Annual Legal Update
36th Annual
Civil Service Conference

September 19, 2017

Yakima, Washington

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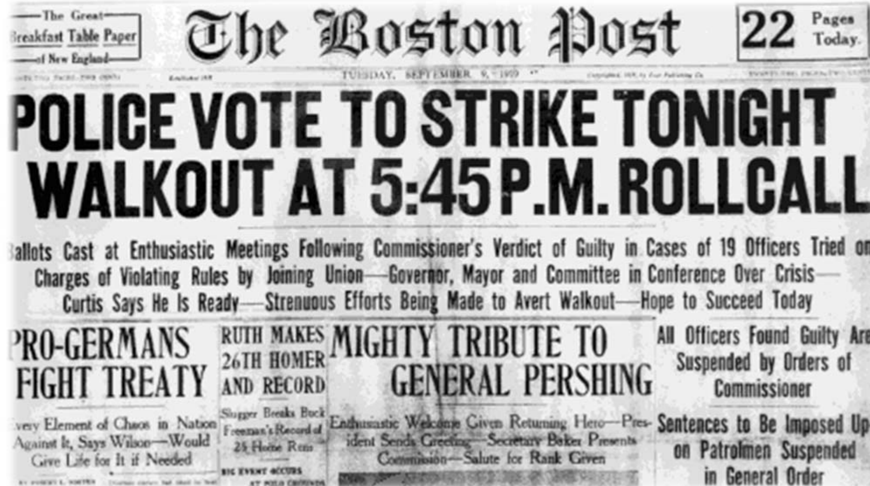

The Great
reakfast Table Paper
of New England

The Boston Post

22 Pages Today.

TUESDAY, SEPTEMBER 9, 1919

POLICE VOTE TO STRIKE TONIGHT
WALKOUT AT 5:45 P.M. ROLLCALL

allots Cast at Enthusiastic Meetings Following Commissioner's Verdict of Guilty in Cases of 19 Officers Tried on Charges of Violating Rules by Joining Union—Governor, Mayor and Committee in Conference Over Crisis—Curtis Says He Is Ready—Strenuous Efforts Being Made to Avert Walkout—Hope to Succeed Today

RO-GERMANS FIGHT TREATY

very Element of Chaos in Nation Against It, Says Wilson—Would Give Life for It if Needed

RUTH MAKES 26TH HOMER AND RECORD

Slugger Breaks Buck Freeman's Record of 25 Home Runs

BIG EVENT OCCURS AT POLO GROUNDS

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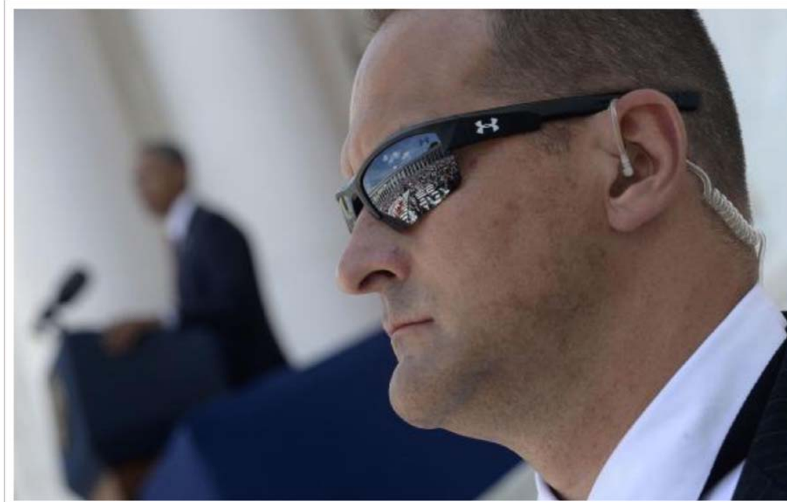

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FOSTER PEPPER PLLC

36th ANNUAL
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2016 – 2017 ANNUAL LEGAL UPDATE

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September 18 – 19, 2017

P. Stephen DiJulio
FOSTER PEPPER PLLC

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1. ADMINISTRATION/GENERAL

1.1 JUDICIAL REVIEW:

1.1.1 *Nguyen v. Merit Sys. Prot. Bd.*, 646 F. App'x 980 (Fed. Cir. 2016)

Hoa Nguyen was a Supervisory Patent Examiner at the United States Patent and Trademark Office. Nguyen was told she would be demoted for violating nepotism rules by trying to prevent her son, a probationary patent examiner also at the agency, from being fired. The agency also revoked her access to supervisory functions, pending her reduction in grade. After being told that she was not being forced out, that a decision to leave the agency is entirely hers, and that resigning would waive her right to appeal, Nguyen retired. She later appealed to the Merit Systems Protection Board, alleging involuntary retirement. The administrative judge dismissed the appeal. Finding that Nguyen failed to allege anything showing "that a reasonable person in her circumstances would have viewed retirement as the only viable alternative," the judge determined dismissal was proper because it lacks jurisdiction to hear appeals from voluntary resignations.

The Court of Appeals for the Federal Circuit affirmed the dismissal. Although threatened action by an agency is purely coercive if the agency knew the reasoned for such action cannot be substantiated, Nguyen failed to sufficiently allege that her reduction in grade could not be substantiated. The court also rejected Nguyen's argument that she was given inadequate time to decide whether to retire or receive a demotion so as to constitute coercion. She never alleged she was asked to give an answer immediately, but rather to give a definitive answer. Finally, the court rejected the argument that she was not properly informed that her decision to retire would terminate her appeal rights. The Agency was not required to inform her of this, the emails on which she relies did not mislead her to believe otherwise, and she was represented by counsel who should have notified her of this.

1.1.2 *Harvin v. Merit Sys. Prot. Bd.*, 666 F. App'x 914 (Fed. Cir. 2016)

Martha Harvin was an employee of the U.S. Department of Agriculture. After being told that if she does not resign she would be removed for "unacceptable" performance and failure to complete a performance improvement plan, Harvin resigned. She appealed her 'removal' to the Merit Systems Protection Board, alleging that she attempted to withdraw her resignation before it became effective. An administrative judge dismissed her appeal for lack of jurisdiction, finding that she failed to communicate any desire to withdraw her resignation prior to its effective date.

The Court of Appeals for the Federal Circuit affirmed, finding substantial evidence supporting the judge's decision that the Board lacked jurisdiction. It found that Harvin's allegations of missing information regarding her resignation in the Agency's Complaint System records to be unimportant and unsubstantiated. It also rejected Harvin's argument that the judge improperly weighed the testimony of the parties' witnesses.

1.1.3 *Phillips v. Hancock Cty. Sheriff's Dep't*, 203 So. 3d 622 (Miss. Ct. App. 2016)

Push Philips was a deputy sheriff with the Hancock County Sheriff's Department. Philips left the county and state for two to three days to visit his distressed wife's mother in Florida. This occurred in the aftermath of Hurricane Katrina, while there was threat to life or human safety. Philips' leave was without permission and in violation of a Department General Order. When Philips returned, the Sheriff pulled him aside at a Walmart parking lot and fired him on the spot for leaving the county during a state of emergency. Philips claimed he told the Sheriff that Lieutenant Chris Russell, a patrol supervisor, gave him permission to leave. In response, according to Philips, the Sheriff said "You have been a thorn in my side with all of these Civil Service complaints that you have made, and now that it is a state of emergency, I can hire and fire at will." Philips requested the Civil Service Commission that he be reinstated. After a hearing, the Commission denied his request, finding that Philips violated the General Order and that he was terminated in good faith for cause. Philips appealed, claiming the decision was arbitrary and capricious and not supported by substantial evidence

The court affirmed the Commission, finding substantial evidence to support its decision. The court held that it is the Commission's role to determine whose testimony is more credible. Accordingly, it upheld the Commission's finding the Sheriff's testimony that Lieutenant Russell lacked authority to permit Philips to leave credible. It also found credible the Sheriff's testimony that Philips was terminated solely because he abandoned his post without permission in a state of emergency. It rejected Philips' argument that he was discharged for "political reasons" in retaliation for his prior complaints related to civil service rule violations.

1.1.4 *Kang v. City of Los Angeles*, No. B264346, 2016 WL 7387227 (Cal. Ct. App. 2016)

James Kang was fired from the Los Angeles Police Department after he became involved in a road rage incident with Joseph McCabe. Kang appealed his dismissal from the Department. He argued that he was denied a fair hearing because McCabe was allowed to testify by telephone and because Kang was not allowed to question McCabe about his alleged mental condition.

Even though Kang's interest in continued employment outweighed the city's interest in expediting its police disciplinary hearings, the court determined that the hearing was fair. Kang had an opportunity to conduct extensive cross-examination of McCabe, and the police board was able to assess McCabe's demeanor and credibility by listening to his tone of voice. Furthermore, McCabe's credibility was not thrown into question merely because he might be bipolar and took medication for anxiety.

1.1.5 *Ellison v. Hillsboro*, 63 N.E.3d 555 (Ohio Ct of Appeals March 31, 2016) *appeal not allowed*, 65 N.E.3d 777 (Dec. 28, 2016), *reconsideration denied*, 69 N.E.3d 752 (Feb. 22, 2017)

Kirby Ellison was an administrative assistant for the City of Hillsboro until she was fired in 2012 when a new mayor took office. She appealed her termination to the Hillsboro Civil Service Commission, which determined that because she served in an unclassified position and was employed at the pleasure of the mayor, she was not covered by the civil service rules. She then appealed to the County Common Pleas Court which found that the City failed to prove that

Ellison's position was an unclassified position, as opposed to a classified position, and ordered the City to reemploy her with appropriate back pay. The city and its civil service commission, mayor, and safety service director then appealed to the Ohio Court of Appeals.

The Court of Appeals explained that Ohio's civil service scheme divides civil service employees into classified and unclassified positions. Unlike unclassified employees, those employed in the classified service may be removed for good cause only according to the procedures enumerated in the civil service termination rules and regulations. Hillsboro civil rules state: "Unless exempted from the classified service by ordinance, municipal charter provisions, or these rules, all positions in the service of the City or the City school district, are in the classified service." As such, the city, mayor, and safety service director had the burden of establishing that Ellison's position was unclassified. The commission's finding that she was in the unclassified service was *not* supported by reliable, probative, and substantial evidence and was *not* in accordance with the law. The Court of Appeals affirmed the Common Pleas Court's order to the City to reemploy Ellison and to compensate her with over four years' worth of back pay.

2. AMERICANS WITH DISABILITIES ACT (ADA) & OTHER

2.1 **GENERAL:**

2.1.1 *Frazier-White v. Gee*, 818 F.3d 1249 (11th Cir.), *cert. denied*, 137 S. Ct. 592, 196 L. Ed. 2d 474 (2016)

In July 2010, a heavy metal door closed on Delores Frazier-White, a former County Sheriff office employee, pinning her against a door frame. She returned to work with limited capacity to perform her regular duties. After two years on light duty status, she requested an indefinite extension and, or permanent reassignment to an unspecified position. The County denied her request and she was terminated shortly thereafter.

Frazier-White sued David Gee, the sheriff of Hillsborough County, claiming her termination constituted disability discrimination under the Americans with Disabilities Act ("ADA") and the Florida Civil Rights Act ("FCRA"). First, standard operating procedures define light duty as a temporary disability status. As such, after two years on light duty, all employees must undergo a medical due process hearing. Accordingly, after two-years, Frazier-White underwent medical evaluation and was approved to work without restriction. At her hearing, she stated she still was unable to perform her job functions and did not know when she would be able to so do. Irrespective of her full medical clearance, Frazier-White nonetheless requested an extension of light duty work for an indeterminate amount of time. Further, she failed to apply for any other positions with perhaps more appropriate job duties. Frazier was then terminated.

The courts rejected Frazier-White's disability discrimination suit based on her hearing testimony that she would be unable to complete standard and necessary job functions, she had not provided any solution or accommodation for her disability that would have allowed her to return to work, at full capacity. The County Sheriff was not required to reassign Frazier-White to some other, unspecified position and complied with any obligation to initiate and facilitate an informal, interactive process.

2.1.2 *In re U.S. Border Patrol*, Decision of Arbitrator No. 154030/02284-3, November 22, 2016.

At issue in this arbitration was whether the U.S. Border Patrol (the "Agency") had just cause to discharge a border patrol agent (the "Agent") for inability to perform the essential duty of his position of carrying a firearm, due to mental disability. The Agent first expressed the need to turn over his firearm to avoid his own suicide following the death of his child. Then, five years later, after asking a fellow border patrol agent to have sex with the Agent's wife and then witnessing the consensual sex, he again expressed the need to turn over his firearm. Upon consideration of the Agent's mental health history, results of psychiatric evaluations yielding a diagnosis of depression, and professional requirements of his employment, mainly carrying a firearm, the Agency removed him from service. Upon removal, the Union filed a grievance contesting the removal and this arbitration ensued.

For an agency to remove an employee, the agency must (1) prove its charge by a preponderance of the evidence, (2) establish a connection between the removal and the efficiency of the service, and (3) establish that the penalty is reasonable. The Arbitrator determined that the Agency had just cause to discharge the Agent based on the two incidents involving the Agent's mental crises, the Agent's expressed need to turn over his firearm due to thoughts of suicide during those crises, the Agent's reluctance to seek professional help, and the uncertain likelihood for future violent actions. Further, the Arbitrator determined that the inability to carry a firearm disallowed the Agent from carrying out an essential job duty which inherently caused inefficiency and that removal was a reasonable penalty. This was not an easy decision for the Arbitrator because the two incidents were five years apart, the Agent had not exhibited violent behavior, and because the Agent could perform all job duties other than carrying a firearm.

2.1.3 *Painter v. Illinois Dep't of Transportation*, No. 13-3002, 2016 WL 3961720 (C.D. Ill. July 21, 2016)

Deanna Painter was an office administrator at the Illinois Department of Transportation ("IDOT"). She claimed that IDOT subjected her to unnecessary medical examinations in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act when she was placed on paid administrative leave several times and had to take four fitness-for-duty exams over the course of two years.

Several incidents led to the paid leave and fitness-for-duty exams. The first reported incident was an outburst at the office during which she loudly accused a co-worker of prank calling her. Soon thereafter, numerous employees complained that she had frequent outbursts and a habit of walking around the office talking to herself. Those employees believed they were in danger of physical violence. After those complaints, Painter was transferred to a different department within the IDOT. Yet again, employees complained that they believed Painter was violent and dangerous. One day, she emailed her union representative stating: "for the record, the clock in the small conference room being set to 4:30 PM when it was only 4:00 PM – that is a tell-tale sign for me. It told me everything I needed to know." The union representative responded by saying that he did not understand what she meant and thought the battery was dead. Painter then responded with: "Something's dead alright – however, I prefer to be 'a lady' and not say what I think is dead." IDOT and the Illinois State Police treated the email as a threat.

The court held that IDOT did not violate the ADA or the Rehabilitation Act by requiring Painter to submit to mental fitness-for-duty examinations. The court explained that fitness for duty examinations must meet a standard of being job related and consistent with business necessity and that based on Painter's erratic behavior, IDOT met this standard.

2.1.4 *Robinson v. City of Chicago*, No. 13 C 4049, 2017 WL 1493675 (N.D. Ill. Apr. 26, 2017)

Christopher Robinson applied to become a Chicago Fire Department ("CFD") paramedic. The application process requires applicants to complete different rounds of physical ability tests. Mr. Robinson failed to complete the "stress test" in his first attempt. Although Mr. Robinson produced follow-up medical reports supporting his physical soundness to retake the test, the CFD did not permit it, breaking custom.

Mr. Robinson alleged that CFD denied him the ability to retake the test due to his obesity, constituting a violation of the Americans with Disabilities Act ("ADA"). To win his case, Mr. Robinson had to prove that: (1) "the CFD regarded him as having a disability as defined by the ADA, (2) that at the time of his application for employment he was qualified to perform the essential functions of the job of paramedic, and (3) that he was not hired because he was regarded as having a disability."

The City responded with a motion for summary judgment, claiming that the undisputed facts showed that: Mr. Robinson was not qualified, the City did not perceive Mr. Robinson's obesity as a disability, and the "business necessity" defense protected the City otherwise. To prevail on a motion for summary judgment, the City had to prove that, as a matter of law, no reasonable jury could infer that the City violated the ADA. The court found that the City failed this standard by not providing an adequate reason for its decision to deny Mr. Robinson a second chance at the stress test. Accordingly, the court denied the City's motion.

2.1.5 *Hoffman v. City of Bethlehem*, No. 16-CV-01581 (E.D. Pa. July 20, 2017).

Richard Hoffman, a former patrol officer, was fired and denied reinstatement after he was involved in four off-duty alcohol-related incidents and several other incidents over a span of eight years. Most recently, Hoffman caused a five-car collision while driving intoxicated with a blood-alcohol level of .16. He was due to report to work three hours later, at 6:45 a.m., and would have still been intoxicated based on his blood-alcohol level at the time of the accident. To make matters worse, Hoffman initially lied by saying he crashed after attempting to swerve to avoid a pedestrian. Later, he admitted that he was distracted by an incoming text message when the collision occurred. Other prior incidents include: (1) a physical altercation in a bar with an on-duty police officer, (2) failing to detect a nine millimeter handgun on an individual he arrested and searched, (3) grabbing a man by the throat in a pub, and subsequently threatening to use his authority to cause the pub owner "problems," and (4) transmitting obscene communications over his mobile data terminal while on duty. Hoffman's conduct violated various police directives and provisions of the Law Enforcement Code of Ethics.

Hoffman alleged that the City terminated and refused to reinstate him in violation of the Rehabilitation Act which forbids employers from discriminating against persons with disabilities, including alcoholism, in matters of hiring, placement, or advancement. The court

dismissed Hoffman's claim because even if he (1) has a disability, (2) was otherwise qualified to perform the essential functions of the job and (3) was nonetheless terminated, Hoffman failed to prove that the City's proffered nondiscriminatory reasons for terminating and refusing to reinstate Hoffman were pretextual. He would have had to have either (i) discredited the Agency's proffered reasons, or (ii) adduced evidence that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. The court explained that although alcoholism is considered a disability under the Rehabilitation Act, and the Act therefore prohibits employers from discriminating against alcoholics merely because they are addicts, the Act does not prohibit employers from firing alcoholics for engaging in misconduct.

2.1.6 *Corkery v. Dep't of Homeland Sec.*, 674 F. App'x 990 (Fed. Cir. 2017).

Brendan Corkery was a border patrol agent ("BPA") until the U.S. Customs and Border Protection ("the Agency") removed him from service for being psychiatrically unfit for any form of duty. An arbitrator then reviewed and upheld the removal. The Agency provided credible testimony that (1) he talked to himself in nonsensical sentences, had strong body odor, and exhibited odd and concerning behavior while on duty, (2) he was observed with human feces on his leg while in a workplace locker room and observed tracking human feces across the locker room floor, and (3) two physicians concluded he was unfit for duty, likely suffered from psychotic symptoms, auditory hallucinations and impaired judgment, and was unable to safely function as a BPA.

