AELE Seminars:

Public Safety Discipline and Internal Investigations
Sept. 28-Oct. 1, 2020– Virtual

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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

Age Discrimination

A 74-year-old employee of the Chicago city water department applied for a promotion and was allegedly denied it because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621–634. He also asserted a hostile work environment claim under the ADEA regarding harassment he supposedly experienced at two department facilities. A federal appeals court upheld summary judgment for the employer, finding that the plaintiff had not provided evidence showing that his age, rather than his failing score on the required verbal exam, was the reason he missed out on the promotion. Assuming a

hostile work environment claim is available under the ADEA, the plaintiff also failed to present sufficient evidence for a factfinder to conclude that the supposed harassment he experienced was "severe or pervasive." He also failed to exhaust this claim regarding conduct that allegedly occurred at one facility, as he did not file a charge with the Equal Employment Opportunity Commission reporting that conduct. *Tyburski v. City of Chicago*, #18-3000, 964 F.3d 590 (7th Cir. 2020).

Collective Bargaining – In General

The union representing Chicago police officers sued the city for failing to destroy records of police misconduct that were more than five years old, as required under the collective bargaining agreement (CBA). An arbitrator held that the collective bargaining agreement should prevail and directed the parties to come to an agreement regarding the destruction of the documents. The Illinois Supreme Court upheld the rejection of the arbitration award by the lower courts. It found that requiring the city to destroy all records related to alleged police misconduct without consideration of whether the records have administrative, legal, research, or historical value ignored the requirements of the Local Records Act (50 ILCS 205) and resulted in diminishing the Local Records Commission's authority to determine what records should be destroyed or maintained. The arbitration award violated an explicit, well-defined, and dominant public policy. While the city could comply with the Local Records Act by submitting disciplinary records to the Commission, that is not required under the collective bargaining agreement. Submission to the Commission is only part of the statutory procedures a local government must follow under the Act. The most crucial aspect is compliance with the Commission's ultimate decision regarding the retention or destruction of the government records. *City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, #124831, 2020 IL 124831, 2020 Ill. Lexis 542.

Disciplinary Interviews & Compelled Reports

A federal district court issued a subpoena to the Iowa Department of Public Safety (IDPS) to appear before a federal grand jury and provide information and documents relating to the investigation of an Iowa State Patrol (ISP) officer for misconduct and excessive use of force. The employer sought to quash the subpoena. In upholding the denial of that motion, a federal appeals court ruled that the employer failed to meet its "substantial burden" to show that compliance with

the challenged portions of the grand jury subpoena would be unreasonable or oppressive when balanced against the interests of the government in enforcing the subpoena. The appeals court agreed that the employer's interest in confidentiality of its early intervention program to prevent employee misconduct was an essential aspect of the program but that the Fifth Amendment privilege applied only to self-incrimination and that the assurance that an officer could cooperate with the early intervention program without being "ostracized or prosecuted" was important but did not control the issue in the case. The employer argued that quashing the subpoena was needed to protect the Fifth Amendment rights of IDPS employees who participated in internal investigation, but the court found that the procedural protections established by *Kastigar v. U.S.*, #70-117, 406 U.S. 401 (1972), and *Garrity v. New Jersey*, #13, 385 U.S. 493 (1967), provide sufficient protection from the improper use of compelled statements. The Fifth Amendment allows the government to prosecute using evidence from legitimate independent sources; and the trial court did not abuse its Federal Rule of Criminal Procedure 17(c)(2) discretion in declining to quash the subpoena. *In Re: Grand Jury Subpoena Dated August 14, 2019*, #20-1404, 964 F.3d 768 (8th Cir. 2020).

Disciplinary Punishment

After a county deputy sheriff was fired because of her failure to report another deputy's use of force against an inmate and her failure to seek medical assistance for the inmate, the county Civil Service Commission upheld the discharge. A trial court disagreed and ordered the Commission to set aside the discharge, award her back pay, and reconsider a lesser penalty. An intermediate California appeals court reversed and ruled that the Department did not abuse its discretion in discharging the plaintiff since her conduct furthered the "code of silence" at the Men's Central Jail, requiring the Department to take action. In this case, her conduct in following the code of silence undermined the Department's trust and confidence in the plaintiff as a deputy sheriff and negatively impacted the operation of the jail. Additionally, at the Commission hearing, she minimized her responsibility to report the use of force. *Pasos v. Los Angeles County Civil Service Commission*, #B291952, 52 Cal. App. 5th 690, 2020 Cal. App. Lexis 700.

