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Jail & Prisoner Legal Issues
January 25-28, 2021

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MONTHLY CASE DIGEST

Some of the case digests do not have a link to the full opinion.
• Most Federal District Court opinions can be accessed via PACER. Registration is required; nominal fees
• ***BNA*** arbitration awards can be obtained for a fee, from BNA Plus

Arbitration Procedures

A customs officer employed by the U.S. Department of Homeland Security was required to remain medically qualified to carry a service firearm. After his wife made a police report that he had cocked his service weapon and pointed it at her head, officers concluded that the allegations were unfounded and did not charge him. The employer, however, temporarily revoked his authority to carry a firearm and ordered a fitness-for-duty evaluation, with a psychiatric evaluation. The first such evaluation was inconclusive, and a second psychiatrist was also unable to assess his possible dangerousness but recommended that he be barred from weapons-carrying positions based on his "lack of full cooperativeness."

A third-party psychologist had found that the employee's Minnesota Multiphasic Personality Inventory results were invalid due to "extreme defensiveness." While he answered every MMPI question, the finding was based on his answers. The employer fired him. In arbitration, the employer denied him access to the MMPI assessments and interpretations. He offered the testimony of his own expert, who administered another MMPI and interpreted his scores as within a range typical among law enforcement personnel. After a fourth fitness-for-duty evaluation and MMPI assessment, the same psychologist again interpreted the results as invalid "because of high defensiveness." An arbitrator affirmed the employee's removal and denied his request to order the employer to produce the records of his MMPI assessments. A federal appeals court vacated the arbitrator's decision. When an agency relies, directly or indirectly, on the results of a psychological assessment in justifying an employee's removal, the agency must provide the employee with a "meaningful opportunity" to review and challenge the data, analysis, and results of that assessment. Because the employee was denied this opportunity, the final award was vacated. The arbitrator legally erred in concluding that he lacked a due process right to review and challenge the records of the assessments the agency's removal decision was based. *Ramirez v. Department of Homeland Security*, #19-1534, 2020 U.S. App. Lexis 29185 (Fed. Cir.).

Bill of Rights Laws

An intermediate California state appeals court had previously held in *Morgado v. City and County of San Francisco*, 1#A141681, 3 Cal.App. 5th 1, (2017), that San Francisco's procedural approach to punishing a police officer for misconduct violated the Public Safety Officers Procedural Bill of Rights Act by not providing him with a valid avenue for administrative appeal of his 2011 termination from his police employment. That court ruling also affirmed a 2014 injunction directing the city to vacate the termination and reinstate him pending an administrative appeal. The officer was reinstated but was suspended without pay retroactive to his 2011 termination. In 2018, he obtained a court order holding San Francisco in contempt for failure to comply with the injunction and requiring the city to "unconditionally" vacate his termination and suspension, compensate him with front pay and benefits lost, and "refrain from ... any other action" against him. The employer offset the payment owed to him based on his post-termination earnings from side income as a mortgage broker, a deduction of $181,402.

He obtained a second order of contempt, directing the city to pay him the amount deducted and to re-assign him to administrative duties. An intermediate state appeals court overturned that order as not resting upon a "clear, intentional violation of a specific, narrowly drawn order." The trial court again found the deduction inapplicable and ordered the city to pay the amount deducted. The court of appeal reversed, citing precedent that entitles the city to deductions for the officer's side income, and remanded for recalculation of the amount. The court found that the employer was entitled to take deductions for the side income the wrongfully terminated police officer earned as a mortgage broker while waiting for reinstatement because his employment as a mortgage broker was inconsistent with his employment as a police officer. Absent his termination and suspension, he would not have been able to take up secondary employment, and that income simply would not have been earned. But the amount the city deducted for the side income was incorrect because deducting the pre-tax income amount from the officer's post-tax front pay left him short of the amount to which he was entitled by exposing him to extra tax liability. *Morgado v. City and County of San Francisco*, #A157320, 2020 Cal. App. Lexis 818.

First Amendment

******Editor's Case Alert******

A city EMS captain posted on his personal Facebook page comments on the police shooting death of 12-year-old Tamir Rice, which had resulted in anti-police protests. The posts did not identify him as a city employee, nor were they made during work hours. He said: “Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal fucker” and also referred to Rice as a “ghetto rat.” The employee removed the posts within hours and later claimed an acquaintance with access to his phone made the posts while he slept.

Subsequently, a termination letter advised him that his speech violated city policies. A federal appeals court overturned summary judgment for the employer on a First Amendment claim. The court found that the posts did address a “matter of public concern.” It did not rule on whether or not the posts amounted to protected speech however. On remand, the court below must determine whether the employee’s free speech interests outweigh the interest of the city EMS in the efficient administration of its duties. Government, when acting as an employer, may regulate employee speech to a greater extent than it can that of private citizens, including to discipline employees for speech the employer reasonably predicts will be disruptive, the court commented. *Marquardt v. Carlton*, #19-4223, 2020 U.S. App. Lexis 26355 (6th Cir.).

