Legal Officers Section
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Employment Law Update
Recent Cases

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Jody M. Litchford
Deputy City Attorney
City of Orlando, FL

TITLE VII

Race-based employment decisions

Alexander v. City of Milwaukee, 474 F.3d 437 (7th Cir. 2007) – 17 white male Milwaukee police lieutenants brought suit alleging discrimination in promotional practices. The lieutenants were able to show a statistical disparity in the 41 promotions during the relevant period and the Chief was only able to testify generally about amorphous, subjective decisional criteria. The Court upheld a jury award to the plaintiffs, including punitive damages, against the Chief and members of a civil service review board.

El v. Southeastern Pennsylvania Transportation Authority (SEPTA), 479 F.3d 232 (3d Cir. 2007) – Employer granted summary judgment in disparate impact challenge to transportation agency's policy disqualifying applicants based on prior criminal convictions. The Court found the SEPTA policy consistent with business necessity based on expert testimony that persons who have committed a violent crime are more likely than others to commit one in the future.

Promotion, Discipline and Assignment

Duckworth v. St. Louis Metropolitan Police Department, 491 F.3d 401 (8th Cir. 2007) – Captain assigned female police officers to the night watch to ensure at least one female officer was assigned on all shifts. The Court found the proffered justification for this action to be insufficient to survive constitutional scrutiny, but found the right not sufficiently clearly established and therefore granted qualified immunity to the defendants.

Piercy v. Maketa, 380 F.3d 1192 (10th Cir. 2007) – Sheriff's policy of considering "only requests from male deputies" for transfers to male jail facility presents factual issue sufficient to defeat summary judgment for defendant.

Lewis v. City of Chicago, 2007 WL 2128308 (7th Cir. 2007) – Plaintiff allowed to proceed to trial on her claims of discrimination and retaliation based on the denial of an opportunity to travel to Washington, DC to assist with policing an IMF rally (the alleged materially adverse employment action) and subsequent assignments to more dangerous situations following complaints of discrimination.

Huff v. Sheahan, 493 F.3d 893 (7th Cir. 2007) – Denial of "case leads critical to advancement" and denial of a transfer are potentially tangible adverse employment actions sufficient to create liability under Title VII in a sexual discrimination case filed by a former Cook County Sheriff's Department employee.

Alvarado v. Texas Rangers, 2007 WL 2028917 (5th Cir. 2007) – Court found question of whether denial of "lateral" transfer to elite unit constituted an actionable adverse

employment action to be one for the jury to determine as well as the sufficiency of the agency's justification for its decision, which was based on subjective oral interview scores.

Johnson v. Caudill, 475 F.3d 645 (4th Cir. 2007) – Plaintiff, a detective hired to be an undercover narcotics officer assigned to a Virginia State Police task force. As a result of inaccuracies in a report submitted by Johnson, the VSP refused to allow her to work on their drug operations. Sheriff Caudill then terminated her employment. The circuit court found that the Sheriff was entitled to qualified immunity and the case against him appropriately dismissed.

Harassment

Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006) – Department of Corrections liable for failure to protect female corrections officers from sexual harassment by male prisoners (jury returned $600,000 verdict in Plaintiff's favor).

Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006) – Court upheld jury verdict in favor of Plaintiff in a Title VII sexual harassment case where Plaintiff, a payroll employee in a minimum security prison was assaulted and raped by an inmate. Plaintiff had reported to her supervisors an unsettling encounter with the same inmate the previous week.

Pregnancy

Tysinger v. Police Department of the City of Zanesville, 463 F.3d 569 (6th Cir. 2006) – Plaintiff, a veteran police officer, was denied light duty during her period of pregnancy. Summary judgment for the employer was upheld based on Plaintiff's inability to show that light duty had been provided to similarly situated male officers (those with off duty injuries preventing them from fully performing their jobs).

Retaliation

Burlington Northern and Santa Fe Railway v. White, 126 S. Ct. 2405 (2006) – A forklift operator, transferred to other duties following a discrimination complaint and another incident of discipline (subsequently overturned) for insubordination, filed suit alleging retaliation. The Supreme Court held that the standard of harm is different for Title VII discrimination violations (which require an adverse tangible job action) and retaliation claims, which require only action, whether or not employment related, which is *materially adverse.* Materially adverse actions are those that would dissuade a reasonable employee from making a charge of discrimination. The Court made several key findings:

- "The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." Id. at 2406.

