2011 Employment Law Update

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Contents

1. U.S. Supreme Court

Borough of Duryea, Penn. v. Guarnieri, 131 S.Ct. 2488 (2011) – Police Chief Guarnieri was terminated by the Borough of Duryea. He was reinstated following an arbitration process. The borough council then issued eleven directives setting out various parameters and restrictions on the chief (prohibiting personal use of the police cars, prohibiting smoking in the building, restricting overtime work).

Guarnieri sued, claiming that these directives were in retaliation for petitioning the government for relief (in the arbitration) and therefore violated the "petition clause" of the First Amendment (the right to petition the government for redress of grievances). The Court held that complaints under the petition clause may only be raised for matters of public concern, consistent with its ruling on the extent of free speech protections for government employees under the 2006 *Garcetti* decision, 547 U.S. 410.

Thompson v. North American Stainless, 131 S.Ct. 863 (2011) – Employee fired after his fiancé, also employed by the Defendant filed a discrimination charge with the EEOC. The termination occurred three weeks after the employer was notified of the EEOC charge. The Court held that the plaintiff could proceed with his retaliation charge,

finding that third party reprisals violate Title VII when they "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Kasten v. Saint-Gobain Performance Plastics Corp., 131 U.S. 64 (2011) – Retaliation claims under the FLSA can be based on adverse employment consequences following oral complaints.

Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011) – Court applied "cat's paw" theory of liability to USERRA, if anti-military animus of a supervisor is intended to cause an adverse employment action and if it is in fact the proximate cause of an ultimate employment action, even though that action is taken by an independent decision-maker, then there is liability under the USERRA.

2. Fair Labor Standards Act

Campbell v. Kelly, #3:09-cv-435, 2011 U.S. Dist. Lexis 97889, 2011 WL 3862019 (S.D. Ohio, August 31, 2011) – FLSA claims by former police officer allowed to proceed against agency (Clark County SO), but not against individual defendants. The court found that care of canines was in all likelihood "not *de minimis*."

Figueroa v. District of Columbia Met. Police Dept., #09-7133, 633 F.3d 1129 (D.C. Cir. 2011) – For purposes of summary judgment based on the statute of limitations, the time frame for FLSA violations is three years and each check received in violation of the law constitutes a separate violation.

Chavez v. City of Albuquerque, #09-2274, 630 F.3d 1300 (10th Cir. 2011) – Calculation of "regular rate" for FLSA purposes requires the employee's pay by the number of hours actually worked (not any "normal workweek" established in the collective bargaining agreement); sick leave buy-back compensation must be included in regular rate, but vacation time buy-back need not be included (analogizing sick leave buy back to attendance bonuses and vacation time buy back to holiday pay).

Gordon v. City of Oakland, #09-16167, 627 F.3d 1092 (9th Cir. 2010) – In former police officer's lawsuit alleging that a requirement that the officer repay training costs if she voluntarily left city employment before completing five years of service violated the FLSA's minimum wage provisions, the Court of Appeals upheld the dismissal of the action, treating the repayment agreement as a loan, not a reduction in minimum wage.

Clark v. City of Fort Worth, #4:10-CV-519-A, 2011 WL 3268110, 2011 U.S. Dist. Lexis 83499 (N.D. Tex. 2011) – Licensees using city facilities were separate employers and hours worked by police officers providing security at such facilities, provided that the

licensee paid the officers, did not have to be paid as overtime. Even the City's practice of providing worker's compensation coverage for these off-duty assignments did not require treatment of this time as hours worked for the City.

Specht v. City of Sioux Falls, 639 F.3d 814 (8th Cir. May 11, 2011) – Court of Appeals remanded for trial the issue of whether fire fighters work in an emergency response was for the primary or separate employer. Whether the two employers were separate and independent for FLSA purposes can only be determined on a case-by-case basis, according to the Eighth Circuit.

Allen v. City of Chicago, #1:10-cv-03183, 2011 WL 941383 , 2011 U.S. Dist. Lexis 27137 (N.D. Ill. 2011) – Chicago police sergeant's FLSA complaint seeking compensation for himself and others similarly situated who were allegedly required to use their PDA's to receive phone calls, emails, voice mails and text messages while off the clock, survives summary judgment. The court further found that general language in the parties collective bargaining agreement requiring all disputes to be submitted to grievance and arbitration (without deciding whether these rights were waivable under any circumstances).

Kuebel v. Black & Decker, #10-2273-cv, ;643 F.3d 352 (2d Cir. 2011) - holding that if administrative tasks performed on a PDA could, at the employees option, be performed at home or at work, then performing them at home before the employee's commute does not render the commute time compensable.

