

**Labor and Employment Decisions
Affecting Criminal Justice Agencies
U. S. Supreme Court 2009 - 2010**



**Legal Officers Section Track
International Association of Chiefs of Police
Annual Conference, October 2010
Orlando, Florida**

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First Amendment

Christian Legal Society v. Martinez, 130 S. Ct. 2971, No. 08-1371 (June 28, 2010)

The Christian Legal Society challenged a public law school's requirement that all student groups wishing to use school funds or facilities must open their membership to all students, even those who do not share the organizations' core beliefs (in this case, about religion and sexual orientation).

In a 5-4 decision, the Court ruled that, although the First Amendment protects the CLS against governmental prohibition of expressive activity, it does not require the government school to subsidize the group's selectivity.

Second Amendment

McDonald v. City of Chicago, 130 S. Ct. 3020, No. 08-1521 (June 28, 2010)

D.C. v. Heller, 128 S. Ct. 2783 (2008) invalidated a federal firearms law, declaring that the Second Amendment guarantees a fundamental individual right to bear arms. *McDonald* extends the *Heller* decision to state and local governments. Justice Alito, writing the plurality opinion, said that the Fourteenth Amendment's Due Process Clause makes the Second Amendment applicable to the states, while Justice Thomas said that the Privileges and Immunities Clause extends the right to the states.

These decisions do not grant unlimited rights to weapons ownership: the right applies only to weapons "in common use," and "presumptively lawful" regulations and prohibitions remain valid (e.g., laws regulating possession by convicted felons, mentally ill persons, minors, or domestic violence offenders, and laws regulating firearm possession in sensitive places such as government buildings, airports, and schools, remain valid).

Now that the Second Amendment has been clearly announced to be a fundamental individual right, the "reasonableness" standard by which governmental regulation had previously been evaluated is now a thing of the past. Unfortunately, the Court declined to announce a new standard of review in either *Heller* or *McDonald*. In the wake of *Heller*, some courts have applied an "intermediate scrutiny" test (substantially related to an important government interest), but the Court's failure to announce a standard will certainly contribute to the flood of firearm-related litigation to come. Employers should be mindful of the *McDonald* decision in establishing workplace rules, regulations, or prohibitions regarding otherwise lawful possession of firearms by employees.

Fourth Amendment

City of Ontario v. Quon, 130 S. Ct. 2619, No. 08-1332 (June 17, 2010)

A member of the Ontario California Police SWAT team, Sgt. Quon was issued a two-way alphanumeric pager. City policy restricted pager use to official purposes, and texts in excess of the plan rate resulted in overage charges. Supervisors were concerned about recurring overage charges for the pagers; a lieutenant was asked to look into the usage and collect reimbursement from staff members whose overages were due to personal use. Quon's lieutenant said he didn't want to be in the bill-collecting business, and Quon regularly reimbursed the city for overage charges incurred for his pager.

Eventually, city officials decided audited pager use to determine if business needs required a restructuring of the service plan or if the overages were due to personal messaging in violation of policy. The city obtained transcripts of the text messages from Arch Wireless, from which they learned that Quon was using his pager to exchange sexually explicit messages with his estranged wife and a police dispatcher (Florio) with whom he was having an affair. Quon and another SWAT sergeant (Trujillo) had also exchanged numerous personal messages. Quon was disciplined for violating city policy regarding pager use.

Sgt. Quon was joined by his wife, his girlfriend, and Sgt. Trujillo, and filed suit against the city and Arch Wireless, alleging violations of Fourth Amendment right to privacy and violations of the Stored Communications Act. The district court found no Fourth Amendment violation, ruling that the city sought only to determine whether the pagers were being used in conformity with stated policy. The Ninth Circuit disagreed, saying the audit violated the Fourth Amendment because Quon was told by his lieutenant that his messages would not be subject to audit if he paid the overage charges. The Circuit also ruled against Arch Wireless, finding a violation of the Stored Communications Act (a *certiorari* petition on the SCA issue was denied).

The questions before the Court were: whether, despite the city's no-privacy policy, but by virtue of his supervising lieutenant's informal policy of permitting some personal use of the pagers, Quon had a reasonable expectation of privacy in text messages transmitted on his city-issued pager; and whether individuals who exchanged texts with him had a reasonable expectation that their messages would be free from review by the government employer.

In Justice Kennedy's opinion, the Supreme Court issued a resounding and unanimous "no" to both questions, reminding us anew that the Fourth Amendment's "reasonable" expectation of privacy is not based on personal and subjective expectations, but on that which society deems objectively reasonable.

Arbitration

Stolt-Nielsen S.A., v. Animalfeeds International, 130 S. Ct. 1758, NO. 08-1198 (April 27, 2010)

The Federal Arbitration Act prohibits imposition of class dispute arbitration if the parties' arbitration clauses are silent on the issue.

Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 1133 (January 15, 2010)

Under the Federal Arbitration Act, is the issue of the enforceability of a forced arbitration agreement decided by a court or an arbitrator? The arbitration agreement in this case clearly stated that all threshold issues were to be delegated to and resolved by the arbitrator. Jackson's claim challenged the arbitration agreement as a whole and a provision forcing arbitration of his employment discrimination claim.