Corkery's behaviors were especially alarming because BPAs at Corkery's level perform demanding duties related to intelligence collection and utilization, and also may be required to perform physically strenuous tasks and to show proficiency with a government-issued firearm. Where an employee occupies a position with such medical standards or physical requirements and the agency finds such employee is unable to perform based on medical history, the agency must show: (1) the condition at issue is itself disqualifying, (2) recurrence cannot medically be ruled out, and (3) the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. Corkery sought review of the arbitrator's decision, but the Court of Appeals held that substantial evidence supported the arbitrator's determination that Corkery was not fit for duty.

2.1.7 *Spring-Weber v. City of Chicago*, No. 16 C 8097, 2017 WL 1316267 (N.D. Ill. April 10, 2017)

Lisa Spring-Weber is a fire paramedic for the City of Chicago. She suffers from chronic Bell's Palsy which causes her paralysis to the right side of her face, facial distortion and drooping, cosmetic disfigurement causing impaired speech and slurring, facial twitching, and impaired hearing. She occasionally experiences flare-ups during which her symptoms worsen for a brief period. Her doctors have nonetheless certified that she is fit for duty as a fire paramedic. Unfortunately, in May 2015, she experienced a flare-up while driving an ambulance. As usual, her symptoms occurred mainly on the right side of her face which happened to be the side of her face closest to the passenger seat where her co-worker was sitting. The co-worker accused her of falling asleep at the wheel and complained about her to the field chief. As a result, she was placed on involuntary medical leave with reduced pay through December 2015. Despite

receiving another fit-for-duty certification from her treating physician, the City deemed her unfit for duty and kept her on involuntary medical leave.

While on involuntary leave, she was not allowed to leave her home except to complete specific activities such as attending religious services, purchasing food or necessities, going to court, or voting. She was therefore confined to her home for over seven months. Also, she was required to submit to multiple drug and alcohol tests, psychiatric consultations and testing over a two-day period, and a year of talk-therapy at her own expense. Further, Spring was required to report at assigned times for evaluations and then had to wait up to five hours to be seen. Moreover, she was also denied medical care to which she felt she was entitled.

Spring alleged that (1) the Department's medical director and deputy district chief subjected her to disparate treatment because of her disability in violation of the American with Disabilities Act (ADA), (2) retaliated against her in violation of the ADA, (3) denied her medical benefits because of her disability in violation of the Rehabilitation Act, (4) violated her constitutional rights under the First, Fourth, Fifth and Fifteenth Amendments, and (5) intentionally inflicted emotional distress on her. The only claim dismissed was the Fourth Amendment violation claim, to the extent that it was based on being confined to the waiting room. All of the other claims are currently moving forward through the litigation process.

This case has not been resolved. Most motions to dismiss denied 4/10/17, but outcome of case unknown. "Status hearing" date 8/2/17 in N.D. Ill.

2.2 **FAILURE TO ACCOMMODATE**:

2.2.1 *United States v. Woody*, No. 3:16-CV-127, 2016 WL 1752762 (E.D. Va. May 2, 2016)

Working as a deputy sheriff, Hall was diagnosed with a heart condition in 2012, leaving her unable to perform the full functions of her position. Hall decided to apply to become a payroll technician with the city. She interviewed for the position along with other applicants. The city found Hall to be the least qualified out of all applicants. Accordingly, the city passed on hiring Hall, choosing instead to hire the most qualified applicant. Hall then commenced an Americans with Disabilities Act ("ADA") claim against the city, contending that the city denied providing her reasonable accommodations for the position. The court ruled that the ADA does not require disabled employees preferential treatment, when they are the least qualified or minimally qualified for the position. As a result, the court sided with the city.

2.2.2 *Raseknia v. Cty. of Los Angeles*, No. B250783, 2017 WL 1488660 (Cal. Ct. App. Apr. 26, 2017), *reh'g denied* (May 24, 2017)

Joe Raseknia, a Deputy Probation Officer II for the County Probation Department, has filed several baseless lawsuits over the years against the County and an ADA Coordinator, alleging various violations of the Fair Employment and Housing Act ("FEHA"). Claims in the instant lawsuit include discrimination based on age, race, ethnic origin, religion, and disability, retaliation, harassment, failure to prevent discrimination, and failure to accommodate. Raseknia based his claims on the County's unsuccessful attempts to transfer Rasekia from his current

(preferred) location to his previous location, but failed to show how he suffered an adverse employment action.

The trial court dismissed the case because the County sufficiently showed that Raseknia suffered no adverse employment action. The court of appeals agreed, explaining that an adverse employment action materially affects the terms, conditions, or privileges of employment and that Raseknia would have to present evidence of such for each of his claims to prevail. Raseknia presented no such evidence. Instead, Raseknia admitted that his current assignment accommodates all of his medical needs and work restrictions, that he has no complaints with his current work assignment, and that he currently works in his preferred location. The court held that actual transfer to a comparable but less desired location is itself insufficient to constitute actionable adverse action, and thus, unsuccessful transfer attempts are not actionable.

2.2.3 *Carey v. Cty. of Albany*, No. 114CV420GLSCFH, 2016 WL 4098598 (N.D.N.Y. July 28, 2016)

Joseph Carey worked for the city of Albany for 30 years as a corrections officer and sheriff. Carey injured his neck at work and while out on medical leave, suffered from a stroke. As a result, Carey developed a neurologic condition that precluded him from carrying a firearm. A neuropsychologist found Carey unfit to perform traditional police duties and recommended that he seek a light-duty, desk assignment. Carey requested reassignment to a modified desk position and was denied. Upon finding out that his time served as a corrections officer would not count towards his retirement, Carey brought forth an Americans with Disability Act ("ADA") claim against the County, alleging it unlawfully forced him to retire.

Carey asserted that although unable to perform the traditional duties of a police officer, he could perform the duties of a desk job within the sheriff's office. The County contended that if Carey admitted his inability to perform the functions of a police officer, then he could not win an ADA claim. The court agreed. Specifically, the court found that an ADA claim can only be won where an employer "fails to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."

Here, Carey's stroke and subsequent cognitive disabilities left him unqualified. The police department may set qualification standards. Carey could not win an ADA claim where he admitted that he does not meet the police department's standards at large, but may be fit for a limited position.

2.2.4 *Stewart v. Cty. of Salem*, No. 1:15-CV-01653-NLH-AMD, 2017 WL 1234112 (D.N.J. Mar. 31, 2017)

Ida Stewart worked for Salem County as a Corrections Officer from 2000 until being placed on unpaid leave in 2013. In May 2007, she shattered her ankle and broke her neck and sternum in a car accident. She returned to work after nine months, but was subject to medical restrictions. Specifically, she was not allowed to climb stairs or work more than a 12-hour shift. Every year, she had an annual "accommodation meeting" at which she was usually assigned to work in Central Control, an area that did not require step climbing. In 2013, she provided documentation substantiating her need for continued accommodations which provided that she

was allowed to climb stairs 1/3 of each day. The doctor who reviewed the report determined that Stewart could not perform the essential elements of her job because a corrections officer must "frequently" climb stairs. She went on unpaid leave pending the determination of her disability pension application.

Stewart sued the county for discriminating against her for being disabled in violation of the ADA. The court denied the County's request to decide the case before it could reach a jury because Stewart met the pleading requirements. First, she established that she suffers from a disability. Second, she established that she suffered an adverse employment action. Third, she presented sufficient disputed issues of material fact for a jury to determine whether she could perform the essential functions of the job with reasonable accommodations by the County.

2.3 **OTHER**:

2.3.1 *Muhammad v. Seattle Police Dep't*, 673 F. App'x 653 (9th Cir. 2016)

Arlandi Muhammad, a Seattle police officer, injured his shoulder while on duty. As a result, the Seattle Police Department ("SPD") placed him on a combination of "light duty" and paid leave, for over two years. Pursuant to his injury, SPD also issued Muhammad a voucher to obtain a modified ballistic vest. SPD and the City of Seattle then terminated Muhammad's employment on the basis of job abandonment.

Muhammad filed suit against the SPD arguing, it failed to reasonably accommodate his disabilities by not *helping him obtain* a modified ballistic vest and revoking his light duty in May 2010, thereby violating the Washington State Law Against Discrimination ("WLAD") and the Family and Medical Leave Act ("FMLA"). The court found that SPD did not violate either law. First, Muhammad did not request assistance or otherwise communicate that he felt ill-equipped to use the voucher. Ultimately, SPD provided Muhammad with a satisfactory vest, accommodating his injury. Second, SPD did not unfairly revoke his light duty assignment, as it is a durational position intended only for a "limited period of time." SPD does not offer officers the combination of paid leave and light duty for more than two years at a time, per policy. SPD does not need to make an exception for Muhammad.

Muhammad also alleged that the department engaged in a "campaign of retaliation" against him. However, the court found Muhammad was terminated for job abandonment because, after receiving several warnings, he exhausted all paid leave and failed to report to work despite having a medical clearance to return to full duty. Further, his pattern of absenteeism and the department's investigation began long before Muhammad filed a complaint. Thus, Muhammad did not establish pretextual reasons for termination, and his Washington Law Against Discrimination (WLAD) retaliation claim failed as well.

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

Robert Adair worked for a fire department in a position that required limited physical activity. After sustaining a work related back injury, three doctors proclaimed Mr. Adair permanently injured and physically unfit to perform the duties of a firefighter. The City encouraged Mr. Adair to apply for disability retirement or else face termination.

Mr. Adair asserted that the City's actions constituted a violation of the Americans with Disability Act ("ADA"). The City filed a summary judgment motion which the District Court granted. Mr. Adair then appealed.

On appeal, the Tenth Circuit found that the District Court erred by failing to assess Mr. Adair's claim under Congress' updated version the ADA, the Americans with Disability Act Amendments Act ("ADAAA"). The Tenth Circuit held the ADAAA required Mr. Adair to prove less than under the ADA, noticeably, Mr. Adair need not prove that "the actual or perceived impairment substantially limited one or more major life circumstances." Still, the Tenth Circuit found that Mr. Adair did need to prove that he was a qualified individual for the fire fighter. Mr. Adair failed to prove that he was both physically qualified or that he could be physically qualified with reasonable accommodation by the City. The Tenth Court thus confirmed the District Court's decision.

2.3.3 *Entergy Operations, Inc. v. United Gov't Sec. Officers of Am. Int'l Union*, 856 F.3d 561 (8th Cir. 2017)

Michael Phillips was a security officer at Entergy Operations, a nuclear power plant. Phillips's job required him to be able to wear a gas mask in the event of a chemical attack on the plant. But Phillips has chronic folliculitis. If he shaves too often, his hair follicles became infected and inflamed. Entergy feared that the condition would prevent Phillips from shaving often enough to properly wear his mask, so it fired him.

Phillips filed a grievance and the case went to arbitration. The arbitrator found that Entergy lacked just cause to terminate Phillips: first, the power plant never fit-tested him with facial hair to see if the mask would seal despite his condition, and second, it did not reassign him to a position that did not require the use of a mask. The arbitrator ordered Entergy to reinstate Phillips with back pay and to provide him with an acceptable respirator or a reasonable accommodation.

Entergy sued to vacate the arbitration award on the grounds that it violated public policy and that the arbitrator exceeded his authority by ordering reinstatement. The district court sided with Phillips, concluding that it could not rule in Entergy's favor without some evidence that Phillips's condition prevented him from wearing the mask. The Eighth Circuit Court of Appeals affirmed. Entergy bargained for the arbitrator's interpretation of its contract; so long as the arbitrator even arguably interpreted and applied the agreement, the appellate court must uphold the award. Because the arbitrator acted within the scope of his contractually delegated authority, Entergy was not entitled to vacation of the award.

2.3.4 *West v. Sewerage & Water Bd.*, 2016-0148 (La. App. 4 Cir. 9/21/16), 201 So. 3d 1011

Kerry West was employed by the Sewerage and Water Board of New Orleans for 25 years. After he was injured in a motor vehicle accident while he was in the course and scope of his employment, West did not return to work. After the Board sent a physician to West who cleared him to perform light duty work, West declined a light duty position with the Board because his primary care physician had not released him to return to work. The Board held a pre-termination hearing, where West testified he was unwilling to work at all. West was later

terminated for being unwilling or unable to perform his job. West appealed to the New Orleans Civil Service Commission, which found sufficient cause to terminate West.

The Court of Appeal of Louisiana held affirmed the Commission's finding of sufficient cause. Although West was given an opportunity to present his side of the story at the pre-termination hearing and civil service hearing, the only evidence he presented was his own testimony that he was unwilling to perform any kind of work. Even accepting this, there was clearly sufficient cause for termination in light of the Board's evidence of two physicians clearing West for light duty work.

3. COLLECTIVE BARGAINING

3.1 ARBITRATION AND PUBLIC POLICY:

3.1.1 *In re City of Tampa, Florida and International Association of Firefighters, Local 754*, No. 16/50071-3 (February 1, 2017)

In 2014, the Grievant took the City's fire captain promotion examination. Following the exam, he filed this grievance alleging that the exam's content exceeded the source materials limitations set forth in the collective bargaining agreement. He also alleged that the "counseling portion" used subjective "benchmarks" that were not included in the "objective source materials" advertised to prepare for the exam. As a remedy, the Grievant requested the "counseling" section of the Captain's exam be stricken from the overall grade. The Arbitrator addressed two issues: (1) whether the requested remedy was beyond the authority of the Arbitrator to effectuate, and (2) whether the City violated the collective bargaining agreement source materials that were advertised for the October 14, 2014 exam.

To address the first issue, the Arbitrator explained that he must confine his decision to the controversy in question. The Arbitrator decided that he had no authority to grant the remedy requested because the grievance was between the Grievant and the City but the remedy requested would impact many other people not party to the grievance. To address the second issue, the Arbitrator explained that the City is vested with unilateral authority to institute promotional exams, dictate their content and determine how they will be assessed. Therefore, the Arbitrator decided that the City did not violate the collective bargaining agreement by using subjective "benchmarks." The requested remedy was denied.

3.1.2 *Norwalk Police Union v. City of Norwalk*, 324 Conn. 618, 153 A.3d 1280 (2017)

Stephen E. Couture was a police sergeant employed by the City of Norwalk Police Department. Couture, the City, and Norwalk Police Union are parties to a collective bargaining agreement that provides for disputes over its interpretation to be resolved through arbitration. After Couture told another officer about a pending criminal investigation against him, her supervisor reassigned her to the Department's patrol division. Later, Couture was terminated after the Board of Police Commissioners determined he had violated Department rules and regulations. Couture disputed the decision and initiated an arbitration proceeding with the State Board of Mediation and Arbitration. A majority of the Board found just cause for Couture's termination. The trial court vacated the arbitration award on the ground that Couture was disciplined twice for the same misconduct (reassigning him to a patrol unit and later discharging

him), manifesting disregard of the law prohibiting double jeopardy. In doing so the court allowed Couture to testify on the issue of whether the reassignment constituted a disciplinary action, and reversed the arbitration board's finding that it was not. The City appealed.

The Supreme Court of Connecticut reversed, finding that the decision of the arbitration board did not manifest disregard of the law. The Court found that the question of whether the reassignment was a disciplinary action was a question of fact, and therefore a question properly decided by the arbitrator, whose finding on the issue is not subject to judicial review. It therefore found that the trial court's permitting Couture to testify on the issue, and its reversal of the arbitration board's finding, were improper. Accordingly, the Court ordered denial of Couture's application to vacate the arbitration award.

3.1.3 *Medici v. City of Chicago*, 856 F.3d 530 (7th Cir. 2017)

In 2015, the Chicago Police Department issued an order requiring all police officers to cover all their tattoos while on duty or otherwise representing the police department. Three officers claimed that the order violated their First Amendment right to free speech. In the context of public employment, their right as citizens to communicate to the public their views on matters of public interest or concern must be balanced against the employer's interests. The district court dismissed the suit on two grounds: (1) that the officers' wearing of tattoos was not protected by the First Amendment because the tattoos were a form of "personal expression" rather than an effort to communicate with the public on matters of public concern, and (2) promoting uniformity and professionalism outweighed the officers' interest in communicating with the public on matters of public concern by means of their tattoos. Two of the plaintiffs appealed.

Meanwhile, the police union filed a grievance against the City claiming that the tattoo order violated the union's collective bargaining agreement because the City had issued the order without bargaining over it with the union as the City must do with any order affecting police officers' working conditions. The grievance was referred to arbitration and the arbitrator ruled that the tattoo order violated the collective bargaining agreement. The City therefore had to revoke the order and compensate officers for any costs incurred by them in complying with it. As a result of the arbitration, the lawsuit between the police officers and City was mooted, and the original judgment in favor of the City was vacated.

3.1.4 *In re Snohomish County Fire District [Wash.] and International Association of Firefighters, Local 2781* (January 31, 2017)

Snohomish County Fire District 7 and the City of Monroe Fire Department have a bargaining relationship with International Association of Firefighters, Local 2871 (the "Union"). Together, the bargaining unit consists of approximately 146 members, 35 of which are qualified as paramedics and serve in dual capacities, both as paramedics and concurrently as Fire Fighters, Drivers/Operators, Lieutenants or Captains. Members of the union "employed as paramedics" are paid a "paramedic premium" on top of their base pay. These arbitration proceedings began when Lieutenant Lundquist, a firefighter who temporarily served as battalion chief, wanted to collect the "paramedic premium" on top of standard battalion chief pay.

The Union filed the grievance on behalf of Lieutenant Lundquist to recover the "paramedic premium" pay. At the time of his temporary promotion, Lieutenant Lundquist was qualified as a paramedic and had been receiving a "paramedic premium" while employed as a paramedic, in accordance with the fire fighters' collective bargaining agreement. While acting battalion chief, on the other hand, Lieutenant Lundquist did not receive the paramedic premium.

The arbitrator denied the grievance, determining that Snohomish County Fire District 7 did not violate the collective bargaining contract which states that paramedic premium applies to firefighters who are "employed as paramedics." The arbitrator explained that he interpreted the language of the contract to mean that a firefighter must actually perform paramedic duties to receive the premium pay. This interpretation was supported by the district's past practice of routinely halting payment of the premium once a firefighter is promoted to battalion chief and conformed to the district's need to have battalion chiefs focused on management issues.

3.1.5 *Blomenkamp v Vill. Of Freeburg*, No. 5-15-0074, 2016 WL 6988592 (Ill. App. Ct., 5th Dist. Nov. 28, 2016)

In 2012, two police officers for the Village of Freeburg were fired for misconduct ranging from breaking into an evidence locker to harassing other police officers by putting pepper stray on the handle of police vehicles. The union filed grievances over these terminations and, per the collective bargaining agreement, these grievances went to arbitration. Even though the union agreed to legally represent the officers, each officer obtained private counsel. The union attorney rejected a dual representation agreement because that arrangement would violate fair labor law practices. The arbitrator decided the termination of the officers was proper.

