Legal Update

Presented by:
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Discrimination – Age

- The U.S. Supreme court holds that an employee may bring a disparate impact claim under the Age Discrimination in Employment Act without establishing intentional bias.

Smith v. City of Jackson
(2005) 125 S.Ct. 1536

Discrimination – Age

- County may be sued where its proffered business reasons are inconsistent and pretextual.

Peterson v. Scott County
(8th Cir. 2005) 406 F.3d 515

Discrimination – Age

- Pennsylvania district court holds that EEOC exemption that allows employers to give retirees 65 or older health benefits that are less than health benefits given to retirees who are younger than 65 violates the ADEA.

AARP v. Equal Employment Opportunity Commission
2005 WL 723991 (E.D. Pa. 2005)

Discrimination – Gender

- Summary judgment upheld in favor of employer where employee could not demonstrate that the decision to discontinue a training program was motivated by gender discrimination.

Mondero v. Salt River Project
(9th Cir. 2005) 400 F.3d 1207

Discrimination – Gender

- Similar job titles and general duties do not equate to equal skills and responsibilities under the Equal Pay Act.

Wheatley v. Wicomico County, Maryland
(4th Cir. 2004) 390 F.3d 328

Discrimination – Gender

- Employer's appearance standards requiring women to wear make-up held not to constitute sex discrimination.

Jespersen v. Harrah's Operating Company, Inc.
(9th Cir. 2004) 392 F.3d 1076

Discrimination – Religion

- Christian employee who was terminated for harassing gay subordinate failed to established claim of religious discrimination.

Bodett v. CoxCom, Inc.
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Discrimination – Disability

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Leonel v. American Airlines Inc.
(9th Cir. 2005) 400 F.3d 702

Discrimination – Race

- Eleventh Circuit holds that an employee in a race discrimination action can establish the element of adverse employment action by showing that she received a 3-percent "met expectations" raise instead of a 5-percent "exceeded expectations" raise.

Gillis v. Georgia Department of Corrections
(11th Cir. 2005) 400 F.3d 883

Discrimination – Race

- A written promotional exam and its cutoff score must be validated and measure minimum qualifications.

Isabel v. City of Memphis
(6th Cir. 2005) 404 F.3d 404

Discrimination – Race

- A city cannot justify its exam cutoff score by asserting that it reasonably limits the number of applicants to be processed through the remainder of the process.

Lewis v. City of Chicago
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- Fifth Circuit holds Texas public hospital violated the First Amendment when it suspended a carpenter during an organizing drive for wearing a union button in violation of the hospital's dress code.

Communication Workers of America v. Ector County Hospital District
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City of San Diego v. Roe
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Speech Rights

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Kirby v. City of Elizabeth
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Speech Rights

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Konits v. Valley Stream Central High School
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Speech Rights

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Hudson v. Craven
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Jenkins v. County of Riverside
(9th Cir. 2005) 398 F.3d 1093

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- Third Circuit holds that an employer who violated the FLSA by not including certain premium pays in its regular rate for purposes of calculating overtime could not offset its violation with a concession in the collective bargaining agreement that non-work pay be included in the employees' regular rate of pay.

Wheeler v. Hampton Township
(3d Cir. 2005) 399 F.3d 238

Fair Labor Standards Act

- Sixth Circuit Court of Appeals rules that city was not justified in denying its police officers compensatory time off based on its belief that the cost of paying replacements premium overtime was an "undue disruption."

Beck v. City of Cleveland
(6th Cir. 2004) 390 F.3d 912

Benefits – Health

- Publication by the Equal Employment Opportunity Commission of a final rule regarding retiree health benefits has been delayed by a legal challenge.

Benefits – Military Leave

- Fifth Circuit holds military reservists employed as city firefighters were not denied benefits and wages in violation of law because they were treated the same as other employees.

Rogers v. City of San Antonio
(5th Cir. 2004) 392 F.3d 758

Benefits – Military Leave

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Veterans Benefits Improvement Act of 2004
(Pub. L. No. 108-454)

Benefits – Military Leave

- USERRA does not confer a right to rest before returning to work from military service.

Gordon v. Wawa, Inc.
(3rd Cir. 2004) 388 F.3d 78

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- Under the Social Security Protection Act of 2004, public employers must inform new employees about their lack of social security coverage.

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- Employee cannot sue for FMLA violations if she would have been fired anyway.

Throneberry v. McGehee Desha County Hospital
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- Seventh Circuit holds that an employee who was given option of undergoing psychological testing or losing her job was not subjected to a search within the meaning of the Fourth Amendment.

Greenawalt v. Indiana Department of Corrections
(7th Cir. 2005) 397 F.3d 587

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- The Department of Labor changes regulations governing labor certification applications for the permanent employment of aliens in the United States.

69 Fed. Reg. 77,326
(Dec. 27, 2004)

Immunity

- County air pollution control district does not have Eleventh Amendment sovereign immunity.

Beentjes v. Placer County Air Pollution Control District
(9th Cir. 2005) 397 F.3d 775

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DISCRIMINATION – AGE

The U.S. Supreme Court Holds That An Employee May Bring a Disparate Impact Claim under the Age Discrimination in Employment Act Without Establishing Intentional Bias.

The City of Jackson, Mississippi, adopted a plan to grant raises to all city employees to attract and retain qualified individuals. A subsequent revision of the plan focused on the city's attempt to bring the starting salaries of police officers in line with regional averages. Under the revision, officers who had less than five years of tenure received greater raises in proportion to their former pay than officers with more seniority. Consequently, since most officers over the age of 40 had more than five years of tenure, most of the officers over 40 received proportionally less of a raise.

A group of officers over 40 filed suit against the City, alleging that the city's pay plan had a disparate impact on officers over 40, thus violating the ADEA. The district court granted summary judgment in favor of the City as to the disparate impact claim. The Fifth Circuit Court of Appeals affirmed, concluding that disparate impact discrimination claims, as distinguished from intentional discrimination claims, are unavailable under the ADEA.

The U.S. Supreme Court rejected the Fifth Circuit's pronouncement that disparate impact claims are unavailable under the ADEA. The plain language of the ADEA does not require an intentional act of limiting, segregating, or classifying individuals. Instead, the ADEA is concerned with employment actions that adversely affect the status of an employee. Therefore an employee need not establish intentional bias in order to bring a disparate impact claim under the ADEA.

However, the U.S. Supreme Court affirmed the judgment of the Fifth Circuit in this case by holding that officers in this case did not set forth a valid disparate impact claim because they did not isolate and identify a specific employment practice.

Smith v. City of Jackson (2005) 125 S.Ct. 1536.

County May Be Sued Where Its Proffered Business Reasons are Inconsistent and Pretextual.

Sheila Peterson applied for a position of corrections officer with Scott County. She was fifty-one (51) at the time she applied and had nine (9) years of prior experience in another agency as a corrections officer. She was hired in an interim position while three (3) male applicants under the age of forty (40) were offered full-time positions.

Peterson applied twice for the full-time position, but both times the promotion went to younger males, neither of whom initially met the minimum qualifications for he position.

