International Association of Chiefs of Police, Inc.

Legal Officers Section

Annual Employment Law Update

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Contents:

1 - TITLE VII

❖ ***Race-based employment decisions***

Dietz v. Baker, 523 F.Supp.2d 407 (D.Del. 2007) – Court denied summary judgment in action where white candidate for the position of police inspector alleged reverse discrimination. The Court reviewed the *Grutter* case and progeny and recognized "operational needs" as a possible compelling interest justifying using race as a "plus factor" in promotions.

Ginger v. District of Columbia, 527 F.3d 1340 (D.C. Cir. 2008) – Although transfers within the canine unit from the midnight shift (with pay differential) to rotating shifts (with only periodic pay differential) constituted material adverse action for purposes of Plaintiffs' discrimination case, summary judgment was granted to the Defendants in light of the department's non-discriminatory motives for the action (decreasing the likelihood that a single unit would be disproportionately responsible for the most dog bites, the addition of a new sergeant to the canine unit and the fear that permanent midnight shift assignments tends to alienate officers from the department).

❖ ***General Discrimination***

Carney v. City and County of Denver, 534 F.3d 1269 (10th Cir. 2008) – City prevailed at summary judgment in a complaint of discrimination growing out of a police recruit's claim of discriminatory treatment during her police academy training. The Court ruled that the Plaintiff produced insufficient evidence of "custom or practice" to prove either her discrimination or her retaliation claim.

❖ ***Age***

Kentucky Retirement Systems v. EEOC, 128 S.Ct. 2361 (June 19, 2008) – Kentucky retirement system for police, fire and other hazardous workers allows retirement either with 20 years of service or at age 55 with 5 years of service. Benefits are calculated at 2.5% per year of service multiplied by preretirement pay. If an employee becomes disabled, the number of years required to meet either of these benchmarks is "imputed" to the employee. The EEOC sued on behalf of a complaining employee that this system treated employees differently based on age in violation of the ADEA. The Court held that retirement plans can include age as a factor and that ensuing difference in treatment because of age is unlawful only if the difference in treatment was actually motivated by age. Here the Court held the difference in treatment was not motivated by age, but by difference in pension status and ruled in favor of Kentucky.

Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008) – The employer defendant in an ADEA case alleging disparate impact has the burden of proving its decisions were based on reasonable factors other than age (the "RFOA" defense).

Davis v. Indiana State Police, 541 F.3d 760 (7th Cir. 2008) – Former state trooper whose request for reinstatement was denied based on an age restriction alleged that the restriction did not constitute a "bona fide hiring or retirement plan" because it made no sense. The court held that "bona fide" did not mean sensible, but remanded for a determination of whether the decision was "made pursuant to" the state plan.

14 Penn Plaza v. Pyett, 498 F.3d 88 (2d Cir. 2007), cert. granted 2/19/08 – Question presented: Whether a collective bargaining agreement's mandatory arbitration clause, which waived the right of a union-represented employee to file a lawsuit under the ADEA, is enforceable.

❖ ***Religion***

Dodd v. SEPTA, 2008 WL 2902618, 2008 U.S. Dist. Lexis 56301, 104 FEP Cases (BNA) 43 (E.D. Pa. July 24, 2008) – Police officer fired after becoming a Rastafarian and failing to keep his hair short enough to comply with his employer's regulations. Court denied summary judgment on issues of whether officer was discriminated against (because there was evidence that two other male officers had been treated differently) and on his failure to reasonably accommodate claim (because women were allowed to wear their hair in ponytails).

Riback v. Las Vegas Metropolitan Police Department, 2008 WL 3211279, 2008 U.S. Dist. Lexis 62491, 104 FEP Cases (BNA) 34 (D. Nev. 2008) – Jewish police office sought to wear beard and yarmulke to work, despite department's "no-beard" policy and policy requiring headgear to be removed indoors. Because the department had previously accommodated officers with medical reasons to grow beards, the court found that allowing the beard was a reasonable accommodation and denied summary judgment to allow factual evidence on whether the yarmulke could be reasonably accommodated.