One officer appealed the arbitration decision to the state court. The court dismissed this appeal because the individual officers were not parties to a collective bargaining agreement, only the union was, so individuals did not have a right to appeal the decision. The officer appealed this dismissal to the state court of appeals.

This court affirmed the lower court's dismissal. Only the union and employer can file a lawsuit unless the union made a decision in representing the individual that was "arbitrary, discriminatory, or in bad faith." Absent this exception, an individual cannot have an arbitrator's decision reviewed by a court.

3.1.6 *City of Palo Alto v. Pub. Emp't Relations Bd.*, 211 Cal. Rptr. 3d 287 (Cal. Ct. App., 6th Dist. 2016)

Since 1978, the City of Palo Alto's charter stated that impasses in employment negotiations with police and firefighters must be decided by binding interest arbitration. In 2011, city voters passed a ballot measure repealing this "interest arbitration" provision. The firefighters union claimed this was an unfair labor practice because binding arbitration issues are subject to mandatory consultation. The Public Employment Relations Board ("PERB") reviewed and ultimately decided that the City had not consulted with the union in good faith before putting the matter to a vote. PERB ordered the City to rescind the ballot measure. The City appealed PERB's decision to this court.

While the court agreed with PERB's ultimate holding, PERB's order for the city to rescind the ballot measure was improper. While PERB has broad remedial authority, rescinding a ballot measure is a purely legislative act which the judicial branch is prohibited from controlling. The court ordered PERB to find a more appropriate remedy, such as voiding a legislative act due to procedural defects.

3.1.7 *Teamsters Local 700 v. Ill. Labor Rels. Bd.*, 73 N.E.3d 108 (Ill. App. Ct., 1st Dist. 2017)

The Sheriff of Cook County issued a "Gang Order" that required employees to disclose any gang affiliations and prohibited any county employees from associating with anyone the employee knew or should have known is or was in a gang. The union filed a charge with the Illinois Labor Relations Board ("ILRB") that this order was an unfair labor practice and must be subject to mandatory bargaining because it might affect wages, hours, and terms and conditions of employment. The ILRB upheld the Order and the union appealed to this court.

This court determined that this Order's "should have known" language and the disclosure requirement changed the terms and conditions of employment. The court recognized there is no right to bargain over "inherent managerial policy," but ultimately held the benefits of bargaining over this order outweigh the burdens. The Court reversed the ILRB decision and held the Order should have been subject to mandatory bargaining.

3.1.8 *State, Cty., and Mun. Emps. v. City of Lebanon*, 388 P.3d 1028 (Or. 2017)

During new negotiations over a collective bargaining agreement, union leaders wrote a letter in a local newspaper stating certain city employee positions should be terminated. In response, a city council member submitted a letter to the newspaper in her "individual" capacity and not a city employee encouraging city employees to "de-certify their union captors." The union filed an unfair labor practice complaint against the city for the city councilor's actions claiming her statements were made in her position as council member. The Employment Relations Board ("ERB") determined the councilor's actions violated fair labor practices. The state Court of Appeals reversed this decision and stated the council member was not acting as a "designated representative" of the city.

The Oregon Supreme Court held the councilor could have been acting in her official capacity and described the correct test to be applied. To determine whether the councilor was a "public employer representative," the question is whether city employees "would reasonably believe that a given individual acted on behalf of a public employer in committing an unfair labor practice." This "reasonable belief" test considers a number of factors, including: whether a council member was a high ranking employee of the city, whether she was acting in her official capacity when violating fair labor practices, whether the councilor had power to hire or fire employees, and whether the city disavowed the actions of the individual. One or more of these factors can be sufficient for a decision, not all are required. The court returned the case to the ERB to apply this new test.

3.1.9 *Ohio Patrolmen's Benevolent Ass'n v. Findlay*, 77 N.E.3d 969 (Ohio 2017)

Sergeant David Hill was a police officer with the Findlay Police Department and a member of the Ohio Patrolmen's Benevolent Association ("OPBA") when he referred to a

female subordinate as a "whore." The police department's disciplinary procedures included a "discipline matrix" that set out progressive levels of discipline based on the seriousness of the offense and the number of prior violations. If more than one discipline level was indicated, the Chief of Police was to have sole discretion in determining which level was appropriate. The OPBA, meanwhile, was a party to a collective bargaining agreement ("CBA") with the city that provided that discipline would be imposed only for just cause and pursuant to a grievance procedure that included binding arbitration. This case addressed whether the just-cause-for-discipline provision of the CBA authorized the arbitrator to modify the disciplinary action recommended by the Chief of Police in accordance with the disciplinary matrix.

Following an investigation into the name-calling incident, the Chief of Police found that Hill had violated the department's sexual harassment policy. The Chief applied the disciplinary matrix and recommended that Hill be terminated. The arbitrator disagreed, concluding that termination was not warranted but that a lengthy disciplinary suspension should be imposed. He ordered that Hill be reinstated with full seniority. Hill and the OPBA filed an application to enforce the arbitration award, contending that any limitation on an arbitrator's authority to modify a disciplinary action must be specifically bargained for and incorporated into the CBA—a prerequisite not fulfilled here. The city argued, meanwhile, that an arbitrator's authority to modify a disciplinary action if he finds just cause lacking is limited by the predetermined penalties set forth in the police department's discipline matrix.

The Ohio Supreme Court determined that the arbitrator did not exceed his authority by modifying the disciplinary action. Because the parties did not specifically bargain for the matrix and incorporate it into the CBA, the arbitrator retained the authority to review the appropriateness of the Chief's recommended sanctions and to fashion a remedy. The court ordered that Hill be reinstated to his former position full seniority but no back pay pursuant to the arbitration award.

3.2 **MINIMUM STAFFING**:

3.2.1 *City of Allentown v. Fire Fighters Local 302*, 157 A.3d 899 (Pa. 2017)

The City of Allentown and the International Association of Fire Fighters, Local 302 began negotiating a new collective bargaining agreement in 2011. The parties were not able to come to an agreement, so the City requested binding "interest arbitration." After two years of hearings, the interest arbitration panel issued a new collective bargaining agreement to run from 2012 to 2015. This new agreement included a minimum staffing requirement of 25 individuals per shift.

The City filed a complaint with the court that staffing requirements were a "managerial prerogative" and beyond the power of the arbitration panel to decide. The trial court determined that general employment levels were managerial decisions and outside the scope of arbitration, but minimum staffing requirements were properly decided under arbitration because they relate to the "duties and safety of firefighters." The City appealed this decision and the next court held the minimum staffing requirement should not have been determined by the arbitration panel because the decision "unduly infringed upon the City's managerial responsibilities."

To solve these conflicting opinions, this decision was appealed to the state supreme court. To determine whether a topic is properly decided by an arbitration panel, the court must determine whether a subject is “rationally related to the terms and conditions of employment.” If it is rationally related, the court should ask whether the award implicates “managerial responsibility.” If the topic meets both requirements, the court must determine “whether collective bargain over the topic would unduly infringe upon the public employer’s essential managerial responsibilities.” Both parties agree that minimum staffing is rationally related to employment and a managerial responsibility. The court determined the minimum staffing requirements were vital to the safety of firefighters and, even though it does impact the finances of the city, the arbitrator’s decision did not unduly infringe on the city’s management.

4. DISCRIMINATION: AGE

4.1 *Simonis v. City of Fort Wayne*, No. 1:15-CV-235-PPS, 2017 WL 1927750 (N.D. Ind. May 10, 2017) (slip op.)

After working for the City of Fort Wayne for 27 years, 58-year-old John Simonis applied for a promotion from his position as an Engineering Inspector to that of Right of Way (“ROW”) Inspector. When the job was given to a younger candidate with seven years less seniority, Brad Fisher, Simonis sued the City for age discrimination under the ADEA, 29 U.S.C. 623(a)(1). The City claimed the decision was solely based on Fisher’s out-performance of Simonis on three tests, two of which require computer proficiency (Microsoft Word and Excel). Simonis claimed that these tests were designed to favor younger candidates.

The District Court denied the City’s motion for summary judgment, finding there are too many genuine disputes as to material facts. First, the court questioned the legitimacy of the two computer proficiency tests. The ROW Department had not before—nor have since—used the tests for hiring a ROW Inspector. There was evidence that the selection process was heavily influenced by Kyle Winling, who developed the skills test and clearly favored his friend, Fisher. Word and Excel proficiency is not listed in the job description. Other ROW Inspectors said such skills do not correlate to job duties. And two ROW employees believed the tests were meant to weed out older applicants in favor of Fisher. Furthermore, the process appeared to violate the City’s own policy by not having Human Resources review the skills test, and failing to consider factors other than mere test scores in selecting Fisher. Finally, the Department’s labor contract mandates that employees with minimum qualifications and greatest seniorities be given preference in filling vacancies. Simonis, whose minimum qualifications the City did not challenge, was clearly the senior.

4.2 *Rogers v. City of Baton Rouge*, No. 14-170-RLB, 2016 WL 4035328 (M.D. La. July 25, 2016)

Captain Flora Rogers sued her employer, the Baton Rouge Police Department, for age and race discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Age Discrimination in Employment Act (“ADEA”). According to Rogers, the police department repeatedly transferred her to objectively less desirable positions, replacing her with younger white subordinates. She alleged that the department required her to train under the supervision of subordinates and to take classes with new recruits in an effort to get her to retire.

She was also subjected to ageist comments during this time. ("You are a 63 [year] old maw-maw who should be home playing with the grandchildren.").

When Rogers complained that the department was taking these adverse employment actions because of her age and refused to sit for the exam associated with her law class, the department placed her on administrative leave. She was precluded from earning extra pay for "extra duty" work during that period. Rogers also contended that she alone was asked to wait a month between completing the law class and sitting for the test, a time delay that she found stressful and potentially harmful to her performance. She alleged that the delay was imposed on her because of her age and in retaliation for her earlier complaints about age and race discrimination in the department.

The court held that Rogers presented evidence sufficient to proceed with her age discrimination claim. Whether her transfers to different positions constituted adverse employment actions or were instead based on the police force's legitimate operational needs was a question of fact to be tried by a jury. Likewise, the issue of whether she was treated adversely *because* of her age was for a jury to decide. The court held that Rogers could not establish that the department retaliated against her for filing her Title VII and ADEA complaints, however, as her placement on administrative leave predated those complaints.

4.3 *Cty. of Berrien v. Police Officers Labor Council*, No. 328794, 2016 WL 6781562, (Mich. Ct. App. Nov. 15, 2016)

In 2001, the County of Berrien and Berrien County Sheriff hired James Ellis and placed him in the road patrol division. After enjoying that position for ten years, the County reassigned Ellis, then 57-years-old, to the jail division. Ellis applied for two road patrol positions but was passed up for younger applicants, ages 34 and 26 respectively. He promptly filed a grievance, alleging age discrimination in violation of the parties' Collective Bargaining Agreement ("CBA"). When the grievance was not resolved to Ellis's satisfaction, the issue went to arbitration. There, the arbitrating body ruled in Ellis' favor, finding discrimination and ordering the County to immediately place him in a road patrol position.

The County sought vacation of the arbitration award; Ellis sought confirmation of the award. To Ellis' dismay, the court vacated the arbitration award. The court based its decision on CBA provisions, which expressly granted county management full and exclusive authority to hire and assign all employees to respective departments. The authority was thus, not subject to the grievance procedure.

Additionally, the court stated it would've upheld the trial court's order vacating arbitration because the sheriff's office is a constitutional office that grants law enforcement powers and the arbitrating body cannot usurp such power. By compelling the department to reinstate his patrol position, the arbitrator had exceeded his authority by attempting to grant Ellis such law enforcement powers.

4.4 *Stilwell v. City of Williams*, 668 Fed. Appx. 227 (9th Cir. 2016)

Stilwell had been a city employee for twenty years when he agreed to testify in a lawsuit against the city for age discrimination. Over the next year, Stilwell began receiving

unprecedented negative comments about his job performance from other city employees who were also encouraging him to not testify in the case. After being placed on administrative leave following complaints about his job performance, Stilwell was fired. Stilwell brought a claim under the Age Discrimination in Employment Act claiming his termination was retaliatory action for his testimony.

Both parties agree that Stilwell was engaged in a protected activity when he agreed to testify. The City argued that his termination was due to poor job performance and unrelated to his testimony so was not a retaliatory act. The court noted that poor job performance was a legitimate and nondiscriminatory reason for Stilwell's termination. However, Stilwell had produced enough evidence to raise a question of whether poor job performance was just a pretext covering for a retaliatory action. The court decided Stilwell's evidence of temporal proximity between his testimony and discharge were sufficient to allow this case to go forward.

5. DISCRIMINATION: GENDER/SEXUAL ORIENTATION/SEXUAL HARASSMENT

5.1 *Thomas v. Monroe Cty. Sheriff's Dep't*, No. 15-11344, 2016 WL 5390860 (E.D. Mich. Sept. 27, 2016)

Christine Thomas was a Deputy Sheriff at the Monroe County Sheriff's Department until budget cuts forced the Department to lay off a number of Deputies, including Thomas. Thomas continued to work for the Department as a Corrections Officer, but wished to return to her Deputy position. As Deputy positions later opened, the Department rehired former Deputies in order of their seniority. Thomas, however, was passed over for new Deputy positions while she was pregnant and on light duty; on two occasions the Department instead hired new Deputies straight from the police academy. Thomas sued the Department claiming that it refused to rehire her because she was pregnant. The Department moved for summary judgment, claiming the decision not to rehire her was based entirely on her prior work performance, and that it needed Deputies who could go on patrol right away given understaffing issues.

The District Court denied summary judgment for the Department. The Department knew Thomas was pregnant, and there was sufficient evidence of causation based on the fact that the department passed her over for rehiring one month after learning of her pregnancy. Although the Department's proffered nondiscriminatory reasons are legitimate, there was evidence that the Department's proffered reason was pretextual. This was based on the fact that the Sheriff allegedly stated "what good is she going to do us?" when her name came up as a possible candidate for rehire, and the fact that the Department had an informal policy of rehiring deputies in order of seniority.

5.2 *Litterdragt v. Miami-Dade Cty., Florida*, No. 14-CV-24737-CIV, 2016 WL 4269962 (S.D. Fla. Aug. 15, 2016).

Miroslava Litterdragt is a female police officer who was temporarily relieved of duty during an investigation of missing evidence and open case files. Litterdragt was a detective in the General Investigative Unit for eight years before she transferred out of the GIU to work in uniform patrol. A few months after her transfer, Litterdragt's former supervisor at GIU could not

locate any of Litterdragt's open-pending case files at the GIU office. When she was contacted, Litterdragt admitted to shredding some files and to missing a box of open pending files. To make matters worse, physical evidence associated with ten of those case files was also missing. The County initiated an investigation and temporarily relieved her of duty pending the investigation but did not reduce her salary and continued her employer healthcare and dental benefits.

Litterdragt brought a civil rights action against the police department claiming she was discriminated and retaliated against because she is a woman. Further, she complained that being on temporary leave disallowed her from earning a promotion, working over-time, working off-duty assignments, working the night-shift, and using a squad car for personal use. The court held that public employees placed on administrative leave and suspension pending an investigation do not suffer an adverse employment action. Additionally, the court could not identify a causal connection between her sex and purported discriminatory retaliation against her. Litterdragt could not point to any similarly situated male detectives not relieved of duty pending an internal investigation for missing open-pending case files and physical evidence. The district court dismissed Litterdragt's claim.

5.3 *Allen-Brown v. D.C.*, 174 F. Supp. 3d 463 (D.D.C. 2016)

Sashay Allen-Brown is a police officer at the District of Columbia's Metropolitan Police Department. After returning from maternity leave, she was still lactating and needed to express breast milk during work hours. She sought a temporary assignment that would not require her to go on beat patrol, since that required wearing a bullet-proof vest that can interfere with lactation. However, Allen-Brown was placed on patrol duty shortly after also complained to her supervisors that the designated location for expressing milk at the police station was unclean. Allen-Brown brought gender and pregnancy discrimination and retaliation claims against the District. The District argued she never formally applied for limited duties and moved for summary judgment.

The District Court denied summary judgment for the District. It found that Allen-Brown produced sufficient evidence for a reasonable jury to find discrimination. There was evidence that the supervisor informed her she would be denied limited duties even if she had formally applied, and it was disputed whether the formal application requirement was even applicable or promulgated to Allen-Brown. She also proffered evidence that eleven other officers with injuries or disabilities were accommodated when she was not. Furthermore, the court rejected the District's argument that lactation is not covered as a "medical condition" by the Pregnancy Discrimination Act. The court also found a genuine dispute of material fact on Allen-Brown's retaliation claim, holding that her complaints about the District's lactation facility could reasonably be found to have caused the District to put her on patrol duty.

5.4 *Neff v. City of E. Lansing*, No. 1:16-CV-66, 2017 WL 2812891 (W.D. Mich. June 29, 2017)

Tresha Neff, a female police sergeant for the City of East Lansing, brought a discrimination claim against the City under Title VII for the City's failure to promote her. Neff alleged she was more qualified than male officers who received promotions to lieutenant. She

alleged that she was more experienced, had more seniority, and worked more voluntary hours than the male officers who were promoted.

The District Court granted the City summary judgment. It found an insufficient showing of disparate treatment, concluding that Neff's allegations as to her qualifications did not show why she was the "plainly superior candidate." It found that, while the number of years of experience is relevant to promotion decisions, there was no evidence as to why it should be the determinative factor in this case. The court also found an insufficient showing of disparate impact because Neff failed to respond to the City's argument that she failed to provide sufficient statistical evidence to establish a prima facie case. Neff filed an appeal.

5.5 *Spreckelmeyer v. Indiana State Police Dep't*, No. 115CV00912TWPDML, 2016 WL 6893825 (S.D. Ind. Nov. 23, 2016)

Shannon Spreckelmeyer was a female merit trooper at Indiana State Police Department, and worked in the Laboratory Division as an analytical supervisor. Mark Keisler was another analytical supervisor in the Division. Keisler sought a civilization position with the Department after his retirement as a trooper. Before his retirement, a forensic scientist position became available, so upon retirement he transitioned into that position as a civilian employee. The Department did not open the position to anyone else, and moved a vacant supervisory position from Spreckelmeyer's Division unit in order to fund it. Spreckelmeyer expressed her desire to likewise convert to a civilian position, but this did not occur following her retirement. Spreckelmeyer filed a gender discrimination claim against the Department. The Department moved for summary judgment, arguing that it had legitimate, nondiscriminatory reasons for not transitioning Spreckelmeyer to a civilian position. It claimed that there was no job position or funding available at the time when Spreckelmeyer retired, and that Spreckelmeyer did not apply for the civilian position when it became available after her retirement

The District Court held that her claim is viable. It found a dispute of material fact as to whether the Department's decision not to create a new position had discriminatory motives. Furthermore, the court found that Keisler and Spreckelmeyer similarly situated because they were subject to the same rules, policies, procedures, and chain of command, worked in the same division, and shared the same rank and supervisor. This was despite the fact that Keisler was a nationally recognized expert in his field, and Spreckelmeyer was not—Spreckelmeyer was never formally disciplined, and always "met the legitimate expectations associated with her positions"). Finally, there was a vacant position in Spreckelmeyer's unit (which was ultimately given to Keisler), and the Department knew that her retirement was impending three years prior to its occurrence. And although Spreckelmeyer did not apply for the civilian position which became available after her retirement, Keisler's civilian position was automatically transferred to him without application.

