

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA  
Held at 800 West Washington Street  
Phoenix, Arizona 85007  
Thursday, May 18, 2023 – 1:00 p.m.

Present:	Dennis P. Kavanaugh	Chairman
	Joseph M. Hennelly, Jr.	Vice Chair
	Scott P. LeMarr	Commissioner
	D. Alan Everett	Commissioner
	James Ashley	Director
	Gaetano Testini	Chief Legal Counsel
	Trevor Laky	Legislative Affairs Chief/Public Information Officer
	Renee Pastor	Self-Insurance (Telephonic)
	Lisa Padgett	Labor Director
	Melissa Spurgeon	Labor Supervisor
	Kimberly Gooby	Labor Investigator
	Jennifer Cox	Labor Investigator
	Christina Lasater	Labor Investigator
	Mark Norton	Assistant ADOSH Director
	Jessie Atencio	ADOSH Director (Telephonic)
	Travis Halling	ADOSH Compliance
	Tom Martz	ADOSH Compliance
	Chuck Thompson	ADOSH Compliance
	Brandt Smith	ADOSH Whistleblower
	Anna Maria Stonerock	ADOSH Admin
	Kara Dimas	Commission Secretary

Chairman Kavanaugh convened the meeting at 1:00 p.m. In attendance, confirmed by roll call were Matthew Yantas and Sean Tsai (Atty In-house Counsel) (Freedom Forever Arizona, LLC DBA Freedom Forever Arizona); Luke Douglas (Torres Consulting & Law Group, LLC) and Lea Bartynski (Snell & Wilmer). Also in attendance on the telephone, confirmed by roll call was Monique Handy (Pinnacle West Capital Corporation).

Approval of Minutes of May 11, 2023 Regular Meeting Minutes.

Commissioner LeMarr moved to approve the Minutes of the May 11, 2023 regular session meeting and Vice Chair Hennelly seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Consent Agenda:

All items following under this agenda item are consent matters and will be considered by a single motion with no discussion unless a Commissioner asks to remove an item on the consent agenda to be discussed and voted on separately. The Commission may move into Executive Session under A.R.S. § 38-431.03(A)(2) to discuss records exempt by law from public inspection. Legal action

involving a final vote or decision shall not be taken in Executive Session. If such action is required, then it will be taken in General Session.

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a. Approval of Requests for Renewal of Self-Insurance Authority.

1. Intel Corporation
2. Pinnacle West Capital Corporation
3. Valley Schools Workers' Compensation Group

Vice Chair Hennelly requested Valley Schools Workers' Compensation Group be moved to the regular agenda.

Vice Chair Hennelly moved to approve the remaining items on the Consent Agenda and Commissioner LeMarr seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Approval of Requests for Renewal of Self-Insurance Authority.

Valley Schools Workers' Compensation Group

Vice Chair Hennelly noted the general fund's revenues and expenditures for 2022 has gone upside down and asked Ms. Pastor for more information.

Ms. Pastor explained their claims picked up a little in 2022 and they have been aggressively settling older claims which has been driving these losses.

Vice Chair Hennelly asked if there was any cause for concern given the recommendation.

Ms. Pastor stated unless the trend continues another year, which would be alarming, but not at this point.

Vice Chair Hennelly thanked Ms. Pastor.

Vice Chair Hennelly moved to approve Valley Schools Workers' Compensation Group and Commissioner LeMarr seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Discussion and Action regarding Proposed Retaliation Penalty.

1. RT-2223-0074 Conair LLC of Arizona

Ms. Padgett summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim for two violations. Ms. Padgett recommended that the Commission approve issuance of a Penalty in the amount of \$35,100 for the first violation and \$34,950 for the second violation for a total of \$70,050 for violation of A.R.S. § 23-364.

Vice Chair Hennelly and Ms. Padgett discussed that the employee was still working for the employer.

Vice Chair Hennelly asked about the sick time policy and if there was a provision regarding use of the sick time and waiting for 90 days to use, if it was presented to the employee during onboarding, and if it was discussed during training.

Ms. Gooby noted the employer did not provide any evidence and referred to their policy.

Vice Chair Hennelly confirmed the violation dates of August 7 and August 8 and the statute says as long as it is continuing, and it is considered continuing until the employer does something about it, like delete them or withdraw them, the violations result in extremely high amounts of compensation. He also confirmed the statute is written in mandatory terms, and as people who apply the law, as opposed to people who make the law, that the statute is what the Labor Department is stuck with at this time. He also confirmed the \$70,050 would go to the employee, notwithstanding, there was no financial harm to him.

Commissioner LeMarr asked about the dialogue there was with the respondent, if any and if they were well versed in the earned paid sick time provision and Arizona Revised Statutes.

Ms. Gooby noted communication was with their attorney, while they did not discuss the attorney's understanding of the statutes, they did discuss the provisions of the statute.

Commissioner LeMarr asked because the Claimant's response was detailed and the employer appeared to not have a firm understanding of the statute.

Ms. Gooby noted that was the Claimant's position.

Chairman Kavanaugh commented that maybe continuing legal education would be helpful for attorneys who represent companies like this.

Ms. Padgett added that with the investigative process they provide education, a link to the FAQs, the statutes and rules for all of their programs regardless if it is retaliation, earned paid sick time, minimum wage and even the wage claim program.

Chairman Kavanaugh noted the law has been in effect for six years, one would think that most employers would at least have some inkling of how it works and the need to promptly remove negative actions from the file.