- "The anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " Rochon v. Gonzales, 438 F.3d 1211, 1219." Id. at 2407.

- "The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable." Id. at 2407.

Denhof v. City of Grand Rapids, 494 F.3d 534 (6th Cir. 2007) – In 2001, the two police officers who are Plaintiffs in this case filed a discrimination case against the City of Grand Rapids. Subsequently, plaintiffs sought to enjoin conduct they believed to be retaliatory. That injunction was denied, but based on Denhof's testimony at the hearing she was ordered to undergo a fitness for duty psychological exam. The co-Plaintiff, LeClear was ordered to a fitness for duty after an on-duty shooting. The psychologist retained by the department found both unfit. The Plaintiffs disputed both the motives and the process of the fitness evaluations. The jury awarded each Plaintiff $1,000,000 in compensatory (later reduced to $350,000 each), $1,276,920 in front pay to each and $223,080 to each in back pay. This verdict was upheld by the 6th Circuit.

O'Sullivan v. City of Chicago, 474 F. Supp. 971 (N.D.Ill. 2007) - Three veteran female police officers filed an internal complaint of racism by their female captain. They alleged that thereafter they were subject to undermining in their jobs, were not selected for promotion and suffered workplace stress and humiliation. Their family members testified about stress related problems at home. The officers ultimately transferred under different supervisors, at which time the problems apparently ceased. The jury awarded $250,000, $50,000 and $25,000 respectively to the plaintiffs and remittitur was denied by the district court.

Marchisotto v. City of New York, 2007 WL 1098678 (S.D.N.Y., April 11, 2007) – Jury award of $300,000 to retired male police sergeant upheld based on his claim that after complaining of "abuse of authority and inappropriate behavior" (which he later testified involved sexual harassment, although that was not included in his original complaint), he was transferred to the records room, which was small and dirty, and his job there was not explained to him.

Weber v. Battista, 494 F.3d 179 (D.C. Cir. 2007) – Plaintiff complained through an internal mechanism alleging sexual and national origin discrimination. Thereafter, her performance evaluation, which included ratings from "fully satisfactory" to "outstanding" on her four job elements, was allegedly lower overall than in the preceding year which caused her to lose a performance award. The Court held that these "adverse actions" met the Burlington standard.

Crosby v. Mobile County Personnel Board, 2007 WL 245126 (11th Cir. January 30, 2007) – Plaintiff, a Captain in the Sheriff's Department, gave a deposition in which he testified about the Sheriff's use of racial slurs in the workplace. Thereafter, he maintained that he was transferred to a different division, no longer allowed to attend the Chief Deputy's meetings, told not to attend weekly staff meetings, managed fewer deputies, had a smaller office with no windows, had no secretary, had to drive a marked vehicle that had higher mileage than his previous unmarked unit and had less overtime available. The Court denied the employer's motion for summary judgment, applying the Burlington standard and finding it to be a question of fact whether these acts constituted material adverse action.

Gary v. Hale, 2007 WL 5812 (11th Cir. January 3, 2007) – Black female deputy sheriff complained of discrimination in the 1980's and 1990's. In 2005, on two occasions, she was not selected for promotion to sergeant. A notation regarding these prior claims was memorialized in Plaintiff's personnel file. This file was reviewed by the selection committee during the sergeant's selection processes. One of the selection committee members testified in deposition that he had reviewed the entire file and "probably" therefore reviewed these notations. That testimony was deemed by the Court to be sufficient to establish a causal link between the earlier complaints and the non-selection for promotion, insofar as actual awareness of the protected expression at the time of taking adverse employment action is enough to meet the causation element in the 11th Circuit.

McGowan v. City of Eufala, 472 F.3d 736 (10th Cir. 2006) – Plaintiff, a dispatcher, had supported a black officer in his EEOC charge of discrimination. Some time thereafter, she requested to be reassigned to the day shift, which request was denied (as it had on previous occasion, before the EEOC charge was at issue). The Court held that, absent evidence of particular materiality, denial of a shift change is not a materially adverse employment action under Burlington.