5.6 *Alfaro-Flecha v. ORC Int'l, Inc.*, No. 15-CV-1402 (AJN), 2016 WL 67722 (S.D.N.Y. Jan. 5, 2016)

Christina Hones was a female correctional officer at Indiana Department of Correction's Henryville Correctional Facility, an all-male correctional facility. Hones' request to be transferred to the daytime shift, which allegedly afforded more opportunity for overtime pay,

was denied. The Facility has a policy limiting female officers' daytime shifts to ensure that male officers would always be present for non-emergency strip searches of inmates (female officers are prohibited from conducting strip searches except in emergencies). Hones claimed that the Facility considered the daytime shift a "male" position, and denial of her transfer request constituted sex discrimination in violation of Title VII. The Facility argued that the gender-based scheduling that resulted in the denial of Hones' request is consistent with Title VII because gender is a bona fide occupational qualification for officer positions at the Facility.

The District Court granted summary judgment for the Facility. It found that the Facility's policy of qualifies both as bona fide occupational qualification and business necessity so as to prevail over a disparate treatment theory of discrimination. The court deferred to the Facility's valid business judgment that gender quota per shift was best way to balance male inmates' privacy rights and rights of female officers to be free from discrimination. Furthermore, the court rejected Hones' disparate impact theory because she presented no evidence that female correctional officers were statistically less likely to receive their desired shift compared to their equally qualified male counterparts.

5.7 *Froby v. Clark Cty. Sch. Dist.*, 669 F. App'x 903 (9th Cir. 2016)

Margaret Froby was employed by the Clark County School District as a principal for inmate classes at Florence McClure Women's Correctional Center. A male lieutenant at the Correctional Center allegedly subjected her to sexually hostile work environment, Froby brought a sexually hostile environment claim against the District under Title VII. Froby pointed to six incidents during a nearly two-year period, including the lieutenant's reference to the mother of his child as a "bitch."

Under Title VII, an employer for conduct giving rise to a sexually hostile environment is liable if the employee proves (1) that she was subjected to verbal or physical conduct of a harassing nature because of her sex, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

The Ninth Circuit affirmed the District Court's grant of summary judgment for the District. The court found that, although the lieutenant's conduct may have been overbearing and bullying, his only gender-related comment—calling the mother of his child a "bitch"—was insufficient to show that his alleged conduct was "because of sex." It found that the six cited examples of the lieutenant's alleged misconduct, which were mostly related to student-inmates, were not severe or pervasive enough to alter her work conditions and create an abusive work environment. Furthermore, there was no evidence that he treated male and female employees differently

5.8 *Guillen-Gomez v. City of Burbank*, No. B242699, 2015 WL 7354722 (Cal. Ct. App. Nov. 20, 2015) (unpublished op.)

Cindy Guillen–Gomez, a Hispanic female officer at the City of Burbank Police Department ("BPD"), claimed that she was harassed and discriminated against due to her pregnancy, race, and sex, and that she was retaliated against for her complaints about such

discrimination. She alleged various incidents in support of her claims, including being called—and hearing others such as suspects and other BPD personnel called—names such as "wetback," "beaner," "spic," "bitch," "whore," and "cunt." Other BPD officers have been heard to make comments such as that women had "no business being detectives." After she was injured while pursuing a suspect, she was reprimanded for carelessness despite the BPD safety committee's finding of no fault. A promotion she applied for was given to an officer with lower test scores. When she got pregnant, she was subjected to inappropriate question about her pregnancy and marital relationship, reprimanded for her being out of compliance with the department "height to weight ration" policy, a rumor circulated within BPD that she got married only because of the pregnancy, and the BPD maternity leave policy was changed such that she had to use her vacation and earned sick days towards her leave.

The California Court of Appeal affirmed summary judgment for the BPD, finding that the four sporadic incidents of harassment were insufficient to demonstrate severe and pervasive harassment. It found no evidence that the Sergeant who allegedly forced Guillen-Gomez to reveal her pregnancy during roll call even knew that she was pregnant. It found the BPD Chief's comment that Guillen-Gomez better "not gain too much weight" was motivated that she maintain her eligibility to work, and thus not harassment. Evidence regarding various comment, like about her being "lazy" and improperly dressed, were properly found inadmissible, and were not severe or perverse enough to create an abusive work environment.

Furthermore, the court found that Guillen-Gomez failed to identify an adverse employment action taken against her as a result of her race or gender. There was no evidence that "BPD employed practices that resulted in the promotion of Hispanics and women in a rate that was disproportionate considering the available pool of eligible employees." And the retaliation claim was found to be properly dismissed because, "of the two alleged adverse actions taken against her in response to her alleged protected activity, one occurred *before* she engaged in the activity, and the other was not alleged in her complaint, and she never moved to amend her complaint to add such an allegation." The court held that Guillen-Gomez cannot rely on the existence of a "hostile work environment" as an adverse employment action.

5.9 *Coleman-Askew v. King Cty.*, No. C15-994-MJP, 2016 WL 4399602 (W.D. Wash. Aug. 18, 2016)

Sharon Coleman-Askew, an African-American woman, was employed as a King County Correctional Officer. Her supervisor, Captain Hardy, would allegedly follow her to the workplace gym; timed his visits to coincide with her visits; and, stared at her while standing directly behind her, making comments such as "you look good for your age." Hardy also allegedly held Coleman-Askew to a "higher standard than other employees and gave her unnecessary directives including where in the room to sit during roll call, unfairly denied [her] opportunities to work overtime hours, and generally bullied and intimidated [her] and other female employees." Coleman-Askew also alleged that other supervisors knew of but failed to stop Hardy's harassment, and that she was retaliated against after complaining of such harassment. Coleman-Askwer claimed she was forced to leave the Center and transfer elsewhere with reduced compensation as a result of the stress caused by the harassment. Based on these allegations, Coleman-Askew brought an employment discrimination action on the basis of sex against Hardy, other supervisors, and King County.

The District Court denied the defendants' motion for summary judgment. The court found that a reasonable factfinder could conclude that Hardy's conduct was sexual in nature and sufficiently severe or pervasive as to create a hostile work environment. The court also found that a reasonable factfinder could conclude King County is vicariously liable as an employer of Hardy. This was based on the allegations that he had control over Coleman-Askew's wages, hours, and working conditions, and that King County failed to respond reasonably to Hardy's harassment. Coleman-Askew submitted evidence of repeated attempts to report Hardy's conduct up the chain of command, in response to which management allegedly tried to avoid formal investigation in favor of mediation. However, the court dismissed her retaliation claims, finding as a matter of law that she did not suffer any adverse employment action.

5.10 *Ernst v. City of Chicago*, 837 F.3d 788 (7th Cir. 2016)

Ernst and four other women, all licensed paramedics with prior experience, applied to work as Chicago paramedics but failed the physical-skills exam and were denied jobs. The physical exam included a modified stair climb, arm-endurance test, and leg lift. These five women brought a gender-discrimination lawsuit against the City of Chicago stating their physical exam had a disproportionately adverse impact on female applicants. Since ninety percent of males who took the exam passed and only sixty percent of women passed, Chicago conceded that their exam had an adverse impact on women. However, Chicago claimed the exam was a business necessity and properly tested job-related skills. Chicago supported this claim with a study that compared different skills and found the areas high-performing paramedics tested better on were the skillsets that were related to the job. The lower court held that this study satisfied federal regulations on these types of studies.

Federal law requires that a study "predicts or significantly correlates with importance job-performance elements." The Court of Appeals found the study relied on by Chicago did not appropriately confirm that the skills tested by the physical exam were job-related. The physical exam skills were "more taxing" than real skills required. For example, the exam included unnecessary timing and abnormally heavy lifting requirements. Based on this information, the court held the plaintiffs should have won their gender-discrimination suit.

5.11 John Byrne, *Chicago to Pay $3.8 Million as Part of Fire Department Gender Bias Case*, CHICAGO TRIBUNE (Dec. 9, 2016)

The Chicago Fire Department has been subject to many lawsuits over the last two decades for discriminatory hiring practices. In 2011, the US Supreme Court ordered the Chicago Police Department to pay $30 million dollars to thousands of African American applicants who took a racially discriminatory written test in 1995. The Department was also ordered to hire 111 of these black firefighter candidates and pay them $15 million for their pensions to account for not being hired earlier.

The twelve women in this group were still forced to take and pass the physical exam before being hired. In 2012, these women brought a lawsuit claiming the physical exam was discriminatory. The Fire Department agreed to begin using a more broadly used exam. The women could accept a cash payment or take the new exam. These twelve women greed to take the new exam, passed, and were hired by the Fire Department. This group of African American

women also received $3.8 million in back pensions to represent what they would have earned had they been hired earlier.

5.12 *Fox v. Cty. of Yates*, 922 F. Supp. 2d 424 (W.D.N.Y. 2013)

Patricia Fox was a female correctional facilities officer in Yates County Jail. Fox brought action against Yates County, the sheriff, the undersheriff, and the lieutenant, for malicious prosecution and sexual discrimination claims.

During her employment, Fox had reported several instances of employee misconduct by her superiors. Fox claims that the individual defendants and other jail employees subjected her to repeated instances of harassment and discrimination in retaliation. Further, the County initiated criminal proceedings against Fox for falsifying her time cards by including overtime that had not been approved under the jail's overtime policy. Fox was acquitted of all charges at trial but maintains the false criminal charges against her were retaliatory. Fox was unable to produce adequate evidence to support these claims.

Furthermore, Fox felt she had not been given promotions due to her gender. However, Fox never actually applied for the vacant positions. Although claiming the application process for these promotions would have been "futile," Fox was unable to prove this point. The courts thus dismissed her case.

6. DISCRIMINATION: RACE/ETHNICITY/NATIONAL ORIGIN

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

From 2005 to 2008, many Massachusetts police departments used an exam to determine who should be promoted to Sergeant status. This exam consisted of a written examination and an "education and experience" rating, which allowed applicants to list relevant work experience. Black and Hispanic officers who took this test and were denied promotion claimed the test had a disparate impact based on race in violation of federal law.

The district court held that there was a disparate impact because the percentage of Black and Hispanic officers who were promoted based on this exam was significantly below the percentage of White applicants who were promoted. However, the court also determined that the exam was a valid tool that helped the city select Sergeants based on merit. The plaintiffs argued that an alternative test that included an assessment center, structured oral interview, and performance review, in addition to the exam, would reduce the racial disparity in promotions while still being a useful tool to the department. The district court did not find evidence to prove this test would reduce racial disparities. The City's expert witness stated it was unlikely an alternative test would materially reduce any disparity because there were hundreds of applications for only two dozen spots. The district court agreed with the City and did not find evidence to prove this test would reduce racial disparities. The court of appeals determined the district court used proper standards and affirmed the lower court's decision.

6.2 *Jones v. City of Boston*, 845 F.3d 28 (1st Cir. 2016)

From 1999 to 2006, the Boston Police Department drug tested thousands of officers, cadets, and job applicants by analyzing samples of their hair. Officers and employees who tested positive for drugs received adverse employment actions, including unpaid suspensions, mandatory drug rehabilitation, or termination.

Ten African American employees brought a civil rights suit against the city and police department claiming this drug test created a disparate impact because black employees were more likely than white employees to have their hair test positive for cocaine. The plaintiffs claimed that hair products commonly used by black individuals made it more likely for their hair to retain contaminants of drugs from environmental exposure. The police department's drug testing could not distinguish between the ingestion of drugs and environmental exposure, leading to positive drug tests for innocent behavior. Plaintiffs also claimed that the police department refused to use an alternative test, requiring a more accurate urine analysis from any individual whose hair tested positive for drugs, before implementing any punishment.

The Court of Appeals found that the drug testing of hair samples was job-related and a business necessity. However, the Court returned the case to the district court to determine if the police department actually refused to adopt the alternative urine analysis test and whether this test would properly meet the needs of the police department while reducing the disparate impact on black employees.

6.3 *Willis v. Anne Arundel Cty.*, Civ. No. JKB-16-1388, 2017 WL 952686 (D. Md. Mar. 10, 2017)

Plaintiff, a white male Firefighter, was demoted to an entry level position after complaints revealed he had cracked an egg on a subordinate's head, "blown smoke in a subordinate's face," and created a hostile work environment by using and permitting the use of "profanity and inappropriate, sexually explicit comments, often directed at a female subordinate." Within the same fire department, a black Lieutenant was suspended for one shift and transferred to a different fire station after complaints of "intimidation and threats" from subordinates.

The Plaintiff brought suit under the Civil Rights Act and other laws claiming he was treated less favorably than his similarly-situated colleague and that this difference was based off of race.

The Court ruled that the Plaintiff's case failed in a multitude of ways. First, the Plaintiff failed to file the required administrative actions before initiating the lawsuit. Even if the Plaintiff had followed proper procedure, the Court ruled his substantive claim also failed to state a prima facie case of discrimination because the Plaintiff and the demoted black firefighter were not "similarly situated" because they were differently ranked officers. While not necessary to the holding, the Court determined the Plaintiff's discrimination claim failed because the Fire Department had an appropriate "race-neutral" explanation for the difference in punishments between the two employees. This case is in appeal to the Fourth Circuit.

6.4 *Ritchie v. Napolitano*, 196 F. Supp. 3d 54 (D.D.C. 2016)

Scott Ritchie, a 43-year-old white male unassigned officer, filed suit against the White House Branch of Secret Service ("Service") for both race and sex discrimination. He applied for a position in the Uniformed Division's Counter-Surveillance Unit and was passed over by five other minority applicants and a younger applicant, several of whom ranked below Ritchie. The White House Branch Deputy Chief, Mark Chaney, said Ritchie was not chosen because the unit needed members that were both "physically and ethnically diverse." EEO Counselor Kathy Brezina reported Ritchie was not chosen because the unit already had enough white males.

Although the Service claimed the position Ritchie applied for was not a promotion because it did not include a raise, the court ruled it was a more highly desired position, offering more variety and more opportunity for advancement, among other benefits. Thus, the failure to assign Ritchie to the unit was an "adverse employment action."

The official statements supported Ritchie's claims of sex and race discrimination. Ritchie also claimed to be the victim of age discrimination, but he failed to offer evidence that established this claim.

6.5 Dave Collins, Lisa Pane, Associated Press, *Police Departments Eye Lower Recruitment Criteria*, The Columbian, Nov. 14, 2016, http://www.columbian.com/news/2016/nov/14/police-departments-eye-lower-recruitment-criteria/

To attract more applicants, police departments nationwide are using easier standards to assess recruits. The growing public scrutiny regarding police conduct has caused less and less individuals to be interested in the profession. One police officer described this dilemma as a "national crisis."

Moreover, studies show that certain hiring standards, such as an applicant's credit score and criminal history, disproportionately disqualify minority applicants. The Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") issued a report showing that some police department hiring qualifications that hurt minority applicants don't accurately screen candidates for the skills needed for police work. As a result, various police departments have changed their hiring practices. For example, the Vancouver Police Department reduced its disqualifying window for marijuana use from three years to ones.

Hoping to increase diversity, police officials will continue efforts to hire officers of color, including holding recruiting events in cities, targeting minority groups on social media, and visiting military bases and colleges. Accordingly to relied upon reports, "diversity [is] the linchpin to building trust between law enforcement and communities."

6.6 *United States Dept. of Just. v. Denver Sherriff Dept.*, Settlement. Agr., DJ No. 197-13-189 (Mar. 17, 2016)

The Department of Justice ("DOJ") investigated the Denver Sheriff's Department for eighteen months and found the Department only hired United States citizens in violation of

federal law. The Department agreed with the findings of the investigation and entered into a settlement agreement with the DOJ.

The settlement agreement requires the Sheriff's Department to pay $10,000 in civil damages. To prevent future discrimination, the Department is also required to provide "right to work" information to all employees and in multiple languages. The Department also must revise their hiring practices to ensure citizenship information is never requested. Lastly, to remediate the harm caused by past hiring discrimination, the Department must contact past applicants who were unlawfully excluded and provide them an opportunity to reapply for employment.

6.7 *Johnson v. City and Cty. of San Francisco*, No. C 09-05503 JSW, 2016 WL 467471 (N.D. Cal. Feb. 8, 2016)

Plaintiffs Mark Johnson, Franco Calzolai, and Michael Bryant sued the San Francisco Fire Department when they were denied promotions to Battalion Chief based on their Civil Service examination scores. They alleged that the administration of the exam resulted in disparate impact against African Americans in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the California Fair Employment and Housing Act ("FEHA").

Because a claim for disparate impact discrimination implicates distinctly factual issues and relies on a statistical analysis of racial disparities, the court determined that resolution of the plaintiffs' claims as a matter of law was inappropriate. The timing, scope, and methodology of the parties' expert witnesses raised factual issues that could not be resolved at the summary judgment stage. Furthermore, factual questions remained as to whether the examination was a valid, job-related selection process. The court accordingly scheduled a further case management conference with the parties to determine the next steps.

6.8 *Blackburn v. State*, 375 P.3d 1076 (Wash. 2016)

The mentally ill patients at Western State Hospital ("WSH") occasionally make racist threats and demands about the administration of their care. This case concerns allegations that WSH illegally took race into account when making staffing decisions in response to those demands.

M.P. was a particularly violent and aggressive patient who had a history of assaulting other patients and staff at WSH. One of M.P.'s regular attendants was Marley Mann, an African American man. In March 2011, M.P. began making credible threats toward Mann on account of his race. In order to ensure staff safety, staff members at WSH decided that M.P. should not have access to staff of color on weekends. The hospital specifically directed the staffing coordinator to assign M.P. the attendant with the "lightest skin." The staffing coordinator refused to comply, and a person of color was assigned to the ward. The weekend passed without incident.

Nine employees of WSH subsequently filed suit under the theory that the hospital's race-based staffing directive violated the Washington Law Against Discrimination ("WLAD"). Although the directive was in place for a single weekend and the evidence showed that the employees had not been subjected to similar staffing incidents before or since, the Washington State Supreme Court determined that the overtly race-based staffing orders constituted unlawful discrimination. WSH made staffing decisions that prevented certain employees from working on

a particular ward due to their race, and the fact that the staffing orders were likely an overreaction to a patient's racist threats did not change discriminatory impact of that decision.

