IACP Legal Officers Section

2012 Employment Law Update

1. United States Supreme Court

Filarsky v. Delia, 132 S.Ct. 2277 (2012). Suspicious about a firefighter's extended medical absence, the City hired a private investigator whose surveillance revealed the firefighter purchasing large amounts of building supplies from a home improvement store. The City surmised that the employee was missing work to do construction on his home rather than because of illness, and it initiated a formal internal affairs investigation. During his interview, the firefighter claimed that he had merely purchased the materials but had not installed them. The attorney hired to conduct the investigation asked that the fire department be permitted to view the purportedly unused building materials. The employee initially refused, but later complied. The firefighter brought suit under Section 1983 against the City, the Fire Department, the private attorney and others, claiming that the request to produce the building materials violated his Fourth and Fourteenth Amendments rights. The District Court granted summary judgment to the individual defendants based on qualified immunity. The Ninth Circuit concluded that the private attorney was not entitled to seek qualified immunity because he was not a City employee. The Supreme Court considered whether an individual hired by the government to do its work is precluded from asserting qualified immunity solely because the individual does not work for the government on a permanent full-time basis. The Supreme Court held that a private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit.

Knox v. Serv. Employees Int'l Union, 132 S.Ct. 1657 (2012). After the Governor called for a special election on propositions opposed the public sector union, the union sent a letter announcing a temporary 25% dues increase and elimination of the monthly dues cap to fund the Political Fight-Back Fund. Non-union members were not allowed to object and they could not avoid paying the increased dues. The United States Supreme Court held that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless there is a comprehensive regulatory scheme and compulsory fees are a necessary incident of the larger regulatory purpose that justified the required association. When a union imposes a special assessment or dues increase to meet undisclosed expenses, it must provide notice and may not exact funds without consent. In this case, the failure to provide a fresh "Hudson notice" was unjustified and the treatment of non-members who opted out after the initial Hudson notice also violated the First Amendment.

Coleman v. Court of Appeals of Maryland, 132 S.Ct. 1327 (2012). Petitioner filed suit, alleging that his employer, the Maryland Court of Appeals, an instrumentality of the State, violated the Family and Medical Leave Act of 1993. The provision at issue required employers, including state employers, to grant unpaid self-care leave for a serious medical condition, provided other statutory requisites were met, particularly requirements that the total amount of annual leave did not exceed a stated maximum. The District Court dismissed the suit on sovereign immunity grounds. The Fourth Circuit affirmed. The Supreme Court held that suits against States under the self-care provision were barred by the States' immunity as sovereigns in the federal system.

2. First Amendment

****Hunt v. County of Orange***, 672 F.3d 606 (9th Cir. 2012). Hunt, a lieutenant officer with the sheriff's department ran for the office of sheriff against his boss, campaigning against the incumbent's alleged culture of corruption. The day after the incumbent sheriff's election to a third term, he placed Hunt on administrative leave and subsequently demoted him three ranks. The sheriff did not refute that both of these adverse employment actions were in response to Hunt's campaign communications, but claimed that Hunt's campaign allegations against the sheriff brought "discredit" upon the department and caused the department to question whether Hunt could be trusted to "further the mission of the agency." Hunt filed suit, claiming his placement on administrative leave and later demotion constituted First Amendment retaliation. The county was dismissed early on due to Hunt's failure to assert a cognizable claim against the municipality. After a trial on the claims against the sheriff, the district court granted judgment as matter of law to the sheriff, ruling that Hunt's campaign speech was not protected by the First Amendment because he fell within the narrow "policymaker" exception to the general rule against politically-motivated dismissals. Alternatively, the Court concluded that the sheriff was entitled to qualified immunity. The appellate court ruled the district court erred in concluding that Hunt, who was one of 60 lieutenants in the department with no apparent autonomy, was a "policymaker." It nonetheless affirmed the lower court's decision because it agreed with the district court's alternative holding that the sheriff was entitled to qualified immunity because a government official in the sheriff's position "reasonably but mistakenly" could have believed that political loyalty was required by someone with the lieutenant's job responsibilities at the time he ran against the sheriff.

****Karl v. City of Mountlake Terrace***, 678 F.3d 1062 (9th Cir. 2012). Karl, the Police Chief's administrative assistant, was subpoenaed to testify in a police sergeant's lawsuit for First Amendment retaliation. In the Assistant Chief's opinion, the employee's testimony "really hurt the city," and he later orchestrated her transfer to his direct supervision. Nine weeks later, the Assistant Chief warned the employee that failure to meet certain previously undisclosed performance targets within three weeks would likely result in her termination. One week after that, the Assistant sent the employee home on administrative leave following a verbal altercation between the plaintiff and another employee. While she was on leave, the City Manager accepted the Assistant Chief's recommendation to fire the plaintiff. The employee sued, alleging retaliation in violation of her First Amendment rights. In rejecting the Assistant Chief's claim of qualified immunity, the district court held that it was clearly established in that a supervisor could not retaliate against a public employee for his or her subpoenaed deposition testimony offered as a citizen in the context of a civil rights lawsuit. The appellate court affirmed.

Barry v. Moran, 661 F.3d 696 (1st Cir. 2011). Fire department employees filed suit under § 1983, alleging cronyism and nepotism in employment decisions. Specifically, they alleged that, because they chose not to associate politically with a powerful group of individuals at the fire department and in city government, they were passed over for promotions and other public benefits that they otherwise would have received. The district court granted summary judgment for the department, finding that nothing linked the employment decisions to an identifiable political group, cause, or belief. The appellate court affirmed, explaining that "[h]owever unsavory it may be, preferential treatment in public employment decisions, unrelated to protected speech or association, does not infringe upon freedoms secured by the First Amendment." "The simple fact that one is a friend or relative of a powerful person does not create a political association implicating First Amendment concerns. There is an important distinction between a public official who chooses to hire friends, relatives, neighbors or college buddies, and one who refuses to hire those who failed to make campaign contributions, join her political party or attend political rallies. Although the first public official may be practicing bad policy, she is not practicing political affiliation discrimination that violates First Amendment rights."

