FOSTER PEPPER PLLC

33rd Annual Civil Service Conference

Yakima, Washington
September 22 – 23, 2014

ANNUAL LEGAL UPDATE

2013 - 2014

P. Stephen DiJulio
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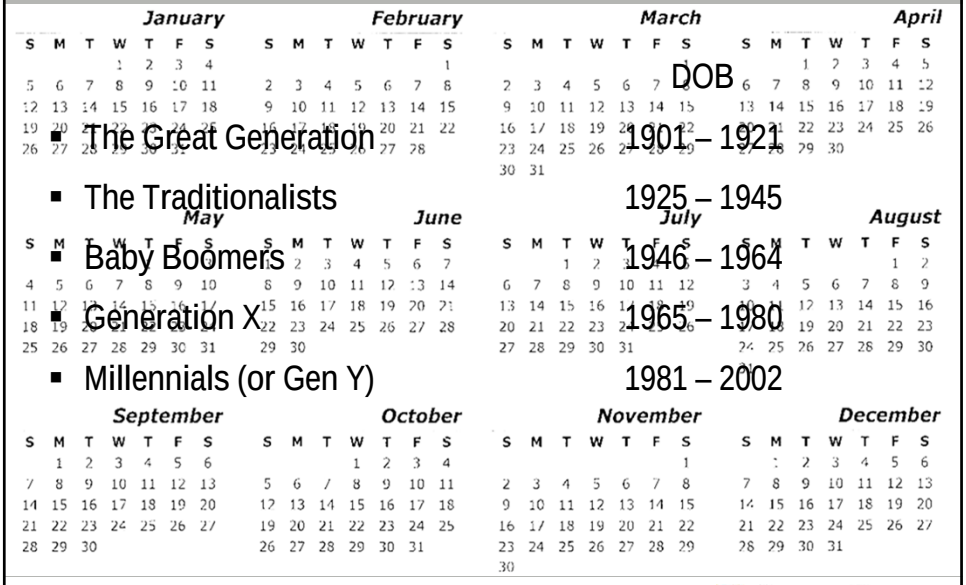
Appearance

8.1 EEOC v. Abercrombie & Fitch

Knowing the Audience



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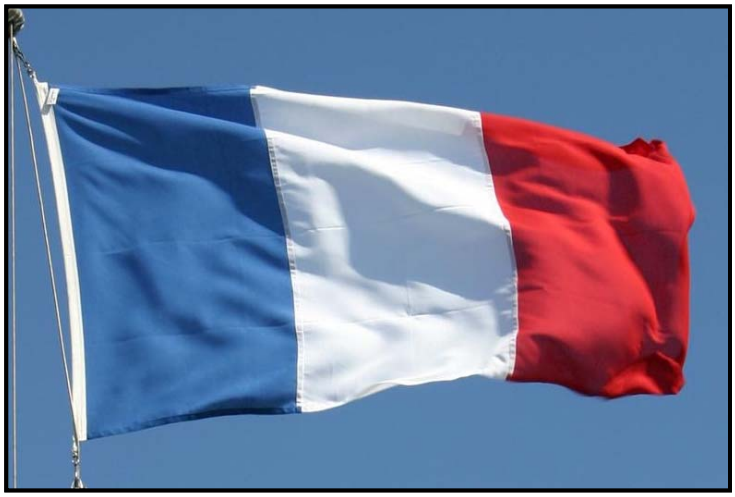

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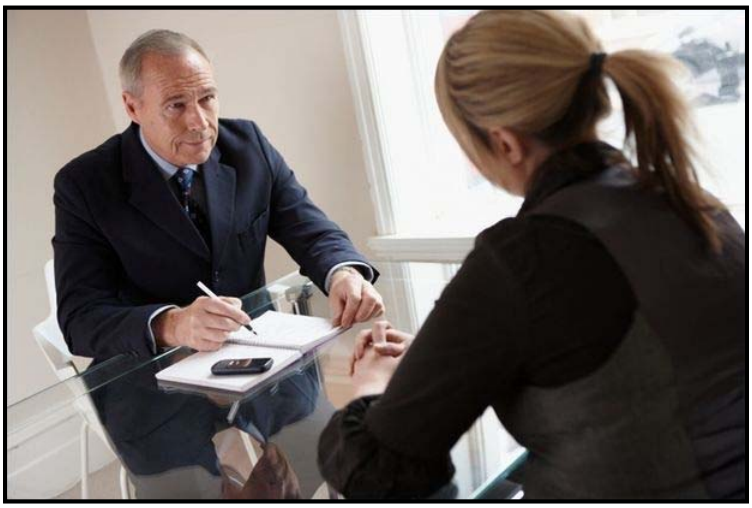
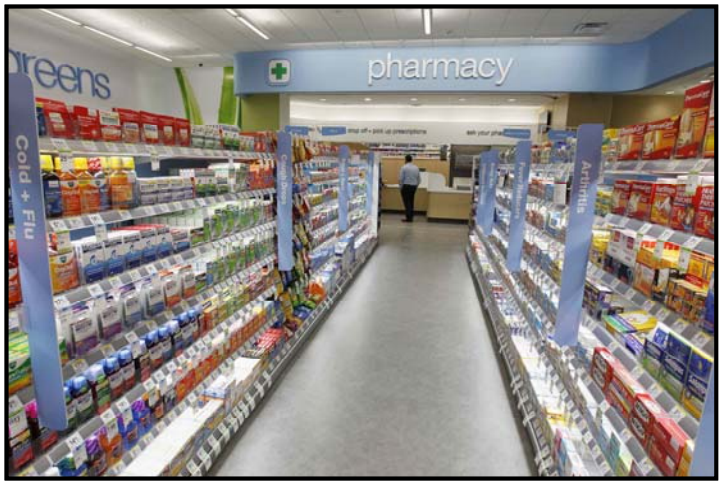


FMLA



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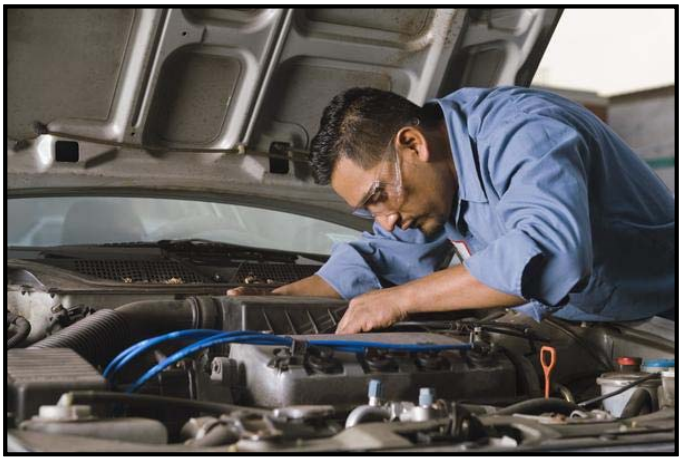

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and Devra Cohen, University of Washington School of Law

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1. Due Process

1.1 *Allen v. City of Jackson*, 981 F. Supp. 2d 738 (W.D. Tenn. 2013)

Joe Allen was terminated from his employment as a probationary at-will police officer for the City of Jackson after he tested positive for THC in a random drug test. The city maintains a zero-tolerance drug policy. The Mayor released a statement to the media stating that Allen had been terminated for testing positive for marijuana in a random drug test. The City offered Allen a public name-clearing hearing at some point after he was fired. Allen waived this hearing. Allen then sued the City and other defendants for damages arising out of his termination. He alleged that the City and Mayor violated his procedural due process rights by depriving him of property (his employment) without following the city's prescribed procedures, and by depriving him of liberty by releasing the statement related to his termination to the press without providing him with a "meaningful" opportunity to clear his name.

The court held that because Allen was an at-will employee, without an expectation of continued employment, and with no reasonable expectation that he would be terminated only for good cause, Allen did not have a protected property interest in his employment. Therefore, he was not entitled to due process for his termination. The court also held that Allen's deprivation of liberty claim must fail because Allen failed to show that the Mayor's statement to the media was false. Furthermore, even if the information had been false, Allen's claim would have failed because he was offered an opportunity to publicly clear his name, and the City followed its procedures regarding re-testing. The court dismissed Allen's deprivation of liberty claim.

1.2 *Behne v. Halstead*, 2014 IER Cases 156455 (M.D. Pa. 2014)

Officers Barry Keller and Richard G. Behne Jr. were terminated from their positions as police officers with the Newport Police Department when the Newport Borough Council voted in a special council meeting to disband the Department. Prior to the Council disbanding the Department, tensions had been mounting between certain council members and Officer Behne. In particular, some members of the council were upset that Officer Behne had joined a union. Certain council members made disparaging remarks about Officer Behne, expressing great animosity toward him. In addition, both Officers criticized members of the council at public meetings. After their positions were terminated, the Officers sued the Borough and certain council members alleging that the individuals "orchestrated a scheme to terminate Plaintiffs' employment due to personal vendettas and anti-union animus." Officers Keller and Behne allege that Defendants violated their procedural due process rights and that the Defendants' actions were an illegal form of retaliation when the defendants deprived them of their property right to their employment without due process.

The court held that Officers Keller and Behne had a property interest in their employment, and that it was a question for a jury whether the Officers were denied due process when the defendants disbanded the police department by resolution. The court granted the defendants' motion for summary judgment on the conspiracy charges because the Officers failed to present any evidence that showed the requisite class-based or racial animus. The court allowed the Officers' claim of retaliation in violation of First Amendment protected free speech to go forward, finding that Officer Keller's speech and the speech of the union representative

were protected and that there were material questions as to whether that speech lead to the officers' termination. Finally, the court denied the defendants' motion for summary judgment based on qualified immunity, finding that the defendants violated clearly established law and that there was a significant factual dispute regarding the defendants' motivation for disbanding the police department.

1.3 *Bombard v. State of New York*, 113 A.D.3d 954 (N.Y. App. Div. 2014)

Jon Bombard, Jr. was employed as a University Police Officer at State University of New York at Plattsburgh. He was promoted, subject to a probationary period. Shortly before the end of his probationary period, Bombard was demoted back to his former position. He challenged the determination, and sought reinstatement to the higher position with back pay. He alleged procedural failures.

The court held that Bombard met his initial burden of proof, raising issues as to whether his termination was in bad faith, or whether it was based upon unsatisfactory work performance. Bombard alleged that the defendants harbored ill will against him. On the limited record, the court found that because the issue turned primarily on issues of credibility, the Bombard "raised sufficient questions of fact to justify a hearing and development of his allegations of bad faith."

1.4 *Bracey v. City of Killeen*, 417 S.W.3d 94 (Tex. App. 2013)

Tramel Bracey was indefinitely suspended from his position as a police officer with the police department of the City of Killeen, following an investigation into his alleged violation of several of Killeen's civil service rules. Pursuant to the Civil Service Act, Police Chief Dennis Baldwin wrote a letter in which he alleged Bracey violated cited rules by providing false information when opening two bank accounts and then being "untruthful" about those events. Chief Baldwin supported these allegations with evidence compiled during a search of Bracey's home conducted by Detective Charles Dinwiddie and with interviews by Captain Jeff Fholer. This supporting information was never reduced to writing. Bracey appealed his suspension, and proceeded before an independent hearing examiner. The examiner concluded that Bracey had violated the civil service rules and that indefinite suspension was appropriate. Bracey appealed, asserting that the examiner exceeded her jurisdiction by not requiring that the "complaints"—the information provided by Dinwiddie and Fholer—be reduced to writing, allegedly in violation of Subchapter B of the Government Code. Subchapter B prohibits taking disciplinary action unless a copy of the signed complaint is given to the officer.

The key issue was "whether the hearing examiner 'exceeded her jurisdiction,' as contemplated by the Civil Service Act's judicial-review limitations, by dismissing rather than reinstating Bracey under circumstances where Subchapter B says that '[d]isciplinary action may not be taken.'" The court held that the examiner did not have jurisdiction to reinstate Bracey based only on the defendant's failure to provide him with "written" complaints under Subchapter B. Bracey did not preserve a complaint that the hearing examiner failed to enforce Subchapter B with a remedy that would have been within her jurisdiction to award. Therefore, the hearing examiner did not exceed her jurisdiction as a matter of law.

1.5 *City of San Antonio v. Salvaggio*, 37 IER Cases 317 (Tex. App. 2013)

Joseph Salvaggio, a lieutenant with the San Antonio Police Department (SAPD), was placed on indefinite suspension after he tried to take a post-it note with scribbles on it outside of the testing room during an examination. The exam was to qualify for promotion to the rank of captain. Before the test began, those taking the test were instructed not to remove test materials from the test room. However, "test materials" were never defined. Salvaggio appealed his indefinite suspension to an independent hearing examiner. The hearing examiner overturned Salvaggio's suspension and restored him to his position as lieutenant with full back pay.

The court upheld the hearing examiner's decision, finding that the term "test materials" had never been defined as including a post-it note. The court held that the Chief had no authority to define test materials to include a post-it note, and that by suspending Salvaggio for removing the post-it note from the test room, the Chief created a new rule by defining test materials. Because the Chief had no authority to define "test materials," and because that term was undefined, Salvaggio could not be disciplined because he did not violate any rule against removing test materials from the test room.

1.6 *Denvir v. Donham*, No. 2013–P–0039, 2013 WL 6881804, at *1 (Ohio Ct. App. Dec. 31, 2013)

Thomas Denvir, a part time police officer in the Village of Windham, was suspended for 40 hours. The Police Chief served the "complaint," the Mayor conducted an investigation, reviewed the charges, and found a 10-day suspension appropriate. Denvir appealed to the Village Council, which reduced the suspension to five days. Denvir appealed, alleging procedural flaws. The trial court vacated the suspension, holding that it was contrary to law. On appeal, the Court affirmed the trial court's ruling, holding that the procedural flaws were fatal to the suspension.

The court found that while the procedures followed by the defendants did not violate due process, the disciplinary procedures in the departmental procedural manual provided for more in the pre-disciplinary procedure, including a pre-disciplinary hearing. The court held that the departmental policy mandated a pre-disciplinary hearing, and that because Denvir was not afforded a pre-disciplinary hearing, the suspension must be vacated.

1.7 *Divis v. Wash. State Patrol*, No. 43744-9-II (Wash. App. May 28, 2014) (unpublished)

David Divis was demoted from sergeant to trooper for making racially insensitive remarks. The Washington State Patrol (WSP) Trial Board determined that the WSP had proved violation of various WSP regulations for three of the eleven alleged racially insensitive remarks. The Trial Board recommended that Divis be suspended for 20 working days. State Patrol Chief Batiste chose to demote Divis from sergeant to trooper. Divis contends that the Chief exceeded his authority and wrongly entered his own findings of fact. He asserted the Chief improperly relied on a prior settlement agreement arising from Divis' prior acts of misconduct not before the Trial Board; failed to weigh the proportionality of his discipline of Divis against discipline of other similarly situated troopers; and, lacked just cause to demote him because the investigation was not conducted fairly.

The court upheld the demotion. The court held the Chief acted within his authority and did not enter his own findings of fact; the settlement agreement was in the Trial Board's record and the Chief properly considered the Divis' disciplinary history in making a determination about the appropriate discipline; the discipline was proportionate because the legislature has given the chief sole discretion to determine the proper disciplinary action; and, the investigation was conducted fairly.

1.8 *Farran v. City of Cleveland Civil Serv. Comm'n.*, 37 IE Cases 1703 (Ohio Ct. App. 2014)

Matthew Farran was employed by the city of Cleveland as a manager with the city's Department of Port Control. The City filed four different complaints against him during a ten-month period. Farran was suspended for the first three complaints and then was dismissed for the fourth complaint, as required by the City's progressive discipline policy. On Farran's appeal, the four complaints were consolidated for a hearing. Farran claimed the commission relied upon inadmissible hearsay in upholding the suspensions and that he did not receive due process because the four complaints were consolidated in one proceeding against him for the purpose of establishing the chain of infractions necessary for termination.

The court upheld the termination. The court found that the rules of evidence do not apply in administrative hearings, and that although the referee had to determine that the statement was reliable or trustworthy, that was a question that went to the weight and not the admissibility of the proffered evidence. The court also found that the Farran did not present sufficient evidence to show that the city did not adhere to its progressive discipline policy.

1.9 *Hudson v. City of Riviera Beach*, No. 12–80870–CIV, 2013 WL 6017282, at *1 (S.D. Fla. Nov. 13, 2013)

Michael Hudson was the multi-media specialist for the City of Riviera Beach's government-access television station. He asserts that defendant Doretha Perry used her position as the Human Resources Director to force him to take a drug test to settle a personal vendetta against him. He alleges that she had no other basis for forcing him to take three different drug tests. The collective-bargaining agreement that governed Hudson's employment provided that an employee may be drug tested when there is reasonable suspicion that the employee is using drugs or alcohol. One of the tests returned negative results. Hudson revoked the rights to his protected health information, thereby preventing the city from obtaining the results of the hair-sample test. The city suspended him in retaliation for refusing to release his drug test results. The city claimed that the collective bargaining agreement specified that revocation of a drug test was tantamount to a refusal to take it. Hudson was terminated. Hudson alleged that the hearing was inadequate because Perry was not present, he was not allowed to cross-examine any witnesses, and the defendants did not provide Hudson with requested documentation until after the hearing. Furthermore, Perry was allowed to make a recommendation as to Hudson's termination. After termination, Hudson requested an appeal before the Civil Service Board. It took the city more than six months to assemble the Board, and Hudson had to wait a year-and-a-half to depose the defendants.

Hudson asserted seven constitutional claims and one state-law claim. Hudson asserts that under 42 U.S.C. § 1983, the drug testing was an unlawful search and seizure, and that his

termination violated his due process rights. The court dismissed the section 1983 claims against the City of Riviera Beach because Hudson failed to show that the city had its own unconstitutional or illegal policy. As to Hudson's procedural-due-process claims, the court found that Hudson had a property right in his continued employment, but that he failed to establish that he did not have notice and an opportunity to respond, nor did he establish the state did not provide a means to correct the alleged deficiency. In fact, he had three hearings, and he did not appeal to the state courts to correct the state procedural issue. As to Hudson's Fourth Amendment unreasonable search and seizure claim, the court held that the issue of reasonable suspicion was subject to judicial review, and that Hudson sufficiently alleged that the proceedings were biased. His Fourth Amendment claim against Perry was upheld. However, because Hudson failed to state a claim against two of the individuals, those claims were dismissed.

In addition to the aforementioned claims, Hudson alleged a First Amendment violation based on retaliation for sending the letter to the drug company revoking their right to release his drug test results. The court dismissed this claim because the speech was private communication and not subject to First Amendment protections. The court also dismissed Hudson's state-law claims because the Florida drug-free workplace program does not create a private right of action.

1.10 *Hugoe v. Woods Cross City*, 37 IER Cases 295 (Utah Ct. App. 2013)

Wade Hugoe was terminated from his position as a master mechanic with Woods Cross City after an outburst at his supervisor in which he shouted, "You don't do anything around here and you can go [expletive] yourself and all of you can go [expletive] off." Hugoe asserted due process violations, arguing that the notice of pre-disciplinary hearing did not comply with due process requirements. He argued that the notice was too vague and that it failed to identify specific allegations or explain the city's evidence against him. He also argued that the Board based its decision on a past incident, which was not a reason given for his termination in the termination letter. Finally, he argued that he did not have an impartial tribunal for his post-disciplinary hearing. He also argued that termination was disproportionate and inconsistent.

The court held that Hugoe had actual notice of the basis of the pre-disciplinary hearing, and that Hugoe failed to allege harm resulting from the alleged deficiencies in the written notice. Because Hugoe had actual notice and received a pre-disciplinary hearing, the court held that he was afforded due process in the pre-disciplinary proceedings. The court also found that the Board did not improperly rely on past incidences as the basis for its decision to terminate Hugoe. Finally, the court held that Hugoe could not assert the impartiality argument on appeal because he did not raise it to the Board. As for Hugoe's inconsistency argument, the court held that he failed to make a prima facie case for inconsistent treatment. Despite all of this, the court set aside the Board's decision and directed the Board to make additional findings regarding whether or not termination was a proportionate disciplinary action. The court found that because the Board did not adequately detail its determination of proportionality, the court could not make a meaningful review, and thus it had to find that the Board's determination was arbitrary and capricious.

1.11 *Moss v. Shelby Cnty. Div. of Corr.*, No. W2013-01276-COA-R3-CV (Tenn. Ct. App. 2013)

In December 2011, Aretha Moss was found visiting the home of Stanley Cooper. There was a large quantity of illegal drugs in the residence. Mr. Cooper admitted the drugs were his. Ms. Moss was a corrections officer at the Shelby County Division of Corrections.

Ms. Moss was relieved of duty with pay. During the internal investigation, Ms. Moss signed a Truthfulness Form and a Garrity Notice. In her recorded statements, she said that she did not know Mr. Cooper had been involved in drug trafficking, or that he had been arrested and incarcerated for drug activity. She denied ever visiting him in jail, and stated they were just childhood friends. The investigation revealed that Ms. Moss had visited Mr. Cooper in jail in 2001, that her vehicle was seized when Mr. Cooper's marijuana and ecstasy were found in her car, and that Mr. Cooper had been arrested 22 times. The investigator concluded that Ms. Moss had misrepresented the truth in her interview, and Ms. Moss was suspended without pay. Ultimately, Ms. Moss was terminated because she was not truthful when she said she was unaware of Mr. Cooper's drug activity. The Board affirmed the decision for violating policy which provided that employees should be professional at all times and not engage in illegal activity or behavior that could reflect negatively on the Division of Corrections of Shelby County. The Board found that "too many events confirmed that Ms. Moss knew Mr. Cooper's past with drugs and did not in any way separate herself from this detriment to her career."

On appeal, Ms. Moss raised one issue: whether "Ms. Moss was denied due process when she was charged with a 'Standard of Conduct' violation after Director Coleman stated there was an error in her charges and she was only charged with truthfulness." The court held that the Board's decision was not arbitrary or capricious, and that the Board had a reasonable basis for its decision to terminate Ms. Moss. Furthermore, because Ms. Moss did not assert due process violations in trial court, she could not raise the issue for the first time on appeal. The court upheld her termination.

1.12 *Turner v. U.S. Capitol Police*, 122 FEP Cases 928 (D.D.C. 2014)

Gregory Turner was terminated from his position as a lieutenant with the Capitol Police after he was found "guilty" of unbecoming conduct. Turner was a member of the Tribes Motorcycle Club (TMC), a "social riding club" for motorcycle enthusiasts. His membership had previously been the subject of multiple investigations by both the Capitol Police and the FBI, but those investigations had not resulted in charges. As a member of TMC, Turner associated with members of "outlaw" motorcycle clubs, with a white supremacist, and with convicted felons. Turner was also serving as the president of TMC. Although the Disciplinary Review Board recommended that Turner be suspended without pay for 14 days as punishment for his unbecoming conduct, Chief Morse recommended that Turner be terminated based on the unbecoming conduct and the "totality of the circumstances." The Capitol Police Board approved the termination. Turner contends that his termination was unlawful and in violation of the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, the Fifth Amendment right to due process, and the First Amendment right to freedom of speech and association.

