
AELE Seminars:

Public Safety Discipline and Internal Investigations

Sept. 28-Oct. 1, 2020– Orleans Hotel, Las Vegas

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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](#)

Collective Bargaining – Duty to Bargain

A federal appeals court has ruled that the Federal Labor Relations Authority's order setting aside an arbitrator's award was erroneous because it failed to reasonably explain its departure from precedent and its decision denying the union's bargaining request. The case involved a grievance filed by an employee's union after the U.S. Customs and Border Protection agency distributed a memo to its agents changing vehicle inspection procedures at the El Paso border checkpoint. The union claimed that the employer failed to notify and negotiate with it before issuing the memo and the arbitrator agreed. The Authority failed to explain how its decision complied with federal statutes concerning bargaining and while it characterized its decision as clarifying the terms of the Federal Service Labor-

Management Relations Statute, the court found that its rationale provided more questions than answers, and thus, the order was arbitrary and capricious. [*American Federation of Government Employees v. Federal Labor Relations Authority*](#), #19-1069, 2020 U.S. App. Lexis 18081 (D.C. Cir.).

Family Personal and Medical Leave

A county nurse claimed that her employer interfered with her rights under the Family Medical Leave Act (FMLA) and unlawfully retaliated against her for exercising her rights under the statute. Her claims arose after she was put on administrative leave following an investigation into her former husband's alleged sexual abuse of their children. A federal appeals court rejected her claims. Her FMLA interference claim failed because she was on paid time off (PTO) when she requested FMLA leave and she remained on PTO until she resigned, and therefore, she could not show that she suffered prejudice as a result of the employer's failure to provide proper notice of her FMLA rights or due to the delay in processing her FMLA request. Additionally, the county did not interfere with her FMLA rights by requiring her to perform work while on medical leave because the requested tasks were not work-related, but concerned the child abuse investigation. The FMLA retaliation claim failed because there was no causal connection between the denial of her FMLA request and the employer's decision to fire her based on the results of the child-protection investigation. [*Thompson v. Kanabec County*](#), #19-1456. 958 F.3d 698 (8th Cir. 2020).

First Amendment

A local government EMS administrator challenged a trial court's failure to grant him qualified immunity on claims that he fired a paramedic for exercising their First Amendment free-speech and free-association rights. A federal appeals court found that the paramedic failed to show that defendant violated one of his constitutional rights. In this case, on his retaliatory-discharge claim, a 19-month gap between the date the paramedic sent a letter suggesting changes to personnel, procedures, and policy and the date of his firing was too long to show a causal connection by itself, and his claim did not state with specificity when he was allegedly harassed. The appeals court further held that the trial court did not err in refusing to on its own initiative address another paramedic's claim that he was retaliated against for refusing to provide a false statement where the administrator

made no substantive argument for dismissing that claim. [Benfield v. Magee](#), #18-30932, 945 F.3d 333 (5th Cir. 2019).

Homosexual and Transgender Employees

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

Three cases were consolidated for decision by the U.S. Supreme Court in which long-time employees were fired for being homosexual or transgender. Each of the former employees sued for sex discrimination under Title VII of the Civil Rights Act of 1964. A 6-3 majority of the U.S. Supreme Court held that an employer violates Title VII when it intentionally fires an individual employee based in part on sex (including homosexuality or transgender status) regardless of whether other factors besides the plaintiff's sex contributed to the decision or whether the employer treated women as a group the same when compared to men as a group. Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex.

The ruling states that it is irrelevant what an employer or others might call the discriminatory practice or that another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from that assigned at birth might play an important role in the employer's decision, or that an employer could refuse to hire a gay or transgender individual without learning that person's sex. The Court rejected arguments that homosexuality and transgender status are distinct concepts from sex or that a stricter causation test should apply because the policies at issue have the same adverse consequences for both men and women who are homosexual or transgender. The majority stated that the legislative history had no bearing where "no ambiguity" exists about how Title VII's terms apply to the facts. The dissenters argued that the outlawing of homosexuality and transgender discrimination in employment was not within the common understanding or meaning of outlawing discrimination on the basis of sex when Title VII was enacted. [Bostock v. Clayton Cty.](#), #17-1618, 2020 U.S. Lexis 3252.

Pay Disputes – In General

County employee unions sued a county finance authority which instituted a year-long wage freeze for all county employees. They argued that the wage freeze,

because it was a legislative act that was not reasonable and necessary to achieve the purported goal of fiscal soundness, violated the Contracts Clause of the United States Constitution. A federal appeals court ruled that the wage freeze did not violate the Contracts Clause and upheld the trial court's grant of summary judgment. The appeals court assumed without deciding that the imposition of the wage freeze was legislative (rather than administrative) in nature, and held that it was a reasonable and necessary means to achieve the stated end of ensuring the continued fiscal health of the county. [*Sullivan v. Nassau County Interim Finance Authority*](#), #18-1587, 959 F.3d 54 (2nd Cir. 2020).

Pensions

Retired Dallas, Texas police and firefighters sued the pension system Board over changes to their pension fund, claiming that limiting their ability to withdraw from their Deferred Retirement Option Plan (DROP) funds amounted to an unlawful taking under the Fifth Amendment of the United States Constitution and violated article XVI, section 66, of the Texas Constitution, which prohibits reducing or otherwise impairing a person's accrued service retirement benefits. A federal appeals court certified two questions to the Supreme Court of Texas, asking (1) whether the method of withdrawing DROP funds was a service retirement benefit protected under Section 66, and (2) whether the Board's decision to change the withdrawal method for the DROP funds violated Section 66. The Supreme Court of Texas held that while the DROP funds were service retirement benefits protected by Section 66, the method of withdrawing DROP funds was not, and that therefore the decision to change the withdrawal method of the plaintiffs' DROP accounts did not violate Section 66.