Bland v. Roberts, 2012 U.S. Dist. Lexis 57530, 2012 WL 1428198 (E.D. Va. April 24, 2012). Former employees sued sheriff in his individual and official capacities, alleging that their termination violated their First Amendment rights to free speech and association. During a political campaign a deputies "liked" the sheriff's political opponent's Facebook page. The District Court granted the sheriff's motion for summary judgment. The court concluded that merely "liking" a Facebook page is insufficient speech to merit constitutional protection. The court distinguished the act of "liking" a page from actually posting comments on a page, which would be protected.

Kensington Volunteer Fire Department, Inc., v. Montgomery County, Maryland, 684 F.3d 462 (4th Cir. 2012). A group of local volunteer fire and rescue departments and several of their former administrative employees sued the county government. The departments alleged that the government eliminated public funding for some of the departments' administrative support positions in retaliation for the departments' opposition to imposition of an ambulance fee. The fee would have raised $14.1 million in annual revenue. After the departments "vehemently, publicly, and forcefully" campaigned against the fee, the legislation was defeated. In order to cut the budget, among other things, the county discontinued funding for 20 of the departments' administrative, at a savings of $592,000. In turn, the departments terminated the 20 administrative employees through a Reduction-in-Force. Ultimately, the district court dismissed the departments' complaint, declining to consider the alleged illicit motives behind an otherwise facially valid budgetary enactment.

Westmoreland v. Sutherland, 662 F.3d 714 (6th Cir. 2011). The city disbanded its dive team due to budget cuts, after which two children drowned. Plaintiff, a fire department employee and member of the disbanded dive team, spoke at a city council meeting, indicating that the budget cuts caused the deaths and would cause more deaths. He was ordered to serve unpaid suspension on grounds of insubordination, malfeasance, misfeasance, dishonesty, failure of good behavior, and conduct unbecoming of an officer. After a grievance hearing the mayor affirmed the suspension, finding that plaintiff's statements had been false. The district court granted summary

judgment for the city. The Sixth Circuit remanded for determination of whether the statements were false; whether any false statements were knowingly or recklessly made; whether a reasonable official would have believed any false statements were knowingly or recklessly made; and, if necessary, whether plaintiff's interest in speaking as a citizen on a matter of public concern outweighed the city's interest in promoting the efficiency of the public services it performs through its employees, thus entitling it to qualified immunity.

Brooks v. Arthur, 685 F.3d 367 (4th Cir. 2012). Three corrections officers sued their employer under 42 U.S.C. § 1983, alleging that the defendant unlawfully fired them for exercising their First Amendment right to free speech. The two officers were pursuing complaints though the department of corrections' Equal Employment Opportunity office when they were discharged for disciplinary violations. One officer alleged that he was reprimanded in front of inmates in violation of department policy; the other alleged discrimination on the bases of race and religion. After their terminations, they sued, alleging, among other things, that defendants retaliated against them for the exercise of their First Amendment rights in the course of lodging their employment complaint. The First Amendment claim was rejected because the speech during the grievance process was "not on a matter of public concern." The officers' complaints were personal in nature. Such speech may only be protected by statute. "It is no defeat for the First Amendment, that we do not permit every criticism directed at a public official ... [to] plant the seed of a constitutional case."

Hutchins v. Clarke, 661 F.3d 947 (7th Cir. 2011). During a radio call-in show, a deputy sheriff called in to agree with other listeners' critical comments regarding the sheriff's community involvement and indicating that the sheriff was not a good fit for his position. Sheriff Clarke called in and retorted by describing the deputy as a "slacker" and mentioning a disciplinary action taken in 2004 against the deputy for "sexual harassment." In actuality, the disciplinary action was for violation of a department rule that prohibited offensive conduct or language. The deputy sued, claiming a violation of § 1983 for disclosure of his disciplinary history. The District Court granted the deputy summary judgment. The Seventh Circuit reversed. There was no Records Act violation; there was no request to inspect a disciplinary record, no permission granted, and no balancing test undertaken. The information at issue is a matter of public record, so there was no Privacy Act violation. Rejecting a First Amendment retaliation claim, the court noted that there was no threat, coercion, or intimidation.

Rojas–Velázquez v. Figueroa–Sancha, 676 F.3d 206 (1st Cir. 2012). Plaintiff began working for the police department in 1986. Although he was a member of the New Progressive Party (NPP), one of Puerto Rico's two major political parties, he received promotions while NPP's main rival, the Popular Democratic Party (PDP), dominated the executive branch. In 2008, Plaintiff was promoted to the rank of Commander. However, his career path became rocky when NPP won the 2008 general election. At that point, the new leadership of the department began to question his loyalty to NPP in light of his success during the PDP administration. Plaintiff's duties were changed, his department-issued cellphone and car were taken, he was evicted him from his office, and he was reassigned to mundane tasks that were beneath the dignity of his rank. But he did not suffer discharge of employment, demotion in rank, or diminution of pay. He sued the department and several of its leaders, alleging that his First Amendment rights were violated. The District Court dismissed his suit. The First Circuit affirmed, finding no plausible

claim of political discrimination. The plaintiff failed to assert that defendant discriminated against him because of his party preference or any other political affiliation. Indeed, he was a member of the ruling party. The Court noted that "professional success is not an activity that the First Amendment protects." Thus, Plaintiff did not allege deprivation of a constitutionally protected interest.

