FOSTER PEPPER

Annual Legal Update
34th Annual Civil Service Conference

Yakima, WA
September 10 - 11, 2015

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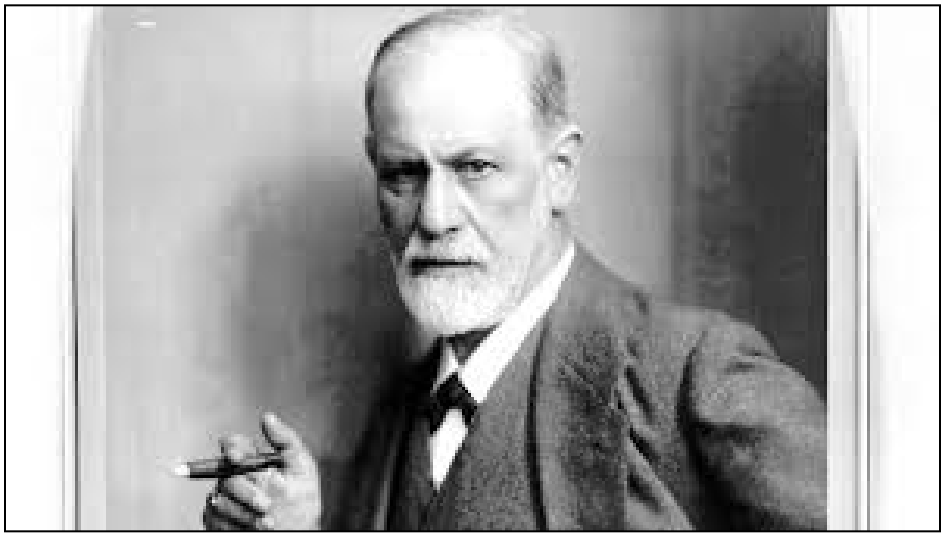

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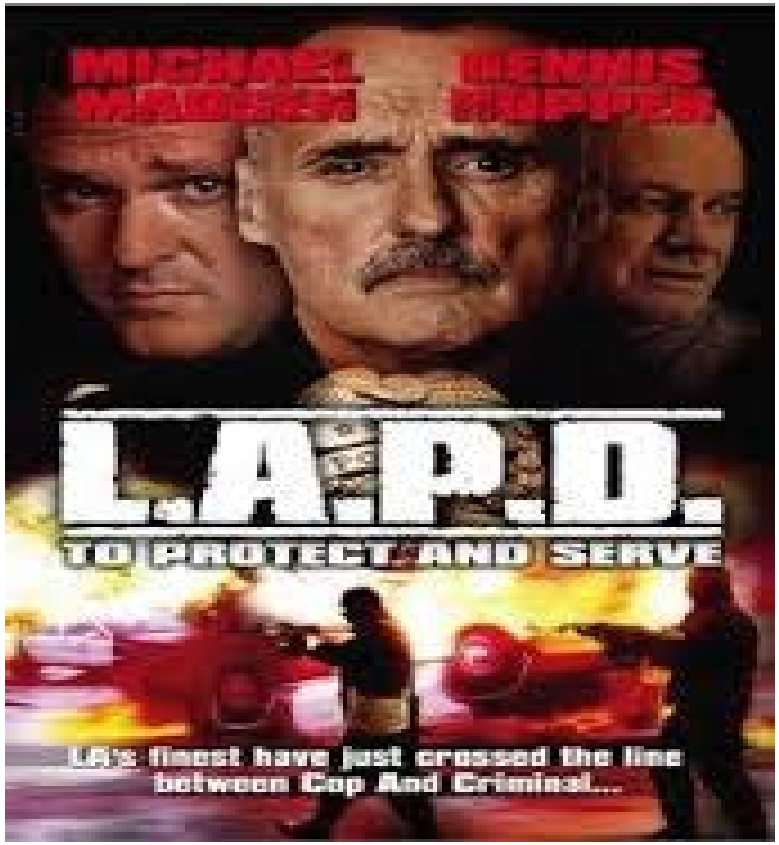

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1. **Due Process**

1.1 *Smith v. City of Atlanta*, 38 IER Cases 674 (Ga. Ct. App. 2014)

Javon Smith worked as a firefighter for the City of Atlanta. The fire department conducted random drug tests. When Smith was tested, his urine sample came back positive for marijuana. The medical review officer asked Smith if he had any explanation for the positive drug test; Smith had no answer. The medical review officer offered to have another portion of the original urine sample tested by a different lab. That sample came back positive as well. Because of the positive drug test, Smith was fired. Smith argued that he was denied due process because the department's written policy about conducting drug tests differed from the actual practice of conducting drug tests. He argued that the department denied him the opportunity to dispute the test results at the time he gave the urine sample because the department failed to utilize rapid-screening drug tests. Nevertheless, the appellate court upheld the termination. The appellate court concluded that Smith's due process rights were not violated because he was given multiple opportunities to explain or dispute the test results, to the medical review officer and to the civil service board.

1.2 *McCollins v. Cuyahoga Cty.*, 2014 IER Cases 169739 (Ohio Ct. App. 2014)

Gloria McCollins worked as an investigator for a county medical examiner's office. While employed there, she engaged in several acts of misconduct that gave rise to disciplinary action. She took photographs of live people at a crime scene, in violation of department policy. On the same crime scene, she failed to follow standard operating procedures when she neglected to collect the decedent's personal property. Later, Gloria was involved in another incident in which she intimidated a coworker in an argument about who was responsible for handling a new death scene assignment.

As a result of those incidents, the County held a pre-disciplinary conference with Gloria. At the conference, Gloria was given an opportunity to explain these incidents. Following the conference, Gloria was given a five-day suspension and served with a last chance agreement. Gloria had the right to appeal the disciplinary action, but she declined to do so. Gloria also failed to sign the last chance agreement. The County informed Gloria that if she did not sign the agreement, she would be terminated. Gloria did not respond, so the County fired her.

Gloria appealed the disciplinary action, arguing that her due process rights were violated. The trial court affirmed the County's disciplinary action, so Gloria appealed again. The appellate court also affirmed the County's disciplinary action against Gloria. The court noted that Gloria had been given the opportunity to explain her misconduct at the pre-disciplinary conference. She was also given the opportunity, which she declined, to appeal her suspension and the issuance of the last chance agreement. She was free to accept the terms of the last chance agreement and remain employed, or she could refuse the agreement and accept termination. She chose the latter option. She was not entitled to separate notice and a hearing regarding her decision to not sign the agreement.

1.3 *Fritzgerald v. City of Cleveland Civil Service Commission*, 39 IER Cases 1768 (Ohio Ct. App. 2015)

Diante Fritzgerald, an assistant commissioner for the City of Cleveland in the division of printing and reproduction, was fired for a series of violations of the City's civil service rules. Before his termination, Diante was given a letter informing him that a predisciplinary hearing had been scheduled to discuss three alleged violations. After the hearing, Diante received a termination letter that outlined the three violations and also alluded to other incidents. Diante requested a hearing before a referee. At that hearing, the City presented evidence about several incidents besides the three outlined in Diante's predisciplinary letter. The referee upheld the termination, as did the trial court. The appellate court, however, concluded that the City violated Diante's due process rights. Diante was not informed in the predisciplinary letter or at the predisciplinary hearing that additional incidents were being considered as a basis for his termination. Thus, Diante was not given a chance to prepare a defense or explanation for those incidents. He should have been given notice of the charges against him, an explanation of the City's evidence, and an opportunity to present his side of the story, all before disciplinary action was imposed. The appellate court remanded the case to the trial court for an evidentiary hearing on whether Diante would have been fired even if his due process rights had been observed.

1.4 *Chamberlain v. Civil Service Commission of Gurnee*, 39 IER Cases 641 (Ill. App. Ct. 2014)

Henry Chamberlain, a firefighter for the Village of Gurnee, was passed up for a promotion because of several incidents of alleged misconduct and work-performance shortcomings. At the time, Chamberlain was the highest-ranked person on the promotion list. Under controlling law and the collective bargaining agreement between Gurnee and the firefighters' union, the highest-ranked person on a promotion list must be selected for promotion unless the candidate has demonstrated substantial work-performance shortcomings or engaged in misconduct. Because he was passed over for promotion, Henry brought a suit against the City, alleging that the City violated his due process rights.

The court held that Henry did have a protectable property interest in a promotion, given that the City was required to promote the highest-ranked person on the promotion list—rather than choosing from the top candidates—unless it had reason to pass over that person. Thus, the City owed Henry due process in making its determination not to promote him.

Henry asserted that the City violated his due process rights by considering hearsay evidence about four incidents of alleged misconduct when it decided not to promote him. The court recognized that the City did in fact consider hearsay evidence. However, the consideration of hearsay evidence in this case did not violate due process for three reasons. First, Henry's private interest in a promotion was relatively weak, since the interest was prospective and since Henry would remain on the promotion list. Second, the court determined that the risk of error based on consideration of hearsay in this case was only marginal, because Henry was represented by counsel and had the opportunity to address accusations against him. Third, the City had a clear governmental interest in efficiency, and thus did not need to "create a process tantamount to a judicial trial" in order to weigh evidence of Henry's misconduct. Thus, the court affirmed the City's decision to pass over Henry for a promotion.

1.5 *Crews v. Monarch Fire Prot. Dist.*, 39 IER Cases 681 (8th Cir. 2014)

Following a verdict against Monarch in an employment discrimination case filed by some of Monarch's female firefighters, the fire department's board of directors voted to terminate the employment of the department's highest-ranked officers. Three fire chiefs – Leslie Crews, Cary Spiegel, and Michael Davis – were fired because of this decision. The three ex-chiefs sued the City, alleging that the City deprived them of their property interest in continued employment and their liberty interest in reputation without due process. The court rejected the idea that the ex-chiefs had a property interest in continued employment since fire chiefs are at-will employees. The court also concluded that the ex-chiefs failed to support their liberty interest claim because they showed no evidence that the board of directors made stigmatizing statements against the chiefs. At the public hearing to terminate the chiefs' employment, members of the board of directors made statements alluding to the employment discrimination case that had been brought against the department. The board did not accuse any of the three chiefs of direct discrimination or harassment. Thus, the board did not make any stigmatizing statements that compromised the chiefs' liberty interests.