The Court ruled that delegation provisions are presumptively valid unless specifically challenged. Jackson's challenge to the overall agreement did not, in the Court's view, constitute a specific challenge to the delegation provision. Because the delegation provision is presumptively valid, any claim that the agreement as a whole is unconscionable must be determined by the arbitrator.

Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847 (January 9, 2010)

An employer claimed against a local union and its international parent organization for economic damages arising from a strike; part of the claim was that the union had agreed to a collective bargaining agreement with a no-strike provision. The union continued to strike until the employer agreed to hold the union members harmless for strike-related damages, claiming the no-strike agreement was not ratified at the time the dispute arose.

In a 7-2 decision, the Court ruled that a court is the proper forum in which to resolve the issue of the existence of an arbitration contract at the time of the dispute. If the arbitration contract was not valid at the time of the action giving rise to the complaint, referral to an arbitrator would be a legal absurdity. The Court unanimously affirmed the Ninth Circuit Court's decision that violations of the Labor Management Relations Act do not create an independent tort action; enforcement falls within common law contract law.

Statutory Rights

Lewis v. City of Chicago, 130 S. Ct. 2191 (May 24, 2010)

A Title VII claimant who does not file a timely EEOC charge regarding the *adoption* of a discriminatory practice may still assert a timely disparate-impact claim based on later *application* of that practice, provided the claimant alleges all elements for a disparate-impact claim. The Court distinguished *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), because it concerned a discriminatory treatment claim that specifically required a showing of discriminatory intent *at the time of adoption*.

Union Pacific RR Co., v. Brotherhood of Locomotive Engineers and Trainmen, 130 S. Ct. 5841 (December 8, 2009)

A statute requiring conferencing settlement efforts prior to bringing a grievance claim before the National Railroad Adjustment Board is merely a procedural rule; failure to conduct conferencing did not create a jurisdictional bar preventing consideration by the Board.

National Labor Relations Board

New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (June 17, 2010)

The NLRB does not have authority to decide cases when there are only two sitting members. 29 U.S.C §153(b) authorizes delegation to groups of *three or more members*. The delegated authority has no effect if the third member of the group is not present, regardless of quorum rules. This case potentially invalidates more than 600 cases decided by the two-member panel between December 2007 and March 2010.

Procedure

Perdue v. Kenny A., 130 S. Ct. 1662 (April 21, 2010)

Superior attorney performance is adequately taken into account in §1988 lodestar calculations in civil rights cases. Extraordinary attorney's fees are justified only if there is specific evidence that the lodestar fee is not "adequate to attract competent counsel." The 75% district court enhancement was arbitrary. Careful crafting and justification by trial courts will be required to justify future enhancements for "exceptional" attorney's work in such cases.

Conkright v. Frommert, 139 S. Ct. 1640 (April 21, 2010)

The Employee Retirement Income Security Act of 1974 (ERISA) requires deference to retirement plan administrator's interpretation, even if the administrator committed "honest" errors in previous interpretation.

Cases to Watch in the 2010 – 2011 Term

NASA v. Nelson, 09-530 (argument 10.5.2010): To what extent may the government inquire into the backgrounds of federal contractors' employees without violating the employees' constitutional right to privacy, even if the inquiry is limited to employment purposes? The government's area of inquiry was whether potential employees received counseling or treatment for recent illegal drug use within the past year, the answer to which was likely protected under the Privacy Act, 5 USC 552a.

Kasten v. Saint-Gobain, 09-834 (argument 10.13.2010): Do the anti-retaliation provisions of the FLSA protect an employee whose wage and hour complaints were made verbally to the employer, rather than by a written complaint filed with the government? Does the FLSA's use of the phrase, "file any complaint" require a formalized written complaint?

During oral argument, members of the Court expressed concern about imposing liability on private employers that may not have grievance procedures in place, and that may not employ supervisory staff who appreciate the gravity of verbal wage and hour complaints. Several circuits have interpreted the FLSA as applying to intracompany complaints, and others require filing formal complaints with the Department of Labor.

Staub v. Proctor Hospital, 09-400, (argument November 2) involves a question of the application of "cat's paw" theory of liability in a USERRA suit. Vincent Staub was a medical technician employed by Proctor Hospital for many years. One of his supervisors was openly hostile about the time Staub took away from work to fulfill his duties as an Army Reserve member. The supervisor exerted her influence with human resources personnel, who ultimately terminated Staub, unaware of the supervisor's discriminatory behavior.

Thompson v. North American Stainless, 09-291 (argument 12.07.2010): Does an employee have an anti-retaliation claim when the employer fires the fiancée of the employee who made discrimination claim? Does Section 704(a) of Title VII forbid an employer from retaliating against a third party employee who stands in close relation to an employee engaged in protected activity?

AT&T Mobility LLC v. Concepcion, 09-893 (argument 11.9.2010): Does the Federal Arbitration Act preempt states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures, such as class-wide arbitration, when those procedures are not necessary to ensure that parties to the arbitration agreement are otherwise able to vindicate their claims? The Ninth Circuit ruled AT&T's arbitration provision unconscionable under California law because it required consumers to arbitrate small consumer claims on an individual basis, precluding class action resolution.

Chamber of Commerce of the United States v. Whiting, et. al., 09-115 (argument 12.8.2010): Does federal law preempt a state employment law that (1) imposes sanctions on employers that knowingly hire unauthorized aliens; and (2) mandates all employers to participate in an otherwise voluntary federal verification program to determine eligibility to work in the United States?