The court dismissed Turner's Age Discrimination and First Amendment claims, finding that Turner did not demonstrate any evidence of age discrimination, that his actions were not "speech," and that the police's interest in the efficient operation of law enforcement outweighed Turner's interest in participating in the activities that brought him into contact with white supremacists and convicted felons. However, the court did not dismiss Turner's Title VII claim or his Fifth Amendment claim, finding that there were issues of material fact. For both charges, the court was concerned that Chief Morse had relied on the "totality of the circumstances" and "other department documents" when he decided to terminate Turner. With regard to the Title VII claim for racial discrimination, the court noted that these background circumstances could reveal the motivation about the termination, and that the motivation might be reverse racism. Regarding the Fifth Amendment due process claim, the court held that Chief Morse's reliance on these other considerations and documents raised issues of material fact as to if Turner received full notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story. Furthermore, the court held that there were questions of material fact as to if Turner had a protected property interest in his employment.

1.13 *Woods v. City of Berwyn*, No. 12 C 1900 (N.D. Ill. 2013)

John Woods was a lieutenant with the Berwyn Fire Department. Woods was terminated from his position after a conversation he had with Lieutenant Ronald Hamilton. Although the parties dispute what was said in that conversation, Hamilton wrote a report, stating that during the conversation Woods said "that at one time he wanted to kill somebody, all of them. He stated that his kids asked him for the addresses, and that they would go 'over there' and 'tune them up.'" Hamilton reported the conversation to the Union and told the Deputy Chief that he believed Woods made "threats against the fire administration and/or our families." Woods was charged with unbecoming conduct, fighting/verbal abuse, false reports, and violation of the law. Ultimately, the City's Board of Fire and Police Commissioners fired him. Prior to the conversation with Lieutenant Hamilton, Woods had filed multiple FMLA and workers' compensation claims, and dealt with comments implying that he was too old for some of his duties. Woods suffered from a back injury and had experience with depression. Woods sued the city challenging his termination and alleging discriminatory and retaliatory termination in violation of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Illinois Worker's Compensation Act. He also alleged a violation of his due process rights under the Fourteenth Amendment because the city terminated him without allowing arbitration.

The court granted the city's motion for summary judgment on the retaliation and discrimination claims. The court found that the Board made the decision to terminate Woods after its own evidentiary hearing in which both sides called and cross-examined witnesses, and gave opening and closing arguments. The court also found that there was no evidence that the Board took any prohibited factor into account when making its decision to terminated Woods. The court also granted the city's motion for summary judgment on the due process claim. Woods invoked state law to argue that the city denied him due process when it terminated him without arbitration. However, a violation of state law alone does not constitute a violation of federal due process, and Woods based his claim on the Constitution's due process clause. The court determined that the pre-termination process—which was like a full trial—satisfied the federal due process requirements, and that no jury could find Woods was denied due process.

2. Just Cause – Suspension and Discipline

2.1 UNBECOMING BEHAVIOR

2.1.1 *Botsford v. Bertoni*, 977 N.Y.S.2d 497 (N.Y. App. Div. 2013)

Botsford was a fire inspector for the Village of Endicott Fire Department and was president of the Village's firefighters union. In 2009, he was charged with multiple counts of misconduct after using profanity in two statements in a verbal altercation with the Fire Chief regarding the Chief's directive that all firefighters have a respiratory physical examination. After disciplinary charges were filed against him, the Botsford filed an improper practice charge with the Public Employment Relations Board (PERB), alleging that the decision to discipline him was anti-union animus. At the disciplinary hearing, Botsford denied making the second statement. The Hearing Officer found the Petitioner guilty and recommended a period of unpaid suspension. Bertoni, the Mayor of Endicott, sustained the findings of guilt, but modified the period of suspension. During the March 2010 PERB hearing, Botsford testified that he did not make the second statement.

Based upon Botsford's denial of having made the second statement at both the disciplinary and PERB hearings, he was charged with misconduct amounting to perjury, making a false official statement, and incompetence for failure to be truthful. The hearing officer found the Botsford guilty, and recommended that his employment be terminated. The Mayor adopted the hearing officer's findings and penalty. The Botsford challenged the determination.

The court reversed the decision, holding that the Mayor should have been disqualified from reviewing the hearing officer's recommendations. The evidence indicated that the Mayor, the administrative decision maker, prejudged the matter. The Mayor made statements that indicated he had already judged the facts surrounding the key issue—whether the Botsford made false statements "knowingly and willfully." Because the decision maker prejudged the issue, disqualification was required.

2.1.2 Brandon Blackwell, *Cleveland firefighters demoted, suspended for roles in urinal prank*, Cleveland.com (Feb. 6, 2014, 1:21 PM).

Eight firefighters in Cleveland Ohio were disciplined for a prank that involved urinating on the official photograph of a former Chief. The punishments ranged from unpaid suspension to demotion. The photograph of the former chief was placed in the urinals at two local bars during a celebration honoring new firefighters. Captain Roy Ziganti—who was demoted to rank of firefighter for his involvement in the prank—took a picture with his cell phone of the photograph resting in the urinal, and had an acquaintance text the picture to the former Chief and the division lieutenant. This sparked the investigation. Among other offenses, the firefighters were charged with: conduct unbecoming an employee in public service, neglect of duty, failure of good behavior, and offensive conduct.

The former Chief retired in August after he was pulled from his supervisory duty because he failed to meet training requirements. Weeks before, the former Chief received a verbal reprimand for threatening to stab a subordinate in the neck for violating the dress code. The

Union secretary stated that the discipline meted out for the prank was excessive when compared to the verbal reprimand the former Chief faced.

2.1.3 *Broward Sheriff's Office & Fed'n. of Pub. Emps.*, 133 LA 87 (Arb. 2014).

Grievant, a detention deputy with the Broward County Sheriff's Office (BSO), was terminated for conduct unbecoming an employee and for being untruthful in BSO matters. Grievant reported that he was the victim of an armed robbery. When he was questioned by detectives, he first re-told the events of the robbery, and then, when the detectives made it clear that they did not completely believe him, recanted his statement. The arbitrator determined that the Grievant was untruthful during an official investigation—either the Grievant lied about being a victim of an armed robbery, or he lied when he recanted his story. The arbitrator held that because Grievant had been untruthful during an official investigation, and because Grievant knew that BSO employees are expected to be truthful at all times, it was reasonable for the BSO to terminate the Grievant.

2.1.4 *City of Galveston, Tex. & Tex. Mun. Police Ass'n.*, 132 LA 1101 (Arb. 2013).

Grievant was a police officer for the City of Galveston, Texas. Grievant was called to assist a Grandmother with her 14 year-old granddaughter. At the scene, Grievant subjected the grandmother to profane, demeaning, and disrespectful comments. He called her a coward and belittled her parenting skills multiple times. Grievant then handcuffed her with her hands behind her back, and placed her in the back seat of Grievant's patrol car. The grandmother lost her balance while she was being handcuffed and was injured. Grievant also handcuffed the granddaughter and placed her in the back seat of his car.

After an Internal Affairs investigation, the police chief placed Grievant on indefinite suspension. Grievant appealed. The city charged Grievant with: acts of incompetency and unsatisfactory performance; unwarranted detention of the grandmother and Grievant's unbecoming conduct; acts of discourtesy and lack of moral character; and conduct prejudicial to good order. Although immediately after the incident Grievant sought assistance from the Employee Assistance Program; and took responsibility for his actions—admitting that his conduct was inappropriate and that he should have been suspended for a prolonged period of time—the hearing examiner held that the Grievant's discharge was for just cause and not made in a retaliatory or discriminatory manner. The hearing examiner denied the Grievant's appeal for a modification of his indefinite suspension.

2.2 **MISSING WORK**

2.2.1 *B&W Pantex, LLC & Metal Trades Council of Amarillo, Tex. & Vicinity*, 133 LA 503 (Arb. 2014).

Grievant, a motor pump operator in B&W Pantex's fire department, was fired for leaving work without authorization and for willful use of a Government vehicle for an other than official purpose. Grievant worked at a facility that safeguards the U.S. nuclear arsenal. While on duty, Grievant left work in a government vehicle and met a woman on the side of a highway. A B&W employee noticed the company vehicle parked on the side of the road along with a personal vehicle, and reported it to B&W. When officers arrived, they pointed a spotlight at the personal

vehicle, and saw the silhouette of a man in the passenger's seat and a head pop up from the passenger's seat into the driver's seat. Responding officers thought that they saw an object—possibly a blanket—be thrown into the back seat. Grievant asserted that the woman was his sister, and that he was exchanging car keys with her. He stated that she had been crying with her head on his shoulder.

The question was whether there was just cause to fire the Grievant. The arbitrator found that, although it was "quite obvious" that Grievant left the plant on a personal errand without permission and in a government vehicle, termination was an unreasonable penalty under the totality of the circumstances. The Grievant had worked at B&W for 33 years with only one prior disciplinary action, had received numerous awards for community service, and was very active in his church and community. The arbitrator held that termination was too severe. However, because the Grievant's activity was misconduct, there was a reasonable basis for discipline. The Grievant was not awarded back pay or benefits, and he was reinstated in the same position as an employee who twice had been subject to corrective discipline.

2.2.2 *City of Elgin & Int'l Ass'n. of Fire Fighters, Local 439*, 132 BNA LA 1517 (Arb. 2013).

Grievant—a firefighter/paramedic—used one day of sick leave so that he could participate in a 5K race in Chicago, Illinois. Grievant's supervisors saw a picture of him running the race. When questioned about his use of sick time to run the race, Grievant admitted that he inappropriately used his sick time. Grievant was removed from any overtime opportunities and acting lieutenant duties, and was suspended without pay for 20 days. The questions for the arbitrator were whether the city had just cause to issue the 20-day suspension, whether the city violated the parties' collective bargaining agreement when it removed Grievant from acting lieutenant duties and when it removed Grievant from overtime opportunities.

The city bore the burden of proving that the discipline was for just cause. The arbitrator found that the Grievant's use of sick time to run a race clearly violated the city's abuse of sick leave rules and policies, and that such abuse undermined the credibility of the city and its employees. Therefore, the city had just cause in issuing the 20-day suspension. Because the acting lieutenant was responsible for enforcing city rules and policies, the city also had good cause to remove the Grievant from his acting lieutenant duties. However, the arbitrator found that city was unable to justify why the Grievant could not be assigned overtime work. There was no justification for how abuse of sick leave impeded the Grievant's ability to perform his regular duties on overtime, and an imposition of an economic sanction or refusal to allow overtime as a disciplinary measure violated the intent of the parties' collective bargaining agreement.

2.2.3 *Red Wing Shoe Co., Inc. & United Food & Commercial Workers, Local 527*, 132 LA 1049 (Arb. 2013)

Grievant was terminated because he exceeded the maximum disciplinary points under a "no-fault attendance" policy. Despite multiple warnings about his "awful attendance," Grievant left his new supervisor a voicemail the evening before a scheduled work day requesting that the work day be switched to a vacation day and specifically requesting that the supervisor call back if there was a problem. The supervisor did not call back, but Grievant was penalized for his absence because his "short notice" violated the attendance policy.

The arbitrator found that the employer did not have just cause to discharge the grievant. Because the previous employer had been lax and arbitrary in its enforcement of the attendance policy, the arbitrator found that the Grievant reasonably and in good faith concluded that his short-notice would be acceptable to management. The arbitrator held that although his behavior was not acceptable under the actual language of the collective bargaining agreement, it would be unfair to penalize the Grievant for his good faith belief that he was not violating policy.

2.2.4 Susan McCord, *Firefighter reinstated after calling in sick to work second job*, The Augusta Chronicle (July 17, 2013, 7:58 PM)

Adam Krebs, an August firefighter was fired for calling in sick to work a second job at the city's ambulance provider. Mr. Krebs did not know that he could be fired for calling in sick to work a second job. The Fire Chief said that Krebs' calling in sick led to the Chief having to close Engine Co. 3 because of a personnel shortage. The city's personnel board overturned the termination, finding that the punishment was excessive, and noting that some elements of the Personnel, Policies, and Procedures Manual had areas that needed to be improved and that the commission did not particularly discuss the "zero tolerance" policy for calling in sick.

2.2.5 *Town of Lisle & Teamsters Local 693*, 132 BNA LA 1783 (Arb. 2013).

Grievant was discharged after he threatened to kill his supervisor, took unauthorized absences, committed fraudulent activities by lying about taking his daughter to college to get off of work early, and was insubordinate. The threat took place during an oral confrontation with his supervisor—who was also the Grievant's cousin—regarding a notice that Grievant would be put on paid suspension. During that incident, the Grievant threw the notice in the trash, and told his supervisor, "You're dead." The supervisor followed the Grievant, saying, "What did you say? What did you say?"

The arbitrator found that there was not sufficient proof to discipline the Grievant on the fraudulent activities charge because there was no clear and convincing evidence on the record that the Grievant lied about taking his daughter to college. The arbitrator did find that there was sufficient proof and just cause for disciplining the Grievant for the threat, the unauthorized absence, and the insubordination. However, the arbitrator found that in light of the Grievant's long and unblemished work history, and the fact that the threat and insubordination took place during an oral confrontation for which the supervisor shared some of the blame, discharge was too severe a penalty for the threat and the insubordination. Similarly, discharge was too severe a penalty for the Grievant's single instance of unauthorized absence. Instead, the arbitrator ordered that the Grievant's discharge be reduced to one month unpaid suspension.

2.3 **EXERCISING POOR JUDGMENT**

2.3.1 *Perez v. S. Jordan City*, No. 20100545–CA, 2014 WL 268882, at *1 (Utah Ct. App. Feb. 6, 2014).

Officer Brett Perez failed to turn on either his lights or his siren when he engaged in a high-speed chase, and failed to turn on his siren when he ran through a red light during the chase. The Police Chief terminated Perez after reviewing this incident and three other disciplinary matters. The Chief determined that Perez's "on-going failure to exercise proper judgment" and

"repeated problems involving poor judgment and policy violations compromise [his] ability to function as a police officer." The Chief terminated him. Officer Perez appealed the decision on two counts. He asserted that he was not engaged in a "pursuit" when he failed to activate his lights and siren, and that termination was not proportional to his misconduct nor consistent with past department discipline for similar incidents.

The court reviewed the South Jordan City Appeal's Board affirmance of Officer Perez's termination to determine if the Board abused its discretion or exceeded its authority. The court held that the Board did not abuse its discretion when it determined that Perez was engaged in a pursuit when he went 70 miles per hour in a 35 zone while attempting to apprehend a fleeing suspect. The court also held that the Board did not abuse its discretion by terminating Officer Perez because Officer Perez failed to show inconsistency in discipline between similarly situated officers—those with similar disciplinary histories and years of service—who had committed similar offenses and himself.

2.4 **INSUBORDINATION**

2.4.1 *City of Colton & San Bernardino Pub. Emps. Ass'n.*, 133 LA 268 (Arb. 2014).

Grievant was a Senior Planner with the City of Colton's Development Services Department. Grievant had 20 years of experience, and was certified by the American Institute of Certified Planners. Grievant was fired for "repeated violations of the City of Colton's Ethics and Values Model" and for an incident that bordered on insubordination. The three alleged violations involved respect for others; loyalty, dependability, and integrity; and independent objective judgment. The Notice of Intent to terminate referred to an incident in which the Grievant used the word "impasse" during a meeting to describe the state of contract negotiations between a developer and the city. The Notice also referred to a counseling memo, but did not provide the document. No other documents were provided to the Grievant, in violation of the City's Ethics and Values Model which requires that the Grievant receive notice of specific incidents of misconduct before any disciplinary action occurs.

The arbitrator held that the termination was arbitrary and capricious, and not supported by evidence. The Grievant had received very positive performance evaluations and was delegated responsibilities that indicated management trusted his judgment. Grievant had not received any disciplinary action, and the city failed to provide the Grievant with any documents. Furthermore, the city delayed arbitration by eight months. The arbitrator ordered that the Grievant be immediately reinstated as Senior Planner, and that he be made whole for lost compensation and benefits.

2.4.2 *City of Ocoee, Fla. & Int'l Ass'n. of Firefighters Lodge 3623*, 132 BNA LA 1703 (Arb. 2014)

Grievant was given a 48 hour unpaid suspension (later reduced to 24 hour unpaid suspension) and demoted from the position of Engineer to Firefighter for failing to provide a biography and the name of the "pinning person" who would pin the new engineer's badge at the Promotional Pinning Ceremony. The Pinning Ceremony is voluntary and unpaid. Although Grievant was asked for the information multiple times prior to the Pinning Ceremony, on the day

of the Ceremony, Grievant informed an administrative assistant that he would not be attending the Ceremony. The city alleged that Grievant's refusal to provide the requested information amounted to insubordination, a violation of the City of Ocoee's Personnel Rules and Regulations that could be disciplined by up to termination.

The arbitrator found that this case was an "archetypal mutual miscommunication mutual culpability situation" with the "management erecting the proverbial mountain out of a molehill to probe it's [sic] point-do it because I tell you to." The event was voluntary, and thus Grievant could not violate an "order" related to the event. However, Grievant's blatant disregard for and inattentive conduct toward his supervisors was insubordination. Thus, there was just cause to subject the Grievant to some discipline. Because Grievant's behavior was "only the most minimal level of insubordination," the 24 hour unpaid suspension was justified, but the demotion was without just cause and was too severe. Therefore, Grievant was subject to the 24 hour unpaid suspension, but the city was ordered to reinstate the Grievant to an Engineer position as soon as one was available.

2.4.3 *Shiawassee Cnty. Sheriff's Deputies & IBT Local 214*, 133 LA 69 (Arb. 2013).

Grievant was demoted from her position as a Corrections Sergeant to the position of Corrections Officer for insubordination, failure to comply with verbal and written orders issued by a supervisor, failure to conform to work standards, and for engaging in conduct that brought the Department into disrepute or impaired operational efficiency. Grievant was working the night shift when she read a letter from an anonymous source in one of the cells that housed 12 inmates. The letter detailed on-going harassment and intimidation of young inmates by two fellow inmates. Grievant did not act on the information in the letter that night because she read the letter after "lights out" and she believed that officers could not "shake a cell" after lights out unless there was an incident. At shift change, Grievant gave the letter to the day shift supervisor so that he could investigate the matter. The day shift supervisor did nothing. The Assistant Jail Administrator left a note to the Grievant asking the Grievant to investigate and document any findings. Grievant began to address the situation by moving one of the two complained-about inmates to another cell. Grievant did not investigate further or record any findings; she stated that she had intended to complete the investigation, but became too busy with other tasks.

The arbitrator found that the Grievant failed to conform to the work standards of her rank during this incident. She failed to conduct cell checks and to write a report of her findings. Her failure to keep her superiors informed about the situation potentially could have impaired operational efficiency. This behavior exhibited non-compliance with one aspect of a directive. However, this behavior did not amount to gross insubordination. Because Grievant's misbehavior was an isolated incident, and because the Employer failed to prove that she willfully refused to carry out the directive, Grievant's permanent demotion was punitive, not corrective, and therefore was too severe. The arbitrator reduced the discipline to one week unpaid suspension, and ordered that the Grievant be reinstated in her position as a Corrections Sergeant.

2.5 **INAPPROPRIATE OR SEXUAL MISCONDUCT**

2.5.1 *Cnty. of Yuba/Yuba Cnty. Sheriff's Dep't & Deputy Sheriff's Ass'n.*, 133 LA 361 (Arb. 2014)

Appellant, a Deputy Sheriff in the County of Yuba Sheriff's Department, was promoted to the rank of Corporal within the Department's jail division. As Corporal, he served as a supervisor in the Yuba County Jail. Beginning in spring of 2013, inmates and jail staff reported allegations of Appellant's misconduct. The allegations include Appellant: 1) "[b]eing alone in a cell with a female inmate or present with female deputies when it would have been more appropriate for just female deputies to be managing an inmate event," 2) "[p]hysically searching, examining/touching a female inmate when such contact was not necessary or available female deputies could have managed the event . . . occasions of touching a female coworker when such conduct was either not welcomed or necessary," and 3) [i]nappropriate comments or questions to female inmates about clothing fit, tattoo locations or others of a personal nature when available female deputies could have managed the event . . . occasions of personal comments to a female coworker when such engagement was either not solicited or professionally necessary." After investigation, the Sheriff's Department terminated the Appellant's employment for this misconduct.

On Appeal, the Arbitrator acknowledged that the validity of some of the alleged events was based on hearsay. However, the Arbitrator found that the hearsay evidence could be allowed because it was part of the "composite of similar misconduct allegations that were provided by witnesses first hand." Therefore, there was sufficient evidence to find misconduct. The Arbitrator found that termination was warranted because the Appellant's behavior was misconduct that constituted violations of the public's trust.

2.5.2 *Spokane Cnty. Deputy Sheriff's Ass'n. & Spokane Cnty. Sheriff's Office* (Arb. 2014)

Deputy Sheriff Scott Kenoyer was terminated from his position with the Spokane County, Washington Sheriff's Office for engaging in on-duty sexual relations in violation of the Sheriff's Office policy. Mr. Kenoyer admitted that while on duty and in uniform, he went to the apartment of the woman he was dating and allowed her to perform oral sex on him for one to two minutes. Mr. Kenoyer was terminated, and then offered a last chance agreement which would have reinstated him if he abided by the agreement for five years. The union disputed the validity of the agreement because of the reinstatement language, asserting that the Sheriff did not have authority to discharge and reinstate a deputy under the collective bargaining agreement.

The arbitrator held that the Sheriff's Office did not have just cause for terminating Mr. Kenoyer. Mr. Kenoyer had an otherwise unblemished 15 year work history as a Deputy Sheriff, he was truthful about the incident, he expressed remorse, and there was evidence that he was capable of being rehabilitated. The arbitrator ordered a 60 day suspension and a two year last chance agreement that did not contain termination language.

2.5.3 *State v. Pub. Safety Emps. Ass'n.*, 199 LRRM 3324 (Alaska 2014)

An Alaska State Trooper was fired after having consensual sexual relations with a domestic violence victim the morning after that the Trooper responded to the domestic violence

call. The Trooper filed a grievance under the collective bargaining agreement, and the matter went to arbitration. The arbitrator found that the State did not have just cause to discharge the Trooper, and ordered that he be reinstated with back-pay after a three day suspension. The State appealed, arguing that the arbitrator's order was unenforceable as a violation of public policy and that the arbitrator committed gross error. The superior court affirmed the arbitrator's decision on back pay, but found that it could not enforce the reinstatement because by that point the Trooper's police certificate had been revoked.

The Alaska Supreme Court affirmed the superior court's decision, noting that it could not vacate an arbitration decision merely because they would have reached a different conclusion. The relevant inquiry was whether the arbitrator's award—not the Trooper's conduct—violated an explicit, well-defined, and dominant public policy. Because there was "no explicit, well-defined, and dominant public policy in Alaska prohibiting reinstatement of a law enforcement officer who has engaged in off-duty consensual sexual misconduct, and because the arbitrator did not commit gross error" the Court affirmed the superior court's decision.