❖ ***Harassment***

Dixon v. International Brotherhood of Police Officers, 504 F.3d 73 (1st Cir. 2007) – Female police officer, verbally abused during a union-sponsored bus trip and then subject to further abuse based on the complaint she filed following the incident, resigned from the department and filed suit against the Union. Court upheld the award of $1,205,000 in compensatory damages and $1,027,501 against the Union and two of its officers.

Weger v. City of Ladue, 500 F.3d 710 (8th Cir. 2007) – Court entered summary judgment in favor of City based on its Faragher defense in action filed by two communications employees who had suffered from hostile work environment harassment by their supervisor, a lieutenant. The department had a published written policy prohibiting discrimination and retaliation, which had multiple reporting options. Upon receiving their complaint, the department investigated and although they found the charges not sustained, they permanently reassigned the supervisor out of that unit. The Court also found in favor of the City on Plaintiff's retaliation complaints, holding that the trivial (ostracization, supervisory notetaking, institution of a performance evaluation process) did not amount to materially adverse actions under the Burlington Northern standard.

Lauderdale v. Texas Department of Criminal Justice, 512 F.3d 157 (5th Cir. 2007) – Female corrections officer, who was harassed by her manager, reported the conduct to her supervisor, who told her she could speak to the warden, but to keep his (the supervisor's) name out of it. The Plaintiff did not complain again, but ultimately resigned and filed suit. The Court dismissed the action against the TDCC based on the Faragher defense, because the TDCC policy included numerous reporting alternatives and the Plaintiff unreasonably failed to take advantage of them after the first unsuccessful attempt.

McCann v. Tillman, 526 F.3d 1370 (11th Cir. 2008) – Four instances of racial epithets over a two year period, only one of which, the term "girl," was directed at Plaintiff, found insufficient to constitute a hostile work environment.

Webb-Edwards v. Orange County Sheriff's Office, 525 F.3d 1013 (11th Cir. 2008) – Plaintiff, a deputy sheriff, complained about her supervisor's remarks that she "looked hot" and should wear tighter clothes. These remarks stopped when she told the supervisor that the remarks made her uncomfortable. The SO offered her a lateral transfer, which she accepted. Six months later, she was not selected for a school resource officer position and resigned. The Court held that the supervisor's remarks were not

sufficiently severe or pervasive to alter the terms and conditions of her employment and hence did not constitute sexual harassment. Plaintiff was further unable to prove the denial of the transfer was motivated by retaliation. The period of six months was not sufficient temporal proximity to alone constitute evidence of a causal connection. Finally, the Court held that the failure to select Plaintiff for lateral transfer to the SRO position did not constitute an adverse employment action sufficient to obtain relief under (the non-relation provisions of) Title VII.

Hindman v. Thompson, 557 F.Supp.2d 1293 (N.D.Okla. 2008) – Plaintiff, the secretary and bailiff for a county court judge was terminated shortly after observing the judge using a "penis pump" in his courtroom. Although the Court held that this observation, which could have been made by members of either sex and was not conduct directed toward Plaintiff, did not constitute sexual harassment, the Plaintiff was allowed to proceed on her claims of retaliation and wrongful discharge.

❖ ***Pregnancy***

Orr v. City of Albuquerque, 531 F.3d 1210 (10th Cir. 2008) – Plaintiffs allowed to proceed to trial on their claims that pregnant females requesting FMLA leave were required to use their sick leave first and were prohibited from using compensatory time and that officers requesting FMLA leave for other reasons were not subject to this requirement.

Hall v. Nalco, 534 F.3d 644 (7th Cir. 2008) – Employment actions taken as a result of time off taken to undergo in vitro fertilization, if proven, would constitute a violation of Title VII.

❖ ***Retaliation***

Burlington Northern and Santa Fe Railway v. White, 126 S. Ct. 2405 (2006) – A forklift operator, transferred to other duties following a discrimination complaint and another incident of discipline (subsequently overturned) for insubordination, filed suit alleging retaliation. The Supreme Court held that the standard of harm is different for Title VII discrimination violations (which require an adverse tangible job action) and retaliation claims, which require only action, whether or not employment related, which is *materially adverse.* Materially adverse actions are those that would dissuade a reasonable employee from making a charge of discrimination. The Court made several key findings:

- "The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." Id. at 2406.