During her employment as in interim officer, Peterson had performance problems. She allowed an inmate to leave three (3) hours early, destroyed an inmate funds receipt, and inappropriately criticized case workers for the way they were doing their jobs. In criticizing her performance her supervisor called her an "old lady." He told her to put on her glasses "so [she could] see better." When she complained that she had not received adequate training on procedures, her supervisor said that it was "too hard to train old ladies." One co-worker said that women did not belong in the jail because they were lazy. She complained to an administrator about these comments, but the only action he took was to discuss with the male employees the need to use appropriate language. Eventually she was fired.

Peterson sued, alleging discrimination, harassment, and retaliation. The District Court granted the County's motion for summary judgment, and Peterson appealed to the Eight Circuit Court of Appeals.

The Eighth Circuit reversed the granting of summary judgment, finding that there were triable issues of fact that should be presented to a jury. Although there were numerous grounds cited by the Court for its reversal, the Court focused on some of the business reasons proffered by the County to justify its actions. For example, in explaining why it had promoted the younger males to the full-time positions, the County argued that they chose the males because they had more relevant prior experience. The Court, however, cited evidence in the record that at least one of the males had no prior experience of any kind as a corrections officer.

The Court also cited the County's reliance on Peterson's performance problems to justify its action. The County argued that those performance problems allowed it to promote others and cited a particular supervisors' team meeting where those problems were discussed. According to the County, the consensus from that meeting was to reject her request for promotion. However, the Court cited evidence that the promotion decisions was made *before* the team meeting at which the performance problems were discussed. Even more persuasive was the fact that at least two of the incidents of performance deficiency had not yet occurred.

The Court also addressed issues of hostile work environment, retaliation, and qualified immunity. In the end, the Court remanded the matter back to the District Court for further trial proceedings.

Peterson v. Scott County (8th Cir. 2005) 406 F.3d 515.

Pennsylvania District Court Holds That EEOC Exemption That Allows Employers to Give Retirees 65 or Older Health Benefits That Are Less Than Health Benefits Given to Retirees Who Are Younger Than 65 Violates the Age Discrimination in Employment Act.

In April 2004, the U.S. Equal Employment Opportunity Commission approved an exemption which allows employers to give retirees 65 or older health benefits that are inferior to health benefits given to retirees who are younger than 65. The EEOC argued that this exemption was justified because employers would be able to afford greater health benefits to its retirees under 65, and retirees over 65 have less need for employer-provided benefits since they are eligible for Medicare.

The American Association of Retired People (AARP) sued the EEOC, seeking to have the exemption declared invalid and unlawful. The U.S. District Court, Eastern District of Pennsylvania, granted AARP's request and held that the exemption violated the Age Discrimination in Employment Act. On its face, the ADEA prohibits the practice of terminating or reducing retiree health benefits in accordance with Medicare eligibility. While the EEOC has rulemaking authority with respect to the provisions of the ADEA, it cannot establish rules that are in direct contravention of the law.

AARP v. Equal Employment Opportunity Commission, 2005 WL 723991 (E.D. Pa. 2005).

DISCRIMINATION – GENDER

Summary Judgment Upheld in Favor of Employer Where Employee Could Not Demonstrate That the Decision to Discontinue a Training Program Was Motivated by Gender Discrimination.

In November 1998, Salt River Project notified five male electricians that they were going to be laid off. To avoid the layoff, the electricians' union negotiated an agreement with SRP, whereby the electricians would be transferred to another department and would participate in an experimental on-the-job training program so that they could gain the experience needed to work as operations journeymen. As part of the agreement, even though the electricians were classified as servicemen, they received journeymen wages during the pendency of the program. The electricians transferred to the other department and participated in the training program. In August 1999, journeymen positions became available and each of the electricians became operations journeymen.

Sylvia Mondero was also an electrician employed by SRP. In May 1999, SRP informed Mondero that she was going to be laid off due to a decrease in workload. To avoid the layoff, Mondero was given the option of continuing to work for SRP in the same department as the five electricians in training. Mondero requested that she be allowed to participate in the same program as the other electricians, but SRP denied her request. Mondero worked temporarily for the department as an operations serviceman, but was later laid off.

Mondero first filed a complaint with the Equal Employment Opportunity Commission, which concluded that SRP had discriminated against Mondero on the basis of her gender when it did not allow her to participate in the training program. Mondero then filed a gender discrimination lawsuit in United States District Court.

The district court granted SRP's motion for summary judgment and the Ninth Circuit Court of Appeals affirmed. While Mondero could establish a prima facie case of gender discrimination, SRP demonstrated that it had a legitimate, nondiscriminatory reason for not allowing Mondero to participate in the training program. Specifically, SRP did not want to pay journeyman level wages for serviceman work and, because the experimental program was still in progress, SRP was uncertain if the program was going to be a success.

Although Mondero presented evidence that two men in the department had stated, "they bring a woman to do a man's job?", the Court did not believe this was sufficient evidence to establish that SRP's stated reasons were pretextual. The men who made the comments did not participate in the employment decision, and Mondero could not demonstrate that the comments had any effect on SRP's refusal.

Mondero v. Salt River Project (9th Cir. 2005) 400 F.3d 1207.

Fourth Circuit Rejects Equal Pay Act Claims by Two Female County Department Heads in Holding Similar Title Plus Similar Generalized Responsibilities Is Not Equivalent to Having Substantially Equal Skills and Responsibilities.

Sandy Wheatley and Jane Grogan supervise the Wicomico County, Maryland, Emergency Services Department, which includes the 911 call center. Since 1986, Wheatley has served as director of the Emergency Services Department. Grogan has been the deputy director since 1997.

In 1999, the County commissioned a study to evaluate its compensation schedule for all 500 of its employees. This study led the County to reconfigure its pay schedule. The new plan created 22 separate grades and assigned a numerical grade to all County jobs. Within each grade, the study recommended a minimum, maximum, and mid-point salary.

Wheatley's job was classified as Grade 17. Although she received an 18% pay increase as a result of the study, her salary was set below the mid-point of her grade. Grogan's job was classified as a Grade 13. Her pay increased by a similar proportion, but she too received a salary below the mid-point of her grade.

Wheatley and Grogan filed a lawsuit against the County, alleging violations of the Equal Pay Act (EPA). Specifically, they claimed that male department supervisors are paid significantly more than female department supervisors, despite the fact that all perform substantially equal managerial work.

At trial, Wheatley and Grogan offered statistical evidence to demonstrate a pay disparity between male department leaders and female department leaders. They also attempted to demonstrate that department managers all perform the same general duties. After Wheatley and Grogan rested their case, the County made a motion for judgment as a matter of law.

During argument, counsel for Wheatley and Grogan first articulated a new theory of the case. He argued that Wheatley and Grogan perform work substantially equal to the work performed by male employees whose jobs are assigned the same Grades. On this new theory, Wheatley and Grogan would point not to other department heads, but to male employees in their respective pay Grades. The district court granted judgment in favor of the County. Wheatley and Grogan appealed.

The Fourth Circuit Court of Appeals affirmed. The EPA guarantees equal pay for "equal work" regardless of sex. The burden falls on the employee to show that the skill, effort, and responsibility required in her job performance are equal to those of a higher-paid male employee. Under the EPA, "equal" means substantially equal. The comparison to the male employee in an EPA action has to be made factor by factor, and cannot be made to a hypothetical male with a composite average of a group's skill, effort, and responsibility. In this regard, having a similar title plus similar generalized responsibilities is not equivalent to having equal skills and equal responsibilities.

