2008 – 2009 Labor and Employment Decisions of the United States Supreme Court and Other Federal Decisions of Note

IACP - Legal Officers Section
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Jody M. Litchford · Deputy City Attorney · City of Orlando · 400 South Orange Avenue · Orlando, Florida 32801 · 407.246.3480 · jody.litchford@cityoforlando.net

Lee Ann Freeman · Police Legal Advisor · Orlando Police Department ·Post Office Box 913 Orlando, Florida 32802-0913 · 407.246.2464 · leeann.freeman@cityoforlando.net

Labor & Employment Law Cases
United States Supreme Court October Term 2008

Disparate impact v. disparate treatment: *Ricci v. DeStefano*, 129 S.Ct. 2658 (June 29, 2009).

New Haven, Connecticut firefighters vying for advancement to the rank of lieutenant and captain, participated in a promotional examination process in 2003. The City hired Industrial/Organization Solutions, Inc. (IOS) to develop and administer those tests. IOS developed the promotional examination from materials provided by the City. At each stage of job analyses, IOS oversampled minority firefighters to ensure the process did not unintentionally favor white majority candidates. IOS utilized qualified outside assessors at the City's request, two-thirds of whom were minorities. IOS was experienced in development and administration of promotional examinations for governmental communities similar to New Haven. The testing and assessment process was administered according to the terms of the collective bargaining contract, established Civil Service Board (CSB) rules and the City's charter. The City employed a "rule of three" for those who made the promotional eligibility list.

The results of the tests revealed statistical racial disparity, with white candidates far outperforming minority candidates. 77 candidates completed the lieutenant's examination, 43 whites, 19 blacks and 15 Hispanics. Of those, 34 candidates passed the examination – 25 whites, 5 blacks and 3 Hispanics. The rule of three made the top 10 candidates (all white) eligible for immediate promotion to fill 8 vacancies. Subsequent vacancies would have allowed 3 black candidates to be promoted.

41 candidates completed the captain's examination – 25 whites, 8 blacks, and 8 Hispanics. 22 passed – 16 whites, 3 blacks, and 3 Hispanics. The top 9 candidates – 7 whites and 2 Hispanics – were eligible for immediate promotion to fill 7 vacant captain positions.

City officials and the CSB reviewed the list and realized the statistical racial disparity, and rancorous public debate ensued. The CSB held several meetings and received input from the public, city officials, union representatives, testing experts, IOS staff, and promotional exam participants. There was spirited argument for and against certification of the promotional list, with the threat of lawsuit against the City in either case. Based on the statistical racial disparity in the list, and the fear of suit for disparate impact, the City refused to certify the list.

Ricci and his fellow plaintiffs sued, alleging disparate treatment discrimination under Title VII, claiming the City's refusal to certify the list was intentional race-based discrimination. New Haven responded that, if the City had certified

the test results, it would certainly have faced Title VII liability based on the disparate impact on minority test participants.

The District Court granted summary judgment for the City and the Second Circuit affirmed. The Supreme Court accepted the case on a petition for *certiorari* review.

The United States Supreme Court reversed in a 5-4 decision. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justice Scalia authored a concurring opinion, as did Justice Alito, in which Justices Scalia and Thomas joined. Justice Ginsburg filed a dissenting opinion, joined by Justices Stevens, Souter, and Breyer.

The Court noted that Congress intended that all provisions of the Civil Rights Act of 1991 be enforced. Employment decisions based on race are prohibited, whether by disparate impact or disparate treatment. "We must interpret the statute to give effect to both provisions where possible."

The Court began its analysis by holding that the City's refusal to certify the list was an express, race-based decision, prohibited by Title VII. All evidence showed that New Haven rejected the test because there were no minorities in the top tier; otherwise stated, the list was rejected because all top tier candidates were white, an intentional race-based decision.

In determining how to reconcile purported conflict between disparate impact and disparate treatment provisions of the federal law, the Court looked to its Equal Protection cases in which action was taken to remedy past discrimination. In those decisions, the Court said that race-based remedial actions are constitutional under the Equal Protection clause only when there is a strong basis in evidence that such action is necessary. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989), *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 290 (1986).