2.6 **OTHER TYPES MISCONDUCT**

2.6.1 *Matter of Santer v. Bd. of Educ. Of E. Meadow Union Free Sch. Dist.*, 199 LRRM 3291 (N.Y. 2014)

Petitioners Richard Santer and Barbara Lucia, and other members of the East Meadow Teachers Association, engaged in a picketing event at the Woodland Middle School. The action blocked traffic, forced students to get out of their parents cars in the middle of the road on a rainy day, and made 16 teachers late for school. The Petitioners sought attention to an ongoing labor dispute between the teachers association and the District.

In response to this picketing event, the District took disciplinary action and fined Santer $500 and Lucia $1,000 for misconduct. The District found that the teachers "intentionally created an unnecessary health and safety risk by purposely situating [their] vehicle[s] alongside the curb . . . in front of Woodland Middle School in order to preclude children from being dropped off curbside. The action resulted in children being dropped off in the middle of the street which resulted in an otherwise avoidable and unnecessary health and safety hazard." Santer and Lucia appealed, won, and then the District appealed the decision. Santer, Lucia, and other teachers had engaged in almost weekly protests, including picketing, for over two years prior to the protest that lead to this case, and have since continued to engage in demonstrations.

The court held that, while the teachers' speech was protected by the First Amendment, the teachers' interest in engaging in this constitutionally protected free speech by interfering with the safety of students was outweighed by the District's interest in maintaining an orderly and safe school. The court held that the disciple for misconduct was reasonable and justified, and ordered the teachers to pay the fines.

2.6.2 *Nykol v. Wash. State Dep't of Emp't. Sec.*, No. 69279-8-1 (Wash. Ct. App. Oct. 14, 2013) (unpublished)

Jay Nykol was fired from his job as a firefighter for Boeing when his driver's license was suspended after an off-duty driving under the influence (DUI) charge. He was denied

unemployment benefits—a decision that Nykol appealed. Nykol argued that he did not violate Boeing's work rule, which required all firefighters to have a valid Washington State driver's license, because he obtained a restricted ignition interlock driver's license after his regular license was suspended. In the alternative, Nykol argued that he was not fired because of misconduct, but because Boeing failed to accommodate his disability of alcoholism by not signing a waiver that would allow him to drive the company's vehicles.

The court held that neither of Nykol's arguments was persuasive. Nykol failed to demonstrate reversible error that would allow the court to overturn the denial of unemployment benefits based on a finding of per se misconduct. Per se misconduct includes a violation of a company rule that is reasonable, and that the claimant knew or should have known. Nykol knew that Boeing required all firefighters to have a valid driver's license, and that this was a reasonable work rule. Because Nykol's conduct was per se misconduct, he was disqualified from receiving unemployment benefits.

2.6.3 *Wolski v. City of Erie*, 900 F. Supp. 2d 553 (W.D. Pa. 2012)

Mary Wolski, the first female firefighter in Erie, Pennsylvania, was dismissed after setting her father's house on fire in an attempted suicide. She set fire to clothes in the bathtub, intending to die by smoke inhalation, carbon monoxide poisoning, and a drug overdose. She extinguished the fire before she passed out, concerned about property damage and the safety of others. Her family found her, and rushed her to the hospital. Doctors diagnosed her with severe depression. Four months later, the Chief found that she posed an ongoing threat to public safety, to the safety of other firefighters, and to herself. Ms. Wolski was fired. Ms. Wolski sued the City of Erie under Title I of the Americans with Disabilities Act (ADA), alleging that the city violated the ADA because it did not conduct an individualized assessment based on objective criteria to determine if she posed a "direct threat" to the workplace. A jury found for Ms. Wolski, and the city submitted a motion for judgment as a matter of law and/or a new trial.

The court granted the city's motion for a new trial, finding that the record was insufficient to support Ms. Wolski's theory that the city regarded her as disabled. The court held that, "[b]ecause the jury was permitted to find Wolski disabled under a 'regarded as' theory and because we cannot discern from the verdict slip whether the jury in fact made such a finding and/or whether it served as the sole basis for a finding of disability, we must grant the city's request for a new trial."

Update: Lisa Thompson, *Erie firefighter Wolski wins reinstatement, $350,000*, Erie Times-News (Nov. 8, 2013, 7:40 PM)

In the initial trial, a jury unanimously ruled that the City of Erie violated the Americans with Disabilities Act when it terminated Ms. Wolski. The City appealed, and the court granted a new trial. The City settled its case with Ms. Wolski just days before the second suit was supposed to begin. The City agreed to pay $350,000 and reinstate her with an employment history that showed "continuous, uninterrupted service."

2.6.4 *Vill. of Key Biscayne & Key Biscayne Prof'l. Firefighters Ass'n., Local 3638*, 133 LA 176 (Arb. 2014).

Grievant, a captain with the Key Biscayne Professional Firefighters Association, was terminated for gross misconduct when he failed to respond to a call for help. A Village resident called the fire department directly, requesting assistance getting her father down some stairs and into a private vehicle. Grievant was given the resident's address and was told that she needed assistance and that he would receive an alarm. Although the resident called 911 dispatch twice, the call was never passed on to the Fire Department. Because an alarm did not sound, the Grievant assumed that the person no longer required assistance and did not respond to the call. The Village terminated the Grievant's employment.

The arbitrator held that the Village did not have just cause—it failed to prove the Grievant's actions amounted to gross misconduct warranting discharge; and it failed to follow progressive discipline required under the collective bargaining agreement. The arbitrator found that there was no evidence that the Grievant engaged in intentional, deliberate, or willful misconduct constituting gross misconduct. Furthermore, there were mitigating circumstances that the Village should have considered: the resident did not indicate an emergency or a medically-related issue, most calls directly from residents are typically low priority which do not require immediate attention, the Dispatch Center failed to transfer the calls to the Fire Department, and the Grievant had a long and commendable employment history with the Village. The arbitrator found that although the Grievant did not act unreasonably in waiting for an alarm, he was negligent in not responding to the call. The arbitrator ordered that the punishment be reduced from termination to a 30-day suspension, and that the Grievant be reinstated as a Captain.

3. Unions/Collective Bargaining

3.1 *Attorney General Opinion on Mandatory, Permissive, and Illegal Subjects of Collective Bargaining* (2014 AGO No. 5)

The Attorney General of Washington wrote an opinion regarding whether supplemental retirement benefits, and retiree health and welfare benefits for state employees, were mandatory, permissive, or illegal subjects of collective bargaining agreements. He concluded that both are illegal subjects for bargaining because they were retirement plans and benefits, which the Revised Code of Washington prohibits bargaining over. Specifically, retiree health and welfare benefits are clearly retirement benefits, and a supplemental retirement system is a type of retirement benefit or retirement plan. The language of the Code does not permit it to be a permissive subject of bargaining.

3.2 *City of Brownsville v. Longoria*, No. 13-12-00224-CV, 2014 BL 93246, 199 L.R.R.M. 3013 (Tex. App. Apr. 3, 2014)

During the 2008-2009 fiscal year, the City of Brownsville, Texas, entered into a negotiated settlement with members of its police union. The settlement gave police officers a bonus and pay increase in exchange for dismissing a lawsuit as well as granting concessions in the collective bargaining agreement. Citing a "me too" provision in their 2007 CBA, the

firefighters union sued the city. The "me too" provision stated that when the City voluntarily negotiated a wage increase to any Fair Labor Standards Act non-exempt group, the firefighters were also entitled to a wage increase, if the negotiated increase was more than what the firefighters were receiving. The trial court ruled that the firefighters were entitled to a wage increase and the city appealed.

The Texas Court of Appeals found that the settlement was a voluntary negotiated settlement since it was part of the broader talks between the police union and the city on the union's next CBA, and the union settled for less than what it otherwise could have been entitled to if the court had entered judgment. Next, the court of appeals determined that the pay raises were "across-the-board" since every rank, and essentially every union member, received a pay raise. The court found that even though two police ranks did not receive pay increases, one because the rank was merely an additional title and the other rank because its pay was at the discretion of the police chief. The "me too" provision did not require strict rank-to-rank comparability, but rather applied to the bargaining unit as a whole. Therefore, since the police union received a raise, the firefighters union should receive a similar raise.

3.3 *City of Vancouver v. Wash. Pub. Emp't. Relations Comm'n.*, 2014 BL 84255, 198 L.R.R.M. 2899 (Wash. Ct. App. Mar. 25, 2014)

Clifford Cook was hired as Vancouver's Chief of Police, and planned to reorganize the department along the community policing theory. A budget crisis in 2008 created a manpower issue, so Cook eliminated many specialty units, including the motorcycle unit, transferring those personnel to basic patrol. In 2009, Cook reformed the motorcycle unit and limited the officer selection to those who were previously in the unit; one of them was Ryan Martin. Meanwhile, the police guild selected Martin as its president, wanting a more aggressive approach. Martin challenged the department's leadership on behalf of the guild and filed grievances to block Cook's reorganization of the unit. The selection panel for the motorcycle unit interviewed the potential officers soon after Martin challenged one of the proposed policy changes. As part of their application materials, applicants had to provide their leave usage, including that which was solely given to the guild president for guild related activities. The choice for one position came down to Martin and another candidate—Martin had greater experience and was qualified as an expert witness in drunk driving cases, as well as other certifications that the other candidate did not possess. The majority of the selection committee wanted someone who supported the police chief's vision for the police force. Both candidates had used a lot of leave time. The panel voted 2-1 in favor of the other candidate, partially because of Martin's absences. The guild filed a complaint alleging unfair labor practice.

The hearing examiner found that the City had discriminated against Martin because of his protected activities, specifically because of one of the selection committee member's comments about selecting an officer who supported the Chief's vision. The City appealed to the Public Employment Relations Commission, which affirmed the hearing examiner's decision. PERC also concluded that Cook had anti-union animus as well, because Cook's decision was motivated by the anti-union animus of a subordinate, and the decision was not reached independently of the subordinate's decision. The City appealed to the Washington Court of Appeals asserting that PERC improperly applied the subordinate bias theory to find Cook had anti-union animus and that the examiner's finding of animus was incorrect.

The subordinated bias liability theory (sometimes referred to as "cat's paw" theory) is when a biased subordinate uses an unknowing decision maker for discriminatory purposes. The subordinate's animus sets in motion the events that lead to the discriminatory action. This theory does not impose personal liability on the decision maker. The court of appeals found that no liability was imposed on Cook, and was limited only to the city. The subordinate's anti-union animus influenced Cook's selection of officers, and therefore had an impact on the unit selection. There is no requirement that Cook needed to know of his subordinate's biases and the facts suggest that Cook, at a minimum, suspected an anti-union bias. Finally, adverse employment actions resulting from discrimination are not limited to termination, but include failure to promote or non-selection to beneficial assignments.

3.4 *Fire Fighters Local 3564 v. City of Grants Pass*, No A150721, 2014 BL 128076 (Or. Ct. App. May 7, 2014)

This dispute is about how the City calculates overtime wages for unionized firefighters. The law states that authorized vacation and sick time counts when calculating overtime pay. However, the City contends that the Union bargained for a different calculation that included only time worked, an agreement which overrides the general state law. The language of the agreement is silent, it does not include or exclude time spent on authorized vacation and sick leave.

The court found that the legislature did not mean to have collective bargaining agreements create an exception to the civil service statutes. When the legislature intends to have such an exception, it does so explicitly. Even though Oregon law favors negotiated settlements over forced settlements, the collective bargaining law does not have any law that requires that vacation and sick time be included when calculating firefighters' eligibility for overtime—if the legislature wanted to overrule that law, they could have done so explicitly. Rather than allow a later law to silently overrule an earlier law, the court read the two laws in harmony, and concluded that public employees had collective bargaining rights, but could not bargain out of the civil service laws.

3.5 *Kitsap Cnty. v. Kitsap Cnty. Corr. Officers' Guild, Inc.*, 2014 BL 70342, 198 L.R.R.M. 2834 (Wash. Ct. App. Mar. 13, 2014)

The Kitsap County's jail budget predicted a significant loss and to rectify the shortfall, the jail decided to lay off two officers. The guild demanded that the county bargain the decision to conduct layoffs, and requested information concerning the jail budget. The guild insisted that the decision to lay off officers was a mandatory subject of bargaining, but the county would only discuss future layoffs, but not the current ones. The previous, but now expired, collective bargaining agreement states that all management rights are invested in the county, and they have the right to change the number of employees. Additionally, the civil service rules state that an employer may lay off any employee in a classified service when done due to the shortage of funds. The trial court declared that the county had no duty to bargain to reduction in work force, that the guild's demand to bargain violated the collective bargaining agreement and that demand violated the CBA.

The Washington Court of Appeals found that there was a dispute between the two parties and that the guild did not waive its right to bargain the layoffs, as the CBA had expired by the time the layoff decision was made. The court held that the trial court improperly did not conduct the test to determine whether the layoff decision was a mandatory or permissive bargaining point.

3.6 *In re City of Toledo*, 132 Lab. Arb. Rep. (BNA) 1188 (2013) (Cohen, Arb.)

Daniel Desmond was a line firefighter for 24 years and the Vice President of the local union for 5 years. In 2012, he requested 24 hours of comp leave 3 months in advance, but was denied because the Battalion Chief was not allowed to grant time off that far in advance. His request would be reviewed two tours (6 days) in advance of the requested leave. Desmond and the Union submitted the grievance to arbitration. The collective bargaining agreement allowed firefighters to receive time off instead of overtime pay, and the request must be made *at least* two tours prior to when it is requested. A request will be granted if the manpower estimate was forecasted to be at least 105 members.

The arbitrator found that the words "at least" before two tours, meant that the request could be made more than two tours prior to the date comp time was requested, since the forecast was not a set prediction of manpower availability, which was set two tours prior. The Arbitrator determined that a firefighter's schedule was set for the entire year from January 1 to December 31. Additionally, forecast meant estimate, so did not require the actual forecast strength for that day. Further, the department failed to provide forecasted strengths at least two tours before the requested leave, but rather, only a couple days before the date requested.

3.7 *In re Heinz N.A.*, 132 Lab. Arb. Rep. (BNA) 1089 (2013) (Hornberger, Arb.)

The Retail, Wholesale and Department Store Union contends that Heinz NA Holland Factory discharged the grievant in violation of a last chance agreement. The grievant was a maintenance employee since 1987 and the union president for 17 years. He was terminated in February 2012, but his discharge was suspended under a Last Chance Agreement (LCA), where the grievant had to meet certain conditions—such as not having any "boisterous, disrespectful or improper language or conduct." There was a situation between a mechanic and other employees, where the employees were trying to use a machine the mechanic was fixing, and the mechanic called the grievant to get involved, and supervisors heard the grievant yelling in a loud voice and getting angry that employees were undermining the mechanic and never would let him learn. The company claims that the grievant was getting aggressive and threatening the supervisors, while other employees reported there was nothing unusual or threatening about the grievant's behavior. The grievant and the mechanic were suspended pending investigation and the grievant was terminated because he was on a LCA.

The union brought this matter to arbitration contending that the grievant was acting on union business and the company did not prove that he acted in violation of his LCA. The arbitrator found that the grievant violated his LCA and was not acting on union business. Specifically, it found that since some of the accusers had no ill will against the grievant, they were likely more reliable, and the reports from those who supported the company's position were internally consistent. The grievant also was not acting on behalf of the union because it was not

an issue concerning a grievance, contract negotiation, or during an organizational campaign, but rather concerned an operational issue at the plant.

3.8 *Snohomish Cnty. Pub. Transp. Benefit Area v. State*, No. 43783-0-II (Wash. Ct. App. Dec. 17, 2013)

The Amalgamated Transit Union, Local 1576, represents bus drivers and other transit workers employed by the Snohomish County Public Transportation Benefit Area (Community Transit). Community Transit and the union have executed numerous collective bargaining agreements in the past 30 years. The previous agreement included a provision (Section 18.2) that allowed Community Transit to change employee rules. Section 18.2 was upheld by an arbitration panel as a waiver. In the current negotiations for a new agreement, a mediator determined that the two sides had reached an impasse over Section 18.2. The union filed an unfair labor practice complaint asserting that Community Transit committed unfair labor practices by refusing to negotiate on that section. The union considered the section a permissive subject of bargaining, a view that was affirmed by the hearing examiner and Public Employees Relations Committee, because Section 18.2 was upheld as a waiver, and therefore was a permissive subject of bargaining.

The Washington Court of Appeals upheld the PERC decision because arbitration had previously determined that the provision was a waiver, and neither side appealed the decision. The court upheld the permissive nature of Section 18.2, because the commission had noted that a waiver of statutory bargaining rights is a permissive subject of bargaining. Because this provision was determined to be a permissive subject of bargaining, bargaining to an impasse is unfair labor practices. As Section 18.2 is only a permissive subject of bargaining, a balancing test is not required.

3.9 *Teamsters Local Union No. 117 v. State*, No. 4360-3-II (Wash. Ct. App. Jan 22, 2014)

Phyllis Cherry worked at the Washington Corrections Center for Women in Purdy. She was as the union shop steward, where she acted as a contact, an information source, and an advocate for Corrections Center union employees. In August 2009, she learned that a former state senator had been hired to be an inmate victim advocate, and informed the corrections staff via email, linking to the article. The article included his salary. Within a month, she was investigated about sending an unprofessional email to Corrections Center staff, since it was not concerning union business. The Center did not pursue further investigation on the issue. A few months later, Cherry sent another informative email from her Department of Corrections account, and her supervisor again conducted an investigation into unprofessional emails. She received an official letter of reprimand for these two incidents, and filed an unfair labor practice complaint with the Public Employees Relations Committee (PERC). The Committee found that she sent two non-union emails from her official account, and that her actions did not fall under collective bargaining protection. It therefore dismissed her complaint.

The Washington Court of Appeals first deferred to PERC's definition of a "concerted activity" to require a nexus to union negotiation or administration as the term was undefined by the legislature. Specifically, the court of appeals found that nothing in Washington state law referred to public union employees "concerted activities," as that was a term used in the federal

National Labor Relations Act for "private sector employees." The Washington legislature "clearly opted" not to protect public employees' "concerted activities." Further, the emails were not protected union activity since they were on non-union business and related to her role as shop steward, because they did not involve organizing, filing grievances, or engaging in collective bargain, nor did they mention any union related activity.

4. The First Amendment

4.1 *Allred v. City of Carbon Hill*, 6:13-cv-00930-LSC (N.D. Ala. 2013)

Heath Allred was the police chief of Carbon Hill. He was fired, without notice or hearing, after he supported his wife's campaign for Mayor against the incumbent, James Richardson. Richardson won the election, and told Allred that he was terminated and Carbon Hill would select a new police chief. Richardson also told Allred that he should have known he would be fired because his wife ran for mayor and Allred supported her.

The court denied defendants motions to dismiss, finding that there was enough information in the pleading for the case to move forward. Allred plead sufficient facts to state a plausible violation of his First Amendment right of association. He also plead sufficient facts to suggest there may be a claim of municipal liability. There were also sufficient facts to make out a procedural due process claim because he was fired without notice and hearing; and to assert a state wrongful termination claim.

4.2 *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013)

Bobby Bland, Daniel Ray Carter, Jr., David W. Dixon, Robert W. McCoy, John C. Sandhofer, and Debra H. Woodward were not reappointed to their positions at the City of Hampton [Virginia] Sheriff's Office after the incumbent, Sheriff Roberts, won the election for sheriff. McCoy, Dixon, and Sandhofer were sworn, uniformed sheriff's deputies who worked as jailers in the Sheriff's Office Corrections Division. Bland and Woodward worked in non-sworn administrative positions. All six plaintiffs sued Sheriff Roberts in his individual and official capacity, alleging that Sheriff Roberts violated their First Amendment rights by not reappointing them in retaliation for supporting the Sheriff's electoral opponent.

The court analyzed the plaintiffs' claims under a two-part test: 1) do the plaintiffs' job duties put them in a policymaking position or other position where party affiliation is an appropriate requirement, where allowing dismissal based on political affiliation is allowed because it gives "effect to the democratic process" and 2) did the plaintiffs' prove that their exercise of First Amendment rights "was a 'substantial' or 'motivating' factor in the employer's decision to terminate" the plaintiffs. The court held that none of the plaintiffs held policymaking positions, and thus they were protected for free speech and association on political matters.

The court then examined the plaintiff's claims under the second step in the test. The court determined that Carter, McCoy, and Dixon all had genuine questions of fact as to whether or not their political activities were a substantial basis for their non-reappointment. Therefore their claims had to be litigated fully in the district court. However, the court held that Sandhofer, Woodward, and Bland did not show beyond mere speculation that their political allegiance to the

Sheriff's opponent was a substantial basis for their non-reappointment. Therefore, it was proper that the lower court grant Sheriff Roberts' motion for summary judgment on those claims.

4.3 *Cavanaugh v. McBride*, No. 12–15463, 2014 WL 82616, at *1 (E.D. Mich. Jan. 9, 2014)

Nicholas Cavanaugh was a Sheriff's Deputy in the County of Ostego and President of the Union. Cavanaugh was fired after he made statements that he "could kill the boss" and "should shoot the boss" while he was armed and in uniform. He made these statements upon learning that the shift schedule had been changed. Prior to making these statements, Cavanaugh filed a grievance alleging that it was a violation of the collective bargaining agreement to order members of the Sheriff's Department to jump-start cars using a "jump pack." The grievance was denied. After he was fired, Cavanaugh sued the sheriff, undersheriff, and County of Ostego, alleging retaliation in violation of his First Amendment right to free speech.

The court found that Cavanaugh's speech—his grievance about the jump packs and complaints about the schedule change—did not address a matter of public concern. Although his actions related to the union and his complaints were advanced on behalf of others, this was not sufficient to involve public concern. Summary judgment for the defendants was therefore appropriate.

4.4 *Durham v. Jones*, No. 12-2303 (4th Cir. 2013)

James Durham was a deputy sheriff in the Somerset County [Maryland], Sheriff's Office (SCSO). He used pepper spray and physical force to detain a suspect while helping a Maryland state trooper arrest the fleeing man. After Durham prepared his report, which explained his use of force, he was ordered to charge the suspect with assaulting an officer and resisting arrest. He was told that if he did not do this, he would be charged with assaulting the suspect. Durham decided not to charge the suspect.

Durham was then coerced into revising his original police report and deleting follow-up reports. His badge and gun were taken from him, and he was faced with aggressive interrogation. To avoid "losing everything," Durham revised the reports. After his interrogation, Durham filed an internal grievance with his supervisors. That same day, he was demoted. Durham received a letter informing him that his grievance would be investigated by the officials against whom the grievance had been made, which prompted him to make the matter public. Durham sent a packet of materials detailing the incident to various officials outside of the department and a number of media outlets. Durham was charged with misconduct, and ultimately issued a ten day suspension for disseminating departmental information without permission. Eventually, Sheriff Jones fired Durham. Durham sued, alleging he was fired in retaliation for exercising his First Amendment free speech rights. Jones moved to dismiss on grounds of qualified immunity.

The court held that Durham's speech—which revealed serious governmental misconduct—was protected, and that Jones was not entitled to qualified immunity. Jones admitted that Durham's speech was a substantial factor in his termination. The speech involved corruption and misconduct within the police department, a matter of public concern. Jones presented no evidence that Durham's actions interfered with the operations of the Department.

