AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

Click here for more information about all AELE Seminars

Fire, Police & Corrections Personnel Reporter
ISSN 0164-6397

An employment law publication for law enforcement, corrections and the fire/EMT services

Cite this issue as:
2020 FP June

Click here to view information on the editor of this publication.

Access the multiyear Employment Law Case Digest

Return to the monthly publications menu
Report non-working links here
Some links are to PDF files - Adobe Reader™ can be used to view contents.

CONTENTS

Resources

Cross_References

Report non-working links here

AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

Click here for more information about all AELE Seminars

MONTHLY CASE DIGEST

Some of the case digests do not have a link to the full opinion.
• Most Federal District Court opinions can be accessed via PACER. Registration is required; nominal fees
• ***BNA*** arbitration awards can be obtained for a fee, from BNA Plus

Age Discrimination - Termination

A police officer decided to resign with a pension after the defendants determined that he had made several threats against his former girlfriend. He resigned instead of facing termination and the possibility of losing his pension and being criminally charged while signing a separation agreement agreeing to waive and release any claims he had against the defendants up and through signing the agreement, but later sued for age discrimination claiming that he was punished more severely than younger officers. His assertion that his signed release of Age Discrimination in Employment Act (ASEA) claims against the employing city violated the Older Workers Benefit Protection Act (OWBPA), which requires at least 21 days within which to consider the agreement of which the waiver or release was a part was rejected by a federal appeals court because there was no evidence that his time to consider the agreement was restricted in any way. The officer's signed release was also found to be voluntary because he had graduated high school, had obtained college credits, had served previously as the union

secretary, and had received independent advice through his union. Further, he also chose not to revoke the separation agreement. *Geoffrey v. Town of Winchendon*, #19-1573, 2020 U.S. App. Lexis 15364 (1st Cir.).

FLSA – Overtime in General

A lawsuit was brought under the Fair Labor Standards Act on behalf of thirty-six current and former county sheriff's deputies who, although they were paid on an hourly basis and classified as nonexempt employees who were eligible to receive overtime premium pay for any hours worked in excess of 40 hours per workweek, asserted that they were not paid overtime. The county allegedly simply stopped paying overtime as part of a wage freeze to cope with budget problems. A federal appeals court upheld a finding that the county willfully violated the statute, and that the deputies were entitled to back pay, liquidated damages, and attorneys' fees for work done in the court below. The appeals court remanded to the trial court to consider an award of attorneys' fees incurred on appeal. *Cruz v. Maverick County*, 957 F.3d 563 (5th Cir. 2020).

A federal appeals court ruled that a state, in this case, Nevada, removing a FLSA claim from state to federal court, thereby waives its immunity from suit on all federal-law claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity. Therefore, Nevada waived its Eleventh Amendment immunity in this case. The plaintiffs were state correctional officers who claimed denials of overtime. *Walden v. Nevada*, #18-15691, 945 F.3d 1088 (9th Cir. 2019).

First Amendment

****Editor's Case Alert****

An employee of Maryland's Department of Natural Resources (DNR), who served as a law enforcement officer there for 26 years and then as a civilian employee, submitted to a local website two anonymous blog posts about a captain of the Internal Affairs Unit of the Maryland Natural Resources Police. The posts were not flattering, and among other things, they collected screenshots from the captain's private Facebook page that showed photos of him posing with scantily-

clad women and various comments that he had made about gun violence. In the months that followed, the employee was fired from the DNR, his Law Enforcement Officer Safety Act ("LEOSA") card to carry a concealed firearm was rescinded, and he was disparaged on social media. He filed suit claiming that these actions violated his First Amendment rights. A federal appeals court upheld the dismissal of his First Amendment retaliation claim, holding that the plaintiff's posts concerned nothing more than purely personal speech, as they were devoid of any content that rose to a level of public concern. While his posts were critical of a supervisor, rather than involving matters of public concern, the posts showed that the supervisor engaged in boorish, tasteless, and boastful behavior, which did not impeach the supervisor's conduct of his professional duties, and were merely an airing of personal grievances. The court also upheld the dismissal of the claim that the defendants violated his right to carry a concealed firearm under the Law Enforcement Officer Safety Act, holding that the Act was not privately enforceable under 42 U.S.C. 1983. *Carey v. Throwe*, #19-1194, 957 F.3d 468 (4th Cir.).