6.9 *Jeffery v. St. Louis City Fire Dep't*, 506 S.W.3d 394 (Mo. Ct. App. 2016)

Gordon Jeffery was an African American man employed by the St. Louis City Fire Department. After failing to obtain a qualifying score on the Department's promotion exam, Jeffery filed an administrative charge with the Missouri Commission on Human Rights ("MCHR"), alleging that the exam had a disparate impact on African Americans in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). He received a Right to Sue letter from the MCHR and subsequently filed suit against the Department, arguing that the Department intentionally denied him a promotion despite his superior experience and aptitude compared to similarly situated Caucasian employees; that the Department intentionally failed to properly grade his examination; and that he was denied an opportunity to examine the answer key after failing to obtain a qualifying score.

The Department filed a motion to dismiss. The court below granted the motion after determining that Jeffery had failed to exhaust his administrative remedies before filing suit; his administrative charge did not notify the Department of his claim that the discrimination was intentional. Jeffery argued in response that his administrative charge placed the Department on notice of the claim he later pursued in litigation. The Missouri Court of Appeals agreed with the Department that Jeffery's suit against them involved a claim of intentional disparate treatment, not merely a claim of disparate impact. Nevertheless, the court held that the alleged incidents of discrimination were sufficiently related to the allegations contained in the administrative charge to survive dismissal. The liberal construction of allegations contained in administrative charges best comports with the remedial purposes of the Missouri Human Rights Act.

6.10 *Supinger v. Commonwealth*, No. 6:15-CV-00017, 2017 WL 1498130 (W.D. Va. Apr. 26, 2017)

For twelve years, a white police officer for the Virginia Department of Motor Vehicles ("DMV") worked in the same building as his Korean wife. In 2012, the officer was transferred to a different office ninety minutes away. The reason for the officer's transfer was stated as "to effectuate DMV's nepotism policy." However, the officer felt his transfer was solely because he was in an inter-racial marriage. The officer filed a racial discrimination case. The court did not find any unlawful discrimination because the officer could not prove that the enforcement of the nepotism policy was not the true reason for his transfer.

In 2013, this officer was terminated from his employment with the DMV. The following reasons were given for the officer's discharge: forcing a criminal investigation against another employee whom he had well-established animus against, sending emails to subordinates ostracizing said employee, accessing confidential records to build a complaint against the DMV, and sending emails "to get a rise out" of management. The officer alleged his termination was retaliation for his earlier discrimination claim and his internal grievances. The court did not find the termination to be retaliation for earlier complaints because the officer did not show that the well-documented reasons for his termination were only a pretext.

7. DISCRIMINATION: RELIGIOUS

7.1 *Sprague v. Spokane Valley Fire Dep't*, 381 P.3d 1259 (2016)

Jonathan Sprague, a captain at the Spokane Valley Fire Department ("SVPD"), began sending emails through SVPD's system with information about the Spokane Christian Firefighter Fellowship, a group he started. Sprague included scripture passages in his emails and posted religious information on the work bulletin board. SVPD reminded Sprague of the department's email policy that prohibited using the email system for non-business related purposes. Also, religious content was not allowed in emails or bulletin board postings. Sprague continued to disregard these warnings and was suspended for two shifts and, three months later, discharged. Sprague appealed to the Civil Service Commission, which upheld his termination. Sprague did not appeal the Commission's decision.

Instead of a direct appeal, Sprague brought a lawsuit claiming the department violated federal free speech and freedom of religion laws. The court determined the Department's email policy was constitutional because it was "reasonable and viewpoint neutral." Since Sprague did not appeal the Commission's decision, the Commission's decision was still valid and enforceable. Thus the court upheld Sprague's termination. This case is currently being appealed to the Washington Supreme Court.

7.2 *Rothman v. City of Los Angeles*, No. B258670, 2016 WL 4482925 (Cal. Ct. App. 2016)

Robert Rothman was a police officer with the Los Angeles Police Department ("LAPD"). He was also Jewish. In 2009, the Department assigned Rothman to the Liaison Unit within the Counter-Terrorism and Special Operations Bureau ("CTSOB"), a unit dedicated to building trust between the LAPD and various religious communities. The Deputy Chief acknowledged that he assigned Rothman to the unit in part because of his ties to the Jewish community.

The Liaison Unit focused ninety percent of its efforts on outreach to the Muslim community. Officers in the unit were expected to visit mosques during Friday evening prayers in order to get to know and show support for the community, but they were not required to participate in the services. Rothman, however, resisted attending the Muslim outreach events, did not participate in interfaith activities, and refused to involve Muslim police officers in his own outreach efforts with the Jewish community. He purported to feel an undercurrent of anti-Semitism in the unit, particularly after a fellow officer jokingly asked him about the sideburns worn by Orthodox Jewish men. The situation reached a breaking point when the Deputy Chief displayed a *New York Times* article about the Liaison Unit that featured a photograph of several officers in full uniform praying in a mosque. Rothman grew upset and complained to another officer that the article was "bullshit" and that "they are not allowed to pray in uniform." Shortly thereafter, Rothman was transferred out of the Liaison Unit.

Rothman sued. He alleged that he was removed from his position because of his Jewish faith, that he was retaliated against for complaining about officers praying while in uniform, and that he was harassed for being Jewish. The California Court of Appeal dismissed the case. It found that Rothman could not establish that he had been removed from the Liaison Unit because of religious animus; rather, the LAPD presented compelling evidence that Rothman was

dismissed because of his unwillingness to carry out his job duties. The court also rejected Rothman's retaliation claim on the grounds that he could not show that he reported any conduct that he reasonably believed to be unlawful or against LAPD rules. Finally, the court dismissed the harassment claim, finding that one officer's comments about Jewish hairstyles, while insensitive, did not rise to the level of actionable harassment.

8. FIRST AMENDMENT – SPEECH

8.1 *Ragavage v. City of Wilmington*, No. 7:15-CV-00085-FL, 2016 WL 6537668 (E.D.N.C. Nov. 3, 2016), *aff'd*, No. 16-2361, 2017 WL 2417886 (4th Cir. June 5, 2017)

Donald Ragavage worked for the Wilmington Fire Department as a firefighter from 1990 until 2008 and as Fire Captain from 2008 until 2014. Ragavage was also an active member and leader of the Wilmington Professional Fire Fighters Association, Local 129 of the International Association of Fire Fighters ("WPFFA"). As union president, he spoke publicly about his concerns with the city's plan to close fire stations and continuously raised issues and grievances. On many occasions, Fire Chief Martinette believed that Ragavage shared critiques, both verbally and through email, in a manner that was unprofessional and "openly disrespectful to Department leadership and individual employees." Martinette directed him to change his behavior on multiple occasions. Eventually, Martinette fired Ragavage, purportedly for taking his fire truck out of service without permission.

Ragavage alleged that the City unlawfully terminated him in retaliation for exercising his federal and state rights to free speech and free association in violation of 42 U.S.C. §1983. §1983 prohibits policies that cause "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The court held that § 1983 was inapplicable because Ragavage was not terminated by an officer or entity who had authority to establish final policy respecting employee terminations. Instead, Fire Chief Martinette made the discharge decision and the Commission upheld this decision. Because no identifiable statutory provision vests authority to establish city policy regarding personnel decisions in the fire chief or city manager, Ragavage was unable to demonstrate that city's "policy or custom" inflicted his injury.

8.2 *Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017)

Fred Walraven and Matthew Gillis were correctional officers who posted a memorandum in the jail to notify fellow jail staff of their right to union representation during a drug trafficking investigation. A month before the memorandum was posted, a separate investigation into Walraven began after an anonymous tip to jail administration to review security camera footage. The footage revealed that during evening shifts when Walraven was the supervisor, corrections officers engaged in numerous unacceptable violations of department policy including playing cards for extended periods of time, using cell phones, damaging jail property, conducting outside business and not monitoring security cameras as necessary. Walraven was placed on administrative leave less than a week after the memorandum was posted, and was later terminated. He was told the reason was because of "an investigation of allegations of misconduct by you." A week after the memorandum was posted, a separate investigation into Gillis began when a former inmate alleged that he had engaged in a sexual relationship with her while she was in jail and after her release. Gillis eventually admitted involvement and resigned.

Walraven and Gillis filed a First Amendment retaliation claim against the sheriff and sheriff's department alleging that they were retaliated against for posting the memorandum. The trial court concluded that the memorandum was not protected speech because even if they were speaking as private citizens, the memorandum did not touch on a matter of public concern, and that even if it did, the government employer's investigatory interests outweighed Walraven and Gillis's speech interests.

On appeal, the Sixth Circuit applied the *Pickering* balancing test to determine if the employees' free speech interests outweighed the efficiency interests of the employer. At issue was whether government employers must show evidence of actual disruption in the office stemming from the employee's speech in order to prevail. The court held that such evidence is not necessary. Instead, government employers must show that they could reasonably have predicted the challenged speech would cause disruption. The Sixth Circuit agreed with the trial court, holding that the employer's interest in carrying out the drug trafficking investigation outweighed the employees' First Amendment rights.

8.3 *Barnes v. City of Charlack, Missouri*, 183 F. Supp. 3d 956, 957 (E.D. Mo. 2016)

William Barnes and Jason Powell were police officers who spoke out against their new police chief by sending a formal letter to the mayor. One month after Barnes testified in court regarding the police chief's performance, (a few months after the letter was sent to the mayor), Barnes sustained a foot injury that caused him to be absent from work. He provided a medical note stating he could not work for three months but was terminated after four months because he had not returned to work. Powell, on the other hand, was terminated for failing to secure his firearm while playing kickball with neighborhood children.

After their terminations, both officers sued the city alleging they had been retaliated against for their speech in violation of the First Amendment. The district court dismissed their claim, explaining that a public employee engages in speech protected under the First Amendment only if they speak as a private citizen on a matter of public concern. The court held that they were not speaking as private citizens because the primary purpose of the letters and testimony was to voice their employment concerns as police officers working for the government, not as private citizens.

8.4 *Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017)

Kevin Buker was a paramedic and battalion chief for the Howard County Fire Department. After watching a gun control debate in his office, Buker made a Facebook post suggesting "let's kill someone with a liberal … then maybe we can get them outlawed too!" The post was followed with a similar comment with racial overtones from Mark Grutzmacher, a county volunteer paramedic, which Buker 'liked.' Buker later removed the post at the behest of Assistant Chief John Jerome, though Buker maintained it did not violate the social media policy. Buker then made a series of posts criticizing the Department and County as being overrun by liberal democrats who are suppressing free speech. Buker later 'liked' a Department-affiliated volunteer company employee's post of a photo with the words "WHATEVER THE F*CK I WANT," with a caption saying "for you Chief." Buker was dismissed for violating the

Department's Code of Conduct and Social Media Guidelines. He later sued the Department for discharging him in retaliation for exercising his First Amendment free speech rights.

The County's Social Media Guidelines prohibits personnel from engaging in speech "that could reasonably be interpreted to represent or undermine the views or positions of the Department, the County, or officials acting on behalf of the Department or County," as well as speech "that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission," or anything "involving off-duty activities that may impugn the reputation of the Department or any member of the Department."

The Fourth Circuit held that Buker's series of comments and likes, evaluated as a single expression of speech, implicated a matter of public concern (issue of gun control and the Department's social media policy) and so amounted to protected free speech. However, it held that the County's interest in efficiency and preventing workplace disruption outweighed Buker's free speech interests. The court found such interests threatened by Buker's posts because of their violent and racial undertones. They led to distrust and concerns regarding discipline within the Department (one minority firefighter stated he did not want to work for Buker anymore), questions of Buker's fitness and respect for superiors as a supervisor and role model, and undermined the Department's public safety mission and community trust.

8.5 *Williams v. McKee*, 655 F. App'x 677, 682 (10th Cir. 2016)

Michael Williams was a Detention Officer who parked his privately-owned truck on the street in front of the office every day with his bumper sticker stating "Still Voting Democrat? You're Stuck on Stupid." After receiving a complaint from a private citizen, William's boss, Sheriff McKee, asked Williams to either cover the bumper sticker or park around the side or back of the building. Williams complied by covering the bumper sticker with tape each day, but forgot a couple of times. One day, Sheriff McKee raised his voice regarding the matter which caused Williams significant stress. In response, Williams wrote a letter requesting a leave of absence but Sheriff McKee found the letter to be offensive and fired him for insubordination.

Almost two years later, Williams got a job as an entry-level appraiser at the County Assessor's Office. Soon thereafter, Williams initiated this lawsuit against Sheriff McKee for retaliatory termination in violation of his First Amendment political speech rights. William's new boss, Assessor Griffith, found out about the lawsuit and fired Williams immediately. Then, Williams amended his complaint to add claims against Assessor Griffith and the County alleging Fourteenth Amendment Due Process violations. The district court dismissed both the First and Fourteenth Amendment claims. The Tenth Circuit affirmed.

The court applied the *Pickering* balancing test to the First Amendment claim and held that Williams's interest in engaging in political speech as a private citizen was outweighed by Sheriff McKee's heightened interest in maintaining impartiality and ensuring workplace efficiency. Specifically, the court noted that Williams's interest in engaging in political speech was strong but that the bumper sticker went beyond a law enforcement officer's mere expression of political support for, or opposition to, a partisan cause. Instead, the bumper sticker could

easily spark conflict with fellow employees or the public. In contrast, Sheriff McKee's requests were minimally restrictive and imposed only when the truck was parked on the street directly in front of the office.

The court dismissed the Fourteenth Amendment Due Process claims because Williams did not have a protected property interest in his continued employment, and because he did not adequately support the allegation that termination implicated a liberty interest.

8.6 *Eschert v. City of Charlotte*, No. 3:16-CV-295-FDW-DCK, 2017 WL 2415917 (W.D.N.C. June 2, 2017) (slip op.)

Crystal Eschert was a fire investigator for the Charlotte Fire Department. Leading up to her termination, Eschert sent emails alleging that the Department was mismanaging public funds related to the Department building, and that the building was not safe (not ADA compliant, would not pass building or electrical inspections, and had "questionable" air quality). The complaints prompted a city council probe that was embarrassing for Department leadership. Eschert sued the Department, claiming retaliation for exercising her First Amendment right to free speech, alleging that she was fired because of those complaints. She also claimed First Amendment retaliation based on two of her Facebook posts, which was the Department's purported basis for her termination. The Department argued Eschert was fired for posting racially inflammatory Facebook posts in violation of its social media policy, where she asked why a white person being shot and killed by police did not merit a response from President Obama, stating that "[if] you are a thug and worthless to society, it's not race—You're just a waste no matter what religion, race, or sex you are!"

The District Court denied Eschert's Facebook post claim, holding as a matter of law that the posts were not protected by the First Amendment. Her interest in that speech did not outweigh the Department's interest in providing effective and efficient services to the public. However, the court held that the building complaints were protected by the First Amendment as a matter of law. It found that they addressed matters of "utmost public concern," since they " involved specific allegations of a government's mismanagement of public funds as well as issues of health and safety concerns in a building used by public employees and visited by members of the public." Whether the allegations are true is immaterial. The court also found that Eschert made these complaints as a private citizen, as they were sent to an official with no employment authority over her, and were made outside the course of her official duties and responsibilities as a fire investigator. And finally, although fire departments have a strong interest in the promotion of camaraderie and efficiency, this interest did not outweigh Eschert's speech interest because there was no specific evidence that it caused actual or potential disruption or disharmony. On the question of whether the protected speech was a substantial factor in the decision to terminate, the jury found in the affirmative after rejecting the Department's argument that it was because the Facebook posts undermined Eschert's impartiality as an investigator. The jury awarded Eschert $1.5 million.

8.7 *Zehner v. Jordan-Elbridge Bd. of Educ.*, 666 F. App'x 29 (2d Cir. 2016)

David Zehner was a high school principle employed by the Jordan-Elbridge Board of Education. Zehner instituted a proceeding against the Board, alleging that it violated New York's

open meeting law. The allegation was decided against the Board. Less than one month after the proceeding, Zehner was suspended and faced disciplinary charges. The Board also took numerous other adverse actions against Zehner. Although two counseling memos regarding Zehner mentioned possible further investigation and disciplinary action based on inappropriate comments to students, the Board did not bring complaints against him until about seven months later.

Zehner sued the Board, alleging that he was disciplined in retaliation for his criticism of the Board, in violation of his First Amendment free speech rights, and for his perceived association with other administrators, in violation of his First Amendment association rights. The District Court granted summary judgment for the Board. The Second Circuit then reversed, finding disputed fact issues that Zehner's earlier proceeding, which was protected conduct under the First Amendment, was a motivating factor in the Board's actions against him. The Second Circuit also found that reasonable jurors might disagree as to whether Zehner would not have been suspended and disciplined absent his protected conduct. The Board's purported reasons for disciplining Zehner—e.g. missing camera equipment, poor written communication skills, failing to submit annual goals in the proper format, poor performance in staff evaluations, and failing to follow school district for various issues—were found to be "rather minor and trivial issues" and without sufficient connection to the allegedly retaliatory action. The court also found that the Board's interest in reducing disruption at its meetings was insufficient to outweigh Zehner's First Amendment speech interests to discuss matters of public concern at such meetings.

8.8 *Gibson v. Kilpatrick*, 838 F.3d 476 (5th Cir. 2016)

The Drew City police chief, Anthony Gibson, reported to state and federal authorities about the mayor's misappropriation of funds. The City shortly thereafter released Mr. Gibson. Gibson brought a retaliation, malicious interference with employment, and intentional infliction of emotional distress suit against the city.

The District Court ruled that City actions for statements Gibson made in the report did not equate to an infringement on Gibson's First Amendment rights because Gibson made those statements in his capacity as an employee, not a citizen. The court further found that Gibson's wrongful termination claim would be better classified as an employment dispute, and that Gibson's motivation for the suit stemmed from a personal feud with the mayor. The court sided with the City.

8.9 *City of Meridian v. Meadors*, No. 2015–CC–00767–COA, 2016 WL 7636445 (Miss. Ct. App. Dec. 6, 2016)

The City of Meridian terminated one of its police officers, Adam Meadors, for posting a racially insensitive photo on Facebook (while on duty). Meadors posted a picture of two chimpanzees laughing with the caption: "Earlier today[,] the mayor and the chief of police had a meeting." Below the caption, he left a further comment: "Something will probably be said, but I couldn't resist." Both the mayor and the chief of police were African American.

Meadors appealed his termination to the Meridian Civil Service Commission, arguing that nothing in the photo indicated that he was referring specifically to the local mayor and chief

of police and that the termination violated his right to free speech. The Commission upheld Meadors' firing. Regarding his First Amendment claim, it concluded that there was no "public concern interest in this speech or expression" and that Meadors' Facebook post "at best . . . was an expression ridiculing the Mayor and Chief of Police's humanity and[,] at worst[,] it was an expression of racial prejudice." The court affirmed the Commission's findings, noting that no matter Meadors' subjective intent, the posting was inherently racially insensitive and demonstrated insubordination toward his superiors. As the City's code of conduct expressly forbid offensive or antagonistic behavior toward supervisors, Meadors' termination over his Facebook post did was not a violation of his First Amendment right to free speech.

