

Employment Law Update

Recent Cases

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FIRST AMENDMENT FREEDOM OF SPEECH

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) – Plaintiff, a Deputy DA wrote a memo recommending dismissal of a criminal case over questionable information in the search warrant affidavit. A decision was made by the office that the case would proceed and the Plaintiff was called by the defense to testify in a suppression hearing at which the government ultimately prevailed. Plaintiff was subsequently transferred and sued alleging his transfer and denial of a subsequent promotion was based on his memo, which he alleged constituted protected speech. The Supreme Court held that only speech made *as a citizen* on matters of public concern is protected by the 1st Amendment. The Court found, in a 5-4 decision, that Plaintiff's speech, because it was made "pursuant to the employee's job duties" was not protected by the Constitution.

Fuerst v. Clarke, 454 F.3d 770 (7th Cir. 2006) – Deputy in the 600 officer Milwaukee County Sheriff's Department allowed to proceed to trial in his case alleging that he was denied a promotion based on his earlier campaign activities against the Sheriff and his subsequent criticism of the Sheriff for hiring a \$71,500 "public relations mouthpiece." The Court distinguished *Garcetti*, finding that Plaintiff's comments were made in his capacity as a union representative, not in the course of his employment as a deputy sheriff.

Miller v. Jones, 444 F.3d 929 (7th Cir. 2006) – In a case decided before *Garcetti*, the Court found that a police officers speech relating to a PAL program in which he was initially assigned to participate as part of his regular duties constituted speech on a matter of public concern.

Tripp v. Cole, 425 F.3d 5 (1st Cir. 2005) – Police Chief was asked by the City Manager to have a "dog at large" citation issued against one of the town citizens dismissed. The Chief refused to do so. He later remarked to two town selectmen that his relationship with the Manager had "cooled" after this incident. The Chief is finally terminated following investigations into various old incidents. He sues under the state whistleblower statute and the 1st Amendment. The Court held that he hadn't met the prerequisites of the whistleblower law and further that the speech at issue involved an internal working conditions, not a matter of any real public concern.

Harvey v. City of Bradenton, 2005 WL 3533155 (11th Cir. Dec. 22, 2005) – Police officer who supported losing candidate for Mayor and during the campaign made speeches about morale problems in the police department later denied promotion to sergeant (although he finished fourth on the exam and the officers with the three top and three next lower scores were promoted) was allowed to proceed to trial on his 1st Amendment claims (later prevailing in a jury trial). Political participation held to be one of the core protections of the 1st Amendment.

Weaver v. Chavez, 458 F.3d 1096 (10th Cir. 2006) – Assistant City Attorney in Albuquerque fired after making complaints that attorneys were being hired for political reasons, calling one “a political hack [who] has never tried a case.” This continued after her immediate supervisor instructed her to stop. Based on evidence showing that Plaintiff’s comments either did, or were designed to, undermine the morale of the office and create undeserved criticism of fellow attorneys and involved a serious breach of confidence, the Court held that the City’s interests outweighed the employee’s, who was therefore not entitled to First Amendment protection.

Locurto v. Giuliani, 447 F.3d (2d Cir. 2006) – Three NYPD and FDNY members participated in a Labor Day parade float in their small Queens community that had a racial parody theme. Much media and political attention ensued, including a demonstration by Rev. Al Sharpton. The three were ultimately terminated on conduct unbecoming charges. Court granted summary judgment to Defendants. The Court assumed without deciding that the speech was on a matter of public concern, but held that “[w]e nonetheless find that the defendants’ interest in maintaining a relationship of trust between the police and fire departments and the communities they serve out-weighed the plaintiffs’ expressive interest....The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect.”

Thaeter v. Palm Beach County Sheriff’s Office, 449 F.3d 1342 (11th Cir. 2006) – Two deputies who, along with their wives and others, participated in making pornographic videos that were sold via the internet, were terminated for violating a conduct unbecoming regulation and one requiring prior approval for off-duty work. Dismissal of their First Amendment lawsuit was upheld by the court of appeals, which found the expressive conduct did not involve a matter of public concern and moreover could adversely affect the efficiency and reputation of the PBCSO.

Reilly v. City of Atlantic City, 427 F.Supp. 507 (D.N.J. 2006) – Officer’s participation in internal affairs investigation into alleged criminal wrongdoing is protected by 1st Amendment.