1.6 *McDonald v. Wise*, 769 F.3d 1202 (10th Cir. 2014)

Wayne McDonald served as the special assistant to the mayor of Denver, Michael Hancock. After a female police officer who worked on the Mayor's security detail complained that Wayne sexually harassed her, Mayor Hancock fired Wayne. The City did not provide Wayne a hearing either before or after his termination. Wayne applied for unemployment compensation benefits, which the City opposed. Wayne appealed the denial of his application for unemployment benefits, and a hearing was held. Wayne also brought a civil suit against Mayor Hancock and the City of Denver, alleging violation of his due process rights.

The court held that Wayne did not have a property interest in his continued employment at the Mayor's office, since he was an at-will employee serving at the pleasure of the Mayor. However, the court agreed that Wayne had a liberty interest in his good name and reputation. The court noted that Wayne's termination due to allegations of misconduct gave the false impression that Wayne actually committed serious misconduct. Yet the City never provided Wayne with a name-clearing hearing. The unemployment compensation hearing was not an adequate substitute for the process the City owed him. Moreover, Mayor Hancock was in a position to provide Wayne with due process by recognizing Wayne's right to a name-clearing hearing. Thus, Mayor Hancock was not entitled to qualified immunity. Wayne was entitled to a name-clearing hearing.

1.7 *Brittingham v. Town of Georgetown*, 39 IER Cases 1832 (Del. 2015)

Shawn Brittingham and Christopher Story worked as police officers for the Town of Georgetown. Their police chief ordered members of the police department not to speak with the mayor or city council to discuss internal police business without his permission. In spite of this order, several off-duty officers, including Shawn and Christopher, met with a city council member to discuss police business. When the police captain, Captain Holm, learned of the meeting, he ordered an investigation of the matter. Because so many officers were involved, he

had an officer from a separate police department conduct the investigation. Following the investigation, Captain Holm issued a written reprimand to each of the involved officers.

Rather than accept the written reprimand, Shawn and Christopher elected to request a hearing about the allegations against them. After the hearing, the police captain imposed temporary suspensions following by short-term reductions in rank on Shawn and Christopher. Shawn and Christopher filed a petition for a writ of mandamus, asking for a new hearing and restoration of their employment status. The court rejected their petition, concluding that most of their claims were meritless. Additionally, the court held that Shawn and Christopher failed to demonstrate why their First Amendment free speech claims could not be heard elsewhere, such as in the civil proceeding they later filed. Finally, the court concluded that the court was unable to provide relief under the writ of mandamus because Shawn and Christopher left the police department before the court decided the case.

2. **Just Cause – Suspension and Discipline**

2.1 **FAILURE TO FOLLOW ORDERS**

2.1.1 *City of Chicago & Fraternal Order of Police Lodge 7*, 134 Lab. Arb. 753 (2014) (Goldstein, Arb.).

Russell Schultz was a police officer in the Education and Training Division of the Police Academy. He held advanced degrees in communications studies. In March and April 2011, Russell allegedly failed to add a hyperlink to the Academy's website by the deadline, failed to report for a roll call on a detail he was commanded to work, and failed to meet with his sergeant following a separate roll call. Consequently, the Department involuntarily transferred Russell to the Seventh District and scheduled him to work from 11:00pm to 6:00am. Russell was not able to use the skills he gained from his advance degrees in his new position.

The arbitrator held that the Department did not have just cause to involuntarily transfer Russell. Finding in favor of the Department's account on all the alleged incidents of misconduct, the arbitrator concluded the Department's actions were disciplinary and that there was cause for some discipline. However, the arbitrator found the involuntary transfer to be too severe; instead, the arbitrator suggested common penalties of warnings or reprimands, which give officers an opportunity to correct their misconduct. Because the involuntary transfer did not give Russell an opportunity to receive corrective penalties, the arbitrator held it was "excessive and not correct, and [] was not for just cause."

2.1.2 *Port of Seattle & Teamsters Local 117*, 133 LA 626 (2014) (Lumbley, Arb.)

Grievant was terminated from her employment as a bus driver for the Port of Seattle after she repeatedly failed to follow instructions from her supervisors. After a coworker, Masse, found her bus running more than five hours before she was scheduled to use it, Grievant's supervisor, Dupuis-Tilden, asked Masse to turn the bus off. Half an hour later, Masse found the bus turned on again. When he entered the bus to turn it off, he found a hot dog bun impaled on the on-off switch. Half an hour later, he found the bus running again, and for the third time, he went inside to turn it off. This time, he found the hot dog bun still on the on-off switch, plus a handwritten note on the driver's seat that read, "Isn't his fun idiot? [sic]." Masse reported what he found to

Dupuis-Tilden. Dupuis-Tilden then called the Grievant and told her that buses should not be started more than thirty minutes before their first run. Ten days later, another bus driver found the Grievant's bus running more than four hours before its first run. Despite receiving another verbal instruction from Dupuis-Tilden not to start the bus early, Grievant started her bus almost two hours early a few days later.

The arbitrator noted that if an employee disagrees with instructions, she may appeal them up the chain of the command, but in the meantime, she must comply with those instructions. Grievant failed to follow instructions from her supervisor about the appropriate time to turn on her bus. She also ignored an earlier admonition to refrain from being discourteous to her coworkers. The arbitrator found the Grievant's actions "totally inappropriate." But the Grievant's behavior did not rise to the level of gross insubordination. As a result, the arbitrator concluded that the Port of Seattle did not have just cause to terminate the Grievant. Instead, the Port of Seattle was required to apply progressive discipline. Thus, the court reduced her termination to a two-week suspension without pay.

2.1.3 *Paulin v. Dept. of Health & Hospitals, Office of Behavioral Health*, 38 IER Cases 854 (La. Ct. App. 2014)

Kim Paulin worked as a registered nurse supervisor at a Louisiana hospital until she was fired for insubordination. Kim's supervisors were unhappy with her work performance so they put together a supervisory plan outlining requirements and deadlines. The supervisory plan included a requirement that Kim take an online course about Excel spreadsheets. Kim admitted that she did not complete the course, explaining that she did not like its online format. Additionally, she failed to comply with a directive in her supervisory plan that she submit a project by a certain date. The court held that both of these failures constituted insubordination. Even one specific act of insubordination was sufficient legal cause for termination. Thus, even though Kim disputed several other allegations of misconduct, these two acts of willful disobedience provided adequate legal cause for the Department of Health and Hospitals to fire her.

2.2 **DISHONESTY**

2.2.1 *County of Monterey & Monterey County Park Rangers Ass'n*, 134 LA 1011 (2014) (Thomson, Arb.)

Grievant, a park ranger in Monterey County, was fired for lying, insubordination, and failing to follow appropriate practices to protect the public after losing a police baton. When the ranger realized his baton was misplaced, he called his supervisor, Burnett, for advice. The ranger then realized that the Deputy Chief would learn that the baton was misplaced. The ranger feared the Deputy Chief's reaction, so he lied to Burnett, saying that he had found the baton. In reality, he purchased a new baton, not knowing that his misplaced baton had been found by another ranger. He later admitted that he had lied about finding his baton. The arbitrator agreed with the County that lying to an employer is a serious matter. However, the arbitrator concluded that the County did not have just cause to fire the park ranger for several reasons. First, the park ranger had initially been truthful. Second, his lie stemmed from his fear of the Deputy Chief.

Furthermore, the park ranger did not perpetrate the lie, and he was remorseful. The arbitrator reduced the discipline to a three-month suspension.

2.2.2 *Seneca Cty. Sheriff's Office & Ohio Patrolmen's Benevolent Ass'n*, 133 LA 1113 (2014) (Harlan, Arb.)

Grievant, a corrections officer in a county jail, was discharged after falsifying records logs. In the logs, the officer indicated that he regularly checked inmates on medical and suicide watch when in fact he never left his desk to perform the required checks. In several cases, he was on break or off work at the times of his supposed checks. The officer's failure to perform the mandated medical and suicide checks, and his dishonesty in reporting checks he never conducted, placed both inmates and jail employees at risk.

The arbitrator found the Sheriff was lax about enforcing the requirement that guards regularly conduct medical checks on inmates. As a result, the arbitrator dismissed the charge that the Grievant willfully neglected his duties. But the falsification of records charge supplied just cause for his dismissal. Though falsification of records alone would be ample reason to fire the Grievant, the Grievant had also been disciplined for other offenses, such as failing to obtain required in-service training and failure to secure his locker, which suggested that the Grievant would not respond to progressive discipline. Thus, termination was appropriate.

2.2.3 *Allegan County & Police Officers Labor Council*, 134 LA 797 (2014) (Obee, Arb.)

Grievant, a Deputy Sheriff in Michigan, was fired for violating two Sheriff's Office policies. First, she failed to report that her department-issued portable radio was missing. Instead, she relied on a loaner radio for eighteen months, before the department discovered that she lost her assigned radio. Second, she improperly accessed the Law Enforcement Information Network (LEIN) to obtain information for a friend. Grievant also had at least seven disciplinary infractions on her work record.

The arbitrator held that Grievant's failure to report her work radio missing, plus her disciplinary history, was not alone enough to justify firing her. However, Grievant's misuse of the LEIN system did justify firing her. The arbitrator noted that there are circumstances under which misuse of the LEIN system should not be a terminable offense. For instance, if an officer accesses LEIN for a personal reason only once and is motivated to do so by good faith, the officer should not be fired. Grievant, though, accessed LEIN on behalf of a friend on multiple occasions over several years. When asked about this access, Grievant provided evasive and misleading answers. Those facts indicate that Grievant is an untruthful person who willfully abused her position. Such a fundamental breach of the department's trust justified her termination.