Carrington v. City of Des Moines, 481 F.3d 481 (8th Cir. 2007) – Court upheld grant of summary judgment in a retaliation action to the employer where the evidence established that the employee's complaints of discrimination, although prior to disciplinary action being taken, were initiated only after his supervisors began to investigate his job performance deficiencies.

Higgins v. Gonzales, 481 F.3d 578 (8th Cir. 2007) – Lack of mentoring does not meet the Burlington standard of material adverse impact.

Piercy v. Maketa, 380 F.3d 1192 (10th Cir. 2007) – Sheriff's reasons for termination, which were consistent with past practices, defeats Plaintiff's retaliation claim notwithstanding timing his beginning internal investigation only eight days after Plaintiff filed EEOC charge.

AMERICANS WITH DISABILITIES ACT

McWilliams v. Jefferson County, 464 F.3d 1113 (10th Cir. 2007) – Plaintiff, a computer support specialist, claimed to suffer from intermittent episodes of depression, a difficulty sleeping, difficulty in dealing with people, and difficulty coping with some work related situations. She was ultimately terminated, which she claimed violated the ADA. The Court held that Plaintiff's condition did not prevent her from performing her job nor from performing any other life activities completely, and hence she was not covered by the ADA.

Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007) – Plaintiff worked as a warehouse technician at Iams. All warehouse technicians worked on rotating shifts. Based on a condition of diabetes, Plaintiff's doctor requested that Iams provide Plaintiff with a permanent day shift assignment. The employer declined, citing their team concept and producing evidence that allowing exceptions to shift rotations would create inequities among other technicians in the workforce. Based on this, the court concluded that rotating shifts were an essential function of the warehouse technician position and upheld the district court's grant of summary judgment to the defendant.

Huber v. Walmart, 486 F.3d 480 (8th Cir. 2007) – Plaintiff was injured while working for Walmart and requested reassignment to a vacant equivalent position. The employer instead hired a more qualified candidate for the equivalent position and reassigned Plaintiff to a lesser paid position which she was qualified to perform. Plaintiff filed suit, alleging that she was entitled to reassignment to the vacant equivalent position. The court ruled, consistent with the 7th Circuit, but contrary to the 10th Circuit, that Plaintiff was not entitled to the reassignment if she was not the most qualified applicant.

Thomas v. Corwin, 483 F.3d 516 (8th Cir. 2007) – Plaintiff, a clerical worker in the police juvenile unit, suffered an anxiety attack requiring hospitalization and then three weeks absence from work. The anxiety attack was allegedly due to "work-related" stress, but the Plaintiff refused to provide her supervisor with any specific reasons for the stress. The employer ordered her to undergo a fitness for duty psychological. The psychologist requested her medical history (which included past prescriptions for anti-depressants). Plaintiff refused to sign a release to allow the doctor to obtain these records and persisted in her refusal despite a direct order to do so. She was ultimately terminated for disobeying the direct order. The Court upheld the termination, dismissing her claims under the ADA, ADEA, Title VII anti-retaliation and state privacy laws.

EEOC Advisory Letter (3/28/07) – The EEOC opined in an advisory letter that an employer was permitted, under the ADA, to order a fitness for duty exam for candidates seeking promotion to positions with an increased level of physical requirements, so long as the test did not consist of a "medical" evaluation (heart rate; blood pressure), but only measured performance of a task or tasks. In a competitive selection process, the incumbent employee must be treated like an applicant and only asked medical questions post-conditional offer. If the promotion is non-competitive (career path progression), a medical examination may only be required if the employer has reason to believe that a

particular employee has a medical condition that may impair their ability to perform the essential functions of the new position.

FAMILY AND MEDICAL LEAVE ACT

Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006) – Employee can combine prior service following break in service (in this case, five years) to meet 12 month employment prerequisite to use of FMLA.