Durham's speech was therefore protected by the First Amendment. Jones was not entitled to qualified immunity because there was a constitutional violation and it was clearly established that public employees speaking out on governmental misconduct are protected.

4.5 *Graziosi v. City of Greenville*, No. 4:12–CV–68–MPM–DAS, 2013 WL 6334011, at *1 (N.D. Miss. Dec. 3, 2013)

Susan Graziosi was discharged from her position as a Sergeant of the Greenville Police Department because she made comments on Facebook that negatively portrayed the leadership of the Department. Graziosi posted multiple comments in which she criticized the leadership of the department, implying that they were not real leaders. The posts could be construed as an attack on the chief of police and other officers. The Chief terminated Graziosi for violations of the Department's Police and Procedure Manual, particularly related to rules supporting fellow employees. Graziosi sued, alleging violations of her First Amendment rights.

The court held that Graziosi's Facebook comments were related to her own frustrations about internal decisions, and were not matters of public concern. Furthermore, the comments had the ability to divide the department and disrupt leadership. The court held that the Facebook posts were not subject to First Amendment protection.

4.6 *Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013)

Brian Hagen worked for the Eugene Police Department in the K-9 unit. After incidents in which members of the SWAT team accidentally discharged their firearms, Hagen and other officers voiced safety concerns. After another incident, Hagen sent an e-mail to sergeants in the K-9 and SWAT units inviting them to a meeting at city hall.

Hagen's Sergeant began writing negatively about events that he had previous regarded positively or neutrally, and rated Hagen's work significantly lower than he had in previous years. Hagen was transferred out of the K-9 unit. Hagen sued the City of Eugene, the chief of police, the lieutenant, and his former sergeant, alleging that the individuals retaliated against his using his First Amendment free speech rights. The jury found for Hagen; the defendants appealed.

On appeal, the court found that Hagen's speech was not protected under the First Amendment because he was speaking as a public employee as part of his duties as a police officer, and not as a private citizen. As a police officer, it was within is job duties to report the unsafe practices of fellow employees. He made internal complaints about safety and competence in his official capacity as a police officer. Therefore, Hagen's speech was not protected by the First Amendment and the defendants were entitled to a different verdict.

4.7 *Pierce v. Cotuit Fire Dist.*, 741 F.3d 295 (1st Cir. 2014)

David Pierce, the former Captain of the Cotuit [Massachusetts] Fire Department sued the Fire Chief, the Department, and the Board of Fire Commissioners, alleging, among other charges, political discrimination in violation of 42 U.S.C. § 1983 and the First Amendment. Pierce was married to a full-time firefighter. Although he did not supervise his wife on a daily basis, he became directly involved in her employment in at least three instances, including a disciplinary proceeding. Under Massachusetts' ethics laws, Pierce was prohibited from

participating in his wife's supervision, evaluations, promotions, or in setting her compensation, unless he obtained a formal exemption, which he did not do. Further, Pierce actively encouraged William Wool to run against incumbent Board of Fire Commissioner's member Campbell in the Board election campaign. Pierce campaigned for Wool while he was off-duty. Campbell won reelection.

Months after the election, Pierce sent a letter to the Board, alleging that the Fire Chief had been retaliating against him for his support of Wool. He further claimed his office was re-purposed, he was forced to return his Department-issued cell phone, and he was not promoted to "Deputy Chief." The Board responded, indicating that the letter did not conform to the grievance process, but reminded Pierce that he may be violating the state ethics laws because of his professional relationship with his wife. The Board sent a letter to the Ethics Commission asking for an evaluation of Pierce's relationship with his wife. The Commission sent letters to Pierce and the Board alerting them that he may be in violation of the ethics laws. While the Commission opted not to impose sanctions, the Board terminated Pierce's employment.

The court held that there were legitimate grounds for the termination, and Pierce failed to show violations of his First Amendment rights relating to his election activities. The court found that Pierce presented no evidence that showed the Commission had political motivations for their treatment of him. The court also found that the Department and the Fire Chief had legitimate, non-discriminatory justifications for the "harassment" Pierce suffered after the election: the Department was tight on space, it was more efficient to make the cell phone available to all on-duty officers, and the position of "Deputy Chief" did not exist. Furthermore, the court found that terminating Pierce because of his professional relationship with his wife was within the range of reasonable responses to the ethics violation.

4.8 *Spalding v. City of Chicago*, 37 IER Cases 1582 (N.D. Ill. 2014)

Shannon Spalding and Daniel Echeverria, officers with the Chicago Police Department (CPD), brought claims against the City of Chicago and eleven other CPD officers alleging violations of the first Amendment and the Illinois Whistleblower Protection Act. They asserted conspiracy to retaliate and retaliation against them after they reported criminal misconduct by other CPD officers to the FBI, and after they spoke to the media about this lawsuit. Spalding and Echeverria discovered that CPD officers were extorting drug dealers by demanding money in exchange for police protection from arrest and prosecution. Spalding and Echeverria reported this to the FBI, and subsequently worked with the FBI and CPD's Internal Affairs Division to expose and stop these corrupt officers. Information that Spalding and Echeverria were working with the FBI was leaked to the CPD, and the two were branded as "rats." Supervisors refused to work with them, told them that they would not have backup if they needed it, and hampered their ability to develop cases, among other actions. Spalding and Echeverria's complaints about this treatment were ignored. The media publicized their accounts of corruption and misconduct within the CPD.

The court denied the defendants' motion to dismiss. For their First Amendment claims against the city, the court found that Spalding and Echeverria appropriately pleaded municipal liability by alleging that the entrenched "code of silence" mentality within the CPD and the behavior of the high-ranking officers caused the retaliation. The court also found that Spalding

and Echeverria's speech was constitutionally protected because they spoke as private citizens—not as public employees—when they talked to the FBI and the media, their speech addressed a matter of public concern, and there was an overwhelming public interest in knowing about police corruption. The court also found sufficient evidence to support a claim for conspiracy to retaliate against Spalding and Echeverria.

4.9 *Morgan v. Covington Twp.*, No. 13-3488 (3d Cir. 2014)

William Morgan was suspended and then terminated from his job as a police officer with the Covington Township Police Department. Sergeant Bernard Klocko accused him of two incidents of "conduct unbecoming an officer;" and of being disobedient, neglectful, and inefficient in performing his duties. In the first incident, Sergeant Klocko accused Morgan of attempting to coerce a security guard to drop the charges against Morgan's ex-girlfriend, and of interfering with a police investigation. The second incident involved Morgan's unauthorized entry into his more recent ex-girlfriend's apartment. After Morgan was suspended and notified that the Township was considering termination, Morgan's lawyer requested a public hearing on Sergeant Klocko's accusations and Morgan's suspension. The Board then informed Morgan that the official-oppression charge was forwarded to the Pennsylvania State Police, who declined to pursue the matter. Sergeant Klocko referred the charge to the Lackawanna County District Attorney, who also declined to pursue it. Morgan sued, alleging that the Township, the Chair of its Board of Supervisors, and Sergeant Klocko had retaliated against him for exercising his first Amendment rights to petition because two days after requesting a public hearing, the official-oppression allegation was sent to the state police. The public hearing that Morgan requested occurred approximately one month after Morgan brought suit. Morgan did not appear. The Board rescheduled, but again Morgan did not appear. Morgan filed a second lawsuit, adding job termination to his retaliation claims and naming the same defendants. In both cases, the district court found for the defendants, finding that neither the public hearing request nor the filing of the first lawsuit were protected under the First Amendment because neither addressed issues of public concern.

On appeal, the court affirmed the lower court's decision, holding that neither the request for public hearing nor the filing of the first lawsuit were protected activities under the Petition Clause of the First Amendment. The court held that both activities addressed only matters of private concern—Morgan trying to get his job back. Because neither activity addressed a matter of public concern, neither was protected by the First Amendment and the defendants were entitled to judgment as a matter of law.

4.10 *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013)

From 2006 through 2011, Kirk Chrzanowski was an assistant state's attorney. Kirk began having problems when a special prosecutor began suspecting wrongdoing of his boss, State's Attorney Louis Bianchi. Bianchi was accused of improperly influencing and handling cases involving Bianchi's relatives and political allies. Kirk testified at both a grand jury hearing and at trial. A few months later, Bianchi interrogated Kirk about his testimony and then fired Kirk for testifying against him. The district court determined that Kirk's testimony was as a public employee speaking pursuant to his official duties and dismissed his claims.

The court of appeals disagreed and reversed the trial court. Specifically, the court found that a prosecutor was employed to *prosecute* felonies, not testify at trial as a witness. Therefore, testifying was outside of his job duties and was protected speech. Additionally, he was fulfilling his civic obligations to cooperate with a criminal investigation and trial. Therefore, he was speaking as a "citizen" and not a public employee. The purpose of curtailing public employees' speech is to serve the interests of the state in promoting efficiency in its public services. The public has an interest in having public officials testify about the wrongdoing of their public officials. Threats to speaking out would hurt the civic discourse.

5. Fitness for Duty

5.1 DISCHARGE

5.1.1 *City of Mount Vernon & Fraternal Order of Police, Ohio Labor Council, Inc.*, 132 BNA LA 1528 (Arb. 2013)

Grievant attempted to return to work after an on-duty injury. He was suspended and later terminated for failure to produce his medical records for a fitness for duty examination; for failure to provide a release for the city to provide his medical records for the examination; and, for use of physical force and abusive and threatening language against a supervisor.

The Chief's letter to the Grievant, stated the letter "should be considered a direct order as part of your employment," and ordering him to take a fitness for duty medical examination and supply all pertinent records to the doctor. The Grievant refused to take the fitness for duty examination, claiming that it was not legitimate because the Chief—not the Safety Service Director—ordered the examination. In addition to his failure to comply with this order, the Grievant used physical force and abusive language against his Captain. The Captain went to the Grievant's residence to deliver the Disciplinary Meeting Notice. The Grievant became irate, screaming profanity at the Captain. The Grievant pushed the Captain backward, grabbed his jacket and shirt, refused to let the Captain walk past or get into his vehicle. As a result of these two incidents, the Employer terminated the Grievant for insubordination for failure to submit to a fitness for duty examination, and for gross misconduct for the actions taken against the Captain.

The arbitrator considered three issues: Was the suspension for just cause? Was the termination for just cause? And if not, in either case, what was the proper remedy? The Arbitrator held that because the Employer did not take a written statement from the Grievant about the incident leading to the suspension, the investigation was inadequate under a just cause standard. Furthermore, the Notice given to the Grievant did not include the Charges or the evidence against the Grievant. The Arbitrator determined that because the employer failed to follow procedure, suspension was not for just cause. Grievant was therefore entitled to back pay for the days he was suspended. However, the Arbitrator held that termination was for just cause. The grievant failed to comply with direct orders, and he deliberately chose not to attend his *Loudermill* hearing. Because failing to comply with written or verbal instructions from supervisors qualified as insubordination, which, by the Employer's Work Rules, is punishable "up to and including termination" without the need for progressive discipline, the Arbitrator found that the termination was for just cause. Because failure to submit to a fitness for duty

examination was just cause enough for termination, the Arbitrator did not address the further issues.

5.1.2 *City of Rockford & Police Benevolent & Protective Ass'n., Unit 6*, 133 LA 572 (Arb. 2012)

After being involved in an incident involving the fatal shooting of a suspect, Officer P was ordered to take a fitness for duty examination. The city's psychologist concluded that Officer P was unfit for duty. Officer P obtained a second evaluation from a different doctor who found Officer P fit for duty. Despite the conflicting reports, the city terminated Officer P. The union challenged the city's ability to dismiss Officer P in light of the conflicting evaluations.

The collective bargaining agreement did not provide for a "tie-breaker" provision in the event that there were two conflicting determinations of fitness for duty. The agreement included a provision that required both parties use their "best efforts" to resolve a grievance. However, this provision did not mandate binding contract negotiation. Although the court concluded that both parties recognized the value of a tie-breaking procedure, the arbitrator held that there was no basis for imposing a gap-filling remedy. The collective bargaining agreement did not provide a procedure the parties must follow in the event of conflicting fitness for duty evaluation, and the arbitrator had no authority to add, subtract, or modify the agreement's language. The arbitrator denied the Union's procedural grievance.

5.1.3 *Goral v. Ill. State Bd. of Educ.*, 2013 IL App (1st) 130752, __ N.E.2d__ (Ill. App. Ct. 2013)

Bradley Goral, a tenured teacher in the New Trier Township High School District, was dismissed for blatant failure to follow prescribed corrective action. Beginning in 2011, Mr. Goral's behavior and interactions with District administrative personnel became accusatory and threatening. In 2011, Mr. Goral declared that a parent's concerns regarding Mr. Goral's ability to answer questions in class were "gibberish and nonsense" and that he wanted to pursue criminal charges against the parent for the comments. Mr. Goral filed a grievance against the District's assistant superintendent and his department chair, accusing them of harassment and engaging in "patently criminal" conduct. Mr. Goral's behavior became more aggressive. He was suspended for five days, and received a notice to remedy. The notice required four things: that Mr. Goral interact with his colleagues in a collaborative, professional, respectful, and courteous manner; that he promptly follow work-related directives in a collaborative, professional, respectful, and courteous manner; that he be examined by a health professional for an evaluation of his fitness to perform his duties as a teacher and that he sign all necessary releases so that the health professional could fully evaluate him and report back to the District; and that he comply with these directives fully. The notice stated that failure to comply with the directives would result in further disciplinary action, including suspension and dismissal. In response to the notice, Mr. Goral sent the Board an email warning, accusing everyone of criminal conduct and abuse of authority. Mr. Goral refused to attend his fitness for duty examination, resulting in a large cancellation fee for the District. For failure to attend the fitness examination and for blatant violations of the notice, the Board terminated Mr. Goral.

On appeal, Mr. Goral contended that in requiring him to sign releases for the fitness-for-duty examination, the District violated the Mental Health and Developmental Disabilities Confidentiality Act. The court held that because Mr. Goral was not engaged in a "therapeutic relationship" with the evaluator, the Act did not cover results of the fitness-for-duty examination. The Court affirmed Mr. Goral's dismissal.

5.2 **DRUGS AND ALCOHOL**

5.2.1 *Summit Cnty. Ohio Sheriff's Dep't & Fraternal Order of Police Ohio Labor Council, Inc.*, 133 La. 546 (Arb. 2014)

Grievant, a deputy sheriff of Summit County [Ohio], was on worker's compensation for a work-related injury, including treatment by insertion of a surgical plate in his leg. While he was on worker's compensation and not working, he was pulled over for a minor traffic violation. The officer examined the grievant's car and discovered that the grievant smelled of marijuana and had some of the drug in the car. The grievant then tested positive for marijuana and was placed on administrative leave without pay. The grievant entered the Employee's Assistance Program and returned to work. Upon his return to work, the grievant received a notice of discipline, which informed him that he was suspended from active duty without pay for 60 days (30 days suspended).

The Substance Abuse Policy of Summit County provided for two discipline possibilities for a violation of the County of Summit Substance Abuse Policy. If an employee tested positive for drugs or alcohol within one year of a previous violation, the employee "will be" suspended for 10 working days without pay. However, the policy also stated that if an employee tests positive, the employee "may be subject to disciplinary action up to and including termination and will not be compensated for time off awaiting a negative test in order for them to return to duty."

Based on previous experience, the grievant expected that he would suspended for 10-days without pay. In addition to challenging the length of the suspension, the grievant requested that the time-off due to suspension and mandatory programs be compensated from accumulated sick-time. The employer insisted it imposed a heavier penalty based on the severity of the incident and the harm that it caused the department's reputation. The employer also denied the request to compensate the time off. The arbitrator reduced the length of the suspension to 10 days, holding that "[a]n employee has a right to know the specificity of the discipline to be meted out if in the event that he is found to be a culprit in a similar situation or any situation of discipline." However, the arbitrator agreed with the employer that sick leave could not be used to compensate time lost due to discipline.

5.2.2 *City of Oakland Park & Metro Broward Prof'l. Firefighters Local 3080*, 133 LA 929 (Arb. 2014)

Grievant E was fired from his job as a firefighter/paramedic with the City of Oakland Park after he tested positive for marijuana. The Grievant admitted to off-duty marijuana use prior to a drug test, but asserted that there were mitigating personal and health reasons that should have protected him from being fired. His in-laws had just moved into his home, and his mother-in-law had Alzheimer's disease; his wife was diagnosed with a disease that affected her

motor skills; his two adult children were attending college and living at home; and the Grievant himself had an elevated heart rate for more than two weeks, but did not want to take medication or have surgery. The Grievant had a nine-year job history with above average reviews and no prior discipline.

The arbitrator held that the termination was not for just cause. Although the grievant engaged in illegal drug use, and this drug use could negatively affect the Department and the city's reputation, the Arbitrator was persuaded that the Grievant's drug use was an isolated incident. The use occurred while the Grievant was on leave, it did not result in any publicity, and there was no evidence that his co-workers would refuse to work with him. The Grievant showed remorse, took corrective measures, and demonstrated that he had learned his lesson. The arbitrator ordered that the Grievant be reinstated without back pay, that he pass a drug test within three days prior to returning to work, that he submit to bi-weekly drug testing for two years, that he still be subject to random drug tests, and that he complete any other steps the Employer recommended.

5.2.3 *Lillian Roberts v N.Y. City Office of Collective Bargaining*, No. 10626, 2013 BL 328429 (N.Y. App. Div. Nov. 26, 2013)

New York City's Fire Department instituted a "zero tolerance" policy that required automatic termination of emergency medical service (EMS) employees who either failed a drug test or who refused to provide a specimen for drug testing. The question was whether this policy should have been subject to collective bargaining. The court held that because "the City Charter provides that the discipline of these EMS employees is the sole province of the New York City Fire Commissioner, and because the Fire Department's determination of an appropriate penalty for illegal drug use relates to its primary mission of providing public safety," the policy was not subject to collective bargaining.

5.2.4 *Lynch v. City of New York*, 737 F.3d 150 (2d Cir. 2013)

The Patrolmen's Benevolent Association of the City of New York (PBA) challenged New York City Police Department's (NYPD) policy of administering a Breathalyzer test to any officer who discharged a firearm resulting in death or injury. The PBA argued that any special needs did not outweigh the officer's privacy interests to make warrantless, suspicionless Breathalyzer tests constitutionally reasonable. The Court of Appeals disagreed with the PBA, holding that the policy was constitutional because of the "special needs" of the police department.

The Fourth Amendment protects individual's right against unreasonable searches and seizures. A Breathalyzer test falls within the purview of the Fourth Amendment, and must therefore satisfy the Fourth Amendment's "reasonableness" requirement. Although generally some individualized suspicion is needed to find reasonableness, "[w]arrantless, even suspicionless, searches can be constitutionally reasonable where 'special needs, beyond the normal need for law enforcement,' are present." The court must ascertain the primary purpose of the program to determine if there are special needs. The court must also decide that the interests served by the special needs outweigh individual's privacy interests. In this case, the court found that special needs were served by the mandatory Breathalyzer testing, and that these needs were

the primary purpose of the testing policy. First, the testing served personnel management needs because sobriety is a NYPD fitness-for-duty requirement. Second, the testing helped maintain public confidence in the NYPD by ensuring that officers who discharged their weapons were sober, and it allowed for quick discipline if they were not. The court found that a warrant requirement was not compatible with these needs, and that these needs outweighed the privacy interests of the police. The court found the policy reasonable because police officers have a diminished expectation of privacy in employer testing to ensure they are fit to carry and fire deadly weapons, Breathalyzer testing has been "recognized not to implicate[ ] significant privacy concerns," and it does not impose a significant or dangerous burden on police officers. Therefore, the Breathalyzer testing policy was constitutionally reasonable. **Note, this ruling would not apply in Washington.**

6. Discrimination: Disability

6.1 *Amerson v. Clark Cnty.*, No. 2:10-cv-01071-RLH-RJJ, 2014 WL 223268 (D. Nev. Jan. 21, 2014)

Clark County hired Consandra Amerson as a Juvenile Probation Officer in 1997. During a training course in June 2007, she received lower back and neck injuries and had to have spinal reconstruction surgery in January 2008. Her doctor imposed light work duty and weight restrictions on her work—she would be unable to work as a Probation Officer due to these restrictions. The County informed her that pursuant to county policy, if she could not return to work in a full capacity in a month, the county would institute medical separation proceedings. As part of the separation proceedings, the county had to search for an alternative position for 30 days, but there were no open positions for which she qualified. The office of diversity also concluded that she was unable to perform the duties of a juvenile probation officer with or without accommodations. The County offered her vocational rehabilitation services, but she refused to sign the agreement because she did not have time to review it. She contested the denial, which was settled for $13,000. Despite this settlement, Consandra believes that the county could have accommodated her position and filed this lawsuit. The trial court dismissed the case, because Consandra conceded facts in the vocational rehabilitation settlement. The court of appeals remanded, because Consandra must have a chance to explain the contradiction presented by settlement agreement and her ADA claim, and sent the case back to the trial court for reconsideration.

Clark County argued that Consandra agreed in the settlement that her disabilities could not be accommodated, thereby denying an essential part of her ADA claim. Consandra disagreed, and stated that she did not concede that Clark County could not accommodate her medical restrictions, and the amount received was insufficient to waive her ADA claim. The trial court determined that Consandra insufficiently explained the contradiction between her agreement that there was no position for her in the settlement agreement, and her ADA claim that she could perform her job with or without reasonable accommodation. Additionally, it determined that the two positions were contradictory and could not be reconciled since she agreed that there was no job that she could do, but under the ADA, she claims that she would be able to perform alternative jobs with or without accommodation.

6.2 *Brownfield v. City of Yakima*, No. 30994-1-III (Wash. Ct. App. Jan. 14, 2014)

Oscar "Jeff" Brownfield was employed in the Yakima police department from November 1999 through his discharge in April 2010. In December 2000, Jeff sustained head and other injuries in an off-duty rollover accident. His doctors recommended that the department monitor his performance when he returned in March 2001. In 2003, he went into the Community Services Division and worked as president of the Yakima Police Athletic League (YPAL), which sought to provide recreation and athletic activities to youths to prevent crime. He later reported being unable to focus and having violent tendencies, both which were attributed to his head injuries. Jeff sent a report of unethical work practice regarding another officer and a lieutenant's failure to perform Drug Abuse Resistance Education programs, and receiving compensation for work with the YPAL, which other officers did not receive. An investigation found that these allegations were baseless. After other complaints about the officer not fulfilling his duties and meetings to resolve the issues, Jeff was suspended for insubordination after mouthing off at his sergeant. An investigation concluded that the officer had deficiencies in fulfilling his duties. Soon after, Jeff was transferred to the patrol division. Altercations between him and other officers and his becoming visibly upset when heckled during a traffic stop led to the department questioning his fitness for duty. Psychiatric examinations concluded that Jeff was unfit for duty because of a mood disorder caused by his head injury. The exams disagreed whether he would improve with treatment. Jeff started therapy, but declined to attend further examinations to determine his fitness for duty. The police department terminated his employment.

