



Employment Law Update

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Presented by

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First Amendment

Lane v. Franks, 573 U.S.____ (June 19,2014) – Held that “[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.”

- In discussing the rationale for determining that the speech at issue constituted speech “as a citizen,” the Court stated “[i]t would be antithetical to

our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”

- The Court concluded on the second element of protected speech, that it be on a matter of “public concern,” that corruption in a public program and misuse of public funds is a matter of significant public concern.
- On the final balancing test, the Court found nothing on the employer’s side of the balance in this case, noting that “[t]here is no evidence, for example, that Lane’s testimony at Schmitz’ trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential or privileged information while testifying.”
- Concurring opinion (Thomas, joined by Scalia and Alito) notes that “[w]e accordingly have no occasion to address the quite different question whether a public employee speaks ‘as a citizen’ when he testifies in the course of his ordinary job responsibilities....For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties....[t]he Court properly leaves the constitutional questions raised by these scenarios for another day.”

Gibson v. Kilpatrick, 734 F.3d 395 (5th Cir. 2013); cert. granted, vacated and remanded, 134 S. Ct. 2874 (2014) –The underlying facts in this case involve the Police Chief’s report of the Mayor’s misuse of the City gas card (which investigations resulted in a \$3,000 repayment obligation) to the FBI, DEA, Mississippi Office of the State Auditor and Mississippi Attorney General’s office. The District Court’s denial of Defendant’s motion for summary judgment was reversed by the Court of Appeals, which found that the reports did not constitute “speech as a private citizen,” the Court stating the test as “whether his speech is related to any conceivable job duties.” The Supreme Court vacated and remanded the Court of Appeals decision in light of Lane v. Franks.

Tayoun v. City of Pittston, ___ F.Supp.2d ___, 2014 WL 3943739 (M.D.Pa. August 12, 2014) – Police Chief found illicit photographs on an officer’s computer, including several showing an assault on an unconscious victim (for which the officer was subsequently convicted of aggravated assault). The Chief reported this to the Mayor and the Pennsylvania Attorney General. The Court held that the report outside of the Chief’s normal chain of command constituted speech as a private citizen. Although decided after Lane v. Franks, that decision was not cited in an opinion.

McNeilly v. City of Pittsburgh, ___ F.Supp.2d ___, 2014 WL 4197395 (W.D. Pennsylvania, August 22, 2014) – Complaints of corruption and filing a lawsuit constitute speech protected by the 1st Amendment.

Lakkis v. Lahovski, 994 F.Supp.2d 624 (M.D. Pa. 2014) – Filing of a lawsuit constitutes protected 1st Amendment activity.

Eisenhour v. Weber County, 744 F.3d 1220 (10th Cir. 2014) – Complaints of sexual harassment and improper investigation by judicial commission constitute speech on matters of public concern.

Morgan v. Covington Township, 563 Fed.Appx. 896 (3d Cir. 2014) – Media coverage of officer’s complaints related to employment matter are not a basis for adjudging private employment dispute into a matter of public concern protected by the 1st Amendment.

ADA

Diaz v. City of Philadelphia, 565 Fed.Appx. 102 (3d Cir. 2014) – Court upheld police department’s offer of provision of an unpaid leave of absence as a reasonable accommodation, notwithstanding the officer’s request for reassignment, holding that “[t]he ADA does not, however, require an employer to provide a disabled employee with the accommodation of her choosing.”

Silva v. City of Hidalgo, 575 Fed.Appx. 419 (5th Cir. 2014) – Plaintiff, a police officer and SWAT member, broke her leg while off duty. After taking FMLA leave, Plaintiff was still unable to return to work (and continued to be unable to do so for 5 months). Plaintiff requested accommodation under the ADA by a light duty

assignment or an unpaid leave of absence. The City denied these requests and Silva was terminated. The City testified that there were no vacant positions available and Plaintiff did not establish otherwise. The Court decided this case in favor of the City, without addressing whether a broken leg is a disability under the ADA.

Coleman v. Pennsylvania State Police, 561 Fed.Appx. 138 (3d Cir. 2014) – In a case that proceeded under the Rehabilitation Act, the Court upheld reliance by the employer on return to work standards established by a general protocol (requiring a prerequisite five years of freedom from seizures) over individual clearance by the officer’s personal doctor (employment was terminated).

Due Process

Michalesko v. Freeland Borough, ___F.Supp.2d___, 2014 WL 1689719 (M.D.Pa. 2014) – Employer’s motion to dismiss denied in case where the Borough Council suspended officer without pay following apparently reliable reports (subsequently found to be inaccurate) that the officer had held a pistol to his head and threatened to commit suicide. This action was taken without any process, which was not afforded the officer for several weeks.

Title VII

Bender v. Miami Shores Village, ___Fed.Appx.____, 2014 WL 4099251 (11th Cir. 2014) – An instruction not to use God’s name in the workplace does not constitute religious discrimination.

Ellis v. Houston, 742 F.3d 307 (8th Cir. 2014) – Case involving corrections officers who were written up for minor infractions and then transferred following complaints of racial harassment withstands summary judgment.

Laster v. City of Kalamazoo, 746 F.3d 714 (6th Cir. 2014) – Employment actions allegedly taken against Public Safety Officer, essentially over scrutiny of work and denial of training opportunities were not sufficient to constitute “adverse action” necessary to support a discrimination claim, but were sufficient to constitute “materially adverse employment action” to support Plaintiff’s retaliation claim.

Garofalo v. Village of Hazel Crest, 754 F.3d 428 (7th Cir. 2014) – Reverse discrimination case on failure to promote Plaintiffs to a deputy chief vacancy failed when neither of remaining plaintiffs could show that they would have been promoted in absence of discrimination. The Court also held that a failure to

promote was not sufficient grounds upon which to base a claim of constructive discharge.

Drug and Alcohol Testing

Lynch v. City of New York, 737 F.3d 150 (2d Cir. 2013); cert. den. 134 S.Ct. 2664 (2014) – NYPD policy of requiring (warrantless and suspicionless) alcohol testing of officers following any firearms discharge upheld.

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014) – District Court order granting summary judgment to department in case challenging the department’s right to terminate employees (or fail to hire applicants) who tested positive for cocaine in a hair sample testing overturned. Court of Appeals found that the testing results produced a disparate impact on African Americans and that the department would need to establish that the testing program was job-related and consistent with business necessity, and whether there was an adequate alternative to the hair test.

FLSA

Sandifer v. United States Steel Corp., 571 U.S. ____ (January 27, 2014) – Changing into safety gear constitutes “changing clothes” and is therefore not included within “hours worked” for FLSA purposes in a dispute where the collective bargaining agreement does not require compensation for these hours.

Pending Before the Supreme Court

Integrity Staffing Solutions v. Busk (No. 13-433) – Question presented is whether time spent in security screening post-shift is compensable under the FLSA.

Young v. United Parcel Service (No. 12-1226)- Question presented is whether the Pregnancy Discrimination Act requires work accommodations for pregnant employees if similar accommodations have been provided to non-pregnant employees “similar in their ability or inability to work.”