Annual Legal Update
35th Annual
Civil Service Conference

September 13, 2016

Wenatchee, Washington

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Phone Number | E-mail Address

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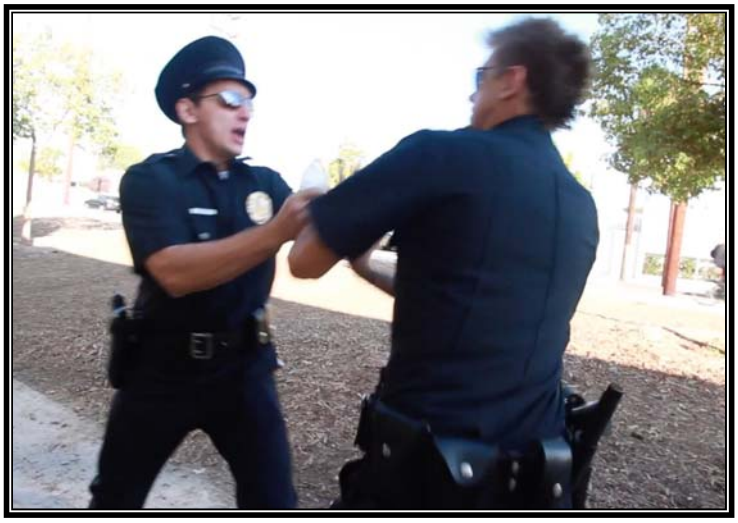

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FOSTER PEPPER PLLC

35th ANNUAL
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1. Race Discrimination

1.1 *Bonenberger v. St. Louis Metro. Police Dep't,* 810 F.3d 1103 (8th Cir. 2016)

Sergeant David Bonenberger, a white male, applied for Assistant Academy Director for the St. Louis Missouri Police Academy, and Sergeant Angela Taylor, an African-American woman, was chosen for the position. In response to Sergeant Taylor's promotion, Sergeant Bonenberger alleged he was passed over for the position because he is white, and sued St. Louis Police Department officials for race discrimination.

The federal appeals court agreed with the lower court, both ruling that Sergeant Bonenberger alleged enough facts to support his claim. To continue on his claim for race discrimination, Sergeant Bonenberger had to present evidence of an adverse employment action motivated by his employer's discrimination. Sergeant Bonenberger was able to present evidence of people in the police department telling him, "not to bother applying…the job was going to a black female…" and "there's no way they were going to put a white male in that position." Sergeant Bonenberger also needed to show the adverse employment action resulted in a material change in working conditions. In Sergeant Bonenberger's case, the Assistant Academy Director's position would have offered a material change in his working conditions.

1.2 *Vill. of Freeport v. Barrella,* 814 F.3d 594 (2d Cir. 2016)

In this case, a federal appeals court addressed whether being "Hispanic" constitutes "race" for the purposes of proving racial discrimination under Title VII. Christopher Barrella is a white Italian-American who brought a lawsuit against the Village of Freeport alleging that its new mayor appointed a less-qualified Hispanic man to Chief of Police, Miguel Bermudez. Mr. Bermudez identifies as "white" and was born in Cuba. When the Chief of Police position became available, six Freeport police lieutenants sat for the civil service promotional exam and Barrella scored second-highest, with Bermudez coming in third. Barrella felt he was more qualified than Bermudez—who ultimately became the Chief of Police—because Barrella had a master's degree whereas Bermudez never finished college.

A jury heard the case and determined Barrella had been discriminated against on the basis of race, and denied the City's argument that race discrimination was impossible because both men identify as "white". The federal court of appeals disagreed with the City's argument that "Hispanic" is not a distinct race for purposes of race discrimination, and held that race includes ethnicity—of which Hispanic qualifies. Thus, discrimination based on Hispanic ancestry constitutes race discrimination, regardless of whether people of Hispanic ethnicity or American national origins both identify as part of the white "race". The court of appeals ordered a new trial, taking into account its holdings as to race and Title VII.

1.3 *West. v. Houston Cty.*, 5:13-CV-338 (CAR), 2015 WL 5724375 (M.D. Ga. Sept. 29, 2015)

Rick West, an African-American male, was employed as a Sergeant at the Houston County Detention Center. He consistently received "fully satisfactory" or "superior" job-performance reviews throughout his tenure. During the 15-year period in which West worked at the Detention Center, he was involved in an incident at an illegal gambling club. He had gone to

pick up his girlfriend, where the owner and an employee—one of which was a former inmate—reported to police that West had acted violently toward his girlfriend. In response to the police incident report, one of West's supervisors recommended his termination, without ever interviewing West or his girlfriend about the incident. West appealed the termination decision, which was denied, in spite of suspicions that West's superior harbored racial biases. The superior had even admitted to using racial slurs and visiting racist websites.

West needed to show sufficient evidence that race was a motivating factor in his termination in order to succeed on a claim for racial discrimination, at which point the Sheriff's Department would need to prove West was terminated for a legitimate, nondiscriminatory reason. To prove his claim, West needed to show he was treated less favorably than a similarly-situated individual. West produced evidence of at least two white officers who were arrested for assault and battery, which West was accused of in the report, but never terminated. While the court agreed there were sufficient reasons to terminate West besides racial discrimination, including a previous arrest and other minor incidents, it ultimately found these reasons were a cover-up for the real motivation of racial discrimination. There were several contradictory and inconsistent statements up the chain of command relating to the cause of termination such that it appeared West's supervisors were attempting to make a post-hoc rationalization of West's termination.

1.4 *McIntyre v. City of Chesapeake*, 3:14CV449 DJN, 2015 WL 2064007 (E.D. Va. Apr. 30, 2015)

Cheryl Lynn McIntyre held a bachelor's degree in building construction technology and worked in the private and public sectors as a consultant and construction inspector for over 15 years before joining the City of Chesapeake as a construction inspector. After eight years with the City, McIntyre sought a promotion in a new City department. The City interviewed five candidates: McIntyre (an African-American woman), two white males, and two Asian-American males. One of the white male candidates who scored the highest in the interviews was given the promotion; McIntyre scored third highest. Upon learning she was passed over for the promotion by a white male, McIntyre filed a lawsuit against the city for gender and racial discrimination.

To support her claim, McIntyre needed to produce direct or indirect evidence of discriminatory intent by the City, which the court held she did not produce. Without that evidence, McIntyre needed to prove she was treated less favorably than other applicants because of her race or gender, at which point the City would need to show sufficiently legitimate reasons unrelated to race or gender for passing-over McIntyre. McIntyre was able to show disparate treatment based on the fact that she is an African-American woman fully qualified for the job, and the City ultimately hired a white man for the promotion. However, the court found the City's reasons for hiring the white male candidate were legitimate, because he scored the highest in the interview portion of the hiring process, had sufficient education and experience, and testimony from those involved revealed no evidence of race or gender discrimination. McIntyre was unable to prove that these reasons were illegitimate, and failed on her claim.

1.5 *Doyle v. City of Chicago,* 139 F. Supp. 3d 893 (N.D. Ill. 2015), *redacted opinion issued,* (N.D. Ill. Oct. 29, 2015)

Eleven former Security Specialists in the Chicago Police Department (CPD) filed a lawsuit against the City of Chicago alleging race discrimination and equal protection violations after they were reassigned from their jobs as Security Specialists. Upon Rahm Emanuel's installation as Mayor of Chicago in 2011, CPD's Interim Superintendent met with Mayor Emanuel to discuss his new security detail. It was conveyed to the Interim Superintendent that the new mayor wanted a security detail that "reflected the diversity of the city". The previous mayor's security detail was composed of 14 white males, 1 white female, 4 black males, 3 Hispanic males and 1 Hispanic female. Mayor Emanuel's detail ultimately consisted of 8 white males, 5 black females, 3 Hispanic males and 1 Hispanic female.

First, the plaintiffs alleged their right to work free from political discrimination, was violated because their replacements were chosen based on their support for Mayor Emanuel during the campaign. This claim failed because the accused defendants enjoyed qualified immunity and it was not unreasonable for the mayor to have the right to select his own security staff. Next, the plaintiffs' Title VII race discrimination claim failed because they did not file their lawsuit within the 300-day time period required. Finally, their claims brought under Section 1981 and 1983 for race discrimination were allowed to proceed against two defendants: one defendant reportedly asked for the Security Specialists to be listed according to their race, and the other defendant told one of the plaintiffs, "…the color of your skin is your sin." This evidence was sufficient to deny those two defendants summary judgment on the Section 1981 and 1983 claims.

1.6 *Abrams v. Connecticut,* No. 3:09-CV-00541 RNC, 2015 WL 4459540 (D. Conn. July 21, 2015)

Plaintiff, a black male, brought an employment discrimination claim after he was not chosen for the Connecticut Department of Public Safety's major crimes "van," a group of five or six detectives who investigate particularly serious crimes. Plaintiff first expressed interest in joining the van in 1998. Between 2004 and 2009, eight detectives were selected for the van, all of whom were white. In attempting to show that the Department's proffered reasons for preferring other candidates were a pretext for discrimination, the plaintiff cited multiple occasions where he was informed that he did not "fit in" with the unit; he also cited a history of discrimination within the Department.

The court explained that to prevail on his equal protection claim, the plaintiff must show that: (1) he was treated differently than similarly situated individuals outside his protected group; and (2) that this disparate treatment was based on race. The court found that the statements about the plaintiff not fitting in were enough to create a reasonable question of fact for a jury.

The court concluded that the plaintiff's non-assignment to the major crimes van was an adverse employment action, despite the fact that the position did not offer increased pay, because the position was prestigious. The court thus denied the defendant's motion for summary judgment.

The district court found that Chappelle's retaliation claims were substantially identical to the claims raised in the circuit court case, and thus found that they are precluded by collateral estoppel. Thus, Chappelle's claims were dismissed.

1.7 *Bouknight v. D.C.*, 109 F. Supp. 3d 244 (D.D.C. 2015)

Plaintiff has been a paramedic in the District of Columbia Fire and Emergency Services Department (DCFESD) since 1991. During a call to pick up a patient, plaintiff rode in the back of the ambulance while another paramedic drove. The driver became lost, causing a delay in reaching the patient. Despite not driving the ambulance, plaintiff was the senior paramedic on call and faulted for the delay. Plaintiff was suspended for 10 days as a result of the delay. Plaintiff, an African American, claims that a white paramedic was not disciplined as severely for a similar incident, and that the DCFESD has a practice of disciplining African Americans more severely than white employees.

The only issue in the case was whether Section 1981 of Title VII of the Civil Rights Act provides a right of action against state or municipal entities. The court concluded that it does not, and dismissed the Section 1981 claim.

1.8 *Johnson v. City of San Francisco*, C 09-05503 JSW, 2016 BL 34931 (N.D. Cali. Feb. 8, 2016)

A number of fire department employees were denied promotions due to their performance on a Civil Service examination. Plaintiffs claimed that administration of the exam, created a disparate impact against African Americans, violated 42 USC 1981, Title VII of the Civil Rights Act of 1964, and the California Fair Employment and Housing Act. The district court held that for such a claim to prevail, the statistical analysis must show a disparity that is sufficiently substantial as to raise an inference of causation. Finding insufficient evidence to determine this question as a matter of law, the court denied the city's motion for summary judgment. It noted that there were disputed facts as to whether the exam was a substantially job-related selection process such that it may be defended as a valid business necessity.

1.9 *Kelmendi v. Detroit Bd. of Educ.*, No. 12-CV-14949, 2015 WL 4394134 (E.D. Mich. July 16, 2015)

John Kelmendi, an Albanian man in his late fifties, was a teacher and administrator at Detroit Public Schools for twenty years. After a promotion he sought was given to a younger Hispanic woman, he filed a complaint with the EEOC for discrimination on the basis of age, national origin, and sex. He subsequently received negative performance evaluations and was terminated – he claims, in retaliation for bringing the EEOC claim.

The Court found that John established direct evidence that the school board discriminated against him under Title VII of the Civil Rights Act of 1964 when it declined to promote him. This evidence was most clear in a deposition where the decision-maker admitted he had given the successful candidate an offer because she was Hispanic and that he had purposefully given John a low score due to his Albanian national origin. Specifically, the decision-maker said in deposition that he had recommended the Hispanic candidate "because of her age, she was young, vibrant, she was eloquent and also Hispanic."

Nevertheless, John only defeated summary judgment in the national-origin claim, not the age discrimination claim, because the burden to show discrimination under Title VII is lower than under the Age Discrimination in Employment Act of 1967.

1.10 *Wright v. City of Ithaca, N.Y.*, No. 5:12-CV-378 GLS/TWD, 2015 WL 1285754 (N.D.N.Y. Mar. 20, 2015)

Douglas Wright, a white male candidate for lieutenant in the City of Ithaca, alleged that a black sergeant, Marlon Byrd, was wrongfully promoted to lieutenant instead of him. During the application process, Douglas had obtained a higher score than Marlon on a civil service examination for the position. Nevertheless, Marlon was offered the position. When Douglas protested to Chief of Police Vallely, the Chief allegedly told Douglas that unless he could show "clear and convincing evidence" why he was the better candidate, Vallely would "have to" promote Marlon. Ultimately, Marlon was promoted, not Douglas. Douglas alleged discrimination on the basis of his Caucasian race.

The U.S. District Court for the Northern District of New York found that the City of Ithaca did not discriminate against Douglas when it promoted Marlon because the City offered legitimate, non-discriminatory reasons for not choosing Douglas. In particular, it stated "[Marlon] Byrd's skill at community policing was unmatched in the Department." In addition, the Court found that Vallely's remarks that Douglas would need to present "clear and convincing evidence" in his own favor or else Vallely would "have to" promote Marlon were race-neutral comments and did not indicate clear discriminatory animus based on race. In addition, the use of a "matrix" to weigh many factors surrounding each candidate indicated a thorough balancing of considerations, not that race was the only or even the dominant consideration. For these reasons, the court granted summary judgment against Douglas.

1.11 *Fagerstrom v. City of Savannah, Ga.*, 627 F. App'x 803 (11th Cir. 2015)

Dean Fagerstrom was a police officer in Savannah, Georgia. He brought a § 1983 discrimination claim against the city and its police chief, alleging that the chief violated his equal protection rights by promoting two white captains to major instead of promoting him. Dean was of Japanese descent. The United States District Court for the Southern District of Georgia granted summary judgment in favor of defendants. Plaintiff appealed.

The court of appeals held that the police chief did not have knowledge of officer Fagerstrom's Asian racial identity, a requirement for any finding of intent to discriminate. The chief's lack of knowledge owed in part to the fact that Officer Fagerstrom identified himself as white on his application to the police department more than 30 years prior to the allegedly discriminatory action.

1.12 *Stevenson v. City & Cty. of San Francisco*, No. C-11-4950 MMC (N.D. Cal. Jan. 5, 2016)

Applicants for Assistant Chief in the San Francisco Fire Department challenged a 2010 civil service examination alleging that the department's use of the exam results in developing an eligibility list for the position had a disparate impact on African Americans, violating Title VII of

the Civil Rights Act. They sought a preliminary injunction against the fire department making promotions based on this eligibility list and the examination.

The court found that the five firefighters were not entitled to a preliminary injunction. The court found that they had not shown irreparable injury because any delay in their prospective instatement to the Assistant Chief position, which is the highest civil-service position in the department, would not deprive them of an opportunity to fairly compete for other promotional opportunities. In addition, the court noted that "a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to such relief." Such a showing, particularly a showing of irreparable harm, was not present here.

1.13 *Lopez v. City of Lawrence, Mass.*, 823 F.3d 102 (1st Cir. 2016)

A number of Massachusetts police departments, including the City of Boston's police department, used exams developed by a state agency in order to evaluate candidates for promotion to sergeant. The exams consisted of question-and-answer portions and "education and experience" ratings for each candidate. The results were then used to stack rank candidates and make promotion decisions. The percentage of Black and Hispanic applicants selected for promotion using the results of this test fell significantly below the percentage of Caucasian applicants selected. A large number of minority police officers and minority officer associations brought a class action suit against the City of Lawrence, Boston, and government agencies. The federal district court found that the exams did not violate Title VII. Plaintiffs appealed.

The Court of Appeals for the Fifth Circuit upheld the use of exams, finding that their use was not clearly erroneous, despite the fact that they had clear disparate impacts on minority candidates. It found that the department was entitled to rely on its expert opinion that this particular examination methodology was a valid selection tool under EEOC exam guidelines. It concluded that these measures could help departments select sergeants based on merit. The low rate of job openings also made it unlikely that an alternative selection mechanism would have materially reduced the adverse impacts. And minority applicants were not able to meet their burdens of showing that their preferred testing alternative would have reduced the disparate impacts.

2. Sex and Gender Discrimination

2.1 *Caulfield v. Human Res. Div. of Commonwealth of Massachusetts*, CV 15-10091-PBS, 2015 WL 5190716 (D. Mass. Sept. 4, 2015)

John Caulfield brought this lawsuit alleging he was wrongly bypassed for a position with the Boston Police Department (BPD) based on his gender. BPD sought two lists of qualified candidates: one list of mixed gender candidates to fill 45 positions and one list of all-female candidates to fill ten female officer spots. Caulfield alleged that he was overlooked for a police officer position because of BPD's improper use of a gender-specific candidate list, and that BPD consistently failed to show a compelling government interest in hiring female officers because BPD has had enough female officers to meet its stated criteria.

Caulfield was not able to bring sex discrimination claims under Title VII because he failed to exhaust his administrative remedies. However, Caulfield could pursue his sex

discrimination claims under Section 1983 because it does not have an exhaustion requirement. The Court held that Caulfield did not have sufficient evidence to prove up his sex discrimination claim, based largely on his claim that BPD had a sufficient number of female officers and no longer needed to seek out all-female lists for female-only slots. However, the court determined it would not dismiss Caulfield's claim because he had not been afforded a sufficient amount of time to pursue necessary evidence to support his claims. Therefore, BPD's attempt to dismiss Caulfield's claim failed, and Caulfield was able to move forward in collecting evidence.

2.2 *Greene v. Buckeye Valley Fire Dep't,* 625 Fed. Appx. 319 (9th Cir. 2015), *opinion amended and superseded,* 617 Fed. Appx. 778 (9th Cir. 2015)

Aimee Greene brought a Title VII sex discrimination claim against the Buckeye Valley Fire Department based on evidence that the captains, battalion chiefs, and crew members expressed hostility toward her because of her sex. This was particularly problematic because the hiring lists that informed the promotion schedule were generated exclusively through feedback from those captains, battalion chiefs and crew members. Taken together, Greene sufficiently demonstrated a connection between the alleged sex-based hostility and her poor performance reviews. Even though the Assistant Chief and Fire Chief in charge of making promotions, were not implicated in Greene's accusations, the court found that the Assistant Chief and Fire Chief had sufficient knowledge of the pervasive discriminatory attitudes of others in the department and failed to prevent that discriminatory behavior as it related to Greene's promotion. Greene also presented enough evidence to support her claim of retaliation because, while her peers had also not completed all required training programs, they were not removed from active status, while Greene was removed.

2.3 *Figueroa v. Vill. of Melrose Park,* 127 F. Supp. 3d 905 (N.D. Ill. 2015)

Blanca Figueroa is a Hispanic woman who filed this lawsuit against the Village of Melrose Park after she was not hired as a police officer following her successful completion of academy basic training. Figueroa alleged that the Village's police department discriminated against her based on her sex and race. Both Figueroa and her male counterpart completed basic training, but her male counterpart was hired as a police officer and Figueroa was asked to resign during her probationary period. Figueroa contends this was because she was a Hispanic woman, whereas the police department contended Figueroa simply didn't perform up to par.

Figueroa's sex discrimination claim was allowed to proceed to trial based on direct and indirect evidence. She presented evidence including her supervisor telling her she would be a liability to the police department and she would not be able to defend herself against a 200-pound man. While the police department alleged it was within their prerogative to terminate someone who wasn't meeting their "legitimate job performance standard," depositions and other evidence demonstrated that Figueroa sufficiently met the standards for passing the academy—she passed all of the physical strength requirements and improved in all other aspects of training during the academy. Figueroa's claim of race discrimination was not supported by similarly-strong direct evidence as her gender discrimination claim. However, the court found that her superior's statement that, upon her resignation, she should pursue a job at a 911 dispatch center where the center needed bilingual employees was sufficiently strong indirect evidence of race discrimination for her claim to progress to trial.

2.4 *Stump v. City of Shreveport,* CIV.A. 13-3053, 2015 WL 5794474 (W.D. La. Sept. 30, 2015)

Sherrie Stump filed this lawsuit based on discrimination she faced while working for the Shreveport Police Department. Stump alleged she was treated differently than male officers, evidenced by their ability to shop while on duty, leave early and arrive late, run errands, take extended lunch breaks—all without being charged "comp" time. The thrust of her claim pertained to a purported testing requirement, whereby she failed a Crime Scene Certification exam twice, after which she was transferred out of the Crime Scene Investigation Unit (CSIU), when similarly-situated men were not. At the transfer, Stump filed an EEOC complaint based on the alleged discrimination. Stump was subsequently assigned to the patrol division and given the graveyard shift, which was a hardship on her as a single mother of two children. Once more, when Stump's old job within CSIU became available, she applied and was the most qualified candidate, remaining the most qualified even when the position was opened to a larger pool of candidates a second time. Stump was still passed over for the position. It was at this point Stump filed this lawsuit for hostile work environment, Title VII sex discrimination and retaliation.

Stump's hostile work environment claim failed because none of her evidence met the "pervasive" requirements that hostile-work-environment claims must meet. However, Stump was able to proceed on both her sex discrimination claim regarding the Crime Scene Certification exam and failure to rehire her back into CSIU. The court held that a reasonable jury could find the City's allegedly non-discriminatory reasons for transferring Stump after two failures, and not rehiring her, were actually a pretext for discrimination. This holding was based on evidence of inconsistent rationales for creating the exam and confusion on whether it was a "goal" or a policy to require passage of the exam after two attempts. As to her retaliation claim, the Court held that Stump provided sufficient evidence to sustain her claim. Stump's EEOC complaint constituted a protected activity, passing over Stump twice for her old job was considered an adverse employment action, and though the City technically produced evidence that its decisions were not based on discriminatory motives, the Court held that a reasonable jury could find those decisions were a pretext for discrimination.

2.5 *Teamsters Local Union No. 117 v. Washington Dep't of Corr.,* 789 F.3d 979 (9th Cir. 2015)

In order to combat the phenomena of prison guard misconduct, Washington State designated a limited number of female-only correctional positions, 100 in this case, to patrol housing units, prison grounds, and work sites. The Union that represents prison guards sued the State, arguing that designating positions as female-only was discriminatory against male guards. The court held that Washington's female-only correctional positions were justified because sex is a bona-fide occupational qualification (BFOQ) for these certain positions. Generally speaking, the bar is very high with regards to designating certain positions as sex-specific, but in the case of prison guards, the State was able to meet that bar.

The prison facilities' decisions were entitled to deference, particularly because the Washington facilities went through several phases of research, including studying the way prisons operate and what policies could be implemented to address the abuse faced by female

inmates. Second, the court determined that the prisons' justifications for the BFOQ positions were proper because it was an attempt to prevent sexual assaults, preserve the privacy rights and dignity of female offenders, and ensure strong security. With regard to housing units, prison grounds, and work sites, all three positions required sex-specific prison guard positions, occupied by female employees, in order to enhance security, preserve privacy and dignity of female offenders, and prevent sexual assaults. As such, the 100-sex specific positions designated for females withstood the Union's claims of sex discrimination.

2.6 *Jones v. Sewerage & Water Bd. of New Orleans*, CIV.A. 13-6288, 2015 WL 2354079 (E.D. La. May 15, 2015)

Cassandra Jones brought a lawsuit against the New Orleans Sewerage & Water Board (S&WB) for sex discrimination after she was transferred from her prior position as a Boiler Room Operator (BPO) to train as a Pumping Plant Operator (PPO). During her training for PPO, Jones was unable to perform some of the required tasks without standing on a box. Jones alleges that she was harassed by a steam plant engineer, after which she was reassigned to a position where she lost overtime pay and shift-pay differentials. She also alleged she was told by a supervisor that she was "too short, weak, and a woman" to do the job of PPO.