Homosexual Employees

An employee for over 20 years of the Indiana state Department of Corrections identified as a homosexual. He had received good work reviews and promotions and obtained the rank of Internal Affairs Investigator. In 2015, he was arrested for operating a vehicle while intoxicated, resulting in a written reprimand from a warden. Subsequently, in 2016, he attended a law enforcement conference in Indianapolis. A sheriff from another county complained that he became intoxicated at the conference and behaved inappropriately, which the employee denied.

Later that month, the employee and others confronted a subordinate. Marshall denies the allegations. Later that month, Marshall and others confronted a subordinate directly under his supervision about his alleged unethical disclosure of confidential investigation materials. The next day, that subordinate accused him of sexually harassing him twice outside of work. A regional director of the department decided to terminate him. At a meeting before the termination, someone said they should be prepared for him to file a complaint with the EEOC. He was fired and the subordinate was demoted. A federal appeals court upheld summary judgment for the employer on claims of sexual orientation discrimination and unlawful retaliation. The court found that the case failed for lack of a similarly situated comparator. Additionally, there were "legitimate issues" about whether he was meeting the employer's expectations. His exposure of his subordinate's alleged breach of confidentiality was not protected by Title VII. The court found that retaliation for the exposure could not be Title VII retaliation. *Marshall v. Indiana Dept. of Corrections*, #19-3270, 2020 U.S. App. Lexis 28185 (7th Cir.).

Political Discrimination

The plaintiff employee was the Crime Victims Unit (CVU) coordinator for a judicial district's District Attorney's office. Her boss was the District Attorney. She claimed that she was fired because of political disagreements with her boss. A federal appeals court ruled that the plaintiff's employment was not shielded by the First Amendment from political discrimination, but rather, she was subject to the patronage dismissal exception to First Amendment retaliation claims. In this case, her position was a confidential or policymaking role, and one for which "party affiliation is an appropriate requirement for effective performance."

The employee's political affiliation and actions disrupted the work of the DA's office, and after the employee's political actions, her supervisor was unable to place absolute confidence in her performance of her vital statutory duties. In

performing those duties, the employee was representing her supervisor, the elected DA, and he was thus entitled to her loyalty and needed confidence in her representation. The employee was actively seeking to unseat at least one judge by supporting her sister's candidacy, and it was easy to see that such a conflicting position may have hampered the ability of the DA's office to discharge its duties. The court further held that because the plaintiff had not plausibly alleged a constitutional claim, her municipal liability claim was also properly dismissed. *Garza v. Escobar*, #19-40664, 2020 U.S. App. Lexis 27559 (5th Cir.).

Retaliatory Personnel Actions

An IRS employee serving a one year probationary period was fired for misconduct. She appealed to the Merit Systems Protection Board, challenging her removal as an unlawful adverse action and filed a formal Equal Employment Opportunity (EEO) complaint claiming that she had actually been terminated because of discrimination based on her national origin, disability, and prior protected EEO activity. An administrative judge (AJ) dismissed her claims, reasoning that she was a probationary employee, not entitled to full appeal rights. She then filed a complaint with the Office of Special Counsel, alleging whistleblower retaliation, but the office took no action. She subsequently filed an Individual Right of Action (IRA) appeal, claiming that she had disclosed attendance violations by others and a hostile work environment, including refusal to accommodate her disabilities, and that she had been removed from her position in retaliation for those disclosures. The AJ in response ordered her to make a nonfrivolous showing that she had made protected disclosures that led to her removal with detailed factual support. When she failed to respond, her appeal was dismissed. She argued that she was unable to file a timely response because of health issues, but she never sought an extension and she submitted other filings during the period she was given for filing a response. A federal appeals court upheld the dismissal of her claims, finding that she failed to make nonfrivolous allegations that she made disclosures that the Board has jurisdiction to address in an IRA appeal, *Young v. Merit Systems Protection Board*, #19-2268, 961 F.3d 1323 (Fed. Cir. 2020).

Retirement Benefits

Oregon made changes to the Public Employees Retirement System (PERS) by enacting amendments to the legislation. PERS members sued, challenging two of

those amendments. The first was the redirection of a member's PERS contributions from the member's individual account program to a newly created employee pension stability account, used to help fund the defined-benefit component of the member's retirement plan. The second was a cap on the salary used to calculate a member's benefits. The plaintiffs argued that these changes impaired their contractual rights and therefore violated the state Constitution's Contract Clause. The Oregon Supreme Court rejected these arguments. The court ruled that the amendments did not operate retrospectively to decrease the retirement benefits attributable to work that the member performed before the effective date of the amendments. While the amendments operated prospectively to change the offer for future retirement benefits, the pre-amendment laws did not contain a promise that the retirement benefits would not be changed prospectively. *James v. Oregon*, #S066993, 366 Ore. 732, 2020 Ore. Lexis 580 (2020).