Handicap/Abilities Discrimination: Reasonable Accommodation

A county sergeant allegedly threatened physical violence against one of his fellow officers, a county deputy. He was placed on temporary paid administrative leave and ordered to undergo a fitness-for-duty evaluation. He believed that his supervisors took this action because they knew that he had a history of PTSD stemming from his military service, not because his conduct violated the County's Workplace Violence Policy and implicated public safety. He sued for employment discrimination, citing the Americans with Disabilities Act (ADA), 42 U.S.C. 12112. The trial court concluded that no reasonable jury could find that his PTSD was the "but for" cause of the county's action or that it was plainly unreasonable for his superiors to believe that a fitness-for-duty examination was warranted. A federal appeals court upheld summary judgment for the employer. The plaintiff presented no evidence to support his claim of pretext. There was no evidence that his supervisors knew about his PTSD. Contrary to his argument that he and another officer acted in a comparable fashion and should have been treated similarly, the record reflected that only the plaintiff explicitly threatened physical violence, while the other officer may have behaved in an intimidating fashion towards the plaintiff, but their behavior was not identical. *Kurtzhals v. County of Dunn*, #19-3111, 2020 U.S. App. Lexis 25182 (7th Cir.).

Pensions

The Supreme Court of California ruled that the California Public Employees' Pension Reform Act's (PEPRA), Stats. 2012, ch. 296, 1, amendment of the County Employees Retirement Law (CERL), Cal. Gov. Code 31450 et seq., did not violate the contract clause under a proper application of the California Rule and declined to reexamine and revise the California Rule. It found that county employees had no express contractual right to the calculation of their pension benefits in a manner inconsistent with the terms of the PEPRA amendment. The challenged provisions added by PEPRA met contract clause requirements, and the test announced in *Allen v. City of Long Beach*, 45 Cal.2d 128 (1955), as explained and applied in this case, known as the California Rule, remains the law of California. Under the "California Rule," the contract clause of the California Constitution requires any modification of public employee pension plans to satisfy a standard established in a long line of California Supreme Court decisions. In determining the constitutional validity of a modification to a public employee pension plan, a court is first required to determine whether the modification imposes disadvantages on affected employees, relative to the preexisting pension plan, and, if so, whether

those disadvantages are accompanied by comparable new advantages. Assuming the disadvantages are not offset in this manner, the court must then determine whether the agency's purpose in making the changes was sufficient, for constitutional purposes, to justify an impairment of pension rights. The new provisions were enacted, the court ruled, for the constitutionally permissible purpose of closing loopholes and preventing abuse of the pension system in a manner consistent with CERL's preexisting structure.
Alameda County Deputy Sheriff's Assoc. v. Alameda County Employees' Retirement Assoc., #S247095, 2020 Cal. Lexis 4870.

Religious Discrimination

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

A Jewish man born in Germany had suffered the loss of some family members who died in Nazi concentration camps. He emigrated to the U.S. and joined the Chicago police department. For years he allegedly was subjected to vicious anti-Semitic abuse from his supervisor, a sergeant who made statements about Hitler, the Holocaust, and his opinion that Jews should not live in the U.S. A federal appeals court, in addressing this claim, stated that "we prefer not to debase this opinion by repeating" what the supervisor said. After the supervisor insulted the Mexican ethnicity of the officer's girlfriend, the officer filed a formal complaint. Two days later, the supervisor accused him of insubordination for an unrelated incident, and recommended his suspension. The resulting five-day suspension was "unprecedented" for the relatively minor offense of failure to report one's location. Subsequently, the officer was denied a promotion, even though he was given a rating of "well-qualified."

The officer sued the supervisor and the city, claiming harassment, discrimination on the basis of race, religion, and national origin, and retaliation based on protected activities. The trial court dismissed the claims against the city but awarded the plaintiff $540,000 in punitive damages, $8,703.96 in pre-judgment interest, plus another $54,315.24 in economic damages. A federal appeals court upheld this result, finding that while the evidence was "not overwhelming," it was sufficient to support the jury's conclusion that the supervisor actor with discriminatory animus and was the decision-maker on the adverse actions taken against the officer. In upholding the award of punitive damages, the appeals court found that while the supervisor's harassment never involved physical violence, it

was still "extremely reprehensible." *Sommerfield v. Knasiak*, #18-2045, 967 F.3d 617 (7th Cir. 2020).