Fulmer v. Pennsylvania, 460 Fed. Appx. 91 (3rd Cir. Feb. 2, 2012). A retired police lieutenant, who was Crime Section Commander, sued the state police, alleging that the police violated his First Amendment rights by retaliating against him for statements he made during internal investigations of other officers. The statements were made in various contexts and involved criticisms of performance and allegations of misconduct against a subordinate and superiors. Eventually, a captain called the lieutenant to inform him that he was to be removed from his position as Crime Section Commander. The captain indicated that the removal was based on statements the lieutenant made in internal investigations. Some months later, the lieutenant received a negative employee performance review, which referenced some of those statements. This performance review was deleted when Fulmer challenged it in a grievance. At issue in the case was whether the lieutenant spoke pursuant to his official duties. If so, the Constitution does not insulate his speech from employer discipline. The District Court granted summary judgment in favor of the defendants. The appellate court affirmed, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Because of the context and content of the lieutenant's statements, he was speaking pursuant to his official duties and his comments were not shielded by the First Amendment.

Redd v. Nolan, 663 F.3d 287 (7th Cir. 2011). Plaintiff, who was training to be a correctional officer, resigned from her probationary employment after she was charged, by the state's attorney, with failure to cooperate as a witness during a criminal investigation. She sued the sheriff, claiming First Amendment retaliation, retaliatory discharge, and violation of procedural due process rights. The District Court granted the county summary judgment in favor of the sheriff. The Seventh Circuit affirmed because Plaintiff's evidence was insufficient to survive summary judgment: There was no evidence that the detective had anything to do with the charge against Plaintiff, or that the investigation of plaintiff or the charges were in retaliation for her refusal to lie. As for her procedural due process claim, the court noted that "it is well-settled that probationary public employees do not possess a property interested in continued employment and thus have no right to procedural due process before their employment may be terminated."

3. Fair Labor Standards Act

****Krause v. Manalapan Township***, No. 11–3773, 2012 U.S. App. Lexis 13339, 2012 WL 2478360 (Unpub. 3rd. Cir. 2012). Patrol officers in the department's K9 unit received four hours per week of comp time as payment for their off-duty care of the dogs. They never requested any additional compensation to the time they spend caring for the dogs; nor did they complain that the amount of comp time was insufficient. After they stopped serving as K9 officers, the sued under the FLSA, arguing that four hours of paid time off was not enough remuneration for the time that they had spent caring for the dogs while off duty. Generally, employers and employees

cannot make agreements for compensation less than that provided for in the FLSA, and such agreements are unenforceable. However, because it is difficult to determine precisely how many hours employees spend working at home, an exception allows employers and employees to reach a "reasonable agreement," in light of all the facts, regarding the amount of compensation to be received for work performed at home. This exception has been construed by the U.S. Department of Labor to cover K9 police officers for the off-duty time they spend caring for their dogs. Likewise, courts have recognized that K9 officers' off-duty care of dogs constitutes work compensable under the FLSA. The District Court granted summary judgment in favor of the Township, finding the agreement reasonable and entered based upon all relevant facts.

Huff v. City of Los Angeles, 468 Fed.Appx. 773, 2012 WL 562756 (9th Cir. 2012). Security guards employed by city brought action alleging that city violated FLSA by failing to compensate them for time spent donning and doffing their uniforms and safety equipment at work. The complaint was dismissed because guards failed to plead sufficient facts to distinguish their claims from those which were found non-compensable under *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010). *Bamonte* held that police officers' donning and doffing of their uniforms and safety equipment at home was not an integral and indispensable to principal work they performed and was not subject to compensation.

4. Disability-Based Discrimination

****St. Martin v. City of St. Paul***, 680 F.3d 1027 (8th Cir. 2012). A captain in the fire department injured his right knee and underwent reconstructive surgery. He returned to work on a light-duty schedule, performing administrative duties, and then worked briefly as an arson investigator. He applied for a district fire chief position. After a four-part exam, medical clearance, and an intensive interview process, St. Martin was the interview panel's first choice. The Department Chief instead promoted the applicants who were ranked numbers three, four, and five by the panel. After the decision was announced, the Chief told St. Martin's union representative that he was going to give St. Martin "the disability benefits he wants." Later that year, the Chief passed St. Martin for another district fire chief opening, stating in an email that St. Martin was not selected because he needed "additional professional development," but that this would be "difficult given [St. Martin's] medical status." The following year, after St. Martin was again passed over, the Chief stated in an email to the City's human resources department: "We are at an impasse with [St. Martin]… and to be frank, I would not willingly promote him unless I was forced to. I would prefer he retire, take his disability, and open up further options on the district chief list." St. Martin sued the city, alleging that it discriminated against him three times by promoting other firemen into the district fire chief positions in violation of the ADA either based on his actual disability or because they "regarded him" as disabled. The district court granted the city's motion for summary judgment, concluding that the plaintiff could not show that he was actually disabled or regarded as such. The Eighth Circuit affirmed the lower court's decision, finding that the plaintiff's knee injury was not an actual disability and that he failed to set forth direct or indirect evidence that the city regarded him as disabled due to his knee injury. The court of appeals also found that the plaintiff had not met his burden of showing that the department's legitimate, non-discriminatory reasons for promoting lower-ranked candidates were pretextual. In a strongly-worded dissent, one circuit judge rejected the majority's assertion that the numerous statements by the Chief regarding plaintiff's medical status were mere "stray

remarks." Arguing that these comments were, in fact, direct evidence of discriminatory animus, the dissenting justice noted that "the discriminatory statements were made by the sole decisionmaker and directly related to St. Martin's ability to do the job," and concluded that "[t]o affirm the grant of summary judgment in this case erroneously takes away from the jury a question of fact and denies [the captain] the trial to which he is entitled based on the direct evidence he has offered."