Jeff originally filed a lawsuit in Federal District Court. The district court found that the police department had a valid, non-discriminatory reason to fire him—insubordination—and applied the business necessity exception since he had a number of emotional responses to stressful situations. The United States Court of Appeals for the Ninth Circuit agreed with the district court on every issue. Jeff then filed a lawsuit in state superior court for whistleblower retaliation, wrongful discharge, negligent hiring and supervision of the police chief, and violation of the Washington Law Against Discrimination. The state trial court denied Jeff's claim, stating that the city was immune from a state whistleblower suit since the city had its own policy, he could not retry the wrongful discharge claim that he original brought in state court, and there was no evidence that his insubordination termination was pretextual.

The Washington Court of Appeals upheld the trial court's dismissals. In regards to Jeff's disability claim, the court found that the district court's ruling on the Americans with Disabilities Act did not bar the WLAD claims, since the WLAD has a lesser standard of proof. The court of appeals, like the trial court, focused on whether the reason for termination was pretextual and found that it was not. Specifically, the termination came after he refused to attend an examination to determine his fitness for duty. Jeff did not submit any evidence to show that his firing was because of his disability. The court also decided that Jeff did not provide any justification as to why the city failed to accommodate his disability. The court declined to readdress the issue because he did not provide any argument why the result should be different.

6.3 *Coleman v. Pa. State Police*, No. 13-3255, 2014 BL 78175 (3d Cir. Mar. 20, 2014)

Emmett Colman successfully completed the six months of training required to become a State Trooper in December 2008. After training, cadets are placed on probationary status for a

year. Eight months into his probation, Coleman was in an off-duty car accident and suffered a traumatic brain injury and multiple facial fractures. He took medical leave before returning to limited duty from October 28, 2009 through December 31, 2009, when he was approved to return to full-time status. However, Coleman was forced back to limited status after suffering a seizure during the night in February 2010; his doctor prescribed anti-seizure medication for posttraumatic epilepsy. Coleman suffered two more seizures, failing to report the second one. The Pennsylvania State Trooper policy dictates that no trooper, either probationary or permanent, could return to full-time status until they are seizure-free for five years. A medical exam determined that Coleman was unable to perform all of his duties during a seizure, so could not obtain an exemption. The H.R. department noted that Coleman had "glowing recommendations" and stated that it would have no problem finding a limited duty position for him until he had been seizure-free for five years. Regardless, the Department initiated termination proceedings because it would be five years until he would be able to return to duty, and that each new seizure would require an additional five-year waiting period. The Department's budget was limited and it could not sustain an extra position for the required time period. Coleman's treating physician cleared him to return to full-time work, and noted that his risk of repeat seizures was below 3%. The district court decided that Coleman was unqualified to perform the essential functions of his job and that the Department was unable to make reasonable accommodations for Coleman.

The United States Court of Appeals agreed with the trial court, and found that Coleman was unqualified to perform the essential functions of his job, posed a direct threat to public safety, and was not entitled to light-duty reassignment. The court found that because Coleman never finished his probationary period, he had not received sufficient education and experience necessary to become a State Trooper—therefore he was not qualified. The five-year seizure-free protocol is essential to protect the health and safety of both other troopers and of the public. The five-year protocol is reasonable, since a person who has two seizures is 75-90% likely to have another in a five-year period. Reasonable accommodations are only available to those who can otherwise perform the essential functions of the job. The court found that Coleman would still have been unable to perform the essential functions of the job, and there were no vacant and funded positions available for him. To accommodate Coleman, the Department would have had to create a new position, which it is not required to do.

6.4 *Feist v. Louisiana*, No. 12-31065 (5th Cir. Sept. 16, 2013)

Pauline Feist had osteoarthritis in her knee and applied for on-site parking with her employer, the Louisiana Department of Justice (LDOJ). When her application for on-site parking was denied, she filed a claim with the EEOC. Five months later, she was fired from her job. Pauline sued claiming she was retaliated against for filing the EEOC complaint. The trial court dismissed her claim finding that Pauline did not explain how the denial of on-site parking limited her ability to perform the essential functions of her job, and that there was adequate information to determine that she was fired due to poor performance. Specifically, the trial court required that there be a nexus between the requested accommodation and the essential functions of the job.

The Federal Court of Appeals found that there is no requirement that the modifications enabled the performance of those essential functions. Her requested accommodation would have allowed her better access to her place of work, and therefore may have been a reasonable

accommodation. Therefore, the court of appeals sent this portion of the case back to the trial court to determine if the accommodation was reasonable. The court affirmed the trial court's denial of her retaliation claim, because there was no link between her EEOC complaint and her termination. LDOJ also had a non-retaliatory justification for her termination—that she was performing unsatisfactorily.

6.5 *Lee v. District of Columbia*, No. 09-1832(RC), 2014 WL 642890 (D.D.C. Feb. 20, 2014).

Joseph Lee, a corrections officer assigned to guard inmates receiving treatment at Howard University Hospital, was fired in 2008 for neglect of duty. He had Type II diabetes. If Joseph did not manage his diabetes through healthy eating, exercise and medicine, he would become dizzy and faint or fall asleep. His superiors were aware of his condition. Before his termination, Joseph was found asleep at least three times in two weeks, but he denies that he ever slept on the job. On March 27, 2008, Joseph did not receive a "lunch" break on his overnight shift, and the hospital found him sleeping around 3:00 a.m. Joseph claims that he was denied reasonable accommodations for his diabetes. At trial, the judge instructed the jury that a disability that is corrected by medication is not a disability under the Americans with Disabilities Act, an instruction to which Joseph objected. The jury found that Joseph did not have a disability under the ADA. He then requested that the district court give him a new trial.

The district court determined, following the guidance of the Supreme Court that no impairment automatically qualifies as a disability—the disability must substantially limit a major life activity. Joseph claims his disability affected his eating, which is a major life activity. To determine whether a disability is substantially limiting, a court needs to look at the severity, the duration, and the long-term impact of the impairment, as well as any efforts to lessen the effects of the impairment. Although Joseph was on a meal and exercise schedule, there was no evidence that he had to take insulin or check his glucose. It is the plaintiff's burden to prove that he has an impairment that qualifies as a disability, and Joseph's evidence did not prove that *he* would fall asleep if his glucose went too low, just that *some people* have fallen asleep—the testimony was not specific to Joseph.

6.6 *Merino v. State*, No. 43865-8-II (Wash. Ct. App. Mar. 11, 2014)

Douglas Merino seeks disability benefits from the Washington State Patrol. He served in the Patrol for over 10 years until he injured his neck and shoulder after being ejected from a patrol car while on duty. He went without pay for three years before receiving full-disability pay in 1994. Merino then was hired by the Department of Labor and Industries as an investigator. In 2008, Merino was convicted of insurance fraud and lying to insurance investigators. Three days later, Merino requested retirement from the state patrol, but was denied since he was not yet on active duty status. After an investigation and hearing, the Patrol discharged Merino for violating the code of conduct and terminated his disability payments. The superior court ruled in favor of the State, as Merino was not entitled to disability benefits once he was discharged from the Patrol.

The court of appeals found that disability benefits were to last as long as the employee remained disabled from a job-related injury, regardless of whether the employee committed a felony afterwards. The court found that the legislature included a disqualification if the injury

itself was sustained during the commission of a tort or crime, but not if a crime was committed separate from the injury. The court further found that the disability payments were not connected with the time that the officer was employed by the patrol, but would last as long as the injury lasted.

6.7 *Rorrer v. City of Stow*, No. 13-3272, 2014 BL 51839 (6th Cir. Feb. 26, 2014)

The City of Stow employed Anthony Rorrer as a firefighter from 1999 until July 2008. In July 2008, he injured his right eye in a bottle rocket accident unrelated to his work as a firefighter. He lost his entire vision in his right eye and was discharged. The doctor who operated on his eye cleared him for duty a month after the operation, and a colleague of the city's doctor cleared him with a note of caution that he could have some complications. His chief called the doctor's office and was told that there had been a mistake—Anthony was unable to return to work because he was blind in his right eye and the fire department regulations would not allow it. After questioning by the union, the city doctor was unable to determine which regulations he was referring to that stated that Anthony would be unable to return to work. The city claims the regulations were the National Fire Protection Association (NFPA) regulations, the union asserts that these regulations were never adopted. Even the interpretation of the NFPA regulations was disputed, since it was conditional and could be overcome by taking Anthony off the truck driving rotation. Before his termination, Anthony sought accommodation and asked to be taken off the driving rotation and be transferred to the Fire Prevention Bureau as a fire inspector.

The United States Court of Appeals for the Sixth Circuit questioned whether driving an emergency vehicle was an essential part of Anthony' job, which if it was not, would prevent the city from terminating his employment due to his right eye blindness. The court found that there was extensive evidence that the department never adopted the NFPA guidelines and did not rely on them in determining what the essential functions of a firefighter's job were. The courts are not to give the employer's definition of what is an essential function more weight than an employee's definition. There was also direct evidence that some firefighters never drive the trucks as a matter of choice—and the district court should have considered the statement of a supervisor who declared that driving was not an essential function of the job. An essential task is not a task that an employee would be compelled to do if asked, as that would defeat the Americans with Disabilities Act, which requires accommodations be made for nonessential tasks. Finally, the court found error in the city's unwillingness to modify the job description for a fire inspector when the job's duties remained the same. The city also fell short of its obligation to locate a suitable position. The requested transfer was reasonable, and did not unduly burden the city.

6.8 Sanders v. Ill. Dep't of Healthcare and Family Servs., No.11-3445, 2014 BL 32248 (C.D. Ill. Feb. 6, 2014)

The Illinois Department of Healthcare and Family Services (DHFS) fired Michael Sanders for violating its attendance policy. Michael claims that he took sleeping medications for work-related stress, which resulted in his unscheduled absences. Michael requested hearings with the Illinois Civil Service Commission, and the Administrative Law Judge approved the discharge, which was approved by the Illinois State Courts. Now he sued DHFS in federal court.

DHFS claims that Michael is unable to sue under the Americans with Disabilities Act and that he cannot sue because he has already brought this issue before the judicial system.

The district court determined that Michael had already brought his claim for disability discrimination in state court, and therefore cannot bring the same claim in federal district court. He had a "full and fair opportunity to litigate . . . his discharge in state court" and therefore cannot try again in federal court.

6.9 *Sube v. City of Allentown*, No. 11-cv-05736, 2013 WL 5410912 (W.D. Pa. Sept. 27, 2013)

The City of Allentown employed Anthony Sube as a police patrol officer, working directly under the supervision of Sergeant Vargo. Anthony was qualified for the position and had an "above average" work history. In September 2008, Anthony injured his hand in the line of duty and was placed on light duty for six months before returning to his patrol duties. In February 2010, Anthony requested a change in his shift time, which the Assistant Chief agreed to, based on his injury. Later, he called off from work because he was snowed in, and was later told that there was a mandatory meeting that same day, which he attended. Anthony was written up for reporting to the mandatory meeting when he had called out sick due to the snowstorm. His superiors started to frequently ask about his whereabouts. Anthony was then suspended for three days due to the snowstorm incident, and took two weeks off due to stress. Upon his return, other officers frequently harassed him because his superiors were constantly monitoring him. On June 21, 2010, he notified the department that he was filing an EEOC claim and was dismissed on July 2, 2010, when he was scheduled to return to his regular position on July 3 after his time off.

Anthony filed a lawsuit asserting that the police department failed to accommodate his disability by failing to engage in an interactive process. The court determined that Anthony provided enough information for a claim, and that there was a reasonable inference that the department knew of his disability. Anthony had requested additional leave and a job transfer and the city failed to talk to him about the physical and medical bases for his request. The court also refused to dismiss Anthony's retaliation claim, his June 21 letter to the city notified them that he was filing an EEOC disability complaint and then he was terminated 11 days later.

7. Family Medical Leave Act (FMLA)

7.1 *Bailey v. City of Daytona Beach Shores*, 22 WH Cases 2d 358 (11th Cir. 2014)

Fire Inspector Christine Bailey was given the option to resign or be terminated after she admitted to taking prescribed narcotics not disclosed to the City of Daytona Beach Shores. Bailey had submitted for reimbursement of those drugs while she was on FMLA leave. Bailey chose to resign, and then sued the city alleging that it interfered with her FMLA rights and that it retaliated against her for exercising her FMLA rights.

The court held that there was no genuine dispute of material fact that the city would have presented Bailey with the same choice—resign or be terminated—if Bailey had not taken FMLA leave. The city's decision was unrelated to the FMLA leave, and was instead based on the City's drug-free workplace policy. Because there was no evidence of FMLA retaliation or that the

city's actions were pretextual, the city was entitled to summary judgment on the retaliation claim.

7.2 *Dawkins v. Fulton Cnty. Gov't*, 733 F.3d 1084 (11th Cir. 2013)

Marlene Dawkins claimed that she was demoted from a temporary assignment in retaliation for leaving work to care for her terminally ill uncle. Dawkins had been on her temporary assignment for two weeks when she learned that her uncle was terminally ill. She sent an e-mail to her supervisor that was titled FMLA, but requested emergency leave and that an FMLA packet be sent to her Uncle's address in Florida. Although Dawkins admitted that caring for an ill uncle was not covered by the FMLA, and although she knew that Fulton County required paperwork be filled out prior to granting FMLA leave, Dawkins alleged that the County retaliated against her for caring for her sick uncle when they removed her from her temporary assignment. She argued that the County should be estopped from denying her FMLA leave was qualifying because there was no evidence that her manager's approval of leave was not valid and because she was not given notice that her leave had not been counted as FMLA.

The court held that Dawkins did not reasonably and detrimentally rely on any representation made by the County. She knew that the paperwork had to be completed before leave was covered under the FMLA. Furthermore, Dawkins had the paperwork sent to her Uncle's house in Florida, even though Dawkins lived in Georgia, indicating that she had decided to leave work regardless of whether or not she was granted FMLA leave. Because Dawkins failed to show she relied on any misrepresentation, the lower court properly granted the Defendant's summary judgment motion.

8. Discrimination: Religion

8.1 *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-5110 (10th Cir. Oct. 1, 2013)

Abercrombie & Fitch requires that its employees comply with a "Look Policy" that is intended to highlight the Abercrombie brand—the classic East Coast collegiate style. Under this policy, sales floor employees, "models," must dress in clothing that is consistent with the kind of clothing that Abercrombie sells in its stores, it prohibits the wearing of black clothing or caps. If an employee requests a deviation for a strict religious practice during the hiring process, the store manager is instructed to contact the corporate human resources department, which may grant accommodations if doing so will not hurt the brand. Samantha Elauf was a practicing Muslim, who previously wore Abercrombie clothes. The assistant store manager did not see a problem with wearing a non-black headscarf, since Abercrombie employees had worn yarmulkes. During her interview, Samantha never mentioned that she would need an accommodation to wear a headscarf; however, the store manager assumed that she was a practicing Muslim. In consultation with the district manager about the use of a headscarf, the district manager informed the store manager that the headscarf was inconsistent with the Look Policy. The store manager changed the original favorable evaluation to reflect that Samantha was not recommended to be hired. A friend informed Samantha that she was not hired because of the headscarf, and she filed an EEOC complaint.

The EEOC sued because Abercrombie failed to hire Samantha because of her religious beliefs. The trial court determined that Abercrombie could not prove that Samantha's use of a headscarf would harm its brand, and found that Abercrombie allowed other employees to wear a headscarf. The case went to trial and the jury found in favor of the EEOC and Samantha.

The court of appeals found that the trial court should have granted judgment in favor of Abercrombie because Samantha never informed it that she wore a headscarf for religious purposes. Specifically, the court noted that the obligation to discuss religious accommodations occurs only *after* an employer learns of the need for religious accommodation. As Samantha never informed Abercrombie of her religious needs, she cannot sue for religious discrimination. "[N]o Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge—*from any source*—that [Samantha's] practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it." An employer is not required to guess, surmise or figure out what an applicant or employee's religious beliefs are. The court found that merely wearing a headscarf was insufficient to provide notice to the employer of the applicant's religious beliefs; similar to if those beliefs prevented an applicant from working on the Sabbath. The employers are not allowed to ask about an applicant's religious beliefs, so if special accommodation is needed, the applicant herself will need to inform the employer. A concurring and dissenting opinion by one of the panel's judges thought that a jury should decide whether Abercrombie was on notice of Samantha's religious beliefs.

8.2 *Farah v. A-1 Careers*, No. 12-2692 (D. Kan. Nov. 20, 2013)

Abdifatah Farah was hired by a temporary staffing agency, A-1 Careers, and was placed at Centrinex for the month of June 2010. He was the only Muslim employee. Centrinex employees received two 15-minute breaks and an hour for lunch each day and could use the restroom as needed. As a practicing Muslim, Abdifatah was required to perform a prayer ritual five times a day, but only the noon prayer was not performed at home. His faith prevented him from praying in filthy or unsanitary conditions or where other people would be offended. On Fridays, he combined his breaks and drove to a mosque, apparently receiving permission to do so. During his employment, Abdifatah prayed in the building's common lobby, as his supervisor suggested he do. The property manager received complaints about Abdifatah prayers from other building tenants and visitors. A-1 Careers informed him of the complaints and asked if he could pray in his car or outside, each of which he was unable to do. He did not want to go to a mosque, which was 30 minutes away, since then he would consistently return late from his lunch break. He did not ask if he could have an extended lunch break to travel off site to pray, as he did on Fridays. He continued to pray in the lobby and he received a written warning, which he refused to sign. As such, A-1 considered him to have voluntarily resigned.

The court determined that Abdifatah's employers had offered him reasonable accommodations for his religious beliefs by offering, in good faith, options of how he could perform his prayers. The off-site option, as done every Friday, was a workable solution to both Abdifatah and his employers. The court concluded that requiring Centrinex to lease additional space solely so that Abdifatah could pray would be an undue hardship, since at the time there were no available offices for him to use. Therefore, the court dismissed Abdifatah's case.

8.3 *Fields v. City of Tulsa*, No. 12-5218, 2014 WL 2119210 (10th Cir. May 22, 2014)

Paul Fields was a captain in the Tulsa, Oklahoma police department. The police department frequently was invited to attend events at religious facilities and institutions affiliated with religious faiths as part of their community policing policy. In 2010, the FBI notified the Islamic Society of a threat against it, and the department worked to protect the mosque and school next door. When the threat was over, the Islamic Society planned a thank you event, and believed that officers may want to tour the mosque and/or discuss Islam. When there were no RSVPs to the event, a major forwarded an email from the deputy chief ordering each shift to send two officers and a supervisor or commander. Fields response indicated that he had no problem with voluntary participation, but had concerns about requiring his officers to attend due to his religious beliefs. The deputy chief responded that there would be allegations of disparate treatment if officers did not show up, since they often showed at events hosted by other religious groups, the deputy chief reminded him of the consequences of refusing to obey a lawful order. After an in-person discussion, Fields was transferred to another division and internal affairs opened an investigation. Fields publicized his intention to disobey the order, an act that the department considered insubordination. After his transfer, the order was made voluntary, and over 150 officers voluntarily participated. After the investigation, he was suspended for 80 hours, his transfer was made permanent, and he was assigned to the graveyard shift. The district court granted judgment in favor of the police department, finding that Fields' right had not been violated since it was an order to assign others, not himself, to attend.

The appellate court agreed with the district court's determination that Fields' personal rights were not violated since he was not required to attend personally. Therefore, his right to the free exercise of religion was not violated. Although there was some evidence that the harshness of Fields' punish was because he made a religious objection, merely refusing the order would have resulted in less punishment, Fields did not properly appeal that issue, so the court could not consider it. The court further found that there was no violation of the establishment clause, since the police had attended community events at hundreds of religious venues previously, many for religious organizations. Nothing in the order required the officers to attend any religious ceremony, doing so was purely optional, and failure to send officers to the social event would have treated the Islamic Society differently than other religious groups. Fields' discipline did not violate his free speech rights, since the police department has a compelling interest in maintaining discipline among its officers.

8.4 *Finnie v. Lee Cnty*, No. 1:10-CV-64 (5th Cir. Sept. 12, 2013)

Crystal Finnie was a correctional officer at the Lee County Detention Center for nearly four years when she converted to the Pentecostal Church, which directs that women cannot wear men's garments such as pants. She had previously worn shirt and pants issued by the Sherriff's Department according to its policies. She sought permission to wear a skirt instead. The Department had a history of waiving certain policies, such as the minimum age requirement, but the Sherriff refused. She took her accrued vacation and filed a charge with the EEOC. At the end of her vacation, she was fired for failing to follow the dress code and allegedly for filing an EEOC claim. The district court judged in favor of the Department on her First Amendment and gender and religious discrimination claims, which Crystal did not appeal. She only appealed the denial of her Title VII retaliation claim.

The court of appeals noted that filing the EEOC claim had to be at least a motivating or substantial factor in Crystal's termination. That was not the case here, since she was told that she would be fired *before* she filed the EEOC case, therefore it could not be a motivating factor in her termination—it did not meet the "but for" test.

8.5 *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, No. 2012-0613, 37 IER Cases 328 (Ohio Nov. 19, 2013)

The Mount Vernon City (Ohio) School District warned, since at least 1994, John Freshwater about injecting his Christian faith into his teaching. After the school district denied his application to critically teach evolution, Freshwater supplemented his 8th grade curriculum with religious handouts, showed videos on creationism and intelligent design, displayed religious paraphernalia, and made in-class references to the Bible. The school had a strict policy about injecting religious thought in the classroom. Freshwater contends that the school district violated his First Amendment rights. Freshwater's litigation history with the school began when he used a Tesla coil to make a mark on a student's arm. He frequently received commendation for his teaching abilities and his students achieved high scores on the state standardized tests. Several families filed actions against the school for the Tesla coil incident and his religious handouts. The district began an investigation, which included a monitor observing Freshwater's classroom, and concluded that his teaching was inconsistent with the district's curriculum and state standards. The final report concluded that Freshwater was insubordinate for not ceasing teaching creationism and intelligent design. After a public hearing, Freshwater was terminated because he failed to follow the established curriculum, and he disobeyed orders to stop using religion in his classroom.

The Ohio Supreme Court found that Freshwater was legally terminated for insubordination. Specifically, he defied the school board's directives that he was not to promote or denigrate any particular religion while on school grounds. Insubordination is a legitimate cause for termination. However, the court held that merely displaying a Bible was not a violation of the establishment clause, and any order to cease displaying it was a violation of Freshwater's First Amendment rights. Teachers are allowed to display "personal religious items" when it the display is kept in their personal space. The court held that when the religious displays were not on Freshwater's personal desk and readily accessible to students, then the district had a right to ask him to remove those displays.

8.6 *Kumar v. Gate Gourmet, Inc.*, No. 88062-0 (Wash. May 22, 2014)

James Kumar, Ranveer Singh, Asegedew Gefe, and Abbas Kosymov filed a lawsuit against their employer, Gate Gourmet, because of its meal policy. The policy bars employees from bringing in their own food, thereby forcing them to eat foods, which violate their religious beliefs. The Plaintiffs work near the SeaTac airport preparing meals for trains and airplanes. They are unable to bring in their own food due to security concerns, nor were they able to leave the premises to obtain other types of food. They informed their employer that they could not eat beef-pork meatballs, and Gate Gourmet temporarily switched to turkey meatballs, before returning to the beef-pork meatballs without informing the plaintiffs. Even the vegetarian option included animal by-products, which they were forbidden to eat. Gate Gourmet then refused to further alter its employee meals. The trial court dismissed the complaint because the Washington

Law Against Discrimination (WLAD) did not allow the plaintiffs to sue for religious discrimination, primarily relying upon a previous case from the Washington Court of Appeals.