- "The anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well

might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " Rochon v. Gonzales, 438 F.3d 1211, 1219." Id. at 2407.

- "The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable." Id. at 2407.

Crawford v. Metro.Gov't of Nashville, 211 Fed. Appx. 373 (6th Cir. 2006), cert. granted, 128 S.Ct. 1118 (2008) – Plaintiff who, when contacted during an internal sexual harassment investigation, gave evidence to the investigator about her boss' inappropriate comments and actions. The boss was apparently not disciplined. Plaintiff claimed that her subsequent termination for drug use and embezzlement was in retaliation for this testimony. The lower court found that the Title VII anti-retaliation provisions only apply to participation in actual EEOC investigations or in overt opposition to unlawful employment practices. The case will be decided this term.

Brannum v. Missouri Department of Corrections, 518 F.3d 542 (8th Cir. 2008) – Plaintiff, a corrections officer witnessed an exchange between her female supervisor and a male employee (Bjork) in which the supervisor advised the male employee that he needed specialized training to work in the Special Needs Unit and responded to Plaintiff that she didn't need the training because women do a "better job than men do anyway and are more patient and nurturing than men." Plaintiff alleged that a subsequent disciplinary action following a use of force incident was in retaliation for her participation in the male employee's grievance regarding the statement she overheard and signed a memorandum regarding. Summary judgment in favor of the defendant was upheld based on the court's conclusion that Plaintiff could not have reasonably believed that this single comment by her supervisor constituted illegal sexual discrimination.

Thompson v. North American Stainless, 520 F.3d 644 (6th Cir. 2008) – Plaintiff, terminated three weeks after his employer was notified of his fiancée's EEOC charge (she worked for the same employer) allowed to proceed with his retaliation case, with the Court holding that the retaliation clause protects family members and close associates.

Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008) – In a case involving a DEA agent, the Court of Appeals found error in the trial court's decision not to allow Plaintiff to present evidence related to the original claim of discrimination (litigation that began in 1977).

Butler v. Alabama Dept. of Transportation, 536 F.3d 1209 (11th Cir. 2008) – Although a retaliation claim can be based on a complaint of discrimination regarding conduct that is not in fact unlawful, the employee's belief that it was unlawful must be "objectively reasonable." Here, Plaintiff's belief that a racial epithet, uttered outside the workplace by a coworker and not directed at Plaintiff, constituted a violation of Title VII was held not to be objectively reasonable "or even close."

Kelley v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008) – Plaintiff, a former Assistant City Attorney who had represented the City in an EEOC case against the client

of an attorney who was subsequently elected Mayor, was terminated by the new Mayor immediately following his election. The Court denied summary judgment for the City, ruling that the defense of an EEOC charge is protected by the retaliation clause prohibiting retaliation for participation in an EEOC case.

Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008) – Plaintiff, after complaining of discrimination, received a negative evaluation resulting in no merit raise. She grieved this evaluation and ultimately was retroactively awarded the merit increase. The Court held that, notwithstanding the retroactive correction, the negative evaluation and lack of merit increase constituted material adverse action sufficient to support a claim of retaliation.

Lapka v. Chertoff, 517 F.3d 974 (7th Cir. 2008) – In a case involving a DHS employee who filed an EEOC complaint after an alleged "date rape" by a co-worker while attending a FLETC training program, the Court held, with respect to Plaintiff's retaliation claim, that "lower performance ratings are not actionable unless they are accompanied by tangible job consequences." Moreover, the Court went on to hold that even if the lower rating prevented Plaintiff from a merit bonus, it would not be enough to constitute a materially adverse action.

Nichols v. Southern Illinois University, 510 F.3d 772 (7th Cir. 2007) – The Court held that the Plaintiffs failed to meet their required burden of proof in their case of racial discrimination. With respect to Plaintiff Nichols' retaliation claim, the Court held that being placed on paid administrative leave pending results of a fitness-for-duty psychological exam following a use of force incident did not constitute a materially adverse employment action sufficient to support a retaliation claim.

Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008) – Plaintiff's complaint that her boss, the Town Administrator, frequently stared at her breasts, stated sufficient grounds to proceed on her charges of sexual harassment. Moreover, her transfer, without loss of pay, from her position as secretary to the Town Administrator to the arguably less prestigious position of secretary to the Recreation Department and/or requiring her to take personal time off to attend her deposition in her Title VII case constituted possible bases sufficient to withstand summary judgment on her retaliation claims.

Metzger v. Illinois State Police, 519 F.3d 677 (7th Cir. 2008) – Retaliatory animus harbored by non-decisionmaker not sufficient to establish the employer's liability for alleged retaliation in failure to reclassify Plaintiff's position.

Hervey v. County of Koochiching, 527 F.3d 711(8th Cir. 2008) – In a retaliation case filed by the jail administrator against the county and sheriff, the Court held that "an employee in trouble with supervisors and on the verge of disciplinary action, may not insulate herself from discipline by filing a claim of discrimination."

Culton v. Missouri Department of Corrections, 515 F.3d 828 (8th Cir. 2008) – Court upheld disciplinary actions taken against Plaintiff subsequent to his complaint regarding

unwanted sexual advances directed to a co-worker by a supervisor over Plaintiff's allegations of retaliation because the department was able to document an independent for each of the actions taken.

2 - AMERICANS WITH DISABILITIES ACT

Dargis v. Sheahan, 526 F.3d 981 (7th Cir. 2008) – Corrections officer who suffered a stroke and was no longer able to have any inmate contact and had further physical restrictions could not perform the essential functions of his position.

Brown v. City of Los Angeles, 521 F.3d 1238 (9th Cir. 2008) – Under a police pension system where the members and the City contributed to the general retirement plan and the City funded a separate disability plan, offsets to the disability plan for workers' compensation benefits was upheld as not violative of the ADA.

Desmond v. Mukasey, 530 F.3d 944 (D.C. Cir. 2008) – In a case filed by an FBI Academy trainee, the court held that sleep qualifies as a major life activity under the Rehab. Act and disruption is a substantial limitation on a major life activity. The case was remanded for trial on the issue of whether Plaintiff's dismissal recommendation, by Assistant Director of Training Jeffrey Higginbotham, constituted discrimination.

EEOC Advisory Letter (10/1/07) – The EEOC issued an advisory letter regarding a policy department's obligation to accommodate an officer who experiences asthma when exposed to a certain type of cologne. The letter discusses the extent to which this condition might (or might not) be covered by the ADA and also discusses what options the employer has in making a "reasonable" accommodation.

EEOC Advisory Letters (6/24/08 and 9/10/08) – In a series of letters addressing matters related to anabolic steroid use, the EEOC opined that a police agency can require officers to report any use of anabolic steroids, can discipline officers using steroids illegally, but cannot send officers using steroids by prescription for a fitness for duty (or require other medical certification) unless there is a specific reason to believe the officer is unable to perform his duties or poses a direct threat.

3 - FAMILY AND MEDICAL LEAVE ACT

Downey v. Strain, 510 F.3d 534 (5th Cir. 2007) – In a case involving a crime lab technician who, after using more than 12 weeks of FMLA qualifying leave, was reassigned upon her return to an arguably less attractive position (without overtime and a car). Plaintiff's use of FMLA leave was for several discrete surgeries, the last of which exceeded the 12 weeks. The Sheriff had notified Plaintiff that the first surgeries counted toward FMLA leave, but had failed to provide similar notice on the last leave, as is required by regulations interpreting the FMLA. Plaintiff argued that had she been

properly notified she would have rescheduled her surgery to a different FMLA period. Court upheld the award of front and back pay damages of approximately $30,000.

Darst v. Interstate Brands Corp., 512 F.3d 903 (7th Cir. 2008) – In a case involving an employee who "fell off the wagon" for several days after which he sought and obtained treatment, the Court held that an employee suffering from alcohol or substance addiction is entitled to FMLA leave for the period of incapacity caused by actual treatment and not for any incapacity caused by the addiction.