Roe v. City of Atlanta, 456 Fed.Appx. 820, 2012 WL 281766 (11th Cir. 2012). Applicant for police officer position with city's police department sued city for denying position allegedly due to applicant's HIV-positive status in violation of the ADA. The district court granted summary judgment for the city, concluding that the officer failed to prove that he is not a direct threat because of his HIV status. The appellate court reversed because, although the city argued that the officer's HIV status posed a direct threat, it made many judicial admission that HIV-positive status was not a disqualifying factor. The court also noted that the city did not perform the required individualized assessment of the officer's medical problem and his present ability to safely perform the essential functions of the job.

Griffin v. Municipality of Kingston, 453 Fed.Appx. 250, 2011 WL 5967035 (3rd Cir. 2011). Police detective brought action against city and city officials, alleging that his termination violated the ADA rights and constituted retaliation for filing an EEOC claim. The detective slipped on ice and fell in the parking lot outside the police department. He took a leave of absence to recover from his injuries. He was offered a light duty clerical position, but he declined. While on leave, he twice applied for vacant sergeant positions, and he was turned down both times. Active duty status was a requirement for the sergeant positions. Ultimately, the detective was arrested and then terminated. He filed complaints with the Pennsylvania Human Rights Commission and the EEOC and eventually sued. The District Court granted summary judgment in favor of the defendants. The detective relied upon his back injury in claiming that he was discriminated against because of a disability. However, the city had videotaped the detective "carrying a recliner near his home, carrying a watering can and an axe, and bending to plant flowers." Additionally, the detective admitted that he could not perform the duties of a job that required a certain minimum level of fitness. Thus, he was not a "qualified individual" under the ADA. The detective also claimed that his complaint was "obviously" a substantial factor in his discharge, but he presented no proof and he failed to draw a causal connection between his protected activity and his discharge. Accordingly, the judgment of the District Court was affirmed.

McDonald v. Pennsylvania State Police, No. 11–1867, 2012 U.S. App. Lexis 12826, 2012 WL 2366015 (Unpub. 3rd. Cir. 2012). Certified police officer allowed his certification to lapse because his position in the Attorney General's Office did not require certification. He suffered a herniated disk in work-related car accident and, due to chronic pain and the inability to perform his duties, his employment was terminated. After subsequent treatment he was much improved. Eventually, he was hired to be a city's Police Chief; however, his application for certification was denied three times. He lost his position as Police Chief. He sued, claiming discrimination under the Rehabilitation Act and the ADA. The District Court granted summary judgment for the State Police concluding that it was not a "covered entity" under Title I of the ADA. The

appellate court reversed because the officers suit was filed under Title II of the ADA, which prohibits all disability discrimination by a "public entity."

Knowles v. Sheriff, 460 Fed.Appx 833, 2010 WL 573576 (11th Cir. Feb. 23, 2012). After being terminated from employment, employee sued sheriff's department, claiming his alcoholism was a disability and he was denied a reasonable accommodation. The District Court granted summary judgment in favor of the sheriff. The appellate court affirmed, finding that the employee failed to establish that he was denied a reasonable accommodation. He claimed, as a reasonable accommodation, the sheriff's department should have allowed him to seek treatment in the Employee Assistance Program (EAP), which the sheriff's department provided for any employee who wished to enter the program. The employee knew that he could enter the program at any time, but he argued that an alleged "communication breakdown" regarding whether he was to be directed to enter the program proved a failure to accommodate. He claimed he would have entered the program if he had not been under the mistaken belief that he would be directed to do so, and, thus, the sheriff's failure to alleviate his confusion prevented his reasonable accommodation. The employee failed to show that the sheriff denied or prevented him from entering EAP.

Dulaney v. Miami-Dade Cnty., No. 11-12585, 2012 WL 2037724 (11th Cir. June 6, 2012). A firefighter, who was rumored to be a drug addict, missed work due to a series of medical incidents, including an incident involving a "severe depressive episode" for which he was ordered to undergo a psychiatric evaluation. After he was cleared to return to work, he refused. He was terminated for job abandonment, a legitimate, non-discriminatory reason. The District Court granted the county's motion for summary judgment because the firefighter failed to establish a *prima facie* case of disability discrimination. He failed to establish that he was disabled because he was "regarded as" being a drug user. He offered no evidence that the final decision maker, the Fire Chief, was aware of the drug-use rumors. Instead, he argued that the county was liable for disability discrimination under a "cat's paw" theory. However, even under a "cat's paw" theory of causation, the firefighter failed to establish that the Chief, who recommended termination, regarded the him as a drug user, much less that the recommendation was based on any discriminatory animus. In fact, the Chief testified that she was aware of the drug-use rumors, but did not take any stock in them in making her decisions. There was no evidence to the contrary. Furthermore, the firefighter failed to establish that he was subjected to unlawful discrimination because of any perceived disability. The Chief's knowledge of the drug-use rumors was temporally remote from the eventual decision to terminate him almost a year later.