8.10 *Jones v. City of Heflin*, 207 F. Supp. 3d 1255 (N.D. Ala. 2016)

Heath Jones was a police lieutenant for the City of Heflin Police Department. Jones brought a Title VII retaliation claim against the City. He claimed he was discharged for refusing his captain's order to falsify a report about an extra-marital affair of the husband of a female officer who brought a gender discrimination lawsuit against the Department. He also claimed he was discharged for supporting that female police officer's allegations of gender discrimination, including offering to be a witness in her case. The City argued that the real reason for his discharge is that Jones' continued to live with a convicted felon (his fiancée, Constance Scott), constituting conduct unbecoming an officer in violation of Department policy. Scott's criminal history included six felonies and nine misdemeanors, (including two counts of first degree theft, second degree forgery, and fraudulent use of a credit card). Jones retorted that his captain was aware of the relationship when he was hired, and that it had never been a job-ending issue until now.

The District Court denied summary judgment for the City, finding that Jones has a viable claim. It found that, although Jones never opposed any of the City's employment practices, a reasonable jury could conclude that Jones' negative reaction to his supervisor's order to make a false report of infidelity to the female officer's husband was protected conduct in the form of opposition. The court also found evidence of causation, since the captain had not contemplated Jones' termination based on his relationship with Scott until after the false report incident. Furthermore, the causal chain was not broken by Major Rooks' independent role in deciding to allow Jones' termination. The captain's alleged bias could be imputed to mayor under the cat's paw theory, given the mayor's knowledge of the failure to investigate Jones' allegations prior to his discharge, and that neither the personnel board recommendation nor the city council vote regarding Jones' termination shows an intervening act because neither body considered merits of his retaliation allegations or had authority to override the mayor's decision.

8.11 *Potter v. Dooly County*, No. 5:14-CV-315, 2016 WL 1677291 (M.D. Ga. Apr. 26, 2016), *motion for reconsideration granted*, 2016 WL 4150005 (M.D. Ga. Aug. 2, 2016)

Laurie Potter was a white female working as a part-time Emergency Medical Technician ("EMT") for Dooly County. Outside of work, Potter was politically active and supported a challenger in the 2012 Sheriff's election. During this election, Potter responded to a call at the jail for a sick inmate. The nurse at the jail complained about Potter's conduct and reported that Potter ignored her when she was providing health information regarding the inmate. Based on this report, the Sheriff banned Potter from non-public spaces within the jail.

Potter brought a First Amendment retaliation claim against the Sheriff and her supervisor for her ban from the jail. Originally, the court determined the First Amendment retaliation claim failed and the Sheriff's ban on Potter was lawful because the ban was based on alleged misconduct, a non-discriminatory reason, and not Potter's political involvement. On reconsideration, the court agreed with Potter that her retaliation claim should not be decided immediately. Even though the Sheriff had a nondiscriminatory reason for banning Potter through the negative report, it was not clear the Sheriff relied on the nondiscriminatory reason for banning Potter when the Sheriff did not impose this same ban on Potter's work partner who received the same negative review. The court decided that this question needed to be reviewed by the lower court.

Later that year the Sheriff won re-election. After the election, Potter applied for a full-time EMT position but was passed over by an African American candidate with less experience. When Potter asked why she was not promoted, her supervisor stated the department needed "different viewpoints." Potter brought a racial discrimination claim against the same parties. The court decided there was enough evidence to support Potter's contention that her lack of promotion was race-based and returned the case to the lower court to be reviewed.

An appeal of these decisions is pending in the Eleventh Circuit.

8.12 *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016)

Herbert Liverman and Vance Richards were veteran police officers in the City's Police Department who challenged disciplinary actions for violations of their Department's social networking policy. Their supervisor, Chief Dixon, had recently revised the policy to prohibit, in sweeping terms, the dissemination of any information that would tend to discredit or reflect unfavorably upon the Department or any other City Department or its employees. Specifically, the policy provided: "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment[.]"

Three months after the policy revision, while off-duty, Liverman posted a message to his Facebook page regarding "rookie cops becoming instructors." He stated that data shows "it takes at least 5 years for an officer to acquire the necessary skill set to know the job. [. . .] Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others." Richards commented on the post, agreeing to Liverman's statements, stating "Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor [. . .]. How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street?" The conversation continued.

Chief Dixon disciplined the officers for violating the social networking policy. The two officers challenged the disciplinary actions, alleging that the policy violated their First Amendment free speech rights. The court applied the *Pickering* balancing test to determine if the employees' free speech interests outweighed the efficiency interests of the public employer. Importantly, the court noted that the officers raised serious concerns regarding the Department's training programs and the promotion of inexperienced supervisors, both of which are matters of public concern. As such, the officers' speech would be protected unless offset by an equally

substantial workplace disruption. Chief Dixon failed to establish that the officers' speech meaningfully impaired the efficiency of the workplace, so the court held that the disciplinary action violated their rights to free speech. The court also held that the policy was unconstitutionally overbroad.

8.13 *Bailey v. Wheeler*, 841 F.3d 473 (11th Cir. 2016)

Bailey joined the police City of Douglasville Police Department in 2010. In 2011, Bailey filed a complaint with the Chief of police stating other officers were violating civilians' constitutional rights and were racially profiling citizens. In 2012, Bailey was ordered to rewrite certain incident reports. Bailey refused since it was against department policy to rewrite reports. Based on this refusal, Bailey was placed on administrative leave with pay, then suspended for three days without pay, and charged with "conduct unbecoming an officer." Eight days later, Bailey was fired. While Bailey was appealing his termination, officers from the Department tailed him and tried to intimidate Bailey. During this appeal, the Department also issued a notification to all officers to be on the lookout for Bailey and described Bailey as being a danger to all law enforcement. Bailey won his appeal and returned to work. Bailey then filed this lawsuit claiming he was retaliated against for exercising his First Amendment rights.

This Court determined that Bailey's First Amendment rights were violated because his complaint to the Chief was protected speech, the notice sent to all officers would "deter a person of ordinary fitness from exercise of First Amendment rights," and Bailey provided enough evidence to infer the speech and the notice were causally related. This decision only rejected the City's motion to dismiss; it was not final judgment on the merits of the case.

8.14 *Adams v. Bd. Of Educ. Harvey Sch. Dist. 152*, No. 15 cv 8144, 2016 WL 2609987 (N.D. Ill. May 6, 2016), *motion for reconsideration denied*, 2016 WL 4987473 (N.D. Ill Sept. 19, 2016)

Dr. Denean Adams was the superintendent of Harvey School District 152. After her third year, Dr. Adams approached the school board about $500,000 in potentially misused funds and recommended hiring a financially auditor. In response, a board member called Dr. Adams and said Dr. Adams was "itching for an ass kicking." Dr. Adams told the Board President about this encounter and when she heard nothing from the Board, Dr. Adams went to file a formal criminal complaint. The Police Department did not allow Dr. Adams to file a formal complaint. A month later, the Board rescinded Dr. Adams employment contract citing concerns with her job performance even though no concerns had been raised before.

Dr. Adams filed a lawsuit against her employers and the Police Department claiming violations of her First Amendment rights. The Police Department asked the court to dismiss the claims against them. To succeed on this claim, Dr. Adams had to show she participated in protected speech and that defendants retaliated against her based on her speech. The court dismissed Dr. Adam's claim against the Police Department because police officers are not required to pursue prosecution for all reports of criminal activity. Since there is not requirement to pursue a criminal conviction, Dr. Adams did not prove that her speech was a motivating factor in the officers' decision to not pursue her case.

8.15 *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231 (3d Cir. 2016)

The Camden Police Department implemented a policy known as "directed patrols," which required police officers to complete a minimum of eighteen informal conversations with city residents. The goal of this program was to become a more visible presence in the city while also learning more about individual residents and their quality of life. If officers did not comply and meet the minimum under this new policy, they would be disciplined. Police officers spoke out against the policy and the union filed a complaint stating that this new policy was violating New Jersey's anti-quota law.

The Court of Appeals held that this policy did not violate the anti-quota law because that statute only prohibits requiring a certain number of arrests and the policy only requires non-criminal interactions with the public. The court also held there was no retaliation in violation of the First Amendment. Public employee's statements are only protected by the First Amendment when they are speaking as a citizen, not an employee. The officers' objections to the new policy were made within their official duties so were not protected by the First Amendment.

8.16 *Jung v. City of Minneapolis*, 187 F.Supp. 3d 1034 (D. Minn. 2016)

Jung was an employee of the Minneapolis Fire Department. In 2012, she filed an ethics complaint against her supervisor, Assistant Chief Penn, asserting Penn had a subordinate complete Penn's college homework for her. The ethics violation was investigated but not substantiated. After the conclusion of the investigation, Jung felt Penn treated her differently. Jung brought a retaliation compliant stating that Penn had changed her work schedule and was monitoring Jung closely throughout the day. While Jung's ethics complaint was protected under the state's Whistleblower Act, the Court determined Jung was not a victim of retaliation because the court did not find any adverse employment action beyond a slight inconvenience.

Jung also claimed that she was discriminated against because of a disability. The Court determined Jung's compromised immune system from past cancer treatment to be a qualified disability and that Jung had received an adverse employment action when she was transferred to a different unit. However, the Court dismissed the disability claims because there was no evidence to show her disability led to her transfer.

Lastly, Jung claimed she was subject to retaliation based on her requests for accommodation for her disability when she was transferred to the new unit. The Court held that Jung had made a strong enough case for the lower court to consider the facts and ordered this retaliation claim to be heard.

8.17 *Igwe v. City of Miami*, 208 So. 3d 150 (Fla. Dist. Ct. App. 2016), *reh'g denied* (Dec. 20, 2016), *review denied*, No. SC17-80, 2017 WL 1056173 (Fla. Mar. 21, 2017)

Victor Igwe worked as an Independent Auditor General ("IAG") where he investigated the mayor of Miami's conduct from 2009 to 2011. Victor's investigation led to a report that listed several instances of misconduct by the mayor. Due to his report, Victor was subpoenaed and later testified against the city, noting the misconduct. The city chose not to renew Victor's IAG contract once it ended.

Victor then filed a retaliatory discharge claim. Victor argued that Florida's Whistleblower's Act protected his testimony while working as the IAG. The court found that the Florida legislature intended the act to prevent agencies from taking retaliatory action against employees, and thus Victor was in fact protected. The court then sided with Victor.

9. FIRST AMENDMENT – ASSOCIATION/PRIVACY

9.1 *Burke v. City of Montesano*, 197 Wash. App. 1078, 2017 WL 702507 (Wash. Ct. App. February 22, 2017)

Burke worked for the City's Public Works Department from 1986 until 2013. In 2010, he was promoted to Public Works Supervisor, a position the City created *for* Burke. The position was created as a union alternative to the Public Works Director position because Burke refused to leave the union but the City wanted him to be the Public Works Director.

In 2011, Burke hosted a party to support a mayoral candidate who ended up losing the election. After the election, the victorious mayoral candidate, Estes, asked Burke about the party and offered Burke a pin that said he voted for Estes. Burke rejected the pin because he did not vote for Estes. Then, when Estes became major, he decided to hire a Public Works Director who had the authority to discipline and make other personnel decisions, which a union position is not authorized to do. Burke was the hiring committee's first choice but they hired someone else because Burke refused to leave the union. Shortly thereafter, through an investigation into the Department's paint expenditures, the City found that Burke had ordered double the normal amount of paint for the City during a two-year period that coincided with Burke opening a personal painting business. The City placed Burke on administrative leave and investigated the allegations against him. Unfortunately, Burke repeatedly failed to appear for interviews with the investigator and refused to attend a hearing. In response, the City suspended Burke for insubordination and ultimately fired him.

Burke brought a lawsuit for wrongful discharge in violation of public policy. The trial court dismissed Burke's claim. Burke appealed, arguing that he was discharged for exercising his First Amendment right to engage in political activities. The Court applied the *McDonnell Douglas* three-step burden shifting test. The Court held that the City sufficiently articulated that insubordination for failure to appear was a legitimate nonretaliatory reason for Burke's termination, and that Burke failed to establish that the City's reason was pretextual. The WA Court of Appeals affirmed the dismissal.

10. TORT CLAIMS

10.1 *Maderer v. City of Los Angeles*, No. B261168, 2016 WL 1749450 (Cal. Ct. App. Apr. 29, 2016), *review denied* (July 13, 2016)

Roshea Maderer was a typist for the Los Angeles Department of Water and Power. While at an office holiday party, some of her co-workers threatened and verbally abused her in front of approximately 75 other employees. Maderer sued the City of Los Angeles for failing to protect her, as an employee, against hazing. She alleged that the City was liable under Government Code § 815.6 which makes public entities liable for injuries caused by failure to exercise its duty with

reasonable diligence when the public entity is "under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury." The court dismissed the case because Maderer failed to identify a statute under which a public entity could be held liable for causing the "hazing" injuries she alleged she suffered.

11. CONSTITUTIONAL CLAIMS

11.1 *Washington v. Unified Gov't of Wyandotte Cty.*, Kansas, 847 F.3d 1192 (10th Cir. 2017)

Robert Washington served as a lieutenant in a juvenile detention center before being fired for testing positive for cocaine. Mr. Washington filed a civil rights action against the Country alleging the random drug test was an illegal search that violated his Fourth and Fourteenth Amendment rights, and his employment contract.

The court found that ordinarily a government employer drug test is subject to the Fourteenth Amendment and must therefore be reasonable, i.e., based on an individualized suspicion of wrongdoing. However, when the government asserts a special need beyond crime detection, it may issue suspicion-less drug testing if the government's interest outweighs the individual's privacy interest.

The court held that the County's legitimate special need to "ensure the safety and welfare of the children housed in the Juvenile Detention Center" outweighed Mr. Washington's privacy concerns. Accordingly, the court sided with the County.

11.2 *Tully v. City of Wilmington*, 790 S.E.2d 854 (N.C. Ct. App. 2016)

Officer Tully was a police officer in the Wilmington Police Department since 2000. In 2011, Tully took the written Sergeant's examination to hopefully obtain a promotion. Tully was notified that he failed the exam. While investigating what went wrong, Officer Tully discovered that the answers deemed "correct" by the department were actually incorrect and based on outdated law. Tully filed a grievance procedure with the department but was denied. Tully then filed a case in court claiming violations of his federal and state due process rights. The court dismissed Tully's case because he did not raise a valid constitutional violation since individuals do not have a "right to promotion." Tully appealed.

This Court determined Tully's complaint was proper. Tully was not claiming a "right to promotion." Instead, Tully was claiming he had a right to "a non-arbitrary and non-capricious promotional process." After the court decided that Tully had a proper complaint, the Court sent the case back down to the lower court to decide whether the actions of the police department were arbitrary or capricious.

11.3 *Coker v. Whittington*, 858 F.3d 304 (5th Cir. 2017)

A pair of Louisiana sheriff's deputies who were fired after swapping wives and moving in with their new families before divorcing their legal spouses lacked constitutional claims based on their terminations, the Fifth Circuit Court of Appeals held.

Brandon Coker and Michael Golden were lawfully terminated for disobeying the Bossier Parish sheriff's orders that each stop living with a woman who was not his wife. Both men were fired for refusing to change their living situations after the sheriff notified them that they were violating the department's code of conduct and that their behavior would reflect unfavorably on the sheriff's office.

The court stated that government employees surrender some constitutional protections when they choose to enter public service. Therefore, the sheriff's office permissibly concluded that the deputies' open flouting of the "legally sanctioned relationships of marriage and family" could "besmirch" the department's reputation and "hinder its ability to maintain public credibility."

11.4 *Longmire v. City of Mobile*, No. 16-0025-WS-M, 2017 WL 1352226 (S.D. Ala. Apr. 10, 2017)

Carla Longmire was a Police Captain with the City of Mobile Police Department. Longmire's employment was subject to and governed by the rules of the Mobile County Personnel Board. A disciplinary action was taken against Longmire for allegedly engaging in an intimate relationship with a subordinate under her command, and for failing to provide proper oversight and guidance to that subordinate, officer Latham, by allowing to meet with her at her apartment while he was on duty. There was a hearing to address these charges. There is evidence that Longmire admitted to these allegations and that she specifically admitted guilt as to both the unbecoming conduct and failure to supervise charges. As a result, Longmire was demoted to the position of lieutenant. Longmire appealed to the Personnel Board, which found she was guilty and that demotion was appropriate. Longmire appealed to the Circuit Court of Mobile County, Alabama, which affirmed the Personnel Board. Longmire appealed to the District Court, claiming that she was denied due process because of various deficiencies in the lower proceedings, including that Donald Dees, the Personnel Director for the Personnel Board, failed to perform his duties under Personnel Board Rules to ensure proper procedures. She also claimed, for example, that the disciplinary hearing notice stated that only a verbal statement would be allowed, she was not allowed to be present during adverse witness' testimony, had no opportunity to present rebuttal witnesses, was never given a hearing transcript, and was questioned in an adversarial manner. Dees moved for summary judgment based on his defense of qualified immunity.

The District Court determined that Dees is entitled to qualified immunity and dismissed all claims against him. It found that all of Dees' alleged acts and omissions—for example, his alleged failure to investigate within seven days after Longmire's initial appeal of her demotion as required—were undertaken pursuant to the performance of his duties and within the scope of his authority. The court found these were "discretionary functions," and that they entitled him to qualified immunity because Longmire failed to show that he violated a clearly established constitutional right. The court found that Longmire made no claim that Dees' noncompliance deprived her of due process, nor can that be the case given that the rule concerns a clearly discretionary function. The court also dismissed all claims against Dees as a defendant in his official capacity as Personnel Director, since they are duplicative of the claims against the Personnel Board.

11.5 *Howe v. City of Nashua*, No. 2016-0055, 2016 WL 4413273 (N.H. July 8, 2016)

Scott Howe was employed as a police officer by the City of Nashua. For reasons that are unclear, Howe was suspended for two months with pay. After his supervisor found out that Howe could elect to retire or he would bring face statutory termination proceedings against Howe, Howe elected to retire. Howe sued the City for denying him due process, believing that the hearing would have been impartial towards him, and that he would not have prevailed. Howe also claimed he was wrongfully discharged, claiming he was "essentially terminated for complying with a public policy that encourages police officers to tell the truth."

The Supreme Court of New Hampshire Supreme upheld summary judgment for the City, holding that Howe was not deprived due process under the New Hampshire Constitution. The Court rejected Howe's contention that he was coerced to retire, finding that his decision to avoid disciplinary process was entirely his. The supervisor notified Howe of his intent to seek Howe's discharge, and gave him the opportunity to avoid the disciplinary process; Howe was not forced to choose one alternative over the other. Furthermore, the terminations proceedings allow removal of police personnel only for just cause and after a hearing satisfying the requirements of due process, and Howe's beliefs about lack of impartiality and that he would not prevail at the hearing did not constitute denial of due process. The Court stated that the proper recourse would have been to seek judicial relief. It also rejected Howe's argument that he was unaware he could not be fired except for cause, given that he was the Department's second in command and so presumed to know the law. Finally, the Court found that Howe was not terminated "for telling the truth, but for his admitted misconduct."