FAIR LABOR STANDARDS ACT

Adams v. United States, 471 F.3d 1321 (C.A. Fed. 2006) - The plaintiffs were federal law enforcement officers issued government-owned police vehicles and required as a condition of their employment to commute from home to work in those vehicles so that the cars will be available to the officers for rapid response to emergency calls at any time. They were required to have their weapons and other law enforcement-related equipment and to have on and monitor their vehicles' communication equipment while in the car. They were not allowed to run any personal errands in their government vehicles, so had to proceed directly from home to work and back again without unauthorized detours or stops. The Court held the FLSA did not require payment for the commuting time.

DOL Letter Ruling of Interest

2007-8: School Resource Officers, based on the facts presented in this example, are properly classified as exempt under the administrative exemption.

FIRST AMENDMENT FREEDOM OF SPEECH

Bradley v. James, 479 F.3d 536 (8th Cir. 2007) – Comments to an internal investigator and human resources official, in response to an investigation into a police incident, by (now former) police Captain that the Chief showed up at the crime scene intoxicated held not to be protected speech under Garcetti rationale.

Sigsworth v. City of Aurora, 487 F.3d 506 (7th Cir. 2007) – Police investigator who reported suspicion of wrongdoing by gang task force members to his supervisor and was subsequently removed from the task force and allegedly denied promotions. The Court held his 1st Amendment claim to be barred by Garcetti.

Haynes v. City of Circleville, 474 F.3d 357 (6th Cir. 2007) – K-9 officer's written memo to Chief protesting training cutback decision did not constitute protected speech under the Garcetti standard.

Spiegla v. Hull, 481 F.3d 961 (7th Cir. 2007) – Prison guard, reassigned to a less attractive shift after reporting to the Asst. Superintendent a possible security breach by superior officers in the department filed suit alleging a 1st Amendment violation and was awarded $210,000 by a jury. The Garcetti decision was released during the pendency of the employer's appeal. The circuit court found the report to be unprotected speech, applying the Garcetti standard.

Morales v. Jones, 494 F.3d 590 (7th Cir. 2007) – Officers reassigned to undesirable posts after informing an Assistant District Attorney about possible criminal conduct committed by the police chief and deputy chief held not entitled to 1st Amendment protection under Garcetti. One officer, who had also testified about the same events in an unrelated civil matter, could proceed on his 1st Amendment claim based only on that testimony.

Deprado v. City of Miami, 446 F.Supp.2d 1344 (S.D.Fla. 2006) – Plaintiff police officer, testified regarding police misconduct in a grand jury proceeding and was thereafter disciplined on another basis and transferred. The court held that grand jury testimony related to official duties as a police officer is not protected by the 1st Amendment under Garcetti.

Weisbarth v. Geauga Park District, 2007 WL 2403659 (6th Cir., August 24, 2007) – Park ranger alleged that she was terminated based on information given to a consultant hired by the Park District to address morale problems in the agency, held to have uttered speech entitled to 1st Amendment protection under Garcetti.

Foraker v. Chaffinch, 2007 WL 2445561 (3d Cir., August 30, 2007) – Officers in the firearms training unit complained about safety at the new indoor firing range, were referred to the state auditor, and after speaking to the auditor were subsequently transferred. The Court held that neither the complaints nor the report to the auditor were protected under the 1st Amendment based on Garcetti.

See v. City of Elyria, 2007 WL 2710829 (6th Cir., September 19, 2007) – Complaints made by officer to the FBI about misconduct in the police department protected under the 1st Amendment.

Campbell v. Galloway, 483 F.3d 258 (4th Cir. 2007) – Court held that complaints of sexual harassment, while not *per se* matters of public concern, when they included complaints about conduct directed at citizens and other officers, they met this threshold test. Because the speech in this case, however, fell within a "gray area" in the law, the Chief was entitled to qualified immunity and summary judgment in his favor.

Skehan v. Village of Mamaroneck, 465 F.3d 96 (2d Cir. 2006) – Complaints of misfeasance within the police department, ongoing cover-ups and attempts to silence anyone who spoke out against these problems, when made by the employee's labor representatives in a memo posted in the police locker room are protected speech under the 1st amendment, unaffected by Garcetti.

