Recent Labor and Employment Decisions of Note

IACP - Legal Officers Section
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Fair Labor Standards Act

Donning and Doffing

Bamonte v. City of Mesa, 598 F.3d 1217 (9th Cir. 2010) – Time spent by police officers in changing into and out of their police uniforms and equipment, when it was not required to be done at work by either law or the employer, was not mandatorily compensable under the FLSA. Similarly, see Dager v. City of Phoenix 2010 WL 2170992 (9th Cir. 2010).

Mandatory Alcohol Treatment

Todd v. Lexington Fayette Urban County Government, 2009 WL 4800052 (E.D. Ky. 2009) – Notwithstanding that the employer had required plaintiff, a police officer, to attend AA meetings and obtain counseling as a condition of retaining his job, the time spent in these activities did not constitute compensable work for FLSA purposes.

Dual duties

Cremeens v. City of Montgomery, 602 F.3d 1224 (11th Cir. 2010) – Fire arson investigators, who perform both firefighting and police functions, are subject to the overtime exemption provisions for the assignment in which they spend the majority of their time.

Canine Care

Lewallen v. Scott County, 2010 WL 2757145 (E.D. Tenn. 2010) – Time spent by K-9 officers providing food and water to the dog, brushing the dog and his teeth, administering arthritis medication, cleaning the kennel area and training the dog are compensable under the FLSA and absent any agreement on the treatment of this time, it must be paid as regular overtime. The fact that K-9 officers were paid an additional $1000 per year did not constitute an agreement between the parties.

Americans with Disabilities Act

Budde v. Kane County Forest Preserve, 597 F.3d 860 (7th Cir. 2010) – Termination of police chief after he rear-ended another car and was found to have a blood alcohol level of .23 (nearly three times the legal limit) did not violate the ADA by "failing to accommodate his alcoholism."

Title VII

Hostile Work Environment

Beckford v. Dept. of Corrections, State of Florida, 605 F.3d 951 (11th Cir. 2010) – FDOC liable under Title VII for failing to remedy a sexually hostile work environment created for female employees by male inmates in special housing unit.

Retaliation

O'Neal v. City of Chicago, 588 F.3d 406 (7th Cir. 2009) – Lateral transfers can constitute adverse action for purposes of establishing the elements of a retaliation claim when there is evidence that those transfers effect promotional opportunities. In this case, however, Plaintiff was unable to prove the causation element and did not prevail.

Racial Discrimination

Finch v. Peterson, 2010 WL 3516210 (7th Cir. 2010) – Three white Lieutenants alleged that they were passed over for promotion to Captain in favor of three African American candidates. The Defendant moved for summary judgment, relying on the existence of a consent decree entered in 1978. The Court held that based on the language of the consent decree at issue, the City of Indianapolis could not rely on the decree to establish qualified immunity for taking race into consideration in making promotions.

Religious Discrimination

Wallace v. City of Philadelphia, 2010 WL 1730850 (E.D. Pa. 2010) – Court found that police department had made good faith effort to accommodate Muslim officer's religious belief in growing his beard by allowing a one-quarter inch beard (similar to accommodations made for medical reasons) and found in favor of the City on officer's claim that his termination for repeated violations of the beard length policy discriminated against him based on his religion.

Risk v. Burgettstown Borough, Pa., 364 F. Appx, 725 (3d Cir. 2010) – Plaintiff, a part-time police officer sued after his termination following a cost-cutting study. Evidence that police chief had made adverse comments about officer's church attendance and a prior controversy over officer's wearing of a cross pin sufficient to sustain jury verdict of $100, 000 on claim of religious discrimination.

First Amendment

Establishment Clause

Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523 (7th Cir. 2009) – Sheriff's invitation of a Christian organization that engaged in religious proselytizing to

speak on numerous occasions at mandatory employee meetings violated the Establishment Clause.

Freedom of Association

Starling v. Board of County Commissioners, 602 F.3d 1257 (11th Cir. 2010) – Termination of fire captain because of an extramarital relationship with subordinate did not violate the captain's First Amendment right to intimate association. The department's interest in discouraging such conduct clearly outweighs such an interest "even if we assume arguendo that the First Amendment protects extramarital association."