11.6 *Flowers v. Fulton Cty. Sch. Sys.*, 654 F. App'x 396 (11th Cir. 2016)

James Flowers was a school police officer for the Fulton County School System. After allegedly violating public policy by using his police vehicle to pick up his son from school, Flowers was given a choice to either resign or be terminated. Flowers chose to resign. The School System reported his 'resignation in lieu of termination' to Georgia Peace Officer Standards and Training Council. According to Flowers he was then unable to continue his career in law enforcement. Flowers brought a s 1983 due process violation claim against the County, alleging his was promised he would be reported only to have 'resigned' (not in lieu of termination).

The District Court dismissed Flowers' complaint for failing to adequately state a claim for being discharged without due process. The Eleventh Circuit affirmed, finding that the District Court properly accepted as true all facts in Flowers' complaint. This includes Flowers' own assertion that he chose to resign when given an 'ultimatum' that he must either resign *or be terminated*, which Flowers later tried to mischaracterize as a choice to resign in lieu of 'alternatives.' The court also found that the County was required to report to Georgia Peace Officer Standards and Training Council within 15 days of accepting any resignation in lieu of termination.

12. JUST CAUSE

12.1 TERMINATION:

12.1.1 *City of W. Miami v. Professional Law Enforcement Association of Miami Dade Cty.*, 136 LA 1546 (2016) (Wolfson, Arb.)

In 2014, a Sergeant for the City of West Miami Police Department spent one hour and thirty-one minutes at a gas station while on patrol duty but reported she was at the gas station for eighty-one minutes. The Department stated that this action violated fifteen Administrative Directives and one Florida Criminal Statute and terminated the Sergeant, a 15-year veteran of the Department. The Sergeant appealed her termination to arbitration.

The arbitrator reviewed the Sergeant's actions and each violation and determined the majority of the listed violations were duplicitous or vague. Ultimately, the Sergeant was found guilty of violating only three administrative rules, specifically the rule that a business stop should be limited to ten minutes, the expectation that patrol cars be used for preventatively if stationary, and time limits on breaks. The other twelve directives and one criminal statute were not violated.

The arbitrator determined that there was no just cause for the Sergeant's discharge. All of Sergeants were also guilty of violating these three directives and were not discharged. Additionally, the gas station stop was in line with common practice in the Department and no employees were ever warned about potential discharge based on these stops. The arbitrator ordered the Sergeant to be reinstated and "made whole."

12.1.2 *Rosario-Fabregas v. Merit Sys. Prot. Bd.*, 833 F.3d 1342 (Fed. Cir. 2016)

In 2010, Jose Rosario-Fabregas was fired from his job as a scientist with the Army Corps of Engineers. The Merit Systems Protection Board found that this termination violated Mr. Rosario-Fabregas's due process rights and ordered him reinstated in November 2011. Before resuming his duties, Mr. Rosario-Fabregas took sick leave to recover from anxiety and depression caused by his 2010 firing. In June 2012, Mr. Rosario-Fabregas submitted a doctor's note to his supervisor, Mr. Castillo, stating that he was improving and ready to return to work on July 2, 2012 with certain accommodations. Mr. Castillo requested additional information to process the accommodation request and a medical release to address the possibility of aggressive episodes in the workplace. Mr. Rosario-Fabregas failed to submit the requested medical documentation over the following four months. A "Revised Notice of Proposed Removal" was issued that repeated the original 2010 reasons for removal. On November 18, 2012, Mr. Rosario-Fabregas was placed on administrative leave while the removal proposal was evaluated.

Mr. Rosario-Fabregas again appealed to the Merit Systems Protection Board. The Board only has the power to review removals and suspensions. The Board would not review Mr. Rosario-Fabregas's appeal because he did not prove that his absence from work was an actual suspension.

Mr. Rosario-Fabregas appealed the Board's decision and claimed his absence from work was a suspension because it was involuntary and coerced by the Army Corps. To find an action to be coerced, the US Court of Appeals required Mr. Rosario-Fabregas to prove "he lacked a

meaningful choice" and to demonstrate the presence of "improper agency action." The Court held that the agency's "clearance to return to work" policy was appropriate. Since there was no improper agency action, Mr. Rosario-Fabregas's absence was not coerced and his leave was not involuntary. The Board properly did not review Mr. Rosario-Fabregas appeal.

12.1.3 *Vance v. City of Laramie*, 382 P.3d 1104 (Wyo. 2016)

A firefighter was randomly breathalyzed at work and alcohol was detected in his system. Based on this test, the firefighter was terminated. The firefighter appealed his termination to the Civil Service Commission. The Commission reduced his punishment to a suspension. Both parties appealed to the district court. This court held the legal standard used by the Commission was inappropriate. The Commission then reviewed the case again and found that the breathalyzer test itself was invalid and refused to consent to the discharge of the firefighter. The city appealed this to the district court again. Once again, the court did not agree that the test was invalid and remanded to the Commission to "accept and consider the breathalyzer results." This time the Commission agreed with the discharge of the fire fighter and the district court refused additional review.

The case was brought to the Wyoming Supreme Court to determine which of the decisions of the Commission and district court was correct. The court determined that the district court was not allowed to review the commission's second decision (stating the test was invalid).

Courts can only review administrative decisions when a particular law says so. Even though review is interpreted broadly, there cannot be judicial review without some statutory authority. The law allowing the Commission's decision to be reviewed by a court states, "The decision of the commission discharging or reducing any person in rank or pay may be reviewed by the district court . . . ." Based on the language of the law, other laws related to the Commission, legislative history, the objective of the Commission, and the type of decision made by the Commission, the court held that since the Commission's second decisions (invalidating the alcohol test) only helped the firefighter with no discharge or reduction in rank, it could not be reviewed by the district court. Thus all decisions after the Commission's invalidation of the test were not proper.

12.1.4 *Salt Lake City Corp. v. Gallegos*, 377 P.3d 185 (Utah Ct. App. 2016)

From 2009-2012, Gallegos was the President of the Salt Lake Police Association ("SLPA") and a board member of the International Union of Police Associations ("IUPA"). Gallegos would attend IUPA annual meetings and pay for travel expenses with his SLPA credit card. Gallegos would receive certain reimbursements from IUPA but he would keep the money for himself and not refund SLPA. Based on these improper double payments, Gallegos was terminated. Gallegos appealed this decision to the Civil Service Commission. The Commission reversed Gallegos termination because there was "substantial and sufficient evidence . . . to conclude that Officer Gallegos made, at most, an honest and genuine mistake." The city appealed the Commissioner decision to the state court.

The city claimed the Commission made the following three errors: the Commission required city to provide evidence that Gallegos "intentionally and knowingly took money to

which he was not entitled"; the Commission used the wrong standard of review; and, the Commission improperly excluded certain evidence. The Court found the Commission only made a mistake in its standard of review. The Commission must give deference to the decision of the police chief and will only review such a decision to ensure there is substantial and sufficient evidence to support the decision. In this case, the Commission improperly evaluated whether Gallegos made a genuine mistake. That issue was not for the Commission to decide. The court returned the case to the Commission to reevaluate Gallegos' claim based on the correct standard of review.

12.1.5 *Vidmar v. Milwaukee City Bd. of Fire Police Comm'rs*, 889 N.W.2d 443 (Wis. Ct. App. 2016)

Officer Vidmar began working with the Milwaukee police department in 2004. In 2012, while working in the bicycle unit, Vidmar noticed a dirt bike that had been seized in an arrest. Vidmar waited the required 30 days and then submitted an "Order for Property" form for the dirt bike and listed a third party as the property claimant. Vidmar obtained the bike and gave it to his son. A routine inventory led to the discovery of this incident and Vidmar returned the dirt bike. An anonymous letter was sent to Board of Fire Commissioners and an Internal Affairs investigation was triggered. The District Attorney's Office did not file criminal charges against Vidmar. But the Office determined it would be unable to use Vidmar as a prosecution witness since his actions would need to be disclosed and Vidmar would be deemed a non-credible witness.

A separate internal affairs investigation led to Vidmar's termination. Vidmar appealed his discharge to the Board of Fire Commissioners. The Board agreed that Vidmar violated the Department Code because he "lacked the capacity to enforce federal and state laws" by being unable to act as a prosecution witness. On appeal, the Court agreed with the Board that the capacity to enforce laws includes "the capacity to engage in the full spectrum of responsibilities that an officer may be called upon to undertake." Since Vidmar was unable to testify in court as a police officer, he did not have capacity to enforce laws and his discharge was appropriate.

12.1.6 *Clinton Cty. Sheriff's Office v. Fraternal Order of Police*, 136 LA 949 (2016) (McDonald, Arb.)

A corrections officer was terminated after it was discovered he had been playing vulgar music and encouraging sexual dancing in female dorms. The officer filed a grievance and appealed to an arbitrator. The Department argued that the officer was discharged because his actions were deemed violations of the Department's Code of Conduct, specifically the requirement to affirmatively promote a positive public image and the prohibition on harassment. The officer argued the Code of Conduct was not violated because the dancing was not in public and there was no harassment because all the dancers were voluntary participants and no sexual favors were exchanged.

The arbitrator disagreed with the officer's argument. Even though the dancing was not in public, it still reflected negatively on the institution. Additionally, the music selected by the officer was harassment because the vulgar nature of the songs "created a hostile, offensive, or

intimidating environment" for all inmates. Based on these violations and compared to discipline to other corrections officers, the arbitrator determined discharge was an appropriate punishment.

12.1.7 *Thompson v. Civil Serv. Comm'n*, 59 N.E.3d 1185 (Mass. 2016)

Ten Boston Police Department officers were terminated after their hair samples tested positive for cocaine. Each of these terminations was appealed to the Civil Service Commission. The Commission concluded the testing of hair samples as the sole basis for termination was inappropriate since a positive test result could not differentiate between voluntary ingestion and environmental exposure to cocaine. Instead, the Commission used the hair test as some evidence of drug use but also considered additional exhibits and witnesses. Based on the level of drugs found in the hair, independent hair tests, and credibility of the officers, the Commission ordered six of the officers to be reinstated with back pay. The termination of the remaining four officers was upheld.

The four officers and the police department both appealed the Commission's decision claiming the positive drug tests were given improper weight by the Commission. This Court affirmed the Commission's decision because there was "substantial evidence" that the department's substance abuse policy was violated. Additionally, the department policy allowing the hair drug test to be sufficient evidence for termination was in direct conflict with civil service law requiring "just cause" for termination. The Commission properly required more evidence than one positive test result.

12.1.8 *Israel v. Costanzo*, 216 So. 3d 644 (Fla. Ct. App. 2017)

Anthony Costanzo was a deputy with the Broward County Sheriff's Office when he was arrested on evidence tampering charges. He was fired a short time later. Costanzo filed a grievance that proceeded to arbitration. One year after his termination, Costanzo was convicted of the criminal charges against him. The arbitrator subsequently dismissed Costanzo's grievance because he was a convicted felon and was therefore ineligible to work as a law enforcement officer. A few months later, however, the Florida Court of Appeal reversed Costanzo's conviction. Four months after that, Costanzo filed a petition to vacate the arbitrator's dismissal of his case.

The only issue in this case was whether Costanzo's petition to vacate the arbitration award was timely filed. The court held that it was not. A motion to vacate must be filed within ninety days of the receipt of notice of the arbitration award. But Costanzo filed his petition over a year after receiving notice of the dismissal of his case. The court therefore had no choice but to confirm the arbitration award.

12.1.9 *City of Buffalo v. Buffalo Police Benevolent Ass'n*, 55 N.Y.S.3d 550 (App. Div. 2017)

The City of Buffalo Police Department fired one of its officers after learning from federal authorities that the officer had confessed to operating an illegal marijuana "grow operation." The Police Commissioner served notice of the charges on the officer and then terminated him without a disciplinary hearing. The collective bargaining agreement ("CBA") specified that a hearing must take place before an employee could be terminated for misconduct.

The officer's union filed a grievance asserting that the police department had violated the CBA by terminating the officer without due process. The matter went to arbitration, and the arbitrator found that the department had indeed violated the "very clear procedure" outlined in the CBA. The police department moved to overturn the arbitration award, arguing that the arbitrator's award of back pay was "against public policy and irrational." The court disagreed: the police department failed to meet its "heavy burden" of demonstrating that the award should be vacated on either ground. The police department's public policy argument was vague and insufficient, and while the court agreed that the underlying facts of the case rendered the size of the award "distasteful"—over two years of back pay for a police officer who allegedly confessed to committing felony offenses both before and after becoming an officer—it determined that the public policy analysis could not change just because the implications would be "disturbing." The court also concluded that the police department failed to establish that the award was irrational. The police officer was therefore entitled to his two years of back wages.

12.1.10 *Pinheiro v. Civil Serv. Comm'n for Cty. of Fresno*, 200 Cal. Rptr. 3d 525 (Ct. App. 2016)

John Pinheiro was a personnel services manager for the County of Fresno. In May 2012, the County opened an investigation into his behavior after two County employees reported that he was having an affair with a third employee, Vanessa Salazar. Salazar had told her coworkers that Pinheiro had hit her more than once. The outside investigator assigned to the case determined that Pinheiro had breached County personnel rules governing inefficiency, insubordination, neglect of duty, dishonesty, and discourteous treatment of other employees. As a result, Pinheiro was fired.

Pinheiro immediately appealed his termination, but the Commission upheld his dismissal following an extensive administrative hearing. Pinheiro took issue with the fairness of the hearing, asserting that the Commission violated his due process rights by relying on evidence outside the record. While the trial court determined that the Commission had in fact relied on some extra-record evidence, that evidence was found to be "rather insignificant factoids" that did not require reversal of the case.

On appeal, the court ruled that the lower court erred in concluding that the Commission's consideration of extra-record evidence was insignificant. Since credibility was key to the Commission's overall findings and the extra-record evidence relied upon led the Commission to discredit all of Pinheiro's testimony, the error was not harmless. Pinheiro was therefore entitled to a new hearing before the Commission.

12.1.11 *Moen v. Nw. Educ. Serv. Dist. No. 189*, No. 74260–4–I, 2016 WL 7077143 (Wash. Ct. App. Dec. 6, 2016)

Rhonda Moen filed a lawsuit against her employer, Northwest Educational Service District No. 189 ("NWESD"), alleging constructive wrongful discharge in violation of public policy. NWESD offers school districts in Washington State a drug and alcohol prevention and intervention curriculum, and Moen was hired as a prevention intervention specialist at Marysville Middle School. For the first sixth months of her employment, she, like all prevention intervention specialists, was granted provisional trial status. She acknowledged that she

understood that that meant she could be fired without advance notice during her first sixth months on the job.

In March 2013, approximately four months into her employment, Moen informed her supervisor about her frustration with the Marysville Middle School principal Susan Hegeberg. Hegeberg had not yet sent out the parental permission slips for the drug and alcohol curriculum, and Moen was concerned that the full curriculum could not be presented in the time remaining in the school year. Hegeberg requested that Moen present an abbreviated version of the curriculum. Moen refused, stating that the suggested implementation of the program was "not true enough to how it [was] supposed to be presented." Because her refusal to teach the program meant that she was not fulfilling the requirements of her job, Moen resigned before she could be fired for insubordination.

Moen then sued NWESD for constructive wrongful discharge in violation of public policy. NWESD argued in response that Moen did not identify a clear public policy that it had allegedly contravened as required to prevail on such a claim. The court agreed with NWESD: only clear violations of important recognized public policies can expose employers to liability. Because there was no authoritative, public declaration of a public policy against teaching a curriculum "contrary to the methodology in which the class was designed to be instructed," the court dismissed Moen's complaint.

12.1.12 *Holmes v. City of Memphis Civil Serv. Comm'n*, No. W2016–00590–COA–R3–CV, 2017 WL 129113 (Tenn. Ct. App. Jan. 13, 2017)

Holmes, an employee of the Memphis Fire Department, was fired following his involvement in a physical altercation with a former business associate. Holmes hit the associate in the back of the head with his fist and gun, then struck him in the face with a hammer. Holmes maintained that the associate attacked him first by kicking him in the stomach and that Holmes wielded the hammer only in self-defense. However, he presented no physical evidence to support this claim. The business associate testified that he had never threatened or touched the firefighter before being attacked from behind as he was walking down a driveway with his five-year-old son.

The court determined that substantial evidence supported the Commission's determination that Holmes's conduct during the altercation constituted a "breach of public trust" and violated several disciplinary rules. Evidence of Holmes's long-term service and lack of disciplinary history did not outweigh the seriousness of his conduct. His discharge was warranted.

12.1.13 *Seibert v. City of San Jose*, 202 Cal. Rptr. 3d 890 (Ct. App. 2016)

Grant Seibert, a firefighter and paramedic, was fired from his position with the San Jose Fire Department after exchanging a series of risqué emails with a sixteen-year-old girl during work hours. Seibert also had a history of touching a female colleague against her will, making inappropriate and unwelcome advances, leering at her, and asking invasive questions about her personal life. The City's Civil Service Commission upheld the termination.

The lower court reinstated Seibert because it determined that the Commission had failed to provide him a fair hearing. The court held that the Commission's reliance on the testimony of the harassed colleague was inappropriate. It also found that the emails between the paramedic and the sixteen-year-old established "at worst, inappropriate horseplay subject to admonition or perhaps minimal suspension without pay." The City appealed, and the appellate court reversed, holding that the lower court erred by not considering the harassed colleague's interview transcripts. The transcripts were admissible evidence according to the Federal Rules of Evidence. The appellate court also found that that the lower court abused its discretion when it determined that Seibert's sexually suggestive emails to a minor amounted to no more than "horseplay."

Holmes's conduct during the altercation constituted a "breach of public trust" and violated several disciplinary rules. Evidence of Holmes's long-term service and lack of disciplinary history did not outweigh the seriousness of his conduct. His discharge was therefore warranted.

12.1.14 In re Employer [Mich.] and International Union of Operating Engineers, 136 LA 1875, 200585-AAA (Dec. 22, 2016) (John A. Obee, Arb.)

Grievant was a police officer with a police department in a Michigan village ("Village"). The Village police officers have limited police powers, i.e. they can only do police work within the Village itself. However, the officers routinely patrol outside the Village in certain areas, and assists departments in other nearby communities when needed. The department Chief reprimanded Grievant for going to bars during work hours and for failing to comply with department policy that administrative staff be notified in the event of shift changes. The Chief later received complaints that Grievant had been outside the Village with her police car. In response, he put a tracker on Grievant's car, which recorded that the car went outside the Village multiple times. Later, Grievant was dispatched outside the Village to address a reckless driver situation, and met with an officer from another county outside the Village. She did not describe it in her log entry because she had never been required to log any meeting outside of the Village.