Sex Discrimination

A female county probation officer met the presiding judge of the county court, who allegedly repeatedly called her asking her to visit his chambers. When she did so, after hours, he allegedly insisted on having sex with her, while stating that it would be a "business relationship." The judge had authority over hiring probation officers. The officer wished to return to her hometown, and the judge made sure that she was hired there. He started summoning her to his chambers for sexual relations. After the sexual relationship ended in 2009, he allegedly continued asking her to film herself performing sexual acts, flirting with her from the bench, and threatening to "help her return to her previous job." Subsequently, she started dating the man she later married, another probation officer. He was allegedly harassed and pushed into retirement. The female officer claimed that she was denied her own office, overtime, training, and other opportunities she alleges her male counterparts had. Within days of telling her supervisors of her intention to file EEOC charges, she was placed on a "performance improvement plan," even though she had received a positive evaluation with no noted performance issues weeks earlier.

A federal appeals court found, accepting her allegations as true, the plaintiff stated plausible claims for sex discrimination in violation of the Equal Protection Clause, a hostile work environment under 42 U.S.C. 1983, and that the judge violated her First Amendment freedom of expression and right to petition the government. Because the law was clearly established that this alleged conduct is actionable discrimination, the trial court did not err in denying the defendant judge

qualified immunity. *Starnes v. Butler County Court of Common Pleas*, #18-321, 2020 U.S. App. Lexis 26794 (3rd Cir.).

Whistleblower Protection

A Veterans' Administration (VA) employee challenged the employer issuing a letter of reprimand against him for accusing a supervisor of improperly pre-selecting an applicant for a position. He claimed that the email making the accusation constituted protected whistleblowing. Under a settlement agreement, the VA agreed to provide a written reference and the assurance of a positive verbal reference, if requested and that his Waco supervisor would not mention the retracted reprimand. He was later fired in April 2016, for performance reasons.

He claimed that the VA twice breached the settlement. When he applied for a position in the VA's El Paso medical center, the reprimand letter was allegedly disclosed and when he applied for a position in the VA's Greenville healthcare center at Waco employee disclosed that he was on a Temporary Duty Assignment. The Federal Claims Court found that the plaintiff's complaint plausibly alleged breaches of the agreement that resulted in the loss of future employment opportunities. He sought $289,564 in lost salary and lost relocation pay of either $86,304 or $87,312. The Claims Court then ruled that he had not stated plausible claims to recover lost salary or relocation pay. A federal appeals court reversed that ruling, finding a plausible claim that the alleged breaches were the cause of his lost salary. His termination from his Waco job did not undercut that plausibility. *Oliva v. United States*, #19-2059, 961 F.3d 1359 (Fed. Cir. 2020).

Workers' Compensation

The Supreme Court of California ruled that when a married couple suffered a violent attack after being asked by law enforcement to check on a neighbor who had called 911 requesting help, the exclusive remedy available to them to recover for their injuries was through workers' compensation. The court found that when members of the public engage in "active law enforcement service" at the request of a peace officer, California treats those members of the public as "employees" eligible for workers' compensation benefits. However, workers' compensation then becomes an individual's exclusive remedy for his or her injuries under state law. At issue in this case was whether the couple were engaged in "active law enforcement service" when they assisted law enforcement by checking on a

neighbor who had called 911, walked into an active murder scene, and had their throats cut. The court concluded that they engaged in active law enforcement under California Labor Code 3366 even though the peace officer allegedly misrepresented the situation, and therefore, their only remedy was through workers' compensation. *Gund v. County of Trinity*, #S249792, 2020 Cal. Lexis 5542.

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RESOURCES

First Amendment: Concerning Behavior: Do a Public Employee's Free Association Claims Share the Public Concern Requirement of Free Speech Claims?, by Samuel Barrows, 61 B.C. L. Rev. E.Supp. II.-302 (2020),

Training: Behavioral Health Training for Police Officers: A Prevention Program, by Vincent B. Van Hasselt, Kristin E. Klimley Margres, Steve Geller, and Samantha Rodriguez, FBI Law Enforcement Bulletin (September 10, 2020).

Reference:

- Abbreviations of laws, law reports and agencies used in our publications.
- AELE's list of employment law resources

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CROSS REFERENCES

First Amendment – See also, Political Discrimination
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