Applying the same analysis to the statutory tension at issue in *Ricci*, the Court said that while the City of New Haven had a legitimate fear that the test results demonstrated *prima facie* evidence of disparate impact, that kind of threshold evidence is wholly inadequate to establish Title VII disparate impact liability.

A plaintiff claiming statutory disparate impact under Title VII must establish a *prima facie* case of that disparate impact, which the employer may defend by showing that the practice is "job-related for the position in question and consistent with business necessity." The plaintiff may still succeed, but only if the plaintiff can show that the "employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the

employer's legitimate needs." 42 U.S.C. §§2000e – 2(k)(1)(A)(i) and 2000e – 2(k)(1)A)(ii) and (C).

The Court held that an employer cannot engage in disparate treatment under Title VII simply to avoid possible disparate impact liability. "Before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."

The Court criticized the City's argument that the promotional examination process was not job related; an abundance of record evidence pointed to a contrary conclusion. Evidence of job-relatedness and business necessity was so obvious that the Court made a specific finding that the City would avoid any future claim of disparate impact based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

An employer may not avoid disparate-impact liability by committing an intentional act of disparate-treatment discrimination. Resolution of the any competing expectations under the disparate-treatment and disparate-impact provisions of Title VII is to be achieved by application of the strong basis in evidence analysis.

Collective bargaining and mandatory arbitration for statutory claims.
***14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (April 1, 2009)**

Petitioner is a member of the Realty Advisory Board (RAB), a bargaining association for the New York City real property industry. The Service Employees International Union (Union) is the exclusive bargaining representative for employees within the building services industry. The Union and the RAB have a Collective Bargaining Agreement (CAB). Respondents are Union members employed by Temco, a maintenance service and cleaning company; they worked as night lobby watchmen and similar positions in a building owned by petitioner.

With the Union's consent, 14 Penn Plaza engaged a security contractor affiliated with Temco to provide licensed security for the building. This new arrangement rendered the respondents' job assignments unnecessary so Temco reassigned them to cleaning and porter duties.

Respondents complained that the reassignments led to lost income and other damages and asked the Union to grieve the action based, among other things, on discrimination under the Age Discrimination in Employment Act (ADEA). The CBA contained a specific requirement that members arbitrate ADEA claims.

The Union requested arbitration but withdrew the age-discrimination claim on the basis that its earlier agreement to the new security contract precluded it from objecting to the respondent's reassignments as discriminatory. The Union continued to advance respondents' other claims in arbitration. Respondents filed an EEOC complaint; after receiving a dismissal and notice of rights, respondents filed an ADEA suit in federal court.

14 Penn Plaza filed a motion to compel arbitration under the terms and conditions of the CBA; the federal court denied the motion. The Second Circuit affirmed, holding that its precedent, following *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), forbids enforcement of collective bargaining agreement provisions that require arbitration of discrimination claims. The Second Circuit noted some tension between *Gardner-Denver* and the more recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), (upholding an individual's waiver of right to a judicial forum for an ADEA complaint).

The U.S. Supreme Court reversed the Second Circuit in a 5-4 decision delivered by Justice Thomas (joined by Chief Justice Roberts, Justices Scalia, Kennedy and Alito). Justice Stevens filed a dissenting opinion, as did Justice Souter, who was joined by Justices Stevens, Ginsburg, and Breyer.

The Court held that a collective-bargaining agreement that clearly and unmistakable requires union members to arbitrate ADEA claims is enforceable.

Justice Thomas explained that the *Gardner-Denver* case was far more limited in scope than posited by the Second Circuit and the respondents. *Gardner-Denver* involved a collective-bargaining agreement that set forth contractual nondiscrimination conditions, and which contained a requirement that any differences arising under the agreement be arbitrated. The Court explained that *Gardner-Denver's* arbitration clause required only that contractual disagreements be arbitrated; it did not mandate arbitrations of statutory right violations. That collective-bargaining agreement contained no waiver of forum in which to enforce statutory nondiscrimination rights.