Here, Wheatley and Grogan failed to show that they had equal skills and responsibilities to male department heads. For example, the County's director and deputy director of the public works department are required to have advanced degrees in civil engineering, while Wheatley's and Grogan's jobs do not require advanced degrees. They also failed to show that their jobs involve substantially equal responsibility compared to male department heads. The district court, therefore, properly held that Wheatley and Grogan failed to establish their EPA claims.

Wheatley v. Wicomico County, Maryland (4th Cir. 2004) 390 F.3d 328.

Employer's Appearance Standards Requiring Women to Wear Make-Up Held Not to Constitute Sex Discrimination.

Darlene Jespersen worked as a bartender at Harrah's Casino in Reno, Nevada. During her employment, Harrah's implemented personal appearance standards entitled the "Personal Best" program. The program outlined appearance standards for beverage service employees. The program imposed specific "appearance standards" on each of its employees and were applicable to both sexes. In particular, all female beverage servers, including beverage bartenders, were required to wear makeup.

However, Jespersen refused to comply with the new policy to wear make-up. Harrah's told Jespersen that the makeup requirement was mandatory for female beverage service employees and gave her 30 days to apply for a position that did not require makeup to be worn. At the expiration of the 30-day period, Jespersen had not applied for another job, and she was terminated.

Jespersen filed a lawsuit against Harrah's, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of Harrah's. Jespersen appealed.

The Ninth Circuit Court of Appeals affirmed. To prevail on a Title VII disparate treatment sex discrimination claim, an employee must establish that, but for his or her sex, the employee would have been treated differently. An employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination where the appearance standards regulate only "mutable" characteristics such as weight.

Here, the Personal Best program requires women to wear makeup, while men are prohibited from doing so. Women are required to wear their hair "teased, curled, or styled" each day whereas men are required to maintain short haircuts. Because Jespersen failed to produce evidence to show how these appearance standards impose a greater burden on women than on men, and how they exceed whatever burden is associated with ordinary good-grooming standards, the Court of Appeal held that the program was not discriminatory.

Jespersen v. Harrah's Operating Company, Inc. (9th Cir. 2004) 392 F.3d 1076.

DISCRIMINATION – RELIGION

Christian Employee Who Was Terminated for Harassing Gay Subordinate Failed to Establish Claim of Religious Discrimination.

Evelyn Bodett, an Evangelical Christian, was a manager at CoxCom, Inc. in Arizona. One of her subordinates, Kelley Carson, is openly gay. When Bodett and Carson began working together, Bodett told Carson that homosexuality is against her Christian beliefs. During a performance review session, Bodett told Carson that homosexuality is wrong and considered to be a sin. Upon receiving a promotion and transfer to the Omaha office, Carson informed a vice-president that she was leaving because she was uncomfortable with the way Bodett had treated her homosexuality. At the time of these events, CoxCom had a general harassment policy that prohibited harassing another employee on the basis of sexual orientation. Bodett was terminated for violating the policy. Bodett sued CoxCom for religious discrimination. On a motion for summary judgment, the district court granted judgment in favor of CoxCom. Bodett appealed.

The Ninth Circuit Court of Appeals affirmed. An employee alleging disparate treatment on the basis of religion must show that she is a member of the protected class, she was qualified for her position, she experienced an adverse employment action, and similarly situated individuals outside her protected class were treated more favorably, or other circumstances surrounding the adverse employment action giving rise to an inference of discrimination. Bodett failed to present any legitimate evidence of bias toward her religious beliefs to show that other similarly situated employees outside of the protected class were treated more favorably, or that an inference of discrimination existed. Further, Bodett's statements fell well within the gambit of harassment, particularly because she had a position of authority over Carson. As Bodett grossly violated CoxCom's company policy prohibiting harassment on the basis of sexual orientation, CoxCom had a legitimate, non-discriminatory reason to terminate Bodett. Therefore, the Court held that Bodett's religious discrimination claim failed.

Bodett v. CoxCom, Inc. (9th Cir. 2004) 366 F.3d 736.

DISCRIMINATION – DISABILITY

An Employer May Not Conduct Medical Examinations Nor Make Medical Inquiries of Applicants Until after the Employer Has Evaluated All Non-Medical Information in Order for a Conditional Job Offer to be a "Real" Offer.

Walber Leonel, Richard Branton, and Vincent Fusco applied for positions as flight attendants with American Airlines. After providing written applications and participating in phone interviews, American flew them to the company's headquarters for in-person interviews. After the interviews, American extended a conditional offer of employment subject to passing a background investigation and a medical examination. After making the offers, American representatives directed them to go immediately to the medical department for medical examinations. The applicants met with nurses to discuss their medical histories. Despite questions eliciting information as to whether they were HIV positive, none of the applicants disclosed that they were HIV positive or that they were taking medications for their condition. However, a blood test revealed that the applicants were HIV positive. As a result, American sent letters to the applicants stating that the conditional offers were being withdrawn. The letters explained that the applicants did not fulfill all conditions in that they "failed to be candid or provide full and correct information." The applicants then brought suit for violations of the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA). The district court granted summary judgment for American and the applicants appealed.

The United States Court of Appeals, Ninth Circuit, reversed. The ADA and FEHA prohibit employers from refusing to hire job applicants whose disabilities would not prevent them from performing the essential functions of the job with or without reasonable accommodations. To ensure that employers do not improperly consider disabilities when evaluating applicants both the ADA and FEHA regulate the sequence of employers' hiring practices. Medical examinations and inquiries are prohibited until after the employer has made a "real" job offer. A job offer is "real" if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. By withholding medical information until the last stage of the hiring process, applicants can determine whether they were rejected because of disability or because of insufficient skills or bad references.

Here, American conditioned its offers on a background check and medical exam and proceeded with the medical exams before completing the background checks. American argued that this procedure did not violate either the ADA or FEHA since the company first evaluated the non-medical information and only then considered the applicants' medical condition. The Court disagreed. It noted that the ADA prohibits an employer from asking disability-related questions or requiring a medical exam pre-offer even if the employer intends to shield itself from the answers until the post-offer stage. Medical information cannot be collected or analyzed until after all non-medical information has been evaluated, unless the non-medical information could not

reasonably have been obtained. The Court noted several other procedures that American could have utilized to complete the background checks prior to the medical exams, such as completing the background checks before the applicants arrived, flying the applicants back at a later date for their medical exam, or having the medical exams performed by regional medical sites or the applicants' own doctors. The Court remanded the case to the District Court for a determination of whether American Airlines can prove that it could not reasonably have completed the background checks prior to initiating the medical exams.

The Court also concluded that the comprehensive analysis by American's medical personnel of applicants' blood samples beyond that normally undertaken as part of post-conditional offer medical exams, without notice to or consent from the applicants, could constitute a violation of their privacy rights under California Constitution Act I, Sec. 1. On remand to the District Court, the applicants will have the opportunity to prove that they had a reasonable expectation that American would not perform these blood analyses without first obtaining their consent. If the applicants establish that they had a reasonable expectation of privacy, the court will determine whether American's reasons for performing the blood tests outweigh the applicants' right to privacy.

Leonel v. American Airlines Inc. (9th Cir. 2005) 400 F.3d 702.

Note:

Agencies be warned. This decision leaves little "wiggle room" as to what is required for a conditional offer to be a "real" conditional job offer under the ADA and the FEHA.