2.2.4 *City of Eaton, Ohio & FOP/Ohio Labor Council*, 134 LA 672 (2014) (Tolley, Arb.)

A police officer was fired for failing to disclose and attempting to conceal a sexual relationship he had with a victim in one of his cases. The officer became the lead investigator in a case involving a woman he had been intimately involved with several months prior. The case involved allegations against the woman's current boyfriend. Despite the clear potential conflict of interest, the officer did not disclose his affair to his supervisor. Moreover, he sent a misleading

email to the prosecutor that concealed his prior relationship with the victim. The arbitrator determined that the officer's "deliberate misrepresentation of facts in a pending case" was serious misconduct. His conduct compromised his credibility. Since he worked in a small community, the damage to his credibility seriously affected his value as an investigator. Moreover, county prosecutors and his superiors no longer trusted the officer's integrity. The police department also worried that reinstating the officer would harm the department's reputation. For these reasons, the police department had just cause to fire him.

2.3 VIOLATION OF DEPARTMENT POLICY

2.3.1 *State of Florida Dep't of Corr. & Teamsters, Local 2011*, 133 Lab. Arb. 652 (2014) (Abrams, Arb.).

Unnamed Grievant was a Correctional Probation Senior Supervisor for the Florida Department of Corrections. She served for the Department for twenty-seven years and had a history of positive evaluations with few minor transgressions. Grievant accidentally brought an unsecured gun into her office when it fell into a shopping bag of other items she was bringing with as she exited her car to enter the office. Department regulations require officers to immediately place firearms in secured lockers when entering a probation office. Another employee found the gun in Grievant's office and reported the incident. Grievant was terminated because of the incident.

The arbitrator found that the Department did not have just cause to terminate Grievant. The arbitrator found Grievant's mistake to be extremely serious, but also weighed the mitigating factors in her favor, like her twenty-seven years of service with few transgressions. The arbitrator also noted that the discipline Grievant received was disparately greater than the discipline received by other employees who had committed similar mistakes. Therefore, while Grievant's mistake was dangerous and deserved discipline, termination was not the appropriate disciplinary action. The arbitrator ordered the Department to return Grievant to her previous position, but without back pay "because of her negligence regarding a very serious matter."

2.4 *Westlake Civil Service Comm'n v. Pietrick*, 202 LRRM 3535 (Ohio 2015)

Richard Pietrick, a fire chief, exhibited "extremely poor judgment" when he required firefighter-mechanics to work on his personal vehicles. The civil service commission demoted him from his position as fire chief to the lowest position in the department—firefighter—and Pietrick was given a 30-day suspension. The trial court reviewed the behavior for which he was disciplined. The court determined that though the behavior was not unethical or criminal, it nevertheless merited discipline. However, the court determined that the discipline meted out by the commission was excessive. The trial court modified the penalty, permitting a demotion to the rank of captain. The appellate court and Supreme Court of Ohio upheld the trial court's authority to modify the commission's punishment.

2.4.1 *City of Tampa & Amalgamated Transit Union, Local 1464*, 134 LA 886 (2015) (Kohler, Arb.)

Grievant, a 9-1-1 dispatcher, was demoted for her failure to follow department policies. One day, while training a new employee, Grievant and the trainee received a call from a citizen.

The citizen wanted to file a complaint against two other police dispatchers. Though Grievant was not a supervisor, Grievant told the citizen that she was a supervisor. Grievant led the citizen to believe she was a supervisor for the duration of their conversation. Grievant then failed to report to an actual supervisor that the citizen had called and wished to make a complaint. Prior to this incident, Grievant had been disciplined for violating other department rules and directives. Thus, the arbitrator determined that the Police Department was justified in demoting Grievant. Demotion was a reasonable punishment based on the Department's progressive discipline policy and Grievant's past infractions. Moreover, Grievant was training a new employee when she deceived the citizen about her position. The Police Department fairly concluded based on that behavior that Grievant should not be employed in a position where she is responsible for training new employees.

2.5 OFF-DUTY MISCONDUCT

2.5.1 *City of Picqua & Fraternal Order of Police, Ohio Labor Council, Inc.*, 133 LA 1811 (2014) (Weatherspoon, Arb.)

Grievant, a police officer in Ohio, was given a 14-day suspension and a last chance agreement after he responded inappropriately to several individuals he found toilet papering his house. Department policy requires officers to refrain from handling incidents of personal interest. Instead of following that policy, the officer chased after the individuals toilet papering his house. He caught one of the offenders. Though he was off-duty and therefore not authorized to use restraints on her, he took her to the ground, causing her to become injured. He was also uncooperative with on-duty officers who reported to the scene, in violation of department policy. He refused to return to his house when instructed to by on-duty officers. Instead, he persisted in yelling and cursing at the offenders, displaying unprofessional conduct. The arbitrator concluded that the off-duty officer violated multiple department policies. Thus, the City had just cause to issue disciplinary action against the officer. The arbitrator agreed with the City that the last chance agreement was a reasonable part of the officer's discipline.

2.5.2 *City of Seldovia & International Brotherhood of Electrical Workers, Local 1547*, 133 LA 1593 (2014) (Landau, Arb.)

Grievant, a facilities maintenance worker for the City of Seldovia, was suspended and ultimately fired for off-duty misconduct that resulted in criminal charges. Grievant hit his girlfriend with his truck, though it was unclear whether he struck her out of anger after an argument or because of mechanical problems with the truck. He was charged with felony assault. As a result, the City suspended his employment. Though his girlfriend did not want to press charges and did not seek a "no contact" order, the court imposed a "no contact" order. Several months later, Grievant and his girlfriend sought to remove the "no contact" order. After submitting a motion to remove the order, they went on a camping trip together. The court did not act on the motion until after they returned from their camping trip, so Grievant was arrested and charged with violating the order. The City continued Grievant's suspension. Grievant eventually pled guilty to violating the "no contact" order in exchange for the prosecutor dropping the felony assault charge. The City and Grievant then signed a settlement agreement that allowed Grievant to resign in exchange for waiver of debts to the City that were not employment-related.

Despite the settlement agreement, the Union proceeded with arbitration. The arbitrator agreed with the Union that the City and Grievant were legally prohibited from entered into their settlement agreement without the consent of the Union. The Union is the "sole and exclusive bargaining agent" for bargaining unit employees such as Grievant. Thus, the settlement agreement was invalid insofar as it related to Grievant's employment-related claims.

Additionally, the arbitrator determined that the City lacked just cause to suspend or terminate Grievant's employment. The disciplinary actions were taken in response to off-duty conduct that did not have any adverse effect on the City. Moreover, the City did not conduct its own investigation into the conduct. The City failed to prove that it had any grounds for disciplinary action against Grievant.

2.6 **INAPPROPRIATE CONDUCT**

2.6.1 *City of Brooklyn and & Mun. Foremen & Laborers' Union, Local 1099*, 134 Lab. Arb. 1066 (2015) (Fullmer, Arb.).

Unnamed Grievant was employed as Assistant Manager for the Brooklyn, Ohio Ice Rink. Supervising full time and part time employees was one of Grievant's duties. While supervising a part time employee, Grievant made offensive racial remarks to the employee on three separate occasions. The City's disciplinary procedures prohibit "giving insult or offense on the basis of race." After an investigation of the remarks, Grievant was terminated.

The arbitrator held that there was not just cause to terminate Grievant. While the arbitrator found Grievant's comments violated the City's disciplinary procedures on all three occasions, the arbitrator also found that the Grievant should have received progressive discipline instead of termination. Because Grievant had worked successfully for the Ice Rink in non-supervisory roles for twenty-two years, the arbitrator ordered that Grievant be offered the next open job in the Ice Rink's garage that "involves either no or limited conduct with the public and no supervision of fellow employees." Until such a job becomes available, the arbitrator ordered that Grievant be regarded as suspended without pay.

2.6.2 *City of Columbus, Ohio & Columbus Municipal Association of Government Employees, CWA, Local 4502*, 134 LA 640 (2014) (Goldberg, Arb.)

Grievant, a supervisor for the Columbus lead abatement program, was suspended for five days without pay in response to a series of incidents involving Grievant's improper behavior. Grievant received a written reprimand in response to an argument with a coworker. Immediately following that argument, Grievant lashed out at his supervisor. Additional disciplinary action was warranted because Grievant made repeated inappropriate comments to his subordinate about marijuana use. He also engaged in inappropriate conduct toward a female coworker, whom he touched for unreasonable lengths of time without her consent. The arbitrator concluded that corrective discipline was merited. However, the arbitrator reduced the suspension from five days to three days because the arbitrator viewed Grievant's mean comments to his supervisor as an extension of the incident in which he argued with his coworker. The arbitrator concluded that a three-day suspension was sufficient discipline for the other incidents.

2.6.3 *City of Portland & Portland Police Commanding Officers*, 134 LA 389 (2014) (Vivenzio, Arb.)

Grievant, a captain for the Portland police force, was demoted to the rank of lieutenant. In the span of about two years, the captain engaged in several instances of misconduct. While off-duty, he displayed his handgun at another driver during a road-rage incident. At work, he touched several female subordinates on the thigh, making them uncomfortable. He also engaged in disrespectful behavior during a meeting with an employee and her union representative. Due to these incidents, Grievant was demoted.

The arbitrator concluded that the captain's conduct merited serious discipline. However, the arbitrator held that demotion for an indeterminate period was punishment, not just discipline. The arbitrator noted that the captain had a 23-year history of untarnished service to the police department prior to these incidents. The incidents all took place once the captain had been placed in charge of the dysfunctional Records Division in the department. And some of the instances of unprofessional conduct merited counseling rather than demotion. Thus, the arbitrator ordered that the discipline be reduced to a sixty-day suspension, and ordered that Grievant be reinstated as a captain.

