to the Affordable Care Act. At the time of the letter, there was an ongoing dispute between plaintiff and the MVAFO regarding whether plaintiff would bargain with the MVAFO regarding plaintiff's alleged decision to limit employees' work hours in light of the Affordable Care Act. Plaintiff ultimately denied Meade's grievances.

¶9 On September 5, 2013, defendant Union filed an unfair labor practice complaint with the IELRB on Meade's behalf, alleging that plaintiff violated various subsections of the Act, namely, 14(a)(1), 14(a)(3), and 14(a)(4). A hearing was held on September 11, 2014, before the ALJ. Meade testified at the hearing. At the conclusion of the hearing, the ALJ found Meade generally to be a credible witness.

¶10 Meade testified that her statement in the August 20 letter that plaintiff was not innovative toward adjunct faculty was based on the results of the survey. Meade explained that she said plaintiff treats adjunct faculty as a disposable resource based on comments made by plaintiff's representatives during a 2012 bargaining session providing that

plaintiff can get more adjuncts anytime it wants. Meade added that there were instances where adjunct faculty members with 10, 15, and 20 years experience were suddenly denied classes despite exemplary records and student compliments. In particular, Meade pointed to two adjunct faculty members for whom she had filed grievances. Meade testified that many adjunct faculty members do not return to teach at plaintiff College, yet she admitted the vast majority actually do return on an annual basis. Meade further admitted the return rate for teachers, along with plaintiff's efforts to make continuing education available to adjunct faculty, plaintiff's recognition of adjuncts as professional, and her inclusion in the search team for the new president of plaintiff College were not consistent with an employer who treats its adjunct members like disposable resources and second class citizens.

¶11 Meade additionally testified that plaintiff attempted to divide and conquer the full-time and adjunct faculty based on "a consistent pattern of small acts." Meade elaborated that plaintiff had not allowed defendant Union to bargain simultaneously with the full-time faculty union. Meade added that plaintiff allowed the full-time faculty to pursue actions that had been tabled during negotiations. According to Meade, if the adjunct faculty refused to be evaluated due to the tabling of issues by plaintiff, as was their right, the full-time faculty retaliated by refusing classes to the adjunct faculty. Meade opined that plaintiff perpetuated the feeling that the adjunct faculty was a disposable resource by attempting to break up the relationship between the adjunct and full-time faculty. Meade was unable to identify any of the "consistent behaviors" plaintiff engaged in to support her belief.

¶12 Meade further elaborated that her comment in the August 20 letter regarding the difference in resources allocated to the adjunct faculty as opposed to the full-time faculty

referred to pay and benefits. Meade referenced 20 adjunct faculty members she had worked with personally and as a MVAFO representative over the course of 10 years wherein those members had been refused classes without justification despite their history of teaching innovatively. With regard to her "chilling effect" reference, Meade explained that she meant adjunct faculty members were worried about their job security. According to Meade, the survey comments reflected a chilling effect; however, the survey did not ask any specific questions using the words "chilling effect."

¶13 Meade testified that her reference to Earth Week resulted from a report provided to her from Dawn Wrobel, a MVAFO delegate. Wrobel indicated that she observed plaintiff's sustainability coordinator say it provided a living wage and access to health care for all employees. With the Earth Week reference, Meade intended to convey that plaintiff stated it paid a living wage to its adjunct faculty. Meade elaborated that she mentioned in the letter that plaintiff had cut adjunct hours because she believed it to be true. Meade, however, admitted said she spoke about plaintiff's Earth Week comments without having knowledge whether plaintiff was referring to adjunct faculty.

¶14 Wrobel testified at the hearing and confirmed having observed plaintiff's sustainability coordinator say plaintiff provided a living wage and access to health care for all employees. Wrobel said she contacted Meade because plaintiff does not provide health care insurance for its adjunct faculty.