Inturri v. City of Hartford, 2006 WL 231671 (2d Cir., January 31, 2006) – Court upheld police chief’s order that they cover their spider-web tattoos while on duty. Because no fundamental liberty was implicated, the order only needed to have a rational basis. Here, the Chief’s concern that the tattoos could reasonably be perceived as racist, sufficient to justify the order, against the officers’ 1st Amendment, vagueness and equal protection claims.

Shrum v. City of Coweta, 449 F.3d 1132 (10th Cir. 2006) – Claim under the 1st Amendment that assignment of police officer/clergyman to work on Sundays as punishment for union activities allowed to proceed to trial on the theory that this action violated the free exercise clause of the Constitution (the Court noting that religious hardships caused by a neutral scheduling policy would not be so actionable).

TITLE VII

Burlington Northern and Santa Fe Railway v. White, 126 S. Ct. 2405 (2006) – A forklift operator, transferred to other duties following a discrimination complaint and another incident of discipline (subsequently overturned) for insubordination, filed suit alleging retaliation. The Supreme Court held that the standard of harm is different for Title VII discrimination violations (which require an adverse tangible job action) and retaliation claims, which require only action, whether or not employment related, which is *materially adverse*. Materially adverse actions are those that would dissuade a reasonable employee from making a charge of discrimination.

Brown v. Snow, 440 F.3d 1259 (11th Cir. 2006) – IRS tax examiner alleged that his evaluation score was lowered from 3.67 (“Fully Satisfactory” on a 5 point scale) to 3.33 (still “Fully Satisfactory”) after rejecting his female supervisor’s sexual advances. He thereafter applied for, but did not receive, several promotions. Summary judgment was granted to the Defendant because Plaintiff failed to produce any evidence that he suffered a tangible employment action (“a significant change in employment status”). He had no evidence that denials of the promotions were based on discrimination on the lower score. His “mere speculation” in this regard was insufficient to survive summary judgment.

Deloughery v. City of Chicago, 422 F.3d 611 (7th Cir. 2005) – Summary judgment upheld for employer, in case brought by black corrections officer had been referred to in racially inappropriate terms, although never in his presence. He was investigated several times for possible policy violations. His car had also been vandalized on several occasions (scratches, damaged antenna, flat tires). His pay, hours, duties, and job title were never affected. The Court held that a few incidences of racial epithets over several years and vandalism that did not have a racial character were not sufficient to create a claim for racial harassment.

Hux v. City of Newport News, 451 F.3d 311 (4th Cir. 2006) – Female Fire Lieutenant sued alleging discrimination in her failure to be promoted to Captain. Good defense language in the Court’s affirming summary judgment in favor of the Defendant. “The obligation of courts to enforce the essential mandate of anti-discrimination law coexists with the duty not to invade the province of another....” “Interviews are an important tool that employers use to make all sorts of hiring decisions, and we may not lightly overturn the reasonable conclusions an employer reaches after actually meeting with a candidate face-to-face.”

Brooks v. County Commission of Jefferson County, 446 F.3d 1160 (11th Cir. 2006) – In a case involving a promotional challenge under Title VII (race), the Court upheld summary judgment in favor of the Defendant, holding that “[a] plaintiff must show that the disparities between the successful applicant’s and her own qualifications were ‘of such

weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff”(cites omitted).”

Lomack v. City of Newark, ___F.3d___, 2006 WL 662848 (3d Cir., September 18, 2006) – Court overturned race-based transfer and assignment policy implemented to eliminate single-race Fire companies. The Court subjected the policy to strict scrutiny, requiring it to be narrowly tailored to achieve a compelling state interest. The Court found that the desirability of racial diversity in a fire department, with no showing that diversity had any bearing on fighting fires, did not constitute a compelling interest.

United States v. City of Erie, 411 F. Supp. 524 (W.D. Pa. 2005) – The Erie police department adopted a physical agility test as a candidate prescreening tool. It was internally developed and consisted of a 220 yard run, push-ups, sit-ups, six foot and four foot walls to climb, an eight foot crawl and a window climb. The test was timed with cut-off points loosely based on 19 incumbent volunteers who took the test. The passing rates for men and women were significantly different; between 1996 and 2002, 71% of male applicants passes and 12.9% of female applicants. At the point the lawsuit was initiated, the police force in Erie had 202 officers, of whom 9 were female. The District Court found that the test was not validated as a requirement of the job, nor was the City able to prove that the passing score corresponded to a minimum level of skill necessary to successfully perform the job of police officer.