Burkholder v. City of Fort Wayne, #1:08-cv-273,750 F.Supp.2d 990 (N.D. Ind. 2010) – 192 plaintiff police officers settled a FLSA claim over denial of use of accrued compensatory time "within a reasonable period after making the request." Total settlement of $236,000 included $819.75 per officer ($157,392) and $78, 608 for attorneys' fees and costs. Denials of comp time use by the department had been based on maintaining minimum staffing levels.

See also:

- *Heitmann v. City of Chicago*, 530 F.3d 642 (7th Cir. 2009) – The City of Chicago must grant officers' requests for use of compensatory time unless doing so would "produce undue disruption," in which case, the request may be deferred for a reasonable time (approving the district court's decision that the previous "informal policy" leaving these decisions to each supervisor did not ensure compliance with the law, but reversing an injunctive remedy fashioned by the lower court);

- *Parker v. City of New York*, #04-cv-4476, 2008 WL 2066443, 2008 U.S. Dist. Lexis 38769, 13 WH Cases2d (BNA) 1122 (S.D.N.Y. May 13, 2008) – In a class action lawsuit filed by 327 Dept. of Juvenile Justice employees, the court upheld the DJJ policy of denying use of comp. time whenever the absence would result in a violation of the statutory staff-to-resident ratio;
- *Valladon v. City of Oakland*, #C-06-07478, 2009 U.S. Dist. Lexis 97485, 2009 WL 2160450 (Unpub. N.D. Cal. 2009) – Court upheld Oakland policy of allowing only a certain number of slots for the use of comp. time off each shift and did not bring officers in on overtime to allow use of comp. time off as consistent with the FLSA.

3. First Amendment

Beckinger v. Twp. of Elizabeth, 2011 WL 2559446, 2011 U.S. App. Lexis 13511 (Unpub. 3rd Cir. 2011) – Police officers who testified in a parking ticket enforcement proceeding and who were subsequently disciplined filed suit alleging a First amendment violation. The Court of Appeals held that testimony at a court proceeding was not clearly protected under the first amendment at the time the disciplinary action was taken.

Eckerman v. Tennessee Dept. of Safety, 636 F.3d 202 (6th Cir. 2010) – Former lieutenant allowed to proceed on his Freedom of Association claim alleging his demotion to sergeant was based on his party affiliation. The decision was partially based on the preclusive effect granted to an arbitration decision overturning the disciplinary decision.

Bardzik v. County of Orange, 635 F.3d 1138 (9th Cir. 2011) – Reserve Division lieutenant, who supported an unsuccessful candidate for sheriff demoted to an undesirably post at court operations and thereafter denied a discretionary pay raise and given a poor evaluation. The court found the Reserve Division lieutenant position to be a policy-making position, therefore exempt from First Amendment protection, however, the causes of action based on subsequent actions allowed to proceed.

Beyer v. Borough, 428 Fed. Appx. 149, 2011 U.S. App. Lexis 7793 (Unpub. 3rd Cir. 2011) – Following a shootout in which a police officer was killed, the plaintiff "pseudonymously" posted on the internet a comment about the relative merits of various police department weapons, including the plaintiff's advocacy of the purchase of AR-15s and his disagreement with the Council's policy on this matter. The Council voted to terminate the plaintiff's employment. The Court of Appeals found these facts sufficient to proceed to trial.

Carter v. Village of Ocean Beach, 415 Fed. Appx. 290 (Unpub. 2d Cir. 2011) – Seasonal police officers report of misconduct within the department, made within their chain of command, is not protected speech under *Garcetti*.

Anemone v. Metrop. Transp. Auth., 629 F.3d 97 (2d Cir. 2011) – Former security director of New York MTA's First amendment claim based on comments to the press after the investigation into his misconduct initiated does not survive summary judgment, with the court finding independent reasons for his termination. His reports to the DA's office on misconduct among MTA contractors were not protected speech under *Garcetti*, but were made pursuant to his official duties.

Dempsey v. City of Omaha, 633 F.3d 638 (8th Cir. 2011) – Plaintiff, former Chief of Elkhorn denied a job by the City of Omaha after the city annexed the Elkhorn, and following public comments critical of the transition process, allowed to proceed on his 1st Amendment claims.

4. Americans with Disabilities Act

ADAAA Regulations – Regulations implementing the ADA Amendments Act of 2008 were finally adopted on May 24, 2011. Major changes include adding a number of activities to the "non-exhaustive " list of major life activities, including eating, sleeping, walking, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, interacting with others and the operation of bodily functions.