¶15 Lehner testified at the hearing that, during the course of Meade's grievance hearing, Meade said she decided to send the August 20 letter after plaintiff rejected two grievances she filed related to the Affordable Care Act.

¶16 On January 22, 2015, the ALJ entered a written recommended decision and order. Ultimately, the ALJ determined that Meade's August 20 letter constituted activity protected by the Act. In so doing, the ALJ found that "Meade's communications clearly indicated the existence of a labor dispute, as she references the bargaining unit's wages, health insurance and hours." The ALJ further found there was no evidence that anything in the August 20 letter was deliberately or maliciously false. As a result, the ALJ found plaintiff violated sections 14(a)(3) and 14(a)(1) of the Act by terminating Meade's employment in retaliation for engaging in the protected activity. The ALJ recommended that Meade be reinstated to her former position.

¶17 Then, on September 17, 2015, the IELRB affirmed the ALJ's decision and ordered the reinstatement of Meade. In so doing, the IELRB noted that "[t]he scope of protection of statements made during the course of protected activity is very broad." The IELRB expressly determined that Meade's communications in her capacity as Union president "clearly indicated the existence of a labor dispute with [plaintiff] regarding [plaintiff] allegedly cutting adjunct faculty members' hours, and the critical statements were not maliciously untrue." The IELRB reasoned that, because Meade's letter was written in her role as MVAFO president and addressed the effect of plaintiff's conduct on adjunct faculty members' working conditions, the statements were "subject to an extremely high degree of protection under the Act." The IELRB added "[a]n employer seeking to prove that a union officer's statements about matters within the scope of the union's representation of employees are not protected faces a very heavy burden. It was the [plaintiff's] burden to show that Meade's statements *** were deliberately or maliciously false, rather than the Union's burden to demonstrate that they were not." After finding plaintiff failed to offer

evidence demonstrating that Meade's statements were deliberately or maliciously false, or even reckless with regard to their truth or falsity, the IELRB concluded that Meade's statements did not lose the protection of the Act. This appeal followed.

¶18 ANALYSIS

¶19 The parties dispute whether Meade's August 20 letter constituted protected activity under the Act. Plaintiff contends the IELRB erred in finding the letter was protected, thereby erroneously ordering the reinstatement of Meade.

¶20 We first establish the appropriate standard of review. The Act provides that, pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq.*(West 2012)), a final order of the IELRB is subject to judicial review directly by the appellate court. 115 ILCS 5/16(a) (West 2012). Under the Administrative Review Law, the scope of judicial review encompasses all questions of law and fact presented by the record. 735 ILCS 5/3-110 (West 2012). The applicable standard of review depends on whether the issue presented is a question of law, fact, or a mixed question of law and fact. *Board of Education of City of Chicago v. Illinois Educational Labor Relations Board*, 2015 IL 118043, ¶ 14.

¶21 For questions of law, this court reviews an agency's conclusion *de novo*. *Id*. ¶ 15. When the interpretation of a statute is at issue, a reviewing court is not bound by the agency's interpretation of the relevant statute. *Id*. That said, the agency's interpretation is relevant where there is a reasonable debate about the meaning of the statute. *Id*. In contrast, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (West 2012). A reviewing court, therefore, will not reweigh the evidence, or substitute its judgment for that of the agency; instead, the court simply determines whether the findings of fact are against the

manifest weight of the evidence. *Board of Education of City of Chicago*, 2015 IL 118043, ¶ 15. Where the question is a mixed question of law and fact asking the legal effect of a given set of facts, a reviewing court must determine whether the established facts satisfy the applicable legal rules. *Id*. ¶ 16. We review an agency's conclusion on a mixed question of law and fact for clear error. *Id*. An agency's decision is "clearly errorneous" when the reviewing court has a definite and firm conviction that a mistake has been committed. *Id*.

¶22 The parties agree that the clearly erroneous standard is appropriate here as we review the mixed question of fact and law presented to this court. "Review for clear error is significantly deferential to an agency's experience in construing and applying the statute that it administers." *Id*. ¶ 18.