Lindsey v. Orrick, 491 F.3d 892 (8th Cir. 2007) – Public works director who cautioned the Mayor and City Council about violations of the sunshine law and advised the Mayor that he was meeting with the Attorney General was fired within a month. The court held that complaints about sunshine matters constitute protected speech and were not part of the job of the public works director. The City's motion for summary judgment was denied, as was the Mayor's motion for qualified immunity.

Blackman v. New York City Transit Authority, 491 F.3d 95 (2d Cir. 2007) – Transit authority worker, who in commenting on the death of two supervisors killed by a disgruntled former transit employee, stated "those two scumbags deserved what they got for getting the [employee] fired," and was subsequently terminated, held not to have uttered speech protected by the 1st Amendment.

Dible v. City of Chandler, 2007 WL 2482147 (9th Cir., September 5, 2007) – Production and sale of sex videos by police officer and his wife are not protected by the 1st Amendment.

Wilson v. Moreau, 492 F.3d 50 (1st Cir. 2007) – Police Chief, along with two other top level officials sued alleging retaliation based on political affiliation in violation of the 1st Amendment. The Chief was harassed, suspended and then resigned. The Court held that, as policy makers, these officials were not protected by the 1st Amendment from politically based employment decisions.

Shockency v. Ramsey County, 493 F.3d 941 (8th Cir. 2007) – A lieutenant who ran against the incumbent sheriff and a sergeant who supported the lieutenant were subsequently transferred to jobs with decreased responsibilities and sued claiming 1st Amendment violation. The court found that the lieutenant and sergeant positions are civil service protected in Minnesota and are not considered policy makers exempt from 1st Amendment protection.

Webb v. City of Philadelphia, 2007 WL 1866763 (E.D. Pa., June 12, 2007) – Female Muslim police officer has no right to wear khimar headpiece while in uniform.

MISCELLANEOUS EMPLOYMENT DECISIONS

Minch v. Chicago, 486 F.3d 294 (7th Cir. 2007) – Neither the collective bargaining agreement, which was silent on this issue, nor, therefore the 14th Amendment due process clause prevented the City of Chicago from imposing a mandatory retirement age of 63 for firefighters (the Court having determined in a previous case, Minch v. Chicago, 363 F.3d 615 (7th Cir. 2004), that the ordinance, which applied to both police and fire departments likewise did not violate the ADA).

EEOC v Sundance Rehabilitation Corporation, 466 F.3d 490 (6th Cir. 2006) – Offer of separation agreement that conditions payment of severance on execution of an agreement that included a promise not to file charges with the EEOC does not constitute retaliation under Title VII (although such provision may well violate public policy and be unenforceable).

Sciolino v. City of Newport News, 480 F.3d 642 (4th Cir. 2007) – In order to assert a liberty interest claim under s. 1983, the employee (here, a discharged probationary police officer) must allege (and ultimately prove) a likelihood that stigmatizing information in his personnel file will actually be released to a prospective employer or the public at large. The court summarizes the different circuits' approach to this issue.

Walden v. City of Providence, 495 F. Supp. 245 (D.R.I. 2007) – City's motion for summary judgment denied in action by more than 100 city employees who filed suit alleging violation of their right to privacy by the City following installation of a recording system on the public safety department telephones that recorded all incoming and outgoing calls with no audible signal.

Bolton v. City of Dallas, 472 F.3d 261 (5th Cir. 2006) – Summary judgment for City reversed in former police chief's claim that termination from his appointed position without due process violated his property right in his previous civil service position by virtue of civil service protection language in City charter.

Sylvester v. Fogley, 465 F.3d 851 (8th Cir. 2006) – Investigation of police officer's sexual relations with crime victim did not violate officer's right to privacy under U.S. or state constitution. Summary judgment for employer upheld by court.

Poolman v. City of Grafton, 487 F.3d 1098 (8th Cir. 1098) – Court denied Plaintiff's liberty interest claim because he conceded the veracity of the acts he allegedly committed (although disagreeing with whether they were "wrong"): 1) installing a pinhole camera to observe the actions of a tenant in a building owned by him; and 2) storing evidence he believed to be drugs in his personal safe at home rather than the police evidence locker.