The Court explored precedent: *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), held that an arbitration clause that does not address violations of statutory rights does not preclude a complaining party from bringing judicial action under the FLSA; *McDonald v. West Branch*, 466 U.S. 284 (1984), recognized that an arbitrator's authority is derived solely from the terms of the contract, which when silent as to enforcement of statutory §1983 rights, provides no authority to an arbitrator to decide those issues; *Gilmer* held that an individual was free to waive the right to a particular forum in which to raise a grievance, and is in harmony with *Gardner-Denver*. The Court declared no legal distinction between an individual waiver of forum (*Gilmer)* and

a collective waiver made by a union on behalf of its individual members (*14 Penn Plaza*).

Respondents argued that Court precedent forbids arbitration of statutory employment rights. To the contrary, the Court held that those cases, as summarized in *Gilmer*, involved a very different issue – whether arbitration of contract-based claims precludes subsequent judicial resolution of similar statutory claims.

There is nothing in the ADEA to prevent or prohibit individuals, or unions on behalf of their members, from waiving the right to bring statutory claims in judicial forums. Until such time as Congress amends the ADEA to remove that class of grievance from the NLRA's broad sweep, individuals and unions are free to bargain those matters.

An agreement to arbitrate a statutory right is not the same as a waiver of the underlying substantive right. Rather, it is an agreement to limit the forum in which violations of those rights will be heard. Unless the statute itself prohibits arbitration of specific rights, individuals and their representative collective bargaining units are free to contractually agree upon the forum in which violations of those rights are heard.

To the extent that dicta from earlier precedent suggested arbitration as an inadequate forum for such grievances, the Court explained that it has since recognized arbitration as ready and capable forums for handling such factual and legal matters.

Title VII anti-retaliation provisions protect employees who provide information to their employers about discriminatory workplace practices. *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (January 26, 2009).

Vicky Crawford was a 30+ year school district employee. In 2002, the district began investigating rumors that its employee relations director, Gene Hughes, hired a year earlier, was engaged in sexual harassment. As part of the district's internal investigation, Crawford was asked whether she had ever witnessed Hughes engage in "inappropriate behavior" in the workplace. Crawford replied that she had been the target of several incidents of obnoxious sex-based behavior. Two other employees reported similar experiences involving Hughes.

Metro took no corrective action against Hughes. Shortly after providing their statements for the investigation, the district fired Crawford and the other two employees. The district claimed Crawford was fired for embezzlement, a claim later unfounded.

Crawford complained to the EEOC and filed suit in federal court, alleging retaliation under Title VII. 42 U.S.C. §2000e-3(a) makes it unlawful for an employer to discriminate against any employee because the employee opposed an unlawful discriminatory practice of the employer (the "opposition clause") or because the employee made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing regarding discriminatory practices in the workplace (the "participation clause").

The district court granted summary judgment for respondents, indicating that Crawford's responses to her employer's questions did not qualify as "initiation or instigation" of a discrimination complaint and, therefore, fell far short of triggering "opposition clause" protections. It likewise held that her report did not qualify as "participation" in an EEOC charge that would invoke Title VII "participation clause" protections. The Sixth Circuit affirmed on the similar grounds, holding that the opposition clause requires "active, consistent 'opposing' activities to warrant . . . protection against retaliation." This ruling was consistent with earlier Sixth Circuit decisions.

The U.S. Supreme Court accepted *certiorari* review and specifically noted in its opinion that Sixth Circuit's decisions in this area were in conflict with all other Circuits, particularly regarding the opposition anti-retaliation clause.

A unanimous Court reversed the Sixth Circuit. Justice Souter wrote the Court's opinion, joined by Chief Justice Roberts, Justices Stevens, Scalia, Kennedy, Ginsburg, and Breyer. Justice Alito filed a concurring opinion joined by Justice Thomas.

The Court did not need to reach the "participation clause" argument, as it was able to reverse on the "opposition clause" issue alone. The Court held that an employee does not have to be the initiator or instigator of a complaint of discriminatory conduct in order for anti-retaliation protections to apply; it is enough that the employee's "opposition" be demonstrated in response to the employer's questions.

