# Employment Law Update

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## Pregnancy Discrimination Act / Americans with Disabilities Act

Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (Mar. 25, 2015) – Plaintiff, who was pregnant, requested accommodations that she alleged the employer had previously provided to workers injured on the job and receiving workers' compensation benefits. The Supreme Court ruled that these factual allegations were sufficient to allege a *prima facie* case of discrimination under the Pregnancy Discrimination Act. In *dicta*, the Court noted that recent amendments to the ADA (the ADAAA) would include pregnancy as a disability so that the decision in this case would essentially be mooted.

Walz v. Ameriprise Financial, Inc., 779 F.3d. 842 (8th Cir. 2015) – Employee ultimately terminated for rude, abrasive and disrespectful conduct sued under the ADA, alleging a failure to accommodate her bipolar disorder, although she had never advised her employer about her condition nor requested accommodation. Held: an employer is not liable for failure to accommodate an unknown disability that is not open, obvious and apparent without some request.

## Fair Labor Standards Act

Integrity Staffing Solutions,Inc. v. Busk, 135 S.Ct. 513 (Dec. 9, 2014) – Employees in this case argued that the time they spent waiting in line and then undergoing security screenings at the end of their shift was compensable time under the FLSA. The Court analyzed whether the activities were "integral and indispensable part of the principal activities" of the employee (here packaging items for shipment) and found that they were not compensable.

Gibbs v. City of New York, 87 F.Supp.3d 482 (S.D.N.Y. 2015) – Applying the rationale of *Integrity Staffing*, the Court held that police officers' required attendance at alcohol abuse programs was not compensable time.

Allen v. City of Chicago – Class action regarding payment for time spent by Chicago police officers on smart phones during off-duty hours.

Wage and Hour Proposed Amendments – Projected increase to "salary" definition from a minimum of $23,660 annually to $50,440 per year with an automatic increase.

## Title VII (Discrimination/Retaliation)

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (June 1, 2015) – Defendant found to have violated Title VII when it denied employment to Plaintiff based on an assumption that the headscarf she wore to her interview was based on religious beliefs and that this headgear did not fit the company image.

Zetwick v. County of Yolo, 66 F.Supp.3d 1274 (E.D. California, 2014) – Correctional officer claimed that the Sheriff's conduct of hugging and kissing this officer and others at work related ceremonies, occasionally during regular job times and at her wedding constituted sexual harassment. The Court granted summary judgment to the employer finding that hugging and kissing on the cheek are common physical interactions at a workplace and further holding that Title VII is not intended as "a general work civility code."

Johnson v. City of Memphis, 770 F.3d 464 (6th Cir. 2014), cert. den., 2015 WL 2462623 (2015) – Court, after twelve years, upheld 2002 sergeants promotional testing process which had been subject to extensive litigation over allegations of racial discrimination. The case contains a lengthy discussion of validation methodologies and application of the "equally valid, less discriminatory measures" doctrine.

## First Amendment

Garcetti v. Ceballos, 547 U.S. 410, 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.

Lane v. Franks, 134 S.Ct. 2369 (June 19, 2014) – Held that "[truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."

Addressing whether the speech at issue constituted speech "as a citizen," the Court stated "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to

prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs." The Court concluded on the second element of protected speech, that it be on a matter of "public concern," that corruption in a public program and misuse of public funds is a matter of significant public concern. On the final balancing test, the Court found nothing on the employer's side of the balance in this case, noting that "[t]here is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential or privileged information while testifying."

In a concurring opinion (Thomas, joined by Scalia and Alito) noted that "[w]e accordingly have no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities….For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties….[t]he Court properly leaves the constitutional questions raised by these scenarios for another day."

Gibson v. Kilpatrick, 773 F.3d 661 (5th Cir. 2014), cert. den., 135 S.Ct. 2318 (2015) – Chief reprimanded and ultimately terminated after he reported to outside law enforcement agencies that Mayor had misused municipal gasoline card. This case was heard on remand after the decision in *Lane.* The Court of Appeals held that, as of the time of the alleged adverse actions, Plaintiff was unable to show that the reports to the outside law enforcement agencies were made "as a citizen."