Farrell v. Tri-County Metropolitan Transportation, 530 F.3d 1023 (9th Cir. 2008) – Although damages for emotional distress are not recoverable under the FMLA, a plaintiff can recover for lost wages due to the inability to work as a result of the emotional problems resulting from the wrongful denial of FMLA leave.

Elsensohn v. St. Tammany Parish Sheriff's Office, 530 F.3d 368 (5th Cir. 2008) – The FMLA does not provide protection against retaliation for spouses of persons covered by the FMLA if the spouse did not participate in the FMLA claim.

4 - FAIR LABOR STANDARDS ACT

Martin v. City of Richmond, 504 F.Supp.2d 766 (N.D.Cal. 2007) – Court held that donning and doffing of police uniforms, which could be done at home or the station, need not be counted as hours worked and compensated under the FLSA. A factual issue remained as to whether the donning and doffing of required duty equipment could likewise be done at home or at the station and summary judgment was denied as to those claims.

Lemmon v. City of San Leandro, 538 F.Supp.2d 1200 (D. N.Ca. 2007) – Donning and doffing of police uniform is compensable time whether done at home or at the place of employment according to the U.S. District Court for Northern California, contrary to the holding of the Southern District and the DOL advisory guidance on this subject.

Maciel v. City of Los Angeles, 542 F.Supp.2d 1082 (C.D.Cal. 2008) – Donning and doffing of police equipment, but not police uniforms is compensable under the FLSA.

Abbe v. City of San Diego, 2008 WL 410687, 2007 U.S. Dist. Lexis 87501 (S.D. Cal. 2007) – When employees have the option to change into their gear at home, donning and doffing are not compensable under the FLSA.

Bamonte v. City of Mesa, 2008 WL 1746168, 2008 U.S. Dist. Lexis 31121 (D.Ariz. 2008) – When the location an officer dons and doffs his uniform and gear is a matter of choice and convenience to officers, the time spent doing so is not compensable under the FLSA.

Anderson v. Cagle's Inc., 488 F.3d 945 (11th Cir. 2007), cert. denied, 128 S.Ct. 2902 (2008) - Chicken plant workers donning and doffing excludable from compensable time, based in part on the longstanding custom or practice under a collective bargaining agreement.

Heitmann v. City of Chicago, 2008 WL 506111, 2008 U.S. Dist. Lexis 34881 (N.D.Ill. 2008) – Court entered an injunction requiring the City of Chicago to grant officers' requests for use of compensatory time if made 48 hours in advance, interpreting FLSA regulations requiring "reasonable" notice, and allowing denial only if an "undue disruption" to the employer's operation would result. The federal circuits that have considered these regulations vary widely in their interpretation.

Parker v. City of New York, 2008 WL 2066443 , 2008 U.S. Dist. Lexis 38769 (S.D.N.Y., May 13, 2008) – In a class action lawsuit filed by 327 Dept. of Juvenile Justice employees, the Court upheld the DJJ policy of denying use of comp. time whenever the absence would result in a violation of the statutory staff-to-resident ratio.

Mullins v. City of New York, 554 F.Supp.2d 483; subseq. ruling at 2008 U.S. Dist. Lexis 83370 (S.D.N.Y. 2008) - Court enjoined NYPD investigation of untruthfulness charges related to a sergeant's class action claim for unpaid overtime.

DOL Opinion Letter 2007-12 – Analyzing the applicable facts in this case, the DOL held that the hours worked by City police officers who work off-duty for a City's Convention and Arena Authority need not be combined with their regular hours for overtime purposes. The DOL applied a seven factor test, analyzing whether the two entities had separate personnel/payroll systems, separate retirement systems, separate budgets, were separate legal entities for the purpose of suit, whether transactions between the two involving officers was arms length, control issues and treatment by state law.

DOL Opinion Letter 2008-5NA, 2008 DOLWH Lexis 6 – Off duty work by a sworn police officer as a civilian dispatcher for the same agency, when done voluntarily, on an occasional and sporadic basis, can be paid at the part-time communications rate of pay without violating the FLSA, as the work is in a different capacity.