DISCRIMINATION – RACE

Eleventh Circuit Holds That An Employee in a Race Discrimination Action Can Establish the Element of Adverse Employment Action by Showing That She Received a 3-Percent "Met Expectations" Raise Instead of a 5-Percent "Exceeded Expectations" Raise.

Thalia Gillis was an African-American woman who had been employed by the Georgia Department of Corrections since 1987. Despite testimony that Gillis was a consistently thorough worker who paid close attention to detail, Gillis received an "exceeded expectations" ranking only once on her annual review. On all other occasions, Gillis received a "met expectations" ranking. According to department policy, employees who received a "met expectations" ranking received a 3-percent pay increase and employees who received an "exceeded expectations" ranking received a 5-percent pay increase.

On her 2000 annual performance review form, Gillis wrote in the comments section that she believed she was the subject of racial discrimination. She then filed a formal grievance with the department about her evaluation. In response to her complaints, one of Gillis' supervisors commented, "ain't it like a fucking nigger to complain."

Gillis sued the department and her supervisors, alleging racial discrimination. The district court granted the department's motion for summary judgment, concluding that Gillis had not established the essential element of an adverse employment action for a racial discrimination claim.

The Eleventh Circuit Court of Appeals disagreed and reversed. An evaluation that disqualifies an employee for a raise of any significance is an adverse employment action. Because Gillis' ranking on her annual performance review directly affected her salary, her lower ranking was sufficient to meet the element of adverse employment action.

Gillis v. Georgia Department of Corrections (11th Cir. 2005) 400 F.3d 883.

Written Police Promotional Exam Must Test for "Entire Job Domain" and Cutoff Score Must Measure Minimum Qualifications.

Minority police sergeants in the City of Memphis challenged the results of a written exam which was testing for promotion to lieutenant. The challenge was successful, and the plaintiffs were awarded retroactive promotions, back pay, and attorneys fees.

According to the federal Sixth Circuit Court of Appeal, the City's process had two major defects. The first was the written exam. It had been constructed by an industrial psychologist who had developed prior police exams. The psychologist consulted with subject matter experts in the department, had them identify the knowledge, skills, and ability needed to be a lieutenant, and then he developed the questions for the written test. He had the subject matter experts critique the exam once he had prepared an early version of the test.

The Court criticized the written test for its inaccuracy in "approximating job performance." One example of that inaccuracy was a non-minority candidate who did poorly on the written exam but did well on the remaining components of the selection process (practical, evaluations, seniority). Her total score placed her second on the overall promotional list. The Court criticized the fact that she was barely able to pass the written exam but finished near the top of those competing.

The Court also faulted the City for using a written test for only measuring "job knowledge" and for "failing to test the entire job domain." The psychologist who had constructed the written test explained that the remaining components of the selection process were designed to measure other job components.

The second defect in the City's testing process identified by the Court was the setting of the cutoff score. There was an outstanding negotiated Memorandum of Understanding with the police association which established a cutoff score of seventy (70). In prior exams, the psychologist felt there should be no cutoff score, merely ranking by score. In this exam, the psychologist worked with the subject matter experts to estimate the percentage of minimally qualified candidates who could answer questions correction. He had intended to use that number for the cutoff score, but ultimately used the score of 70 as required by the MOU. (Interestingly, because of the adverse impact of the designated cutoff, the score was eventually lowered to 66).

The Court's criticism of the cutoff score began with a review of the Uniform Guidelines, quoting that portion of the Guidelines which provides that

> "Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency with the work force."

The Court cited the failure to "validate" the cutoff score, a fact that the psychologist readily admitted from the witness stand. The Court went on to question whether the cutoff score measured the minimum qualifications needed for the job.

Isabel v. City of Memphis (6th Cir. 2005) 404 F.3d 404.

To Be Upheld, a Cutoff Score for an Entry Level Firefighter Exam Must Distinguish between Those Who Were Qualified and Those Who Were Not

The City of Chicago established a score of 89 (out of 100) for its written exam for entry level firefighters. The cutoff had an adverse effect on African-American applicants. The only justification offered by the City for the score was the administrative and fiscal advantage of limiting the number of applicants who moved to the next step of the selection process. The United States District Court for the Northern District of Illinois held that the cutoff score was statistically meaningless, that the City failed to show that its test measured what it was supposed to measure, that the test did not distinguish between qualified and unqualified applicants, and that less discriminatory alternatives were available.

There was no dispute about adverse impact. White applicants were five (5) times more likely to score 89 or higher than African-American candidates. Those with scores of 89 or more were designated "well qualified" and were selected for the openings occurring over a six (6) year period. At that point, the City ran out of candidates in the "well qualified" group and began hiring at random from those with scores between 65 and 89, a group designated at "qualified." The City's consultants had determined that scores below 65 were "unqualified." The Court was very

impressed with the fact that there was no evidence that the candidates scoring between 65 and 89 were any less qualified than those who had scored above 89.

Although the Court had several criticisms of the testing procedure and the setting of the cutoff score, perhaps its strongest criticism was aimed at one particular component of the test. In addition to the written exam, there was a video demonstration integrated in the written exam process. The Court found that the video had a "design flaw" and was "chaotic," It had never been "piloted in a practical setting," had never been used before, and had not been used since. It was supposed to assess cognitive skills like understanding oral instructions, learning from demonstration, and taking notes. However, the Court determined that the only skill really tested by the video was the ability to take notes, a skill that the City's evidence showed was relatively important.

Since it had serious reservations about the validation of the test, the Court found that the reliance on scores from tat test to distinguish between "well qualified" and "qualified" was not justified by business necessity. The Court also felt that there was an alternative, less discriminatory selection procedure; namely, the random selecting of those with scores about 65. This use of the "qualified" pool was less discriminatory and had been used by the City with apparent success since the "well qualified" pool was exhausted.

Lewis v. City of Chicago (March 22, 2005) No. 98 C 5596 (USDC No. Dist. Ill.).

SPEECH RIGHTS

Fifth Circuit Holds Texas Public Hospital Violated the First Amendment When It Suspended a Carpenter during an Organizing Drive for Wearing a Union Button in Violation of the Hospital's Dress Code.

Urbano Herrera worked as a carpenter for the Ector County Hospital District. Herrera was also a volunteer union organizer at the Hospital. He and others decided in knowing violation of the Hospital's dress code to wear lapel buttons bearing the message "Union Yes" during their work shifts. An anti-adornment provision of the District's code states that "ONLY pins representing the professional association and the most current hospital service award may be worn."

A supervisor asked Herrera to remove his button, but he refused. Herrera was then confronted by his supervisor and instructed to remove the button. Herrera again refused. Herrera eventually removed the button after being read the dress code. However, upon consulting his union, Herrera put his button back on. Thereafter, Herrera was suspended for three days for refusing to remove the button again. This incident was also entered in his disciplinary record, and as a result he received only a 3% annual raise instead of the usual 4% increase.

Herrera filed a lawsuit against the Hospital, claiming that the anti-adornment provision of the dress code policy violated his First Amendment rights. The district court granted a motion for judgment as a matter of law in favor of Herrera. The Hospital appealed.

