
AELE Seminars:
Jail & Prisoner Legal Issues

January 25-28, 2021

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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](#)

Arbitration Procedures

A regional police commission appealed an arbitrator's reinstatement of police officer under an arbitration filed under a collective bargaining agreement. The termination was based on the following facts. A fellow officer rummaged through the officer's desk while looking for motor vehicle report forms. He discovered a folder containing approximately eighty pages of documents including photographs of women downloaded from the Internet, which included photos of women in lingerie and bathing suits, while others were pornographic and showed women in bondage and varying stages of undress, as well as seven photographs of attractive young women that had apparently been saved from unauthorized criminal justice record searches. The officer was fired after he admitted that he took the

photographs into the departmental bathroom and masturbated. There was no evidence that the officer ever attempted to contact any of the women.

The Pennsylvania Supreme Court ruled that the arbitration award was not illegal, because the arbitrator limited his decision to an analysis as to whether the police commission had just cause to terminate the officer at the time of his firing on September 27, 2016, and correctly noted that the officer's loss of police computer interface access privileges was known by the time of the arbitration and for purposes of the issue before the arbitrator, it was irrelevant to whether he was fired for just cause on September 27, 2016 or what was the appropriate remedy for that termination without just cause. The union had argued that the firing was disproportionate based on a four-day suspension previously imposed on another officer who carried out thousands of improper searches of criminal justice records. The court also noted that the police commission's petition to vacate the arbitrator's award was based solely upon factual developments post-dating the officer's termination, namely his loss of computer access and the alleged illegality of employing him without it. The reinstatement was therefore upheld. [*NJ. Berks Reg. Police Comm. v. Berks Co. FOP*](#), #53 MAP 2019, 230 A.3d 1022_2020 Pa. Lexis 2768, 2020 WL 2529056 (Pa. 2020).

Collective Bargaining: In General

The South Dakota Supreme Court upheld a decision of the state Department of Labor ruling that sergeants in the Yankton Police Department were ineligible for membership in a collective bargaining unit under state law because they have authority to hire or effectively recommend hiring decisions. The record supported the Department's determination that sergeants were ineligible for membership in the collective bargaining unit because they used independent judgment to hire or effectively recommend hiring. [*Fraternal Order of Police v. City of Yankton*](#), #29203, 2020 S.D. 52, 2020 S.D. Lexis 104, 2020 WL 5551713.

Disciplinary Punishment: In General

Three firefighters were disciplined by the California Department of Forestry and Fire Protection (CAL FIRE) for cheating on a promotional exam. Two of them were notified that their appointments as limited-term fire captains would end, and the third was notified that he failed his probationary period. They were also all notified that their pay would be reduced by 5 percent for 12 months. One of them appealed his discipline to the California State Personnel Board, but the other two did not. While the appeal was pending, CAL FIRE substituted new disciplinary notices against all three men, seeking to impose harsher penalties, placing them on administrative leave and moving to demote them from their then-current positions to the position of fire fighter II. Over the firefighters' objections, the Board allowed CAL FIRE to proceed. The firefighters filed a petition for a writ of mandate in the trial court, which the court denied. The court of appeal upheld this result in part. CAL FIRE permissibly substituted its disciplinary notice against the firefighter whose appeal was pending before the Board, but not against the other two, the appeals court ruled, because by statute their discipline became final 30 days after they did not appeal. [*Chaplin v. State Personnel Board*](#), #A155107, 2020 Cal. App. Lexis 893, 2020 WL 5651281.

First Amendment

An employee of the Pennsylvania state Department of Transportation subject to a 180-day probationary period posted a number of "rants" to her personal Facebook page, on which she was identified as an employee of the agency. In the posts, she made derogatory statements about "horrible" school bus drivers and other comments that the employer viewed as detrimental, firing her. Despite being on probation, she argued that this firing violated her First Amendment rights. A trial court accepted her argument and reversed the state Civil Service Commission decision dismissing the probationary employee's challenge to her termination. The Pennsylvania Supreme Court concluded that the trial court failed to engage in the required balancing of interests. If the employee's words could erode the public's trust in its mission, the Department of Transportation acted reasonably in terminating her employment. Because the employee's speech prevented the Department from efficiently carrying out its responsibilities, the trial court erred in concluding that its generalized interest in safety did not outweigh the employee's specific interest in commenting on the safety of a particular bus driver. The court characterized the postings as essentially a rant based on her personal observation

rather than an explanation of safety concerns she became aware of as an employee. [Carr v. Commonwealth](#), #3 MAP 2019, 230 A.3d 1075, 2020 Pa. Lexis 2766.