5. Gender-Based Discrimination/Retaliation

****Passananti v. Cook County***, 689 F.3d 655 (7th Cir. 2012). Female former sheriff's department employee sued the county, the county's sheriff's office and her former supervisor, alleging sex discrimination and sexual harassment. The employee alleged that her supervisor: (a) repeatedly and angrily called her "bitch," "stupid bitch," "fucking bitch," and "lying bitch" to her face and in front of their co-workers; (b) trumped up charges against her for purportedly tampering with defendants' urine samples; and (c) fabricated an accusation that she had had sexual relations with her subordinate. The supervisor's allegations led to a temporary transfer and a five-day unpaid

suspension. Ultimately, the employee lost her job when her position was eliminated due to budget cuts. The jury returned a verdict in favor of the employee for $4.1 million in damages, but the District Court entered judgment as a matter of law in favor of the defendants. The appellate court reversed with respect to the use of the word bitch: "The jury could reasonably treat the frequent and hostile use of the word bitch to be a gender-based epithet that contributed to a sexually hostile work environment." It reinstated the jury verdict for sexual harassment, but only for $70,000, the amount of the original judgment attributable to the epithet. As for the discrimination claim, the appellate court concluded that the employee failed to prove that she was terminated because of her sex.

Redd v. New York State Div. of Parole, 678 F.3d 166 (2nd Cir. May 4, 2012). A female parole officer sued the Division of Parole, alleging that a female division supervisor created a hostile working environment by making sexual advances toward her and touching her breasts. The District Court granted the Division's motion for summary judgment, ruling that the supervisor's touching of the officer's breasts was minor and incidental, was episodic, may have been accidental, and did not occur because of the officer's sex. The appellate court reversed the grant of summary judgment. On appeal, plaintiff contended that her supervisor's touchings were sufficiently abusive to support her hostile work environment claim and that summary judgment was inappropriate because there were genuine issues of fact to be tried. The court agreed, noting that the "evaluation of ambiguous acts is a task for the jury, not for the judge on summary judgment." The officer inferred that the supervisor's touching, feeling, and rubbing up against her breasts were "homosexual advances." The appellate court could "see no principled reason why a jury, considering the evidence of repeated touching of such gender-specific body parts, would not be permitted to draw the same inference."

Lee v. City of Syracuse, 446 Fed.Appx. 319, 2011 WL 5084572 (2nd Cir. 2011). Female police department employee brought action against city and police department officials under Title VII and § 1983, claiming retaliation and gender discrimination. The employee proved numerous retaliatory acts by several decision-makers in the police department over a five-year period, demonstrating a custom and practice by the department of retaliating against employees who complained about discrimination. Jury returned a verdict of $400,000 to employee. The appellate court affirmed.

Lore v. City of Syracuse, 670 F.3d 127 (2nd Cir. 2012). Female police officer brought action against city, mayor, corporation counsel, and police officers in their individual and official capacities, alleging discrimination and retaliation in violation of § 1983, Title VII, New York Human Rights Law. The officer was removed from a position as the department's Public Information Officer and transferred to the Technical Operations Section before being transferred to the Uniform Patrol Division. She filed a grievance, alleging discrimination. To settle the complaint, the department agreed to assign her to the Community Relations Division and give her comparable overtime assignments to other CRD sergeants. She later discovered that she was not getting comparable overtime as promised in the settlement agreement. She filed an EEOC complaint alleging gender-based discrimination and retaliation. The district court dismissed the discrimination claim, but allowed the retaliation claim to proceed to trial, after which the jury awarded Lore $100,000 in actual damages for harm to her reputation and $150,000 for pain, suffering, and emotional distress. Both parties appealed. The appellate court largely affirmed

the lower court's actions but reversed the dismissal of the discrimination claim and remanding for a new trial on this claim.

Holland v. Gee, 677 F.3d 1047 (11th Cir. 2012). Female data processing telecommunications technician, who provided technical support to county sheriff's office, informed the sheriff's office that she was pregnant. Several months later, she was transferred to the Help Desk over her objections. Eventually, she was transferred back to her position as a technician and then, in relatively short order, she was terminated. The technician sued the sheriff in state court alleging pregnancy discrimination in violation of Title VII and Florida Civil Rights Act. At trial, the supervisor--a woman and mother--who made the decision to transfer the technician testified that the decision was in part motivated by the technician's pregnancy. The supervisor explained that she had a difficult pregnancy and she knew the technician had previously had a miscarriage, and those factors weighed in her decision to transfer the technician. The jury returned a verdict in the technician's favor, finding that her transfer and her termination were both adverse employment actions and that her pregnancy was a motivating factor for both decisions. The jury awarded $80,000 in back pay and $10,000 for emotional distress.

Wahl v. County of Suffolk, 466 Fed.Appx. 17, 2012 WL 593162 (2nd Cir. 2012). Employee of county police department brought action against county, police department, and various officials, alleging that he had been subjected to discriminatory "maternity leave" policy in violation of his equal protection rights. Wahl argued that the policy was unconstitutional because, although it allowed parents of both genders to take leave after the birth of a child, it only allowed women who have given birth to use accrued sick days before being taken off payroll. Wahl claimed the policy concerning the use of sick days was "not attributable to any different physical needs of men and women" because "a woman can take the leave even if she is perfectly capable of working." This argument was rejected because of the "physical reality of childbirth" and the medical procedures and appointments required. Thus, the policy was narrowly tailored to a legitimate interest and not unlawfully discriminatory.

Keene v. Prine, No. 11–13274, 2012 U.S. App. Lexis 9778, 2012 WL 1697836 (11th Cir. 2012). Former sheriff's department employees who alleged that they were wrongly terminated from their jobs filed suit against sheriff and county alleging discrimination based on sex and age, and alleging retaliation for engaging in protected speech. District Court granted summary judgment for sheriff's department. The appellate court reversed, concluding that each employee has clearly met the proffered legitimate, nondiscriminatory reasons for termination "head on" by demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" that would permit findings of pretext and discrimination. Therefore, summary judgment was not appropriate.