An impairment now needs only to "substantially limit" the activity "as compared to most people in the general population." Short term impairments (less than six months) may be covered. With the exception of contact lenses or eyeglasses, mitigating measures such as medication, etc., cannot be considered when determining whether an impairment substantially limits a major life activity.

Lee v. City of Columbus, Ohio, 636 F.3d 245 (6th Cir. 2011) – Columbus police department policy which required officers returning from a leave of three days or more provide a doctor's note stating both the nature of the illness and confirming the officer's ability to return to regular duty upheld against challenges that the policy violated the Rehabilitation Act or the officers' right to privacy.

5. Title VII/Pregnancy (Discrimination/Retaliation)

Mosby-Grant v. City of Hagerstown, 630 F.3d 326 (4th Cir. 2010) – Female recruit's allegations of sex based harassment in the police academy allowed to proceed. Plaintiff was one of 17 recruits and the only female.

Williams v. City of Tupelo, Miss., 414 Fed. Appx. 689 (Unpub. 5th Cir. 2011) – Female recruits allegations of race and sex discrimination following her termination from police department based on her performance in the police academy, where she was the only female among 17 recruits, allowed to proceed to trial.

Summers v. City of Dothan, #10-15361, 2011 WL 4376015, 2011 U.S. App. Lexis 19383 (Unpub. 11th Cir. 2011) – Plaintiff, a female police officer terminated followed two "major offenses," the first involving failure to complete paperwork resulting in a suspect arrested for trespassing spending 104 days in jail before his case was brought before a magistrate and a second "major incident" of failure to turn in UTC citations, appealed her termination alleging she was discriminatorily treated differently than a male officer who had a thirteen day delay in the completion of paperwork (deemed "minor" by the department).

Hartley v. Pocono Mountain Regional Police Dept., 417 Fed. Appx. 153 (Unpub. 3rd Cir. 2011) – Former police officer's claim that the police department had retaliated against her by opposing her unemployment compensation claim (and not opposing a male employee's) dismissed based on her failure to establish that the two employees were similarly situated.

Amini v. City of Minneapolis, 643 F.3d 1068 , 112 FEP Cases (BNA) 1089 (8th Cir. 2011) – Police department's denial of employment to a candidate born in Afghanistan on the basis of his defensive, agitated and argumentative behavior in the interview process upheld against allegations of discrimination.

Buchanan-Rushing v. City of Royse City, Texas, #3:09-CV-2434, 2011 WL 2292132, 2011 U.S. Dist. Lexis 63661, 112 FEP Cases (BNA) 989, 17 WH Cases2d (BNA) 163 (N.D. Tex. June 7, 2011) – Plaintiff, a police officer terminated during her pregnancy, filed lawsuit claiming discrimination and retaliation. The court found genuine issues of material fact existed denying summary judgment and indicated that a departmental regulation requiring firearms qualifications more frequently than state law requirements might not be used to find a pregnant officer disqualified for her position.

Wahl v. County of Suffolk, #09-cv-1272, 2011 WL 1004879 , 2011 U.S. Dist. Lexis 28021 (E.D.N.Y. March 16, 2011) – Defendant police department's motion for summary judgment granted, defeating male officer's challenge to departmental regulations allowing only women to use sick leave for their pregnancy (male officers were allowed leave, just could not use sick leave).

6. Miscellaneous Cases

Crosby v. City of Gastonia, 635 F.3d 634 (4th Cir. 2011) – Summary judgment granted City in litigation over failure of supplemental pension fund, finding no cognizable s.1983 claim for contract violation.

Schmidt v. Creedon, 635 F.3d 613 (3rd Cir. 2011) – Police officer suspended without pay entitled to pre-disciplinary due process absent extraordinary circumstances, regardless of whether a post-disciplinary grievance process is available. The pre-discipline hearing can be informal, without advance notice of charges, but at the hearing must give the officer notice of the charges, an explanation of the evidence against him or her and an opportunity to be heard. Finding that this requirement had not been clearly established prior to this case, the court granted to the defendants.

Hollins v. Fulton County, 422 Fed. Appx. 828 (Unpub. 11th Cir. 2011) – Former sheriff's sergeant, injured in an altercation with an inmate, did not return to work and was terminated after several months. Plaintiff sued, claiming among other things violations of the ADA and ADEA (occurring after she turned 58).

The Court of Appeals upheld summary judgment in favor of the county, finding that an alleged statement by the sheriff that he was "going to get rid of all you old people who have been here a long time that don't want to do your job," was capable of multiple interpretations, that the plaintiff failed to show that she was qualified for the position nor that she was replaced by a younger person. Summary judgment was also granted on the ADA claim as the plaintiff did not allege that she was unable to perform a "broad class of jobs."