DOL Opinion Letter 2008-9NA, 2008 DOLWH Lexis 15 – Corrections officers, despite not having arrest authority, qualify for the 207(k) exemption (allowing up to 171 hours worked each 28 days before overtime is required by the FLSA).

5 - FIRST AMENDMENT FREEDOM OF SPEECH

Ruotolo v. City of New York, 514 F.3d 184 (2d Cir. 2008) – Police Sergeant Ruotolo, assigned as the precinct safety officer, authored a report raising health issues at his precinct. He was thereafter subject to alleged retaliation, including reassignments to undesirable shifts and duties, denial of leave and minor discipline. He filed a lawsuit over these actions and subsequently amended the lawsuit to include actions of retaliation

post-suit. The court held that the original report, as part of Plaintiff's official duties, was not speech by a citizen, following *Garcetti*, and that the lawsuit itself was a "personal grievance" not protected by the First Amendment.

Vose v. Kliment, 506 F.3d 565 (7th Cir. 2007) – Twenty six year veteran police sergeant in the narcotics unit discovered and exposed misconduct (relating to some narcotics cases) by members of the major case unit. Vose was involuntarily transferred out of the narcotics unit to patrol and ultimately resigned. The Court dismissed his lawsuit based on *Garcetti*, holding that the report of misconduct was within his official (albeit not his normal daily) duties.

Nixon v. City of Houston, 511 F.3d 494 (5th Cir. 2007) – Plaintiff, a patrol officer, wrote a column for a local publication in which he identified himself as a police officer and frequently made disparaging comments about certain segments of the community. After a police pursuit case, Plaintiff responded to the scene (on-duty) and gave statements to the press disparaging the pursuit. He continued these remarks on a talk show the next day. He was suspended for 15 days and ultimately terminated. The Court held that the media remarks at the pursuit scene were not protected by the 1st Amendment, based on *Garcetti*. The Court further held that with respect to the other comments, even if made as a citizen, the departmental interests in maintaining it's relationships with the community and the professionalism of its image outweighed the Plaintiff's right to make these comments.

Hughes v. Stottlemyre, 506 F.3d 675 (8th Cir. 2007) – Police sergeant's suit contends that four disciplinary investigations initiated against him after he disagreed with consolidation plans constituted a violation of his Free Speech rights. The Court did not discuss *Garcetti,* but did uphold the grant summary judgment to the defendant based finding sufficient evidence of an independent basis for the IA complaints.

Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007) – Caseworkers in the Georgia Dept. of Family and Children Services, one of whom was terminated and one transferred for "deficient performance" alleged that the discipline was actually as a result of emails they had sent internally to their supervisors, managers and to the union complaining of caseload issues. The Court reiterated that post-*Garcetti*, only speech made by a government employee, speaking as a citizen on a matter of public concern is protected by the First Amendment. The speech at issue in this case was held to be made by employees interested in improving their personal work conditions and hence not speech made as a citizen on a matter of public concern.

Callahan v. Fermon, 526 F.3d 1040 (7th Cir. 2008) – Plaintiff, an Illinois State Police Lieutenant, transferred after making complaints to internal affairs about his captain and as a result of subsequent hostility between the two commanders, sued alleging a First Amendment violation and was awarded damages of over $650,000 in a jury trial (later reduced by the Court to $150,000). After *Garcetti* was decided, the Court of Appeals reversed and entered judgment for defendants, finding among other things that the ISP rules of conduct required misconduct be reported to IA.

Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) – An employee's truthful testimony in court, even though related to his normal job responsibilities, is protected by the First Amendment post-*Garcetti.*

Greenwell v. Parsley, 541 F.3d 401 (6th Cir. 2008) – Deputy sheriff, who had filed to run for the sheriff's position, was terminated by the sheriff immediately upon is learning of the candidacy. The Court upheld this termination, finding on the facts that it was based solely on the fact of the candidacy and not on any protected speech.