F.L.S.A.: Administrative & Executive Exemption

Those employed in an executive, administrative, or professional capacity are exempt from entitlement to overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1). If an employer violates the overtime requirement, it is liable for unpaid overtime compensation plus an equal amount as liquidated damages. If the employer shows “good faith and that it had reasonable grounds for believing that [its] act or omission was not a violation,” the court may award no liquidated damages. The FLSA applies to civilian employees of the federal government. The Naval Criminal Investigative Service (NCIS) classified an employee’s position, Investigations Specialist, as exempt from the overtime requirements.

The U.S. Claims Court held that NCIS had not willfully misclassified the employee in 2007, so that the relevant period started in 2014, and found that the employee’s team leader duty was optional and comprised a minority of the Investigations Specialist position’s duties so that his primary duty was not management but was “conducting surveillance,” which would not qualify for the administrative exemption. The court therefore awarded him compensatory damages and back pay but denied liquidated damages, finding that NCIS’s classification decision was objectively reasonable and in good faith. A federal appeals court upheld that result, noting that the statute does not require documentation of the original classification decision and requiring frequent classification review would be “untenable.” Between the position description and the testimony of the employee, his supervisor, and NCIS’s classification witness, the evidence supported the holding that NCIS reasonably believed that the position had “substantial” managerial duties. [Shea v. United States](#), #19-2130, 2020 U.S. App. Lexis 30767, 2020 WL 5666884 (Fed. Cir.).

Handicap/Abilities Discrimination: Reasonable Accommodation

A woman worked for a Colorado county clerk and recorder's office. Because of a posterior reversible encephalopathy syndrome ("PRES"), a rare condition characterized by fluctuating blood pressure that causes swelling in the brain, coma and sometimes death, she became unable to work for a time. Eventually, the condition resolved and she began to recover. The county permitted her to take a number of months off, but then fired her. By that time, she claimed, she had recovered enough to return to work with reasonable accommodations for her disability.

She sued the employer under the Americans with Disabilities Act ("ADA"). Overturning summary judgment for the employer, a federal appeals court ruled that the plaintiff had presented sufficient evidence from which a jury could have found that the employer failed to engage in the collaborative interactive process that the ADA called for between an employer and an employee in order to determine whether there was a reasonable accommodation that would have permitted the employee to perform the essential functions of her job. In light of that evidence, her failure-to-accommodate and disability discrimination claims were sufficient to survive summary judgment. Summary judgment for the county was affirmed, however, on the employee's retaliation claims because she failed to present sufficient evidence for a reasonable jury to find that the county terminated her employment in retaliation for her asking for an accommodation. [*Aubrey v. Koppes*](#), #19-1153, 2020 U.S. App. Lexis 29891, 2020 WL 5583649 (10th Cir.).

Pay Disputes

The Nebraska Supreme Court upheld summary judgment for the state, dismissing the claim of an employee of the Nebraska Department of Health and Human Services (DHHS) for an alleged violation of the state Wage Payment and Collection Act on behalf of himself and other agency employees. He argued that the employer's failure to pay him for leave hours during pay periods in which he also worked his full normal hours violated the statute. The court ruled that because the labor contracts at issue contained no provision guaranteeing employees the right to use leave time to the extent that doing so would cause them to exceed their normal hours during a pay period, the employer could, within the terms of the labor contracts, enforce its policy prohibiting employees from doing so. [*Lassalle v. State*](#), #S-19-810, 307 Neb. 221, 2020 Neb. Lexis 148.