Freedom of Speech

Revell v. City of Jersey City, 2010 WL 3610162, C.A.3.N.J. (2010) – Police officer asserting First Amendment retaliation claim did not make requisite showing that her protected speech, in which she complained of alleged improprieties surrounding city purchasing decision, was substantial factor in any negative or adverse conduct directed toward her where there was no evidence that threats against officer's brothers occurred in retaliation for officer's conduct, that officer's random drug test was retaliatory, or that officer's transfer, which occurred more than one year after she was told to stop writing complaint letters, was due to her speech.

Dahl v. Rice County, Minn., 31 IER Cases (BNA) 263, C.A.8.Minn. (2010) – Deputy sheriff's statements in an e-mail to county sheriff regarding department morale did not address matter of public concern, but rather concerned personal employment dispute, and thus statements could not form basis of deputy's First Amendment retaliation claim; deputy's comments did not attain status of public concern simply because subject matter of comments could have, in different circumstances, been topic of general interest to public.

Platt v. Incorporated Village of Southampton, 2010 WL 3393738, C.A.2.N.Y. (2010) – Village police officer's communication of his concerns about allegedly improper relationship between other officers with village trustee was made pursuant to his official duties as police officer, rather than in his private capacity as citizen, and thus did not amount to protected speech under First Amendment, where issues discussed related solely to his work as police officer and adverse impact of relationship on public safety concerns in village.

Deutsch v. Jordan, 31 IER Cases (BNA) 196, C.A.10.Wyo. (2010) – Police chief's testimony in his defamation action against a private citizen, which was brought in defense of the citizen's allegation that the chief misused city funds, was a matter of public concern, in determining whether such speech was protected under the First Amendment; public interest did not end with the accusation of misconduct, and the response to the accusation was also a matter of public concern.

Mulero Abreu v. Ocquendo-Rivera, 2010 WL 3118595, D.C.P.R. (2010)
Puerto Rico Police Department (PRPD) officer, who was subject to involuntary transfers, was not speaking on matter of public concern, as required to sustain § 1983 First Amendment claim against PRPD officials and employees, when she made written and verbal complaints to her supervisors regarding her alleged sexual harassment by PRPD sergeant; employee's speech concerned internal working conditions, there was no manifestation of community concern over internal workings of PRPD, and employee's speech did not suggest subjective intent to contribute to public discourse.

Aubrecht v. Pennsylvania State Police, 2010 WL 3037820, C.A.3.Pa. (2010) – Alleged speech by Pennsylvania State Police (PSP) officer, complaining of alleged traffic ticketing quota system, if proven, was not protected, and any retaliation against officer by PSP thus did not violate First Amendment, where officer confined all of his comments to workplace, and all of his complaints dealt with aspects of his official duties as police officer.

Brownfield v. City of Yakima, 612 F.3d 1140, C.A.9.Wash. (2010) – Police officer's speech was personal, rather than public, and therefore, not protected under the First Amendment for purposes of his claim that his temporary suspension was retaliation; officer wrote memo and spoke with supervisor complaining that his partner was lazy and incompetent, that officer was forced to complete duties assigned to partner, and that another supervisor was too friendly with partner and unfairly awarded partner comp time and preferable assignments.

LeFande v. District of Columbia, 613 F.3d 1155, C.A.D.C. (2010) – Reserve police officer's speech involved a matter of public concern, as required for his § 1983 action alleging his termination from reserves was retaliation in violation of the First Amendment; officer filed class action lawsuit alleging police chief implemented new rules without public comment and pursuant to emergency procedures while there was no emergency, and that new rules permitted him to terminate any reserve officer without process and limited authority and access to training of the reserves.

Clark v. City of Oakland, 2010 WL 2617594, C.A.9.Cal. (2010) – Police officer's demotion to officer trainee after speaking on private personnel dispute did not violate right to freedom of speech, in that speech did not raise matter of public concern.

D'Olimpio v. Crisafi, 2010 WL 2428128, S.D.N.Y. (2010) – Law enforcement officer's complaints to supervisor about fellow officer's behavior, his workplace incident reports, and his complaint to the inspector general, was speech falling within officer's official duties, and thus was not protected under the First Amendment, as required to support employee's retaliation claim; statements were made privately though channels available through officer's employment and were made in a manner that would not be available to a non-public employee citizen, and subject of statements was that other officer was not performing his job properly.

Kast v. Greater New Orleans Expressway Com'n, 2010 WL 2540807, E.D.La.. (2010) –

Complaints made by supervisory officer in city expressway commission's enforcing police department, regarding alleged preferential treatment afforded to well-connected individuals, were made pursuant to his official duties, precluding his First Amendment retaliation claim arising from his termination; officer made complaints internally to his direct supervisors, and reporting of superior's alleged misconduct was part of officer's official duties under commission's employee handbook.