Welch v. Ciampi, 542 F.2d 927 (1st Cir. 2008) – The Police Chief in the Town of Stoughton, MA, was fired, then reinstated following a recall election specifically instituted to replace the commissioners who voted to terminate the Chief. During the recall campaign, Plaintiff "remained neutral" and was perceived as therefore disloyal to the Chief. Although in a complex turn of events, the Chief was then removed, one of his allies became Chief and failed to reassign Plaintiff to a specialist position, although the other specialists, who had supported the previous Chief, were reappointed. The Court held that "remaining neutral" constitutes protected speech under the First Amendment and reversed a decision granting summary judgment to the new Chief.

Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007) – Corrections officer posted negative comments on a Union sponsored web bulletin board, comparing the Sheriff to Hitler and suggesting that command officers needed to follow the precedent set by the Generals who plotted against Hitler. Plaintiff had previously been disciplined for making threatening comments to a superior office. The Court found the Plaintiff was speaking as a citizen and that the speech had some public value. That value was, however, outweighed by the "substantial risk of disruption to the department."

6 - FIRST AMENDMENT FREEDOM OF ASSOCIATION

Morris v. City of Chillicothe, 512 F.3d 1013 (8th Cir. 2008) – Plaintiff's claim that he was terminated, in violation of the First Amendment, in retaliation for "association with an attorney" dismissed.

Davignon v. Hodgson, 524 F.3d 91 (1st Cir. 2008) – Court upheld award of $17,980 in damages (and $172, 248 in fees) to several officers who claimed that they were disciplined following their participation in collective bargaining activities that were protected under the First Amendment.

Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007) – Court upheld termination and discipline of corrections officers for violating "conduct unbecoming" policies based on their association with the Outlaws Motorcycle Club, dismissing Plaintiffs' First Amendment (Freedom of Association) and due process claims.

7 - MISCELLANEOUS EMPLOYMENT DECISIONS

Engquist v. Oregon Department of Agriculture, 128 S.Ct. 2146 (April 21, 2008) – The Court refused to recognize a "class of one" claim under the Equal Protection clause in an employment case. Unless the adverse action is taken based on protected class status, the Constitution does not protect employees from bad (arbitrary, vindictive and malicious) employment decisions by their governmental employers.

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545 (6th Cir. 2007) – Court of Appeals upheld the constitutionality of a residency requirement against equal protection and vagueness challenges (the latter based on the fact that exceptions could be granted by the city council, but no standards existed for that decision).

Nilsson v. Mesa, 503 F.3d 947 (9th Cir. 2007) – Plaintiff, an applicant denied employment by defendant after a psychological evaluation recommended against her (based on stubbornness, edginess and impulsivity), sued with claims including one that the defendant's investigation into previous workers' compensation claims violated the ADA and one that the denial of employment was in retaliation for previous EEOC claims, in violation of Title VII. The Court of Appeals upheld the lower court's grant of summary judgment, dismissing the Title VII claim based on the independent reason for denial of employment (the psychological evaluation) and dismissed the ADA claim based on a waiver signed by the Plaintiff at the time she applied, by which she agreed "to hold harmless and release from liability under any and all possible causes of legal action the City of Mesa, Arizona Police Department, their officers, agents, and employees for any statements, acts, or omissions in the course of the investigation into [her] background, employment history, health, family, personal habits and reputation."

Petty v. Metropolitan Government of Nashville-Davidson County, 538 F.3d 431 (6th Cir. 2008) – Police sergeant who was also member of Army National Guard Reserves was called to active duty. Upon his discharge (which was "honorable" although following rules violations), the PD required a return to work process (questionnaire, medical exam, drug test, including for returning vets, an authorization to obtain records), required of all employees gone for an extended period. After completing this process, Plaintiff was reinstated within three weeks of application, but was assigned to an office job rather than his prior position of patrol. An investigation was also initiated into incidents that occurred while on military duty and the paperwork submitted upon Plaintiff's return to the department. The Court ruled that the 3 week delay in reinstatement related to the reinstatement process and failure to assign him to patrol violated the USERRA, although noted that an investigation into his current fitness could be conducted after reinstatement.