Commissioner Everett and Ms. Pagett discussed if Conair does not agree their recourse would be able to appeal with the Commission's Administrative Law Judge Division, and then the Arizona Court of Appeals.

Vice Chair Hennelly moved to approve issuance of a Penalty for Retaliation in the amount of \$70,050.00 to Conair LLC of Arizona. Commissioner Everett seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

2. RT-2223-0077 Circle K Stores Inc.

Ms. Padgett summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim. Ms. Padgett recommended that the Commission approve issuance

of a Penalty in the amount of \$9,000 for violation of A.R.S. § 23-364 and a \$250 civil penalty for violation of § 23-375(c).

Commissioner LeMarr moved to approve issuance of a Penalty for Retaliation in the amount of \$9,000.00 and \$250.00 civil penalty to Circle K Stores Inc. Commissioner Everett seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

3. RT-2223-0079 Harvest Dental, A Professional Corporation

Ms. Padgett summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim and terminated employment within 90 days of exercising a protected right. Ms. Padgett recommended that the Commission approve issuance of a Penalty in the amount of \$21,000 for violation of A.R.S. § 23-364; and a \$1,000 civil penalty for violation of § 23-375(c).

Vice Chair Hennelly moved to approve issuance of a Penalty for Retaliation in the amount of \$21,000 and \$1,000 civil penalty to Harvest Dental, A Professional Corporation. Commissioner LeMarr seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

4. RT-2223-0080 Southwest Airlines Co.

Ms. Padgett summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim on their expanded policy. Ms. Padgett recommended that the Commission approve issuance of a Penalty in the amount of \$4,950 for violation of A.R.S. § 23-364.

Commissioner Everett moved to approve issuance of a Penalty for Retaliation in the amount of \$4,950 to Southwest Airlines Co. Commissioner LeMarr seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

5. RT-2223-0090 Southwest Airlines Co.

Ms. Padgett summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim. Ms. Padgett recommended that the Commission approve issuance of a Penalty in the amount of \$23,100 for the first violation, \$22,200 for the second violation and \$14,700 for the third violation, which is still in violation since not removed, for a total of \$60,000 for violation of A.R.S. § 23-364.

Chairman Kavanaugh asked since the employer has been aware of this issue for several months and could have taken action to mitigate penalties by removing the warning documents, was there any reason that they did not do so, or are they simply claiming their collective bargaining pre-empts everything and they do not need to comply.

Ms. Cox noted on her first Southwest case they removed the letter of warning, but not in this case. Ms. Spurgeon noted that each case has a different representative.

Chairman Kavanaugh noted one way to mitigate damages is good advice from legal counsel.

Commissioner Everett asked a hypothetical question, if a worker has taken 27 sick days in a year, and a warning letter cannot be issued within 90 days, there could never be a warning letter.

Ms. Padgett noted with their policy, they expanded those rights by allowing them to accrue and use up to 2,000 hours and their policy has a rolling 12 month, and essentially that rolling could take some time with the high number of hours that they are allowed to accrue for those to roll off. Ms. Padgett also noted in the packet, Southwest Airlines has revised their policy on March 24, 2023.

Chairman Kavanaugh noted it was wise for them to revise their policy after these investigations.

Commissioner Everett moved to approve issuance of a Penalty for Retaliation in the amount of \$60,000.00 to Southwest Airlines Co. Vice Chair Hennelly seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

6. RT-2223-0096 Southwest Airlines Co.

Ms. Padgett corrected an error on the determination received date which should be March 8, 2023 not February 25, 2023. She summarized the Labor Department's investigation into the Earned Paid Sick Time (EPST) Retaliation claim. Ms. Padgett recommended that the Commission approve issuance of a Penalty in the amount of \$24,450 for violation of A.R.S. § 23-364.

Commissioner LeMarr moved to approve issuance of a Penalty for Retaliation in the amount of \$24,450.00 to Southwest Airlines Co. Vice Chair Hennelly seconded the motion. Chairman Kavanaugh, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties.

Chairman Kavanaugh discussed the purpose of and process for the Commission's consideration of ADOSH citations and proposed penalties.

Freedom Forever Arizona LLC  
2546 W Birchwood Ave #101  
Mesa, AZ 85202

Site Location: 18831 W Christy Dr  
Surprise, AZ 85388  
Inspection No: FC-2023-R0175-0012  
Inspection Date: December 27, 2022

Fatality/Catastrophe  
Years in Business: 3  
Empl. Covered by Inspection: 4

Mr. Norton summarized ADOSH's investigation and reviewed the file. ADOSH was not recommending a citation for Freedom Forever Arizona LLC.

Chairman Kavanaugh checked if Mr. Tsai would like to comment.

Mr. Tsai noted he is the in-house counsel for Freedom Forever Arizona and was here with the National Safety Director Mr. Yantas. They appreciate being given the opportunity to speak. He noted that Freedom Forever is a nationwide company in the business of residential solar installation.





system. There were no questions or concerns from ITAC for the additional funds and the agency is on track to conclude the system improvement by the end of the fiscal year in June.

Ms. Dimas confirmed Commission meeting dates through July 2023.

Mr. Ashley reminded the Commissioners about their availability for a May 26<sup>th</sup> safety partnership signing event.

Public Comment.

There was no public comment.

The meeting was adjourned at 2:14 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By James Ashley  
James Ashley, Director

ATTEST:

Kara Dimas  
Kara Dimas, Commission Secretary