2.7 **USE OF FORCE**

2.7.1 *State of Florida Dept. of Corrections & Individual Grievant*, 134 LA 1181 (2015) (Abrams, Arb.)

Grievant, a Corrections Officer, was fired for participating in a "use of force" incident which led to the death of an inmate. Following the incident, Grievant was placed on paid administrative leave. The Department of Corrections conducted an investigation of the incident. But before the investigation was complete, the Department fired Grievant. The arbitrator concluded that the Department did not have just cause to terminate the Grievant for two reasons. First, the termination took place before the conclusion of the investigation, though the parties' bargaining agreement specified that discipline must occur only after a thorough investigation. Second, the Department failed to provide Grievant with any evidence of the reasons for his termination. Thus, the Grievant was denied an opportunity to rebut such evidence or explain his actions.

2.7.2 *City of Tampa & Tampa Police Benevolent Ass'n*, 133 LA 1128 (2013) (Smith, Arb.)

Grievant, a police officer in Tampa, was fired after using excessive force twice within a span of three days. In the first instance, Grievant arrested a man selling newspapers without the proper licenses. As part of the arrest, Grievant struck the man several times with a police baton, asking, "Do you want another?" Grievant recorded the event on his personal video camera, but failed to turn over the footage for several days, as required by department policy. A few days later, Grievant used an unauthorized, painful control technique to hold a woman's handcuffed arms.

The arbitrator agreed with the City that the seriousness of the Grievant's offenses warranted some discipline. But the arbitrator concluded that the City incorrectly fired the Grievant, citing three reasons. First, other officers who had used excessive force—including an

officer who participated in the second of the Grievant's problematic arrests—received disciplinary suspensions but were not fired. Second, the City failed to show that progressive discipline would be ineffective. Third, the City failed to consider mitigating circumstances, such as the Grievant's record of service; Grievant had never received any prior discipline in over six years of service; and, he regularly received excellent evaluations. The arbitrator held that not every charge of excessive force requires firing, and that termination was too extreme a penalty in this case.

2.8 WEAPONS/IMPROPER USE OF A FIREARM

2.8.1 *King County Metro Transit & Amalgamated Transit Union, Local 587*, 134 LA 319 (2014) (Landau, Arb.)

Grievant, a bus driver, was fired for gross misconduct. One day, he brought a children's archery set he had purchased to work in order to return it to the store. Upon entering the dispatch station, he was told that the archery set qualified as a weapon. He ignored that warning and brought it into the station and then onto his bus. He kept the set in his bag, and returned it to the store during his break. The County fired him for bringing a weapon to work. The arbitrators sided with the bus driver, holding that the junior archery set was not a weapon for the purposes of the County weapons policy. The arbitration panel noted that though the archery set was capable of harming another person, it was not designed to harm people. It fell into the "grey area between a 'toy' and a 'weapon.'" The weapons policy did not give fair notice to the bus driver that an archery set was considered a prohibited weapon. Thus, the County was not justified in firing him.

2.8.2 *City of Columbus, Ohio, Division of Police & Fraternal Order of Police, Capital City Lodge No. 9*, 134 LA 422 (2014) (Goldberg, Arb.)

Grievant, a sergeant with the Columbus police department, received an eight-hour suspension for accidentally discharging his weapon. The sergeant responded to a call of a man with a gun at a shopping mall. While covering other officers and trying to control the scene, the sergeant kept his gun in out, in the same hand that was holding a portable microphone cord. The sergeant got into an altercation with a person on scene. In the course of taking the person down to make an arrest, the gun discharged. In past incidences of accidental gun discharges, officers with the police department had received written reprimands rather than suspensions. Here, however, the Police Chief was justified in disciplining the sergeant by means of a short suspension because of the unique factual circumstances of the case. The sergeant had his weapon out while acting in the vicinity of numerous civilians, which created serious risk of harm. The sergeant also should have realized that he could not simultaneously control his weapon, his microphone cord, and the crowd. He should have created a safe space between him and the suspect, and should have issued verbal commands to the suspect, rather than taking down the suspect. His failure to take such precautions, especially around civilians, provided a rational basis for his heightened level of discipline.

2.9 **OTHER TYPES OF MISCONDUCT**

2.9.1 *The City of Ada, Oklahoma & International Association of Firefighters, Local 228*, 134 LA 702 (2014) (Lumbley, Arb.)

Grievant, a firefighter, was terminated after posting a series of offensive and threatening messages on Facebook about two City police officers. The two police officers had arrested the firefighter's wife for public intoxication. The firefighter was present at the scene of arrest. During the arrest, he "spewed expletives" at the police officers. Over the next several weeks, the firefighter wrote notes on Facebook disparaging the two police officers and the City police department. While some of his posts could be considered protected speech, others were not protected, because they did not touch on matters of public concern and they disrupted the workplace. Still other posts actually threatened the police officers and their families. The firefighter continued to post these tirades knowing they were wrong and that they could cost him his job.

The arbitrator concluded that the firefighter's posts clearly constituted workplace harassment. The firefighter's conduct thus violated the City's workplace harassment policy. Moreover, given the number of Facebook posts and their egregious content, the City was justified in firing the firefighter.

2.9.2 *City of St. Mary's v. Fire Fighters Local 3633*, 199 LRRM 3852 (Ohio Ct. App. 2014)

Chris Wilson worked as a firefighter for ten years, until he was disability separated from the St. Mary's Fire Department. Chris's asthma impaired his ability to complete a search and rescue training and an agility and performance training one year. The City placed Chris on sick leave after he failed to complete the two trainings. Then, Chris provided a doctor's note indicating that he was fit to return to work. However, Chris's doctor did not answer the City's questions about Chris's condition. The City contacted a new doctor, who concluded that Chris could not safely perform the essential functions of his job. Chris sought a third medical opinion about his fitness for duty from Dr. Vogelstein. Following his examination by Dr. Vogelstein, Chris was disability separated from his employment.

The arbitrator concluded based on Dr. Vogelstein's report that the separation was made in error because "Dr. Vogelstein's opinion does not clearly indicate that [Chris] cannot perform the essential functions" of his job. The trial court then vacated the arbitrator's decision based on its own interpretation of Dr. Vogelstein's report. The appellate court agreed with the trial court that the arbitrator misinterpreted Dr. Vogelstein's report. The appellate court pointed out Dr. Vogelstein's findings that Chris's asthma is a permanent, recurring condition which would at times render him unable to perform his job. Chris's condition thus constituted a disability for which no suitable accommodation could be made. Chris's condition posed a risk to his own safety and to the safety of others. The court concluded that the City fairly issued a disability separation to Chris.

2.9.3 Amber Jamieson & Susan Edelman, *EMT caught sleeping 12 times on job can't be fired*, The New York Post (December 7, 2014, 2:30 AM); *Fire Dep't v. Ehrlich*, OATH Index

No. 1850/12 (2013) (Richard, Arb.), *modified, Comm'r Dec.* (2013), aff'd, *NYC Civ. Serv. Comm'n Item No. 2013-0195* (2014).

After falling asleep while on duty at least six times, going AWOL on several occasions, and habitually reporting late for duty, Emergency Medical Services lieutenant Serele Ehrlich was demoted, cutting her salary almost in half. Serele was seen sleeping at her desk, during a training session she was supposed to be leading, in her department vehicle, and even once in the driver's seat while stopped at a red light. The Fire Department recommended that she be terminated for such conduct. The administrative law judge disagreed, noting that Serele had no prior disciplinary record over the course of her 19 years in the department. No serious consequences had ever resulted from Serele sleeping on the job. Moreover, Serele readily acknowledged her problems with lateness and showed a desire to fix that problem. The judge also noted that the Department undermined its argument that Serele's sleeping posed an unacceptable risk given that the Department failed to begin disciplinary proceedings on sleeping charges from 2007 until five years later. The judge recommended a 45-day suspension. However, upon approval from the Civil Service Commissioner, the Fire Department demoted Serele instead of imposing the suspension.

2.9.4 *City of Mason & Mason Professional Firefighters, IAFF Local 4039*, 134 LA 1165 (2015) (Tolley, Arb.)

A firefighter was fired upon suspicion that he had engaged in sexual activity with a female friend in the firehouse. The firefighter and his friend were alone in the firehouse for about thirty minutes. Other firefighters, upon returning to the firehouse, immediately grew suspicious about the Grievant's and his friend's activities while they were alone. Acting battalion commander Mark Gerano noted a strong perfume scent leading to the bunk rooms. He also found stains on the firefighter's mattress pad, which Gerano assumed were from a woman's makeup. Gerano took a photograph of the mattress pad and collected several long hairs he found on the pad for investigation. Gerano asked the firefighter whether his female friend had been on the mattress pad. The firefighter denied it. The firefighter was fired for dishonesty.

The arbitrator concluded that the Fire Department did not have just cause to fire the firefighter. The Department was highly suspicious of the firefighter's activities while alone with his female friend. However, the Department failed to conduct a fair and objective investigation. The Department also failed to find substantial evidence proving that the firefighter engaged in misconduct and lied. The Department neglected to test the stains on the mattress to determine whether they were makeup stains. In fact, the Department did not collect the mattress as evidence until several days later, after another firefighter had slept on it. Additionally, the hair that Commander Gerano collected from the mattress was never tested. The Department made only one effort to contact the firefighter's female friend, and it dismissed the firefighter's explanation that they were merely longtime friends. And the Department failed to prove by clear and convincing evidence that the odor on the mattress pad was from the firefighter's friend's perfume. Because of the Department's numerous failures in investigating this event, the Department had no substantial evidence of the firefighter's guilt. Thus, it was not justified in firing him.

2.9.5 *City of Sparks*, 134 LA 360 (2014) (Tolley, Arb.)