EEOC Compliance Manual Provisions on Race and Color Discrimination – The EEOC issued guidance on race and color discrimination on April 19, 2006. This lengthy guidance contains helpful information and case law cites.

Challenge to Light Duty Policy by Pregnant Officers – A jury awarded female plaintiffs between \$5,000 and \$23,000 each following a change in policy by the Suffolk County Police Department that limited light duty to officers injured on the job.

AMERICANS WITH DISABILITIES ACT

Allen v. Hamm, 2006 WL 436054 (D. Md. Feb.22, 2006) – Baltimore changed its light duty policy to require that after 12 months of light duty, officers be able to perform the functions of making a forcible arrest, driving a motor vehicle under emergency conditions and qualifying with a firearm, or apply for retirement. The Court found that officers unable to perform these three functions were not qualified to perform the essential function of a police officer and not entitled to ADA protection.

Vinson v. New York City Department of Corrections, 2006 WL 140553 (E.D. NY, Jan. 17, 2006) – Court found that corrections worker with a condition exacerbated by smoke was not protected by the ADA, since she could work in any non-smoking environment and her smoke sensitivity (despite keeping her from going to certain bars and social establishments) did not substantially limit a major life activity.

Thursby v. City of Scranton, 2006 WL 1455736 (M.D. Pa., May 25, 2006) – Court denies summary judgment to City on claim that police officer’s smoke allergy is protected by the ADA and City’s failure to prohibit smoking in all Plaintiff’s work areas was unreasonable. The Court held that whether Plaintiff’s smoke allergy substantially limited her ability to work and breathe was a jury question, as was the reasonableness of the City’s response.

Fornes v. Osceola County Sheriff’s Office, 2006 WL 1208050 (11th Cir., May 4, 2006) – Deputy with CIDP (chronic inflammatory demyelization polyneuropathy), which limited his ability to run, lift, and stand for prolonged periods. Deputy argued that the standard for whether he was a “qualified individual” under the ADA should be his *assignment* as a technical services sergeant, not the more demanding general job requirements for a deputy. The Court, however, did not reach this issue, finding that even if he met all of the formal job requirements documented in the technical services sergeant’s job description, the evidence showed that he was in fact unable to meet the actual job requirements.

FAMILY AND MEDICAL LEAVE ACT

Chubb v. City of Omaha, 424 F.3d 831 (8th Cir. 2005) – Police officer who used 3 weeks of paid sick leave for surgery, which was also treated as FMLA leave, denied an annual leave bonus available to officers who use fewer than 40 hours of sick leave per year. Despite the fact that the officer was required by the department to use accrued leave during FMLA leave, the court upheld the denial of the bonus as not violating the FMLA.

Slentz v. City of Republic, 448 F.3d 1008 (8th Cir. 2006) – The City did not violate the FMLA when it allowed a police officer to use only 12 weeks of leave even though the employee had more than 12 weeks of accrued sick leave accrued.

Brumbalough v. Camelot Care Centers, 427 F.3d 996 (6th Cir. 2006) – Damages for emotional distress are not allowed under the FMLA, which the Court found to be consistent with the 4th, 10th, 5th, 11th and 7th Circuits, but inconsistent with the 8th).

FAIR LABOR STANDARDS ACT

Sehie v. City of Aurora, 432 F.3d 749 (7th Cir. 2005) – Emergency dispatcher required to work an extra shift walked off the job. The department sent her to a fitness for duty evaluation. The doctor found her fit for duty, but recommended that she attend weekly counseling sessions for the next six months. The City ordered Plaintiff to attend weekly counseling sessions with a therapist selected by the City as a condition of continued employment. Plaintiff attended the sessions, which lasted an hour, and traveled for two hours back and forth by car to each session. The Court held both the time attending the

counseling and the travel time to be compensable hours worked under the FLSA, determining that the counseling sessions were for the primary benefit of the employer, noting, among other factors, that the City was short of telecommunications staff. Acton v. City of Columbia, 436 F.3d 969 (8th Cir. 2006) – Payments made to employees under a sick leave buy back program must be included in the regular hourly rate for the purpose of the calculation of overtime.