6. Race-Based Discrimination

****McDole v. City of Saginaw,*** 471 Fed.Appx. 464 , 2012 WL 1003553 (6th Cir. March 26, 2012). African-American former police officer brought action against city, alleging employment discrimination based on race. The officer was terminated following an internal affairs investigation, regarding an incident involving the officer and the officer's subsequent conduct. The officer sued, alleging that the sergeant who conducted the investigation repeatedly demonstrated a racial bias against him. Among other things, the officer claimed the investigator

alleged that only black men approached a prostitute during an undercover investigation, demanded that his "black ass" contribute to a fund for a holiday party, discussed a book from Oprah's Book Club about a light-skinned slave, dismissed his chances of advancement because of prior scandals involving black officers, referred to "white power, and "his people." The jury awarded the officer $950,000 in economic damages and $50,000 in noneconomic damages.

Harris v. Warrick County Sheriff's Department, 666 F.3d 444 (7th Cir. 2012). African-American former deputy sheriff sued sheriff's department under federal civil right statutes, alleging that he was terminated from his probationary employment due to his race. The sheriff's department claimed the deputy was terminated based on violations of standard operating procedures, failure to follow orders, and insufficient commitment to the job. Among other things, the deputy used sick leave suspiciously, asked a sergeant whether the required minimum of 40 traffic contacts per month should be taken seriously, installed non-issue lights on his patrol car, affixed a non-standard patch on his uniform jacket, and frequently stated that he needed to attend to business at his recently opened hair salon. In support of his discrimination claim, the deputy alleged that detectives watched excerpts from the movie Blazing Saddles in his presence and gave him racially-tinged nicknames, such as "Calvin," the name of an African–American boy in a McDonald's commercial; "Urkel," the name of an African–American character on the television show Family Matters; "Cowboy Troy," the nickname of an African–American country-western singer; and "Tubbs," the name of an African–American officer on the show Miami Vice. The department prevailed because Blazing Saddles "makes racism ridiculous, not acceptable," and the nicknames were not used by anyone in the decision-making chain of command.

Brown v. City of Syracuse, 673 F.3d 141 (2nd Cir. 2012). A former Syracuse police officer sued the city for race-based discrimination after the department suspended him with pay. The suspension related to an incident involving a fifteen-year-old female runaway for whom the officer had rented a hotel room while she was missing. The officer alleged that the department discriminated against him through disparate disciplinary treatment, namely suspending him with pay which caused him to lose overtime pay. The appellate court held that administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action because an employee does not suffer a materially adverse change in the terms and conditions of employment when the employer merely enforces its preexisting disciplinary policies in a reasonable manner. However, the rule is not absolute. A suspension with pay may rise to the level of an adverse employment action if the employer has exceeded the regular procedures and thereby changed the terms and conditions of employment. Here, however, the court held that the loss of overtime pay attendant to suspension with pay does not rise to the level of an adverse employment action.

7. Age-Based Discrimination

Levin v. Madigan, 2012 U.S. App. Lexis 17291, 2012 WL 3538659 (7th Cir. 2012). Former Illinois Assistant Attorney General sued the State of Illinois, the Office of the Illinois Attorney General, the Illinois Attorney General, in her individual and official capacities, and four additional Attorney General employees in their individual capacities, asserting claims for relief under the Age Discrimination in Employment Act (ADEA), Title VII and § 1983. The appellate court held that the ADEA is not the exclusive remedy for age discrimination in employment

claims; therefore, it does not preclude a § 1983 claim. Moreover, because it was clearly established that age discrimination in employment violates the Equal Protection Clause, the officials sued in their individual capacity are not entitled to qualified immunity. Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest."

Hedges v. Town of Madison, 456 Fed. Appx. 22, 2012 WL 101199 (2nd Cir. 2012). Former police officer sued the police department, claiming employment discrimination under a number of federal and state laws. The District Court dismissed all of his claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. His claim that he was fired because he was nearing the age of retirement is based on the undisputed fact of his age alone. Under any standard of pleading, this is not sufficient because the Supreme Court has held that firing an employee to prevent pension benefits from vesting, does not, without more, violate the Age Discrimination in Employment Act. Dismissal of the officer's ADA and Rehabilitation Act claims was also proper. "Even the most liberal standard of pleadings does not require a court to make inferences" when reviewing the sufficiency of a complaint. "Assuming the most minimal of notice pleading standards, a plaintiff is still required to give fair notice to the defendants of the factual bases for his claims." The officer did not allege a single fact in support of his claims of discriminatory treatment that could conceivably give notice of the basis of his claims to the defendants.

8. Uniformed Services Employment and Reemployment Rights Act

****Petty v. Metropolitan Government of Nashville & Davidson County***, 687 F.3d 710 (6th Cir. 2012). Police officer left the department for active duty with the United States Army. He was deployed to Kuwait, where he was caught brewing homemade wine and sharing it with another soldier in violation of military rules. The office resigned his commission and accepted discharged under honorable conditions "in lieu of trial by court martial." He returned to Nashville and sought re-employment with the department. During the return-to-work process, the officer disclosed that he had been subject to military disciplinary action but did not reveal the specific details. Additionally, he enlarged the discharge form he provided to the government, cutting off the box that referenced the pending court martial. The government investigated his honesty and assigned him to answer telephone calls from the public. Eventually, the government concluded that the office had been untruthful and terminated his employment. The officer sued his former employer alleging violation of his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), claiming that the government failed to restore him to his former position and discriminated against him because of his military service. The District Court granted summary judgment in favor of the officer on the re-employment claims, and following a bench trial, ruled in the officer's favor on the discrimination claims. The officer was awarded $172,058 in back pay from the time of his termination until his court-ordered reinstatement and $120,116 of partial liquidated damages.