A sergeant with the Missouri State Highway Patrol (MSHP) got involved in a public controversy over the drowning death of a young man while he was in MSHP custody. He testified during a legislative inquiry as well as in a deposition in a civil lawsuit and also publically spoke out several times about the case to a member of the press and members of the decedent's family, and on social media about what he claimed was an internal MSHP cover-up of the drowning. He subsequently faced a transfer and other threatened adverse employment actions, including a reduction in rank, but retired before a hearing on that reduction could be held. He claimed that these actions violated his First Amendment rights. A federal appeals court upheld summary judgment to the defendants on the First Amendment retaliation claims. His non-testimonial speech was not entitled to First Amendment protection. While it was undisputed that he spoke as a private citizen and his speech was of public concern, the highway patrol showed sufficient evidence of disruption to the efficiency of its operations. The factors weighed in favor of the highway patrol's interest in efficiency and indicated that the plaintiff's speech activity was more likely than not impeding his ability to perform his job duties as a police officer. Therefore, the defendants were entitled to qualified immunity regarding his speech to the family of the victim of a drowning accident, on social media, and to the news reporter. The court also found that the remaining testimonial speech was not a substantial or motivating factor in the adverse employment actions against him. *Henry v. Johnson*, #18-3298, 950 F.3d 1005 (8th Cir. 2020).

A former city police officer sued the city and the chief of police, claiming unlawful retaliation for exercising his First Amendment right to participate in a media interview, deprivation of his right to a pre-termination process, and violation of his rights under the North Dakota state Constitution. A federal appeals court upheld summary judgment for the defendants, ruling that the plaintiff failed to prove his speech as a public employee was protected by the First Amendment. He gave a media interview in which he denied giving an anonymous tip to a broadcast station accusing a member of the sheriff's department of using a county-owned jet ski for personal use. He was accused of having given the tip using an alias connected with a Facebook account he used for investigatory purposes. He was not speaking as a citizen in a local news interview. His statements in the media interview made clear that his appearance was within the scope of his duties as a member of the police department and President of the Fraternal Order of Police. Further, his speech during the interview was not on a matter of public concern because his asserted desire was to clear the name of his Facebook alias, which was a purely private interest, and even assuming plaintiff was a citizen commenting on a matter of public concern, his speech at the interview was not First Amendment protected, because it created great disharmony in the workplace, interfered with his ability to perform his duties, and impaired his working relationships with other employees. The court also found that plaintiff was not deprived of his right to due process. The city afforded him constitutionally adequate pre-termination process since the officer knew enough about the incident to prepare a response and had many meaningful opportunities to present his side of the case, and the decision to fire him was upheld after a full trial-type post-termination hearing. The court declined to exercise supplemental jurisdiction over the state law claims. *Nagel v. City of Jamestown*, #18-2842, 952 F.3d 923 (8th Cir. 2020).

Handicap/Abilities Discrimination

A prison correctional officer who sometimes stuttered when he spoke sued the California Department of Corrections and Rehabilitation (CDCR) and his supervisor alleging disability discrimination in the form of mocking harassment by coworkers. A stutter was found to be a disability under the state Fair Employment and Housing Act (FEHA). A jury found in Caldera's favor and awarded $500,000. The trial court granted a motion for new trial because it found the damage award excessive. An intermediate appeals court reversed on procedural grounds. The plaintiff then sought $2.4 million in statutory attorney fees (a $1.2 million

"lodestar" and a 2.0 "multiplier"). The trial court awarded a little over $800,000. On appeals, the court ruled that the plaintiff could not find a local attorney to take his discrimination lawsuit, so he hired an out-of-town firm. But when calculating attorney fees, the trial court set the attorneys' hourly rate based on a lower local rate, rather than a higher out-of-town rate. The appeals court therefore ruled that the attorneys' fees awarded did not adequately compensate the plaintiff consistent with the purposes of the FEHA. *Caldera v. Dept. of Corrections and Rehabilitation*, #GO57343, 48 Cal. App. 5th 601, 2020 Cal. App. Lexis 365.