¶23 The IELRB determined that plaintiff violated section 14(a)(3) of the Act and, thereby, derivatively violated section 14(a)(1) of the Act. Under section 14(a)(1) of the Act, "Educational employers, their agents or representatives are prohibited from *** [i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." 115 ILCS 5/14(a)(1) (West 2012). Under section 14(a)(3), educational employers, their agents, or representatives are also prohibited from "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." 115 ILCS 5/14(a)(3) (West 2012).

¶24 Our supreme court explained the interplay of subsections 14(a)(1) and 14(a)(3) in *Speed District 802 v. Warning*, 242 Ill. 2d 92 (2011). The supreme court stated:

> "It has been held that section 14(a)(1) refers to adverse action taken against an employee as a result of any protected concerted activity, while section 14(a)(3)

> refers specifically to discrimination based on union activity. [Citation.] Where, as here, an alleged violation of sections 14(a)(1) and 14(a)(3) stems from the same conduct, the section 14(a)(1) violation is said to be derivative of the section 14(a)(3) violation. [Citation.] In such cases, the test to be applied is the one used to determine whether a section 14(a)(3) violation occurred. [Citation.]." *Id*. at 112.

A *prima facie* case for a section 14(a)(3) violation is made when evidence is presented showing: (1) the employee was engaged in activity protected by section 14(a)(3); (2) the employer was aware of that activity; and (3) the employer took adverse action against the employee for engaging in that activity. See *Board of Education, City of Peoria School District No. 150 v. State of Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 150 (2000). Moreover, section 3(a) of the Act further provides, in relevant part, that:

> "It shall be lawful for educational employees to organize, form, join, or assist in employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or bargain collectively through representatives of their own choice." 115 ILCS 5/3(a) (West 2012).

This case concerns only the first element of a *prima facie* case for a section 14(a)(3) violation, namely, whether the employee engaged in protected activity.

¶25 In *Chicago Transit Authority v. Illinois Labor Relations Board*, 386 Ill. App. 3d 556, 573 (2008), this court discussed the standard for establishing the difference between protected and unprotected or disloyal activity. In so doing, this court cited a federal case interpreting the National Labor Relations Act (NLRA), which the Illinois Supreme Court

has recognized as the model for the state Act.[1] See *Board of Education of Schaumburg Community Consolidated School District 54 v. Illinois Educational Labor Relations Board*, 247 Ill. App. 3d 439, 455 (1993). This court explained that attempts by employees and labor organizations to enlist the aid of third parties or the public fall under the protection of the Act, " 'so long as (1) the communications clearly indicate the existence of a labor dispute with the employer and, (1) the critical statements are not maliciously untrue.' " *CTA*, 386 Ill. App. 3d at 574 (quoting *Duane Read Inc. v. Local 338 Retail, Wholesale, Department Store Union*, 791 N.Y.S.2d 288, 291 (2004)).

¶26 Plaintiff contends the IELRB erroneously found that the August 20 letter clearly indicated the existence of an ongoing labor dispute. Plaintiff additionally contends the IELRB's decision was erroneous because it relied on an impermissibly overbroad interpretation of "concerted" activity and found that Meade's statements in the letter were "not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." Finally, plaintiff contends the IELRB erred in shifting the burden to prove the August 20 letter was not protected activity to it instead of properly imposing the burden on the Union. In response, the Union argues plaintiff forfeited its argument that the August 20 letter did not indicate the existence of a labor dispute by failing to file an exception to the ALJ's findings and failing to raise the issue as an affirmative defense to the complaint. The Union further asserts the IELRB correctly determined that the August 20 letter was protected activity under the Act. Finally, the Union responds that the IELRB correctly found plaintiff had the burden of proving the contents of the August 20 letter were maliciously untrue.

[1] Section 7 of the NLRA is analogous to Section 3(a) of the Act.