The S&WB argued that Jones was never discriminated against based on her sex because preventing Jones from working as a PPO was based on her height, not her sex. Jones was allowed to proceed on her claim for gender discrimination because S&WB was unable to challenge evidence that a former employee who was a male and short used a box during his employment as either a BPO or PPO, and there is also no legal support S&WB could cite to bolster its argument that discriminating on height is completely different than discriminating based on sex. Jones was unable to succeed on her retaliation claim because, while it is factually correct that Jones was transferred between positions after she filed grievances, there was no proof that the transfers were done for retaliatory reasons.

2.7 *Hicks v. City of Tuscaloosa,* 7:13-CV-02063-TMP, 2015 WL 6123209 (N.D. Ala. Oct. 19, 2015)

Stephanie Hicks brought this case against the City of Tuscaloosa alleging she experienced discriminatory treatment during and after her pregnancy. Hicks discovered she was pregnant while working in the West Alabama Narcotics Squad (WANS). She was put on limited duty during her pregnancy and told there was no pregnancy policy for employees. Before taking maternity leave, one of Hicks' superiors told her she should not take the full 12 weeks of FMLA maternity, which Hicks disregarded and took anyways. Upon returning to work, Hicks was written up on her first day for not changing the oil in her work vehicle, obtaining too many warrants (which she had not been retrained on, or warned about) and was issued a negative review, which largely covered the time she was on maternity leave. Hicks was also required to breastfeed in a locker room that was not private or comfortable, and was subject to negative comments about taking the full 12 weeks, her post-partum depression, and how "different" she seemed since coming back to work.

Hicks failed on her claims of a hostile work environment and disparate treatment because the court determined that, while she was the recipient of inappropriate comments and behavior,

these comments and behavior were not pervasive. However, Hicks' claims of pregnancy discrimination, retaliation, and constructive discharge withstood dismissal. The comments and actions Hicks endured sufficiently demonstrated that she was discriminated against because she had been pregnant and was now breastfeeding. The court relied on the fact that other similarly-situated employees had been provided desk jobs so that they could express milk whenever necessary, whereas Hicks was not accommodated. She was merely provided a choice between wearing a vest (which would stanch her milk supply) and foregoing a vest (which would expose her to danger). That action constituted both pregnancy discrimination and constructive discharge because Hicks could not do her job without wearing a vest. Hicks also substantiated her retaliation claim by pointing to the same evidence as the grounds on which she was transferred from WANS.

2.8 *Seibert v. Jackson Cty., Miss.*, 1:14-CV-188-KS-MTP, 2015 WL 4647927 (S.D. Miss. Aug. 5, 2015)

Kristan Seibert, a deputy in the Jackson County Sheriff's Department, sued the County's former Sheriff, Michael Byrd, for sexual harassment. Seibert's sexual harassment claim was supported by evidence of daily, persistent, sexual comments and intimidation perpetuated by Byrd. Specifically, Seibert alleged that Byrd would get in her face and tell her she wanted to kiss him, rub his hands on her body including up her inner thighs, and say other very sexually explicit comments. He would also threaten to take away her job when she rejected his advances.

Seibert was unable to sue Byrd in his personal capacity because he is not an "employer" for the purposes of Title VII, but was able to sue him in his professional capacity as Sheriff because he possessed complete authority in the Sheriff Department's employment decisions. Although Seibert couldn't succeed on a sexual harassment *quid pro quo* claim, she provided enough evidence to support a hostile work environment claim. Her evidence substantiated her claim that she received unwelcomed sexual harassment, based on her sex, which was severe and pervasive.

2.9 *Peeler v. Boeing Co.*, C14-0552RSL, 2016 WL 772788 (W.D. Wash. Feb. 29, 2016)

Sandra Peeler was hired by Boeing as an aviation maintenance technician in Everett, Washington in 2013. Peeler described her work environment as overall belittling toward women in the work place, alleging she experienced intentionally harassing conduct, constant gender-based jokes and comments, and disparaging remarks about women in general. Others in the same work environment strongly objected to this description, describing the environment as occasionally "juvenile or decidedly lowbrow," but nothing like Peeler suggested. Apart from her job, Peeler also suffers from post-traumatic stress disorder, which can be triggered by stress or profanity, but her triggers are not all known. While working for Boeing, Peeler sought treatment for her PTSD and entered into an arrangement whereby her personal doctor and Boeing's medical physician evaluated her health and ability to perform her job. Ultimately, Boeing determined she was not pursuing the proper medical treatment she needed, and was unable to perform her job, after which she filed this lawsuit.

Peeler's hostile work environment claim failed. It was not enough for Peeler to argue that she subjectively perceived the work environment was hostile, even in light of her traumatic history and PTSD. She needed to demonstrate that any woman in her circumstances would perceive the environment was hostile, and she did not present evidence to support that. Peeler's claim alleging that Boeing failed to accommodate her disability also failed. The court found that Boeing's decision to exclude Peeler from the work place until she had a successful psychological evaluation was based on Peeler's inability to perform the essential functions of her job, not based on her underlying disability.

2.10 *Cheatham v. Dekalb County, N.D. Ga.,* No. 1:14-cv-01887-WSD (Feb. 8, 2016)

Plaintiff was employed by Dekalb County Fire Rescue. During a meal at the fire station, plaintiff witnessed a coworker, Roberts, experience an allergic reaction to onions. Plaintiff did not provide assistance to the coworker. Two other coworkers who entered the room during the reaction administered epinephrine to Roberts. Plaintiff was later transferred and then resigned. An internal investigation aimed at determining whether someone knowingly caused Roberts' reaction concluded that the plaintiff made falsified records and neglected her duty by, pursuant to an order from Captain Robinson, representing that a vial of epinephrine was "damaged" rather than used to treat Roberts. Asserting she was subjected to a gender-based hostile work environment, plaintiff filed a retaliation claim under Title VII of the Civil Rights Act of 1964, and disparate treatment gender discrimination claims based on Title VII and the 14th Amendment's Equal Protection Clause. The County moved for summary judgment, which the magistrate judge accepted as to both claims.

First, the district court agreed with the magistrate's factual determination that plaintiff often failed to support her claims with facts. The court granted summary judgment for the County on the disparate treatment claim. This was based on the court's determination that plaintiff failed to establish the 2nd element of a *prima facie* gender-based disparate treatment case (*i.e.*, that she was subjected to an adverse employment action). For example, criticism of an employee's job performance not leading to tangible job consequences cannot be considered "adverse," and so neither can the counseling letters and other disciplinary warnings issued to plaintiff. The court also found that plaintiff failed because she failed to present any evidence showing that the County treated similarly-situated male employees more favorably.

The court then granted summary judgment for the County on the hostile environment claim, finding no plain error in the magistrate's determination that plaintiff failed to show sufficient evidence to support the requisite 3rd element of a *prima facie* case: that the harassment (here, an alleged threat of suspension against her) was made because of her sex. The court also found that plaintiff failed to show that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment (the 4th element), because the alleged suspension threat happened only once, and plaintiff did not specify how frequently her coworkers (allegedly) defecated in the women's bathroom and left the toilets unflushed, and the un-flushed toilets and the comment about women working at fire stations only to cook and perform clerical work were neither physically threatening nor sufficiently humiliating.

The court also granted summary judgment for the County as to the retaliation claims. Plaintiff failed to show that she suffered a materially adverse action (the 2nd element of a *prima*

facie Title VII retaliation case) in response to her filing a complaint with the EEOC. Her only argument, that the severity of the treatment increased thereafter, was found vague and insufficient. The only applicable specific adverse actions alleged were found to be based on her claim of constructive discharge, but here the court agreed with the magistrate that, since plaintiff cannot establish a hostile work environment, she therefore cannot meet the higher standard for constructive discharge. Regardless, the court found that plaintiff utterly failed to establish a *prima facie* case with a causal connection between her statutorily protected activity and the materially adverse actions.

2.11 *Rosati v. Colello,* 94 F. Supp. 3d 704 (E.D. Pa. 2015), appeal dismissed (Dec. 10, 2015)

Patricia Rosati, a Philadelphia police officer, filed suit against a sergeant for employment discrimination on the basis of sex, a hostile work environment, and retaliation for protected Title VII activities. She alleged sexual discrimination because the sergeant made comments about her children and pregnancy. In one instance, after she had requested a few hours off for a doctor's appointment, the sergeant asked in the presence of a number of other officers whether she was "going to get fixed." In another instance, the sergeant asked, upon hearing that Rosati was pregnant, "whether she was going to keep the baby." During this time she was placed on restricted duty leave due to pregnancy-related physical limitations. The relationship soon soured. The sergeant called Officer Rosati a "scammer" for the time she was taking off to attend to her children and she was assigned more work responsibilities. Rosati was penalized for perceived insubordination and denied her requests for night shifts. After the birth of her fifth child, Rosati submitted a maternity leave request, but it was "lost during the approval process." She was reassigned to another department and remained on restricted duty for pregnancy-related reasons after giving birth.

The Pennsylvania District Court found that Officer Rosati could not meet her burden of showing a *prima facie* case of discrimination, a hostile work environment, and retaliation, and that the lower court properly granted summary judgment against her. It concluded that she was not subject to an adverse employment action, which requires serious and tangible consequences that alter an employee's compensation, terms, condition, or privileges of employment. These requirements were not met by the sergeant's derogatory comments, the assignment of extra responsibilities, the refusal of night shifts, and the reassignment to another division. The sergeant's comments were found to be mere offensive utterances, not physically threatening or humiliating. The claim of retaliation failed to defeat summary judgment because the alleged retaliation would not have dissuaded a reasonable employee from making or supporting a charge of discrimination and *because* Rosati failed to show that the sergeant took adverse employment actions against her because of her engagement in protected activities under Title VII.

2.12 *Tyndall v. Berlin Fire Co.,* No. CIV.A. ELH-13-02496, 2015 WL 4396529 (D. Md. July 16, 2015)

Zackery Tyndall, a heterosexual male firefighter and paramedic, was taunted by co-workers, who called him "gay boy" and "homo" after he refused to have sex with an intoxicated girl. The harassment extended to criticisms of his behavior with women, his hair, clothes, car, diet, home décor, and his relationship with his mother. His colleagues touched him

inappropriately, threatened his job, and turned other colleagues against him so that some refused to assist him while he was serving as an emergency responder.

The Maryland District Court ruled that Zachary defeated summary judgment because he successfully established a hostile work environment claim, under Title VII of the Civil Rights Act of 1964, based on a theory of gender stereotyping. The court found that single acts that may not be cognizable as adverse actions on their own may, over time, cumulatively amount to an unlawful employment practice where they create a hostile work environment, and that the persistent teasing of Zachary could have created such a hostile work environment. It also found that the alleged conduct could amount to discrimination on the basis of sex because it appeared to convey the plaintiff's behavior did not conform to the harasser's sex-based stereotypes and perception of how men should behave.

2.13 *Pugsley v. Police Dep't of Bos.*, 427 Mass 367, 34 N.E.3d 1235 (2015)

Sean Pugsley was a male applicant for the police academy of Boston who brought a sex-based failure-to-hire claim against the city police department for its use of a separate candidate certification list and preferential treatment of female candidates. Sean ranked 103 on an academy examination, but was ranked at 214 as a result of the preference for female candidates. And he was ultimately denied an offer to attend the academy.

The Massachusetts Supreme Judicial Court found Sean lacked standing because he failed to allege injury sufficiently concrete and imminent because it was unlikely that his name would ever have been reached even absent the preferential-treatment policy. In other words, the preferential policy did not cause the damage Sean claimed, and so his claim failed for a lack of standing.

On the issue of Boston's preferential policy, the Court held that the use of evidence of statistical disparities alone in male and female representation in the police department was not enough to support a bona fide professional qualification (BFOQ) favoring female candidates. The use of such a policy must be done in coordination with, for example, recruitment efforts directed at female candidates.

2.14 *Legg v. Ulster Cty.*, 820 F.3d 67 (2d Cir. 2016)

Ann Marie Legg worked as a corrections officer in Ulster County jail in New York. She sought accommodations in her working conditions when she was pregnant. Particularly, she sought less strenuous "light duty" assignments. But she was denied such accommodations by the Sheriff. She filed suit alleging pregnancy discrimination under Title VII of the Civil Rights Act. The District Court granted the defendant's motion for summary judgment and Legg appealed.

While the appeal was pending, the Supreme Court decided *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), where the Court held that an ostensibly-neutral accommodation policy can create an inference of pregnancy discrimination if it imposes significant burdens on pregnant employees.

Under *Young*, the Second Circuit found that Ann had presented sufficient evidence to proceed to trial with her claim alleging intentional discrimination under Title VII. This is

because she showed that Ulster County categorically denied light-duty accommodations to pregnant woman. The Court thus vacated the lower court's ruling and remanded the case for a new trial.

2.15 *Leafblad v. City of Pasadena Fire Dep't,* No. B251923, 2015 WL 1736328 (Cal. Ct. App. Apr. 14, 2015)

Robin Leafblad had entered the City of Pasadena Recruit Fire Academy, completed the Academy, and was then working as a probationary female firefighter with the City of Pasadena Fire Department. She failed to pass a written exam and was then terminated. She sued the Department on the basis that the examination was not the true grounds for her termination, but rather that the Department was discriminating against her based on her gender (claiming she was never given the same constructive feedback as male probationers), perceived sexual orientation (she had gone on a trip with a female firefighter and was teased back at work for possibly being homosexual), and perceived disability (she had suffered a lower-abdomen muscle strain and ankle sprain and allegedly was discriminated against for perceived disabilities). The court excluded most of this evidence as irrelevant to the primary issue at hand - the test score. The trial court granted summary judgment on all issues except gender discrimination, which went to trial. The jury determined that her gender was not a substantial factor in her termination. Robin appealed.

The California Court of Appeals affirmed the lower court's judgment. It held that the various incidents she cited as discrimination were not causally connected to any discriminatory treatment that allegedly contributed to Leafblad's low test score. It concluded that the proffered evidence was not relevant to the disparate treatment claim and that the trial court did not abuse its discretion by excluding the evidence.

3. Age Discrimination

3.1 *Morse v. Illinois Dep't of Corr.*, No. 12 C 10263, 2015 WL 6153449 (N.D. Ill. Oct. 16, 2015)

Plaintiff, a former dental assistant at Stateville prison, brought age discrimination and retaliation claims against the Illinois Department of Corrections. Morse began her career with the Department in 1993. Between 2009 and 2010, Morse had various incidents with Dr. Jacqueline Mitchell, the lead dentist at the prison. Morse alleged that Dr. Mitchell had referred to Morse as "old and slow," and praised another dental assistant for being "younger and faster." Morse also alleged that Dr. Mitchell asked the Assistant Warden to block Morse from taking a pre-approved holiday vacation. Morse filed grievances pursuant to both of these incidents. In March of 2010, Morse filed another grievance, alleging that Dr. Mitchell and the Assistant Warden had attempted to sabotage her performance review. Specifically, Morse alleges that the Assistant Warden instructed various employees to downgrade Morse's performance, and to say that Morse needed to show improvement in getting along with coworkers.

In August of 2011, the Department hired a new dental assistant, a woman in her twenties. Morse alleges that she heard the Warden make comments to the effect that Morse could be replaced by two younger dental assistants for the cost of Morse's salary. Morse made various

allegations about her supervisors establishing a regime to plot against her, tapping her phone and hacking into her bank account. After Morse refused a counseling referral, the Warden decided to place Morse on paid administrative leave, and instructed Morse that she needed to complete a fitness for duty assessment in order to return to work. Morse alleges that these actions were taken as retaliation for her filing various grievances and complaints.

The psychiatrist that performed Morse's fitness for duty evaluation determined that she was not fit for duty, and estimated that Morse would be disabled for two to three months. Morse's own attending physician opined that she had no emotional or psychological issues.

The court explained that in order to prevail on her discrimination claim, Morse must show that she is a member of a class protected by the statute (older than 40), that she has been the subject of some form of adverse employment action, and that the Department took the adverse action on account of Morse's membership in the protected class. The court found that Morse suffered an adverse employment action once the Department stopped paying her during her leave. The court denied the Department's motion for summary judgment on the discrimination claim, as it found that, accepting Morse's story as true, she presented issues of material fact sufficient to preclude summary judgment.

For her retaliation claim, Morse was required to show that she engaged in statutorily protected activity, she suffered an adverse employment action, and that there was a causal connection between the two. The court found that a reasonable jury could find that Morse's objection to discrimination on the basis of her age is a statutorily protected activity. The court also found that a reasonable jury could find that Morse had suffered an adverse employment action, and a causal connection between her engaging in statutorily protected activity and the adverse action.

3.2 *Brown v. City of Shreveport,* No. CV 13-03290, 2015 WL 7458646 (W.D. La. Nov. 23, 2015)

Plaintiff, a water quality lab manager with the City of Shreveport, claims that she was passed over for a promotion to the position of Superintendent of Water Purification due to her age (68), even though she was more qualified than the successful candidate, Qiana Maple, who was 32. Two years after being passed over for the promotion, Plaintiff was suspended 5 days without pay for engaging in misconduct by harassing a subordinate employee. A few months later, Maple, who was now Plaintiff's supervisor, reprimanded Plaintiff in response to an incident in which the water purification laboratory failed to ship certain samples for testing. Plaintiff claims that the failure to ship the samples was actually Maple's fault, and that Plaintiff was disciplined to cover up Maple's failure.

Plaintiff was required to show that (1) she was over forty; (2) she was qualified for the position sought; (3) she was not promoted; and (4) the position was filled by someone younger. The Plaintiff must also prove that age was a "but-for" cause of the employment decision. The City claimed that the decision to promote Maple rather than Plaintiff was not based on Plaintiff's age, but rather on the subjective assessments of those who conducted the interview process. Simply put, the interviewers felt that Maple performed better in the interview than did Plaintiff. The interviewers felt that Plaintiff did not act professionally and that she answered specific

questions too generally. Plaintiff disputes this, and claims that the she provided a specific "plan of work" for the purification plant. Plaintiff also points to her considerably greater experience, and the fact that Maple was passed over for a position subordinate to the Superintendent position shortly before she was hired as Superintendent. The court found that the disputed facts prevented the entering of summary judgment for the defendant.

4. Disability, Fitness for Duty, and Reasonable Accommodations

4.1 *Reeder v. Cty. of Wayne,* No. 15-CV-10177, 2016 WL 1366442 (E.D. Mich. Apr. 6, 2016)

Plaintiff worked as a Police Officer for the Wayne County Sherriff's Office, providing inmate security in Wayne County's jail. Per Plaintiff's collective bargaining agreement, Plaintiff was required to work at least some amount of overtime each week. In the last two years of his employment with Wayne County, Plaintiff was disciplined 13 times for rule violations, and eventually terminated. Several of these rule violations involved Plaintiff refusing to work overtime. After having been disciplined and suspended several times for unsatisfactory work performance and refusing overtime assignments, Plaintiff eventually produced a doctor's note which explained that he suffered from atypical chest pain, situational anxiety, and work-related stress, and which restricted plaintiff to working no more than 8 hours per day. After an additional suspension for refusal to work overtime, Plaintiff informed Deputy Chief Tonya Guy that he was on medication and could not work overtime. Guy was skeptical about Plaintiff's medical condition, as she felt that his motive in avoiding overtime was to rest before his other job, coaching football at Wayne State University. On April 14, 2014, Plaintiff's police powers were suspended, and his gun and badge were taken away. Plaintiff claims that the day before his police powers were suspended, he requested reasonable accommodation, which was not granted due to his disability and race. On May 6, 2014, Plaintiff was terminated.

Plaintiff also claimed that Wayne County retaliated against him by terminating him after he requested to take FMLA leave. Plaintiff claims that his refusal to work mandatory overtime was, in effect, the assertion of a right to work a reduced schedule under the FMLA. The court determined that because Plaintiff was terminated after asserting this right, that a reasonable jury could find a causal connection between the two. Thus, the court denied the defendant's motion for summary judgment on this claim.

Plaintiff also claimed that Wayne County discriminated against him on the basis of his disability by refusing to provide reasonable accommodation. Plaintiff alleged that his depression and anxiety substantially limited his ability to eat, sleep, concentrate and work, and that this qualified him as disabled under the ADA. The court found that a reasonable jury could find Plaintiff to be disabled under the ADA, that working 8 hours was not an essential requirement of Plaintiff's position, and that Wayne County knew of Plaintiff's disability. The court also found that there was sufficient evidence for a jury to decide that Wayne County's proffered reason for terminating Plaintiff was merely pretext to discrimination.

4.2 *Adair v. City of Muskogee*, 823 F.3d 1297 (10th Cir. 2016)

Robert Adair was the HazMat director with the city of Muskogee when he injured his back during a training exercise. According to the results of a functional capacity evaluation, Adair's lifting capabilities were impaired. Adair received a worker's compensation award stating that the lifting impairments were permanent. The same month Adair received his worker's compensation award, he retired. Adair claims that he was forced to choose between being fired and retiring, and that this was discrimination in violation of the Americans with Disabilities Act. However, the court found that Adair was not qualified to meet the physical demands required of a firefighter, and that the City could not accommodate his restrictions.

The district court granted summary judgment for the City as to the retaliation claim, holding that mere proximity between the timing of termination and his filing a workers' compensation claim is insufficient for establishing a *prima facie* retaliation case. Assuming arguendo a *prima facie* case, it also determined that the City established a non-retaliatory reason for the discharge (based on a rule allowing it to not retain any employee determined to be physically unable to perform assigned duties after his period of temporary total disability has ended, and the fact that Plaintiff was determined to have sustained partial impairment, not total disability), and that Plaintiff failed to show that such reason was a pretext, given that fact that the City's policy that a firefighter must be unrestricted in lifting weight. The court then dismissed the ADA claims for failure to show that Plaintiff has an impairment that substantially limits a major life activity, because the job of a firefighter does not constitute a class of jobs for purpose of establishing a substantial limitation in the major life activity of working, and also because the medical exam imposed by the City was shown to be job-related and consistent with business necessity.

The 10th Circuit affirmed the district court's grant of summary judgment for the City on all claims. The Oklahoma Administrative Code describes the essential functions of a firefighter, which include the ability to lift and carry an adult weighing over 200 lbs to safety despite hazardous conditions and low visibility. Adair's functional capacity evaluation revealed that Adair had a maximal lifting capacity of 105 pounds. Three different doctors evaluated Adair, and each concluded that he could not perform the duties of a firefighter. Adair argued that the requirement that he be able to lift over 200 lbs was an improper qualification, as during his time as the HazMat director, he never once had to perform firefighting duties. The court found that despite Adair never having to perform firefighting duties while serving as the HazMat director, he was still required to meet the Oklahoma Administrative Code's requirements for all firefighters. Although Adair could show that he was "regarded as" having an impairment, he could not show that he was qualified for the job, and thus his ADA claims failed. The 10th Circuit affirmed the district court's grant of summary judgment for the City.

4.3 *Jordan v. City of Union City, Ga.*, No. 15-12038, 2016 WL 1127739 (11th Cir. Mar. 23, 2016)

Jordan, a probationary police officer, had been diagnosed with generalized anxiety disorder, cyclothymic disorder, and panic disorder. Jordan was fired following a series of events on duty during which Jordan experienced heightened levels of anxiety causing another officer to believe Jordan needed immediate medical attention.

During his Field Training program, in which he rode with training officers for a period of sixty days, Jordan received largely positive performance reviews. During the first part of his training period, Jordan successfully disarmed a man in possession of a firearm, and attempted to pursue fleeing suspects into a wooded area after a high-speed chase. However, after failing to perform satisfactorily on a particular occasion, he was harshly reprimanded by his training officer. As he was being reprimanded, Jordan began to "choke up." The training officer decided to take Jordan to the fire station to be evaluated, and explained that Jordan would have to meet with Captain Tate the next day. The next day, Captain Tate informed Jordan that if he did not resign, he would be fired. Captain Tate explained to Jordan that he had done some investigating and discovered that this was not the first time Jordan had had an anxiety episode. Jordan chose to resign under threat of firing. Jordan claims that he was constructively fired because Captain Tate regarded him as disabled.