The WLAD prohibits discrimination based on "race, creed, color, or national origin" as originally enacted, and amendments included "sex, marital status, sexual orientation" honorable discharge status of a veteran, or mental or physical handicap. "Creed" means religion. The Washington Court of Appeals disapproved of its previous case that found that the WLAD did not require employers to make reasonable accommodations for their employees' religious beliefs. Specifically, the court noted that silence endorses rather than bars the type of antidiscrimination theory advanced by the Plaintiffs, and federal case law, even if it comes later than the enactment of WLAD, is used to interpret WLAD. The court focused on the history of Title VII's reasonable accommodation clause, and that an amendment added that interpretation to Title VII unless the accommodation would cause an undue hardship. Further, the statutes are interpreted to allow more protection for protected classes, and the court declined to make an exception to that rule. Additionally, even a policy applied evenly to every person can be discriminatory if it has a disproportionate impact on one of the protected classes. Therefore, the dismissal of the case was in error.

8.7 *Griffin v. City of Portland*, No. 3:12–cv–01591–MO, 2013 WL 5785173, at *1 (D. Or. Oct. 25, 2013)

Kellymarie Griffin works in a clerical position for the City of Portland. From 2009 to 2012, she worked in the Portland Parks and Recreation Department's Mt. Tabor Yard Office. Griffin worked with four other members of the clerical team, including Ms. Lareau, who was the team's "lead." Ms. Griffin is a devout Christian, who states that her faith is the most important thing in her life. Ms. Griffin's co-workers used profanity and took God's name regularly. Ms. Lareau allegedly called Ms. Griffin a "wacko" because of her beliefs, and told her that God was a figment of her imagination. On May 4, 2011, in response to Ms. Griffin indicating that she was offended by a co-worker's use of "Jesus Christ!" to express surprise, Ms. Lareau loudly and angrily told Ms. Griffin that she was "sick of your Christian attitude, your Christian [expletive] all over your desk, and your Christian [expletive] all over the place." She accused Ms. Griffin of using her faith for attention. As a result of this outburst, Ms. Griffin filed suit against the City under Title VII and Oregon law for religious discrimination under a hostile work environment theory.

The court denied the City's motion for summary judgment, finding that there were questions of material fact. To prove hostile work environment based on religious discrimination, the plaintiff must show that she was subjected to verbal conduct based on/because of her religious beliefs, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to create a hostile work environment. The City could be liable for the plaintiff's coworker's behavior if it knew or should have known about it and did not take steps to prevent offensive conduct. The court found that there was enough evidence that a jury could conclude some of the profanity was because of Ms. Griffin's beliefs. The court also noted that Ms. Lareau referring to Ms. Griffin as a "wacko" was sufficient to show that there may be a "but for" case of religious discrimination. A jury could find the conduct pervasive enough to create a hostile work environment. Similarly, there was a question of material fact whether the city took sufficient steps to prevent the harassment.

9. Discrimination: Race/Ethnicity/National Origin

9.1 *Aboubaker v. Washtenaw Cnty.*, Jury Verdict

According to verdictsearch.com, a jury found that Washtenaw County illegally fired Ali Aboubaker from his 17-year job as a maintenance technician, and his insubordination was only a pretext to fire him. He claimed discrimination based on race, national origin and religion. He was denied an interview to a drain inspector position, contrary to his collective bargaining agreement. The jury awarded him over $300,000 for lost wages and benefits, and over $600,000 for future wages and benefits from the date of the jury verdict through his anticipated retirement date, minus any wages that he earns during that period. The jury also awarded him $250,000 for emotional pain and suffering, inconvenience, and loss of enjoyment of life. The total award was $1,185,520.10.

9.2 *Adams v. City of Indianapolis*, No. 12-1874 (7th Cir. Feb. 4, 2014)

This case involved dozens of claims of illegal discrimination in the promotion process used by the Indianapolis Metropolitan Police and Fire Departments. A number of black police officers and firefighters sued the City of Indianapolis alleging that the examination process it uses to rank candidates for promotion unfairly prejudices black candidates. The plaintiffs are officers and firefighters who were passed over for promotion by non-black officers and firefighters who received higher scores. The test included a written test, oral exercise, and an assessment of the candidate's personnel profile. The oral examination required that the officers respond to a hypothetical situation. Generally, promotions were given to the highest scorers on the exam, except to a single instance where a black officer was promoted over higher scorers. They allege that the exam was culturally and racially biased. The district court dismissed the claims, finding that there were still administrative remedies potentially available, and it could not find evidence that the neutral exam caused a disparate impact on black officers and firefighters.

The court of appeals decided that the firefighter and officers did not sufficiently state the disparate impact in their complaint, even though the district court erroneously decided that allegations of intentional discrimination necessarily defeat a disparate impact claim. Employees may bring a disparate impact claim based on any employment action, not just a facially neutral policy. Even so, the firefighters and officers did not sufficiently demonstrate that the exam resulted in a relevant and statistically significant disparity between black and white officers. Further, the officers did not adequately identify which portion of the exam had a disparate impact. Although the court of appeals found that the district court erred in its reasoning, the dismissal was appropriate.

9.3 *Arnold v. City of Columbus*, 515 F. App'x. 524 (6th Cir. 2013), *cert. denied*, No. 130382 (U.S. Nov. 4, 2013)

Plaintiffs were all members of the Columbus Division of Fire's Inspection Section, working in the Fire Prevention Bureau. They worked with civilian employees to conduct building and fire code inspections. The Building Services were primarily white, while the Inspections Section was predominately black. The plaintiffs' grievance arose from three allegations that the members of the Inspection Section did not show up for inspections, and were

claiming overtime not actually worked. The investigations did not show any wrongdoing. A later investigation into missing records showed that members of the Inspections Section believed that a former white member had taken them, which the same members later denied and the Battalion Chief, Yolanda Arnold, was charged with dishonesty. Yolanda sent a memo to the Fire Chief alleging discrimination, and an investigation found that there was no discrimination. Arnold was transferred to emergency services due to a breakdown in communications within her section that resulted in the missed inspections. She worked on administrative matters in Emergency Services rather than managing staff. She filed an EEOC complaint. The other plaintiffs filed EEOC complaints because of the presence of a union representative during their interviews with the investigators, the requirement to complete time sheets, and the loss of remote parking privileges. The district court granted judgment in favor of the City of Columbus.

The court of appeals affirmed the decision because the plaintiffs, except for Arnold, did not suffer an adverse employment action. It also determined that Arnold could not win her case, since she was unable to show that she was not transferred for legitimate, non-discriminatory reasons. An investigation into potential wrongdoing is not an adverse action upon which an employee can base a claim of discrimination, and negative media coverage is not an adverse employment action. The loss of remote parking privileges, the requirement to complete time cards, and the presence of union officials during interviews were not demonstrated to be anything more than a minor inconvenience. The plaintiffs petitioned the U.S. Supreme Court for review, which was denied.

9.4 *Bates v. City of Chicago*, 726 F.3d 951 (7th Cir. 2013)

Ronald Bates joined the Chicago Fire Department in 1977. In 2000, he was promoted to one of the seven District Chief positions. A District Chief was an "at-will" position. When a new Commissioner was appointed, he rearranged the at-will employees of the fire department to form his own management team, and Ronald was demoted back to Deputy District Chief. Both the new Commissioner and Ronald are black. Another black firefighter was appointed to the District Chief position that Ronald held. Ronald took a yearlong medical leave, and afterwards retired since he was unable to work. He sued the city, stating that he was demoted because of his race. The district court dismissed all charges against the defendants before trial because Ronald could not prove that he was treated differently than non-black employees.

The appellate court agreed with the district court, since the new Commissioner's promotions and demotions were equally split between black officers and non-black officers. Additionally, each of the promoted officers had skill sets that set them apart from Ronald. Further, the new Commissioner had concerns about Ronald's lack of enthusiasm for the job, concerns that are non-discriminatory reasons for adverse employment actions.

9.5 *Brown v. City of Montgomery*, No. 12-1534, 2014 WL 763133 (W.V. Feb. 20, 2014)

Jackie Brown was employed by the City of Montgomery as a police officer from 2007-2011. He was promoted to Chief of Police in 2009. During his tenure, a lieutenant in the police force sued the city for discrimination, a case which was eventually settled. Jackie's employment was terminated in November 2011, and he sued the city and the mayor, alleging that he was directed to retaliate against the lieutenant for his complaint, and he refused to do so. He was also

asked to do various illegal activities by the mayor, all of which he refused to do. Jackie alleges that he was discharged in retaliation for refusing to intimidate an officer. The trial court dismissed Jackie's claim, finding he held an at-will position and was not entitled to a pre-determination hearing, and the requested actions, such as placing a GPS on a police vehicle, were not illegal.

The West Virginia Supreme Court found that Jackie was not entitled to a pre-determination hearing because he did not meet the requirements to be an "accused officer." An officer not subject to the civil service provisions can be terminated without a finding of wrongdoing. However, the court found that refusing to retaliate against an officer for filing a racial discrimination claim is a substantial public policy, and that Jackie stated enough facts to go forward with his claim of wrongful termination. Additionally, a public official is only immune if they are acting within the scope of their authority, but the mayor's actions ordering retaliation against an officer was not within his duties, and therefore he is not protected.

9.6 *Cox v. Onondaga Cnty Sheriff's Dep't*, No. 12-1526-cv, 2014 BL 203082 (2d Cir. 2014)

Five sheriff deputies shaved their heads in solidarity with one of the plaintiffs, a cancer patient who lost his hair from chemotherapy treatments. Based on their shaved heads, rumors began circulating that they were "skinheads," a rumor supposedly started by an African-American deputy. Much of the harassment appears to have been from inmates whom the plaintiffs transported between facilities. An internal investigation found no evidence of harassment, since no one had heard the plaintiffs called "skinheads." A complaint filed with the EEOC alleged that the officers were confronted and called "skinheads" to their face. They alleged that the department was not taking their claims of racism as seriously as they take claims by minority officers. The plaintiffs threatened with discipline because of inconsistencies between the internal complaint and the complaint filed with the EEOC. The district court dismissed the case because there was no adverse employment action.

The court of appeals found that merely instituting an investigation was not an adverse employment action, even if the investigation was more thorough that normal. Nor did the investigation itself cause a hostile work environment. Although filing false claims with the EEOC is illegal, nothing gives the department the ability to threaten independent action because of that false claim. There is evidence that the plaintiffs intentionally exaggerated their interactions with their African-American colleagues concerning why they shaved their heads in an effort to support a claim of racial harassment by a black officer against white officers. Employers are under a duty to investigate racism, and therefore can punish false reporting. In addition, law enforcement officers are required to file all reports truthfully. Therefore, the department was able to threaten them with discipline for filing false reports.

9.7 *Ellis v. Houston*, No. 12-2178, 2014 WL 349765 (8th Cir. Feb. 3, 2014)

Five African American officers who worked in the maximum security Nebraska State Penitentiary sued their employer for race based harassment and retaliation. All of the plaintiffs worked on the morning shift. Even though the prison population is 30% African American, they were the only African American guards among the 95 guards on the first shift. Three were officers, one was a caseworker, and the other was a corporal, each with a different supervisor.

The plaintiffs could not identify a starting date, but the longest working employee noted that other African American officers left because of the harassment—but at least by summer of 2010, they received race based taunts and jokes. Their supervisors knew about and did nothing to stop the harassment. The plaintiffs eventually reported the harassment to the Prison System, which sanctioned three of the supervisors. Afterwards, the officers were assigned undesirable jobs, and eventually two were transferred to less significant penal institutions with fewer overtime possibilities. They were also completely ignored on the shift, and their citation rates and negative reports increased dramatically. The district court determined that the discrimination was not severe enough to allow the plaintiffs to sue their employers; and, dismissed their case.

The Court of Appeals for the Eighth Circuit decided that actions, even those not experienced by the plaintiffs, can show a hostile work place. Hostile work environments can be just a single racial slur, and the constant jokes and taunts that the plaintiffs received are adequate to constitute discrimination. Additionally, retaliation can be evidenced through false or retaliatory reports. Although some of the plaintiffs were able to reach the bar, others did not—the retaliation was not sufficiently linked to the report of harassment to be considered discrimination, because unconnected prison officials transferred them, or only isolated instances of being assigned inferior work.

9.8 *Hughes v. City of Lake City*, No. 3:12-cv-158-J-32JBT, 2014 BL 88109 (M.D. Fla. Mar. 28, 2014)

Christopher Hughes worked in the Lake City Police Department from August 2009 through February 2011. In February 2010, he filed an internal complaint alleging that his commanding officer used a racial slur. A few months later, another supervisor found out that Christopher lied about the repair status of his car and instituted an internal investigation.

The federal trial court found that other officers outside of Christopher's racial group were treated similarly as he was. The courts try to avoid second guessing employers' employment decisions, so "identical treatment" must be identical. Although discrimination against others may support a plaintiff's claim of discrimination, he still must show some evidence that he was discriminated against, which Christopher failed to do. He was also unable to provide any evidence to support any of his allegations. Therefore, the court found that there was no discrimination. In regards to Christopher's retaliation claim, the court found that the temporal nearness of his complaints and his termination was enough to allow his claim to proceed.

9.9 *Jones v. City of Boston*, No. 12-2280, 2014 BL 127008 (1st Cir. May 7, 2014)

Ten black officers challenged the Boston Police Departments drug-testing program after they tested positive for cocaine. Seven of the plaintiffs were full officers, one was a fired cadet, one a former applicant, and the tenth went into rehabilitation. The officers stated that black officers tested positive 1.1% of the time, while their white counterparts only tested positive 0.2% of the time—indicating that there was a higher rate of false positives for black officers. Statistical analysis shows that these differences were not random. The district court ruled in favor of the defendants on the Title VII because the difference was not large enough, even though it was scientifically significant.

The court of appeals recognized that the differences need to be more than merely non-random, but rejected that the difference must be at least 80% of the norm. Rather, the court concluded that the department was unsuccessful in arguing that no jury could reach a verdict in favor of the plaintiffs, and therefore sent the case back to the trial court for trial. The court declined to determine whether there was a business necessity for the test, since the trial court had yet to make that determination. The court further determined that the district court correctly found that there was no due process violation since the department provided sufficient process. The department also did not violate the Americans with Disabilities Act, since using drugs is not a disability, and while being an addict is, the department had a rehabilitation program in place to support them so long as the officers were not using drugs.

9.10 *Lavalais v. Village of Melrose Park*, 734 F.3d 629 (7th Cir. 2013).

Kyle Lavalais was a 20-year veteran and the only black officer with the Village of Melrose Park (Ill.) Police Department. In February 2011, he was promoted to sergeant and placed on the midnight shift. In April 2012, he requested a change off that shift, and expressed an interest in any supervisory assignment other than the midnight shift. The chief of police denied the request, and Lavalais sued for race discrimination alleging that non-minority officers were treated more favorably and he had been placed on the midnight shift indefinitely, and he did not have the full responsibilities that a sergeant should have. The trial court dismissed all claims against the village.

The United States Court of Appeals for the Seventh Circuit decided that an "adverse employment action" could be a diminished material responsibility. The indefinite assignment to the midnight shift and the diminished responsibilities were valid claims for race discrimination and the district court improperly dismissed the case. Placing Lavalais on the midnight shift indefinitely after a promotion, without the corresponding responsibilities of that promotion, constituted discrimination.

9.11 *Matthews v. Waukesha Cnty.*, No. 13-1839, 2014 BL 202592 (7th Cir. 2014)

Bernadine Mathews applied to two positions in Waukesha County (Wis.). With her application, she also completed an Affirmative Action Program form, which disclosed that she was African-American. Debbie Rapp reviewed her application and determined that she did not meet the minimum qualifications. Upon notification, Bernadine provided Debbie with additional information explaining her work experience, and Debbie placed Bernadine's application on hold and consulted with the Senior Human Resources Analyst. The county testifies that her application was then forwarded to the hiring supervisor for consideration. None of the materials included a reference to Bernadine's race. The hiring supervisor sorted the applicants into four categories based on the amount of experience they had. The supervisor only interviewed those with the most relevant work experience, of which Bernadine was not one. The supervisor planned to interview by groups until the positions were filed. The district court dismissed her case finding that she failed to show evidence of discrimination.

The court of appeals found Bernadine's argument that the supervisor could determine the race of an applicant because of their name is unfounded, and she did not offer any evidence to support it. Bernadine also attempted to show racial discrimination because Rapp initially denied

her application, and that decision negatively influenced the supervisor's decision not to hire her. However, the court found that a slight delay in forwarding an application, even if there was racism from the person forwarding, was not sufficient to affect the supervisor's hiring decision. Further, a statistical analysis shows that the county hired African-American workers in proportion to the number that applied. Absent any showing of discrimination, the district court was proper to dismiss her case.

9.12 *Morshed v. Cnty. of Lake*, No. 13-CV-521, 2014 BL 124281 (N.D. Cal. May 1, 2014)

Michael Morshed is of Iranian descent but was born and raised in Seattle, Washington. He began working at a county deputy sheriff in 1990 and was promoted to sergeant in 2002. Throughout his employment, Michael received ethnic and religious slurs, which increased after September 11, 2001. He was specifically called derogatory terms and asked questions on Persian stereotypes. The county denies that he was subject to any of the abuse since no witnesses have verified these incidents. Michael admitted to having sexual relations with another county employee while on-duty and in uniform. After an investigation, he was demoted to deputy and would be able to seek reinstatement to sergeant after 12 months if there were no further incidents. He was reassigned to a remote area, and he claims that the harassment decreased. After reporting to a potential gun situation and assault at a middle school, Michael was placed under investigation since he filed the wrong report. He received "below standard" evaluations When he later took the sergeant's exam, he received the lowest score out of all candidates. In May 2009, a sheriff candidate filed an EEOC complaint, alleging national original harassment, and Michael noted that his own harassment stopped. Michael then filed his own EEOC complaint for national original discrimination. Afterwards, Michael claims that he was subject to write-ups and denial of overtime requests. After the county discovered harassing email printouts, his Captain discussed the situation with him. Michael denied that the emails were offensive and stated he did not want to file a complaint. After he was found with a thumb drive with potentially stolen materials, Michael refused to cooperate with an internal investigation and was terminated for insubordination.

The district court found that Michael supplied enough evidence to show that his supervisors participated in the harassment and knew about it. It held that only a jury could determine whether the harassment that Michael received constituted a hostile work environment, and whether it was the sheriff department's custom to harass minority deputies. However, the court also concluded that Michael did not provide enough evidence to support his claim that he was prevented from applying for a promotion because of his national origin. Further, the denial of overtime and being written up are not adverse employment actions for Michael's retaliation claims, and he could not show that his termination was a result of his EEOC complaint. Therefore, the court dismissed Michael's retaliation claim, Title VII discrimination but allowed his claims for hostile work environment and violation of his Civil Rights to go to a jury.

9.13 *Lewis v. City of Chicago*, 1:98–cv–05596, 2014 WL 562527, at *1 (N.D. Ill. Feb. 13, 2014)

In a prior action, the Chicago Fire Department was ordered to hire 132 African American firefighters and grant those firefighters retroactive seniority dating back to the date they would have been hired if the city had not unlawfully discriminated against them. In this action,

firefighters who were hired pursuant to that order moved to have the court order the Department to allow them to wear service bars on their dress uniform. Firefighters are allowed to wear service bars once they have served for ten years with the department.

The court held that to effectuate the purpose of Title VII—make whole those who suffered unlawful discrimination—the Fire Department must allow the firefighters to wear the service bars. The bars denote how long the firefighters had been with the department. Not wearing the service bars indicated that they are not equal to their peers, and was a reminder of the discrimination they faced. The firefighters were allowed to wear the service bars reflecting a period of service beginning from when they would have been hired had the Department not unlawfully discriminated against them.

9.14 *Tarbuck v. Nevada*, No. 3:12–cv–00454–RCJ–WGC, 2014 WL 590496, at *1 (D. Nev. Feb. 14, 2014)

Steve Tarbuck was employed at the Nevada Youth Training Center. He claimed a hostile work environment based on age, national origin, disability, and religion. Tarbuck alleged that his mistreatment began when he reported racial insults a coworker made to a ward and other inappropriate behavior. Tarbuck filed a complaint of discrimination with the Nevada Department of Personnel. Shortly thereafter, he was assigned a different shift and could not attend religious services. The State fired Tarbuck for failure to complete his probationary period, even though he had two satisfactory performance evaluations. Tarbuck sued for: hostile workplace in violation of Title VII; retaliation under Title VII, Equal Protection Clause violation; and First Amendment free speech violation. The court dismissed all of the charges except the retaliation claim. Defendant moved for summary judgment.

The court granted defendant's motion for summary judgment. Tarbuck only alleged that retaliation was based on comments a coworker made to wards. This is not an unlawful employment practice. Because treatment of non-employees does not fall within the protection of Title VII, Tarbuck did not make out a retaliation claim.

9.15 *City of Chicago & Fraternal Order of Police, Chicago Lodge 7*, 132 LA 1072 (Arb. 2013)

The City of Chicago instituted Operation Safe Summer to combat increased gang and drug-related violence and homicides during the summers of 2006, 2007, and 2008. To staff the program, the city cancelled the day off of certain specially trained personnel and assigned them to work in specific areas of the city to reduce violence. Participation was mandatory and officers did not volunteer for the program. Twenty-nine officers brought a grievance against the city alleging that the city violated its collective bargaining agreement by excluding them from the program. The arbitrator held that management had discretion to make staffing assignments for overtime as it saw fit. Furthermore, the decision was not arbitrary or capricious because "it was [a] matter of administrative convenience to assign specific teams who had their regular days off as teams to specific shifts." The department's decision was reasonable and rational.

9.16 *City of Troy, Ohio & Police FOP, OLC–Troy Police Officers Ass'n.*, 132 LA 1058 (Arb. 2013)

Joel Misirian, a police officer with the City of Troy, applied to the city for tuition reimbursement for classes he was taking that were job related. The city denied funding, stating, "2013 Funding does not allow for tuition reimbursement at this time." The collective bargaining agreement gave the city discretion in granting tuition assistance requests; the city has not granted such a request since 2008. The arbitrator held that the city did not violate the collective bargaining agreement because of the collective bargaining agreement gave it discretion to deny requests, and the city produced evidence of other budgetary cuts. Therefore the decision to deny Misirian's education assistance request was not "arbitrary, capricious or taken in bad faith."

10. Discrimination: Gender and Sexual Orientation

10.1 *Arthur v. Whitman Cnty.*, No. CV-12-365-LRS, 2014 BL 93885 (E.D. Wash. Apr. 1, 2014)

Brenda Arthur was employed at the Whitman County Assessor's Office and claims that her supervisor, Joe Reynolds, sexually harassed her. Arthur also sued the County for "negligent supervision," stating that the County failed to supervise Reynolds or train him well enough to prevent the harassment.