Citing EEOC guidelines, the Court said that an employee "opposes" discriminatory behavior in the workplace when that employee tells her employer a "disapproving account of sexually obnoxious behavior toward her by a fellow employee." "Countless people were known to 'oppose' slavery before Emancipation, or are said to 'oppose' capital punishment today, without writing public letters, taking to the streets, or resisting the government."

The Court found Sixth Circuit precedent out of sync with *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). Both cases hold employers subject to vicarious liability to victimized employees for an actionable hostile work environment created by a supervisor with authority over the employee. The holdings of those cases and their

progeny are a strong incentive for employers to ferret out and eradicate such behavior. If employees who report discrimination in answer to such an investigation were subject to dismissal without remedy, "prudent employees would have a good reason to keep quiet about Title VII offenses." Noting that fear of retaliation is the reason why most people remain silent on such issues, the Court said that it is no "imaginary horrible:"

> If an employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it 'exercised reasonable care to prevent and correct [any discrimination] promptly' but 'the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer. *Ellerth*, at 765.

It obviously strained the Court's credulity to believe that Crawford did not "oppose" the personnel director's sexual harassment when she reported his grossly inappropriate sexual behavior to the employer in direct response to their investigation of rumors of that very behavior.

Labor & Employment Law Cases from the Lower Federal Courts

Americans with Disabilities Act

Allmond v. AKAL Security, Inc., 558 F.3d 1312 (11th Cir. 2009) – Plaintiff applied to a private security company providing security services at federal courts via a contract with the US Marshalls Service. He failed to pass the pre-employment physical which required applicants to pass a hearing test without using any assistive devices. The Court of Appeals upheld a grant of summary judgment to Defendants in the ensuing ADA case, finding the ability to hear without assistive devices to be job-related and consistent with business necessity in light of the safety risks at stake in this job position.

Hennagir v. Utah Department of Corrections, 2009 WL 2883037 (10th Cir. September 10, 2009) – Plaintiff's position as a physician's assistant at a correctional facility was brought under the Public Safety Retirement System after she had been employed there for several years. Enrollment in the retirement system required POST certification, which Plaintiff was unable to complete because of preexisting health issues. She was offered a transfer to another facility or a non-PSR position. She instead sued alleging a violation of the ADA. The Court upheld summary judgment for the Defendants, finding, inter alia, that the essential function requirement is determined as of the date of imposition (employers are not limited in establishing new job requirements by the ADA) and that just because a task is rarely performed does not mean it is non-essential. In this instance, the Court agreed that safety concerns in prisons justified the POST requirement. Reasonable accommodation does not require the elimination of an essential job requirement.

Fair Labor Standards Act

Scott v. City of New York, 592 F.Supp.2d 386 (SDNY 2008), 2008 WL 4949343 (SDNY Nov. 19, 2008), 2009 WL 2610747 (SDNY August 25, 2009) – FLSA class action filed against NYPD, involving over 15,000 plaintiffs and originally seeking hundreds of millions of dollars of damages. Several rulings favorable to the Department resulted, including a decision that overtime opportunities could be offered only to officers willing to accept compensatory time rather than cash overtime and a ruling that denial of a request to use comp. time without a provision of alternate dates is not a per se violation of the FLSA. The Department was found to have violated the FLSA by failing to pay some overtime due as a result of the regular schedule periodically exceeding 171 hours in a 28 day period and for failing to include shift differential in the regular rate. After trial, the plaintiffs were awarded $900,000 in past overtime damages (after the award was doubled based on a finding that the violations were willful) (approximately $30 per plaintiff, doubled to $60). Although the

court dramatically reduced the attorneys fees requested by plaintiffs, it awarded $4,328,194 in fees and costs to the several firms involved.

Heitmann v. City of Chicago, 560 F.3d 642 (7th Cir. 2009) – The Court found essentially the same practice for granting or denying overtime used upheld by Scott in the NYPD (decisions to grant or deny requests are made at the Supervisory level based on a subjective evaluation of staffing needs) to violate the FLSA because the Department failed to treat an officer's request as beginning a reasonable time period in which the officer must be granted time off.