Union City's written description of the police officer position lists the essential functions of a police officer, including the ability to exercise sound, independent judgment in emergency or stressful situations and to react quickly and calmly in emergencies. The court found that Jordan's condition affected his ability to process and manage stress, and that his anxiety episodes were unpredictable. The court concluded that this prevented Jordan from being able to react quickly and calmly in high-stress and potentially life-threatening situations while experiencing and trying to mitigate the effects of an anxiety episode. The court explained that even an infrequent inability to perform the essential functions of the position is enough to render an individual not a "qualified individual." For these reasons, the court concluded that Jordan was not qualified for the position of police officer in Union City, and thus his ADA claims failed.

4.4 *Perez v. Denver Fire Dep't,* No. 15-CV-00457-CBS, 2016 WL 379571 (D. Colo. Feb. 1, 2016)

Perez had been employed by the City as a full-time firefighter since 2006. Prior to holding his position as a firefighter, Perez served eight years in the United States Marine Corps. In August 2011, Perez was assigned to Engine Company 9. During a training session on the application of tourniquets in the field, Perez became visibly upset after viewing training materials which included pictures from military combat operations. Later that month, Captain Wells requested that Perez be evaluated for Post-Traumatic Stress Disorder. Perez explained to Administration that he was currently seeking treatment through the United States Department of Veteran Affairs. The next month, at the request of Captain Wells, Perez underwent a "fit for duty" evaluation, which determined that he was "fit for duty with considerations." On October 1, 2011, a day when Perez was not scheduled to work, Captain Wells called a meeting with the other firefighters to discuss Perez having PTSD. Perez then accepted an administrative transfer, and worked as a Hazards Material Inspector between October, 2011 and April, 2013. In April of 2013, Perez began an assignment at Engine Company.

Perez claims that the Denver Fire Department violated the ADA when during the October 1, 2011 meeting, Captain Wells disclosed the fact that Perez suffers from PTSD. The court explained that because Perez only disclosed that he suffers from PTSD in response to a formal request for an evaluation, and during the evaluation itself, that the fact that he suffers from PTSD was required to be held in confidence. The court also found that Perez had sufficiently alleged that Captain Wells obtained knowledge of Perez's PTSD from the

evaluation, and that he improperly disclosed that information during the October 2011 meeting. The court also found that Perez had sufficiently alleged injury, as he claims that Captain Wells's disclosure created a hostile work environment, which forced Perez to accept a transfer to a division with a less desirable work schedule.

4.5 *Hill v. City of Phoenix,* No. CV-13-02315-PHX-DGC, 2016 WL 469613 (D. Ariz. Feb. 8, 2016)

Stacia Hill was employed by the City of Phoenix Police Department from 1991 to 2012. In 2003, Hill began suffering ankle problems and shift work sleep disorder. Between May, 2010 and February, 2012, Hill took 21 months of leave for her ankle problems. The City attempted to accommodate Hill's ankle and sleep problems by assigning Hill to the Front Desk Sergeant position, which it described as a desk job, and by giving Hill an 8:00 a.m. to 4:00 p.m. shift. Beginning in April, Hill began to arrive late to work and miss work entirely. Hill's attendance problems worsened in May. During this time, Hill asked to flex her hours to 9:00 a.m. to 5:00 p.m., but this request was denied. Also during this time, Hill received a letter from her doctor explaining that she would have trouble making it to work on time, and that she would have days where she would miss work entirely.

On May 21, 2012, Lieutenant Lopez held a meeting with Hill to discuss her workload. Following the meeting, Lopez scheduled an appointment for Hill to meet with someone from the City's Equal Opportunity Department. However, after May 22nd, Hill stopped reporting to work entirely. On May 23rd, Hill's psychologist drafted a two-sentence letter recommending that Hill be placed on stress leave for an indeterminable amount of time. Hill eventually returned to work on June 28, 2012, but began using unscheduled leave again on July 10th. After July 13, Hill did not return to work. On July 30, 2012, the City informed Hill that the City would be classifying her as having abandoned her job.

Hill argued that the City had unlawfully terminated her because of her disability, and had failed to engage in the interactive process in good faith. The court determined that regular and reliable attendance was an essential function of the Front Desk Sergeant position, and this was the type of job that Hill could not perform from home. The court concluded that because Hill could not maintain regular and reliable attendance with or without reasonable accommodations, that she was not qualified for the position of Front Desk Sergeant. However, the court concluded that because the City did not explore the possibility of certain suggested accommodations that might have allowed Hill to continue to work as a Front Desk Sergeant prior to her becoming unqualified, that the City was not entitled to judgment on Hill's claim that the City failed to engage in the interactive process in good faith. The court also found that Hill was not entitled to judgment on that claim, as a jury could choose to disbelieve her testimony regarding the City's failure to provide her with certain accommodation opportunities.

4.6 *Anderson v. Harrison Cty.*, Miss., 639 F. App'x 1010 (5th Cir. 2016)

In 2007, Patricia Anderson began working for Harrison County at the Harrison County Adult Detention Center as a canteen officer. This position involved Patricia working an eight-hour shift. However, after a restructuring eliminated the canteen officer position in 2012, Patricia (as well as all of the other correction officers) was assigned to work as a general

correction officer, which involved twelve-hour shifts. Anderson submitted documentation from her psychotherapist that explained that she was suffering from severe anxiety and depression and could only work for 6-8 hours a day. Anderson was informed that her request could not be accommodated because there was no position available with that type of schedule.

Anderson alleges that the County violated the ADA in refusing to accommodate her depression/anxiety by allowing her to work 6-8 hour shifts. The individual in charge of the restructuring explained that Anderson's request could not be accommodated due to the Detention Center's staffing and budget shortfalls. According to this individual, accommodating Anderson as she requested would have required other corrections officer to work longer hours. Anderson did not provide any evidence to dispute this. The court cited authority that an accommodation requiring others to work longer hours is not required by the ADA, and affirmed the district court's grant of summary judgment for the County.

4.7 *Kennedy v. D.C.*, 145 F. Supp. 3d 46 (D.D.C. 2015)

The District of Columbia's fire department maintains a policy requiring its firefighters to be clean-shaven in order to allow their respirators to fit properly. Manu Kennedy has a condition that causes his skin to become irritated if he shaves too close. Manu Kennedy refused to comply with the clean-shaven policy. The District denied Kennedy an exemption, and disciplined him for his non-compliance. Kennedy initially requested and was denied an accommodation prior to the effective date of the Americans with Disabilities Amendments Act (ADAAA). For this reason, the court concluded that Kennedy's claim should be evaluated under the ADA's more narrow definition of disability. However, Kennedy continued to request an accommodation for his condition after the effective date of the ADAAA, and thus argues that his claim should be evaluated under the ADAAA's more expansive definition of disability.

The court disagreed with this argument, but allowed Kennedy to pursue an interlocutory appeal to answer the question of whether a request for accommodation made pre-ADAAA but renewed after the ADAAA should be governed by the narrow disability standard of the ADA or the more expansive standard of the ADAAA. The court found that the issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal … may materially advance the ultimate termination of the litigation."

4.8 *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515 (E.D.N.C. Apr. 6, 2015)

Plaintiff was hired as a police officer, with a six-month term of probationary period beginning April 23, 2013. Plaintiff was assigned to patrol duties. On September 4, 2013, a little more than a month before she was to become a permanent employee, Plaintiff discovered she was pregnant. Plaintiff received a doctor's note advising that she be placed on a light duty assignment. Defendants informed Plaintiff that no such position was available, and that she would be placed on short-term disability. Defendants then requested that Plaintiff undergo a "fitness for duty evaluation." On September 25, after receiving a doctor's note that limited Plaintiff to no running, jumping, or heavy lifting, the Town notified Plaintiff that she would be terminated immediately, as she could not perform the duties of her job.

The Town explained to the EEOC that it reserves its available light duty positions for employees who have been injured in service or who are coming back from worker's compensation leave. During Plaintiff's employment, two male officers were put on light duty assignments, including one male employee who was hired at the same time as the Plaintiff.

The court explained that to show disparate treatment on the basis of pregnancy, a complaint must allege facts sufficient to show that defendants discharged or otherwise discriminated against plaintiff "because of her pregnancy, childbirth, or related medical conditions." The court found that because the Town had placed two male officers on light duty assignments, one of which for longer than Plaintiff herself would have required, that Plaintiff's claim should not be dismissed. The court found that the Town does not have a policy of reserving light duty positions to employees who had been injured on the job.

The court also determined that Plaintiff's physical limitations were sufficient to establish a substantial impairment under the ADA, and thus refused to dismiss the ADA claim.

4.9 *Pesce v. New York City Police Dep't,* 159 F. Supp. 3d 448 (S.D.N.Y. 2016)

The NYPD determined that Jonathan Pesce was medically disqualified from serving as a police officer due to his seizure condition and his taking of anti-convulsant medication. Pesce alleges that the decision not to hire him violated the Americans with Disabilities Act.

Pesce first began having seizures in 2000, and began taking medication for the condition in 2001. After a period of time on the medication, Pesce's doctor determined that he should stop taking the medication to determine if the medication was still necessary. After discontinuing the medication, Pesce's seizures returned. In 2008, Pesce again began taking the medication, and has not had a seizure since. Pesce's expert witness testified that Pesce's seizure condition has been completely controlled for the past seven years. Since 2008, Pesce has worked as a paramedic and volunteer firefighter. Pesce's duties have required him to be on standby in the firehouse for up to 24 hours at a time.

After taking the civil service competitive examination, Pesce was required to complete a medical evaluation. Based on his answers to a questionnaire in which he indicated his history of seizures, Pesce was medically disqualified from employment as a police officer for the NYPD.

Pesce's personal doctor and a medical expert witness both provided opinions that Pesce was qualified to work as a police officer with no accommodations. NYPD provided the opinions of three doctors who disagreed, finding that whether Pesce will have a seizure while working is unpredictable, and that this disqualifies him from performing the duties of a police officer.

The court determined that the NYPD had not provided sufficient evidence that Pesce's seizure condition rendered him incapable of adequately performing the duties of a police officer, and denied NYPD's motion for summary judgment.

4.10 *Michael v. City of Troy Police Dep't,* 808 F.3d 304 (6th Cir. 2015)

Michael began working as a patrol officer in 1987. Between 2000 and 2001, Michael underwent surgeries to remove a tumor from his brain. The surgeries were only partially

successful, as the surgeons could not remove the entire tumor, which continued to grow. Beginning in 2007, Michael's behavior became erratic and disturbed. Michael's wife discovered that he had a stash of empty steroid vials, some of which were labeled for veterinary use. After Michael's wife turned the vials over to the then Chief of Police, Michael embarked on a crusade to retrieve them. This crusade included suing the Chief in small claims court, and serving process on him during his retirement party. The City's new Chief of Police, Gary Mayer, also received reports that Michael had accompanied a cocaine dealer to several drug deals. In 2009, Michael had brain surgery for a third time. After Michael was cleared for work, the city informed Michael that he needed to pass a psychological evaluation before he returned to work.

A series of doctors either personally examined Michael, or reviewed his file and the test results of the others. Two neuropsychologists who evaluated Michael found that he "may be a threat to himself and others," and further concluded that his ability to make split-second decisions, drive at high speeds, and potentially use deadly force were impaired to the point that he should not return to duty. Two of the doctors who reviewed Michael's file, and another that personally examined him found, however, that Michael was fit to return to duty. A final doctor, chosen by Michael, found that he should not return to duty, and questioned his safety with weapons. Michael kept the report of the final doctor to himself.

Michael argued that the reports of the doctors that found him fit for duty proved the contrary opinions wrong. The court found, however, that the reports favoring Michael did not inquire into the effect that his conditions may have on his ability to perform the job of police officer. Further, the court pointed out that it is not required that an employer rely on a medical report that is "correct," but rather one that is "objectively reasonable." Finding that the reports relied on by the City were objectively reasonable, and that the City reasonably acted on Michael's own conduct, the court concluded that the City's decision not to return Michael to duty was reasonable.

A dissenting opinion determined that there was a genuine dispute as to whether the opinions concluding that Michael was unfit to return to duty were objectively reasonable.

4.11 *Brownell v. Snohomish Cnty. Pub. Util. Dist. No. 1*, No. 71269-1-1 (Wash. Ct. App. May 18, 2015) (unpublished opinion)

Plaintiff, a former public utility district employee, was disabled 3 times during his 8-year tenure by a neurological disease causing weakness, a chainsaw accident which rendered an arm weak, and hearing loss. He was cleared to return to work with limited duties, but was still assigned labor-intensive work and often given performance warnings. He was eventually discharged for violating work rules when he accidentally dewatered a part of a stream when operating a dam. Plaintiff sued, claiming that his termination constituted disparate treatment disability discrimination in violation of Washington law. The trial court granted summary judgment for the employer and dismissed the case

The Court of Appeals reversed, finding that Plaintiff raised genuine issues of material fact and therefore holding that the trial court erred in granting summary judgment dismissing the case. It found that Plaintiff established a *prima facie* case by alleging selective enforcement of rules, that he was performing satisfactorily, and that similarly-situated non-disabled co-workers

were treated more favorably. In doing so, the court noted several considerations making Plaintiff's case easier to establish. First, it emphasized that here, because no performance reviews of his work exist, evidence of Plaintiff's theory of selective enforcement of performance standards is by nature difficult to prove, and that accordingly the case does not neatly fit into the traditional burden-shifting standard for proving discrimination. The court also noted that summary judgment to employers in discrimination cases is rarely granted. The court then noted that a *prima facie* disparate treatment disability discrimination case requires showing that the plaintiff (1) belong to a protected class, (2) was discharged, (3) was doing satisfactory work, and (4) was discharged under circumstances that raise a reasonable inference of unlawful discrimination (not "was replaced by someone not in the protected class," as is required in a non-disability discrimination case, and which is more difficult to establish). Taking these considerations into account, the court held that, seen in a light most favorable to him, Plaintiff raised genuine issues of material fact as to whether his termination was based on his disability, and that his ongoing pattern of poor performance and lack of good judgment as alleged by his employer was a pretext.

4.12 *Parker v. Metro. Gov't of Nashville*, 2016 Wage & Hour Cas.2d (BNA) 11,890, No. 3:14-cv-00959 (M.D. Tenn. Jan. 15, 2016) (slip opinion)

Plaintiff was a correctional officer for the Davidson County Sheriff's Office. After he was promoted to Corporal, he was involved in 2-separate incidents where he was assaulted and injured by inmates. He took a FMLA leave after the first, but not the second, incident. The Chief of Security, concerned about Plaintiff's fitness psychological stability, referred Plaintiff for a psychological fitness for duty evaluation. After 2 doctors and Plaintiff's treating psychologist agreed he suffered from PTSD and was unfit, Plaintiff took FMLA leave again. After the 12-weeks of leave expired, the Office fired him even though doctors still deemed him unfit. Recognizing that it failed to provide him due process, the Office reinstated him and encouraged him to apply for and receive a disability pension. Plaintiff did so, and was administratively moved to the Benefit Board. Plaintiff filed a charge of discrimination with the EEOC and subsequently brought suit alleging that his later-rescinded termination and his voluntary switch to the Benefit Board constitute discriminatory terminations in violation of the ADA and the FMLA. The Office moved for summary judgment.

The district court granted summary judgment for the Office. It determined that, as to the ADA claim, Plaintiff failed to establish a *prima facie* case on the basis of direct evidence of disability-based discrimination. His doctors stated at the time that there are no reasonable accommodations that would help Plaintiff perform differently on the job and remain on duty as a corrections officer, and Plaintiff himself maintains that he is unfit for duty. As to the FMLA claim, the court found no direct evidence of discrimination or retaliation. It also found that Plaintiff failed to establish, with indirect evidence, a *prima facie* case under the McDonnell Douglas framework. This was based on the absence of an adverse employment action, given the Office's encouragement that Plaintiff take leave, its reinstatement of Plaintiff after improperly firing him, and suggesting another mechanism to retain him while he recovers.

4.13 *Pena v. City of Flushing*, 2015 WL 5697680 (E.D. Mich. Sep. 29, 2015) (unpublished opinion)

Plaintiff, a former wastewater treatment plant operator for the City of Flushing, claimed discrimination by department of public works employees because of his Mexican origin. Plaintiff started having problems at work for which he was reprimanded, and which he claimed was a result of the harassment he was suffering. Plaintiff started treatment with a therapist, who prescribed him medications for his anxiety and stress. He eventually was placed on paid medical leave. After he was cleared by his treating doctors to return to work, Plaintiff filed a formal complaint about the harassment from his co-workers. His co-workers were not happy about the complaint, and Plaintiff continued to suffer harassment. He took more medical leave, later a third one for trouble breathing, later a fourth for stress from alleged discrimination and retaliation from his co-workers, among other things. After going on another leave he was required to undergo a fitness-for-duty medical clearance before returning to work. Suspicious that the examination would be prejudiced against him, Plaintiff refused to take it and filed a grievance demanding management to stop discriminating against him and allow him to return to work immediately. The City fired him for refusing to attend the examination. Plaintiff brought suit under the Americans with Disabilities Act and Title VII.

The district court granted summary judgment for the City as to the ADA claim, holding that the City never perceived Plaintiff to be disabled, finding that management's knowledge of Plaintiff's depression, past medical leave, and psychological treatment was insufficient to establish a perception of his being disabled, given that management was concerned about the fact that Plaintiff was on leave for 2 months based simply on psychologist's cursory note that "Above pt was seen today. He needs to be on sick leave," and about Plaintiff's demeanor and response to questions when a supervisor spoke with him about the matter. Regardless, the court found that the City was justified in ordering the exam because it was job-related and consistent with business necessity, given that Plaintiff's demeanor raised questions as to whether he was fit for duty. As to the VII claim, the court determined that, even assuming that Plaintiff could establish a *prima facie* case of discrimination and retaliation, he failed to show that the City's legitimate, nondiscriminatory reason for terminating him (insubordination by not submitting to the exam) was a pretext. The case was dismissed.

4.14 *Lehigh Acres Fire Control and Rescue*, Decision of Arbitrator, FMCS Case No. 150109/00707-3 (Jan. 22, 2016)

Grievant, a firefighter, laughed so hard while at the fire station that he fainted and hit his head while falling to the ground, resulting in a gash to his head which required staples to close. The urgent care practitioners authorized by Grievant's worker's compensation carrier to treat him determined he could not return to full duty as a firefighter until seeing a cardiologist and neurologist, both of whom determined he was still unfit to return to duty. The cardiologist referred Grievant to an electrophysiologist, who cleared him to return to full duty. Grievant then saw the cardiologist again, who finally also cleared him to return to full duty, then followed up with him 6 months later to satisfy the urgent care practitioners' original instructions. However, the District's Fire Chief required Grievant to be checked by the District's own physician, who reviewed Grievant's medical records and determined he still cannot return to duty until he had been episode-free for 24 months. Grievant was referred back to his cardiologist, who, along with

the electrophysiologist, still believed he was fit for full duty. However, the Fire Chief, following the District physician's opinion and non-approval of even light duty, placed Grievant on unpaid leave, and rejected yet another recommendation from the cardiologist and electrophysiologist concerning Grievant's fitness to return. Grievant's union and the District dispute whether the latter's decisions were appropriate.

The arbitrator determined that the District was justified in referring Grievant to the District physician for re-evaluation under the labor-management agreement. However, the arbitrator determined that the District, in failing to take steps to resolve the medical conflict, did not comply with other of management obligations. The arbitrator found the District's conduct was not in accordance with a best practice that is "unequivocal, clearly performed and articulated, and obviously established over a reasonable time," and sustained this issue of grievance. The arbitrator acknowledged the District's "articulated concern of liability." The arbitrator ruled, upon the determination that Grievant is fit to return to full duty made by an independent medical examiner, that Grievant be re-instated to full duty upon passing another physical examination within 10 days.

4.15 *Ching Bedeski v. The Boeing Co.*, W.D. Wash., No. C14-1157RSL (Sep. 25, 2015)

Plaintiff, a former Boeing employee, requested a leave of absence claiming she could not perform her essential job functions due to acute anxiety, panic attacks, and neck pains. This request was granted, and Plaintiff then received 5 leave extensions. Her final granted leave expired on June 28, 2013, but she failed to return to work. Boeing's attempted communications with her between June 20th and July 9th were to no avail. Having received a report prior to leave expiration that Plaintiff had engaged in outside employment while on leave, and having had its investigator confirm this afterwards, Boeing discharged Plaintiff for job abandonment and violation of leave policies while on medical leave. Plaintiff, claiming a "miscommunication regarding her return to work date," filed suit asserting Boeing, by failing to reasonably accommodate her disability, discriminated against her in violation of the Americans With Disabilities Act and the Washington Law Against Discrimination.

The district court granted Boeing's motion for summary judgment to dismiss, based upon the findings that Boeing granted every leave extension Plaintiff requested, and that Plaintiff failed to follow Boeing's procedure for requesting an additional extension, rendering her post June-28 absences inexcusable.

4.16 *Gamble v. Greater Cleveland Reg'l Transit Auth.*, No. 1:15 CV 1219, 2015 WL 5782073 (N.D. Ohio Sept. 30, 2015)

Michael Gamble, a part-time Cleveland bus driver, suffered a knee injury through the course of employment that prevented him from working for long stretches of time. He was granted a long-term absence, which allows for up to six months of leave, after which an employer may be entitled to terminate an employee. Two weeks after exceeding the six-month entitlement, the city provided Michael notice that he would be terminated. At the pre-termination hearing, Michael argued that the city had misclassified his injury as a non-industrial medical condition. This argument was rejected and he was discharged by Cleveland's transit

authority under the transit authority's long-term absence policy. Michael claimed disability discrimination under the Americans with Disabilities Act (ADA).

The Northern Ohio District Court rejected Michael's claim, finding that he merely suffered an injury requiring surgery and absence from work for more than six months, but that he did not have a disability under the ADA. Therefore, he did not state a claim upon which relief could be granted. In addition, the Court found that it did not have subject matter jurisdiction over Michael's claim that the Transit Authority misclassified his injury in order to terminate him under the Authority's Attendance Policy with its Long Term Absences provision. This is because interpretation of the Attendance Policy is actually a state law contract claim over which the Court had no jurisdiction.

4.17 *Emeson v. Dep't of Corr.,* No. 46157-9-II, 2016 WL 2647498 (Wash. Ct. App. May 3, 2016)

Desmond Emeson was an employee of the Department Corrections (DOC). Emeson claimed employment discrimination because the DOC allegedly failed to accommodate his disability, which he claimed was mental impairment resulting from a past gunshot wound to the head. He also claimed invasion of privacy due to a DOC supervisor's Facebook post referencing Desmond having a disability. He first brought his claims in federal court, which dismissed his case. Emeson subsequently filed a state-court action against the DOC, based on the same events, alleging employment discrimination and invasion of privacy under state law.

The Court of Appeals held that a new state-law claim, making the same claims as in federal court, was precluded by the doctrine of *res judicata* (where a matter that has been adjudicated by a competent court and may not be pursued further by the same parties). It also held that a three-year statute of limitations applied to an invasion of privacy by publication claim and that the clock started when Desmond's former supervisor had made the post on Facebook (more than three years before Desmond brought the claim). Lastly, the court held that Desmond's supervisor was acting outside the scope of her employment when she made the post on Facebook, and thus the DOC could not be held liable for the invasion of privacy by that publication.

4.18 *Ellis v. San Francisco State Univ.,* 114 F. Supp. 3d 884 (N.D. Cal. 2015)

Plaintiff Linda Ellis was hired by San Francisco State University as a professor of Museum Studies in 1987. She brought an action against the university alleging that she was terminated for refusing to submit to a medical examination and that this violated the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA). The university moved to dismiss her claims.

The Court found that the university's reference to the California Rehabilitation Act that grants it the authority to require medical examinations as a condition of employment was not sufficient on its own to justify its order that a professor undergo a psychological fitness-for-duty exam. The university had to comply with the protections afforded to employees in the FEHA and ADA, which require an employer to prove the exam is job-related and vital to business. However, the Court ultimately granted the university's claim for partial summary judgment

because California regulation, the ADA, and the FEHA must exist in harmony and should not be read to conflict. This meant that the job-related and vital-business-interests requirements of the ADA must be incorporated into and satisfied by the Rehabilitation Act's requirements to determine potential liabilities under Title I of the ADA.

4.19 *McQuistion v. City of Clinton*, 2015 BL 424338, Iowa, No. 14-0413, 12/24/15

Karen McQuistion, was a pregnant paramedic for the City of Clinton, Iowa. The City of Clinton offered light-duty assignments to employees who were temporarily disabled as a result of injury on the job, but not to those that were pregnant. Karen sued the City claiming that the City's light-duty policy was discriminatory. The lower court granted summary judgment in favor of the City. Karen appealed.