¶27 At the outset, we address the Union's claim that plaintiff failed to preserve its argument contesting the finding that the letter clearly indicated the existence of a labor dispute. "It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review." *Cinkus v. Village of Sitckney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212 (2008). The supreme court explained:

> "The rule of procedural default in judicial proceedings applies to administrative determinations, so as to preclude judicial review of issues that were not raised in the administrative proceedings. The rule is based on the demands of orderly procedure and the justice of holding a party to the results of his or her conduct where to do otherwise would surprise the opponent and deprive the opponent of an opportunity to contest an issue in the tribunal that is supposed to decide it. [Citation.] Additionally, raising an issue for the first time in the circuit court on administrative review is insufficient. The rule of procedural default specifically requires first raising an issue before the administrative tribunal rendering a decision from which an appeal is taken to the courts." *Id*. at 212-13.

¶28 We agree that plaintiff procedurally defaulted its contention. Both the ALJ and the IELRB expressly found that Meade's August 20 letter clearly indicated the existence of a labor dispute by referencing reductions in adjunct faculty members' hours, as well as, in terms of the ALJ's recommendation, by referencing the wages and health insurance.

¶29 To the extent plaintiff disagreed with the findings and conclusions of law made by the ALJ, it was required to file with the general counsel exceptions specifying each finding of fact and conclusion of law which it challenged. See 80 Admin. Code Section

1105.220(b). Plaintiff failed to satisfy this requirement. Instead, in response to the ALJ's findings, plaintiff filed the following exceptions: (1) that Meade's August 20 letter was activity protected by the Act; and (2) that plaintiff violated sections 14(a)(3) and (a)(1) of the Act by terminating Meade's employment in retaliation for engaging in activity protected by the Act in order to discourage support for the Union by members of the bargaining unit. In support of the listed exceptions, plaintiff stated:

> "The [ALJ] erred in finding that Meade's August 20, 2013, letter was protected activity within the meaning of the Act. The record establishes the comments contained in Meade's August 20, 2013, letter were not only false, but knowingly and recklessly false. As such the August 20 letter is not protected activity. Since the letter is not protected speech, the College did not violate Section 14(a)(3) and (1) of the Act."

Nowhere in the exceptions to the ALJ's findings did plaintiff challenge the finding that the August 20 letter clearly indicated the existence of a labor dispute. Rather, the only basis provided was that the letter was "not only false, but knowingly and recklessly false." As a result, the IELRB was denied the opportunity to consider the merits of whether the ALJ properly found the August 20 letter clearly indicated the existence of a labor dispute. Plaintiff's challenge to the August 20 letter on that basis is, therefore, forfeited.

¶30 Moreover, plaintiff had an opportunity to raise the challenge as an affirmative defense to the complaint issued by the IELRB on Meade's behalf. Pursuant to section 1120.30(d) of the IELRB rules and regulations, plaintiff was to respond to the unfair labor practice complaint by filing an answer, which was to include a detailed statement of any affirmative defenses. 80 Admin. Code Section 1120.30(d). In fact, the IELRB rules and

regulations provide that an affirmative matter includes an allegation that the complaint failed to allege an unfair labor practice. 80 Admin. Code Section 1120.30(d)(2). Plaintiff failed to raise as an affirmative defense a challenge to the August 20 letter having indicated the existence of a labor dispute. Again, plaintiff has forfeited review of the challenge on appeal.

¶31 We turn next to plaintiff's contention that the IELRB erred in finding the August 20 letter constituted protected activity. Plaintiff contends the factual findings did not support the legal finding that it violated sections 14(a)(3) and (a)(1) of the Act and, therefore, the IELRB's conclusion was clearly erroneous. Plaintiff specifically argues the August 20 letter was not protected by the Act where the IELRB applied an impermissibly overbroad interpretation of "concerted" activity and Meade's statements were disloyal, reckless, and maliciously untrue.