Kasten v. Saint-Gobain Performance Plastics Corp., 870 F.3d 834 (7th Cir. 2009) – Plaintiff, terminated from his employment after failing to properly clock in on numerous occasions, filed a case claiming his termination to be illegal retaliation in response to numerous verbal complaints he had made about the legality of the location of the time clocks. The Court of Appeals held that verbal (unwritten) complaints do not trigger the retaliation provisions of the FLSA. This position is consistent with the 4th and 2d circuits, but inconsistent with the 6th, 8th and 11th circuits.

National Council of EEOC Locals v. EEOC, FMCS Case. No. 071012-00226-A (March 23, 2009) – An arbitrator found that the EEOC willfully violated the FLSA by requiring staff to take comp. time rather than overtime pay for excess hours worked.

DOL Wage and Hour Opinion 2008-11NA (September 22, 2008) – Detention officers cannot volunteer as reserve sheriff deputies in the same agency without being paid under the FLSA. Detention officers can volunteer to work without pay as reserve officers in an agency that is not their primary employer.

DOL Wage and Hour Opinion 2008-16 (December 18, 2008) – The jobs of civilian victim specialist in the department's crisis unit and reserve police officer are sufficiently dissimilar that generally the civilian could volunteer as a reserve officer without the volunteer hours counting as "hours worked" for overtime purposes. In this instance, however, reserve officers "volunteer" for 10 hours per quarter, but thereafter are eligible for employment paid by the City at 17.31 per hour (not nominal). The DOL stated that all paid hours worked must be combined for FLSA purposes if they occur on a regular or predictable basis. It the reserve hours are truly occasional and sporadic, the time need not be combined for overtime purposes.

DOL Wage and Hour Opinion 2009-15 (January 15, 2009) – Time spent outside regular working hours doing homework *required* as part of a *required* training course must be compensated (excluding training required by law in order to maintain certification).

Title VII (Discrimination)

Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. 2009) – Plaintiff, a veteran female Muslim police officer was disciplined with a 13 day suspension for reporting to work wearing a traditional Muslim headscarf while in uniform, after being denied the right to do so by her commanding officer. The Court denied Plaintiff's freedom of religion claim, holding that requiring the Department to accommodate this religious practice would constitute an undue hardship in light of the evidence presented on the need to have uniformity and the appearance of religious neutrality.

Lightner v. City of Wilmington, N.C., 545 F.3d 260 (4th Cir. 2008) – Plaintiff, w/m Acting Division Commander of Professional Standards Department, who received one week suspension was not similarly situated to b/f officer who received a one day suspension for same offense (related to ticket fixing).

Jimenez v. Dyncorp, International, 2009 WL 2143470 (W.D. Texas July 13, 2009) – Female applicant not hired for police advisor position in Afghanistan sued alleging sexual discrimination committed by the psychologist who evaluated her. Summary judgment denied in an opinion that the psychologist was an agent of the employer and the employer was liable for any liability arising from his acts.

Nagle v. Village of Calumet Park, 554 F.3d 1106 (7th Cir. 2009) – Plaintiff's assignment to senior liaison position and to strip mall detail, which did not involve any change in pay, hours, or prospects for advancement, not "materially adverse," sufficient to support a claim for retaliation.

Sprinkle v. City of Douglas, Ga., 621 F.Supp.2d 1327 (S.D.Ga. 2008) – Court held that post-EEOC charge complaints of discrimination are not barred by failure to exhaust administrative remedies, but can be heard as part of underlying EEOC case. Plaintiff's allegations that he was reassigned to an older patrol car, denied the opportunity to work overtime on "more than one occasion" and that his off-duty work request was unreasonably delayed sufficient to constitute actionable adverse actions on a retaliation claim.

Porter v. City of Flint, 2009 WL 1406405 (E.D.MI May 19, 2009) – White police officers suit challenging Mayor's appointment of only black officers to newly created citizen-service bureau as racially discriminatory allowed to proceed.