The Supreme Court of Iowa ruled that excluding employees from disability policies like light duty because they are pregnant may be discriminatory. However, an employer can present a "legitimate, nondiscriminatory reason to exclude pregnant employees." It remanded the case to the lower court so that it could evaluate the whether such a reason existed and thus whether the City's summary judgment motion should have been granted. The court also noted that a government employer should be given particular latitude to consider policies that best weigh competing interests surrounding job performance and employee rights, and that the legislature may be best suited to perform such balancing in accordance with public will.

5. Medical Leave

5.1 *Taylor v. City of Shreveport,* 798 F.3d 276 (5th Cir. 2015)

Police officers working for the City of Shreveport brought this lawsuit against the City's police department based on its adoption of a new sick leave policy. The officers' claims failed on nearly all grounds, but they were able to proceed on their claim that the policy violated the Rehabilitation Act.

The 5th Circuit found that the officers' claim that the policy violated substantive due process failed because the policy's "home confinement" provision (that officers on sick leave should not leave their homes except to comply with five discrete purposes: vote, religious activities, to obtain medicine, participate in medical care, obtain food or meals) rationally served the Department's legitimate interest in their officers' recovery. The officers' ADA claim also failed because Title II of the ADA does not create causes of action for employment discrimination. However, the plaintiffs' claims based on the Rehabilitation Act had merit. The policy's mandate that officers out sick for three or more days must provide certain forms to their employer may reveal or necessitate revealing a disability, in violation of the Rehabilitation Act. The only claim the plaintiffs' could move forward on was their claim that the sick leave policy violated the Rehabilitation Act, as to the portion of the policy that requests information regarding an officer's "chronic condition."

5.2 *Mendel v. City of Gibraltar*, 607 Fed.Appx. 461 (6th Cir. Apr. 14, 2015)

Plaintiff was a police dispatcher for the City of Gibraltar, working as on a schedule based on employee preference and availability. He began having severe and constant abdominal pain,

which continued despite surgery and eventually incapacitated him from working. Though his doctor notified the City that he would be able to return to work in January 2009, Plaintiff missed all of his scheduled shifts that month due to continued pain. He notified the City about his ongoing issues and declined to submit his availability for work until he got better, though he never requested removal from the schedule. After missing his scheduled shifts in February, the City asked for another doctor's note. After receiving that note, the City notified him that it was late, lacked specificities, and that it is firing him because it believed he had voluntarily terminated his employment. Plaintiff filed suit, claiming the City interfered with his FMLA-leave rights by firing him. The district court granted the City summary judgment, concluding that Plaintiff was not entitled to relief because the earliest day he could return to work following medical clearance was well past the 12-week leave period provided by the FMLA. On appeal, Plaintiff argued the district court erred in assessing full weeks of utilized leave rather than intermittent leave pursuant to 29 C.F.R. Section 825.205(b)(1), as well as assessing utilized leave even for weeks in which the City had removed him from the dispatcher schedule entirely.

The 6th Circuit affirmed summary judgment. In upholding the district court's assessment of Plaintiff's utilization of full FMLA weeks, it found that Plaintiff was not on intermittent leave taken in separate periods of time, given that he missed every single day he was scheduled to work for 2 months straight, and that therefore "intermittent leave" regulation (29 C.F. R. section 825.102), though applicable to employees who continue to work reduced workweeks, does not apply here. It then concluded that no authority supports Plaintiff's claim that an employer cannot assess FMLA leave against an employee who is otherwise not scheduled to work. Then the court held that Plaintiff cannot establish a *prima facie* case of denial of FMLA-rights even if the City terminated him before the full 12 weeks expired, since doctors did not clear him to return to work until much later than the 12 week period (in total, 6 months), and Plaintiff did not testify unequivocally that he would have returned by the end of the weeks had he known his job was at stake.

5.3 *Jury v. Boeing Co.*, 2015 WL 1849527 (W.D. Wash. Apr. 22, 2015) (unpublished opinion)

Plaintiff, a former Boeing employee, alleged that Boeing violated the Washington Family Leave Act and the Washington Law Against Discrimination by considering statutorily-protected medical leave as a negative factor in making the decision to terminate him. Boeing moved for summary judgment.

Addressing the claim based on the WFLA, which mirrors the federal FMLA, the court found sufficient evidence to create a triable issue as to whether Boeing considered FMLA-protected leave as a negative factor, given that Boeing cited all of plaintiff's absences as the basis for termination, including those not covered by approved leave which it described as unacceptable, but also including those for which medical documentation was provided. In doing so it held that, even if Plaintiff failed to notify Boeing of those absences in compliance with Boeing's policies, as required by a FMLA regulation, the court found that Plaintiff may fall under the "unusual circumstances" exception to that regulation on grounds that he did not understand that the FMLA might apply and therefore did not realize he needed to submit such notice, given that employees are not expected to be familiar with the intricacies of the law, and that Boeing had enough information to know that Plaintiff potentially qualified for protection,

based on his various absences and communications with his doctor concerning his "serious health condition." The court then found sufficient evidence for a reasonable jury to conclude that Boeing, having specifically remarked on Plaintiff's absences, used them as factors in his termination.

The court then granted Boeing summary judgment on the WLAD claim that the termination was based on his medical issue and that Boeing failed to accommodate his disability with a short leave of absence. This was based on its finding that, even if Plaintiff were to establish a *prima facie* case, Boeing has identified a nondiscriminatory reason, namely 8 unexcused absences unrelated to his medical problem. It was also based on the finding of insufficient evidence, as a matter of law, to show that he was qualified to perform the essential functions of his job, or that Boeing failed to adopt reasonably available measures to accommodate his disability. It found no evidence that his job could be performed remotely, that Boeing did accommodate the limitations identified by his doctors, and that termination was based on Plaintiff's failure to follow attendance policies when he was able to.

5.4 *In re Bakersfield [Cal.] City School District and California State Employees Association, Chapter 48*, Decision of Arbitrator, September 26, 2015

Grievant was a Team Custodian on the Night Crew in the Maintenance and Operations Department of the Bakersfield City School District ("BCSD"). The grievant had been with the BCSD for about 19 years. The BCSD has a collective bargaining agreement ("CBA") in place with the California State Employees Association ("CSEA") which includes a "Leave of Absence" policy. According to the policy, in order to request medical leave for longer than ten days, an employee must submit a doctor's verification and estimated time of disability.

In late December of 2014, the Director of Human Resources was informed that the grievant had been absent for close to ten days. The grievant had not requested medical leave, and had not provided a doctor's verification or estimated time of disability to the BCSD. On December 29, the BCSD sent the grievant a letter explaining the Leave of Absence policy, and then on January 6, 2015, sent another letter giving the grievant notice of the BCSD's intent to recommend dismissal. The grievant testified that he had not received either of these letters. The arbitrator found, however, that the grievant had been intentionally refusing his mail. The arbitrator concluded that the grievant was absent without leave as alleged, neglected his duty in failing to respond to the BCSD's written communications, and refused to obey the reasonable regulations related to requesting a leave of absence. The arbitrator upheld the grievant's dismissal.

5.5 *In re Coast Community College District and Coast Federation of Classified Employees*, Decision of Arbitrator, May 26, 2015

Grievant worked as a Community Technician II, a 40-hour per week position in the Records and Admissions Department. Between 2008 and 2012, Grievant missed significant periods of work due to the death of her father, the death of her fiancé, an ankle injury, and because she was caring for her daughter after her daughter's surgery. On August 23, 2012, Grievant's supervisor met with grievant to discuss the negative impact that Grievant's absences were having on the Department. On October 24, 2012, the supervisor issued Grievant a written

warning for excessive absenteeism. On December 4, 2012, the supervisor issued Grievant a written reprimand for excessive absenteeism. On May 22, 2013, Grievant was suspended without pay for 10 days for excessive absenteeism and abuse of leave. On November 22, 2013, Grievant was issued a "Notice of Proposed Disciplinary Action, Intent to Terminate" based on misuse of leave.

The arbitrator determined that Grievant was not eligible for leave under FMLA because she had not worked at least 1250 hours in the preceding 12 months. A doctor examined Grievant and determined that Grievant did not have a physical disability under FEHA or ADA. The arbitrator determined that Grievant's absences were caused by a series of unrelated, temporary issues, rather than a permanent issue. Between the date of her written warning and the Notice of Intent to Terminate, Grievant missed more than 30% of her workdays. The arbitrator found that the District had just cause to terminate Grievant.

6. Retaliation

6.1 *Plancich v. Skagit County*, 147 F.Supp.3d 1158 (W.D. Wash. Nov. 23, 2015)

5 days after being a first responder to a horrific homicide scene at which a fellow deputy and friend was murdered, Plaintiff had a stress-related heart attack for which he filed a Workers' Compensation claim. Not wanting to set a precedent for paying workers' compensation for heart attacks, the Chief Deputy asked Plaintiff to revise his statement. After Plaintiff refused, the Chief submitted a memorandum "clarifying" the statement, but which Plaintiff characterized as misrepresenting it. The Chief then won the office for the Skagit County Sheriff, against a candidate supported by Plaintiff. Plaintiff was later involved in an incident which prompted a criminal investigation by the Whatcom County Sheriff's Office, which concluded there was insufficient evidence to charge Plaintiff. Nonetheless, the Skagit County Sherriff determined Plaintiff misused his authority as a police officer for personal gain and had been dishonest at various points in the investigation in violation of the Office's policies and code of conduct. After receiving notice of termination, Plaintiff appealed to a labor arbitrator, who found just cause and upheld the termination. Plaintiff then filed suit for defamation, wrongful termination, political retaliation, outrage, emotional distress and negligent supervision.

The district court dismissed Plaintiff's claim of defamation for failure to show that the press disclosures which allegedly harmed him were not privileged. As to the 1st Amendment claim it concluded Plaintiff raised a genuine issue of fact regarding the County's allegedly retaliatory motivation for his termination and that the temporal connection between the events support a causal inference. Accordingly, it denied summary judgment for the County and set thr matter for trial.

6.2 *Gibson v. Milwaukee Cnty.*, 95 F.Supp.3d 1061 (E.D. Wis. Mar. 5, 2015)

Plaintiffs, Gibson and Rohr, were 2 corrections officers at Milwaukee County Sheriff's department when they suffered from conditions that required them to take significant amounts of leave. They allege that upon returning the department refused to accommodate certain work restrictions identified by their doctors, and instead the department required them to take additional leave until they could return to unrestricted duty. Plaintiffs filed suit, claiming denial

of a reasonable accommodation in violation of the ADA. Gibson also claimed interference with and retaliation in violation of the FMLA, alleging that the County rescinded his Temporary Appointment to a Higher Classification (TAHC) to lieutenant and that he was unlawfully demoted by being transferred to a less favorable location because he had repeatedly taken statutory leave. The County moved for summary judgment.

First the court granted summary judgment dismissing Gibson's ADA claim for failure to show a genuine issue of material fact as to whether the ability to work overtime was an essential function of his position of Corrections Lieutenant. It rejected Gibson's argument that working 8 hours at a time is not an essential job function, based on a department work schedule table reflecting that some employees with hours-restrictions worked less, since that table did not specify the position held by each employee with an hours-restrictions, and so does not specifically speak to Plaintiff's position. Furthermore, the testimony of Gibson's direct supervisor that Gibson could have worked reduced hours is irrelevant because that supervisor is not shown to be someone who determines the essential functions for a Corrections Lieutenant, or that he is familiar with the reasons behind the department's time requirements. Given the department's alleged practice of routinely ignoring TAHC deadlines and keeping officers on it indefinitely, and evidence of department officials' negative perception of the impact of Gibson's FMLA leave on his attendance record, the court found that a reasonable jury could conclude that Gibson's FMLA usage, not the length of his TAHC, was the cause of his demotion.

Regarding Rohr's ADA claim, the court found a question of fact as to whether the department was required to allow Rohr to work on light duty, given evidence that such a light-duty program was offered to other officers based on the need for them to avoid contact with inmates (which was Rohr's limitation). It was also based on the court's holding that the department may not refuse to place a temporarily disabled corrections officer in a light-duty assignment solely because the officer's disability does not stem from a workplace injury. In addition, the Court found that light-duty roles were available and that there was no need for the department to require her to take additional leave instead of taking light-duty assignments. Finally, the court declined to address Rohr's FMLA claims, founding that it is unclear whether those claims could result in relief different than that to which Rohr will be entitled to from her ADA claim.

6.3 *In re Dep't of Homeland Security*, AFGE, et al., FMCS Case No. 1400310/01508-3 (July 1, 2015)

Grievant is employed by the Department of Homeland Security as a border patrol agent, and also serves as a Lieutenant Colonel in the Army Reserves. Both jobs are physically arduous. She suffered 2 on-the-job injuries during her career with the agency (one requiring hip and ankle surgery, and a herniated disc), and except for her time off resulting from them she performed all duties without restrictions. Later, Grievant testified at an EEOC hearing as a witness for a fellow agent who claimed she was discriminated against in her removal from the agency's Honor Guard program because of her black color and Puerto Rican national origin, stating that Grievant's own removal from that program was unfair. Then, experiencing episodic back problems, she requested to be assigned to drive Tahoes or Durangos because other models were likely to exacerbate her condition. However, because some supervisors failed to make this accommodation even though those latter vehicles can be used on any assignment and such

switches were possible, Grievant sought out her Field Operations Supervisor to put her request in writing, and submitted multiple medical reports, including an attending physicians report stating she was capable of performing her duties but that she should not use Jeeps or Kilos. In light of that report, the Chief Patrol Agent temporarily put her on administrative duties and revoked her authority to carry a firearm. Grievant's union eventually filed a Step 1 grievance contending that the Agency committed a prohibited personnel action in assigning her to administrative duties and committed EEOC violations by engaging in reprisal to her EEOC testimony, by treating her disparately from male employees and by creating a hostile work environment. After another Fitness for Duty Examination (FFDE), this time with the Agency-designated physician, she was allowed to return to law enforcement duties. After the Step 2 grievance was denied, the Union filed a step 3 grievance alleging the same, the denial of which resulted in referring this matter to arbitration.

The arbitrator dismissed the grievance. First, it dismissed the grievance to the extent that it applies to the agency-imposed FFDE because it was not raised in the Step 2 grievance, although the CBA requires that step to include precisely what the grievance is. As to the issue of the prohibited personnel action based on discrimination and retaliation, the arbitrator determined that the Union failed to show any evidence that Grievant was treated differently than any other employees with regard to assignment of light duties. Regardless, it found that the Union failed to show that legitimate reasons proffered by the agency (concerns about her ability to perform duties) were a pretext. The two relatively isolated actions on which she bases her claim of hostile treatment were likewise found insufficient to establish a *prima facie* case. As to the retaliation claim, the arbitrator found insufficient evidence for establishing the causation element of a *prima facie* case.

6.4 *Chappelle v. City of Leeds*, No. 2:12-CV-2058-SLB, 2015 WL 5693636 (N.D. Ala. Sept. 29, 2015)

On May 23, 2010, Chappelle received a "Notice to Employee of Contemplated Disciplinary Action" for conduct unbecoming a classified employee, insubordination, and neglect of duty, among others. These charges were based on various incidents, including Chappelle's insistence that being assigned to cut grass with other employees was "punishment work;" his becoming argumentative with a senior officer after Chappelle failed to restock the medicine box in one of the fire trucks; and, various derogatory statements Chappelle made to or about senior officers. Chappelle's fellow employees claimed that his behavior causes them to fear for their safety at work. Shortly before his termination, Chappelle filed two charges with the EEOC.

A hearing before the Jefferson County Personnel Board resulted in the Hearing Officer finding that Chappelle had likely been retaliated against based on protected activity: his filing of charges with the EEOC. The City argued that the Personnel Board ignored critical evidence in finding that Chappelle had not been disrespectful or insubordinate. On review, the Personnel Board disagreed with the findings of the Hearing Officer, and found that Chappelle had been terminated for legitimate, non-retaliatory reasons. Chappelle then filed an appeal of the Personnel Board's decision in the Circuit Court of Jefferson County. While that appeal was pending, Chappelle filed a complaint in federal court for violations of Title VII of the Civil

Rights Act. The Circuit Court of Jefferson County affirmed the Personnel Board's finding that Chappelle had been terminated for non-discriminatory reasons.

6.5 *McCowen v. Village of Lincoln Heights,* 624 Fed.Appx. 380 (6th Cir. Aug. 21, 2015)

Plaintiffs, part-time firefighters for the Village of Lincoln Heights, were fired for failing to obtain certification as EMTs as required by fire department. After exhausting their administrative remedies Plaintiffs sued the Village. They claimed they were discharged because of their support for Chief Solomon the fire chief, who had filed a claim against the Village for discrimination. The Chief advocated for the part-time personnel. The district court granted summary judgment for the Village, finding that Plaintiffs failed to show that the Village's reason for their discharge (their lack of certification) was pretextual.

The 6th Circuit affirmed summary judgment for the Village. In doing so it first found that Plaintiffs indeed failed to obtain certification despite being told to do so, that the requirement was not contrived (90% of the Village's runs required EMT-certified employees, and that Plaintiffs were generally unable to assist when such calls came in), and that the Village had paid for them to take a certification course. Second, the court found that Plaintiffs failed to show the discharge was based on a reason other than their non-certification, considering the Village's legitimate need for EMTs, the manager's statement that Plaintiffs would be considered for rehire if they obtain certification, the significant time gap (8 months) between the filing of Solomon's harassment suit and Plaintiffs' discharge, and an independent village board's affirmance of the discharge. The court found so even while acknowledging that Plaintiffs need not show that retaliation was the only reason for discharge, but only that it was at least a but-for cause. The failure to establish this element was held to undermine Plaintiffs' case even if they could establish that the discharge had the undesirable consequence of the inability to respond to 15% of calls due to a lack of available firefighters. Third, non-certification was found to be a justified basis for Plaintiffs' discharge.

6.6 *Donevant v. Town of Surfside Beach,* 414 S.C. 396, 778 S.E.2d 320 (Ct. App. 2015), reh'g denied (Nov. 19, 2015)

Jacklyn Donevant, a building and planning official for the Town, was terminated by the Town of Surfside Beach at some time after she had issued a stop-work order to the Pier Restaurant, which was performing construction with only a demolition permit and not a construction permit. She brought a wrongful termination action against the Town, asserting she was fired in retaliation for issuing the stop-work order. A jury returned a verdict in favor of Jacklyn.

The Court of Appeals held that Jacklyn's claim fell within the public policy exception to at-will employment because she was fired for refusing to violate the law. In this case, she had no choice but to issue a stop-work order, given that the restaurant did not have a construction permit and was aggressively moving forward with construction. In addition, the court held that Jacklyn presented a cognizable claim that she was terminated in violation of a clear mandate of public policy to enforce the law against wanton violations. The Court of Appeals, therefore, upheld the trial court's ruling and judgment for Jacklyn.

7. First Amendment

7.1 *Carney v. City of Dothan*, 2016 BL 23722, No. 1:14-CV-392-WKW (M.D. Ala. Jan. 28, 2016)

City of Dothan police officer Christopher Dorner murdered several fellow officers and civilians in response to his termination, which he believed was motivated by retaliation against his speaking out against what he perceived to be a culture of racism and misuse of police power within the Department. Plaintiff, a black female former police officer at the City of Dothan's Police Department, maintained an active personal Facebook page which was open to the public. On it, she made a series of posts which fellow officers described as sympathizing with Dorner and supporting his action. Her superior then spoke with her and reminded her of the Department's personnel rules prohibiting misconduct and disgraceful conduct reflecting unfavorably on the City.

Citizens and other officers complained about Plaintiff's statements. After an investigation, Plaintiff was found in violation of Department rules and a City general order (prohibiting speech that will impair working relationships, impede the performance of duties, impair discipline and harmony among coworkers, or negatively affect the public perception of the department). Plaintiff was put in temporary suspension. On appeal before a City board, she stated she would be justified in shooting a co-worker or a co-worker's family members if that co-worker wronged her, based on that statement, the Department required her to undergo a psychological evaluation to determine whether she was fit for duty. The Board upheld the disciplinary action against her. Plaintiff filed an EEOC complaint against the Department alleging race and gender discrimination in violation of Title VII. Sometime thereafter, Plaintiff was involved in a domestic dispute with her fiancé during which she blocked her fiancé's car. Other officers arrived on the scene, and Plaintiff refused to allow her fiancé's car to be removed despite multiple direct orders from her superiors. After an internal investigation she was terminated for insubordination, and a City board upheld the decision.

Applying the burden-shifting framework under McDonnell Douglas, the district court granted the Department's motion for summary judgment to dismiss Plaintiff's failure to promote claim, finding that promotions to sergeant were made in order of ranking, largely based on exam scores, and that another black officer who was ranked higher was in fact promoted. The court also dismissed Plaintiff's discriminatory work assignment claim because her assignments did not directly impact officer pay, rank, or benefits, and therefore did involve the requisite serious and material change in the terms, conditions, and privileges of employment. Even assuming such change, the Department was found to have a legitimate, nondiscriminatory reason for removing her from community-oriented roles: her violation of social media policy. Finding that the Department did not deny Plaintiff of any material training opportunities, the court then dismissed her claim as to that issue. Her three discriminatory testing claims were all dismissed for lack of evidence or failure to constitute an adverse employment action. Her claims regarding restricting software access, paid leave, and Facebook discipline were all dismissed for lack of evidence of failure to identify a discriminatory basis. Her claim as to her termination was dismissed for failure to establish a *prima facie* case (no showing regarding other, similarly situated officers) as well as failure to show the City's nondiscrimination reason was pretext (gross insubordination carries mandatory termination). Her failure to investigate and gender discrimination claims were

dismissed for lack of evidence. The court also granted summary judgment for the City as to these claims made under the Consent Decree to which the City is bound, finding that it does not provide Plaintiff with a separate right of action, and that contempt is the proper vehicle for enforcing it.

The court dismissed her claim alleging deprivation of 1st Amendment rights under section 1983. Though it found sufficient evidence to create a material dispute as to whether Plaintiff was speaking as a citizen on a matter of public concern, it found as a matter of law that her speech interests are outweighed by the City's interests in taking disciplinary action against her, citing other officers' loss of confidence in her and her role in the community. It also dismissed her retaliatory hostile work environment claim under Title VII, finding that Plaintiff cannot establish the causation element of a *prima facie* case (because the relevant decision makers were unaware of the alleged protected activity which she claims was the basis for retaliation. It found the City offered substantial evidence for non-retaliatory reasons behind all of its allegedly retaliatory actions, including denials of promotions, office transfers, and Plaintiff's suspension pending the Facebook investigation. Finally, the City was granted summary judgment as to the severe or pervasive harassment and discriminatory hostile work environment claims, both for lack of evidence.

7.2 *Heffernan v. City of Paterson*, 136 S.Ct. 1412 (Apr. 26, 2016)

Plaintiff, a police officer, was demoted (from detective to patrol officer) after he was seen at a mayoral candidate's office picking up a lawn sign for his bedridden mother at her request. The department considered this as punishment for what they thought was his overt involvement in the candidate's campaign. This belief, however, was incorrect. The lower courts held that Plaintiff had not engaged in any 1st Amendment conduct and that Plaintiff's claim cannot proceed because a free speech retaliation claim under Section 1983 is actionable only where the alleged adverse action was prompted by an employee's actual (not merely perceived) exercise of constitutional rights.

The Court reversed, holding that the government's reason for discipline is what counts, and that when that reason is a desire to prevent an employee from engaging in 1st Amendment activity, the employee is entitled to challenge that unlawful action even if no protected activity actually occurred. In doing so, it found that the risks to an employee's constitutional rights in this context is not diminished in any way by the virtue of the fact that there is only a perception of protected activity, and that imposing such liability would not impose significant extra costs upon the employer. However, since the record showed that the department might have acted under a neutral policy prohibiting officers from overt involvement in any political campaign, the Court remanded the case for factual determination of whether it acted out of an improper motive.