Bull v. United States, 68 Fed.Cl. 212, mod. 68 Fed.Cl. 276 (Ct. Fed. Cl. 2005) – Department of Homeland Security and Customs canine officers entitled to up to four hours per week in compensation for time spent at home constructing training aid containers, laundering and processing training towels and in weapons care and maintenance. Claims for off-duty dog grooming of canines not housed in the officers' homes, vehicle maintenance and paperwork done at home denied absent any evidence that the officers' supervisors knew or should have known that this work was being done.

Long v. United States, 69 Fed.Cl. 566 (Fed.Ct. Cl. 2006) – Canine officers of the U.S. Park Police allowed to proceed with their FLSA case despite language in the collective bargaining agreement establishing 2.5 hours per week of compensation for home canine care. Even assuming FLSA rights can be waived, the Court held that the CBA provision did not constitute a waiver of the officers' right to sue.

Valentine v. Harris County, 2006 WL 568709 (S.D. Tx. 2006) – Officers who admitted they did not accurately report their overtime on their pay sheets and who did not establish that their supervisors had actual or constructive knowledge that they were working overtime estopped from proceeding with their FLSA claims.

DOL Letter Ruling on Fines for Damages (March 10, 2006) – The DOL issued a letter ruling that fining an exempt employee for equipment damage destroys the white collar exemption, which requires an employee be paid on a "salary basis" (meaning that they receive the same pay each pay period regardless of the quality or quantity of work performed). The pay of non-exempt employees can be docked without violating the FLSA, so long as their pay, less the amount docked, still meets the minimum wage.

Other DOL Letter Rulings of Interest

2005-40: Police and Fire managers are exempt if they meet the primary duty and other requirements.

2006-10: Canine handlers can be paid a different rate for dog care with the appropriate agreement in place in advance of the work.

2006-13: Details exemption available for off-duty work at municipally owned coliseum.

2006-19: Training in off-duty weapon need not be compensated.

MISCELLANEOUS EMPLOYMENT DECISIONS

Bledsoe v. City of Horn Lake, 449 F.3d 650 (5th Cir. 2006) – The City’s Board of Alderman scheduled a closed-door meeting to discuss allegations against the fire chief. The Chief requested that the meeting be postponed until his attorney could be present and that the meeting be recorded. Both requests were denied and the Chief was advised to resign or he would be fired. He resigned and immediately filed suit, alleging, inter alia, a due process violation of his liberty interests (lack of a name-clearing hearing). The Court affirmed summary judgment entered in the employer’s favor based on Plaintiff’s failure to request such public hearing.

Winskowski v. Stephen, 442 F.3d 1107 (8th Cir. 2006) – Following criticism of the police chief, the City Council met with the Chief in a closed-door session and thereafter voted to dispense with his services. The Chief filed suit alleging due process violations. The Court denied the Chief’s liberty interest claims based on his failure to request a name-clearing hearing.

Littrell v. City of Kansas City, 459 F.3d 918 (8th Cir. 2006) – Court precluded Plaintiff from litigating claims waived by a release he signed in conjunction with the settlement of a disciplinary matter, notwithstanding Plaintiff’s attempt to invalidate the release on the grounds of duress (holding that financial necessity or the threat of employment termination will not alone constitute duress).

McLain v. City of Somerville, 424 F. Supp. 329 (D.Mass. 2006) – Court held that City violated USERRA when it failed to hire a serviceman as a police officer when his date of discharge made him unavailable until two months after the academy training began.

Reyes v. Maschmeier, 446 F.3d 1199 (11th Cir. 2006) – DARE officer filed an action alleging an illegal seizure by her supervisor in the Sheriff’s Office, who, in the course of a meeting about the program, berated her loudly and struck her in the back of the head with a binder of DARE materials. The Court held that the meeting did not constitute a seizure (finding it did not present the “exercise of governmental authority akin to an arrest”).

Hart v. City of Little Rock, 432 F.3d 801 (8th Cir. 2006), *cert. den.* 126 S.Ct. 2902 (2006) – City’s release of officers’ personnel files to criminal defense counsel, which files included home addresses, family information and social security numbers, upon receipt of a subpoena, did not violate officers’ substantive due process rights (reversing a jury award of \$225,000 to each officer involved).

Moore v. Guthrie, 438 F.3d 1036 (10th Cir. 2006) – Officer injured during a live-fire training exercise sued under s. 1983 alleging that the Chief’s failure to equip the officers with the appropriate protective gear violated his constitutional right to body integrity. Summary judgment entered for the employer, finding no violation of a clearly established constitutional right.