City of Baltimore settlement – On June 18, 2009, the City of Baltimore settled a case involving allegations of disparate discipline against African American police officers for $4.5 million in monetary and non-monetary relief. The attorney representing the fifteen plaintiffs handled the matter pro-bono.

First Amendment

Desrochers v. City of San Bernardino, 572 F.3d 703 (9th Cir. 2009) – Plaintiffs, two sergeants, allege that one was demoted and one investigated unfairly and suspended following a grievance they filed alleging their lieutenant was "autocratic, controlling and critical." Court held this speech to be outside the protection of the 1st Amendment, not involving an issue of public concern.

Milwaukee Deputy Sheriff's Association v. Clarke, 574 F.3d 370 (7th Cir. 2009) – Deputy's speech in mocking an inspirational message transmitted by the Sheriff held, in context, to be a matter of personal concern and hence unprotected by the 1st Amendment. In a separate holding, the Court upheld Milwaukee's regulation, requiring employees to keep official business confidential and precluding speech on behalf of the organization unless authorized by the Sheriff. to address only official capacity speech, and hence unprotected under *Garcetti.*

Robinson v. York, 566 F.3d 817 (9th Cir. 2009) – Plaintiff's reports of misconduct held to be matters of public concern, reserving for trial the issue of whether such reporting was included within Plaintiff's job duties. The Court further found that failure to follow a chain-of-command reporting regulation could not be used to retaliate against protected speech (also a question of fact reserved for trial).

Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. 2009) – Officers alleged that they were subject to adverse actions after investigating misconduct by members of the department, working with the FBI on same and ultimately testifying before a grand jury. The Court (with one judge dissenting) found all of these actions to be within the general statutory duties of a police officer and denied the 1st Amendment claims under *Garcetti.*

Davenport v. University of Arkansas, 553 F.3d 1110 (8th Cir. 2009) – University public safety officer's report to University officials about the chief's alleged misuse of resources and lack of equipment, held to be outside his normal job duties and hence protected speech as a private citizen (although ultimately the claim failed on other grounds). Plaintiff's cooperation with state police investigation into the Chief's activities were part of his official duties and therefore not protected by the 1st Amendment.

Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009) – Major in the Baltimore P.D. ultimately terminated after releasing to the media an internal memo he had authored requesting an investigation into a deadly use of force by a tactical unit. Grant of summary judgment to Defendants reversed by Court of Appeals, including strong concurrence by J. Wilkinson: "It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon."

Broderick v. Evans, 570 F.3d 68 (1st Cir. 2009) – Plaintiff, a former police captain, sued the Boston P.D. alleging that his ultimate discharge was in retaliation for his reports of overtime abuses and his subsequent lawsuit over pending disciplinary charges. Jury verdict of $1.565 million upheld, although both the trial and appellate court found the case to be "thin," did not find the jury to be "irrational" in finding the protected conduct "played enough of a role in the mix" to support a verdict.

Nebraska v. Henderson, 762 N.W.2d 1 (Neb. 2009) – Nebraska Supreme Court overturned, on public policy grounds, an arbitration order reinstating a state patrolman discharged because of his membership in the KKK.

Matrisciano v. Randle, 569 F.3d 723 (7th Cir. 2009) – Plaintiff, a former Assistant Deputy director of the Illinois DOC testified in favor of the inmate at a convicted and controversial mob hitman's parole hearing and was subsequently reassigned to a less prestigious position. The Court of Appeals, after analyzing all the relevant 1st Amendment factors concluded that Plaintiff's rights were in any event not clearly established at the time and the Defendants were entitled to qualified immunity.

Bergeron v. Cabral, 560 F.3d 1 (1st Cir. 2009) – Sheriff's alleged decommissioning of jail officers (resulting in their ineligibility to work security details as deputies) allegedly due to their union activities and support for a political rival not entitled to qualified immunity, as the rights of non-policy making employees to be protected against adverse action based on their political beliefs is clearly established.