7.3 *Edinger v. City of Westminster*, 2015 WL 8770002, No. SA CV 14-0145-DOC (RNBx) (C.D. Cal. Dec. 14, 2015)

Plaintiff is a City of Westminster police officer. Plaintiff's friend and co-worker filed a Department of Fair Employment and Housing complaint alleging he was discriminated against by various supervisors at the Department for investigating conduct related to following female suspects at a disproportionately high rate. Plaintiff gave testimony corroborating his friend's

claims of harassment and discrimination. He also corroborated his friend's claim in a separate lawsuit that he was being retaliated against after filing the initial complaint. Plaintiff also filed a tort complaint against the City. Over the next couple of years following the Plaintiff's corroboration of his friend's initial complaint, Plaintiff was not selected for various special assignments and promotions, including a position at the Trauma Support Team. Plaintiff brought suit under Section 1983, based on the City's alleged violations of his 1st Amendment rights fo various issues, including retaliation (by not selecting him for the Trauma Support Team position) and, his deposition testimony in his friend's discrimination suit.

The district court applied the standard 5-step inquiry for evaluating *prima facia* 1st Amendment retaliation claims. With regards to his speech made to IID investigators concerning his friend's discrimination claim, the court found that his statements, even if found not to be supportive of the friend's claim, is protected speech because it involved allegations of discrimination by Department officers. However, the court found that Plaintiff's speech was made as a part of his official duties, and not in the capacity of a private citizen, because he was requested (if not ordered) to do so, and the communication was within his chain of command. Accordingly, Plaintiff's retaliation claim based on his IA investigation speech was dismissed. Next, assessing Plaintiff's claim based on his deposition testimony for his friend's second discrimination case, the court found that the timing of the relevant events were such that it could support an inference that retaliation was a motivating factor for the adverse action against him (*i.e.*, his non-selection for the Trauma Support Team). Furthermore, it found that Plaintiff produced sufficient evidence to support inferences that the chief had been delegated final policy-making authority and was aware of Plaintiff's testimony, and that the City did not meet its burden to show that it would have rejected Plaintiff because he could not be trusted to keep information confidential. Accordingly, it denied summary judgment for the City as to this claim. Finally they found that Plaintiff's filing of the lawsuit is private speech for 1st Amendment retaliation purposes, finding it outside the chain of command and not made pursuant to his official job responsibilities.

7.4 *Del Bosque v. Starr County,* 630 Fed.Appx. 300 (5th Cir. Nov. 23, 2015)

Plaintiffs, former Starr County employees, reported a County commissioner for misuse of county resources (*e.g.*, ordering Plaintiffs to cut firewood and deliver it to his house). Plaintiffs were later fired from their at-will positions by the commissioner. Plaintiffs filed suit claiming their termination was retaliation in violation of their 1st Amendment rights. The district court granted summary judgment for the County, finding that Plaintiffs failed to raise a genuine dispute of material fact as to the causation element of a 1st Amendment retaliation claim.

The 5th Circuit reversed. It held that Plaintiffs made a sufficient *prima facie* showing of causation, given that Plaintiffs made their report to people who regularly met with and advised the commissioners. It also found that Plaintiffs made a sufficient case for establishing that the County's non-retaliatory reasons for the discharge was pretext, including by showing that the commissioner made contradictory reasons for their termination, that the County budget did not clearly call for their terminations, as well as a chronology of additional events from which retaliation may plausibly inferred. This was despite the budgetary explanation proffered by the County, and the fact that the commissioner also discharged other employees in the same termination process. The court also reversed summary judgment for one of the Plaintiffs'

retaliation claims based on the Texas Whistleblower Act for the same reasons concerning causation as applied to the 1st Amendment claim.

7.5 *Kubiak v. City of Chicago*, 810 F.3d 476 (7th Cir. Jan. 11, 2016)

Plaintiff was working in the Chicago Police Department's Office of New Affairs (ONA) when she was verbally assaulted by a colleague who allegedly called her a "stupid bitch." She reported the incident, and was later ordered to leave ONA and return to her prior position as a beat patrol officer. Plaintiff filed a complaint alleging retaliation in violation of the 1st Amendment rights. The district court granted the City's motion to dismiss for failure to state a claim on which relief can be granted.

The 7th Circuit affirmed on the basis that Plaintiff failed as a matter of law to allege facts that plausibly suggest that she spoke as a private citizen on a matter of public concern. Noting that an employee's official duties are not limited to the formal job description, that an employee who is verbally assaulted by a colleague would be expected to report it to a supervisor, especially if it involved violence, and that Plaintiff, as a police officer, is responsible for protecting the public from harm, and that her speech was intimately connected with her job, the court found that Plaintiff spoke as an employee, not a private citizen. Additionally, noting that Plaintiff speech involving police departments and officer misconduct is not always a matter of public concern, that her speech focused specifically on concerns about her own safety (not the public's), that her complaint was made only internally and directly up the chain of command, and that the incident arose from a personal confrontation while at work, the court found that her speech only an airing of a personal grievance and was did not address a matter of public concern.

7.6 *Cory v. City of Basehor*, 631 Fed.Appx. 526 (10th Cir. Nov. 12, 2015)

Plaintiff was a police officer when he reported to his superiors a number of issues involving alleged violations of department policies that he believed affected safety and integrity in the department, including that officers improperly kept shotguns in their vehicles; they slept on the job; and, an officer made a physical threat to him over the phone. He believed he was doing what was required of him under his Standard Operating Procedure. Later, Plaintiff had a meeting to discuss with superiors an allegation of misuse of city resources, during which he had a physical confrontation with a Lieutenant that led him to be frightened (although not hurt or offended). He then received a letter of reprimand for violating the Code of Conduct requiring courteous and respectful behavior toward superiors. Plaintiff later recorded (allegedly in plain view) a conversation with the Chief concerning the reports against him. Upon discovering this, the Chief suspended Plaintiff indefinitely. After attempting to file a criminal complaint against the Lieutenant, he was terminated due to his inability to get along with coworkers and the loss of trust in him by his command staff.

Plaintiff filed suit claiming retaliation in violation of the 1st Amendment. The district court granted summary judgment for the City. The 10th Circuit affirmed, finding undisputed evidence that Plaintiff's speech did not place it beyond his official duties. Rather, they were found to be made within the scope of his duties as a police officer.

7.7 *Boisseau v. Town of Walls*, 138 F.Supp.3d 792 (N.D. Miss. Oct. 8, 2015)

Plaintiff was the Walls police chief when the board of aldermen voted not to re-appoint him to that position. The basis was that when he was asked to delete the emails of the outgoing mayor, Plaintiff allegedly read one of them relating to him. Plaintiff argued that the incident did not warrant termination in light of his overall record as chief, and that the real reason was his refusal of a request from a former alderman and the former mayor to drop the DUI arrest made against their friend. Plaintiff brought suit against the Town, claiming retaliation in violation of the 1st Amendment.

The district court granted summary judgment for the Town on numerous grounds. First, it held that Plaintiff's refusal to drop the DUI charge, as alleged by him to be the motivation for his termination, is not "speech" at all for 1st Amendment retaliation purposes. This was despite the Plaintiff's statements which were allegedly made in connection with such refusal, on the basis that they were merely incidental to his refusal to act. The court noted that, were such explanatory statements incidental to actions to be considered "speech," a vast number of cases would suddenly become 1st Amendment cases. It also noted that that those who pressured Plaintiff to drop the DUI charge were more interested in his actions, not his words, and the mere fact that he inevitably used the medium of speech to communicate his refusal to take that action does not implicate the 1st Amendment. It also held that such refusal is not sufficiently imbued with elements of communication to warrant 1st Amendment protection under the standard set forth by the Supreme Court in *Texas v. Johnson*. Accordingly, it ruled that Plaintiff was not terminated on the basis of any 1st Amendment-protected activity.

The court further concluded that under *Garcetti v. Ceballos* no 1st Amendment protection applies because Plaintiff's refusal to drop the DUI charge was performed as part of his official duties of enforcing the law equally towards all citizens. Furthermore, the court ruled that Plaintiff failed to sufficiently respond to the qualified immunity defense raised by 2 individual defendants, based on his citation to only state (and not federal) law where the 1st Amendment violation is not "obvious."

7.8 *Lloyd v. Birkman*, 127 F.Supp.3d 725 (W.D. Tex. Sep. 2, 2015)

Plaintiff, a sitting Constable for Williamson County, applied for appointment as interim county constable. The county commissioners asked Plaintiff about his views on abortion and same-sex marriage and his political and church affiliations. Plaintiff told them he was Catholic, pro-life, a republican, that he believed marriage was between a man and a woman, and which church he attends. Plaintiff was not selected to be the constable. He later brought claims against various commissioners under Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act. The defendants moved for summary judgment on all claims based on insufficiency of evidence and a qualified immunity defense. A Magistrate Judge issued a report and recommendation on this case granting some and denying some of the motions for summary judgment from both parties.

The district court agreed with the magistrate to dismiss the claims against the individual defendants in their official capacities because they are duplicative and there is no individual liability under Title VII and the TCHRA. Then, finding that an employee relationship exists as

required by those statutes (rejecting the County's claim to the contrary because it cannot fire a constable), the court found the County's role analogous to a manager in a company, based on the fact that the County can hire interim county constables, approve appointments of any deputy constable or other employee of the constable, assign duties to the constable beyond those statutorily required, and controls economic aspects of the constableship with few limitations.

The court then addressed the issue of whether Plaintiff is an employee for purposes of those statutes, or whether he qualifies for the statutory exemption for elected public officials, in light of the fact that he applied for the position through appointment rather than through the traditional manner of election. (It noted that this particular issue is one of first impression.) It held that Plaintiff is an employee not falling within that exception for purposes of both statutes. It then determined that there is an issue of material fact for trial as to whether a nonelected constable position falls within another exception under Title VII which applies to employees who are appointees on the policy-making level. In assessing whether Plaintiff's religious discrimination claims satisfy the elements of the "direct evidence test," the court found sufficient evidence to support satisfaction of the 1st prong (that the commissioners' remarks which Plaintiff claims as direct evidence of discrimination were religion-related), based on his being required to disclose his religious beliefs, which church he attended, and then his disclosure that his views on abortion and same-sex marriage were based on religious beliefs. It found the same as to the 2nd and 3rd prongs (that the remarks were proximate in time to the adverse action, and that it was made by an individual with authority over the employment decision). Finally, it found a triable issue as to the 4th element, *i.e.* whether the remarks were related to the decision not to hire Plaintiff. Accordingly, it denied summary judgment for the County on the Title VII and TCHRA claims.

As to the 1st Amendment retaliation claim, the court held that Plaintiff sufficiently demonstrated an adverse employment action as required for a *prima facie* claim, based on the fact that he was not appointed to the interim county constable position. Then it found a question of fact as to whether Plaintiff's remarks concerning his beliefs were related to decision not to hire him, and therefore whether his protected speech was a motivating factor in that decision. Next, the court considered the commissioners' non-discriminatory explanations for their decision, which included concerns about Plaintiff's qualifications as well as various favorable factors of qualification held by the person whom they ultimately hired, in response to which Plaintiff presented evidence that, *inter alia*, religious-political questions were asked to each of the candidates, and some of the commissioners were aware of certain unfavorable items in the hired person's record at the time of the decision. Though it found such evidence of pretext not substantial, it found a question of fact as to this issue; given 5th Circuit jurisprudence that summary disposition of such issue is generally inappropriate. However, the court then held that it was not clearly established that speech regarding political affiliation was protected at the time of the decision. Accordingly, it held that any 1st Amendment retaliation claim based on Plaintiff's views on gay marriage, abortion, or political affiliation is barred by qualified immunity based upon the law as it existed at that time. As to Plaintiff's claims that he suffered other 1st Amendment injuries including those concerning free expression, freedom of association, and free exercise and establishment, the court held that it cannot rule on then given insufficient treatment of them in the briefings.

The court then considered the 14th Amendment claims. It found insufficient evidence to support a 14th Amendment privacy claim and granted the County summary judgment on the issue, but denied summary judgment on the equal protection claim because the inquiry into intentional discrimination alleged thereunder is essentially the same for individual actions brought under Title VII. It then rejected the County's legislative immunity defense because the actions at issue were found to be administrative. It also found a question of fact as to whether municipal liability may be imposed upon the County, based on the acts of its commissioners. Finally, in considering the state constitutional claims the court denied summary judgment for the County based on official immunity. It also denied Plaintiff's motion for summary judgment as to his privacy claim under the Texas Constitution on similar grounds as its rejection of Plaintiff's federal privacy claim.

7.9 *Stinebaugh v. City of Wapakoneta*, 630 Fed.Appx. 522 (6th Cir. Nov. 10, 2015)

Plaintiff was a City of Wapakoneta fire captain. After learning that the Fire Chief planned to buy a new rescue engine when the existing truck was relatively new and had low miles, he expressed to various members of the City Council. He asserted the purchase would not be a good use of resources, identifying himself as a concerned tax paying citizen of the City. After the Chief learned that Plaintiff did this, he placed Plaintiff on paid administrative leave, then held a disciplinary hearing to investigate Plaintiff's communications with council members, after which Plaintiff was demoted to firefighter. After an incident which Plaintiff was put under investigation for leaving the site of a call to respond to another call in violation of standard operating guidelines, he was terminated. Plaintiff then filed a 1st Amendment retaliation claim against the Chief and the Director of Safety Services (who supported the Chief's plan to purchase the truck), as well as the City. The district court denied the individual defendants' motion for summary judgment on grounds of qualified immunity, as well as the City's motion for summary judgment for lack of evidence of an unconstitutional policy or custom of retaliation.

The 6th Circuit affirmed the denial of summary judgment based on qualified immunity. In doing so it held that Plaintiff engaged in citizen speech on a matter of public concern, noting that an individual's personal motives for speaking is not dispositive to whether such speech addresses a matter of public concern, and that exposing government inefficiency, mismanagement, or appropriation of public moneys are matters of considerable public significance. It also found that his speech was not made pursuant to his official duties, despite department guidelines stating that the fire captain participates in planning department goals and objectives. This was based, in part, on the fact that the speech did not involve such planning but rather concerned how the City allocated its resources; and that 2 out of 3 councilmembers testified Plaintiff expressly told them he was contacting them as a taxpayer, not as an employee. Furthermore, it held that the *Pickering* balancing test tips in favor of Plaintiff, considering that Plaintiff's speech did not interfere with the performance of his duties, that he did not pose any health or safety risk to anyone, and did not prevent the implementation of the Chief's plan to purchase a new truck. In doing so, it also rejected the defendants' claim that fire departments, as paramilitary organizations, have a greater interest in regulating employee speech, because of the lack of evidence that Plaintiff's speech actually disrupted any department operations. Finally, after finding there are questions of fact as to the causation element, the court held that Plaintiff established a *prima facie* retaliation case and therefore the first prong of the qualified immunity analysis. As to the second prong of the analysis (whether a right was clearly established), the

court upheld the district court's rejection of the defendants' claim that reasonable officials could have believed Plaintiff's speech was not protected because of his office.

One dissent found the City's interest in promoting the department's efficiency as paramount to Plaintiff's for purposes of the *Pickering* balancing test, given Plaintiff's position as a captain, and that Plaintiff had other avenues to express his concerns which would have minimized disruption of department operations.

7.10 *Boulton v. Swanson*, 795 F.3d 526 (6th Cir. July 29, 2015)

Plaintiff, a sergeant in the Genesee County Sheriff's Office, expressed concerns about inadequate training of coworkers and others; and, claimed that the Undersheriff, when testifying in a union contract arbitration, had misrepresented the degree of employee training. Afterwards he was ordered to wear his uniform to subsequent arbitrations. When he failed to do so, Plaintiff was investigated for failing to follow a direct order. The investigation was later broadened to encompass complaints made against Plaintiff by several subordinates and he was forbidden to learn about the nature of the investigation. He was then suspended without pay and demoted for creating a hostile and unprofessional environment, making derogatory and sexist comments to female detainees, and violating various department work rules and regulations including one prohibiting public statement criticizing the Sheriff's office. Plaintiff brought a 1st Amendment retaliation claim claiming he was suspended and demoted for criticizing the Sheriff's office. The district court granted summary judgment to the County and dismissed the complaint.

The 6th Circuit determined that the district court erred in holding that Plaintiff's statements were not entitled to protection because he made them during a union arbitration, holding that an employee's job duties do not include acting in the capacity of a union member, leader, or official, and therefore that the *Garcetti* exception does not apply here. It also held that Plaintiff's criticisms of the Undersheriff's statements concerning officer training did in fact address a matter of public concern, because the issue of such training implicated several economic issues in the context of union negotiations, including increased salary, and training in the use of force is an important concern under state law. As to the causation element, however, the court found that Plaintiff failed to adequately tie any constitutional violation or county policy. In doing so it noted that because Plaintiff pled his claims only against the County, he must prove the county itself was to blame, not its individual officials. It also held that Plaintiff cannot bring an as-applied challenge to the policy.

7.11 *Anzaldua v. Northeast Ambulance & Fire Prot. Dist.*, 793 F.3d 822 (8th Cir. July 10, 2015)

Plaintiff was serving a 1-year probationary period as a paramedic and firefighter for the Northeast Ambulance and Fire Protection District (the District). Before the end of probation, the Chief issued him a reprimand for neglect of equipment and property after the District found a hole in the interior of an ambulance he worked in. Plaintiff denied responsibility and disagreed with the disciplinary action, but her probationary period was extended by 6 months for misconduct and she was given a warning. The Chief later found out that an email was sent from Anzaldua's personal email account to a university professor, notifying him of "major issues with the EMS side of operations," including that "not everyone in this department is operating under

the same rules." The professor provided medical oversight for the District but was not employed by it or within its chain of command. Plaintiff was put under investigation. Plaintiff claimed he failed to respond to this inquiry because he never received the Chief's email. Later at a disciplinary hearing, the District Board found that Plaintiff's failure to respond to the Chief constituted an unacceptable failure to respond to a directive issued by a chief officer, and suspended him. Another email outlining various concerns about the department was discovered to have been sent to a reporter, which, after circulating within the department, shocked and angered many employees. The Board, believing it was from Plaintiff, ordered another hearing and later terminated Plaintiff for causing disruption within the department. Plaintiff filed suit against the District and numerous officials for retaliation in violation of the 1st Amendment. The district court granted the defendants' motion for summary judgment to dismiss Plaintiff's complaint, finding the defendants were entitled to qualified immunity under the *Pickering* balancing test.

The 8th Circuit affirmed, holding that the defendants are entitled to qualified immunity applying the *Pickering* balancing factors. Before applying the *Pickering* test the court noted its doubts as to whether Plaintiff's email was primarily motivated by public concern, especially considering it was sent just days after his suspension and that it singled out a superior with whom he had an already strained relationship. It then held that Plaintiff failed to show that his interests as a citizen commenting on matters of alleged public concern outweighs the interest of promoting efficient operations within the department (where, as a fire department, regulating speech is held in higher importance), given evidence that Plaintiff's email caused actual instances of disruption among firefighters when harmony among coworkers is necessary to protect the public. In doing so, the court found that the public interest in Plaintiff's statements was minimal, given various considerations mitigating the concerns expressed in his email. However, the court reversed the district court's denial of Plaintiff's claim under the Missouri Computer Tampering Act (MCTA), finding that he sufficiently alleged that some of the defendants knowingly and without authorization (or without reasonable grounds to believe they had such authorization) took and disclosed emails which they believed had been obtained in violation of the MCTA.

7.12 *Delano v. City of Buffalo,* 626 Fed.Appx. 23 (2d Cir. Dec., 17, 2015)

Plaintiff, a former City of Buffalo police officer, was suspended after speaking to the media about a murder investigation. He brought an action against the City and police department officials, alleging that his 1st Amendment rights were violated because his suspension was in retaliation for his speech. The district court's granted summary judgment to the City and dismissed Plaintiff's claims.

The 2nd Circuit affirmed. Finding that Plaintiff's speech was protected because he was speaking as a citizen on a matter of public concern, it stated that the decisive question is whether the City had an adequate justification for treating Plaintiff differently from any other member of the general public based on the government's needs as an employer. It held that for such justification the City's adverse employment action can be upheld, the City must show that the employee's activity is so disruptive to its internal operations as to outweigh the value of the speech. The court then determined that it was reasonable for the City to predict that Plaintiff's speech would be disruptive, given his violation of direct orders and other rules and regulations.

It also found that while the value of Plaintiff's speech is admittedly strong, given that he spoke out about what he perceived as injustice in the investigation off what may have been the murder of a young girl, it is outweighed by the City's interest of efficient provision of public services.

8. Due Process

8.1 *McGowan v. City of Asotin*, 193 Wash. App. 1052 (2016)

Michael John McGowan, Jr. sued the City for violation of his civil service rights, breach of contract, and wrongful discharge. McGowan was hired as a police officer in August 2008. In July 2010, the City issued Mr. McGowan a written disciplinary warning for insubordination based on his unwillingness to conduct a driving under the influence arrest. The next month, the City issued McGowan a final insubordination warning based on his performance and failure to attend scheduled training. McGowan was terminated on October 19, 2010. McGowan claims that the City denied him due process by not establishing a civil service commission to review the alleged incidents which ultimately led to his termination. The city claims that it complied with the law by establishing such a commission after hiring McGowan (when the city had three police officers), and lawfully dismantled it when the force was reduced to two.

The court explained that tenured, full time police officers covered by Chapter 41.12 RCW have a property interest in continued employment, and that the due process clause of the United States Constitution requires notice and an opportunity to be heard prior to any governmental deprivation of a property interest. The issue in the case is whether the civil service law applied to McGowan. The court agreed with the City's interpretation of Chapter 41.12 RCW; that civil service rules are not required if a city's police force is less than three persons. The court concluded that the law did not apply to McGowan, and dismissed this claim. Accordingly, the court also dismissed McGowan's breach of contract and wrongful discharge claims. The court refused to grant the City's request for sanctions against McGowan for a frivolous appeal.

8.2 *Gantert v. City of Rochester*, 135 A.3d 112 (N.H. Supreme Court Mar. 18, 2016)

Plaintiff, a police officer, sued the City of Rochester for allegedly violating his due process rights by placing him on the "Laurie List" without a hearing. The list identified him as having credibility issues, and would admittedly cause the police chief not to hire Plaintiff. Plaintiff's placement on the list resulted from his submitting a Lethality Assessment Protocol form (LAP) for purposes of booking an individual arrested for domestic violence. Plaintiff's LAP was materially different than the arresting officer's LAP, since the videotaped interview did not present the full scope of information upon which the arresting officer's LAP was based. This discrepancy spurred an internal investigation, a hearing, and a final decision of misconduct (to which Plaintiff admitted), and ultimately a recommendation for Plaintiff's termination. An arbitrator found the City had just cause for disciplinary action, but that termination was too severe. Plaintiff brought suit challenging his placement on the Laurie List, and a lower court granted summary judgment for the City.

The New Hampshire Supreme Court affirmed, finding that Plaintiff failed to support his claim with respect to the second prong of a due process claim: that because of the lack of a full and fair opportunity to be heard, the City's procedure creates a great risk of erroneous deprivation of his interest of continued employment as a police officer. In doing so the Court noted that Plaintiff had multiple opportunities to be heard, and that procedures existed for removing him from the list if grounds for placement proved to be baseless. It found that, though an additional procedure that Plaintiff claimed was necessary may be more in-depth, it is not clear it would add significantly to the accuracy of the current procedure's outcomes. In considering the third due process prong, the Court held that the City has a great interest in placing officers like Plaintiff on the Laurie List—indeed, an interest of constitutional magnitude, given its implications on possible exculpatory information with regards to criminal defendants. In weighing these considerations, the Court ultimately determined that adequate due process was provided. It also held that Plaintiff has no grounds to argue for removal from the list based on some specific post-placement mechanism, finding that the placement is justified because it is consistent with notions of fairness.

8.3 *Horton v. City of Macon*, 2016 WL 589874, (M.D. Ga. Feb. 11, 2015) (slip opinion)

Plaintiff was terminated as a City of Macon police officer after he was accused of exposing himself to a stylist and arrested for public indecency. Plaintiff admitted his arrest but denied exposing himself. A hearing officer conducted a hearing on Plaintiff's termination and found him not guilty of violating Department rules and recommended suspension without pay. The City appealed to the Mayor, who reversed, finding substantial evidence of misconduct. Plaintiff appealed, claiming he was denied procedural due process. The City argued Plaintiff cannot establish his claim because he received constitutionally adequate process as a matter of law.