Retaliatory Personnel Actions

An attorney employee of the federal EEOC claimed that the employer had subjected her to a retaliatory hostile work environment in violation of Title VII of the Civil Rights Act and had violated her rights against disability discrimination under the Rehabilitation Act of 1973. A federal appeals court ruled that the trial court improperly dismissed the employee's retaliatory hostile work environment claim under Title VII, as well as her interference and reasonable accommodation claims under the Rehabilitation Act. The court found that an employer's alleged deliberate attempts to affect an employee's finances and access to healthcare were precisely the type of conduct that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. She pointed to incidents involving anomalies related to her compensation and benefits alleged to have been carried out in retaliation for her pursuing her disability claims.

The employee's Rehabilitation Act reasonable accommodation claim was improperly dismissed because the trial judge erroneously relied on documents outside the complaint as dispositive evidence of the nature of the employee's accommodation request. The employee's Rehabilitation Act interference claim was improperly dismissed because the complaint described the nature of her disability of "depression, acute stress, severe hypertension and complex post-traumatic stress disorder," the employer's persistent and intentional efforts to undermine her exercise of statutorily protected rights, and the employer's apparent failure to engage with the employee in good faith to identify a reasonable accommodation. [*Menoken v. Dhillon*](#), #18-5284, 2020 U.S. App. Lexis 29184, 2020 WL 5521676 (D.C. Cir.).

Workers' Compensation

The Supreme Court of Rhode Island reviewed an award of accidental disability benefits under workers' compensation for occupational cancer to a firefighter. It held that the workers' compensation commission had jurisdiction to hear the employee's appeal but erred in finding that R.I. Gen. Laws 45-19.1-1 contains a conclusive presumption that all cancer in firefighters is occupational cancer. The employee served as a firefighter for the City of Cranston until he was diagnosed with colon cancer. He applied for accidental disability benefit based upon his cancer diagnosis. The Retirement Board of the Municipal Employees' Retirement System of Rhode Island denied the application, finding that he did not prove that

his cancer arose out of and in the course of his employment as a firefighter. The workers' compensation commission then filed his petition arguing that, under chapter 19.1 of title 45 of the Rhode Island statutes, all cancers contracted by firefighters are presumed to be work-related. The trial judge agreed and reversed the board. The Supreme Court held that the law does not contain any presumption that all cancers in firefighters are occupational cancers, and a firefighter must prove that a cancer is occupational. [*Lang v. Municipal Employees' Retirement System of Rhode Island*](#), #17-295, 222 A.3d 912, 2019 R.I. Lexis 144, 2019 WL 6884531 (R.I. 2019).

A police officer in Nevada claimed that he suffered progressive hearing loss from his job to the point where he was assigned to desk duty. "It's a risk that many officers might eventually suffer, for even on the best of days the typical police officer is exposed to a variety of noises that the rest of us might never experience, from such things as sirens, radio earpieces, shouted commands, and the sound of gunfire—maybe not from the rare occasion of having to draw a weapon against a suspect, but much more routinely by being required to regularly qualify on the shooting range," a Nevada intermediate appeals court commented. The officer sought compensation under Nev. Rev. Stat. 617.430 and .440, which entitle employees to workers' compensation benefits if they suffer a disability caused by an "occupational disease." Because he already had some level of hearing loss, perhaps genetically induced, before his employment as a police officer, the appeals officer denied him benefits. The Nevada appeals court held that the plain language of Nev. Rev. Stat. 617.366(1) did not exclude the possibility of benefits for hearing loss when at least part of Respondent's current hearing disability was attributable to some level of hearing loss before he began his job that made the hearing loss worse and ordered further proceedings. [*City of Henderson v. Spangler*](#), #76295, 136 Nev. Adv. Op. No. 25, 464 P.33d 1039, 2020 Nev. App. Lexis 1, 2020 WL 2510922.

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RESOURCES

Statistics: [State and Local Government Expenditures on Police Protection in the U.S., 2000-2017](#), by Kevin M. Scott and Emily Buehler, Bureau of Justice

Statistics (July 13, 2020 NCJ 254856).

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

Handicap/Abilities Discrimination: Reasonable Accommodation – See also,
Retaliatory Personnel Actions
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