9. Disparate Impact

****M.O.C.H.A. Soc'y, Inc. v. City of Buffalo***, 689 F.3d 263 (2nd Cir. 2012). African-American firefighters brought a Title VII discrimination claim, based on 1998 and 2002 promotional

examinations for the position of fire lieutenant. The District Court ruled in favor of the city. The Court found that the city had demonstrated that the test was job-related and consistent with business necessity, despite the disparate impact of the 1998 examination on African-Americans. The Court also found that the plaintiffs were barred from challenging the job relatedness and business necessity of similarly derived examinations. The appellate court affirmed on appeal that, even when the job analysis that produced the test relied on data not specific to the employer at issue, an employer may show that promotional examinations having a disparate impact on a protected class are nonetheless job related and supported by business necessity. The court noted that while employer-specific data may make it easier for an employer to carry its burden in Title VII analysis, such evidence is not required as a matter of law. In this case, an independent state agency determined, based on empirical, expert, and anecdotal evidence drawn from fire departments across New York and the nation, that the job of fire lieutenant, wherever performed, involves common tasks requiring essentially the same skills, knowledge, abilities, and personal characteristics; and developed a general test based on those findings.

NAACP v. North Hudson Regional Fire & Rescue, 665 F.3d 464 (3rd. Cir. 2011). Civil rights organizations and African-American firefighter candidates brought a putative class action against a consolidated municipal fire department for disparate impact discrimination in violation of Title VII, challenging the department's use of residency requirements for hiring. North Hudson was formed in 1998 as a consortium of five municipalities: Guttenberg, North Bergen, Union City, Weehawken, and West New York. As of 2000, the population of North Hudson's member municipalities was 69.6% Hispanic, 22.9% white non-Hispanic, and 3.4% African–American. Yet North Hudson's firefighter ranks included 240 white non-Hispanics, fifty-eight Hispanics, and two African–Americans. The District Court permanently enjoined the department from using residency requirements. The appellate court affirmed, finding that the residency requirement caused a disparate impact on African-Americans that was not justified by any business necessity.

Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135 (2nd Cir. 2012). Eleven Asian-American Port Authority police officers sued the Port Authority, alleging that they were passed over for promotions because of their race. According to the promotion process, entry-level police officers could be promoted to the rank of sergeant, the first level in a hierarchy of supervisory positions. To become eligible for promotion, a police officer was required to pass an examination, which would place him on an "eligibility list." The list did not rank the officers, but merely established eligibility for promotion. Each facility's commanding officer was periodically asked to recommend eligible officers for promotion, at their discretion. The Port Authority did not dictate any criteria for recommendation. A promotion folder was prepared for each recommended officer, which included a performance evaluation by a supervisor, a photograph of the officer, and his record of absences, commendations, awards, and disciplinary history. The nominees would then be considered by the Chiefs' Board for recommendation to the Superintendent. The ultimate decision was the Superintendent's alone. In support of their suit, the officers asserted three theories of liability for discrimination: individual disparate treatment, pattern-or-practice disparate treatment, and disparate impact. The proof included statistical analyses of the chances of promotion among various races. A unanimous jury found the Port Authority liable for discrimination against seven of the plaintiffs under all three theories and awarded back pay and compensatory damages to each of those seven plaintiffs.

10. Fourth Amendment and Immunity

Braun v. Maynard, 652 F.3d 557 (4th Cir. 2011). Employees of the Maryland Department of Public Safety and Correctional Services filed suit against defendants, alleging principally that the searches conducted on them as a result of a portable ion scanning machine, which was capable of detecting minute amounts of controlled substances, violated their Fourth Amendment rights. The District Court held that defendants were entitled to qualified immunity and dismissed the suit. The appellate court affirmed and held that, although it was clearly established that intrusive prison employee searches required reasonable suspicion, it was far from clear that the devices at issue could not meet that standard. The court further held that because no clearly established federal law placed the officers on notice that fighting contraband in the prison environment in this manner was unlawful, the district court correctly held that immunity attached.

11. Rehabilitation Act

Atkins v. Salazar, 677 F.3d 667 (5th Cir. 2011). A law enforcement park ranger was transferred to a staff ranger position based on the conclusion of a medical review board constituted by the National Park Service, an agency of the Department of the Interior, that his uncontrolled diabetes could prevent him from safely performing his duties. The ranger filed suit under the Rehabilitation Act, claiming that his transfer amounted to discrimination on the basis of his alleged disability. The Department raised the affirmative defense that the ranger's transfer was job-related and consistent with business necessity. The district court granted summary judgment for the Department of the Interior. The appellate court affirmed.

12. Family Medical Leave Act

Haybarger v. Lawrence County Adult Prob. & Parole, 667 F.3d 408 (3rd Cir. 2012). Plaintiff has health problems and missed work frequently. According to Plaintiff, her supervisor expressed dissatisfaction with her absences and put her on a six-month probationary period. After the probationary period, Plaintiff's supervisor received authorization to terminate Plaintiff. Plaintiff sued for, among other things, violation of the FMLA. The District Court granted summary judgment for the defendants. On Plaintiff's FMLA claim against the supervisor, the District Court held that, while the FMLA permits individual liability against supervisors at public agencies, an individual supervisor is an "employer" for FMLA purposes only if he has sufficient control over conditions and terms of employment. The Court concluded that Plaintiff's supervisor was not an "employer" because he did not have final authority to fire Plaintiff. However, the Third Circuit held that a rational jury could find that Plaintiff's supervisor had sufficient control to qualify as an employer under the FMLA.