The Chief brought a misconduct hearing against Grievant, where Grievant was charged with untruthfulness about her whereabouts, among many other things. Afterwards Grievant was discharged primarily based her being out of the Village without entering corresponding log entries.

The arbitrator determined that the Village did not have just cause to terminate Grievant. The arbitrator found that Grievant as well as another officer testified credibly that meetings outside the Village for general police business and related meetings were common practice and never required log entries describing them. The arbitrator also found that secretly placing a tracker on Grievant's car was an extreme response and not justified. Furthermore, there was an incident where the Chief called another officer a "f*cking liar" after he offered an explanation for Grievant's log entries. The arbitrator found these incidents to evidence the Chief's ill will toward Grievant, which tainted the discipline process. In fact, allegations of Grievant's going to unauthorized places were largely incorrect. For example, when Grievant was at the store she was shopping for paint for the department office; and she had gone to a restaurant outside the Village for a meeting because there were few if any places to eat in the Village. The arbitrator also found insufficient evidence of Grievant's untruthfulness.

12.1.15 In re King County Sheriff's Office [Wash.] and King County Police Officer's Guild, 136 LA 1820 (Dec. 27, 2017) (Kenneth J. Katsch, Arb.)

S__ and M__ were employed by the King County Sheriff's Office. S and M began a dating relationship despite each being married. Later they divorced their respective spouses and moved in together. At some point M received an email (while attending his father's funeral in New York) addressed to his entire patrol precinct, wherein the supervisor asked everyone for their input on M's performance. He'd never seen such an email; got angry; and, used profane language with the supervisor on the phone. He received a written warning for conduct unbecoming a deputy.

The relationship between S and M began deteriorating rapidly. S confided in another deputy, G, that after finding out about her intentions to leave the relationship, M had threatened to kill her, that he hoped her family would die, and that he'd break G's neck. S moved out of their home, and M was arrested. M claimed that S was becoming increasingly erratic and dangerous from her jealousy of the women in M's life, and that she was the one who had been making threats against him. After internal investigations corroborated S's consistent statements about her fears for her safety, the County discharged M for criminal harassment/domestic violence and conduct unbecoming an officer. M argued he was discharged without just cause, and that he was deprived due process when he was interviewed by detectives in a criminal investigation without union representation.

The arbitrator found just cause to discharge M. He found that the County made a thorough investigation which corroborated the allegations against M, including a good faith inquiry into the counter-allegations raised by M. He also found that the County was not biased against M, even though it expressed concern for S's situation. The investigation produced substantial evidence of guilt, and discharge is appropriate for felonious threats to kill. S's withdrawal from the criminal case did not conclusively show that she was afraid to perjure herself because she had false testimony against M. The arbitrator also found that M's due process claim had no merit, as the collective bargaining agreement contains no affirmative duty to allow union representation in criminal procedures, and M had an opportunity to bring union representation to internal investigation meetings.

12.2 **OTHER PUNISHMENT:**

12.2.1 *Owens Cmty. Coll. v. Fraternal Order of Police*, 137 LA 360 (2017) (Lalka, Arb.)

During a routine patrol, an officer of Owens Community College saw a semi-truck on a road where such large vehicles were not permitted. The officer attempted to pull over the semi-truck by following behind the truck with lights and sirens. The truck continued on the road under the speed limit for .6 miles before pulling over in a parking lot. The officer exited his vehicle and drew his firearm. The officer was given a three-day suspension for violating the Department's use of force policy. The officer appealed this decision to an arbitrator.

The Department policy states, "An officer shall not draw or exhibit a firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm to prevent serious physical harm or death to the officer or others." The officer

claimed he pulled his weapon because the truck might have been stolen and truck drivers are known for having weapons in their cabs. The arbitrator determined that a reasonable police officer would have waited for back up if they felt they were in danger. Ultimately, the officer's use of his weapon was not reasonable and a three-day suspension was appropriate.

12.2.2 *City of N. Ridgeville v. Fraternal Order of Police*, 137 LA 342 (2017) (Szuter, Arb.)

A 16-year veteran of North Ridgeville's Police Department was suspended for one day after a collision with a civilian vehicle. The investigation into the collision found the officer was driving with lights and sirens but was negligent because he was driving too fast for the conditions of the roadway. The Department concluded the officer was driving recklessly and the collision was due to his negligence. Thus the officer was suspended for failing to drive "in a careful and prudent manner." The officer appealed this decision to an arbitrator.

After evaluating the context of the accident, the arbitrator determined that the circumstances leading to the accident were not something the officer could have anticipated. The officer was driving with "due regard" for the circumstances and was not reckless in violation of Department policy. However, the accident still violated a less serious policy. Based on this lesser violation, a one-day suspension was considered inappropriate and a letter of reprimand was ordered by the arbitrator instead.

12.2.3 *Texas Mun. Police Ass'n*, 136 LA 1467 (2016) (Jennings, Arb. 2016)

During work, a police officer told stories to other officers using the word "nigger" and "wetback." A Sergeant overheard these remarks but did not intervene or report these remarks to the Chief of Police. The Sergeant, instead, told a community member about the use of these terms. The Department had a zero-tolerance policy against discrimination and harassment which included requiring supervisors to immediately report such behavior to the Chief of Police. Based on this failure to act and the inappropriate dissemination of information to a citizen, the Sergeant was placed on indefinite suspension.

The arbitrator determined that the Sergeant should have reported the racial slurs to the Chief but could not be punished for not intervening because the Sergeant did not have the authority to stop an officer from telling a story. Additionally, the Sergeant was not guilty of harassment because "none of the officers who overheard the stories told by the lesser ranking officer indicated they were so harassed." The arbitrator held the Sergeant did violate the code of conduct when he told a citizen about the use of racial slurs but since he immediately told the Chief of Police about this interaction with a citizen, the harm was mitigated and the Sergeant should only suffer a five day temporary suspension without pay.

12.2.4 *W. Sacramento Police Dep't v. W. Sacramento Police Dep't Ass'n*, 136 LA 957 (2016) (Riker, Arb.)

In May 2015, a police officer with the West Sacramento Police Department ("Department") participated in the pursuit of a vehicle. During the pursuit, the officer turned on the car's emergency lights but did not activate the sirens. The officer later stated that he did not turn on his siren because four other police vehicles in the pursuit already had their sirens on and the pursuit was in a business district after working hours. Additionally, the officer had a police

dog in the car and did not want to alarm the dog. The Department reviewed the officer's conduct and determined the officer violated Department policy and implemented an eight-hour suspension without pay.

The Department's policy requires the use of a siren when "reasonably necessary." The officer appealed his suspension and claimed he made an appropriate judgment call. Alternatively, the Department stated that use of lights and sirens in a vehicle pursuit is department policy taught to all cadets during training. The arbitrator agreed with the Department and found that the officer's actions violated department policy. The eight hour suspension was deemed appropriate in light of the importance of "uniformity and teamwork" in a paramilitary organization.

12.2.5 *In re Employer and Individual Grievant*, 136 LA 844 (2016) (Jennings, Arb.)

Off-duty undercover narcotics officer "C" crashed a city vehicle into a private citizen's vehicle. Instead of reporting the accident as required by the City's policy, Officer C called his partner, Officer I. Officer C then proceeded to offer the woman he hit ("E") $200 to "keep the situation calm." Police were not called to the scene until more than two hours after the accident occurred.

As a penalty for failing to follow established procedure in notifying the on-duty officers of the accident and for failing to exercise sound judgment when he offered E $200 in cash, Officer C was suspended from the police force for fifteen days without pay. While he did not deny that the incident occurred, he argued that the fifteen-day suspension was excessive and should be reduced to a three-day suspension.

The Hearing Examiner deferred to the police department because of the "paramilitary nature of police work." He determined that an arbitrator should not sustain a grievance solely because an officer did not like the penalty imposed. As long as the police department has met the contractual requirements of due process, fairness, and just cause—all of which were satisfied in the present case, he determined—the decision is the department's, not an arbitrator's. The Hearing Examiner accordingly denied the grievance and allowed the fifteen-day suspension to stand.

12.2.6 *In re Ridgway Area Sch. Dist. and Ridgway Area Educ. Ass'n*, 137 LA 296 (2017) (Franckiewicz, Arb.)

During the 2015-2016 school year, Mr. A taught sixth grade science and social studies. In March 2016, the students in Mr. A's class were working on a group project. "E," a student, was not attending to the project but was instead reading a book unrelated to the project. According to E, Mr. A confiscated the book she was reading and slammed her wrist down on the desk, injuring her.

"H," another student in the class, corroborated most of the story. According to H, however, it was the book, not E's hand, that hit the desk. Mr. A testified, meanwhile, that he grabbed E by one wrist and threw the book to the desk to get the attention of the students who were off task. He maintained that he never slammed E's hand onto the desk but did intentionally throw the book. He further alleged that he sought out E the next day to apologize and make sure that there were no "hard feelings."

When the school district learned of the incident, it suspended Mr. A for two days. The issue in this case was whether there was just cause for the suspension. The arbitrator determined that there was not. He found Mr. A to be a credible witness—more credible than E, who admitted to having fabricated complaints on previous occasions. The arbitrator also found the lack of bruising on E's wrist suspicious. He ordered the school district to abrogate Mr. A's suspension and expunge all references to the incident from his teaching record.

12.2.7 *In re City of Austin and Austin Police Ass'n*, 136 LA 301 (2016) (Jennings, Arb.)

In April 2014, the Chief of the Austin Police Department presented a video to all police officers describing a zero tolerance policy for "Driving While Intoxicated" ("DWI"). The video stated that any officer guilty of a DWI would receive an indefinite suspension. This video was emailed to every officer and placed on the Department's internal website.

In May 2014, an Austin police officer was arrested for a DWI. Breathalyzer tests at the scene and at the jail found the officer's Blood Alcohol Concentration ("BAC") was twice the legal limit. The officer was indefinitely suspended and he appealed that punishment to this arbitration.

The officer argues that his suspension was not appropriate compared to the discipline imposed on other officers found guilty of a DWI. In the past, the Chief would mitigate indefinite suspensions to lengthy temporary suspensions. Based on the Chief's own testimony, the arbitrator determined that the Chief's video was not clear enough on how officers would be disciplined. The arbitrator replaced the indefinite suspension with a suspension of 180 days.

13. UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS (USERRA)

13.1 *Carroll v. Del. River Port Auth.*, 843 F.3d 129 (3d Cir. 2016)

Anthony Carroll was first hired by the Delaware River Port Authority in 1989. Between 1989 and 2009, he served in the Navy and in the National Guard. In 2009, he deployed to Iraq, where he sustained multiple serious injuries. Carroll returned to the United States in 2009 and sought rehabilitation for his injuries until his honorable discharge from military service in 2013.

In October 2010 and then again in October 2012—while on active duty but in rehabilitation—Carroll applied for a promotion with the Port Authority. After being denied the promotion both times, Carroll sued, alleging that the Port Authority unlawfully discriminated against him based on his military service in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The Port Authority pushed for dismissal of the case. It argued that Carroll must demonstrate at the outset of his USERRA claim that he was objectively qualified for the promotion, which he could not do because of his injuries. Carroll contended in response that to survive the motion to dismiss he need only show that his military service was "a substantial or motivating factor" in the Port Authority's decision to deny him the promotion. His (lack of) qualifications, while relevant, were an affirmative defense to a discrimination claim, not an additional hurdle that a USERRA plaintiff must clear at the outset of the case.

The Third Circuit Court of Appeals found Carroll's reading of the USERRA to be more persuasive. The court held that a plaintiff's objective qualifications are only relevant to the USERRA discrimination analysis after he or she has shown that the military service was "a substantial or motivating factor" in the adverse employment action. Carroll was therefore not required to plead and prove that he was objectively qualified for the promotion in order to meet his initial burden under the USERRA.

A petition for certiorari to the Supreme Court of the United States has been filed in this case.

13.2 *Mace v. Willis*, No. 4:16-CV-04150-VLD, 2017 WL 1437060 (S.D. Apr. 21, 2017)

Kieshia Mace was a part-time employee of Kickbox in Sioux Falls, South Dakota and a member of a National Guard unit based out of Sioux City, Iowa—ninety miles away. Upon being hired by Kickbox, Mace informed her boss that she would need to take three weeks off in order to attend National Guard training. Her boss understood that the reason for her absence was mandatory military training.

Kickbox uses a scheduling app called "When I Work" to schedule hours for its employees. When Mace left for National Guard training, her boss removed her from the app. His stated reasons for doing so were twofold: first, removing her allowed Kickbox to save $11 per month, and second, it was "easier" for him to schedule employees to work if the only employees whose names appear in the app were those who were actually available to work. Mace did not learn that she had been removed from the app until she returned from National Guard training and asked to be added to the schedule for the following week. Her boss informed her that the schedule was already full and that Kickbox had hired an employee to replace her. Mace filed suit under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), asserting that her employer failed to reemploy her promptly following her military leave as required by federal law.

The U.S. District Court for the District of South Dakota determined that Mace was entitled to lost wages for the six-week period during which she was seeking alternate employment. The court found that proof of discriminatory intent is not required to sustain a reemployment claim under the USERRA and that an employer may not refuse to reemploy a returning military service member just because the employer has already hired a replacement. Because Mace provided proper notice of her military leave before leaving and upon return, she was entitled to her lost wages as a matter of law.

This case is on appeal in the Eighth Circuit.

13.3 *Jeong Ko v. City of La Habra*, No. 2:10–CV–10–5305–PJW, 2017 WL 1197658 (C.D. Cal. March 30, 2017)

Jeong Ko, a member of the Army Reserves, was hired as a probationary police officer by the City of La Habra. Shortly after transitioning from his position as a probationary officer to a permanent position with the police department, he deployed to Afghanistan for seventeen months. While deployed, Ko missed the annual merit-based pay increases that 98% of La Habra police officers receive. Upon returning from Afghanistan, Ko sued the City, alleging that the

missed merit payments constituted discrimination on the basis of military service in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

The La Habra Police Department requires probationary officers to complete a one-year probationary period that can be extended if the Department believes that an officer's performance is deficient. Ko had some difficulty completing the probationary period. It took him fifteen months to attain a satisfactory evaluation and transition into a permanent position. Once he became a permanent officer, however, he began to score well in his evaluations, consistently achieving scores of "outstanding" and "exceeds standards." Ko deployed to Afghanistan five months after receiving his first satisfactory evaluation. As the USERRA guarantees returning service members the seniority and other rights and benefits that they had when they left plus the seniority and other rights and benefits that they would have attained had they not deployed, Ko sued the City to collect the difference between his current salary and the merit-augmented salary he claimed he would have earned if he had not been absent from the department for seventeen months. He argued that since 98% of permanent officers receive the annual pay increase, it was "reasonably certain" that Ko would have earned it but for his time away from the department. The City, pointing to Ko's previous difficulties during the probationary period, argued that Ko would not have earned the increase.

The court ultimately determined that the City did owe Ko the merit-based pay increase. While Ko did have considerable difficulty making it through the probationary period, he had been performing his job duties exceptionally well for the five months leading up to his deployment. Based on his record, it was "highly probable" that he would have continued to exceed standards and attain the merit increase had he not deployed.

13.4 *Keene v. Clark Cty. Sch. Dist.*, No. 2:14-cv-00381-APG-PAL, 2016 WL 3580465 (D. Nev. June 30, 2016)

Keene was an employee of the Clark County School District ("CCSD") for eleven years. In 2008, Keene was deployed to Iraq by the Army. Before being deployed, Keene was required to attend various training exercises that required him to take time off of work. When one training exercise was cancelled, Keene emailed CCSD to let them know he would be returning to work the following day. CCSD responded that his services were no longer needed. When Keene returned from his deployment five months later, he wrote a letter to human resources asking to be formally reinstated to his past position. Keene was reemployed but in a position that he believed a demotion. After eight years of applying for other positions, Keene retired from CCSD in 2015. After retiring, Keene filed a claim against CCSD for violating the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

CCSD argued it did not violate USERRA because Keene's email notification about returning to work was not an official request for reemployment. The court stated there is no required format for a request for reemployment and Keene's email was an appropriate request that the CCSD was required to respond to by hiring Keene. CCSD also claimed it was not required to rehire Keene because it would have been an undue hardship. The court did not find any evidence that an undue hardship would have ensued from hiring Keene to his original position.

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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.

Steve serves as Chair of the firm's Executive Committee and in that capacity as the Managing Member (or "Managing Partner") of the firm.

SELECTED REPRESENTATIVE WORK

– *Brower v. State/Football Northwest*, 137 Wn.2d 44 (1998) (Successful defense of Seattle Seahawk stadium project and legislative referendum)
– *Washington Securities v. Horse Heaven Heights*, 132 Wn. App. 188, 149 P.3d 379 (2006), rev. denied, 158 Wn. 2d 1023 (successful prosecution of quiet title action for rail right of way)
– *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403 (2006) (successful defense of Sound Transit eminent domain action)
– *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008); 170 Wn.2d 1, 239 P.3d 589 (2010) (successful defense of water fluoridation program)
– *HTK v. Seattle Popular Monorail*, 155 Wn.2d 612 (2005) (successful defense of municipal condemnation authority)
– *Public Utility District No. 1 of Okanogan County v. State of Washington, Peter Goldmark*, 174 Wn. App 793, 301 P.3d 472 (2013); 182 Wn.2d 519; 342 P.3d 308 (2015) (successful prosecution of utility corridor acquisition)
– *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)

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- *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)
- *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)
- *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)
- *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, 2012-2018
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine, Appellate Practice, 2013
- Washington Super Lawyers list, 2002-2017
- 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 Employment Law Sections, Member
- Washington State Bar Association
  + Environmental and Land Use Law and Administrative Law Sections, Member
- King County Bar Association, Trustee, 1986-1989
- South King County Bar Association, Trustee, 1986-1988
- South King County Legal Clinic
  + Founder and Attorney Coordinator, 1985-1986
  + Volunteer, 1978-1989
- University of Washington
  + Lecturer, Evans Graduate School of Public Affairs

QUOTED

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

SELECTED PUBLICATIONS

- Foster Pepper Local Open Government Blog
  + Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
- Washington Real Property Deskbook: Causes of Action, Taxation, Regulation, Chapter Editor (WSBA)
- Washington Public Records Act Deskbook, Chapter 14, Attorney Client Privilege, Co-Author (WSBA)

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- Washington Administrative Law Handbook, Chapter 14, Judicial Review of Administrative Proceedings, Author (Butterworth)
- "Washington Supreme Court Levels the Playing Field in Real Estate and Land Use Litigation," Co-author, Foster Pepper News Alert, June 2015
- "U.S. Supreme Court Decision Expands Scope of Takings Clause," Co-author, Foster Pepper News Alert, June 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
- "Council Meeting Conduct and Citizen Rights under the First Amendment," Author, Municipal Research and Services Center of Washington, November 2009

EXPERIENCE

- Foster Pepper PLLC
  + Chair, Executive Committee, 2017-Present
  + 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