The Fifth Circuit Court of Appeals affirmed. The Court held that his speech was a matter of public concern, and thus implicates First Amendment rights. When a public employer adopts a policy that impinges on the First Amendment speech rights of its employees, the court applies a balancing test, which weighs the interests of the employee, as a citizen, to comment on matters of public concern against interests of government, as employer, to promote efficiency in providing services. If, on balance, the employee's speech rights outweigh the employer's interest in the efficient providing of services, the court then goes on to determine whether the protected speech was a substantial or motivating factor in the adverse employment decision, and, if it was, then whether the employer would have made the same decision in the absences of the protected speech.

Here, the Hospital's interest in enforcing the anti-adornment provision of its dress code was outweighed by Herrera's interest in exercising his First Amendment speech and associational rights by wearing his pro-union lapel button during a union organization drive. Also, his wearing of the button posed no threat to the efficient performance of the Hospital's medical or administrative functions.

Moreover, Herrera's wearing of the button was a substantial factor for his punishment because the Hospital admitted that Herrera would not have been disciplined if he had removed the button when he was asked to do so. Lastly, Herrera's wearing of the button was a "but for" cause of his discipline because the only "insubordination" for which he was punished was his refusal to remove his button. The district court, therefore, properly granted judgment in favor of Herrera.

Communication Workers of America v. Ector County Hospital District (5th Cir. 2004) 392 F.3d 733.

U.S. Supreme Court Summarily Reverses Ninth Circuit and Holds That Police Officer Who Was Fired for Selling Sexually Explicit Video of Himself Online Failed to Establish First Amendment Claim.

A police officer with the City of San Diego Police Department, who is anonymously known as Joe Roe, made and sold videos over the internet of himself stripping off a generic police uniform and masturbating. All aspects of the production and sale of the videotapes were conducted while Roe was off duty. He never identified himself by name in any sale or listing, and he never identified himself as a San Diego police officer. Rather, he marketed the videos using a fictitious name and a post office box in Northern California. There was no evidence that anyone other than Roe's Department discovered his true identity.

The Department ordered Roe, an officer of seven years, to stop making or selling the sexually explicit videos. However, he continued to provide information on how to purchase the videos on the internet. The Department eventually terminated Roe for unbecoming conduct, immoral conduct, improper outside employment, and disobeying a lawful order.

Roe filed a lawsuit against the Department, alleging he was terminated for the content of the videos in violation of the First Amendment. The district court granted the Department's motion to dismiss on the grounds that the speech did not address a matter of public concern. Roe appealed.

The Ninth Circuit Court of Appeals reversed and remanded. The Ninth Circuit determined the videos were protected speech under the First Amendment because Roe was not speaking as an employee on matters related to his personal status in the workplace. The Department sought review by the United States Supreme Court.

The U.S. Supreme Court granted review and reversed. A governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The right of employees to speak on matters of public concern – typically matters concerning government policies that are of interest to the public at large – is a subject on which public employees are uniquely qualified to comment. When government employees speak or write on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it.

Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the Department demonstrated legitimate and substantial interests of its own that were compromised by his speech. Roe took deliberate steps to link his videos and other wares to his police work. In particular, the use of the uniform and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the Department and the professionalism of its officers into serious disrepute.

Furthermore, Roe's expression does not qualify as a matter of public concern. Roe's activities did nothing to inform the public about any aspect of the Department's functioning or operation. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit the Department's image. The Ninth Circuit, therefore, erred in holding that Roe's videos were protected speech under the First Amendment.

Roe v. City of San Diego (2005) 125 S.Ct. 521.

Fourth Circuit Court of Appeals Holds That Supervisory Retaliation for an Employee's Testimony in a Personnel Hearing Raises a Matter of Public Concern under the First Amendment.

Carl Kirby worked as a police sergeant for the City of Elizabeth in North Carolina. Kirby alleged that he testified in the grievance proceeding of a fellow officer who was disciplined for damaging a patrol car by driving it with too little transmission fluid. In his testimony, Kirby recounted the car's maintenance history and transmission fluid capacity, gave his opinion of the grievant's maintenance and driving habits, and explained how transmission leaks are diagnosed. Kirby alleged that his police chief and a lieutenant took offense at his testimony as undercutting them.

After the hearing, Kirby went on a previously scheduled vacation. Upon his return, he learned that he had been orally reprimanded for not providing advance notice to the personnel office that he would be testifying so that another officer could cover his duties. Kirby filed a lawsuit against the City, alleging that no such notice was required and that the reprimand was actually in retaliation for his testimony.

Five days after filing his lawsuit, Kirby was demoted for poor performance. He contended that the alleged policy violations were trumped up, and added a retaliatory demotion count to his lawsuit. The city manager thereafter upheld a six-month demotion.

The district court granted summary judgment in favor of the City. Kirby appealed. The Fourth Circuit Court of Appeals affirmed Kirby's free speech claim.

Determining whether a restriction on a public employee's speech violates the First Amendment requires balancing the employee's interests, as a citizen, in commenting upon matters of public concern against the state's interests, as an employer, in promoting efficient public services. Free speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. Here, neither the setting of Kirby's testimony in a public hearing nor its alleged truthfulness render it a matter of public concern because it involved only the personal interests of the grievant. With regard to the topic of the speech, the "relative unreliability of a single police vehicle simply is not of sufficient significance to attract the public's interest."

However, the complaint alleged that Kirby was reprimanded for providing truthful testimony and was then demoted for grieving and litigating the reprimand. In a retaliation context, the reprimand raised a matter of public concern even though the testimony itself related to a private matter. Supervisory retaliation for allegedly truthful testimony in an official hearing could have a "chilling effect" on officers' testimony in future hearings. Considering that uninhibited testimony is vital to the success of seeking truth, there is a strong public interest in ensuring that process is not compromised.

Kirby v. City of Elizabeth (4th Cir. 2004) 388 F.3d 440.

Retaliation Taken against an Employee Who Speaks out against Discrimination Suffered by Others can Constitute an Actionable First Amendment Claim.

Carol Konits is a tenured music teacher in the Valley Stream Central High School District. In 1996, Konits filed a federal lawsuit against the district, alleging that she was retaliated against after she helped a custodial worker bring an action against the district for gender discrimination. Konits alleged that during the time she was providing assistance to the custodial worker, the district removed her as orchestra teacher and conductor, reassigned her as a general music teacher in special education, and deprived her of seniority rights. On the second day of trial, the case settled.

Konits alleges that after the settlement, the district continued to retaliate against her. For instance, Konits applied for several band and orchestra positions, but was not selected. In addition, she alleges that she suffered hostile actions and derogatory comments. In 2001, Konits filed a second federal lawsuit against the district, alleging that the district retaliated against her in violation of the First Amendment. The district court granted summary judgment for the district on the grounds that Konits's 1996 lawsuit was not speech on a matter of public concern and that therefore Konits could not establish a First Amendment retaliation claim.

The Second Circuit Court of Appeals disagreed and vacated the district court's decision grant-ing summary judgment. To establish a First Amendment claim of retaliation as a public employee, Konits had to demonstrate that (1) her speech addressed a matter of public concern; (2) she suffered an adverse employment action; and, (3) a causal connection existed between the speech and the adverse employment action. Discrimination in employment is undoubtedly a matter of public concern. Therefore, any use of state authority to retaliate against those who speak out against discrimination suffered by others can give rise to a cause of action under the First Amendment.

Konits v. Valley Stream Central High School (2d Cir. 2005) 394 F.3d 121.