The court agreed with the City and held it was entitled to summary judgment. It found that Plaintiff received adequate notice and a meaningful hearing, contrary to his contentions that only had the opportunity to dispute a proceeding against him which was solely based on his being arrested, and that there was sufficient evidence that he was in fact guilty of the alleged offense for which he was arrested. Furthermore, the court agreed with the City that the Mayor's decision was based on the same issues and considerations assessed by the hearing officer, rejecting Plaintiff's contention that the Mayor's consideration of the sufficiency of evidence was an entirely new reason.

8.4 *Homoky v. Ogden*, 816 F.3d 448 (7th Cir., Feb. 24, 2016)

The Hobart Police Department placed Plaintiff, a police officer, under internal investigation for various complaints of wrongdoing, including improper conduct at a traffic stop. Plaintiff agreed to submit to a voice stress test after being told the process was administrative (not criminal), and that he would be afforded the protection of the *Garrity* Rule (incriminating answers given during an examination of a public employee during an internal investigation of official conduct cannot be used in any subsequent criminal proceeding). However, he ultimately did not take the test after refusing to sign a release form stating that he was submitting to it voluntarily. Thereafter, the Department commenced termination proceedings against Plaintiff

for insubordination. After placing Plaintiff on unpaid (then paid) leave, during which he was assigned to such duties as scrubbing toilets, the Department dropped its insubordination charge against him. Plaintiff then filed suit, claiming that the Department's attempts to force him to sign the release were attempts to compel him to waive his privilege against self-incrimination and remove his *Garrity* Rule protection, and that they constituted coercive action in violation of his 5th and 14th Amendment rights. The district court granted summary judgment in favor of the Department, and Plaintiff appealed.

The 7th Circuit upheld the summary judgment as to the 14th Amendment's prohibition against the use of coerced statements because Plaintiff never took the voice stress test, and therefore produced no coerced statements that the government might use against him in a subsequent criminal proceeding. The court also upheld the summary judgment as to the 5th Amendment's general prohibition of a state actor from compelling a person to testify if the testimony would incriminate the person, because application of the *Garrity* Rule allows the government to plainly insist that employees either answer questions under oath about the performance of their job (including via a voice stress test) or suffer job loss. The court found that Plaintiff was only ordered to cooperate with the investigation and take the voice stress test, not that he was compelled to waive his 5th amendment right. It noted that, had the Department failed to tell Plaintiff that the *Garrity* Rule would apply, the practice would have been unconstitutional.

8.5 *Ray v. Miss. Dep't of Pub. Safety*, 2015 BL 260551 Miss., No. 2014-CT-00972-SCT (Aug. 13, 2015)

The Mississippi Department of Public Safety determined that Plaintiff, a former trooper, had written false tickets on 4 occasions and had made a DUI arrest without wearing his Class A uniform. He was charged for record falsification and insubordination. During his pre-termination hearing before the Performance Review Board, Plaintiff denied the falsification counts. The Board determined those charges were well founded, resulting in Plaintiff's termination. Plaintiff appealed to the Employee Appeals Board (EAB), and after conducting a hearing involving extensive testimony, an EAB hearing officer issued an order affirming Plaintiff's termination. Plaintiff was then granted review by the full EAB, which upheld the hearing officer's decision. Plaintiff appealed to court, which upheld the EAB's decision. The Court of Appeals, however, agreed with Plaintiff that the EAB abused its discretion by considering evidence outside the charges against him (*i.e.*, the 4 particular instances of writing false tickets) in violation of his due process rights.

The Mississippi Supreme Court reversed the lower court for erroneously reweighing evidence and reinstated the EAB's finding upholding Plaintiff's termination. The Court held that Plaintiff's hearings satisfied due process. In doing so it found the scope of evidence considered by the EAB was appropriate and within the EAB's discretion. Recognizing that an agency's construction of its own rules and regulations are granted great deference, the Court then held that the EAB's consideration of Plaintiff's own written statement admitting that he'd written far more than 4 invalid tickets in order to increase his ticket activity was consistent with the EAB's rule that it may consider factors which are relevant to the allegations contained in the final disciplinary notice. The Court also found that the EAB's decision was supported by substantial

evidence, especially in light of its proper consideration of Plaintiff's own admission as to writing invalid tickets.

8.6 *Schoen v. Bd. of Fire & Police Comm'rs of City of Milwaukee,* 2015 WI App 95, 366 Wis. 2d 279, 873 N.W.2d 232

Richard Schoen, a police officer with the City of Milwaukee, was discharged for excessive use of force on women arrested for disorderly conduct. He was suspended for 60 days by the Board of Fire and Police Commissioners through its quasi-judicial process. The Board determined, however, that a mistake of law was committed in reaching the 60-day suspension, and that termination was actually the proper course of action. It provided notice to the officer and a second hearing, after which it discharged the officer.

The Wisconsin Court of Appeals upheld the lower court's ruling that when a quasi-judicial agency such as the Board of Fire and Police Commissioner's reaches a decision based on a mistaken standard of law, the agency has inherent authority to reconsider the decision and reach a decision that properly applies the law. The officer's due-process rights were not violated because the board acted to correct the error of law, the officer had notice and a hearing on the charge, and his counsel was present at the second hearing where counsel had an opportunity to challenge the board's actions.

9. Just Cause for Discipline, Demotion, Termination, and Other Adverse Employment Actions

9.1 *City of Yorkville,* Decision of Arbitrator, FMCS Case. No. 151119/00536-A (2015)

The Grievant joined the Yorkville Police Department in 2007 as a patrol officer. He was generally considered a good employee, aside from his weapons proficiency, where he was probably the least proficient shooter in the department. It took him anywhere from 2-5 tries each year to qualify for weapons proficiency. The Grievant's supervisor reached out to let him know he needed to improve, and that the supervisor was available as a resource should the Grievant want to work with him. There is no evidence that the Grievant took the Supervisor up on that offer. In 2011, it took the Grievant five tries to qualify, after which the chain of command approved a 1-day suspension, which the Grievant never actually served. In 2013, the Grievant managed to meet proficiency on his first try (after qualifying in a separate, controlled training facility because he was injured during the regular qualifications round), but again in 2014 he was only able to qualify on his third try. Following the 2014 qualifications attempt, the Grievant was given a 3 day suspension, which the Grievant opposed.

At arbitration, the Police Department maintained that the Grievant was woefully below the standards, particularly in comparison to the rest of the department. And, that the three-day suspension was not overly onerous and was appropriate in light of progressive disciplinary actions. The Union, in defense of the Grievant, argued the Department was making post-hoc policy, arguing limitations on attempts to qualify are not uniformly applied, and a three-day suspension was an unwarranted leap in disciplinary action. The Arbitrator sided with the Department. The Department tried numerous times to assist the Grievant, offering individual

opportunities to assist him with his skill-building, none of which the Grievant ever took advantage of. And, even though the Union's post-hoc argument was strong, the Arbitrator felt that the weight of the evidence of the Grievant's past failures was too strong, and the Department's discretion in holding the Grievant to specific performance standards was not unreasonable. Ultimately, the Grievant made effectively zero progressive in over seven years of weapons training, which warranted the Department's disciplinary actions.

9.2 *In re City of Longwood and Firefighters, Local 3163*, Decision of Arbitrator, March 15, 2016

The City of Longwood Fire Department hired B in January of 2006. B became a paramedic for the Department in 2007. On August 29, 2013, B and his partner were dispatched to a local high school because a 14-year old freshman female was reporting that she had a headache. Apparently, the student had had an altercation with her mother the night before, during which the mother grabbed her hair, shoved her into a sliding glass door and a deep freezer, and choked her. The school security officer told the student that she had been the victim of child abuse. The security officer contacted Child Protective Services to report the incident.

The parties disputed the following events. After arriving on the scene and conducting a preliminary assessment, B and his partner put the student on a stretcher and placed the stretcher in the ambulance. B claims that during the ride to the hospital, the student told him that the incident with her mother was not child abuse. The student, however, claims that B was trying to get her to change her story. After arriving at the hospital, B allegedly told the on-call doctor that the student was suffering from a "little headache." The school security officer arrived shortly after B and the student insisted to the doctor that this was an incident of child abuse. After custody of the student had been transferred to the hospital, the security officer confronted B, explaining to B that she did not like what he had said to the doctor. The security officer filed a formal complaint against B with the Fire Chief, which ultimately led to B's termination. In the investigation of the complaint, four charges were sustained against B, including that he had behaved unprofessionally and aggressively toward the security officer.

The City argued that it had just cause to terminate B based on his serious misconduct related to his treatment of the student and the school security officer. The Union argued that the charges against B were exaggerated and that the investigation into the charges was tainted. The Arbitrator found that although there was evidence that B had raised his voice to the security officer and had most likely had a conversation with the student in which he expressed his opinion that she had not been the victim of child abuse, that these events were not just cause for termination. Rather, the Arbitrator found that the events amounted to two professionals, both of whom had a responsibility to determine and report child abuse, attempting to reach this determination through different methods. The Arbitrator found that it was not surprising that the two professionals might use harsh words during a heated discussion about an important topic.

9.3 *Cty. of Erie v. Am. Fed'n of State*, 138 A.3d 715 (Pa. Commw. Ct. 2016)

Thomas Flores, Jr. has been a deputy sheriff with the Department since March 2009. In June 2014, the Sheriff assigned another deputy (whose position had been eliminated) to Flores's current position, due to the other deputy's seniority. Flores then tried to use his seniority to

bump another deputy, but the Sheriff denied Flores this option. Flores was assigned to front-door security at the courthouse, which resulted in a decrease in pay and the loss of on-call and overtime pay. The Union claims that Flores was demoted arbitrarily and without just cause. The City argues that despite an apparently conflicting provision of the City's Collective Bargaining Agreement with the Union, the Sheriff had ultimate discretion to assign deputies and grant partial bumping rights.

The court found that because Flores's demotion was not based on his job performance, that he had been arbitrarily demoted, and that the Sheriff did not have the discretion or authority to overrule the CBA provision prohibiting such arbitrary demotions.

9.4 *Morris v. City of Minden*, 50,406 (La. App. 2 Cir. 3/2/16), 189 So. 3d 487, *reh'g denied* (Apr. 7, 2016)

Plaintiff Timothy Morris had been employed by the Minden Police Department as a police officer for more than 18 years when he was terminated in May of 2013 for his mishandling of a telephone call. On April 8, 2013, a dispatcher routed a call to Morris. The call was from a mother who could not locate her children. The mother explained to Morris that her children were last seen walking in the direction of their grandparents' house after getting off the school bus. After initial conversations with the mother, the mother informed Morris that she had called a local Sheriff's office, and that they had arrived "on the scene." At that point, Morris was satisfied that the mother received proper assistance. After his shift ended, Morris drove his personal vehicle to the area where the children were last seen, and assisted in the search. The children were found playing in a backyard near their grandparents' house.

Ten days later, Chief Steve Cropper met with Morris and asserted that his handling of the phone call was in violation of the Minden Police Code of Conduct. On May 6, 2013, Chief Cropper terminated Morris.

Morris appealed his dismissal to the Minden Fire and Police Civil Service Board, who unanimously affirmed Morris's dismissal. Morris then appealed to the District Court, alleging that his dismissal was not based on a proper investigation, and that the appeals process was biased. The trial court found that the Board failed to properly investigate Morris's dismissal, and found that although some disciplinary action against Morris was warranted, that Morris should not have been terminated based on his mishandling of the mother's phone call. The Court of Appeals found it significant that there were no written policies or procedures in place regarding how to handle a call about missing children, and that an officer such as Morris, who had over seventeen years of experience, was entitled to rely on his experience and training. The court found that Morris failed in not dispatching an officer to assist the mother, but that this failure was not sufficient for termination. The court found that there was no rational basis between Morris's acts and the punishment imposed. The court imposed a 90-day suspension without pay.

9.5 *In re City of Quincy and Teamsters Local Union No. 760*, Decision of Arbitrator, January 19, 2016

M worked as a truck driver for the City's street department. At the same time, M also ran a private business in which he provided commercial driving license (CDL) instruction. M had

been disciplined several times, including multiple written reprimands and suspensions, for fielding telephone calls related to his private business while on duty for the City. Several of these disciplinary actions involved M driving his vehicle unsafely and damaging property as a result. M did not improve his behavior, but rather continued to use his cell phone while operating City equipment. After being seen using his cell phone during work on March 26, 2015, the City met with M to discuss his behavior. The City terminated M on April 15, 2015.

The City argued that it conducted a thorough investigation into M's behavior, and had just cause to terminate him. The Union argued that there was not sufficient evidence that M had been using his cell phone at work on March 26, and that the witnesses against M had poor relationships with M. The Union asks that M be reinstated. Based on his disciplinary record and reports by other employees regarding the March 26 incident, the Arbitrator determined that the City had just cause to terminate M.

9.6 *Mallett v. Cleveland Civ. Serv. Comm.*, 2015-Ohio-5140, 53 N.E.3d 975, *appeal not allowed*, 2016-Ohio-2807, 145 Ohio St. 3d 1458, 49 N.E.3d 321

Henry Mallet had been employed with the City of Cleveland for almost six years. In May 2013, the City terminated his employment for "neglect of duty," "conduct unbecoming an employee in the public service," and "for other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance, or nonfeasance in office." Mallett appealed his termination to the Cleveland Civil Service Commission, which upheld the termination.

The incident that led to Mallett's termination occurred on May 10, 2013. Mallett was called, along with a crew, to the site of a water main break. The break, along with heavy rainfall, had caused debris and mud to wash into the road, blocking three lanes of traffic. Mallett's foreman instructed the crew to move the debris into a pile that would be picked up later. Mallett apparently dumped some of the debris in a nearby creek, but stopped after he was instructed that he could not do that. Mallett testified that he did this because of the nature of the emergency at hand, and that he believed that his action would help clear the road. An incident report was created after the environmental programs manager for the City's water department determined that the debris was a pollutant.

The court found that the trial court abused its discretion in upholding Mallett's termination. The court found that in his six years with the City, Mallett had never been disciplined. The court also found that the situation caused by the water main break was indeed an emergency, and examined Mallett's behavior with that fact in mind. The court found that although Mallett may not have exercised the best judgment, that his actions did not rise to "neglect of duty" or the other charges asserted by the City.

9.7 *In re U.S. Department of Homeland Security Federal Protective Service and A.F.G.E. Local 918*, Decision of Arbitrator, August 9, 2015

The Grievant was employed as a Canine Inspector, Grade GS-12 prior to his termination. On January 11, 2013, the Grievant's service rifle, shotgun and ammunition were stolen from his government issued police vehicle. The Grievant initially reported that he had placed the

weapons and ammunition in the vehicle the morning they were stolen, but then changed his story, claiming that he had left the weapons and ammunition in the vehicle overnight. The Grievant explained that he falsified his initial report because of stress. The Union opposed the Grievant's termination, claiming that the termination was not issued for just cause.

The Agency argued that the Grievant's actions were egregious and involved lack of candor, and negligence. The Agency also argued that the misconduct affected the Grievant's job performance, and that the Agency was thus no longer able to entrust the Grievant with his employment responsibilities. The Union argued that because the Grievant had never previously been disciplined in his 18-year career with the Agency, that the Agency's termination of the Grievant based on one careless mistake was excessive. The Union argued that the Grievant misinformed the Agency as to when he placed the weapons in the car because he was experiencing "victim stages of recovery."

The Arbitrator found that the Grievant's termination was commensurate with his misconduct, and denied the grievance.

9.8 *City of Albany v. Pait,* 335 Ga. App. 215, 780 S.E.2d 103 (2015), *reconsideration denied* (Dec. 9, 2015), *cert. denied* (Apr. 26, 2016)

The City of Albany terminated firefighter Joseph Pait after Pait pleaded guilty to two counts of theft. Pait sought review of the termination decision in the Superior Court, and the Superior Court reversed Pait's termination and order that he be reinstated. The Superior Court found that the City's own policies required there be a conviction in order to justify termination, or destruction of public property. The Superior Court found that there were no other grounds cited by the City to justify terminating Pait. The City appealed. The Court of Appeals reversed the Superior Court's ruling, finding that Pait's misconduct was sufficient grounds to justify termination.

9.9 *In re Port of Portland and International Association of Firefighters, Local 43,* Decision of Arbitrator, October 23, 2015

The Grievant was employed as a firefighter at the Port of Portland since 2006. In October, 2014, he was among a group of employees sent to Texas for required FAA training. "AB" was also part of the group sent to Texas for training. Upon her return, AB filed a complaint with the Port, alleging that the Grievant had sexually assaulted her during non-duty hours. During an investigation into the incident, the Grievant was informed that any answers to questions asked as part of the Port's investigation would not be used against him in any potential criminal proceeding. Despite this, the Grievant refused to answer any such questions, asserting his Fifth Amendment right against self-incrimination. Based on the Grievant's refusal to answer questions, the investigator determined that the Grievant was insubordinate, and that disciplinary action was warranted. The Port then suspended the Grievant without pay for his refusal to answer questions during the investigation. The Port sent the Grievant a letter stating that unless he provided new information, he would be suspended for one year. The Grievant did not provide any new information.

The Union filed a grievance with the Port, arguing that the Grievant was suspended merely for asserting his Fifth Amendment rights on the advice of counsel. The Port denied the grievance, explaining that the Port's assurance that his answers would not be used in a criminal prosecution abrogated the need for the Grievant to assert his Fifth Amendment rights. The Port and the Union now dispute whether the Port had just cause to suspend the Grievant. Specifically, the Union argues that because the alleged misconduct took place during off-duty hours, the Port's investigation was outside the scope of the employment relationship.

The Arbitrator found that because the alleged misconduct would not have taken place but for the training assignment, that the Port was within its rights to investigate the incident. The Arbitrator also found that the Port had acted appropriately in suspending the Grievant, as its offered protections concerning the Grievant's answers to investigatory questions were reasonable, and the Grievant's refusal to answer such questions was not. Thus, the Arbitrator concluded that the Port had just cause to suspend the Grievant.

9.10 *In re City of Hutchinson, Kanas and the Fraternal Order of Police, Lodge No. 7,* Decision of Arbitrator, October 27, 2014

On December 9, 2013, police officer M was terminated from his employment with the City. On December 2, 2013, a female reported that she had been arrested for DUI by another officer, and that the other officer had proceeded to contact the female in an unwanted manner. The arresting officer sent several text messages to Officer M and others in which he claimed that the female had performed oral sex on him. The arresting officer later explained to Officer M and others that he was just kidding about receiving oral sex. When M was asked whether he had received such text messages, M answered that he had not.

A memorandum sent to M explained that he was being terminated because his lack of honesty and credibility prevented him from being used as a witness in a criminal prosecution. The Union filed a grievance on behalf of M, arguing that M was not terminated for just cause.

The Arbitrator first found that there was no evidence to suggest that M believed the arresting officer to be serious about receiving oral sex from an arrestee, and that M's decision not to inform his superiors was not misconduct. The Arbitrator then found that although M lied, that the notion that once a person lies they are untrustworthy for the foreseeable feature is unwarranted, and the Department had not previously conducted itself in accordance with this notion.

The Arbitrator then considered whether the fact that M lied during the investigation of the arresting officer's behavior could be used to impeach him in a criminal prosecution. The Arbitrator determined that under Kansas law, M's behavior during the investigation could not be used to impeach him. The Arbitrator concluded that the City did not have just cause for terminating M, as termination was disproportionate to M's misconduct, and contrary to the City's previous actions in related situations.

9.11 *In re Polk County, Oregon and Polk County Deputy Sheriffs' Association,* Decision of Arbitrator, July 29, 2015

The Grievant was employed as a sheriff's deputy with Polk County from 1998 until he was terminated on December 5, 2014. In February of 2014, Grievant reported that he had injured himself while on duty. Grievant claimed that he had slipped on some ice while walking around his patrol vehicle, and that he had injured his right shoulder, neck, elbow, and ribs. Grievant filed a worker's compensation claim for his injuries. Following his injury, Grievant was examined by various doctors who limited him to light duty, and instructed him not to use his injured right arm. In correspondence with his lieutenant, Grievant reported severe pain and various other "bad news." Grievant informed his lieutenant that it was unknown when he would be able to return to work.

Meanwhile, the County's worker's compensation carrier performed video surveillance of Grievant, which revealed him performing substantial manual labor around his home using his injured arm. This was in contrast to reports by Grievant to his lieutenant that he had been requiring his children to perform yard work for him.

The County subsequently terminated Grievant for his dishonest behavior. The County argued that once a police officer's credibility is undermined, his career ends. The Association argued that the City has not adequately shown any single incident of dishonesty on Grievant's part, and that Grievant's termination was not based on just cause.

The Arbitrator determined that the Grievant had engaged in dishonest behavior. The Arbitrator based this determination on the surveillance video, testimony by a doctor to the effect that the surveillance video indicated that Grievant's reports of injury were not credible, and Grievant's own inconsistent statements. The Arbitrator denied the grievance.

9.12 *In re United States Customs and Border Protection and National Treasury Employees Union,* Decision of Arbitrator, September 18, 2015

Grievant's career has involved time spent in the Armed Forces, time as a Border Patrol Officer, and time with Customs and Border Protection, where he was hired in 2012. The events leading to Grievant's suspension occurred in 2010, when he was a Border Patrol Officer. In 2010, Grievant was twice stopped for speeding. On the first occasion, Grievant explained to the officer that he was speeding because he was coming from a meeting with an informant. In the second instance, Grievant apparently asked the Officer that stopped him not to issue him a ticket or even a warning. The conversation between Grievant and the Officer indicated that Grievant was attempting to use his position as a Border Patrol Officer to influence the Officer's decision. Based on this incident, Border Patrol commenced an internal affairs investigation into Grievant's conduct.

During the internal affairs investigation, "O," the informant Grievant referred to during his first speeding stop, was asked to appear and be interviewed. In fact, O and Grievant were engaged in a sexual relationship. Grievant was worried that O would use her interview with the internal affairs investigator to "get back" at Grievant, as she was apparently upset that Grievant was attempting to reconcile with his wife, which would have ended Grievant's relationship with

O. Grievant texted O several times in an apparent attempt to convince her not to agree to be interviewed by the internal affairs investigator.

A third incident involved Grievant being involved in a sexual relationship with a female that was working with a drug cartel. The internal affairs investigator claimed that Grievant continued the relationship despite his knowledge that the female was involved with a cartel.

After completing the internal affairs investigation, the investigator referred his report to the United States Attorney's office, which proceeded to have Grievant indicted. Grievant was eventually acquitted of the charges. Despite this, the Agency Review Board recommended that Grievant be removed from his job. Grievant was subsequently suspended for 45 days. The Union argues that because the events leading to the suspension occurred four to five years ago, that the suspension is inappropriate.

The Arbitrator found that although nothing required the Agency to implement discipline in any particular amount of time, the discipline imposed was not proportional to the misconduct. The Arbitrator reduced the suspension to 10 days.

9.13 *In re Wright State University and Fraternal Order of Police, Ohio Labor Council, Inc.*, Decision of Arbitrator, August 3, 2015

In May of 2012, The University's Lieutenant Cox issued an email to all subordinates instructing them not to bring any pets to work unless specific permission was given by the Chief of Police. Despite this, by August 2013, an administrative employee was known to take her dog to work almost every day. Further, the Chief issued an email advertising for an administrative position, and cited certain benefits, including the ability to bring pets to work. Sometime in October, after acquiring a puppy, the Grievant, a police sergeant with the University's Police Force, was asked to work overtime. The Grievant could not find anyone to take care of his puppy, so he made arrangements with the Motor Pool Manager to leave his puppy in the Motor Pool area. When it got too cold outside for the puppy, the Grievant brought his puppy into the office. The Grievant was then suspended for failing to comply with Lieutenant Cox's email.

The Union contended that Cox's email was not an enforceable policy, procedure, rule, or regulation. However, the Arbitrator found that the email demanded compliance, and that the directive not to bring pets into the work place was reasonable. The Arbitrator further found that the Chief's personal policy of allowing pets did not undermine the Lieutenant's email instructions. The Arbitrator denied the grievance, and affirmed the suspension.