NOTE: CIRCUIT SPLIT ON THIS ISSUE! The Fourth, Sixth and Eleventh Circuits have held that a public official is not an employer for purposes of the FMLA when sued in her individual capacity, but the Third, Fifth and Eighth Circuit reached the opposite conclusion.

Compare *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001) (concluding that the FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state)*; Mitchell v. Chapman*, 343 F.3d 811, 832 (6th Cir. 2003), and *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999) with *Haybarger*, 667 F.3d 408 (3rd Cir. 2012), *Modica v. Taylor*, 465 F.3d 174, 184 (5th Cir. 2006) and *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002). Other circuits have not decided this issue.

13. Qualified Immunity

Dahlia v. Stehr, No. 10-55283, 2012 U.S. App. Lexis 16395, 2012 WL 3192768 (9th Cir. Aug. 7, 2012). Defendant's motion for summary judgment, which alleged qualified immunity, was denied by the District Court as premature. The appellate court reversed the denial. First, the appellate court held that, although the district court dismissed the motion without expressly discussing the qualified immunity question, it implicitly denied the qualified immunity claim. A denial of summary judgment without prejudice is sufficiently final to support jurisdiction over an interlocutory appeal, because the purpose of qualified immunity is not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery. Moreover, the defendant was entitled to qualified immunity because the contours of Plaintiff's purported right were not sufficiently clear that an official in the defendant's position would have understood that what he is doing violates that right. At the time of the incident giving rise to the case, the Ninth Circuit had not yet decided that administrative leave does not constitute an adverse employment action.

Kiessel v. Oltersdorf, 459 Fed.Appx. 510, 2012 WL 265953 (6th Cir. Jan. 31, 2012). Three sheriff's deputies sued the sheriff and undersheriff alleging, among other things, First Amendment retaliation claims. The case began when two of the deputies complained to the FBI that the sheriff's department was illegally eavesdropping on employees' phone conversations. The sheriff procured an opinion from the state attorney general that the sheriff was not violating the law, and a public debate ensued. During the debate, the deputies wrote a letter to the editor of the local newspaper, claiming that the sheriff had committed "misconduct" and "unlawful actions" and had authorized the Undersheriff to eavesdrop on "official business conversations" concerning labor union functions. Six months later, the sheriff suspended the deputies without pay for conduct unbecoming an officer because they had made "false public accusations of unlawful conduct by the Leelanau County sheriff." A year later, the Sheriff's Office discharged the deputies. The district court denied the defendant's motion for summary judgment based on qualified immunity. The appellate court affirmed, concluding that the newspaper letter was protected speech, holding that this doctrine provides a shield from liability only insofar as government officials' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. When public employees allege that government officials break the law, their speech addresses a matter of public concern. Additionally, the deputies' right was well-established and a reasonable official could not have believed that the deputies knowingly or recklessly made false statements.

14. Claim Preclusion (*Res Judicata*)

Hayes v. City of Chicago, 670 F.3d 810 (7th Cir. 2012). A police officer was charged with misconduct related to an improper arrest and, following a hearing, was fired. The state trial and

appellate courts affirmed the Police Board; the highest court rejected an appeal. The officer then filed a complaint with the human rights commission, for the first time alleging racial and age discrimination and retaliation. While the matter was pending, the officer filed a civil rights suit in federal court. The district court dismissed the case, citing res judicata. Then the human rights commission awarded $274,283.05 for lost wages, holiday and overtime pay, lost pension annuity interest, and other prejudgment interest, plus attorney's fees of $400,555.50. Neither party appealed that determination. Finally, the officer filed a second federal suit, under Title VII of the Civil Rights Act of 1964. The District Court rejected the suit, finding that the complaint arose from the "same group of operative facts as those before" the state court. The Seventh Circuit affirmed, finding the suit barred by claim preclusion. Claim preclusion prohibits litigants from re-litigating claims that were or could have been litigated during an earlier proceeding. In contrast, issue preclusion (collateral estoppel) prevents litigants from relitigating an issue that has already been decided in a previous judgment.

White v. City of Pasadena, 671 F.3d 918 (9th Cir. 2012). A police officer was diagnosed with relapsing/remitting multiple sclerosis, which her doctor said would not limit her performance of her official duties. Several years later, she was terminated for allegedly associating with a known drug dealer, her son's father, and for lying to the department about her relationship with him. After her first termination and subsequent reinstatement, the officer brought a lawsuit in state court claiming that she had been discriminated against and harassed by the city due to its perception that she had a disability. After her second termination, she reinstated her discrimination and harassment claims in an administrative proceeding, where she also argued that the termination was retaliatory. Both of the officer's actions resulted in a decision in favor of the city. The officer subsequently brought claims in federal court based on the same theories as the state proceedings. The District Court held that principles of issue preclusion prevented the court from reaching these issues. The appellate court affirmed.

15. Consent Decrees

Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland, 669 F.3d 737 (6th Cir. 2012). In 1975 federal court held that the city had discriminated against minorities in hiring entry-level firefighters. During the course of the consent decree, the court approved two racial classifications as a remedy: first, that one of every three new firefighters be non-white; and second, that one third of the firefighters be minorities. Between 2000 and 2009, the city did not hire, but laid off firefighters. In 2009, the District Court declined to extend the decree and its racial classifications for another six years. On appeal, the Sixth Circuit vacated that decision, noting that the district court did not make findings concerning whether the racial classifications continue to remedy past discrimination. To extend or terminate racial classifications, the district court must determine whether the classifications continue to remedy past discrimination in firefighter hiring. The district court did not make specific findings as to that question.

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