Retaliatory Personnel Action

A former city police officer sued the city and his former supervisor, asserting claims for Title VII and First Amendment retaliation, malicious prosecution and breach of contract. He had resigned pursuant to a settlement agreement after asserting claims for sexual harassment, but faced continued investigation and criminal charges after his resignation, which he claimed were retaliatory. A jury found for the officer on all claims and awarded a total of $2.77 million in damages. The trial court ruled that the jury did not properly fill out the verdict form, as each claim required proof of different elements, and there were inconsistencies in the form as returned. Therefore, it asked the jury to redo the form, properly apportioning the damages between the various claims. In doing so, the jury apportioned most of the damages to the former officer's Title VII claim. The trial court then ruled that Title VII's statutory damages cap applied, and reduced the total award to $344,000. The trial court properly characterized the officer's economic damages award as lost future earnings subject to Title VII's damages cap because lost future earnings were similar to common law torts that were not available under the pre-1991 version of the statute and were "other non-pecuniary losses" under 42 U.S.C.S. § 1981a(b)(3). While both parties appealed, a federal appeals court upheld the reduction in damages. *Jensen v. West Jordan City*, #17-4173, 2020 U.S. App. Lexis 24498 (10th Cir.).

A former state attorney sued her former employer under 42 U.S.C. Sec. 1983, claiming that her firing was retaliatory for her complaining about alleged sex discrimination on the job. She asserted that this violated her equal protection rights under the Fourteenth Amendment. A federal appeals court ruled that the lawsuit was correctly dismissed because a claim for pure retaliation may not be brought under the equal protection clause of the Fourteenth Amendment. A claim that she was terminated in retaliation for her complaint of sexual harassment and discrimination, not because she was a woman, "did not implicate" the Equal Protection Clause, but rather, she alleged that she suffered adverse consequences because of her speech and conduct, which implicated her First Amendment rights. The court further found that the right to be free from retaliation for protesting sexual harassment and sex discrimination upon which the plaintiff relied was a right created by Title VII of the Civil Rights Act of 1964, not the equal protection

clause. *Wilcox v. Lyons*, #19-1005, 2020 U.S. App. Lexis 25404 (4th Cir.).

Wrongful Discharge

A federal appeals court found that the Executive Director of the District of Columbia's lottery board took a series of adverse personnel actions designed to push a plaintiff employee out of his job without due process in violation of the Fourteenth Amendment. The employee, in auditing the agency's activities, discovered and subsequently reported financial transactions that he alleged were unethical and possibly illegal. The agency had purchased computer equipment for almost $7million from a subcontractor, only to place the equipment on a depreciation schedule that labeled it worthless just five years later. Subsequently, as part of a new purchase agreement, officials gave the rather expensive computer equipment back to the same subcontractor—at no cost to the subcontractor—despite the fact that "the equipment likely had at least some monetary value due to recent upgrades." Rather than investigating this, the Executive Director targeted a "security officer" job for eventual elimination and then transferred the employee to this soon to be eliminated job. He then placed the employee on paid leave and then eliminated his job. The appeals court found that the trial court erroneously granted summary judgment for the District and in denying summary judgment for the plaintiff on the question of municipal liability. The court found, as a matter of law, that the Executive Director acted as a final policymaker on behalf of the District when he took the series of personnel actions that led to the plaintiff's constructive termination without due process. The District was therefore liable for the Executive Director's actions. On remand, the only remaining issue was the amount of damages to be awarded. *Thompson v. District of Columbia*, #18-7151, 2020 U.S. App. Lexis 24219 (D.C. Cir.).

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RESOURCES

Drug Abuse: **Use and Misuse of Codeine, Oxycodone, and Other Opioids: Information for Employees** (EEOC, August 2020).

Employment Discrimination: A new issue of the EEOC's Digest of Equal

Employment Opportunity Law contains a special article on National Origin Discrimination as well as selected recent EEOC decisions.

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

First Amendment – See also, Retaliatory Personnel Actions (both cases)
National Origin Discrimination – See also, Religious Discrimination
Privacy – See also, Collective Bargaining
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