A College's Academic and Safety Concerns Outweighed a Professor's First Amendment Right to Participate in and Organize An Unofficial Field Trip to World Trade Organization Protests.

In the midst of the World Trade Organization meetings in Seattle, Barbara Hudson, an adjunct economics professor at Clark County College, planned a field trip with her students to attend a public rally and march opposing the WTO. James Craven, head of the college's economic department, learned of Hudson's plans and informed her that he opposed the field trip due to the potential for violence during the demonstrations. Craven also told Hudson that she would be

terminated if she proceeded with the field trip. Craven advised Hudson that she, as an individual, could attend the protests, but she could not affiliate herself with the college.

Two days prior to the protests, the college issued a letter to all faculty members, voicing concerns about faculty and student involvement in the protests. Specifically, the college expressed concern about the safety of students who attended the protests and stated that it did not want non-attending students to be penalized academically.

Hudson discarded her idea of planning an organized field trip, but advised her students that she would be attending and invited her students to join her. Hudson organized the students' transportation to the rally and provided the students with instructional material on what to bring, wear, and do at the rally. Hudson also told her students to pay attention to their observations because there may be questions on the final exam about the experience.

Hudson and numerous students attended the rally without incident. The following semester, Hudson's contract was not renewed. Hudson filed suit against Craven and the college, alleging that her civil rights had been violated when the college retaliated against her for exercising her First Amendment rights. The district court granted summary judgment in favor of the college, holding that the college's interests in protecting the safety of its students and providing a non-biased academic environment outweighed Hudson's First Amendment rights.

The Ninth Circuit Court of Appeals affirmed. In First Amendment cases, like Hudson's, that involve both the freedom of expression and the freedom of association, courts must apply a two-prong inquiry: first, whether the employee's expression was a matter of public concern, and second, if so, whether the employer can show that its legitimate interest outweighs the employee's First Amendment rights.

Hudson's WTO protest activity involved a matter of public concern. However, Hudson was only prevented from organizing a field trip under the auspices of the college during one protest. On the other hand, the college had two compelling interests: ensuring the safety of its students and providing an academic environment free of political bias. While Hudson claimed that her field trip was not mandatory, the students who attended the rally with Hudson were at an advantage because two essay questions on the final examination focused on the protests. In addition, the students who attended had the benefit of additional student-teacher interaction that non-attending students did not. Based on those facts, the college's legitimate interests outweighed Hudson's interest in attending the WTO rally with her students.

Hudson v. Craven (9th Cir. 2005) 403 F.3d 691.

DUE PROCESS

County Employee Designated as "Temporary," Who Consistently Was Scheduled to Work Hours in Excess of the Maximum Allowed under the County's Ordinance for Six Years, Who Passed the Civil Service Exams and Who Was Successfully Evaluated, Qualifies for Regular Employment.

The County of Riverside hired Evelyn Jenkins as a temporary office assistant on May 14, 1992. Jenkins consistently received exemplary performance reviews and worked well in excess of the 1,000-hour ceiling that County ordinance 440 placed on temporary employees. During her employment, she also applied for regular employment seven times. On four of those seven occasions, Jenkins passed the written examination required for all civil service applicants. Each time she passed the exam, she was interviewed for a regular position, but not offered one. On May 26, 1998, Jenkins was terminated.

Jenkins filed a lawsuit against the County, alleging that it deprived her of her property right in continuing public employment. The district court decided that she did not have a property right in her continued employment because she was not qualified for regular employment. Accordingly, the court granted the County's motion for summary judgment. Jenkins appealed.

The Ninth Circuit Court of Appeals reversed and remanded. A public entity may not adopt a rule whereby positions that are neither temporary in fact nor in law can be designated as "temporary." Under ordinance 440, Jenkins qualified because she passed the Civil Service exam with a score high enough to be considered for employment. Moreover, she was a de facto "regular employee" because she was qualified, occupied the position for nearly 6 years, and was given performance reviews similar to permanent employees. Jenkins, therefore, established that she had a property right in her continued public employment.

Jenkins v. County of Riverside (9th Cir. 2005) 398 F.3d 1093.

Note:

This case illustrates the risk an agency runs in not abiding by its own rules and regulations. While the exposure was particularly clear here, because in addition to exceeding the maximum hours for so-called "temporary employees" (in fact the employee was a part-time employee), the agency treated the employee as a regular civil service employee by giving her performance evaluations, and further, she was successful in the civil service selection process. Agencies are well-advised to carefully monitor and enforce their own rules regarding their at-will temporary and part-time employees to avoid having them held to have acquired "for cause" status.

FAIR LABOR STANDARDS ACT

Third Circuit Holds That An Employer Who Violated the FLSA by Not Including Certain Premium Pays in Its Regular Rate for Purposes of Calculating Overtime Could Not Offset Its Violation with a Concession in the Collective Bargaining Agreement That Non-Work Pay Be Included in the Employees' Regular Rate of Pay.

Hampton Township, Pennsylvania, entered into a collective bargaining agreement with its full-time police officers. The agreement specified that the officers would be paid for certain "non-working" time, such as paid holidays, paid personal days, paid sick days, and paid vacation days. The agreement also provided that the officers would be paid "incentive/expense" pay, such as monthly longevity pay, annual pay for education attainment, and increased hourly pay for shift commanders. Under the agreement, for purposes of calculating overtime, the officers' non-working time was included in their regular rate of pay; however, the incentive/expense pay was not included.

The police officers brought a lawsuit against the township to recover overtime pay under the Fair Labor Standards Act. The officers argued that their premium pay should have been included as part of their regular salary and that the failure to include such pay was a violation of the FLSA. The township acknowledged that the FLSA required that the premium pay be included in an employee's regular salary for purposes of calculating overtime. However, the FLSA did not require that non-work pay be included in an employee's regular rate of pay. Thus, according to the township, if it violated the FLSA by failing to include premium pay, that violation was offset by their concession to include non-work pay.

The district court found in favor of the township and dismissed the officers' lawsuit. The Third Circuit Court of Appeals disagreed and reversed. The Court held that the premium pay constituted remuneration pay that must be included in the officers' regular pay for purposes of calculating overtime under the FLSA. Further, the township could not claim a credit for the pay for non-work time it had agreed to pay, and that was not required under the FLSA.

Wheeler v. Hampton Township (3d Cir. 2005) 399 F.3d 238.

Note:

The FLSA only requires that pay for actual work time be included in the regular rate of pay for calculating overtime due. Agencies that credit paid leave time for overtime purposes may not claim such "overpayment" as a credit against FLSA overtime due.

Sixth Circuit Court of Appeals Rules that City Was Not Justified in Denying its Police Officers Compensatory Time Off Based on Its Belief that the Cost of Paying Replacements Premium Overtime Was an "Undue Disruption."

The City of Cleveland, Ohio uses compensatory time as an alternative method of paying overtime to its police officers. The City and the Cleveland Police Patrolman's Association entered into a collective bargaining agreement (CBA) allowing overtime to be paid in compensatory time for law enforcement officers whose work exceeds 171 hours within a 28-day period. Under the CBA, a Cleveland police officer who is eligible to be compensated for overtime can elect on a quarterly basis either compensatory time or cash. With regard to compensatory time, the City awards 90 minutes of compensatory time for each hour of overtime. Under the CBA, the City is the sole judge of the necessity for overtime.