Grievant, a police officer, was fired because he was found unfit for duty. The officer suffered several injuries in the line of duty that resulted in him being prescribed various pain medications. The officer was initially granted leave to recover. He returned to light duty, and then to full duty after a finding of full recovery from his injuries. Upon complaints from fellow officers that Grievant was behaving oddly, Grievant was questioned and asked to submit to a drug test. The drug test showed that Grievant was still taking methadone. A medical officer concluded that Grievant's methadone use rendered him unfit for unrestricted full duty. After several months of disputes as to whether Grievant was fit for duty, the City fired him. The arbitrator held that the City had just cause for the termination. The City had given Grievant notice that he could not continue on light duty indefinitely. Yet the officer still failed to provide medical certification for his return to work. He also disregarded advice from the City's legal counsel about how to apply for a disability accommodation. Moreover, he continued his excessive methadone use.

3. Unions/Collective Bargaining

3.1 *Jonassen v. Port of Seattle*, 199 LRRM 3873 (W.D. Wash. June 11, 2014) (slip opinion).

Tracy Jonassen sued the Port of Seattle, alleging breach of the Port's anti-retaliation and harassment policies contained in the employment handbook. In response, the Port alleged Tracy's claim was preempted by Section 301 of the Labor Management Relations Act (LMRA). If preempted, Tracy's complaint would be subject to the grievance procedures under the collective bargaining agreement ("CBA"). The court found that Tracy's claim was preempted by Section 301 of the LMRA and, consequently, ruled in favor of the Port. Section 301 preempts state law claims when the state law right substantially depends on analysis of the CBA. Tracy's claim was based on the Port's breach of promises of specific treatment in specific situations. While the anti-harassment and anti-retaliation policies were not directly contained in the CBA, the CBA reserved the right for the Port to discipline or terminate employment for just cause, disputes of which would be settled through the CBA grievance procedure. Because the CBA controls when in conflict with other policies, the court found that Tracy's claim was substantially dependent on an analysis of the CBA and, therefore, preempted under Section 301 of the LMRA.

4. The First Amendment: Religion

4.1 *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

Gregory Holt was an inmate in the custody of the Arkansas Department of Corrections. The Department had a grooming policy that prohibited inmates from growing beards. The policy had one exception: inmates with dermatological problems could grow a one-quarter inch beard. Gregory's religious beliefs required him to not trim his beard, so he requested permission to grow a one-half inch beard as a compromise. The Department denied Gregory's request, and warned him that if he disobeyed the grooming policy, he would "suffer the consequences." Gregory sued the Department for violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The district court and the Eighth Circuit Court of Appeals both held in favor of the Department.

The United States Supreme Court decided to some grooming of its own and reversed, holding in favor of Gregory. The Court found that the grooming policy substantially burdened Gregory's religious exercise and that the Department had failed to prove disallowing Gregory's half-inch beard was the least restrict means for furthering a compelling government interest. While the Department asserted that the policy prevented prisoners from hiding contraband and from disguising their identities, the Court was not persuaded. The Court found that the policy did not prevent hidden contraband because little can be concealed in a one-half inch beard. Furthermore, contraband concerns could be satisfied less restrictively by searching Gregory's beard. The Court also found that the policy wasn't necessary to prevent disguised identities because the Department could take pictures of inmates both with and without beards to ease identification. Because the policy was not the least restrictive means of furthering a compelling government interest, the Court held that the Department's policy violated RLUIPA.

4.2 *Fabrizio v. City of Providence*, 104 A.3d 1289 (R.I. 2014).

Theodore Fabrizio and Stephen Deninno were firefighters serving in Engine Company No. 7. Engine Company No. 7 was assigned to drive a fire truck in the 2001 Pride Parade. This type of assignment was common and Engine Company No. 7 was selected for the assignment because of its proximity to the parade route. Theodore and Stephen objecting to participating in the assignment, contending that their religious beliefs did "not allow them to 'support, encourage, nor condone homosexual behavior.'" After they expressed their discomfort to Chief James Rattigan, the Chief reiterated his order to carry out the assignment. Both Theodore and Stephen participated in the parade as ordered. They alleged their belief that refusing to carry out the assignment would jeopardize their continued employment. Theodore and Stephen sued the Chief, the Mayor, and the City of Providence, alleging deprivations of their rights to freedom of religion and speech under the Rhode Island Constitution.

The Rhode Island Supreme Court held that no constitutional rights were violated by the parade assignment. The Court found that Theodore and Stephen participated in the parade "merely as relatively anonymous public servants." Their participation in the parade as employees of the fire department was not expression; instead, Theodore and Stephen were carrying out a common task assigned to engine companies. Because the Court found the firefighters were not engaged in personal speech when carrying out the assignment, it held in favor of the City of Providence.

4.3 *Marrero-Méndez v. Pesquera*, 124 FEP Cases 163 (D.P.R. Aug. 19, 2014) (slip opinion).

Alvin Marrero-Méndez was a police officer for the Puerto Rico Police Department. He performed regular police duties, like attending to complaints and patrolling. During a meeting of police officers, Commander Guillmero Calixto-Rodríguez asked for a volunteer to lead a closing prayer. These meetings normally ended with a closing prayer or invocation. Alvin called Guillmero aside and told him he objected to official prayers at meetings and did not want to participate because it made him very uncomfortable. Guillmero ordered Alvin to exit the circle formation of the meeting, but did not allow him to leave the vicinity until the prayer concluded. Guillmero told the rest of the meeting attendees that Alvin was standing alone "because he does not believe in what we believe." Three days later, Alvin filed an administrative complaint, alleging his First Amendment right to freedom of religion had been violated. In response, the

precinct chief told Alvin he would be reassigned to his choice of clerical duties at the command office or vehicle maintenance at the airport station. Alvin brought claims for violation of his civil rights against his Commander, the precinct chief, and the two other high-ranking officials not directly involved in the aforementioned events.

The United States District Court for the District of Puerto Rico held that Alvin failed to state a claim against the high ranking officials, but had adequately stated an Establishment Clause claim against the Commander and the precinct chief. The court dismissed Alvin's claims against the high ranking officials because they were not personally involved in the alleged violation. Because the officials did not participate, they were not liable. In contrast, the court found Alvin's claims against the Commander and the precinct chief were adequate. The court found that their actions in holding the prayer, forcing Alvin to observe it against his objections, and removing him from his regular duties after he spoke up were "plainly coercive." Further, the court held that the Commander and the precinct chief were not entitled to qualified immunity because freedom of religion is a clearly established constitutional right known to a reasonable person.

4.4 *United States of America v. School District of Philadelphia*, No. 2:14-cv-01334

The Department of Justice reached a settlement agreement with the School District of Philadelphia based on its grooming policies violating civil rights laws. The School District has prohibited men from maintaining beards longer than 1 inch. This presented a religious liberties issue for school police officers like Siddiq Abu-Bakr, who is Muslim and keeps a longer beard. As a result of the settlement, the school district will implement a revised attire and appearance policy. It will include a procedure for requesting religious accommodations on an individual basis, and facilitate an interactive process for coming to agreements before denying requests.

5. The First Amendment: Speech

5.1 *Moss v. City of Pembroke Pines*, 782 F.3d 613 (11th Cir. 2015).

Richard Moss was employed as the Assistant Fire Chief for the Pembroke Pines Fire Department. He was also elected as a trustee of the City's pension board and, prior to taking the role of Assistant Fire Chief, was a member of the fire department's bargaining unit. Richard was terminated after he made several critical remarks about a budget the City approved, which was insufficient to honor collective bargaining agreements, and the City's subsequent efforts to negotiate pay cuts and pension concessions from its employees. Richard made the critical remarks at pension board meeting, at a staff meeting, and generally to other fire department employees. Richard sued the City, alleging he was terminated in retaliation for his speech.

The Tenth Circuit Court of Appeals affirmed that the lower court's findings that Richard's critical remarks were not protected because they were made in furtherance of his job responsibilities, and that the City's interest in promoting efficiency outweighed Richard's free speech rights. The court found that when Richard stated his criticisms during the pension meeting, he was present as a representative of the fire department and was acting pursuant to his duties as a pension board trustee. Similarly, when he made remarks during a staff meeting, he was also participating pursuant to his assigned duties. Richard's statements to fire department

employees generally were made "in accordance with his role as a liaison between the Fire Chief and employees down the chain of command." The court also found the City's interest in promoting efficiency outweighed Richard's free speech rights. Because the City required consensus to institute pay cuts or pensions concessions and because employees disagreed about the best option, the court found that the City had a legitimate interest in avoiding disruption that outweighed Richard's free speech rights.

5.2 *Phillips v. City of Dallas*, 781 F.3d 772 (5th Cir. 2015).

Micah Phillips was a dispatcher for the Dallas Fire Department. Micah announced his candidacy for the Dallas County Commissioners Court. His candidacy violated the Dallas City Charter and the Dallas City Code of Ethics, which require city employees to forfeit their positions when they become candidates. The City notified Micah that he had violated the Charter and the Code of Ethics and the City discharged Micah two days later. Micah sued, alleging the Charter was unconstitutional and facially overbroad.

The Fifth Circuit Court of Appeals upheld the constitutionality of the Charter after it found the City's interests outweighed Micah's interests. The court relied on the United State Supreme Court's decision in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, where the Court upheld restrictions on federal government employees' political rights, including a restriction preventing them from running as partisan candidates for elected office. The Supreme Court upheld the restriction because it advanced government interests like impartial execution of the laws, prevention of political corruption, and protection of government employees from pressure from their political superiors. The Fifth Circuit found that these general government interests where sufficient to uphold the Charter; a specific showing of how the Charter advanced those interests was not necessary. Furthermore, the court found that the Charter was not overbroad, as United States Supreme Court had upheld broader restrictions in a prior case.

5.3 *City of Bay City & Int'l Ass'n of Fire Fighters, Local 116*, 134 Lab. Arb. 276 (2014) (Daniel, Arb.).