Statements made by supervisory officer with city expressway commission's enforcing police department to family member unaffiliated with commission and co-worker, complaining about alleged preferential treatment afforded to well-connected individuals, constituted mere private speech, thus precluding his First Amendment retaliation claim arising from his termination; although complaints were not pursuant to officer's official duties and were arguably in regard to matter of public interest, officer made no effort to publicize alleged wrongdoing by notifying reporter or public official..

Supervisory officer's speech, even if it was protected by First Amendment, was not substantial or motivating factor behind city expressway commission's decision to fire officer, precluding officer's First Amendment retaliation claim, in absence of any evidence of superior's knowledge of speech or wrongful motive.

Sain v. Mitchell, 376 Fed.Appx. 582, C.A.6.Tenn. (2010) – Tennessee Department of Public Safety's refusal to reinstate state trooper who had voluntarily left his position to seek election as mayor did not violate the First Amendment right to free speech.

Hunt v. City of Portland, 2010 WL 1609568, D.Ore. (2010) – Police officer's reports of training officer's bad driving, failure to wear seatbelts, stealing of items from convenience store, and use of excessive force, all of which could be characterized as unlawful conduct, qualified as matters of public concern for purposes of First Amendment free speech analysis. Police officer's complaints to superiors about another officer's misconduct, which were made pursuant to her job duties and in her official capacity as a probationary police officer, did not constitute protected speech under First Amendment.

Knight v. Drye, 375 Fed.Appx. 280, C.A.3.Pa. (2010) – Borough police officer's complaint up chain of command to superior officer and police chief regarding another officer's alleged harassment of local car wash manager was made pursuant to officer's official duties, and thus his speech was not protected by First Amendment..

There was no evidence that discharged borough police officer ever reported his alleged observation of borough manager stealing beer from behind bar of local pub and distributing it to customers, as would support officer's § 1983 First Amendment retaliation claim based on that incident.

Cardarelli v. Massachusetts Bay Transp. Authority, 2010 WL 1416464, D.Mass. (2010) – A police officer failed to state a § 1983 claim against a police department arising out of the alleged violation of his First Amendment free speech rights. The officer's

comments were not protected from retaliatory discipline by the First Amendment because the comments related to officer misconduct and were made to his superior officers and public prosecutors.

Chamberlin v. Town of Stoughton, 601 F.3d 25, C.A.1.Mass. (2010) – Town officials, and two officers who served as town's chief of police, did not take various adverse actions, in violation of § 1983 or Massachusetts Civil Rights Act (MCRA), against either of two of town's police officers that were motivated at least in part by retaliation arising from protected speech of officers in connection with their cooperation with investigation into police misconduct, and for their disclosure of hostile work environment at police department, absent any proof that either of defendant officers knew that one of cooperating officers had instigated special prosecutor's inquiry or that either plaintiff had testified to grand jury; both defendant officers denied knowing about who testified before grand jury, medical examination required by new police chief for officer was required for officers out of work for five days or more due to off-duty injury or illness, town was within its rights in filing suit against officer over his retirement incentive as officer did not retire as promised and town's Board of Selectmen could legitimately seek to enforce their agreement..

Kindle v. City of Jeffersontown, Ky., 374 Fed.Appx. 562, C.A.6.Ky. (2010) – Report by police department employees that supervisor violated federal and state hour laws, generated unnecessary overtime, violated staffing policies, failed to contribute to employee's retirement account, improperly checked employees' controlled substance prescriptions, failed to qualify with her firearm, and committed various acts of mismanagement and abuse, addressed matter of public concern, as required for police department employees' First Amendment claim against city and mayor.

Neron v. Cossette, 2010 WL 782023, D.Conn. (2010) – Police officer failed to establish a causal connection between his complaint alleging racial discrimination and disciplinary action subsequently taken against him and, thus, could not prevail on First Amendment retaliation claim, even though an internal affairs investigation of the officer was initiated only a few days after the discrimination complaint was filed. The officer's speech was not a motivating factor in the disciplinary actions taken against him as he had violated two department regulations prior to filing the discrimination complaint.