In addition, under the CBA an officer's compensatory leave requests are subject to the City police department's operational needs. The CBA, however, does not define "operational needs." The Commander of Human Resources for the City's police department describes "operational needs" as the minimum numbering of zone and special response cars required for a platoon in a district based on the department's review of calls for service, per car per district.

To request compensatory leave time, an officer submits an overtime card or places his or her name on a calendar that is maintained for that purpose. Once the officer-in-charge is satisfied with the number of officers on duty, compensatory leave is awarded on a first come-first served basis. Police supervisors can deny any request for compensatory time off if a special need exists. Problems occurred when requests were denied when "special needs" required more officers to work. Because substitute officers were not allowed to earn overtime, officers were routinely denied use of compensatory time.

Robert Beck, President of the Cleveland Police Patrolmen's Association, filed a lawsuit against the City, alleging violations of the Fair Labor Standards Act. The district court granted the City's motion for summary judgment, finding that the compensatory time system complied with the FLSA. Beck appealed.

The Sixth Circuit Court of Appeals reversed. Under the FLSA, local governments are permitted to award compensatory time in lieu of overtime as long as the compensatory time is granted within a reasonable period after making the request, and that the use of compensatory time does not "unduly disrupt" the government operation. The phrase "unduly disrupt" is inherently ambiguous because to give this phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of this phrase.

Although financial considerations were originally a rationale for creating a compensatory time exception under the FLSA, Congress did not intend to relieve government entities of all costs and that interference with government operations, not budgets, was the overriding concern. The more

overriding need in adding the "unduly disrupt" language was to avoid creating a public safety concern by not having enough staff available.

Here, the City appeared to be utilizing the FLSA to avoid payment of overtime and to avoid adding personnel to meet its actual operational needs. Financial impact was not set forth in the CBA as a basis for the City to deny police officers' compensatory leave requests. While financial reasons cannot be a blanket rationale for finding an "undue disruption," it was possible that the City could prove such a disruption because of finances. However, the City failed to do that at the trial court level. The City's scheme, therefore, violated the intention of the FLSA and the specific exemption.

Beck v. City of Cleveland (6th Cir. 2004) 390 F.3d 912.

BENEFITS – HEALTH

Publication by the Equal Employment Opportunity Commission of a Final Rule Regarding Retiree Health Benefits Has Been Delayed by a Legal Challenge.

In April of 2004, the Equal Employment Opportunity Commission voted to publish final rules to allow employers to offer retiree health plans that end or are reduced when the retiree becomes eligible for Medicare or a comparable state health benefits program. Specifically, the rules would allow employers to create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the Age Discrimination in Employment Act of 1967. The rules do not otherwise affect an employer's ability to offer health or other employment benefits to retirees, consistent with the law.

However, on February 7, 2005, the American Association of Retired Persons (AARP), an organization for people over 50, filed a motion for a preliminary injunction that temporarily prevents the EEOC from publishing the final rules. The federal district court granted the motion. Oral arguments will be heard in the case on March 31, 2005. The final rules, if eventually adopted, would reverse the policy the EEOC initially had adopted in response to a 2000 decision by the Third Circuit Court of Appeals in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000).

BENEFITS – MILITARY LEAVE

Fifth Circuit Holds Military Reservists Employed as City Firefighters Were Not Denied Benefits and Wages in Violation of Law Because They Were Treated the Same as Other Employees.

Anthony Rogers and fourteen of his fellow co-workers are employed by the City of San Antonio fire department in its Fire Suppression division and Emergency Medical Services division. The firefighters are also members of either the United States military reserves or the National Guard.

The collective bargaining agreement (CBA) between the City and the employees' union governs the working conditions of all City firefighters. The firefighters, as members of the uniformed services, typically must take leaves of absence for military training a minimum of one weekend per month and one annual two week session. Reservists may volunteer or be ordered to take military leave to perform extra duties.

The City allegedly violated the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying the firefighters benefits because of their absences from work while performing their military duties. Specifically, the City's CBA and policies regarding military leaves of absence allegedly deprive the firefighters of straight and overtime pay, opportunities to earn extra vacation, vacation scheduling flexibility, and opportunities to secure overtime work and job upgrades.

The firefighters filed a lawsuit against the City, alleging violations of the USERRA. The district court granted summary judgment in favor of the firefighters. The City appealed.

The Fifth Circuit Court of Appeals affirmed in part and reversed in part. USERRA protects military veterans' employment and reemployment rights. USERRA's anti-discrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of membership, application for membership, performance of service, application for service, or obligation of service. Also, an employer must not retaliate against a person by taking adverse action against that person because he or she has taken an action to enforce a protection afforded under USERRA.

A person who is reemployed under USERRA is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the beginning of service, plus the additional seniority and rights and benefits that he or she would have attained if the person had remained continuously employed. An employer is not required to have a seniority system. USERRA requires only that employers who do have a seniority system, restore the returning service member to the proper place on the seniority ladder.

Here, the benefits the firefighters challenged were not seniority-based. Thus, the only question to be determined was whether non-military employees were treated the same under the City's benefits and pay schemes. Indeed, the City did not have a non-military leave available to any employee under which he or she can accrue or receive lost straight-time pay, lost overtime opportunities, and missed upgrade opportunities. Because there was no comparable leave that would allow City employees to earn these type of benefits, the Fifth Circuit held that it was impossible to allege a USERRA violation. Thus, the district court erred in granting summary judgment in favor of the firefighters.

Rogers v. City of San Antonio (5th Cir. 2004) 392 F.3d 758.

New Law Extends USERRA Continuation Coverage Period to 24 Months and Adds Employer Notice Requirement.

The Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) establishes certain reemployment and health plan continuation coverage rights and other benefits for employees who serve or have served in the uniformed services. In particular, an employee who was absent from employment for uniformed service had the right under USERRA to elect to continue health plan coverage, including coverage for any dependents, for up to 18 months.

On December 10, 2004, President Bush signed the Veterans Benefits Improvement Act of 2004 (Pub. L. No. 108-454), which extends the maximum period for health plan continuation coverage under the USERRA and adds a notice requirement for employers. Specifically, the new law extends the maximum period for USERRA continuation coverage to 24 months. This change applies to elections for coverage that are made on or after December 10, 2004.

The new law also requires employers to notify employees of their rights and obligations under USERRA. The Department of Labor will be issuing a notice by March 10, 2005. This requirement may be satisfied by posting the notice where the employer customarily places notices for employees.

You may obtain a copy of the Veterans Benefits Improvement Act at:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s2486enr.txt.pdf.

USERRA Does Not Confer a Right to Rest before Returning to Work from Military Service.

Willie Gordon, an active member of the United States Army Reserve, worked for Wawa, Inc. On his way home from weekend military duties, Gordon stopped by his place of employment to pick up his paycheck and work schedule for the upcoming week. Gordon's shift manager allegedly ordered him to work that night's late shift and threatened to fire him if he refused. Gordon complied. On his drive home after work, he lost consciousness at the wheel, crashed his car, and died.

Gordon's mother sued Wawa, alleging that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) creates a right to a rest period before returning to work, and that the threat to fire Gordon violated this right. The district court granted summary judgment in favor of Wawa. Gordon's mother appealed.

The Third Circuit Court of Appeals affirmed. The USERRA prohibits discrimination against members of the active or inactive military services, and creates an unqualified right of reemployment to individuals who provide notice to their employers of their intention to return to work after military service. The USERRA requires an employee to notify his or her employer of intent to return to work not later than eight hours after completing weekend military duty.