9.14 *In re City of Miami and AFSCME*, Decision of Arbitrator, 135 LA 1105 (Sep. 16, 2015)

The City of Miami issued Grievant a termination notice for being absent without leave for 3 consecutive work days and therefore effectively abandoning her job. Afterwards, the City made an investigation which led to its conclusion that Grievant had engaged in an act of violence in the work place (threatening a co-worker with a bat) which resulted in her arrest and incarceration, and therefore violated a City zero tolerance policy prohibiting violence in the workplace under penalty of discharge. Grievant was then issued another termination notice for violence in the workplace.

The arbitrator determined that Grievant cannot be properly considered to have abandoned her job. Noting that the labor agreement provides that "abandonment of position" only occurs when an employee is absent for 3 consecutive days without notification of a valid reason, and the employee has no legitimate reason for failing to give such notice, the arbitrator found that no such abandonment can be established since Grievant in fact gave the requisite notice within the 3 days. Furthermore, the arbitrator determined that the City may not establish abandonment despite having received notice by claiming that Grievant's incarceration is not a "valid" reason for absence, finding that giving the City discretion to make such judgments would undermine the principles of good faith and fair dealing. The arbitrator also determined that Grievant's reason was at any rate valid, since she was arrested by the City, incarcerated, and lacked the funds to post bond.

The arbitrator then determined that, since Grievant did not abandon her job, she has the right to challenge her termination under the just cause provision of the agreement. In reviewing the issue of just cause, the arbitrator determined that, while Grievant's brandishing a baseball bat while threatening her coworker indeed violated the City's zero tolerance policy, and that she was on notice of such policy, such violation did not warrant termination. This was determined in light of various mitigating factors: that the coworker has bullied people, particularly Grievant, for a long time; that management was aware of but failed to address the coworker's bullying; and that the coworker initiated the confrontation with Grievant; the incident occurred off-duty and off the employer's premises, lasting for less than 1 minute; Grievant was in her personal vehicle and not in uniform, and remained 7 car-lengths away while only holding the bat at her side; and that Grievant was a good worker and a valuable employee for 14 years.

9.15 *Goding v. Civil Serv. Comm'n of King Cty.*, 192 Wash. App. 270, 366 P.3d 1 (2015)

Wayne Goding, a commissioned deputy in King County employed in the warrants unit of the sheriff's office, received severe sanctions from the King County Sheriff for work-related misconduct. Wayne was in charge of transporting inmates, which sometimes involved shuttling inmates to and from the jail and a hospital. Wayne had apparently been discourteous and unprofessional in his engagements with jail staff, disobeying jail policies in the processing of inmates, including refusing to handcuff certain inmates during processing. This behavior caused jail staff to believe they could not trust Wayne to operate independently inside of the jail, and they subsequently limited his access within the jail. Wayne's insubordination and failure to follow orders resulted in the imposition of sanctions, included a one-day suspension without pay and reassignment to a less desirable detail. The Civil Service Commission upheld the sanctions.

The Washington Court of Appeals upheld the sanctions, finding that the commission did not act arbitrarily or capriciously in upholding the sheriff's actions, reversing the decision of the superior court to strike down the sanctions. The Court concluded that the discipline imposed by the Sheriff was in good faith and for cause, giving due consideration to the evidence before him. Of particular note was Wayne's sustained insubordination, involving multiple reports of insubordination and refusal to follow orders. The Sheriff responded appropriately with progressive disciplinary actions, building upon previous warnings and actual discipline of Wayne.

9.16 *Duchesne v. Hillsborough Cty. Attorney*, 167 N.H. 774, 119 A.3d 188 (2015)

Three police officers from the Manchester Police Department were involved in an incident at a bar in Manchester. The incident was widely reported in the local news. After the Manchester police chief ordered a criminal and internal investigation, the chief found that the officers had violated several departmental policies, including those prohibiting unnecessary use of force. Each officer was suspended for a period of time. The officers challenged the discipline imposed, as a result of which it was determined by a neutral arbitrator that the alleged use of force was not excessive. Information regarding the underlying incident was removed from the officers' personnel files. The officers then brought action against the county attorney seeking, among other things, the removal of their names from county's list of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie*. The Superior Court of Hillsborough County denied relief and the officers appealed to the New Hampshire Supreme Court.

The Supreme Court of New Hampshire held that the officers were entitled to have their names removed from county's "Laurie list". The court reasoned that evidence that was before thought to be potentially incriminating, but was now determined not to be incriminating, should be treated as such. Correspondingly, the evidence was properly removed from the officers' files and it was, therefore, also appropriate to remove the officers' names from a list associated with potentially incriminating evidence.

9.17 *Victor Celis v. City of Lakewood*, 190 Wash.App. 1038 (Wash. Ct. App. Oct. 20, 015)

Plaintiff, a former police officer, was investigated by the City of Lakewood Police Department for violating the department's code of conduct after other officers claimed he was uncooperative and aggressive; other persons claimed he was violent towards his wife. The inquiry was also based on a previous incident where Plaintiff identified himself as an officer and gave pointers to a private security guard as to how to become an officer. Plaintiff resigned, having been told that he should do so if he wants to avoid being terminated. Plaintiff then sued the City for wrongful discharge based on racial discrimination, claiming that his resignation was not voluntary. The superior court granted summary judgment for the City.

The Court of Appeals, finding that Plaintiff voluntarily resigned, affirmed the decision. Noting that the presumption of voluntary resignation applies even where there is a threat of termination (provided there is good cause for termination), and that it is overcome only where resignation is shown to be submitted under duress brought on by government action, and that Washington is an at-will state where constructive discharge applies only where the termination was made in violation of a recognized public policy, the court determined that Plaintiff failed to meet his burden to rebut such presumption. Plaintiff's argument, based solely on a foggy memory of hearing a couple of racial jokes which supervisors could not confirm, and which even Plaintiff admitted did not lead him to conclude the existence of any racial animus, was found insufficient. Accordingly, finding that Plaintiff's conduct constituted good cause for termination, the court found that Plaintiff resigned voluntarily, thereby waiving his wrongful termination claim.

9.18 *Peterson v. Richfield Civil Serv. Comm'n*, 864 N.W.2d 340 (Minn. 2015)

Richfield Police Officer Greg Peterson was denied a promotion based on the results of a civil service test conducted by the municipal police and fire civil-service commission. Officer Peterson petitioned for writ of certiorari challenging the denial, arguing that the commission violated state law by failing to review "records of efficiency, character, conduct and seniority" as part of the Commission's promotional process. The Court of Appeals affirmed the commission's denial of promotion. The police officer appealed.

The Supreme Court of Minnesota reversed and remanded the case, holding that the civil service commission failed to consider records "kept in the regular course of the administration of civil service," as required by statute. The court concluded that a review of the "records" could not be satisfied solely through candidate interviews, but that a broader review of a candidate's record of performance was required.

10. Drug Testing

10.1 *In re Dep't of Justice and AFGE*, Decision of Arbitrator, 135 LA 185, FMCS Case No. 141107/50944-3 (Aug. 6, 2015)

Grievant, a correctional officer, tested positive for marijuana, a violation of the Standards of Employee Conduct. Grievant accepted responsibility for the act, but cited stressful and marital issues and noted that an executive order providing for a drug-free workplace but which does not mandate a zero tolerance removal for use of an illegal drug but rather calls for an assessment of the circumstances of each situation. Although Grievant's employer, the Federal Bureau of Prisons, claimed that such violation was "egregious," and that it had lost confidence and trust in his ability to perform satisfactorily, it continued him on duty for months after that testing.

The arbitrator found that, during this period, there was no indication that Grievant's performance was anything but exceptional and outstanding. The arbitrator, determining that the agency recognized that Grievant's position was not affected by his illegal drug use, and considering the stressful circumstances of Grievant's situation, concluded that the agency lacked just cause for termination. Accordingly, the arbitrator reduced the disciplinary action to a 30-day suspension.

10.2 *Lewis v. Gov't of the D.C.*, No. CV 15-521 (JEB), 2015 WL 8577626 (D.D.C. Dec. 9, 2015)

Patricia Lewis was a human-resource adviser with the District of Columbia's Office of Chief Medical Examiner. The Office decided to subject all employees to a drug test as a condition of continued employment. Patricia refused to take the test and was fired nine months later. She then sued the District of Columbia with a litany of claims against the drug-testing regime, including violations of her Fourth Amendment right to privacy, the Civil Rights Act, and the ADA.

The claims did not survive D.C.'s summary judgment motion to dismiss for "failure to state a claim upon which relief can be granted." As the U.S. District put it, "As is frequently the

case when counsel toss any conceivable claim into the cauldron and give it a mighty stir, the Complaint here often looks more like a product of Macbeth's witches than a well-crafted legal pleading." The Court grounded its argument in the fact that the Department is given authority to use a variety of means to "provid[e] for the security and protection of evidence and samples in [the Department of Forensic Sciences'] custody." Drug testing was explicitly one of those tools, and thus summary judgment was found appropriate in this case.

11. Promotion Lists/Register Management

11.1 *Philadelphia Firefighters' Union, Local 22, Int'l Ass'n of Firefighters, AFL-CIO ex rel. Gault v. City of Philadelphia,* 119 A.3d 296 (Pa. 2015)

As part of the Civil Service regulations, a promotion list ranks all qualified applicants, in order from most to least qualified. The lists are set to expire after a previously-determined period of time (2 years in this case) and promotions are to be filled accordingly from that list. In this case, vacancies for Fire Chief and Lieutenants became available while a promotion list created in 2011 had not expired, but the list's expiration was fast approaching. The city determined it would not fill these vacancies from the May 2011 list, but would wait until it expired and fill the vacancies with the top candidates in the forthcoming 2013 list.

The Firefighters Union filed a lawsuit in opposition to this decision, arguing that based on the Civil Service rules, the vacancies needed to be filled immediately, and from the current 2011 list. Ruling with the City, the court agreed that vacancies must be filled by the current list, but there is no requirement with regards to the timing of filling vacancies. The court rejected the Union's argument that vacancies must be filled immediately. There is no imperative that the City must exhaust a promotional list before it creates a new list, or that promotions must occur from a particular list before it expires.

12. Permanent Employee Status

12.1 *Ortolano v. Los Angeles Unified Sch. Dist.,* No. B258305, 2016 WL 800699 (Cal. Ct. App. Mar. 1, 2016)

Ralph Ortolano, a captain in the United States Navy Reserve, was employed in the LA Unified School District. He contended he qualified as a "permanent teacher" on the date before the district terminated him and, therefore, that the District violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). He sought a judgment compelling restoration of his employment as a "certificated permanent employee with a full-time assignment." The trial court denied his request.

On appeal, a California Court of Appeals found that the naval reservist was entitled to reversal on his claim that the district violated USERRA when it failed to grant permanent certificated status and ultimately laid him off. The Court agreed that the district was not required by USERRA to credit the reservist with "time in the classroom" during his military absence, but finds that USERRA should not have been subordinated to the state education code. Ralph had attained the status of permanent teacher at the end of the 2009-2010 school year because he had worked for the full 2009-2010 school year and met the 18-hours-per-week threshold. It was,

therefore, improper for the school district to terminate him during the 2011-2012 school year, without affording him the protections prescribed by the Education Code for a permanent teacher.

13. Failure to Train or Supervise

13.1 *Washington-Pope v. City of Philadelphia,* 979 F.Supp.2d 544 (E.D. Pa. Nov. 23, 2015)

Plaintiff, a former police officer at the City of Philadelphia, sought to hold the City liable for her post-traumatic stress disorder, panic attacks, and related injuries rendering her unable to work in law enforcement. Those injuries arose after a fellow officer, who experienced three prior hypoglycemic incidents on the job. The other officer acted erratically and reacted confrontationally when asked if he took his medication, aiming his weapon at Plaintiff's head. Plaintiff alleged the City adopted a policy or custom which put her at risk and failure to supervise or train, arguing that the City should have instituted a policy preventing officers with uncontrolled diabetes from working. The City moved for summary judgment.

The district court denied the City's motion for summary judgment as to Plaintiff's claim that the City had a policy which put her at risk, finding that an issue of material fact existed regarding the existence of municipal policy within the department that operated as a "moving force" behind her injuries. This was despite the fact that the doctor who headed the department's medical services and cleared her partner as being fit for duty did not have authority to dictate the department policy. Given general awareness of the seriousness risks associated with diabetes and the City's awareness of such risks concerning Plaintiff's partner specifically, the court found sufficient evidence that the department was aware of and acted with deliberate indifference to the risk of officers with uncontrolled diabetes, and held that a *failure* to institute a policy preventing such officers from serving would satisfy the requisite policy element for municipal liability. The court also denied summary judgment as to the City's claim that Plaintiff cannot prove her injuries were caused by her partner's erratic behavior.

The court then granted summary judgment as to Plaintiff's alternative claim of liability, which is that the City had a custom of approving diabetics for duty despite the risks they pose, finding that awareness of a single officer's 3 prior episodes is insufficient for establishing a widespread practice as required to prove a departmental custom. It also granted summary judgment as to the failure to supervise or train claim, finding that Plaintiff's argument to that effect was a mere restatement of her other claims.

14. Unions and Collective Bargaining

14.1 *Kitsap Cty. v. Kitsap Cty. Corr. Officers' Guild, Inc.,* 193 Wash. App. 40, 372 P.3d 769 (2016)

After the Kitsap County Sheriff responded to budget cuts by laying off two jail officers, the officers' union demanded to bargain the layoff decision. Kitsap County refused. The County then secured a declaratory judgment that the layoff decision was not a mandatory subject of bargaining. However, that court perceived the Guild's position as a demand to bargain the level of funding allocated to the jail's budget rather than the layoff decision. The Court of Appeals found that when a public sector employer proposes to balance the budget by laying off workers

who are represented by a union, the union must have the opportunity to bargain over whether the cost saving can be achieved by other means.

The court tasked itself with determining whether the decision to lay off the jail officers should be classified as a "personnel matter," and thus a subject of mandatory bargaining, or classified as within the realm of managerial prerogatives, and thus not a subject of mandatory bargaining. The County argued that the decision to balance the budget by laying off personnel was within the managerial prerogative. The court distinguished between a decision involving the overall staffing level of the jail and the specific decision to reduce budget by laying off two jail officers, finding that the latter is a personnel matter, and thus a subject of mandatory bargaining.

The County argued that even if the layoff decision is a subject of mandatory bargaining, the Guild waived such right in the collective bargaining agreement. The court found, however, that no such waiver occurred, as a waiver of a right to bargain must be clear, unmistakable, and knowingly made, which the court found the provision in question was not.

14.2 *City of Austin Firefighters' & Police Officers' Civil Serv. Comm'n v. Stewart,* No. 03-15-00591-CV, 2016 WL 1566772 (Tex. App. Apr. 14, 2016)

William Stewart, an Austin police officer, was discharged on a last-chance agreement with the city. He had violated the Austin Police Department (APD) policies on neglect of duty, use of mobile data computers, and honesty, and was given a last-chance agreement. Under this agreement, William was suspended for sixty days and placed on probation for one year. In addition, the city was entitled under the agreement to suspend William indefinitely without the right to appeal if William committed the same or similar acts. An internal investigation determined that Stewart committed the same or similar acts and termination was appropriate.

The state civil service act provides a process to appeal indefinite suspension or other disciplinary actions. The Texas Court of Appeals found the act was preempted by the last-chance meet-and-confer provision of the labor agreement between the city and the police officer's union. But, the police department was entitled under the labor agreement to refuse to refer Williams' appeal to a hearing examiner, as would normally occur under the state civil service act, because an internal investigation determined that he had committed the same or similar violations again.

14.3 *Hamilton Cty. Educ. Ass'n v. Hamilton Cty. Bd. of Educ.,* 822 F.3d 831 (6th Cir. 2016)

This case relates to alleged union threats against employees who did not join the union; and, alleged employer interference with the union's First Amendment rights to encourage membership. In Tennessee, the Hamilton County School Board had recognized the Hamilton County Education Association (HCEA) as the exclusive union representative of all the Board's professional employees. Tennessee had recently passed a new collective bargaining law (PECCA) making it unlawful for a professional employees organization to "coerce or attempt to intimidate professional employees who choose not to join a professional employee organization." After a meeting of the HCEA, one union representative forwarded a message recounting "horror stories" about the expiration of collective bargaining agreements due to union membership

dropping below a majority. It said this could result in the requirement that teachers attend 40 hours of in-service, work only 10 hours a day, and lose medical coverage upon retirement. The Board responded by writing a letter to the union, claiming that the union's statements could be construed as intimidating. The union filed suit against the Board, claiming that the letter impeded the union's First Amendment rights.

The United States Court of Appeals for the Sixth Circuit found that the Hamilton County School Board did not threaten the union or interfere with its First Amendment rights when it wrote the letter. It found that while the Board's beliefs may or may not have been correct, the letter did not violate the First Amendment because it did not dictate what the union could do. Instead, the Board simply made a request and did not explicitly threaten reprisal against the union's efforts to increase membership.

14.4 *Cronin v. Cent. Valley Sch. Dist.*, 193 Wash. App. 1022 (2016)

Michael Cronin, a tenured school teacher in Spokane, Washington, received high performance evaluations. His employment contract renewed every year unless the school district gave notice of nonrenewal by May 15 before the upcoming school year. In August 2010 he was arrested for driving drunk. He continued teaching through the 2010-2011 school year, then he was placed on paid administrative leave in August of 2011 without explanation. Cronin had a drinking problem, enrolled in an alcohol treatment program, and informed the school. He pled guilty to driving drunk in September of 2011 and he was sentenced to 120 days confinement at a Spokane correctional facility, but was allowed work-release privileges. Sally McNair, Cronin's union representative, joined him in multiple meetings with the school district assistant superintendent. Ultimately, Cronin was discharged "with probable cause."

Sally demanded a hearing to challenge Cronin's discharge. The school district disputed Sally's authority to represent Cronin and claimed that the various filings were untimely. The Washington Court of Appeals held that Cronin had effectively authorized Sally to act as his representative and authorized her to take steps such as demand a statutory hearing and sign official documents. The Court also found she had authority to choose between an appeal pursuant to a Washington statute and a grievance hearing pursuant to the collective bargaining agreement. The delay the school district caused by claiming she had no authority to take these steps nullified any argument that Cronin's claim and other procedural documents were not timely. The Court remanded the case to the trial court for entry of an order compelling the school district to participate in a statutory hearing process to determine the merits of Cronin's discharge.

14.5 *Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465 (Mo. Ct. App. 2015)

Fire protection district employees brought an action against the district seeking declaratory judgment to enforce employment agreements and the employees' claims for severance payments under their agreements. The Circuit Court granted summary judgment to the district. The firefighter employees appealed.

The Court of Appeals held that under a statute requiring authority for contracts to be provided by the district board in writing, an employment agreement executed between a fire

protection district and district employees was void. The necessary written authorization had simply not been given. Despite the harsh penalty of depriving the employees of severance pay, the Court found that "the protection of the public and the declared public policy requires public officials to comply with mandatory statutory provisions." The Court of Appeals affirmed the Circuit Court's ruling.

14.6 *In re City of Miami Beach and Fraternal Order of Police Lodge 8. 136*, LA 176, No. 15-50272-3 (2016)

The City of Miami Beach used an examination to evaluate candidates for promotion to the ranks of sergeant and lieutenant. The city changed test developers in 2011 and issued a modified test in 2013. At that time, the city ceased providing candidates with test score sheets and scoring keys during the testing process, which they were permitted to view in prior years in order to challenge any component of the testing process. Sergeant Feldman believed that the scoring sheets were a vital part of the behavioral assessment testing process and that it was impossible to challenge the scoring process without these sheets. He also believed that the new exam was significantly different than the one used in prior years. He brought his grievance on behalf of the local police union.

The Arbitrator found that the city did not violate the collective-bargaining contract. The collective-bargaining agreement outlined that examinees were only guaranteed test results and not scoring sheets or keys, and city employers retained the right to make unilateral changes. The city also followed the collective-bargaining agreement's terms to use a broadly defined "behavioral assessment center." The City's request for proposals in 2011 followed appropriate procedures in finding a new test developer and no subsequent test-development procedures diverged materially from the terms of the collective-bargaining agreement.

14.7 *In re City of Mansfield*, 135 LA 1081 (Arb. 2015)

A number of City of Mansfield patrol officers filed a grievance with the City with respect to the definition and calculation of seniority. The City considered the seniority of the police officers that were terminated due to layoffs, including the intervening time when they were not working for the city up until the time they returned to duty, for purposes of calculating a seniority credit on promotional examinations. This positively benefited one sergeant's promotional examination at the expense of other applicants.

The arbitrator found that the City violated the collective-bargaining agreement when it considered seniority of police officers terminated due to layoff for purposes of calculating the seniority credit on promotional exams. It concluded that only a contract can determine what might interrupt seniority, and the contract terminated seniority (or paused the progression of seniority calculations) if an employee refused to return from a layoff or was laid off for 36 months. Regardless of the fact that the city civil service rules failed to specify that layoffs did not constitute a break in seniority, the contract itself defines seniority as uninterrupted service with the City. The arbitrator concluded the union prevailed in arguing that seniority should be calculated consistent with the contract and that the City abused its discretion in failing to apply the definition of seniority in calculating its promotional seniority credit.

15. Jurisdiction, Procedure, and Evidence

15.1 *Hughes v. San Bernardino County*, 244 Cal. App. 4th 542, 197 Cal. Rptr. 3d 912 (2016)

Plaintiff Hughes was a sheriff's deputy for more than 30 years. In September 2009, Hughes was served with allegations of misconduct, which resulted in a 15 day suspension and the loss of about $7,000 in wages. Hughes filed an administrative appeal with the San Bernardino Civil Service Commission, but suffered a heart attack shortly thereafter and could not attend the hearing. Hughes's counsel apparently agreed to a settlement without Hughes's approval, but a written settlement agreement was never prepared. Hughes asked the Commission to continue the administrative appeal. While the issue was pending, Hughes retired. Due to Hughes's retirement, the Commission found that it lacked jurisdiction to hear his appeal.

The court, however, found that the Commission retained jurisdiction over Hughes's administrative appeal. The court found no language in the Personnel Rules that directly or indirectly addresses what happens when an employee properly began the administrative appeals process, and later resigns or retires before the appeal is completed. The court also noted that it would be unfair to require an employee to remain an active employee during the pendency of the appeal, due to the number of years it can take to complete such an appeal.

15.2 *Smith v. City of Mobile*, No. 2140903, 2016 WL 102313 (Ala. Civ. App. Jan. 8, 2016), *reh'g denied* (Mar. 4, 2016)

Michael Smith's employment as a police officer was terminated about September 9, 2014. Smith appealed his dismissal to the Mobile County Personnel Board, but the Board denied his appeal. Smith then appealed the Board's decision to the Mobile Circuit Court on December 14, 2014, and notice of the appeal was served on the Board on December 18, 2014. The Mobile Circuit Court dismissed Smith's appeal on the motion of the Board (a non-party to the lawsuit), who claimed that Smith had failed to serve notice of his appeal within 14 days of the Board's decision, as required by local law.

The Court concluded that because Smith had failed to serve the Board within 14 days of the entering of its decision, that the Court lacked subject matter jurisdiction over Smith's appeal, and that dismissal was proper.

15.3 *Kuttner v. Zaruba*, 819 F.3d 970 (7th Cir. Apr. 14, 2016)

After wearing her uniform while trying to collect on a loan for her then-boyfriend, Susan Kuttner was fired by the DuPage County Sheriff for conduct unbecoming of an officer and improper wearing of the uniform. Kuttner sued the Sheriff under Title VII of the Civil Rights Act of 1964, claiming sex discrimination in its policy governing jail staffing and its failure to promote her. The lower court decided that Kuttner could only look as far back as Jan. 2006 for evidence of men who had been disciplined more leniently for similar offenses, despite Kuttner's assertion that she knew of numerous such incidents before 2006. That court then granted Sheriff summary judgment as to the discrimination claims.

The 7th Circuit found that, given Kuttner's protracted, baselessly broad and burdensome "fishing expedition" for supportive cases, the lower court did not abuse its discretion in limiting discovery to cases no earlier than 2006. The court held that the authorized window of time was adequate for Kuttner to engage in meaningful discovery, and that the limitation reasonable means of preempting a fishing expedition and honing in on likely comparators.