Pearson v. City of Big Lake, Minn., 689 F.Supp.2d 1163, D.Minn. (2010) – Police officers' testimony in internal investigation into possible FLSA violations by police chief was not primarily motivated by public concern, such that it was not constitutionally protected from free speech retaliation; officers were acting in their capacity as employees, not as citizens, and were complying with city administrator's directive to cooperate with the investigation. – City police officers' expression of their opposition to police chief's distribution of allegedly pornographic e-mails was not motivated by public concern, such that it was not constitutionally protected from free speech retaliation; at most, officers were simply attempting to comply with the department's sexual harassment policy.

Carter v. Incorporated Village of Ocean Beach, 693 F.Supp.2d 203, E.D.N.Y. (2010) – Totality of the circumstances indicated that seasonal or part-time police officers' speech was made "pursuant to" their official duties as police officers, and thus, they were not speaking as citizens for purposes of the First Amendment, and as such, their speech was not constitutionally protected; all of officers' complaints to their superiors related to their concerns about their ability to properly execute their duties as police officers, and officers' speech in challenging police department's alleged cover-ups of officer misconduct, including their complaints to District Attorney's Office, was undertaken in the course of performing one of their core employment responsibilities of enforcing the law and, thus, was speech made pursuant to their official duties.

Moore v. Darlington Twp., 690 F.Supp.2d 378, W.D.Pa. (2010) – Former police officer's refusal to sign candidacy petition and his complaint about petition constituted speech undertaken as citizen on matter of public concern, and thus was protected by First Amendment, for purposes of officer's retaliation claim against township and officials, since refusal and complaint allegedly concerned improper or illegal use of elected positions to influence future elections.

Jackler v. Byrne, 2010 WL 1717587, S.D.N.Y. (2010) – Former probationary police officer's filing of supplemental report and refusal to change that report was speech made pursuant to his official capacity as a police officer, and therefore, not protected by the First Amendment in his § 1983 action alleging his termination was retaliation for his speech.

Conklin v. City of Reno, 2010 WL 522724, D.Nev. (2010) – Police officer's statements did not constitute protected speech for purposes of her § 1983 First Amendment retaliation claim because they did not address matters of public concern. Officer made statements to a handful of fellow officers while the officers were relating "war stories" about their experiences in the police department that concerned conduct that occurred approximately nine years earlier. Officer complained internally about conduct that occurred nearly a decade earlier and did so only after an investigation was instituted into her conduct. Officer complained about her training officer only after she was asked how her training was going.

Duffelmeyer v. Marshall, 682 F.Supp.2d 379 S.D.N.Y. (2010) – Taking into account its content, form, and context, police officers' letter to internal affairs officer intended to notify department of incident involving alteration of check written to town police association and deposit of check in account for Chiefs of Police Association and request investigation into matter did not address a "matter of public concern" as required for First Amendment free speech retaliation claim based on chilling effect of questionnaire which officers signing letter were required to come in to headquarters and fill out, despite officers' contention they wrote letter as crime victims and association members; officers stated in letter they had "an obligation to report the incident" because they had knowledge of possible crime and were "making this notification due to our legal and departmental duties," they addressed letter to their superior, and each officer signed the

letter with his official title and badge number, letter was not initially distributed to public and copies were only provided to town clerk and town board.

O'Brien v. Robbins, 679 F.Supp.2d 212, D.Mass. (2010) – Sergeant was not speaking as citizen on matter of public concern when he complained to police chief about visits to station by lieutenant's alleged mistress, but as employee pursuing work-related grievance against coworker with whom he had contentious relationship, and to extent that complaint might be interpreted as warning to chief about breach of decorum that might tarnish the department's reputation, sergeant was doing no more than discharging his duty, as he conceived it, to guard morals and morale of department; thus, First Amendment did not protect him from retaliation for that speech.

Conard v. Pennsylvania State Police, 360 Fed.Appx. 337, C.A.3.Pa. (2010) – Pennsylvania State Police (PSP) employee whose duties included answering phone calls regarding police services and dispatching messages to state troopers was not speaking on a matter of public concern, as required to support her First Amendment retaliation claim, when she made telephone call to another employee's supervisor about his failure to respond to shooting incident; call to a state trooper regarding a police emergency was an act performed during the course of her duties.

Bivens v. Trent, 591 F.3d 555, C.A.7.Ill. (2010) – State police officer, who was responsible for the safe operation of the firing range, did not speak as a citizen when he complained to his supervisors about environmental lead contamination at range, and thus, his speech was not protected by the First Amendment; officer had responsibility, as part of his job duties, to report his concerns about environmental lead contamination.