In 2013, Bay City consolidated its police and fire departments into the Public Safety Department. As a result of the consolidation, the police department's existing social media policy was revised and applied to fire department employees. The firefighter's union filed a grievance, alleging applying the policy to the firefighters "was an unreasonable interference with their constitutional and employment rights." The grievance went to an arbitrator, who evaluated the facial reasonableness of the policies.

The arbitrator upheld most of the social media policy rules as facially reasonable. Rule A restricted social media expression that impedes working relationships, impedes performance of duties, or negatively impacts public perception of the Public Safety Department. Rule C restricted expression that disseminates information firefighters have access to as a result of their employment. Rule E restricted obscene, sexually explicit, reckless or irresponsible, and publicly ridiculing expression. The arbitrator found each of these provisions facially reasonable. However, the arbitrator also emphasized that the employer would have the burden of proving the policies were reasonable under specific circumstances, which would be a substantial burden "considering the potential interference with the rights of individual [employees]."

The arbitrator found one rule, Rule K, facially unreasonable. Rule K requires employees aware of prohibited social media posts to notify their supervisors. The arbitrator found the employer had no right to threaten or discipline employees for failing to snitch on their co-workers. Therefore, the arbitrator concluded that Rule K could not be enforced against any member of the firefighters' union.

5.4 *Seifert v. Unified Gov't of Wyandotte Cnty.*, 779 F.3d 1141 (10th Cir. 2015).

Max Seifert was employed as a reserve deputy for the Wyandotte County Sheriff's Department ("WCSD"). In July 2003, a federal agent assaulted a civilian during a stop. Max was a detective at the time and investigated the incident. In March 2010, Max testified as a witness for the assaulted civilian in his civil claim against the federal government. The next month, Max received a letter from the WCSD, informing him that he had been decommissioned as a reserve deputy. Max sued the WCSD, alleging he was decommissioned to punish him for testifying.

The Tenth Circuit Court of Appeals held that Max's testimony was protected by the by the First Amendment. While law enforcement officers often testify at trial, the court found that Max's testimony was not within the scope of his employment. His testimony was not within the scope of his employment because it was made (a) for a private party, (b) in a civil lawsuit, (c) against law-enforcement entities, and (d) in compliance with a subpoena. Because the speech was not made within the scope of his official duties, the court held the speech was protected. Therefore, the court remanded the case for a jury to decide the issue of whether Max's commission was revoked for improper motive.

5.5 *Burnside v. Kaelin*, 773 F.3d 624 (5th Cir. 2014).

Thomas Burnside was a sergeant in the Nueces County Sheriff Department's patrol division. Thomas also served as chairman of the law enforcement political action committee ("PAC"). In January 2012, Sheriff Jim Kaelin told Thomas that the PAC should support the Sheriff's re-election bid. Burnside refused to give the Sheriff preferential treatment and the PAC did not vote to endorse the Sheriff. Less than a month after the PAC declined to endorse the Sheriff, the Sheriff transferred Thomas from patrol to a less desirable jail assignment. About a year later, Thomas was terminated for disseminating a tape recording of the Sheriff threatening another officer. Thomas sued the Sheriff for violating his First Amendment free speech rights.

The Fifth Circuit held that Thomas had established a case for a First Amendment violation with his transfer from patrol to a jail assignment, but not with his termination a year later. The court found that transfer to the jail assignment constituted an adverse employment action and that a sufficient causal link existed between the transfer and Thomas's protected act of not endorsing the Sheriff. However, the court also found that Thomas failed to establish his case with regards to his termination a year later, because Thomas was not involved in the recording and, therefore, was not engaged in a constitutionally protected act.

5.6 *Walter v. City of St. Peters*, 202 LRRM 3096 (E.D. Mo. Dec. 23, 2014).

Robert Walter, Jr. was employed as a patrolman for the City of Wentzville Police Department. While employed by the Department, Robert was involved in the police union. In 2012, Robert applied to work as a park ranger for the City of St. Peters. Robert passed the

written examination, physical examination, and oral interview; he understood that he was the only applicant still under consideration and would be offered the job upon a successful polygraph test and drug screening. Before Robert could take his polygraph test, he was informed that the test was cancelled and St. Peters was no longer considering him for the position. Robert sued the City and two officials in the Police and Recreation Departments. Robert alleged that the officials stopped his hiring process because of the City's unwritten anti-union policy, in violation of his First Amendment free speech rights. The City filed a motion to dismiss for failure to state a claim.

The court denied the City's motion after it held Robert sufficiently stated his claims against the City and the officials. The court found that a jury could reasonably infer the officials' anti-union comments and denial of Robert's application resulted from an unwritten, anti-union policy. The court also found that a jury could reasonably infer that the officials' anti-union comments caused the adverse employment action of not hiring Robert. Therefore, the court dismissed the motion, leaving it to a jury to decide these questions.

5.7 *Meyers v. E. Okla. Cnty. Tech. Ctr.*, 776 F.3d 1201 (10th Cir. 2015).

Donna Meyers was employed as the adult education coordinator for Eastern Oklahoma County Technology Center's EMT program. Lisa Gonzalez-Palmer also worked for the program as an instructor; Donna was Lisa's supervisor. Lisa had another job working for an air ambulance services company. When the program lost six student's tuberculosis test documentation, Lisa offered to retest the students. Donna instructed Lisa not to perform the test because she did not think Lisa was qualified. Donna later found evidence that Lisa performed the tests anyway. Donna contacted Lisa's other employer and terminated Lisa. When Donna told the program's superintendent she terminated Lisa, the superintendent reinstated Lisa and warned Donna not to retaliate against Lisa or talk to anyone else about the testing. Donna contacted Lisa's other employer again, removed Lisa as a co-instructor from two courses, and failed to renew the program's certification as an EMT training site. The superintendent recommended Donna's termination. The same day, Donna filed a written complaint with the Oklahoma Department of Health regarding the tuberculosis testing. Donna sued the Center, alleging she was terminated in retaliation for reporting the illegal administration of tuberculosis testing, violating her free speech rights.

The Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Center. First, the court held that the termination did not violate her free speech rights with respect to the complaint Donna filed with the Oklahoma State Board of Health. The court found that the communication to the Board could not have been a motivating factor in her termination because the superintendent did not know about the complaint when he made the recommendation. Second, the court held that the termination did not violate Donna's free speech rights with respect to her communication with Lisa's other employer because the Center would have terminated Lisa even if she had not communicated with the other employer. When Donna was terminated, the reason cited with her direct violation of the superintendent's instructions not to retaliate against Lisa. Because Donna retaliated against Lisa by removing her as a co-instructor from two courses, Donna was insubordinate and would have been terminated even without the protected speech. Therefore, the court found that Donna did not have a claim

against the Center and affirmed the district court's grant of summary judgment in favor of the Center.

5.8 *Smith v. Cnty. of Suffolk*, 776 F.3d 114 (2d Cir. 2015).

Police officer Raymond Smith voluntarily retired from the Suffolk County Police Department after 26 years of service, in the face of repeated disciplinary action, including transfer to an administrative position without a computer and loss of his supervisory-position. Officer Smith was initially disciplined for actions such as making Fantasy Baseball League fliers on department computers. However, it was his email communication with CNN and Newsday about department cover-ups and ethical conflicts that precipitated his transfer to an administrative post.

Mr. Smith brought this lawsuit alleging Suffolk County and the County Police Commissioner retaliated against him for exercising his First Amendment right to speak to the media. The County and Police Commissioner maintained they would have punished Mr. Smith regardless of his decision to speak with the media, because of his record of misconduct.

An appeals court determined there were significant questions of fact as to whether the Department would have fired Mr. Smith even without his communication to the media. While Mr. Smith had engaged in numerous instances of constitutionally unprotected speech and behavior, his communication with the media was protected by the First Amendment. Because there was not sufficient evidence in the record to prove the Department would have undertaken the same disciplinary actions without Mr. Smith's protected speech, the court could not rule in favor of the County and commissioner.

5.9 *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015).

Susan Graziosi was fired from her job as sergeant with the City of Greenville Police Department (GPD) after posting critical statements of her boss on Facebook. Grazioso posted disapproving comments of the Police Chief when she found out the department chose not to pay to send GPD officers to the funeral of a fallen officer. Grazioso's posts included comments such as, "If you don't want to lead, can you just get the hell out of the way." Grazioso also shared the posts to the Mayor's Facebook page. She was dismissed from her job after Police Chief Cannon launched an internal affairs investigation, finding that Grazioso's actions violated three sections of GPD policy.

Grazioso filed this lawsuit claiming she was terminated for exercising her First Amendment right to free speech. The Court determined that Grazioso made her comments as a public citizen, which met one threshold for First Amendment protection. Even though she identified herself as a public employee she did not forfeit First Amendment protections. However, the Court also determined that her speech was about an intra-department matter—*not* on an issue of public concern—specifically taking into account the manner in which Grazioso ranted and attacked the Chief of Police. This disqualified her actions from First Amendment protection.

The Court also affirmed that even if Grazioso's speech had been on a matter of public concern, the department's interests outweighed Grazioso's. The government was able to justify

why it treated Grazioso different from any other member of the general public; that Grazioso's dismissal for insubordination was important to prevent future disruption within the department.

5.10 *Hanners v. City of Auburn*, 2014 WL 4071603 (M.D. Ala. Aug. 18, 2014).

Justin Hanners was a patrolman with the Auburn Police Department for six years, during which time he consistently received evaluations indicating he needed to improve his law enforcement efforts. In late 2010 the Department enacted a "two-and-two policy," which required officers to make two contacts and two warnings, on average, per shift. Hanners objected to this policy, and contends he was engaging in "whistleblowing" constitutionally protected speech by making his objection known. Around the time of his objections, the Department discovered Hanners was making obscene comments over the police chat system, spending time on Facebook, and watching television. Hanners also recorded supervisors during roll calls, meetings and counseling sessions, in violation of the City's Personnel Policies. Hanners was terminated as a result of these discoveries.