Quon v. Arch Wireless Operating Company, 529 F.3d 892 (9th Cir. 2008) – Police Department investigating excessive text message usage obtained transcript from their contracted provider and discovered sexually explicit text messages. In ensuing litigation, the Court held that Arch Wireless is an "electronic communication service" (ECS) for purposes of the federal Stored Communications Act of 1986 and hence was liable for the

release of transcripts to anyone other than the addressee or intended recipient of those communications (as opposed to an RCS, remote computing service, which can release transcripts to the subscriber). The Court also held that despite a department policy entitled "Computer Usage, Internet and E-mail Policy" which stated that users "should have no expectation of privacy or confidentiality when using these resources," and which was considered applicable to text messages, and despite the fact that these messages were public records under California law, because the operating practice of the Plaintiffs' supervisor was not to review the records if any charges related to overuse were paid by the user, Plaintiffs had a reasonable expectation of privacy in their text messages and the ensuing search by the department was held to be unreasonable in violation of the Fourth Amendment.

Aguilera v. Baca, 510 F.3d 1161 (9th Cir. 2007) – After receiving a complaint of police brutality, the department ordered the deputies potentially involved to return to the station, where they awaited questioning by the Internal Affairs unit. When questioned without being immunized under Garrity procedures, the deputies refused to respond. They were all reassigned to desk duty during the course of the investigation. Ultimately several deputies were required to give immunized statements and all the deputies were eventually returned to their original assignments. The deputies later filed suit, alleging that being forced to remain at the station constituted an illegal seizure and being assigned to desk duty when they refused to give statements without being immunized violated their Fifth Amendment rights. The Court disagreed on both counts and affirmed the trial court's grant of summary judgment to the defendants.

Pennington v. Metropolitan Government of Nashville, 511 F.3d 647 (6th Cir. 2008) – Plaintiff, while off duty, was involved in an altercation in a bar within his jurisdiction. At some point in the altercation, he identified himself as a police officer. When the on-duty officers arrived, they either asked or ordered Plaintiff to talk a breathalyzer test. He registered .121. After an internal investigation, it was found that Plaintiff had not violated any departmental policies. He did receive informal verbal counseling. He subsequently filed suit, alleging that the involuntary breathalyzer test violated the 4th, 5th, 6th and 14th amendments. Ultimately the Court ruled against Plaintiff on all counts, holding, among other things, that ordering an officer to take a breathalyzer, under pain of job loss, does not constitute a seizure or detention.

Chmielinski v.Comm. of Massachusetts, 513 F.3d 309 (1st Cir. 2008) – Plaintiff challenged his pre-termination process as violating his due process rights because he wasn't afforded pre-hearing discovery, witnesses were not sworn, witnesses were not sequestered and a letter to him had prohibited contact with co-workers, interfering with his right to prepare a defense. Additionally, the hearing officer had lunch with opposing counsel on one of the hearing days, therefore exhibiting bias. The Court found no due process violation under Loudermill, in light of full post-termination due process afforded Plaintiff.

Miyler v. Village of East Galesburg, 512 F.3d 896 (7th Cir. 2008) - Chief in East Galesburg (pop. 900) was fired by action of the City Council, although the Village

ordinances provided that only the Village President had the authority to remove the Chief. The Chief sued in federal court alleging the termination violated his due process. The Court of Appeals found no property right existed that was enforceable in federal court.

Rolon v. Henneman, 517 F.3d 140 (2d Cir. 2007) – Acting Police Chief entitled to absolute immunity in s. 1983 action for (allegedly false) statements made against Plaintiff in an arbitration action following a disciplinary appeal by Plaintiff.

Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559 (6th Cir. 2008) – Court upheld a mandatory arbitration clause in the Plaintiff's employment agreement as requiring arbitration of USERRA claims.

Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008) – Department's reprimand of Plaintiff Johnson for engaging in a consensual extramarital affair while attending a department funded training seminar upheld against a substantive due process challenge. The Court held that the protected right was not "fundamental," requiring heightened scrutiny and that the department met the "rational basis" standard by seeking to require officers to conduct themselves in a manner that furthers the public's respect for its police officers.