However, the USERRA does not create an independent right to an eight-hour rest period before a weekend reservist returns to work. As such, Wawa was not required to provide Gordon an eight-hour "rest period" before returning to work. Gordon's mother, therefore, had no remedy available under the USERRA.

Gordon v. Wawa, Inc. (3rd Cir. 2004) 388 F.3d 78.

BENEFITS – SOCIAL SECURITY

Under the Social Security Protection Act of 2004, Public Employers Must Inform New Employees about Their Lack of Social Security Coverage.

The newly enacted Social Security Protection Act of 2004 requires public employers to provide written notice to employees who begin work on or after January 1, 2005, that they are not covered by Social Security and to explain in plain terms the effects of non-coverage on their Social Security benefits. In particular, employers must explain the effect of the Windfall Elimination Provision and Government Pension Offset Provision to new employees.

New employees are also required to sign a certification that they are aware of a possible reduction in their future Social Security benefit entitlement. Copies of the certification must be sent to their respective retirement systems. The U.S. Social Security Administration recommends that such new employees sign Form SSA-1945, "Statement Concerning Your Employment in a Job Not Covered by Social Security." You may obtain a copy of this form at:

http://www.socialsecurity.gov/form1945/SSA-1945.pdf.

BENEFITS – FMLA

An Employer Is Not Liable for Violating the FMLA if the Employee Would Have Been Fired Anyway

Sandra Throneberry was a home care nurse for a County Hospital. Her employment was acceptable, and she received good performance evaluations for her first ten (10) years of employment. Thereafter, a death in the family and a divorce caused her job performance to decline. She suffered from worsening mental health and attempted suicide. She eventually agreed to resign if she received leave with pay and severance benefits. The Hospital agreed.

While she was on the approved leave, prior to the effective date of her resignation, the Hospital determined that her errors in doing her job cost the Hospital more than $40,000. At the end of the leave, the Hospital did not reinstate Throneberry and instead proceeded with separation based on her previously submitted resignation.

Throneberry sued, alleging that the Hospital violated the FMLA by interfering with her exercise of rights under the Act and by failing to reinstate her at the end of the leave. Although a jury found in favor on the interference claim, the District Court set aside the jury verdict, citing the jury's finding that the Hospital would have fired Throneberry even if she had not sought FMLA leave.

The Eighth Circuit affirmed. The Count pointed out that the Hospital would have fired the plaintiff prior to the effective date of her resignation based on the serious job performance issues it had discovered. That firing would have occurred whether or not she had been on leave. Therefore, the failure to reinstate her was not a violation of the FMLA.

Throneberry v. McGehee Desha County Hospital (8th Cir. 2005) 403 F.3d 972.

FITNESS FOR DUTY

Seventh Circuit Holds That An Employee Who Was Given Option of Undergoing Psychological Testing or Losing Her Job Was Not Subjected to a Search within the Meaning of the Fourth Amendment.

Two years after Kristin Greenawalt was hired by the Indiana Department of Corrections, she was told that she must submit to a psychological examination or else she would lose her job. Greenawalt submitted to the examination, which lasted two hours and inquired into the details of her personal life.

Greenawalt sued her employer, alleging that her Fourth Amendment right to be free from unlawful searches had been violated when she was ordered to submit to the examination. The district court dismissed the lawsuit on the pleadings. The Seventh Circuit Court of Appeals affirmed, holding that a psychological examination does not constitute a search under the Fourth Amendment. The Court analogized psychological testing to lie detector tests in that the objective is not to get physical evidence, but to obtain testimonial evidence.

Greenawalt v. Indiana Department of Corrections (7th Cir. 2005) 397 F.3d 587.

ALIEN WORKERS

The Department of Labor Changes Regulations Governing Labor Certification Applications for the Permanent Employment of Aliens in the United States.

The Department of Labor has issued final regulations governing labor certification applications for the permanent employment of aliens in the United States. The new regulations require that before certain immigrant aliens can be granted permanent work visas in the United States, the Department of Labor must determine that: (1) there are not sufficient workers in the United States that are able, willing, qualified, and available at the time and place where the alien is to perform the work; and (2) the employment of aliens will not adversely affect the wages and working conditions of similarly employed American workers.

Formerly, an employer would file a permanent labor certification with the local state workforce agency and actively recruit American workers for at least 30 days. Then, if the employer was unable to find an American worker, the application for alien workers and related materials would be sent to the Department of Labor's Employment and Training Administration.

Under the new regulations, the employer must engage in specific recruitment efforts before filing the application for alien workers. Specifically, the employer must first advertise in two Sunday newspapers and, if the job is for a professional position (i.e., requiring a Bachelor's degree or higher), the employer must advertise the position in three of the alternative recruitment outlets specified in the regulations. After completing this process, the employer then sends the application materials to the Employment and Training Administration. While an employer is not required to provide any documentation of the recruitment process, it must maintain the documentation in the event it is audited. The state workforce agency's role in the new process is only to provide limited prevailing wage determinations.

The Department of Labor's goal is that electronically filed applications that are not selected for an audit will be acted on within 45 to 60 days of filing.

This new regulation became effective on March 28, 2005, and applies to all labor certifications filed on or after that date.

69 Fed. Reg. 77,326 (Dec. 27, 2004).

IMMUNITY

County Air Pollution Control District Does Not Have Eleventh Amendment Sovereign Immunity.

Jacob Beentjes worked as an air pollution control specialist at the Placer County Air Pollution Control District. After being diagnosed with chronic obstructive pulmonary disease, Beentjes was terminated from his position as an air pollution control specialist. He sought an accommodation under the Americans With Disabilities Act (ADA), and was given another position with Placer County. He later quit his position.

Beentjes subsequently filed a lawsuit for damages and injunctive relief against the District in federal court. He alleged that the District discriminated against him on the basis of his disability and that the District failed to reasonably accommodate him. The District moved for summary judgment on the ground that it was an arm of the state and therefore qualified for Eleventh Amendment sovereign immunity. The court denied the motion. The District appealed.

The Ninth Circuit Court of Appeals affirmed. The opening guarantee of the Eleventh Amendment is that non-consenting states may not be sued by private individuals in federal court. The decision to extend sovereign immunity to a public entity turns on whether the entity is to be treated as an arm of the state, or is instead to be treated as a municipal corporation to which the Eleventh Amendment does not apply.

The Ninth Circuit employs a five factor test to determine whether an entity is an arm of the state: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performed central government functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state; and (5) the corporate status of the entity. The first prong and most important factor of the test is whether a money judgment would be satisfied out of state funds.

Here, the District is responsible for money judgments against it under California law. Ninety percent of the District's budget is made up of local funds. There is no evidence that the state would replace funds used to satisfy a judgment. The District also has the ability to raise independent revenue, showing it is a separate entity rather than an arm of the state. Furthermore, the District may sue or be sued, has the power to take property in its own name, and has corporate status. The district court, therefore, properly affirmed the motion for summary judgment.

Beentjes v. Placer County Air Pollution Control District (9th Cir. 2005) 397 F.3d 775.

Note:

Where claims against a local public agency are not paid by warrants drawn by the State Controller, the agency is not an "arm of the state" and therefore is not entitled to Eleventh Amendment immunity.