The trial court found that negligent supervision was not a claim that could be filed in relation to a sexual harassment claim. However, the agency principles state that if a supervisor is guilty of sexually harassing an employee, then the County will be guilty as well, and if the supervisor is innocent, then so will the County be innocent. Therefore, Arthur does not need a claim for negligent supervision in order to sue the County. Therefore, the court dismissed the negligent supervision claim, but allowed the other claims to go forward.

10.2 *Maldonado-Catala v. Municipality of Naranjito*, No. Civ. 13-1561, 2014 WL 610362 (D.P.R. Feb. 15, 2014).

Maribel Maldonado-Catala sued the Municipality of Naranjito for sexual harassment and retaliation after she reported the harassment. She is openly lesbian and works as an Emergency Medical Technician (EMT), and her co-workers, with the consent of her supervisor, constantly made sexually explicit comments and jokes about her orientation. She filed a complaint with the Director of Human Resources after discussing the matter with the city mayor. She believes that they took no investigative action, and prevented any investigation from occurring. The mayor, however, asked for the resignation of her supervisor, and other co-workers were reassigned or fired. When her complaint became public knowledge, she was retaliated against, denied sick leave, and forced to return to work after an injury before she received medical clearance to do so. She sued the city in the Federal District Court in Puerto Rico.

The court found that the law preventing discrimination does not prohibit discrimination based on an employee's sexual orientation. However, the court found that Maldonado-Catala met the criteria for gender discrimination, since she suffered conditions to which her male co-workers were not subjected. It found that the sexual harassment was partially based upon comments related to her gender and that male employees were harassing a female employee with

sexually provocative language. That type of interaction is consistently considered gender discrimination. Based on this interpretation, the city did not provide enough evidence to dismiss the lawsuit. [Note: in Washington and other states, sexual orientation is protected status.]

10.3 *Orton-Bell v. Indiana*, No. 13-1235, 2014 BL 201257 (7th Cir. 2014)

Connie Orton-Bell was a substance abuse counselor at a maximum-security prison in Indiana. She was told to come to a meeting so that the supervisor could look at her, and not to wear jeans because her "ass looked so good that she would cause a riot." The male employees would often congregate around the pat-down area to watch her be pat-down, a process that took longer than for her male colleagues. An internal investigation revealed that night-shift employees were having sex at her desk, and informed her of these activities, suggesting that she should wash her desk every morning. The department was not concerned with the nightly activities since it did not involve inmates. Soon afterwards, the same investigator discovered that Connie was having an affair with the major in charge of custody, involving the pair having sex on the major's desk. The pair used their work emails to send sexually explicit messages to each other. Both were terminated. The major testified against Connie, which allowed him to keep his benefits, including his pension, obtain unemployment benefits, and work at the prison as a contractor, a deal which was not offered to Connie. She sued the state for gender discrimination. The trial court dismissed her case before trial, finding that she did not prove retaliation and that the sexual tenor of the prison was not severe or pervasive enough to be a hostile work environment.

The court of appeals found that the night shift having sex on her desk was offensive to Connie. It was also pervasive conduct because, unknown to her, she worked at her desk without it being sanitized. The indifference of the prison administration was sufficient to find that the prison is at fault for this action. However, the comments for her to clean the desk, and that it was used, is insufficient to show that the sex occurred because she was a woman. Nevertheless, the constant comments are severe and pervasive and made because she was a woman. The superintendent was the one who harassed her and made sexual comments to her. Although she had a single email of vulgar banter with a male colleague, it is for the jury to decide whether the comments were subjectively offensive to her, not a determination for the court to make. She reported the harassment to her supervisors and no changes were made. Therefore, she has provided enough evidence for a jury to rule in her favor, so it was improper for a court to dismiss her case. Connie's retaliation claim was properly dismissed because she did not state how her complaint about sex on her desk related to her gender. The court also found that the prison discriminated against her for not giving her the same benefits as the major with whom she had an affair.

10.4 *Chaib v. Indiana*, No. 13–1680, 2014 WL 685274, at *1 (7th Cir. 2014 Feb. 24, 2014)

Nora Chaib resigned from her position as a corrections officer at the Pendleton Correctional Facility. She sued her former employer, the State of Indiana, alleging employment discrimination and retaliation based violation of Title VII on for her gender and national origin. She grounded her claim on a disparate treatment theory. She alleged that her field training officer made sexually offensive remarks to her throughout her time training with him. She also alleged that he made disparaging remarks about her French heritage, the French in general, and

called her a "snitch." Ms. Chaib had encounters with other co-workers that she identified as discriminatory. In some of those encounters, co-workers showed overt animus toward her based on her national origin or her gender; other encounters involved criticism of her work or negative feedback concerning her performance. Ms. Chaib made multiple complaints to her employer. After each report, Ms. Chaib had no further problems with the co-worker involved. In 2011, Ms. Chaib was groped by an inmate while working in the "chow hall." The inmate was reprimanded and placed back into general population, where Ms. Chaib worked. After this episode, Ms. Chaib requested time off under the FMLA based on stress, depression, and anxiety. During this time off, Ms. Chaib tendered her resignation.

The court rejected Ms. Chaib's arguments that she suffered an adverse employment action because she was not trained, that she was denied transfer to a less secure facility, and that she received a poor performance evaluation. The court found that she was trained, that being denied the transfer did not have an adverse impact on her career, and that a poor performance evaluation alone is not enough to be considered an adverse employment action. The court held that because Ms. Chaib failed to show an adverse employment action because of her national origin or gender, her claim for discrimination based on gender and national origin failed. The court also held that Ms. Chaib did not set out a basis for employer liability for a hostile work environment. Therefore, Ms. Chaib's hostile work environment claim failed. The court rejected Ms. Chaib's retaliation claims, finding that none of the adverse employment actions that Ms. Chaib identified were tied to the complaints she made to her employer about the alleged harassment.

10.5 *Geraty v. Vill. of Antioch*, 122 FEP Cases 985 (N.D. Ill. 2014)

A jury found that the Village of Antioch discriminated against police officer Dawn Geraty based on her gender when the village failed to promote her to the position of sergeant and when it failed to transfer her back to the position of detective. The court determined that the appropriate remedy to make Geraty whole was to award her back pay and prejudgment interest from the time she likely would have been promoted, and place her at the rank of sergeant.

10.6 *Godfrey v. City of Chicago*, No. 12 C 08601 (N.D. Ill. 2013)

Plaintiffs in this putative class action were members of a class of African American applicants who successfully sued the City of Chicago in *Lewis v. City of Chicago*. In *Lewis*, the city was held liable for race discrimination in the hiring of firefighters, based on the results of a written examination. The court in *Lewis* ordered the city to hire 111 class members as firefighter candidates, who would still have to meet all other hiring criteria and graduate from the academy. The female plaintiffs in this case, *Godfrey*, were among the group of class members from *Lewis* who were invited to participate in the hiring process. These female plaintiffs took the physical abilities test (PAT), and each failed. Plaintiffs then brought this putative class action alleging that the PAT is discriminatory against women. The court held that the plaintiffs were allowed to go forward with their action because the basis of the claim in *Godfrey*—gender discrimination—was completely distinct from the basis of the claim in *Lewis* (racial discrimination). The plaintiffs in *Godfrey* were seeking relief for a distinct harm. Therefore their claims are not barred by *Lewis*.

10.7 *Mosley v. Ala. Unified Judicial Sys.*, 122 FEP Cases 711 (11th Cir. 2014)

Linda Johnson Mosley, a black female, was passed over for the position of chief juvenile probation officer in favor of Battiste, a black male. Battiste was selected from a group of candidates referred to the ultimate decision-maker by a hiring committee. Ms. Mosley was not in that group of candidate. Ms. Mosley sued her employer on numerous counts, many of which were dismissed on summary judgment. As to her Title VII gender discrimination claim and her section 1981 retaliation claim, the court held that that the proffered legitimate reason—that Battiste was hired because of his superior administrative and managerial skills—could not rebut Ms. Mosley's prima facie case for either claim because Ms. Mosley's qualifications were not in front of the person making the hiring decision.

10.8 *Rodríguez-Vives v. P.R. Firefighters Corps*, No. 13–1587, 2014 WL 593673, at *1 (1st Cir. Feb. 18, 2014)

Kathy Rodríguez-Vives was a transitory firefighter with the Puerto Rico Firefighters Corps of the Commonwealth of Puerto Rico. She obtained that position as part of a settlement agreement with the Commonwealth of Puerto Rico to settle a 2005 suit in which she alleged that the Firefighters Corps refused to hire her as a firefighter because of her gender. Later, she alleged that during her transitory employment she suffered abuse and retaliation for her earlier suit. Her supervisor constantly told her that she was dumb, incompetent, inept, and backward, and he shouted at her on multiple occasions. The only duties she was given were cooking, cleaning, and keeping the fire station's journal. Unlike other firefighters who had not yet attended the Academy, she was not trained, given an emergency kit or a uniform, or allowed out on incidents. She filed sex discrimination and retaliation claims in violation of Title VII. The district court dismissed both claims, and Ms. Rodríguez-Vives appealed the dismissal of her unlawful retaliation claim.

The court vacated the district court's dismissal, holding that there was a plausible claim for unlawful retaliation in violation of Title VII. The court found that the Firefighters Corps prohibiting her from accompanying firefighters on calls, and her subjection to inequitable and unpleasant treatment was sufficient to be materially adverse, meaning that that treatment "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The court therefore found there was a plausible claim for unlawful retaliation under Title VII.

10.9 *Webster v. City of Fairfield*, 122 FEP Cases 1010 (S.D. Ohio 2014)

Shannon Webster, a part-time firefighter/EMT with the City of Fairfield, was placed on administrative leave after failing the required physical ability test three times, and refusing to take the test a fourth time. Ms. Webster was approximately 100 pounds overweight, smokes, has heart and lung problems, back pain, and shortness of breath. Ms. Webster was not completing her mandatory paid hour of working out at the station, and did not provided documentation that she is working out at a private facility. After Ms. Webster failed the physical ability test the first time, her supervisors met with her and offered to work out with her because they were "not going to let [her] quit." After she failed the second time, she was evaluated by the department's doctor, per department policy. She received training on the types of exercises she needed to be doing to pass the examination and the doctor concluded that she was unfit for duty but that the "ball is in

her court." The doctor believed she could become fit for duty in 90 days if she followed the work-out regime shown to her at his office. She was placed on administrative leave and told to contact her supervisor when she was ready to re-take the test so that she could return to work as soon as possible. She failed the test for a third time. The department scheduled her to take it a fourth time, but she refused. She remains on administrative leave. Ms. Webster filed suit, alleging discrimination on the basis of sex.

The court granted defendant's motion for summary judgment, finding that Ms. Webster failed to make a prima facie case for discrimination. The court found that she was not qualified for the position because she failed the physical ability test, a position requirement. The court also found that Ms. Webster was not treated less favorably then similarly situated male firefighters. Even if she had made her prima facie case, the court held that her claim would still fail because placing her on administrative leave after she failed the physical ability test multiple times was a nondiscriminatory and legitimate reason for placing her on administrative leave.

11. Sexual Harassment and Hostile Work Environment

11.1 *Coy v. Cnty. of Delaware*, No. 2:12–CV–00381, 2014 WL 117085, at *1 (S.D. Ohio Jan. 10, 2014)

Kathleen Coy worked in Delaware County's 9-1-1 Communications Call Center in management. She sued the former Executive Director, Robert Greenlaw, and the County of Ohio [Delaware] for a hostile work environment, sexual harassment, and age discrimination. Greenlaw made sexually explicit comments about women's breast size, body parts, and other sexual comments about female employees and applicants to female employees on a regular basis. Coy and other female employees of the Call Center made numerous complaints about Greenlaw to human resources without avail. In 2010, Coy was passed over for the position of Operations Manager in favor of a significantly younger candidate. In 2011, Coy's position at the Call Center was abolished.

The court held that Coy made out a prima facie case for her sexual harassment claims. Greenlaw's comments were made to women, were sexual in nature, were unwelcomed, and were pervasive enough that a jury could find they created a hostile work environment. The court also found that Delaware County would be liable for hostile work environment because Greenlaw was Coy's supervisor and the harassment culminated in a tangible employment action. There were remaining questions of material fact if the county could establish an affirmative defense to this claim. As for Coy's common law sexual harassment claims, the court denied defendants' motion for summary judgment under substantially the same rationale as the claim for hostile work environment. The court dismissed Coy's claim for age discrimination under the ADEA for failure to submit a timely charge to the Equal Opportunity Employment Commission. However, the court denied summary judgment on Coy's failure-to-promote claim under the Ohio Revised Code because the plaintiff presented sufficient evidence that a reasonable jury could find the rationale used to hire the younger woman constituted pretext. The court utilized similar rational to reject the defendants' motion for summary judgment on Coy's reduction-in-force claims, finding that a reasonable jury could find the rationale behind eliminating Coy's position was pretext.

11.2 *Daniels v. Cal. Dep't of Corr. & Rehab.*, No. 2:10-cv-00003-MCE-AC (E.D. Cal. 2013)

Maria Aguilar, one of three named plaintiffs in this action, was a correctional officer at the California State Prison-Solano. She alleged that she was subjected to a hostile work environment by the California Department of Corrections and Rehabilitation (CDCR) in violation of Title VII. Ms. Aguilar asserted that the CDCR failed to properly enforce its policies prohibiting the possession and display of sexual materials by inmates. On a number of occasions, she had to enforce this policy. She would first ask inmates to remove the material. If they did not follow this directive, she would issue a written disciplinary report. In 2008, Ms. Aguilar frequently had to take action to enforce the policy. Between 2008 and 2011, there were only two instances in which her verbal warning was insufficient and she had to issue a written warning. Neither of the inmates who received written warnings threatened or verbally abused her, and both were disciplined. Ms. Aguilar conceded that she was never retaliated against or ridiculed for making reports about inmate violation of the policy. And, she did not report or confront any other correctional officers for not following the policy.

The court granted CDCR's motion for summary judgment on Ms. Aguilar's claims. The court held that while the conduct—the unwanted display of sexual images—was unwelcomed conduct of a sexual nature, the conduct was not severe or perverse enough to create a hostile working environment, particularly in the context of an all-male prison where inmates were allowed to possess some sexually suggestive materials. Even if Ms. Aguilar had proved a hostile work environment, the CDCR would not have been liable because it took corrective action and had policies and procedures in place to curtail such behavior.

11.3 *Echavarría-Díaz v. Cuerpo de Bomberos de Puerto Rico*, 122 FEP Cases 874 (D.P.R. 2014)

Dagnes Mabel Echavarría-Díaz was a wild land firefighter with the Cuerpo de Bomberos de Puerto Rico (the Bomberos) under a contract tied to the American Recovery Act program. During her time with the Bomberos, Ms. Echavarría-Díaz was subject to harassment from the other firefighters, including having a water hose sprayed directly in her face; having her hair pulled and back scratched; unwanted touching of her back, shoulders, and hair; having male colleagues grab their crotch and make thrusting movements whenever they worked together; being watched by her male colleagues while she did her required exercises; finding feces in the women's bathroom; being teased about her underwear; being exposed to pornography and other sexually explicit images at work; and, being told that her colleagues would never work with her. In addition, Ms. Echavarría-Díaz was prevented from sitting in the front seat when out with the other firefighters; was not allowed to rest in her Wildland t-shirt like her male colleagues but instead had to wear her long-sleeved firefighting shirt; was not allowed to fully participate in some training activities; and, was not given the same duties as other firefighters. Ms. Echavarría-Díaz made numerous verbal complaints, and written-notice of her complaints. After filing her written complaint, her supervisor issued an internal memorandum that stated that "Firefighter Echavarría has displayed inappropriate conduct since the start of the Wildland Program," although Ms. Echavarría-Díaz had not previously been reprimanded about the allegedly inappropriate conduct, and it was raised only after she made a sexual harassment complaint. She was excluded from group comradeship events, and felt intimidated by several firefighters. She was transferred to another fire station for the last few months of her contract.

There she was not allowed to work as a firefighter, but instead spent her time cleaning the bathrooms. Ms. Echavarría-Díaz sued the Bomberos, the Commonwealth of Puerto Rico, and various senior ranking officers for employment discrimination based on a hostile work environment.

The court denied defendants motion for summary judgment on Ms. Echavarría-Díaz's Title VII sexual discrimination, sexual harassment, and hostile work environment claims. The court found that as a female employee, she was a member of a protected class. The court also found that a reasonable jury could her treatment created a hostile work environment, that the harassment was based on sex, that it was sufficiently severe or perverse so as to alter her employment conditions and create an abusive working environment, that the conduct was hostile or abuse, and that there could be employer liability because the defendants knew or should have known about the sexual harassment and failed to correct it.

11.4 *Johnson v. Rockford Pub. Sch. Dist. #205*, No. 12 C 50098, 2014 WL 197725, at *1 (N.D. Ill. 2014 Jan. 16, 2014)

Anna Johnson was a non-tenured teacher for the Rockford Public School District from August 2005 until the end of the 2009-2010 school year. In 2009, she began a consensual romantic relationship with Don Rundall, the principal of the school where she worked. Ms. Johnson ended this relationship in January 2010. Mr. Rundall continued to contact Ms. Johnson, attempting to continue their sexual relationship. Ms. Johnson submitted more than once. In February 2010, Ms. Johnson says she complained to the HR director about Mr. Rundall's unwelcome sexual advances. In May 2010, it was discovered that Ms. Johnson was writing personal information and derogatory statements about the district's personnel in her student's notebooks which went home to their parents. As a result of this and other complaints, a letter was placed in Ms. Johnson's file detailing her unbecoming conduct. At the end of the 2009-2010 school year, the district dismissed all non-tenured teachers. Ms. Johnson applied for and was offered a summer teaching job at Page Park School. Shortly after Ms. Johnson accepted the position, the school's principal called and told her that she could not hire Ms. Johnson because of her relationship with Mr. Rundall. Ms. Johnson testified that the HR director had told the principal not to hire her because of her relationship with Mr. Rundall; the HR director denies making this statement. Ms. Johnson claims that she applied for teaching positions with the District for the 2010-2011 school year, but that she was not interviewed or hired for any of them. Ms. Johnson believes that other principals had been told not to hire her because of her relationship with Mr. Rundall. Ms. Johnson sued the district, alleging unlawful retaliation and sexual harassment under Title VII.

The court denied the district's motion for summary judgment as to Ms. Johnson's retaliation claims for the summer 2010 and 2010-2011 school year. The court found that the HR director's statement to the principal that Ms. Johnson could not be hired because of her relationship with Mr. Rundall could be interpreted to be a reference to Ms. Johnson's complaint. Finding that this comment could be a tangible employment action, and finding that the district would be strictly liable for Mr. Rundall's sexual harassment because he was Ms. Johnson's supervisor, the court denied the district's motion for summary judgment as to Ms. Johnson sexual harassment claim.

11.5 *Kramer v. Wasatch Cnty. Sheriff's Office*, No. 12–4058, 2014 WL 702111, at *1, (10th Cir. 2014 Feb. 25, 2014)

When Camille Kramer worked as a jailor for the Wasatch County Sheriff's Department, she was subjected to offensive comments about her breasts, frequently heard graphic sexual conversations, and saw sexually explicit material on work computers. The male colleagues who engaged in this type of behavior were promoted, while the women who complained suffered retaliation. Later, as a bailiff, Ms. Kramer worked under Sergeant Rick Benson. Benson did not have the authority to hire, fire, or promote employees, but he did have the authority to make such a recommendation. In addition, Benson assigned duties to Ms. Kramer. As soon as Ms. Kramer began working as a bailiff, Benson began to sexually harass her. His behavior escalated to sexual assault and rape.

Ms. Kramer did not report the harassment, assault, or rape because she feared that it would negatively affect her job. After being in a serious car accident, Ms. Kramer confided in a court clerk, and allowed the clerk to tell a detective about Benson's conduct. The result was an internal investigation into "sexual misconduct" between Benson and Ms. Kramer, which deteriorated into what Ms. Kramer felt, was an interrogation and investigation on her and her personal life. Peace Officer Standards and Training (POST) suspended Ms. Kramer's POST certification for six months after this investigation revealed that she had consensual intercourse with her lover (a County firefighter) when he, but not she, was on duty. Ms. Kramer was pressured to resign. There is no evidence that Benson was ever prosecuted, and he resigned before the Sheriff could fire him. Ms. Kramer sued the County, alleging that the sexual harassment she suffered constituted sex discrimination prohibited by Title VII and the Constitution.

The court reversed the district court's grant of summary judgment to the county on Ms. Kramer's Title VII claim, finding that there were questions of material fact regarding Benson's supervisor status and the county's affirmative defense. In addition, the county may be vicariously liable for Benson's sexual harassment if he is found to be a supervisor. However, the court upheld the district court's grant of summary judgment to the county on the county's liability under Title VII on a negligence theory, the court's grant of qualified immunity to the Sheriff, and the dismissal of the county's liability for sex discrimination under section 1983.

11.6 *Pedrosa v. City of New York*, 13 Civ. 01890 (LGS) (S.D.N.Y. 2014).

New York Police Department (NYPD) officer Lisette Pedrosa worked directly with Special Operations Lieutenant Salvatore Marchese. Shortly after accepting the position, Marchese began making unsolicited sexual advances toward Officer Pedrosa, including texting her explicit photos, and demanding and receiving oral sex. Officer Pedrosa asked Marchese to stop, but he became increasingly hostile toward her. Officer Pedrosa reported Marchese's behavior to Lieutenant Garfield Edmonds. Edmonds failed to notify the NYPD's Office of Equal Employment Opportunity (OEEO), as required by department policy. Eventually, Officer Pedrosa was transferred. Since her transfer, she has received poor assignments, unfair discipline, and was precluded from overtime. After her transfer, Officer Pedrosa had her police equipment stolen from her work locker. She reported to incident to Officer Kevin Coleman, who failed to notify the Internal Affairs Bureau (IAB) as required by department policy and then fabricated a

report to cover up his failure. Deputy Inspector and Commanding Officer Nilda Hoffman caused false reports to be written to cover up Coleman's failure to notify and the fact that there had been a theft under her command.

Frustrated that the NYPD did not take her complaints of sexual harassment seriously, Officer Pedrosa gave an interview to the New York Daily News. Approximately six months after her interview was published, Sergeant Jessica McRorie changed the classification of a citizen's complaint to which Officer Pedrosa had responded without Officer Pedrosa's authorization. Throughout this time, Officer Pedrosa had filed multiple complaints with the IAB and OEEO. The NYPD is allegedly aware of its problem with white male employees committing sexual harassment, and allegedly responds by refusing to acknowledge the misconduct or administering disproportionately light punishment and discrediting the accusers.

Office Pedrosa asserted 25 claims against the City, Marchese, Edmonds, Coleman, Hoffman, and McRorie, alleging violations of retaliation under the First Amendment and New York state and city laws against all defendants; failure to train and supervise under section 1983 against the city; sexual harassment under section 1983 and New York state and city laws against all defendants; and hostile work environment under section 1983 and New York state and city laws against all defendants. Defendants moved to dismiss all claims against all individual defendants other than Marchese, the failure to train and supervise claims against the City, and the First Amendment retaliation claim against all defendants.