Matthews v. City of New York, 779 F.3d 167 (2d. Cir. 2015) – NYPD officer took exception to an arrest quota policy and reported his objections to both his Captains over a two year period. He claimed that thereafter he was retaliated against by punitive assignments, denial of overtime and leave, separation from his longtime partner and negative performance evaluations. In reversing the summary judgment granted by the District Court in favor of the City, the Court of Appeals heal that "when a public employee whose duties do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern engages in speech concerning that policy, and does so in a manner in which the ordinary citizens would be expected to engage, he or she speaks as a citizen not as a public employee."

Williams v. City of Atlanta, 2015 WL 3953574 (June 30, 2015) – Police Major demoted after emailing community members opposing a planned reorganization of his precinct. The Court held that this was not speech as a "citizen," but as an employee, insofar as it arose out of the employee's professional duties.

Moss v. City of Pembroke Pines, 782 F.3d 613 (11th Cir. 2015) – Assistant Fire Chief alleged that his termination following the elimination of his position in budget cuts was really motivated by retaliation for opining about ongoing collective bargaining that the City had "manufactured the fiscal urgency and was negotiating with employees in bad faith." The Court of Appeals held

that this speech was pursuant to his official duties and not speech as a citizen. The Court went on to address the balancing of interests that would apply if the speech were protected and found that the City would prevail on that test: "Indeed, we have recognized a heightened need for order, loyalty, and harmony in a quasi-military organization such as a police or fire department." The Court went on to state that, "Plaintiff's argument that the City failed to show that Plaintiff's speech had any actual negative impact on the fire department is irrelevant. The government's legitimate interest in avoiding disruption does not require proof of actual disruption."

Burnside v. Kaelin, 773 F.3d 624 (5th Cir. 2014) – Deputy who failed to support sheriff's re-election bid transferred from patrol to jail. Court found that the transfer was materially adverse and denied sheriff's motion to dismiss based on qualified immunity.

Wagner v. Campbell, 779 F.3d 763 (8th Cir. 2015) – Written reprimand which was to remain in employee's file for only one year did not constitute an "adverse employment action" sufficient to establish a First Amendment Freedom of Speech violation.

Heffernan v. City of Paterson, 777 F.3d 147 (3d. Cir. 2015), cert. granted, 2015 WL 5725544 – Plaintiff, a police officer, was demoted after obtaining a mayoral candidate's sign at his mother's request. The Court of Appeals upheld summary judgment for the City based on a finding that Plaintiff's conduct was neither speech nor association, based on Plaintiff's testimony that he was only doing a favor for his mother. The Court held that the First Amendment does not protect mistakenly perceived speech (in conflict with the 1st, 6th and 10th Circuits).

**Miscellaneous Cases**

Hilde v. Eveleth, 777 F.3d 998 (8th Cir. 2015) – A 51 year old lieutenant, second in command in the police department, not selected to replace the retiring police chief allegedly because he was retirement-eligible allowed to proceed on his ADEA claim. The Court noted that to "assume that Hilde was uncommitted to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits."

Bill v. Brewer, 2015 WL 5090744 (9th Cir. Aug. 31, 2015) – No constitutional rights were violated where the police department required officers present at a Phoenix crime scene to provide buccal swabs for the process of elimination.

Powers v. United States, 783 F.3d 570 (5th Cir. 2015) – The Court upheld a significant departmental overhaul of the off-duty work process for the City of New Orleans Police Department against challenges that the new regulations violated Civil Service Laws and impaired contracts. The Court also held that these regulations did not "make the City the officer's employer for a job offered, planned, and paid for by a third party."

Fabrizio v. City of Providence, 104 A.3d 1289 (Rhode Island, 2014) – Order requiring fire crew to drive a fire truck in a gay rights parade did not violate the First Amendment constitutional rights of two roman catholic members of that crew.

Arroyo v. Volvo Group North America, 2015 WL 5846595 (Oct. 6 2015) – Following Plaintiff's termination for attendance issues, she sued alleging that her military service was "a motivating factor" in her termination and also alleging that her PTSD was a "but for cause." The Court denied summary judgment, allowing the case to proceed based on emails between Plaintiff's supervisor and HR indicating some disenchantment with the USERRA requirements and noting that the Plaintiff "is really becoming a pain with all of this."