In his lawsuit, Hanners was unable to prove his poor performance reviews and termination were Departmental retaliation against him for his opposition to the "two-and-two" policy. The Court believed the Department would have given him warnings about his job performance, and ultimately terminated him, regardless of his views on the policy. Because he was unable to connect his comments on the policy to his termination, the Court could not find he experienced retaliation based on exercising his First Amendment right to free speech.

5.11 *Tayoun v. City of Pittston*, 39 F. Supp. 3d 572 (M.D. Pa. 2014)

Former Police Chief Jeff Tayoun was demoted, and suffered numerous adverse actions, after finding and reporting 46 sexually explicit images on a department computer, taken by another police officer, Robert J. Semyon. Tayoun notified the mayor and notified the Officer of the Attorney General of Pennsylvania, who opened a criminal investigation into Officer Semyon's actions. After Tayoun reported the photographs, a new mayor—who was friends with Officer Semyon—was sworn-in, and promptly ordered Tayoun's demotion from Police Chief.

A court determined that Tayoun's actions qualified for First Amendment protection. Taking the photographs to the Attorney General was outside Tayoun's official duties, which meant he acted as a private citizen. Furthermore, Tayoun was addressing an issue of public concern by exposing a police officer engaged in sexual misconduct. Finally, the mayor was unable to provide evidence that Tayoun was demoted for any reason other than retaliation for reporting Officer Semyon. Accordingly, the Court held Tayoun's speech, reporting police officer misconduct, was protected by the First Amendment.

5.12 *Allred v. City of Carbon Hill*, Ala., 2014 WL 5426822 (N.D. Ala. Oct. 24, 2014)

Following his wife's unsuccessful campaign for mayor, Mr. Heath Allred was terminated from his position as Police Chief by the incoming mayor. Allegedly, new Mayor James Richardson alerted Allred his termination was due to his wife's "dirty campaign," which Allred had assisted with, always out of uniform and never during business hours. Allred brought a lawsuit against the City of Carbon Hill for violating his First Amendment right to freedom of association and due process.

The Court recognized that technically, Allred's term as Police Chief expired, and Mayor Richardson chose not to reappoint him. Because Allred was not terminated per se, he did not qualify under Alabama law for constitutionally-protected expectation in continued employment. However, Allred's per se termination did qualify as a violation of his First amendment right to freedom of association. The court affirmed that Allred's non-reappointment was effectively a "firing" and qualified as adverse employment action. Richardson and Carbon Hill offered no evidence the firing was due to professional disloyalty or that Allred was ineffective in his job. Therefore, the Court determined the City did not deserve judgment in their favor.

5.13 *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014)

After actively working to protect a local mosque from a terrorist attack, the Islamic Society of the City of Tulsa invited police officers to its mosque for refreshments, a tour, and general visiting to thank them. After no one had RSVP'd, the Chief of Police informed Paul Fields and other police captains that they either needed to go, or send a supervisor in their place. Fields refused to attend or send someone in his stead, arguing the order was an infringement on his freedom of association and free exercise of religion. Fields was demoted, suspended without pay for ten days, and placed on probation.

The court determined Fields did not have a free exercise of religion claim because the order to attend the Islamic Society's event did not involve any practice of religion; in fact, the Police Department arranged times for officers to attend the event that did not overlap with prayer, and had warned the Islamic Society any discussion about Islam would be discretionary. Additionally, the court determined that the Department did not prefer one religion over another, and it would have had the opposite effect for the department to avoid an invitation from the Islamic Society when it had honored hundreds of community invitations including numerous from religious organizations. There was also no viable freedom of association claim, because Fields was never required to perform any further duty than be present, and he could appoint someone to be present in his place. Finally, no First Amendment retaliation claim for free speech could survive because Fields' concerns involved an internal employment dispute, not a matter of public concern.

5.14 *Plummer v. Cnty. of Warren*, N.Y., 2014 WL 2534975 (N.D.N.Y. June 5, 2014)

Kathleen Plummer worked as a corrections officer for Warren County, New York. On three separate occasions she experienced disciplinary action: first for giving pen and paper to an inmate without authorization, second for acting insubordinate to a supervisor, and finally for expressing to a potential employee that he should "think twice" before accepting employment with the Sheriff's office. She expressed this reservation because she harbored concerns about alleged misconduct taking place at the Warren County Jail. These remarks elicited disciplinary charges that ultimately led to her termination from her job.

Plummer brought a lawsuit against the County for First Amendment retaliation—that she had been exercising her first amendment right to free speech by expressing her concerns for the Sheriff's office and the county. The Court determined that Plummer's speech was indeed protected by the First Amendment. Even though it touched on an employee grievance, it ultimately involved a matter of public concern: county misconduct. The Court also determined

there were open questions of fact as to whether Plummer's speech led to her termination, or whether it was a combination of other disciplinary actions for other behavior. Finally, the Court could not find sufficient evidence that Plummer's remarks were detrimental to government operations. As a result, the Court could not rule in favor of Warren County because Plummer's comments were protected by the First Amendment, and there were open questions as to whether her termination was retaliation for her speech, or other actions.

5.15 *Heffernan v. City of Paterson*, 777 F.3d 147 (3d Cir. 2015)

After working at the City of Patterson Police Department for over 20 years, Officer Jeffrey Heffernan was demoted from Detective to a "walking post" when he was seen picking up a mayoral candidate's campaign sign for his mother. The City maintained he was demoted because of his overt involvement with a political election.

Heffernan brought a lawsuit against the City for violating his First Amendment right to free speech, expressive conduct, and association. Throughout the entire lawsuit, Heffernan maintained he was picking up the sign for his mom, and wasn't expressing his own political views by getting the sign. The Court found this problematic. The First Amendment protects people's actions, not people's perceived actions. Heffernan could not win on a First Amendment claim because he confirmed that he was not affiliating himself with any campaign—merely acting on behalf of his mother. In order to have a First Amendment claim, there must be First Amendment activity, and Heffernan denied he was exercising his own First Amendment rights.

5.16 *Sims v. City of Orange*, 2015 WL 1190170 (D.N.J. Mar. 13, 2015)

Police Officer Hakim Sims alleged he was not only denied a promotion, but further demoted within the Police Department, as punishment for his political speech and affiliations. Sims had worked for the City of Orange Police Department since 1989, and developed an increasingly antagonistic relationship with the newly elected mayor, Eldridge Hawkins, Jr. Based on their sour relationship, Sims supported his opponent Duane Warren in the 2012 mayoral election, which Hawkins was well-aware of. At a community event several weeks after Warren's campaign commenced, Sims and Hawkins had an altercation when Sims refused to shake Hawkins hands, and Hawkins conceded he knew Sims was supporting his opponent and he would not be re-promoted to his previous post. Hawkins was heard saying, "You're right. In corporate America when you go against the grain, this is what happens."

Sims alleges that his First Amendment right to expressive conduct was infringed on when he supported an opposing mayoral candidate and Hawkins withheld his re-promotion in retaliation. The Court determined that Sim's political support for Warren was protected by the First Amendment. Sim's decision not to shake Hawkins' hand was protected because he refused in his capacity as a citizen, not as a police officer—he was not in uniform at the time. The Court also agreed that Sim's actions were on a matter of concern. Not only were his comments about an employment grievance—not getting re-promoted—but he was also addressing Hawkins' abusing of his office. The Court concluded Sims' speech resulted in him losing his promotion, and that Hawkins did not have legitimate reasons for the disciplinary actions taken toward Sims.

5.17 *Kidwell v. Eisenhauer*, 679 F.3d 957 (7th Cir. 2012)

Kenneth Kidwell had worked for the Danville police department for 16 years when he was recommended for termination. Kidwell engaged in questionable activity such as becoming friendly with an informant, and asking a judge to exercise leniency on the informant's sentencing for domestic violence. Kidwell continued to meet with the informant, even taking him across state lines and violating his parole, to help the informant seek medical treatment after he was shot. Unrelated to Kidwell's relationship with the informant, Kidwell was also involved in a police-on-police car accident. While on leave to recover from injuries sustained in that accident Kidwell failed a fitness-for-duty exam, and was ultimately terminated.

Kidwell brought a lawsuit claiming retaliation for exercising his right to free speech. At various times over the course of his career he alleged he had engaged in protected speech when he made comments about the department's failure to follow through on certain investigations. He also questioned superiors, such as when he asked a Deputy Director, in front of subordinates, why he was "head hunting" an officer for termination. The Court found that each disciplinary action Kidwell received corresponded with bad behavior he had undertaken. And that ultimately the termination was connected to Kidwell's failure to pass a fit-for-duty exam and other misconduct such as his relationship with the informant, and not for any free speech activity.

5.18 *Tompos v. City of Taylor*, 2015 WL 1192907 (E.D. Mich. Mar. 13, 2015)

Plaintiff Robert Tompos was the Chief of the Taylor Fire Department. During his tenure he made several budget reductions as the result of city deficits. While he was Chief, Tompos made remarks to City Council and the media about the department's deficient protective gear, negative effects of reduced staff, and the City's mismanaging of funds. Tompos was warned to watch what he said to the media, and in 2013 he was terminated for "budgetary" reasons. Tompos brought a lawsuit alleging retaliation for exercising his First Amendment right to free speech.

The Court determined that if Tompos was acting in his role as policymaker his speech would not be protected by the First Amendment. This is because the government had a significant interest in securing employees in position of leadership who will execute the policies of democratically elected officials. In this case the Court found that Tompos' speech was done in his position as a policymaker and that any balancing factors favored the government's position as a matter of law. Therefore, Tompos speech was not protected by the First Amendment.