¶32 As stated, a union member's communications to a third party, as in this case, or the public are protected by the Act " 'so long as (1) the communications clearly indicate the existence of a labor dispute with the employer and, (1) the critical statements are not maliciously untrue.' " *CTA*, 386 Ill. App. 3d at 574 (quoting *Duane Read Inc. v. Local 338 Retail, Wholesale, Department Store Union*, 791 N.Y.S.2d 288, 291 (2004)). The communication, however, must constitute a "concerted" activity in order to qualify for protection under the Act. Cases interpreting the NLRA and applying it to the Act have provided that "concerted" activities invoke rights grounded upon a collective bargaining agreement or those engaged in with or on the authority of other employees, not solely by and on behalf of the individual. *Board of Education of Schaumburg Community Consolidated School District 54*, 247 Ill. App. 3d at 456 (and cases cited therein). The

"concerted" activity must be for the purpose of inducing or preparing for action on behalf of the group to correct a grievance or complaint. *Id*. Moreover, in order for the "concerted" activity to enjoy protection, it must be a means to an end and not an end in itself. *Id*. Public venting of a personal grievance, even one shared by others, does not constitute a "concerted" activity. *Id*.

¶33 Our review of the August 20 letter establishes that Meade's communication qualified as a "concerted" activity. The letter discussed the issues experienced by the adjunct faculty as a group, not by Meade as an individual. A number of the matters raised in the letter related to grievances already filed and rejected or were those in dispute at the time, namely, surrounding the Affordable Care Act and adjunct faculty members' reduction in hours/benefits. The August 20 letter was not merely a public venting of Meade's personal grievances, but rather was an attempt to shed light on the employment conditions experienced by the adjunct faculty members and to mobilize change by establishing plaintiff's lack of innovation in stifling the growth of the adjunct faculty. Specifically, Meade referenced the fewer resources available to adjunct faculty members in terms of class availability despite experience and dedication, as well as pay and benefits, the disparate treatment as compared to the full-time faculty, and the statements made by plaintiff regarding the fungibility of the adjunct faculty, all of which had a chilling effect on the members in terms of fearing their job security. We, therefore, find the IELRB did not apply an impermissibly overbroad interpretation of "concerted" activity in this case.

¶34 Moreover, we find that Meade's "concerted" activity was protected by the Act. Despite plaintiff's forfeiture of its challenge that the August 20 letter clearly indicated the existence of labor dispute, our review of the letter confirms as much. The letter itself

expressly referenced the adjunct faculty's wages, benefits, and hours, as well as plaintiff having reduced adjunct faculty hours to avoid providing health care benefits under the Affordable Care Act. In addition, the testimony at the hearing before the ALJ confirmed that Meade sent the letter because plaintiff rejected two grievances she had filed related to plaintiff's reactions to the Affordable Care Act. The undisputed facts demonstrate plaintiff and the MVAFO were engaged in a labor dispute at the time of the August 20 letter. In fact, in an attempt to establish the contents of Meade's letter as maliciously untrue, plaintiff concedes that the letter was a response to its failure to respond to Meade's grievances related to the Affordable Care Act.

¶35 Furthermore, the critical statements included in the August 20 letter were not so maliciously untrue as to lose their protection under the Act. In reviewing whether a "concerted" activity was protected under the NLRA, which we have established holds precedential value, the United States District Court of Appeals for the D.C. Circuit elaborated that the second part of the test provides that the communication was " 'not so disloyal, reckless or maliciously untrue as to lose the Act's protection.' " *Endicott Interconnect Technologies, Inc. v. National Labor Relations Board*, 453 F.3d 532, 536 (2006). "An employee's actions may lose the protection of being classified as 'protected concerted activity' if the employee's 'actions cross the lines of acceptability so that they can be characterized as "disloyal" to the employer.' "*Chicago Transit Authority*, 386 Ill. App. 3d at 573 (quoting *Sierra Publishing Co. v. National Labor Relations Board*, 889 F.2d 210, 215 (1989)). That said, " '[w]here it can be shown that the complained-of employer actions directly affect their working conditions, employees are permitted a wide range of protest.' " *Village of Athens*, 29 PERI 27 (ILRB, State Panel 2012) (quoting

Village of Bensonville, 10 PERI 2009 (ISLRB 1993).[2] Even false and inaccurate statements made in the course of a concerted activity maintain protection unless they are deliberately or maliciously false. *Niles Township High School District 219*, 10 PERI 1041, Case No. 94-CA-0043-C (IELRB Opinion and Order, Feb. 24, 1994).