Miscellaneous Cases

Lerman v. City of Fort Lauderdale, 2008 WL 5378127 (S.D.Fl. December 23, 2008) – Protected-age police officers challenged an early retirement plan offered by the City, which included a DROP plan, as violative of the ADEA. The District Court entered summary judgment for the City, finding that the officers had executed voluntary waivers that met the requirements of the OWBPA, with a good explanation of those requirements. Note: the EEOC published an excellent summary of such agreements on July 15, 2009, entitled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements," available on the EEOC website.

Mach v. Will County Sheriff, 2008 WL 2692018 (N.D.Ill. July 1, 2008), affd., 2009 WL 2750256 (7th Cir. September 1, 2009) - District Court granted summary judgment against Plaintiff on his ADEA claim that a transfer to traffic from patrol, which was to an allegedly less prestigious job, finding no objective evidence that such a transfer constituted a materially adverse employment

action. In subsequent decision, the Court of Appeals upheld the summary judgment award as well as an order that Plaintiff pay part of the Defendant's attorneys fees.

Riggins v. Goodman, 572 F.3d 1101 (10th Cir. 2009) – Plaintiff was terminated from his position as a sergeant in the Louisville, CO P.D. The Court upheld his termination, finding that Plaintiff had been given sufficient due process, including an extensive analysis of the right to an "unbiased" decision-maker, noting that this requirement ensures a decision-maker who is not personally biased against the party, not a lack of previous knowledge of, or even participation in, the case.

Perraglio v. State of New Mexico, 106 FEP Cases 1555 (D.N.Mex. 2009) – In ruling on a motion in limine in a discrimination case, the District Court allowed the admission into evidence of a tape recording made by a recorder left on, sitting on the Plaintiff's desk in his cubicle during working hours in an area accessible to the public.

Poirier v. Massachusetts Department of Corrections, 558 F.3d 92 (1st Cir. 2009) – Plaintiff, a prison guard, was discharged after engaging in a romantic relationship with a former inmate, in violation of DOC regulations. Plaintiff sued, alleging a violation of her substantive due process right to intimate association. The Court found the state's interest in preserving prison security to outweigh any intrusion into Plaintiff's private life.

Doe v. Department of Justice, 565 F.3d 1375 (Fed.Cir. 2009) – Plaintiff was employed by the FBI as a special agent. He was discovered to have been videotaping consensual sexual encounters without the knowledge or consent of his partners. As a result, Plaintiff's employment with the FBI was terminated. The Court of Appeals remanded for consideration of whether the off-duty conduct had sufficient job nexus to support the agency's right to discipline insofar as it did not, as originally thought, violate federal or state law. Sufficient nexus would depend on whether the off-duty personal conduct impacted agency's ability to perform its responsibilities or whether it violated an internal regulation.

State Troopers v. State of New Jersey, 2009 WL 2058811 (D.N.J. July 9, 2009) – Twenty one troopers, also licensed attorneys in New Jersey, challenge application of a new state ethics provision that precludes troopers from practicing law (except in a limited *pro bono* capacity). The District Court dismissed the challenge, finding that the regulation was sufficiently rationally related to a legitimate state purpose to withstand Equal Protection and Liberty interest challenges and further that there was no property right to secondary employment.

Potts v. Davis County, 551 F.3d 1188 (10th Cir. 2009) – Following an investigation into improper conduct, Plaintiff, a sheriff's sergeant, was terminated. He was reinstated to the rank of sergeant by a merit system appellate board. He was assigned to court security (his former position had involved supervising paramedics). His salary, rank and benefits remained the same, although he was no longer able to work nights and therefore couldn't qualify for night shift differential. Several months later he received an allegedly threatening voice message, but the department concluded that there was not enough evidence to conduct an investigation. Plaintiff resigned and sued, alleging due process violations and constructive discharge. The Court of Appeals upheld a grant of summary judgment to the Defendants holding, inter alia, that if "employees had protected property interests in every nuance and detail of their particular positions, employers would lose their ability to transfer employees between positions-otherwise equal in pay and grade- without risking a lawsuit."