The court also upheld the ruling that Kuttner failed to establish a *prima facie* discrimination claim because she was unable to identify any similarly situated male employees who received more favorable treatment, finding her 4 examples to be insufficiently similar comparisons. One example was found dissimilar because the officer had worn his uniform at a Halloween party and during personal visits, as opposed to in a context of alleged coercion of the use or appearance of legal authority. The court also upheld summary judgment for the Sheriff as to Plaintiff's failure-to-promote claim, on the basis that Kuttner never even applied for a promotion; failed to show any male comparisons; and, did not produce any supporting statistical evidence.

15.4 *City of Arlington v. Kovacs*, No. 02-14-00281-CV, 2015 WL 4776100 (Tex. App. Aug. 13, 2015), *review denied* (Nov. 6, 2015)

Tibor Kovacs began working for the Arlington Police Department in 2003. On October 28, 2010, Kovacs performed a traffic stop of a female driver. Kovacs explained to the driver that he thought she had been drinking, and that she had a warrant out for her arrest. The driver pleaded with Kovacs not to arrest her, but to take her to a friend's house instead. Kovacs instructed the driver to leave her car in the parking lot, and to sit in the back of his police cruiser. Kovacs proceeded to take the driver to an unfamiliar neighborhood, and invited her to sit in the front seat. Kovacs then digitally penetrated the driver's vagina. The driver complained to the Department about the incident. Shortly thereafter, Kovacs's fiancée reported that he had awakened her by violently demanding her to perform oral sex on him. Kovacs's fiancée also reported that Kovacs put her in a leg lock, shoved her head into a pillow, and restrained her arms until she bruised. A warrant was then issued for Kovacs's arrest.

Based on these events, Kovacs was dismissed. Kovacs grieved the dismissal. The Arbitrator found that the City did not establish by a preponderance of the evidence that Kovacs had committed the actions on which the Police Chief based Kovacs's dismissal. The Arbitrator determined that Kovacs should be reinstated. The Arbitrator relied on various post-termination events, such as the denial of a protection order, no-bills by a grand jury, and an affidavit of non-prosecution. The City claims that the Arbitrator exceeded his authority by relying on such events. The court agreed that the Arbitrator exceeded his authority in considering post-termination evidence related to three of the four charges on which the Police Chief based his decision to terminate Kovacs, and overturned the trial court's ruling confirming the arbitration award.

15.5 *Glover v. City of Santa Barbara*, 2015 WL 2438638 (Cal. Ct. App. May 21, 2015) (unpublished opinion)

Plaintiff worked in the City of Santa Barbara's Water Resources Distribution, where he claims he was regularly singled out, belittled, chastised and harassed due to his hypertension and

pre-diabetes and African-American race, and from where he alleges to have been fired on the basis of defamatory statements about him made by other employees (*i.e.* that he consumed alcohol and disrupted a training session). The City's Civil Service Commission upheld the termination on initial review and again on appeal. Instead of seeking judicial review of the Commission's decision, Plaintiff filed suit claiming defamation and discrimination under Section 12940 of the Fair Employment and Housing Act. The trial court dismissed Plaintiff's defamation claim on the basis of collateral estoppel because the Commission made a final determination that the charges of misconduct against Plaintiff were true.

The Court of Appeals affirmed the trial court, acknowledging that the Commission's final decision to terminate and Plaintiff did not seek judicial review, resulting in the Commission's findings binding.

15.6 *Muller v. City of Tacoma,* 2015 BL 194824, W.D. Wash., No. 14-cv-05743-RJB (June 18, 2015)

Plaintiff, a former accountant with the City of Tacoma, claimed wrongful termination, gender and racial discrimination, retaliation, violations of privacy and due process, false light, and negligent retention and supervision. The City claimed that Plaintiff made insufficient responses to its discovery requests concerning Plaintiff's alleged economic damage.

The district court agreed with the City that Plaintiff's discovery efforts were inadequate because she only provided tax returns which presumably lack financial information germane to calculating any other damages other than loss of wages (and not, for example, damages of reputation and character or emotional distress). The court then held that the Plaintiff's mental, physical, and emotional health is in controversy and that there is good cause for an independent examination by the City. This was based on the fact that Plaintiff alleges damages from continuing emotional distress from psychological and physical problems.

15.7 *Manger v. Fraternal Order of Police, Montgomery Cty. Lodge 35, Inc.*, 227 Md. App. 141, 132 A.3d 895 (2016)

The Montgomery County Police Department altered its interrogation policy to utilize video recording technology and keep a complete record of interrogations of officers. When three officers received notice that they would be interrogated using this technology, the Fraternal Order of Police filed a show-cause petition on behalf of the officers to enjoin the Department from recording the interrogations. Lower courts ordered that the Department cease these video recordings because they found the recordings could jeopardize an officer's right to a fair hearing and that the state statute covering interrogations did not expressly encompass video recordings.

The Supreme Judicial Court of Massachusetts overturned the lower courts and held that the Union was not, under the state Law Enforcement Officers' Bill of Rights, entitled to an injunction against the county's video recording of police officers facing potential disciplinary proceedings. While the term "tape" in the statute includes audio recordings because audiotape was most commonly used during the intervening years, nothing in the statute indicates that the enumerated methods of creating a record are exclusive, and requires that a "complete record…

be kept of the entire interrogation." Video recordings qualify as such a complete recording, and thus the Union was not entitled to an injunction against their use.

15.8 *Ames v. Pierce Cty.*, 194 Wash. App. 93, 374 P.3d 228 (2016)

Michael Ames, a Pierce County detective in a child-pornography case called "Dalsing" filed suit against the County, seeking writ of prohibition to bar the County prosecutor from disclosing to the criminal defendants' counsel potential impeachment evidence. The Pierce County Prosecuting Attorney's Office had sent Ames a letter stating that several of Ames's "Dalsing" declarations would be disclosed to defense counsel as potential impeachment evidence in the prosecution of *State v. George* and in any other case where Ames was expected to testify. Ames filed a lawsuit requesting a writ of prohibition against the disclosure of the declarations to defense counsel. The Superior Court of Pierce County initially granted the county's motion for Rule 11 sanctions, but on reconsideration reversed the order imposing sanctions.

The Court of Appeals of Washington (Div. II) rejected the detective's writ to bar the disclosure of the declarations. It held that the writ of prohibition was not a permissible remedy to bar the county prosecutor's officer from disclosing declarations as potential impeachment evidence. In addition, the detective claims that declarations he had issued in the arrestee's civil rights case were truthful and did not present a justiciable controversy or an issue of major public importance, and thus they did not present a basis for obtaining declaratory relief under the Uniform Declaratory Judgments Act (UDJA).

15.9 *Slusser v. Celina*, 2015-Ohio-3721, 2015 WL 5320277

David Slusser, the Chief of Police for the City of Celina, Ohio, was placed on paid administrative leave for allegedly mishandling a bottle of Xanax pills. A few months later he was terminated from his position. David appealed his termination to the Celina Civil Service Commission. The city contended the appeal was not timely filed because it was not also filed with the common pleas court.

The Ohio Court of Appeals held that the former Police Chief filed his appeal in a timely fashion with the commission within 30 days, despite the contention that the appeal was untimely because it also should have been filed with the common pleas court. While the better practice may have been to also file the appeal with the common pleas court, this was not required by Ohio law, which clearly states an "administrative appeal is perfected when it is filed with the commission."

16. Arbitrator Authority

16.1 *Portland Police Ass'n v. City of Portland*, 275 Or. App. 700, 365 P.3d 1123 (2015)

On January 29, 2010, Officer Frashour shot and killed Aaron Campbell, who was unarmed. Police had received a call that Campbell, who owned a gun, was distraught over the death of his brother and might be suicidal and contemplating "suicide by police." When police arrived at the apartment where Campbell was, Campbell came outside and refused to follow instructions to put his hands in the air. One officer fired bean bag rounds at Campbell, and

Campbell began to run. Frashour reports that he saw Campbell reach in to his pants as he was running away. Frashour then fatally shot Campbell. The Portland Chief of Police determined that Frashour had violated the City's policies on use of deadly force, and terminated Frashour.

An Arbitrator determined that when the circumstances indicate that a suspect may be armed, and the suspect has indicated intent to use a weapon, that use of deadly force is justified when an officer witnesses the suspect reach toward what could reasonably be believed to be a weapon. The Arbitrator ordered Frashour to be reinstated, but the City refused. The City argues that reinstating Frashour would violate public policy. The Association filed a grievance on behalf of Frashour with Portland's Employment Relations Board, which upheld the Arbitrator's award and ordered the City to reinstate Frashour. On appeal, the City argued that the decision of the Arbitrator and Employment Relations Board is against public policy, and that deference should be granted to the Chief of Police's decision to terminate Frashour. The court found, however, that nothing in the relevant statutes requires arbitrators to defer to public employers' decisions about whether an employee engaged in misconduct (as the Chief of Police had decided).

The City also argued that the Arbitrator, in concluding that Frashour's use of force did not violate the city's use of force policies, essentially adopted a use of force policy inconsistent with that of the City. The court rejected this argument, explaining that even if the Arbitrator did commit an error in interpreting the City's use of force policy, that this is not a basis for refusing to enforce an arbitration award that the parties agreed would be final and binding. The court upheld the Employment Relation Board's decision that Frashour must be reinstated.

16.2 *Lorain v. IAFF Local 267*, 2016-Ohio-978 (March 14, 2016)

After being confronted with allegations of sick leave abuse that could be considered theft in office, firefighter Joe Colon consulted with his union representatives, then offered to resign his employment. The City gave Colon time to think about his decision and to consult an attorney, but Colon chose to resign. Months later, Colon retained private counsel and attempted to grieve his separation from the City, arguing that his resignation was coerced, and was thus an effective discharge. During arbitration of Colon's grievance, the Arbitrator determined that Colon was not constructively discharged, as his resignation was not coerced. The Union filed a petition to vacate the arbitration decision, arguing that the arbitrator exceeded his authority in making his decision. This petition was granted and the arbitration decision was vacated. The City then appealed, arguing that the arbitrator did not exceed his authority. The Court of Appeals agreed with the City, and found that the Arbitrator analyzed the issue before him in accordance with the collective bargaining agreement between the parties.

16.3 *City of Springfield v. Local Union No. 648, Int'l Ass'n of Fire Fighters*, 79 Mass. App. Ct. 905, 948 N.E.2d 1281 (2011)

Firefighters in the City of Springfield had been appointed by the City to fill positions on an "acting" basis and performed out-of-grade work for less compensation than would be available to permanent employees. An arbitrator awarded back pay to these firefighters. The City of Springfield brought an action seeking declaratory and injunctive relief, alleging that a

grievance filed by a local firefighter's union was not arbitrable under their collective bargaining agreement with the city.

The Court of Appeals ruled that the arbitrator did not exceed his authority. It held that the arbitration clause in the collective bargaining agreement was broad and thus generally arbitrable, particularly to the extent that it was a grievance for paid leave. This is because paid leave for incapacitated firefighters was included in the statute listing statutory provisions whose application could be amended by contract in a collective bargaining agreement. However, the grievance was not arbitrable to the extent that it sought medical expense indemnification because such indemnification for firefighters was excluded from the statute listing statutory provisions whose application could be amended by contract in a collective bargaining agreement.

16.4 *Ohio Patrolemn's Benevolent Ass'n v. City of Findlay,* 40 N.E.3d 610 (Ohio Ct. App. Aug. 13, 2015)

An Ohio patrolman, Hill, was terminated for referring to a coworker, Morgan, as "Whoregan" at a Christmas office party, together with various prior disciplinary issues. An arbitrator determined that the City had just cause to impose severe discipline against Hill but that his offense did not warrant termination (instead, 5-month suspension and reinstatement without back pay). The arbitrator found insufficient proof of some of the charges, including the charge that he sexually harassed Morgan; and, considered the "discipline matrix" provided in the labor-management agreement (CBA). When Plaintiffs (Hill and his union), filed suit in a county court to enforce the arbitration decision, that court granted the City's motion to vacate, concluding that the arbitrator exceeded his authority by failing to properly apply the discipline matrix. Plaintiffs on appeal assert that the county court exceeded its authority in applying its own interpretation of the CBA instead of deferring to the arbitrator's interpretation thereof.

The Court of Appeals upheld the county court's decision finding that the arbitrator exceeded his authority provided in the CBA by departing from the agreement's essence. The court recognized that arbitration is highly favored in law and that arbitration decisions are given substantial deference. But it stated that the arbitrator's modification may not conflict with the CBA's express terms, contrary to Plaintiffs' argument that where there is just cause the arbitrator does not have full authority to modify disciplinary action even if such remedy is not expressly recognized by the CBA as long as it is fair. The court then found that the arbitrator's decision in fact conflicted with the CBA's discipline matrix, which provides that modification of the action applicable to Hill was in the sole discretion of the department's chief.

17. Attorney's Fees

17.1 *Hanson v. Kitsap County,* No. 13-5388 RJB, 2013 WL 11253207 (W.D. Wash. May 29, 2013)

A discharged reservist filed an employment case pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). He sued his former employer for willful retaliation, demotion, discrimination, failure to comply with USERRA's reemployment provisions, and violations of the public records act. After many failed motions and a mistrial, he won at a second trial on his claims of willful retaliation, demotion, and discrimination.

The U.S. District Court for the Western District of Washington found he was entitled to $471,050 in attorneys' fees and $20,716 in costs because the fees were reasonable as is required under USERRA. The Court arrived at the reasonable attorneys' fees through the "lodestar" calculation, multiplying the number of hours reasonably expended by a reasonable hourly rate. The approach was upheld and adjustments to the lodestar figure were deemed unnecessary.

18. Agency Authority

18.1 *In re Prob. Officer,* N.J. super. Ct. App. Div. 2015 LRRM 186582. No. A-0056-13T2 (2015)

The Administrative Office of the Courts (AOC) adopted a new pilot program with a fresh method of selecting and appointing candidates for the titles of Probation Officer (English) and Probation Officer (Bilingual in Spanish and English). It would replace open and competitive testing for the two job titles with a noncompetitive evaluation system. The Probation Association of New Jersey appealed the final administrative agency decision of the New Jersey Civil Service Commission concerning the manner in which the AOC selected and appointed candidates.

The Court found the commission's decision was arbitrary and capricious because the record does not contain sufficient evidence demonstrating that the AOC was experiencing significant problems with the recruitment of probation officers. Therefore, there was no need to relocate job titles into noncompetitive divisions (which made the pilot recruitment program effectively permanent). In addition, the commission had acted without considering whether an open, competitive examination was impracticable – a requirement given the general recruitment benefits and flexibility of an open and competitive process. Indeed, maintaining the competitive examination was reasonably practicable, and thus the decision to move away from that system was arbitrary and capricious.

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SERVICES

Municipal Government

Construction

Employment & Labor

Environmental & Natural Resources

Environmental Litigation

Infrastructure

Land Use, Planning & Zoning

Litigation & Dispute Resolution

Ports

Real Estate

Right-of-Way (Chair)

School Districts

Sports Law

Transportation

Wine, Beer & Spirits

PRACTICE OVERVIEW

Steve's practice focuses on litigation involving state and local governments; civil service and public employment; and, land use and environmental law. His particular experience includes representation of jurisdictions on eminent domain, utilities (water, wastewater, storm water, solid waste systems), local improvement districts, facility siting and contractor litigation.

REPRESENTATIVE WORK

- *Brower v. State/Football Northwest*, 137 Wn.2d 44 (1998) (Successful defense of public-private stadium project and legislative referendum)
- *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403 (2006) (successful defense of Sound Transit eminent domain action)
- *HTK v. Seattle Popular Monorail*, 155 Wn.2d 612 (2005) (successful defense of municipal condemnation authority)
- *Servais v. Port of Bellingham*, 127 Wn.2d 820 (1995) (amicus for Washington Public Ports Association in defense of protected public records
- *Klickitat Citizens v. Klickitat County*, 122 Wn.2d 619 (1993) (Defense of comprehensive plan and environmental impact statement for regional landfill)
- *Rabanco v. King County*, 125 Wn. App. 794 (2005) (successful defense of county solid waste management authority)
- *Wong, et al. v. City of Long Beach*, 119 Wn. App. (2004) rev. denied 152 Wn.2d 1015 (2004) (successful defense of city trail project)
- *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74 (1990) (Defense of multi-million dollar government contract procurement)
- *Barnier v. City of Kent*, 44 Wn. App. 868 (1986) (Defense of development assessment process)
- *Tiffany Family Trust v. City of Kent*, 155 Wash.2d 225 (2005) (successful defense of assessments and rejection of civil rights claims)
- *Grant County Fire District No. 5 v. Moses Lake*, Supreme Court, 150 Wn.2d 791 (2004) (Court reconsiders and unanimously reverses earlier ruling; affirms city annexation authority)

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- *Jensen v. Torr*, 44 Wn. App. 207 (1986) (Defense of government permit process and immunity of government officials)
- *Prater v. City of Kent*, 40 Wn. App. 639 (1985) (Defense of claims of discrimination in employment)
- *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)
- *Little Deli Marts, Inc. v. City of Kent*, 108 Wn. App. 1, 32 P.3d 286 (2001); 107 Wash. App. 1011 (2001) rev. denied 145 Wn.2d 1030 (2002) (successful defense of local improvement district process)
- *City of Seattle v. Auto Sheet Metal Workers Local*, 38727 Wn. App. 669, 620 P.2d 119 (1980) (Defense of City charter and personnel system reorganization)
- *Leonard v. Civil Service Commission of City of Seattle*, 25 Wn. App. 699, 611 P.2d 1290 (1980) (Judicial review of administrative proceedings)
- *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn. App. 411, 12 P.3d 1022 (2000) rev. denied 143 Wn.2d 1013 (2001) (successful defense of connection charges)
- *Petersen v. City of Seattle*, 21 Wn. App. 108, 583 P.2d 1259 (1978) (Constitutionality of reckless driving laws upheld)
- *City of Seattle v. Platt*, 19 Wn. App. 904, 578 P.2d 873 (1978) (Prosecution and public record defense in criminal proceedings)
- *City of Seattle v. Shepherd*, 93 Wn.2d 861, 613 P.2d 1158 (1980) (upholding crime victims' rights to recovery of stolen property)

RECOGNITION

- *The Best Lawyers in America*© Appellate Practice, 2012-2017
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine, Appellate Practice, 2013
- Washington Super Lawyers list, 2002-2016
- 2010 Top Lawyer, *Seattle Metropolitan* magazine
- Martindale-Hubbell AV rating

ACTIVITIES

- Municipal League, Board of Trustees, 2010-2013
- Washington State Association of Municipal Attorneys
- International Municipal Lawyers Association
- American Bar Association, State and Local Government Law and Labor and Employment Law Sections, Member
- Washington State Bar Association
  - Environmental and Land Use Law and Administrative Law Sections, Member
  - Amicus Brief Committee, Member
- King County Bar Association, Trustee, 1986-1989
- South King County Bar Association, Trustee, 1986-1988
- South King County Legal Clinic
  - Attorney Coordinator, 1985-1986
  - Volunteer, 1978-1989
- University of Washington
  - Lecturer, Evans Graduate School of Public Affairs

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QUOTED

- "Breaking Down Freedom of Information Laws," The Willis Report, FOX Business News, July 2010

PUBLICATIONS

- Foster Pepper Local Open Government Blog
  - Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
- "Washington Supreme Court Levels the Playing Field in Real Estate and Land Use Litigation," Co-author, Foster Pepper News Alert, June 2015
- "Washington Initiative I-517 Impacts Retailers, Public Facility Access and Local Government Elections," Co-author, Foster Pepper News Alert, September 2013
- "U.S. Supreme Court Decision Expands Scope of Takings Clause," Co-author, Foster Pepper News Alert, June 2013
- "Court of Appeals Reaffirms Public Utility District Authority to Condemn State School Trust Lands," Co-author, Foster Pepper News Alert, May 2013
- "Pollution Control Hearings Board Clarifies Use of Overriding Consideration of Public Interest Statute," Co-author, Foster Pepper News Alert, March 2013
- "Curing a Violation of the Open Public Meetings Act?" Co-Author, Advisor Column, Municipal Research and Services Center of Washington, March 2013
- "A Blessing on Your Meeting?" Co-Author, MRSC In Focus: Council/Commission Advisor, April 2012
- "Giving for the City: Constitutional Limits on Municipal Economic Development Programs," Cityvision Magazine, March/April 2012
- 2011 Washington Real Property Deskbook: Causes of Action, Taxation, Regulation, Editor
- "Council Meeting Conduct and Citizen Rights under the First Amendment," Author, Municipal Research and Services Center of Washington, November 2009

PRESENTATIONS

- Bidding Public Works and Construction Contracts, Program Co-Chair, The Seminar Group
  - May 2016
  - March 2016
- Elected Officials Essentials Live Webinar, Speaker, Association of Washington Cities, December 2015
- "Form, Structure and Content of Non-Land Use Proceedings and Decisions," Speaker, Hearing Examiners Association of Washington's 2015 Annual Conference, October 2015
- "Condemnation Public Trust Land," Speaker, International Municipal Lawyers Association's 80th Annual Conference, October 2015
- "Managing the Record and the Okanogan PUD Litigation," Speaker, PUD Municipal Attorney Conference, June 2015
- "The Judiciary and Government Policy," Guest Speaker, UW Political Science, May 2015
- "Is Your Employee Handbook Ready for Prime Time?" Speaker, Foster Pepper Client Briefing, April 2015
- "Open Government and Anti-SLAPP Litigation," Speaker, LSI Open Government Seminar, January 2015
- "Basic Training for New Commissioners and Staff; Annual Legal Update," Presenter, Civil Service Conference, 1986-2015
- "Labor Relations and Public Record Disclosure," Speaker, Washington State Office of the Attorney General CLE, December 2014
- "The Okanogan PUD Litigation: The Pitfalls of Life in One of Washington's Great Scenic Locations and Condemnation of State Lands," Speaker, PUD-Municipal Attorney Conference, June 2014

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- "Infrastructure Development - Managing Property Acquisition and Procurement," Speaker, Washington Public Utility District Association, Managers Committee Meeting, May 2014
- "Labor Relations and Public Record Disclosure," Speaker, Washington Association of Public Records Officers Spring Training, May 2014
- "Litigating Open Government Cases: A Well-Stocked Tool-Kit for Public and Private Practitioners"
  - Program Co-Chair and Speaker, February 2014
    - Legal Ethics: Managing Conflicts and Understanding Privileges; What To Do When The Client Does Not Disclose
    - Continue the Exchange of Ideas: Reception for Faculty and Attendees
- "Privilege and the PRA: Freedom Foundation v. Gregoire," Speaker, Law Seminar International, One-Hour Expert Analysis, December 2013
- "Wage & Hour Compliance – Beyond the Basics (Part I)," Presenter, Foster Pepper Client Briefing, February 2013
- "LIDs: Nuts and Bolts," Speaker, Washington State Association of Municipal Attorneys (WSAMA), May 2008
- "Newly Elected Officials Workshop," Speaker, Association of Washington Cities, January 2008
- "Eminent Domain," Speaker, Lorman Seminar, September 2006
- "Knowing the Legal Territory," Association of Washington Cities, 1988-2006 (Newly Elected Officials Workshop)
- "Road and Access Law in Washington," National Business Institute, 1999 and 2001
- "Inverse Condemnation Issues in the Direct Condemnation Setting," Law Seminars International, December 2000; December 1999; December 1998
- "Washington State Association of Fire Chiefs," Executive Officer Labor Relations Training Courses, 1998, 1993, 1992, 1989
- "The People's War: In the Trenches with Nuisances, NIMBYs, and Essential Public Facilities," Washington State Bar Association, Environmental & Land Use Law Section, May 1997
- "The ABCs of LUDs," Washington Public Utility Districts Association, July 1996, 1997

EXPERIENCE

- Foster Pepper PLLC
  - Member, 1990-Present
  - Associate, 1986-1990
- City of Kent, City Attorney, 1982-1986
- City of Seattle, Assistant City Attorney, 1977-1982

BAR ADMISSIONS

- Washington, 1976
- U.S. District Court
  - Eastern Division of Washington, 1993
  - Western Division of Washington, 1976
- 9th Circuit U.S. Court of Appeals, 1980
- Supreme Court, State of Washington, 1976

EDUCATION

- J.D., Seattle University, 1976
- B.A., University of Washington (Oval Club Scholastic Honorary), 1973