¶36 Here, Meade identified the sources of her statements as the MVAFO survey administered to the adjunct faculty members, private discussions with adjunct faculty members—two of which resulted in Meade filing grievances on their behalf against plaintiff, and plaintiff's representatives—one during a 2012 bargaining session and one during an Earth Week presentation. The ALJ expressly found Meade to be credible and the IELRB adopted the ALJ's findings. Plaintiff does not contest those findings. Simply stated, there is nothing in the record to demonstrate that Meade's letter was maliciously untrue or made with the knowledge that its contents were false or with reckless disregard for their truth or falsity. At the hearing before the ALJ, Meade acknowledged a number of contradictions to her statements, *e.g.*, that she could not be sure whether the Earth Week comments were related to adjunct faculty; however, we do not believe the inaccuracy of some of the statements demonstrates that they were maliciously untrue, even if they were misleading. The statements were made by Meade, acting in her capacity as president of the MVAFO. The statements were made, at least in part, based on results from the MVAFO members' survey responses and discussions with adjunct faculty members. Moreover, drafts of the August 20 letter were reviewed in some form by the MVAFO board members and were discussed at three board meetings in December 2012, May 2013, and August

[2] Pursuant to section 17.1 of the Act, the IELRB shall consider decisions of the State and local panels of the Illinois Labor Relations Board or their predecessors, although it is not required to follow those decisions. 115 ILCS 5/17.1 (West 2012).

2013. In sum, the August 20 letter conveyed Meade's concerns regarding the welfare of the adjunct faculty members and did not prove to be maliciously untrue.

¶37 Finally, we conclude that the IELRB did not impermissibly shift the burden to plaintiff of establishing that the contents of the August 20 letter were maliciously untrue. The cases and agency decisions make it clear that a communication which qualifies as a "concerted" activity and which clearly communicates the existence of an ongoing labor dispute enjoys protection under the Act. See *CTA*, 386 Ill. App. 3d at 574 (quoting *Duane Read Inc. v. Local 338 Retail, Wholesale, Department Store Union*, 791 N.Y.S.2d 288, 291 (2004)). That protection, however, can be lost if the communication is shown to be maliciously untrue and made with knowledge of their falsity or with reckless disregard for their truth or falsity. See *Endicott Interconnect Technologies, Inc.*, 453 F.3d at 536. Accordingly, in order to withdraw the communication from the Act's protection, plaintiff was required to demonstrate the communication was disloyal, reckless, or maliciously untrue. In other words, the Union established its *prima facie* case for a violation of 14(a)(3) by establishing that the August 20 letter qualified as a "concerted" activity and clearly communicated the existence of an ongoing labor dispute. As a result, it was plaintiff's burden to respond to the complaint with an affirmative defense alleging the complaint failed to establish an unfair labor practice where the communication was disloyal, reckless, or maliciously untrue. See 80 Ill. Admin. Code Section 1120.30(d)(2). As previously determined, plaintiff failed to do so. Simply stated, the IELRB did not impermissibly shift the burden in this case.

¶38 In sum, we find the IELRB's decision that plaintiff violated section 14(a)(3) and derivatively section 14(a)(1) of the Act was not clearly erroneous.

¶39 CONCLUSION

¶40 We affirm the decision of the IELRB finding plaintiff violated sections 14(a)(3) and (a)(1) of the Act.

¶41 Affirmed.