Race Discrimination

An African-American Maine state corrections officer left his job for a similar federal job, but the federal job was allegedly put on hold due to a hiring freeze. He applied for, but was repeatedly rejected for rehiring by his former employer. His Title VII race discrimination claim and retaliation claims failed. The plaintiff's evidence did not show that race was a motivating factor in the facility's hiring decisions, particularly as an investigation by one hiring officer revealed that there was not a hiring freeze at the particular federal facility when the officer's federal job fell through, which led to the conclusion that the officer was not truthful about wanting to return to the state job. The retaliation claim also failed because the officer did not show that he would have been rehired but for his prior protected complaints to the Maine Human Rights Commission. *Brandt v. Fitzpatrick*, #19-1174, 957 F.3d 67 (1st Cir. 2020).

Whistleblower Protection

A police officer employed by a city claimed that it engaged in whistleblower retaliation against him in violation of California Labor Code section 1102.5 (b) by denying him promotions after he reported what he perceived to be misconduct by another officer and complained about a Department program he believed was an unlawful quota system. Before trial, the city successfully moved to strike allegations of other retaliatory acts within the cause of action on grounds that he had not timely presented a government tort claim within six months of the acts as required by the Government Claims Act. The trial court excluded evidence of any violations by the city of the Public Safety Officers Procedural Bill of Rights Act while at the same time permitting the city to present evidence that the department

had denied him promotion because of an e-mail he wrote under an assumed name lodging the officer misconduct accusations. The jury returned a verdict finding in favor of the officer that his reporting of the city's violation of the law was a contributing factor in the city's decision to deny him the promotion. However, it also found that the city would have denied the officer his promotion anyway for legitimate independent reasons. Therefore, the court entered judgment in the city's favor on the whistleblower retaliation claim.

On appeal, the officer argued that the trial court erred as a matter of law by striking those portions of his whistleblower cause of action because the Government Claims Act's six-month statute of limitations was either equitably tolled or his cause of action had not accrued by reason of the continuing tort/continuing violation doctrine. Furthermore, he argued that the court's evidentiary rulings were a prejudicial abuse of discretion. An intermediate appeals court rejected these arguments, finding no error. *Willis v. City of Carlsbad*, #D074988, 2020 Cal. App. Unpub. Lexis 2454. [While initially not certified for publication, it subsequently was, at 2020 Cal. App. Lexis 396].

A director at the Veterans Administration's (VA) Chief Business Office Purchased Care made several protected disclosures to the VA's Office of the Inspector General (OIG) questioning various financial practices and perceived contractual anomalies. His supervisor became aware of these concerns. The director was subsequently subjected to an investigation. He filed a complaint with the Office of Special Counsel (OSC) alleging whistleblower retaliation based on several personnel actions, including a letter of reprimand. He later filed an individual right of action appeal with the Merit Systems Protection Board (MSPB), claiming retaliation under the Whistleblower Protection Act. The Administrative Judge declined to order any corrective action, finding that a retaliatory investigation, by itself, does not qualify as a personnel action eligible for corrective action under the Act. The OIG subsequently confirmed that the concerns raised by the plaintiff were justified. The plaintiff retired from the VA. A federal appeals court upheld the decisions below. The Whistleblower Protection Act defines qualifying personnel actions at 5 U.S.C. 2302(a)(2)(A). Retaliatory investigations, in and of themselves, do not qualify. The Act provides that a retaliatory investigation may provide a basis for additional corrective action but only if raised in conjunction with one or more of the qualifying adverse personnel actions. *Sistek v. Dept. of Veterans Affairs*, #19-1168, 955 F.3d 948 (Fed. Cir. 2020).

• Contents menu.

• Report non-working links here

RESOURCES

Personnel Management: Leadership Spotlight--Delivering Bad News to Employees, by Brian Boetig, FBI Law Enforcement Bulletin (May 7, 2020).

Training: Perspective--Need for Critical Thinking in Police Training, by Michelle Ridlehoover, FBI Law Enforcement Bulletin (May 7, 2020).

Reference:

- Abbreviations of laws, law reports and agencies used in our publications.
- AELE's list of employment law resources

Report non-working links here

CROSS REFERENCES

Handicap/Abilities Discrimination – Attorneys' Fees
Retaliatory Personnel Actions – See also, First Amendment (all three cases)

AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

Click here for more information about all AELE Seminars

Return to the CONTENTS menu.
Return to the monthly publications menu
Access the multiyear Employment Law Case Digest

List of links to court websites
Report non-working links here.

Library of Employment Law Case Summaries