The court dismissed the First Amendment retaliation claim and the failure to train and supervise claim. The court also dismissed the retaliation claim under New York state and city laws against Coleman, Hoffman, McRorie, and Edmonds; and the hostile work environment claims against Coleman, Hoffman, and McRorie. The court also dismissed the sexual harassment claims against Coleman, Hoffman, and McRorie, finding that Officer Pedrosa had not plead that these defendants were personally involved in the acts that lead to the sexual harassment claim. After this decision, only the sexual harassment claims against Marchese and Edmonds, the retaliation claims against Marchese, and the hostile work environment claims against Marchese and Edmonds remained. The court found that Edmonds' failure to take action after Officer Pedrosa complained about Marchese's conduct constituted personal involvement in the harassment, and aiding and abetting sexual harassment under New York law. Edmonds' failure to report was also a sufficient basis for aiding and abetting liability under state law for a hostile work environment.

11.7 *Falcon v. Continental Airlines*, No. 12-5782 (JLL) (D.N.J. 2014)

Ray Falcon is an openly gay man who works as a flight attendant for Continental Airlines. Mr. Falcon was told by Continental Airlines that his hairstyle was not in compliance with the airline's appearance standards. Continental told Mr. Falcon that he could either self-correct by getting a haircut, or be removed from the flight he was supposed to work. Mr. Falcon got a haircut at the airport. Mr. Falcon sued Continental alleging a hostile work environment discrimination claim based on sexual orientation in violation of the New Jersey Law Against Discrimination. The court granted Continental's motion for summary judgment, holding that there was no evidence suggesting that Mr. Falcon suffered discrimination because of his sexual

orientation. There was no evidence suggesting that Continental made comments about his sexual orientation, and there were no other allegations of discrimination aside from this incident.

11.8 *Wilson v. Cook Cnty.*, 742 F.3d 775 (7th Cir. 2014)

Krystal Almaguer (now Wilson) was an out-of-work massage therapist who interviewed for a "position" at Oak Forest Hospital, part of the Cook County Bureau of Health Services. However, the "position" that she interviewed for did not actually exist. Felice Vanaria, a politically-appointed staffer at the hospital who did not have the authority to interview or hire new applicants, or to create positions, used the promise of a new job to convince Wilson to give him erotic massages and engage in other sexual contact. Vanaria convinced Ms. Wilson to take off her clothes, kiss him, and eventually to manually stimulate him, all under the promise that she would get the job. Ms. Wilson discovered the scheme when she called the Hospital's HR department after Vanaria told her that the job would pay $10,000 more, but that she would have to give him a second massage. Ms. Vanaria sued the county for violations of Title VII, sexual harassment, and violations of due process.

Regarding Ms. Wilson's sexual harassment claim, the court noted that municipalities may be directly liable for sexual harassment when their own policy/custom is the "moving force" behind the deprivation. However, in the present case, the court held that that the "moving force" behind the harassment was Vanaria, not Cook County. Therefore, Ms. Wilson's equal protection claims against the county failed. Ms. Wilson's due process claim—based on the allegation that the county's practice of not screening political employees caused her to suffer a violation of her due process right to bodily integrity—also failed. The court held that the decision to hire Vanaria was not the moving force behind Ms. Wilson's injuries. That also meant that the county lacked the requisite mental state of deliberate indifference. Therefore, the substantive due process claims failed. Finally, the court held that the requisite employment relationship did not exist, and therefore Ms. Wilson could not sustain a Title VII claim. The court held that a plaintiff must have been passed over for a job that actually existed before that person can claim an "unlawful employment practice" has occurred. Because the job that Ms. Wilson applied for never existed, the county could not have engaged in an unlawful employment practice in violation of Title VII.

12. Discrimination: Age

12.1 Jaxon Van Derbeken, *Jury finds age bias in S.F. firefighters' test*, SF Gate (Oct. 29, 2013, 9:38 AM)

Fifteen San Francisco firefighters were awarded a total of $3.7 million after a jury found that the Fire Department had discriminated against them based on age when they failed a promotional exam for lieutenant. The firefighters accused the city of randomly altering test scores for the 2008 test. They challenged the exam process, alleging that it was skewed against firefighters over 40. The firefighters each received back pay, future pay as if they had been promoted to lieutenant, and over $100,000 for emotional distress.

12.2 *Hilde v. City of Eveleth*, No. 12-2794 (RHK/LIB) (D. Minn. 2013)

Leroy Hilde has worked for the City of Eveleth as a police officer for the past 29 years, serving as Lieutenant since 1998. In 2012 he was not selected to replace the retiring police chief. He sued, alleging that he was not selected because of his age, in violation of the Age Discrimination in Employment Act and the Minnesota Human Rights Act.

The court held that Hilde did not satisfy all of the elements to establish his discrimination claim. Hilde met the first three elements of an age discrimination claim: that he was (1) over 40 at the time of the decision, (2) was not hired, and (3) that he was qualified for the job. However, he failed to meet the fourth element: that he was passed over for a candidate who was substantially or significantly younger. The person who was selected for the position was only eight years younger than Hilde, which in the Eight Circuit is not "substantially younger." Even if Hilde had met the four elements of the claim, there was no evidence that the proffered reason for the decision—that the other candidate was the better candidate—was a pretext for age discrimination. The only evidence that the city was even aware of Hilde's age was that they knew he was eligible for retirement. An employer may consider retirement eligibility in making hiring decisions without facing charges of discrimination.

12.3 *Stockwell v. City & Cnty. of San Francisco*, 122 FEP Cases 795 (9th Cir. 2014)

Police officers over the age of forty who performed well enough on an examination to qualify for consideration for promotion brought a class action alleging that a new policy of the San Francisco Police Department worked a disparate impact based on age. The officers claimed that the new policy, which abandoned the examination as the basis for investigative assignments, violated California's Fair Employment and Housing Act (FEHA) and the Age Discrimination in Employment Act. The officers moved for class certification on the FEHA claim. The district court denied certification based on a lack of commonality. The plaintiff's appealed, and the Ninth Circuit accepted the case for review of the issue of commonality.

The court held that the Plaintiffs met the commonality requirement for class certification. There were questions presented that were common to all members of the putative class. The officers identified a single policy that generated all of the alleged disparate impact. Whether or not the class prevailed on the claim would depend on if that practice did generate disparate impact. Because the answer to that question would affect every class member's claim uniformly, the plaintiffs met the commonality requirement.

13. Transfer/Assignment/Probation/Classification

13.1 *Ass'n. of Cleveland Firefighters v. City of Cleveland*, No. 99999 (Ohio Ct. App. Dec. 12, 2013).

The Association of Cleveland Firefighters challenged the residency preference given to civil service applicants if they lived within the city limits for more than a year. The Ohio Supreme Court previously struck down the residency requirements, which required all members of the civil service to reside within the city limits because it violated the Ohio Constitution. The trial court struck down the residency preference as violating the Ohio Constitution, and the city appealed.

The specific provision of the Constitution states that appointments and promotions within the civil service at all levels of government will be made based on merit and fitness. After defining the meaning of "merit" and "fitness," the Ohio Court of Appeals determined that, even though the preference points were only given if the candidate received a passing grade, the awarding of points was arbitrary and not related to the merit or fitness of the candidate for the position. Because the fire department was "hyper-competitive" and because a candidate who received a perfect score exam but who did not reside within the city would not be promoted, the court of appeals found that this essentially created a residency requirement for promotions within the Cleveland Fire Department (or any civil service branch).

13.2 *City of Boston v. Bos. Police Superior Officers Fed'n.*, 466 Mass. 210 (2013)

Sergeant Ralph Caulfield, an area representative for the union, was involved in a physical fight with another officer. The station captain suspended the other officer, but did not suspend or otherwise discipline Ralph. The two men were required to interact and exchange information with each other even though they did not work on the same shift. The captain and the chief of field services determined that Ralph's effectiveness as a supervisor was compromised and he was transferred to another station. His union sought to enforce a provision in its collective bargaining agreement (CBA) prohibiting the involuntary transfer of union representatives between stations. An arbitrator found that the city violated the CBA and the superior court affirmed the award.

The Massachusetts Supreme Court found that the Massachusetts General Laws give the police commission the power of assignment and organization of the officers in the police department. The department must have the ability to react to changing conditions and assign police manpower where it is needed; therefore, any police assignment can be changed. The arbitrator did not have power to prevent the transfer.

13.3 *Gulliver Sch., Inc. v. Snay*, No. 3D13-1952, 2014 WL 769030 (Fla. Dist. Ct. App. Feb. 26, 2014)

Gulliver Schools did not renew Snay's contract as the school headmaster, and Snay sued alleging age discrimination and retaliation. The school and Snay settled for $150,000 so long as the details and the existence of the agreement were kept confidential. If either Snay or his wife disclosed the existence of the agreement, then Snay would have to repay the school $80,000. Four days after the settlement, the school notified Snay that he had breached the settlement agreement because Snay's daughter posted a message on Facebook stating that her father won a case against the school and that the school was now paying for her vacation to Europe. The message went out to approximately 1200 of her friends, including many current and former students of the school. The school withheld $80,000 from the award because Snay had breached the confidentiality agreement. Snay sued the school to enforce the settlement agreement. The trial court determined that Snay's comments to his daughter about the settlement agreement and her comments on Facebook did not violate the confidentiality agreement.

The Florida Court of Appeals disagreed with the trial court and decided that both Snay's comments to his daughter and her Facebook post violated the confidentiality agreement. The court of appeals based its decision on standard contract interpretation. It determined that there

was no special meaning underlying the confidentiality agreement. Specifically, the confidentiality agreement prohibited Snay and his wife from disclosing the existence of the agreement to anyone other than their attorneys or professional advisors. The court determined that nothing in the agreement allowed Snay to inform his daughter about the agreement, if he wanted to tell her, he could have included a clause in the agreement to allow him to tell her.

13.4 *Ogden v. Wash. State Criminal Justice Comm'n.*, No. 69662-9-1 (Wash. Ct. App. Mar. 10, 2014)

Thomas Ogden was a Tacoma police officer for two years before he was discharged for making false or misleading statements during an internal investigation. The Criminal Justice Training Commission sought to revoke his peace officer certification and Ogden requested a hearing. Before the hearing took place, Ogden attempted to voluntarily surrender his certification, which the Commission denied and denied his motion to dismiss the case against him. The court of appeals addressed the issue of whether the Commission could refuse to accept a voluntary surrender of a certification.

The court focused on the language of the regulation, which was silent on whether the Commission could accept a surrendered license, but included the power to issue, deny, revoke, lapse, and reinstate the certificate. Based on methods of interpretation, because the regulation specifically provided for other types of actions, the regulation's silence in regards to whether the Commission could accept a surrendered license means that it could not. The legislature declined to give the Commission this authority.

13.5 *Reeves v. City of Georgetown*, No 12-6227 (6th Cir. Sept. 12, 2013).

Greg Reeves was the former police chief of the City of Georgetown, Kentucky before the Mayor fired him without notice or a hearing. He alleges that that city violated his due process rights and breached a contract provision. The City had an ordinance that stated that the police chief was subjected to removal at any time by the city council. The district court dismissed the claim, because that ordinance conflicted with Kentucky's Home Rule Statute, where the mayor has the power to appoint and remove city employees.

The United States Court of Appeals for the Sixth Circuit agreed that the dismissal was appropriate, but did not find a conflict between the two statutes. The Home Rule Statute gives the mayor the authority to appoint and dismiss city employees, but it does not give the mayor the exclusive authority to do so—the city council can also have the concurrent power to dismiss as well. Because the mayor removed Reeves, which is allowed under Kentucky law, his removal did not violate any of Reeves' rights.

13.6 *City of Jenks v. Stone*, 2014 OK11, 321 P.3d 179 (Okla. 2014).

The City of Jenks filed a petition for a declaration that Timothy Stone, a probationary police trainee, was an at-will employee, so that his removal would not require cause or a board of review hearing. The trial court found that Stone was an at-will employee and therefore the city was not required to have cause to fire him or to conduct a board of review hearing.

The Oklahoma Supreme Court found that Oklahoma was an "at-will" employment state, which does not require an employer to have cause to fire an employee. Further, a probationary officer is an officer who lacks all of the employment rights of a permanent employee, until the officer satisfied the employer that he or she could perform the job. The court noted that the law allowing collective bargaining only included permanent officers, not probationary officers. This interpretation was also consistent with other state laws. The court found that a probationary officer was an "at-will" employee and could be fired without cause and without the need for a post-termination board review.

13.7 *Brewer v. City of Seminole*, 2014 OK 41, 199 LRPM 3341 (Okla. 2014)

Renee Brewer was employed by the City of Seminole as a probationary police trainee. Brewer claims that the City needed cause to fire her, even though she was not covered by the collective bargaining agreement.

The Oklahoma Supreme Court referred to its previous decision in *City of Jenks v. Stone*, *supra* Section 13.6, and found that probationary police officers are "at-will" employees and can be fired with or without cause.

13.8 *Estrada v. City of Los Angeles*, 218 Cal. App. 143 (2013)

Frank Estrada was a reserve officer in the Los Angeles Police Department, which is a volunteer position, and those officers are not employees of the city or of the LAPD. While on duty, he was in a car accident and sustained back and leg injuries. The next year he was in another car accident and injured his shoulder. He received workers' compensation. He was suspended and eventually fired for selling a knock-off version of Viagra. He sued the city for disability discrimination. The trial court determined that he was not able to sue under California's Fair Employment and Housing Act because he was not a city employee.

The appellate court determined that the trial court properly determined that Frank was not an employee. The city's charter defined an employee as a person who had a position in the classified civil service. Frank conceded that he was not appointed or considered an employee by the city. Since he was not appointed to a classified civil service position, he was not a city employee. The court also found that merely providing workers' compensation coverage was insufficient to make a volunteer into an employee under the common law theory of agency. Regardless of the workers' compensation coverage, reserve officers were not paid for their time, and therefore were not employees.

13.9 *Haro v. City of L.A.*, Nos. 12-55062, 12-55310, 12-55076, 12-55303, 2013 BL 74669 (9th Cir. Mar. 18, 2014)

Because of an exemption in the Fair Labor Standards Act (FLSA), employees "engaged in fire protection" do not receive the standard time and a half after working 40 hours a week, but rather receive overtime only after working more than 212 hours in a 28-day period. Los Angeles fire department dispatchers and helicopter paramedics were classified as employees "engaged in fire protection" and therefore did not fall under the standard overtime provisions. They claimed standard overtime pay.

Dispatchers work in an office environment and, although they are required to have worked previously as firefighters or paramedics, they only rarely go to a scene to act as a liaison between different groups and are not required to have protective equipment with them. Helicopter paramedics are certified as firefighters and paramedics. They spend the majority of their time administering medical care aboard helicopters. Occasionally, the helicopters help fight brush fires. In that circumstance, the paramedics load the helicopter with fuel and water so that it is ready for the firefighters to use—they do not participate in the actual firefighting.

Based on these definitions, the trial court determined that neither the dispatchers nor the paramedics were "engaged in fire protection," and therefore both were entitled to standard overtime pay. The city appealed, asserting that both were essential to supporting firefighting activities. The United States Court of Appeals for the Ninth Circuit relied on a previous discussion that "engaged in fire protection" involved more than merely assisting fire protection activities and must actively engage in fire suppression, not merely be at the scene. The court found that neither the dispatchers nor the paramedics were "engaged in fire protection," and therefore they are entitled to normal overtime pay.

13.10 *Mendel v. City of Gibraltar*, No. 12-1231 (6th Cir. Aug. 15, 2013)

Paul Mendel was employed by the City of Gibraltar (Mich.) as a police dispatcher and tried to sue the City under the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA) for when he was discharged. The City claimed that it did not have enough employees to qualify under the Acts. The City has a number of volunteer firefighters who receive a substantial hourly wages each time they respond to a fire. The firefighters have to undergo training at their own expense, and do not have regular shifts or benefits. The trial court concluded that these firefighters were not employees and dismissed the case.

The court of appeals determined that the firefighters were in fact employees of the City, as "employee" has a very broad definition. Specifically, the $15 per hour that the City paid to the firefighters was compensation under the acts, and not merely a nominal amount. Each time a firefighter responds to a call, he or she will be paid. The amount was essentially the same wage paid to full-time firefighters in nearby areas. Those who "work in contemplation of compensation" are considered employees under FLSA and FMLA, regardless of whether they consider themselves volunteers.

14. Uniformed Services Employment and Reemployment Act

14.1 *Bradberry v. Jefferson Cnty.*, 732 F.3d 540 (5th Cir. 2013)

John Bradberry was a County Correctional Officer from February 2007 to December 2008. He also served in the Army Reserves. In September 2008, he reported for annual Reserves training and was scheduled to return to work on September 13. John did not return until the evening of September 16—missing shifts on September 13 and 14. He claimed that he received oral orders to report to Abilene, Texas due to the imminent landfall of Hurricane Ike, and he informed the County of his new orders. The County wanted documentation. John was only able to provide memoranda from his commanding officer, which was not the type of

documentation that the Country wanted. After an internal investigation into his conduct, the County fired John in December 2008 because he was insubordinate, absent without leave, and failed to answer questions truthfully or with proper documentation. John contested his discharge and classification of his behavior. An Administrative Law Judge found there was insufficient evidence to support the discharge reasons, and ordered a change in his discharge status to "fired at will" after a disagreement over military leave. The Texas Department of Veterans' Employment and Training Services also found that the County discriminated against John because of his military service. The federal district court declined to grant John's claims before trial in part because it was unclear if John was asserting his claim under USERRA's discrimination or reemployment provisions. John appealed to the federal court of appeals.

The United States Court of Appeals for the Fifth Circuit found that even though the Administrative Law Judge determined that John was fired over an argument about his military service, this decision did not bind the federal district court to the same conclusion. A federal judge does not need to follow the decisions of a state administrative agency when the administrative agency did not have a trial on the issues. Even if the underlying dispute involved his military service, the County could discharge him for insubordinate behavior. For USERRA application, the discharge has to be "motivated by his military service," not by a dispute *concerning* his military service.

14.2 *Brown v. Vermont*, No. 2012-337, 2013 WL 656383 (Vt. Dec. 13, 2013)

The Vermont Department of Corrections hired Daniel Brown as a temporary corrections officer in an at-will, non-union position. By law, temporary officers cannot work more than 1,520 hours per year and are not entitled to benefits. Soon after he completed his training, his supervisors discovered that he might be deployed to Afghanistan. Concurrently, he was interviewed for a permanent position. Of the eight candidates, three were National Guard members who were soon to be deployed, and none of the National Guard members were selected. Brown received the lowest score among all of the interviewees and had the least amount of experience. Two supervisors allegedly told Brown and another National Guard member that the reason they were not promoted was because of their pending military deployment. Brown continued to work as a temporary officer, and received a number of critical reports and evaluations about his confrontational behavior, and a written reprimand for consistently arriving late. After a number of incidents, the Department of Corrections discharged him. Brown filed a lawsuit complaining that the State violated USERRA by failing to promote him to the permanent position and discharging him for being a member of the National Guard. The trial court dismissed the case before trial on summary judgment.

The Vermont Supreme Court determined that Brown had not shown that his qualifications were similar, equal or superior to the officers who were hired, and that the only evidence shown was that he was the *least* qualified candidate. Just because the three candidates selected were not members of the National Guard is not enough evidence of discrimination. Additionally, his positive performance reports were outweighed by the negative reports and do not show that Brown was discriminated against based on his military service. Brown's low ranking on the interview, lack of experience, and the negative performance evaluations supported the Department's position that it did not discriminate against Brown based on his service in the National Guard.

14.3 *DeLee v. City of Plymouth*, No. 3:12 CV 380, 2014 BL 87331 (N.D. Ind. Mar. 31, 2014)

Robert DeLee was an 11-year veteran of the Plymouth police department, and served as a reserve officer in the Air Force. From September 2010 through May 2011, he was deployed with the Air Force. Normally, the department pays its officer's longevity pay yearly after three years, an amount that increases the longer the officers have been continuously employed. DeLee received a reduced bonus due to his active duty status, and the department refused to pay him the full amount.

The trial court determined that the statute granting the longevity pay only allowed the pay for the amount of time that the officer spent working the previous year—it was a form of compensation. DeLee's longevity pay would have been prorated had he taken extended medical leave. USERRA does not prohibit the department from making a pro rata reduction in the longevity pay for the time spent on active duty, as it is a form of compensation for time actually worked.

14.4 *Murphy v. Radnor*, No. 12-4202, 2013 WL 5738899 (3d Cir. Oct. 23, 2013)

In 2009, John Murphy, a long-term member of the Air Force and Air Force Reserve, applied for the town manager position in Radnor Township. During the 45-minute interview, one member questioned him for 10 minutes concerning his military obligations, such as how many days he had missed from his previous employment and how the town would be affected by his ongoing military obligations. Only after the interim town manager expressed concerns about the legality of the questions did the board member cease his questioning. Murphy was not asked to return for a second round interview, and the interim manager informed him that the board of commissioners had "serious reservations about [his] ongoing military obligations." None of the applicants selected for a second round interview had a military background or any military obligations. Murphy sued the town, but the district court granted judgment in favor of the township because even though Murphy's military obligations were a "motivating factor" in deciding not to hire him, the town had presented sufficient non-discriminatory reasons why they did not ask him back for a second round interview.

The United States Court of Appeals for the Third Circuit decided that the trial court erred by requiring the township to show only that it had a legitimate reason not to hire Murphy. Rather the town needed to show that there was a non-discriminatory reason for not hiring him, that there was no dispute that he was not the best person for the job, in order to defeat a summary judgment motion. A "motivating factor" is one that is taken into consideration when deciding whether to hire a service member. A legitimate reason not to hire a service member would have to be so compelling that there was no dispute that he would have been treated exactly the same way had he not been in the military. The town was unable to show this, so the court sent the case back to the trial court.

14.5 *Rivera-Melendez v. Pfizer Pharm.*, LLC, 730 F.3d 49 (1st Cir. 2013)

Luis Rivera-Melendez worked at Pfizer's pharmaceutical manufacturing facility in Puerto Rico and received several promotions during his 14-year tenure, including a promotion to group leader. In 2008, Rivera-Melendez went on active duty and properly notified human resources

that he needed to take military leave from December 2008 through October 2009. During his tour, Pfizer eliminated his position and replaced it with two separate classifications. The current leaders, including Rivera-Melendez, were informed that they could apply for the seven openings. If they were not selected, they could either apply for an alternative position, be demoted, or voluntarily separate from the company. All of the positions were filled before Rivera-Melendez returned from his tour, and he was appointed to another position with the same benefits and compensation, but that no longer had the supervisory duties that he had as a group leader. Rivera-Melendez and his wife filed suit alleging that he was entitled to be rehired to a supervisory position upon his return. The district court denied his claims because he was not guaranteed the promotion had he not gone on his Naval tour, and therefore was not able to assert that claim.

The United States Court of Appeals for the First Circuit rejected the district court's interpretation. The court of appeals determined that the trial court interpreted the USERRA too narrowly and that Rivera-Melendez was not precluded from making a claim. The court of appeals decided that the issue was whether there was a *reasonable certainty*, rather than a *guaranteed certainty*, that he would have been promoted but for his active duty.