Subsequently, the federal appeals court ruled that the plaintiffs failed to state a federal constitutional takings claim because they did not have a property interest in the method of withdrawing DROP funds. The appeals court additionally ruled that the plaintiffs failed to plead a regulatory taking claim. [*Degan v. Board of Trustees of the Dallas Police and Fire Pension System*](#), #18-10423, 956 F.3d 813 (5th Cir. 2020).

Probationary Employment

Los Angeles County Civil Service Rules 2.01 and 12.02(B), when read together, have a plain meaning that so long as a probationary employee is engaged in the duties of "a position or positions" he is not "absent from duty." A deputy sheriff challenged his employer's practice of extending the length of probation while investigating a deputy's claimed misconduct, arguing that it violated these rules. Agreeing with this argument, an intermediate California appeals court upheld a trial court's order directing the Los Angeles County Sheriff's Department to reinstate the deputy as a permanent civil service employee. He had had his probation extended when he was reassigned to administrative duties and then been terminated without a hearing. The court ruled that the plain language of the rules does not authorize the department's practice of extending probation by re-

assigning deputies under investigation to administrative duty. Accordingly, the plaintiff became a permanent civil service employee 12 months after his probation began. [*Trejo v. County of Los Angeles*](#), #B293564, 2020 Cal. App. Lexis 512.

Race Discrimination

A North Carolina state black correctional officer who suffered a demotion after allegedly violating a rule concerning the handcuffing of prisoners in certain circumstances sued his former employer for race discrimination. He had retired subsequent to the demotion. He claimed that he was punished more severely than white employees who violated the same rule. He sought reinstatement in his former position and the removal of negative materials in his personnel file. A federal appeals court rejected the defendants' motion to dismiss the plaintiff's appeal as moot because of his retirement, since the plaintiff swore that he would immediately return to the job if reinstated. It upheld, however, the grant of summary judgment to the defendant state Department of Public Safety, holding that its removal of the case to federal court did not amount to a waiver of sovereign immunity. Summary judgment for the Secretary of the Department, based on sovereign immunity, however, was vacated because—contrary to what the trial court found—the employee was seeking prospective (not retrospective) relief, meaning this claim fell under the sovereign-immunity exception articulated in [*Ex Parte Young*](#), #10, 209 U.S. 123 (1908). [*Biggs v. North Carolina Dept. of Public Safety*](#), #18-2437, 953 F.3d 236 (4th Cir. 2020).

Race and Sex Discrimination

A city was properly granted summary judgment on an African-American female firefighter's Title VII race and sex discrimination claim based on a lack of overtime, because she failed to show that white male employees treated differently were similarly situated where they did not have the same job, responsibilities, or supervisor. Her Title VII hostile work environment claim also failed as she failed to show that her alleged harassment was frequent, pervasive, or interfered with her work performance. At most she showed that her co-workers were sometimes offensive and boorish, including passing gas at the dinner table, infrequently engaging in sleeping in their underwear at the fire station, making an occasional racially insensitive joke, and bringing adult magazines to the station. Title VII, the appeals court commented, did not impose a general civility code on employers. [*West v. City of Houston*](#), #19-20294, 2020 U.S. App. Lexis 18142 (5th Cir.).

Retirement Rights and Benefits

The highest court in Massachusetts overturned a lower court ruling that a police officer who is a member of a municipal retirement system need not remit payments to obtain creditable service for prior work conducted as a permanent-intermittent police officer (PIPO), holding that a state statute mandates remittance payments by member police officers for past intermittent work. [*Plymouth Retirement Board v. Contributory Retirement Appeals Board*](#), #SJC-12711, 483 Mass. 600, 135 N.E.3d 702 (2019).

Sex Discrimination

A female employee of the U.S. Department of Justice working as an analyst sued the U.S. Attorney General, claiming that the DOJ had denied her a promotion to a Division Director position because of her gender and her age. A federal appeals court ruled that summary judgment for the employer was improper because a reasonable jury could find that the offered nondiscriminatory reason for denying her the promotion that she sought was pretextual and that discrimination was the real reason. A reasonable jury could find in the plaintiff's favor based on her superior qualifications, the accumulated evidence of gender discrimination, and pretext. The employee offered compelling evidence to prove that the decision-maker had discriminated against her on the basis of her gender in the past, ruled her out of consideration for the promotion before she was interviewed, designed the interview to mask the employee's superior qualifications, allowed gender bias to taint scoring of the candidates, influenced the other panelists' candidate scoring, and provided shifting and false rationales for his actions. [*Stoe v. Barr*](#), #18-5315, 2020 U.S. App. Lexis 17082 (D.C. Cir.).

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RESOURCES

COVID-19: [Law in the Time of COVID-19](#), Columbia Law School (2020).

Employment Law: [Digest of Equal Employment Opportunity Law](#), new quarterly issue, includes key federal sector decisions and Special Article on Claims of Harassment and the Problem of Fragmentation (EEOC March 2020).

Reference:

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

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CROSS REFERENCES

Age Discrimination – See also, Sex Discrimination
Retaliatory Personnel Action – See also, Family Personal and Medical Leave
Retaliatory Personnel Actions – See also First Amendment
U.S. Supreme Court Decisions – See also, Homosexual and Transgender
Employees

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