5.19 *Willingham v. City of Valparaiso, Fla.*, 2015 WL 1276755 (N.D. Fla. Mar. 19, 2015)

Matthew Willingham was both a restaurant owner and police captain in the Valparaiso Police Department. Willingham attended a City Commission meeting one evening to speak about his concerns with the City Administrator's new power to enforce city code, which was a duty previously shared with the police department. New City Administrator Carl Scott cited Willingham with multiple code violations and had agreed to take Willingham's concerns about code enforcement to the City Commission. After expressing his concerns at the City Commission meeting, Willingham was sent a letter indicating the Mayor was considering his termination, and

two weeks later Willingham was terminated. It is worth noting that Willingham supported Mayor Arnold's competitor in the previous mayoral election.

Willingham attempted to have the City Commission review his termination, at which time he was informed by Mayor Arnold that because Willingham had an internal appeal pending he could not address his termination at the City Commission meeting. Willingham's lawyer contemporaneously withdrew Willingham's internal appeal and sought the commission's direct review immediately. Mayor Arnold stated the motion was not in order and refused to call the motion to question.

Willingham brought a lawsuit for retaliation for exercising his free speech rights under the First Amendment. In his lawsuit Willingham sought to hold the City liable for Mayor Arnold's actions. Willingham contended he had engaged in constitutionally protected speech at the City Commission meeting, and was prevented from appealing his termination as a result. The Court stated the City could only be liable for the Mayor's actions if he constituted the city's "final policy maker" in the context of employee-discipline. It determined Mayor Arnold successfully thwarted the City Commission from discussing Willingham's termination, thereby satisfying the role of "final policy maker." Based on this determination the Court determined Willingham had indeed engaged in protected speech and the City was liable on behalf of the Mayor.

5.20 *Fitzgerald v. El Dorado Cnty.*, 2015 WL 966133 (E.D. Cal. Mar. 4, 2015)

Plaintiff Richard Fitzgerald was demoted after 18 years as a detective to a patrol unit. He had voiced his opposition to department changes including the recruitment of volunteers to do property crime work and a rotation policy for detectives, The Deputy Sheriff's Association filed an employee grievance requesting Fitzgerald be reinstated to his previous post, and was denied. An appeal of that decision was also denied. After being unable to fight the reassignment, Fitzgerald went on permanent leave and then posted his notice of resignation.

In his lawsuit Fitzgerald alleges he was retaliated against based on his age, and for opposing changes within the department. The Court found that there were open questions as to whether Fitzgerald spoke on a matter of public concern, and would not resolve in the County's favor. Fitzgerald did address internal policy concerns, which the County said he did so out of fear for his own job, but which could also be construed as concern about the police work being done by volunteers. Additionally, the Court could not conclude definitively whether Fitzgerald spoke as a private citizen or public employee. While Fitzgerald did make his concerns known within his chain of command, he also participated in the union grievance process, which is outside his employment duties. Ultimately, the Court determined a reasonable jury could find a causal connection between his opposition to policies and his demotion, and ultimate resignation. As a result the Court would not rule as a matter of law for the County.

5.21 *Matthews v. City of New York*, 779 F.3d 167 (2d Cir. 2015)

Craig Matthews had been a police officer in New York City for several years before his precinct enacted what he perceived to be a "quota system." This system mandated the number of arrests, stop-and-frisks and summons police officers needed to conduct, which Matthews

perceived put a lot of pressure on officers. Matthews reported his concerns with the system to police Captain Timothy Bugge and an unnamed Precinct executive officer in 2009. Subsequently he also shared his concerns with his precinct's new commanding officer in January 2011. Matthews was concerned the system caused unjustified stops and arrests, and it was creating an adverse relationship between cops and the community. He brought a lawsuit against the police department after experiencing retaliatory actions such as denied overtime and vacation, separation from his career partner and humiliating treatment by superiors, which he perceived to be a reaction to his reporting his opposition to the quote system.

The only issue in this case was whether Matthews could succeed on his claim for retaliation under the First Amendment, which required determining whether he spoke as a private citizen on a matter of public concern. In this case the Court found that he did. Specifically, the Court found Matthews was concerned with the department's relationship with the community, which qualified as speech on a matter of public concern. Additionally, he spoke as a private citizen because it is not within his actual or constructive job description to address issues of public policy. Matthews is required as a police officer to report officers who violate the law, but he is never required to voice concerns about policy issues. Furthermore, Matthews spoke to people who were not in his typical chain of command, and who everyday citizens had access to for expressing concerns. This cemented his First Amendment protection.

5.22 *Gonzalez v. City of McFarland*, 2014 WL 5696551 (E.D. Cal. Nov. 4, 2014)

Before her position was dissolved, Anita Gonzalez worked in the Finance Department of the City of McFarland. The City of McFarland asserts that the department downsized from three to two positions for financial reasons; however, Gonzalez alleges downsizing was done in retaliation for exercising First Amendment protected speech.

Gonzalez's supervisor was made aware of a conversation Gonzalez and her two coworkers had over breakfast one morning where they addressed the issue of fuel reimbursements for supervisors and directors, as well as an alleged interoffice affair and Gonzalez' frustration with being prohibited from working the front counter in the Finance Department. Following this conversation, Gonzalez and her two coworkers were reprimanded, with her supervisor allegedly stating if it were up to him they would all be terminated. Within two months the City offered up the consolidation of the finance department's three positions to two, which resulted in Gonzalez's job dissolving.

Gonzalez brought this lawsuit against the City claiming it retaliated against her by dissolving her position for the conversations she had with her coworkers, which she claims is speech protected by the First Amendment. While not all of her speech qualified i.e. the interoffice affair and counter prohibition, the Court found that Gonzalez's discussion of the fuel reimbursement program was protected speech. Furthermore, Gonzalez qualified as a public citizen for the purposes of the First Amendment because she was not performing tasks she was paid to do at the time of the breakfast.

The Court easily identified the formal reprimand and termination as adverse actions, and held that her supervisor's comments about terminating her were direct evidence of the retaliation against her. The Court did not find the City's defenses credible, because of the close timing of

the reprimand and the termination, and the fact that the City can't prove they were considering department consolidation until this all transpired.

5.23 *Graber v. Clarke*, 763 F.3d 888 (7th Cir. 2014)

Richard Graber was a Deputy Sheriff Sergeant with the Milwaukee County Correctional Facility and simultaneously served as vice-president of the Milwaukee Deputy Sheriff's Association (the Union). After a tragic fatal accident outside the Correctional Facility one evening, jail deputy sheriffs were mandated to work overtime to help secure the accident site. Graber expressed concern that this may conflict with the union's collective bargaining agreement.

Graber had multiple conversations directly after the accident; one with two Sergeants where Graber expressed his concerns about deputy exhaustion and union compliance, another with Deputy Inspector Nyklewicz where both men allege the other was belligerent, unprofessional, and insubordinate. Graber had a final meeting with Inspector Bailey and Assisting Officer Clarke, where both men allegedly dressed-down Graber for his supposed opposition to enlisting deputies to assist with the accident. After his meetings, Graber began to withdraw from union activities and began having a challenging time with work, stating he was afraid to perform his job duties because he felt he was under a microscope, being looked at for fault. Ultimately, Graber was given a seven day suspension for signing a subordinate's deficient memo book, which led to his early retirement at age 45.

Graber brought a lawsuit against the County of Milwaukee alleging his First Amendment rights of association and speech were violated. Graber alleged, and the court agreed, that he exercised protected speech on a matter of public concern when he discussed the collective bargaining agreement with deputies directly after the accident, and expressed concern for public safety because of deputy exhaustion. However, the Court disagreed Graber exercised First Amendment free speech and association when he spoke to Deputy Inspector Nyklewicz. The Court found that Graber spoke as a disgruntled employee—not a citizen—and he did not speak on a matter of public concern. In his conversation with Nyklewicz, Graber never addressed his union concerns, and his approach was more akin to a personal attack on superiors, and workplace efficiency. Furthermore, the Court determined Graber's suspension was not connected to his protected speech during the time of the accident, so he could not qualify for an adverse employment action as a result of retaliation. Graber had only exercised protected speech when he initially spoke to deputies about his union agreement concerns, which did not have a causal connection to his suspension.

6. **Discrimination: Disability**

6.1 *City of Houston v. Proler*, 437 S.W.3d 529 (Tex. 2014).

Shayn Proler was a captain for the Houston Fire Department; he led the fire suppression crew. In 2004, Shayn allegedly refused to enter a burning building. He was reassigned to the firefighter training academy, but later returned to the fire suppression crew after he complained about the reassignment. In 2006, Shayn was again unable to respond to a fire. He was taken to a hospital, where he was diagnosed with transient global amnesia. After the incident, the

Department again reassigned Shayn to the training academy. Shayn sued, alleging the reassignment constituted disability discrimination.

The Texas Supreme Court held that Shayn was not reassigned because of a disability because his fear of running into burning buildings did not constitute a disability. A disability is a "mental or physical impairment that substantially limits at least one major life activity." The Court found that a fear of running into burning buildings did not meet this definition because it is a normal fear that did not limit Shayn's ability to perform major life activities when compared to the general population. Instead, Shayn's fear prevented him from a meeting specific qualification of working as a firefighter on a fire suppression crew. Because Shayn was merely unable to perform a specific job, the court held that he was not disabled and, therefore, did not have a valid disability discrimination claim.

6.2 *Spears v. Creel*, 31 AD Cases 832 (11th Cir. Apr. 15, 2015).

Lisa Spears worked as a certified corrections officer in the medical unit of the Wakulla County Jail. In 2012, Lisa was diagnosed with cancer. Later that year, Lisa was terminated, along everyone else in her unit, when a private health care provider took over the unit's duties. Lisa requested a transfer to the corrections department of the jail, preferably to a lieutenant position. On several occasions, the Human Resources Director told Lisa that there were no vacancies in lieutenant positions, but that she could be reassigned to a detention deputy position. Lisa never formally accepted the position and continued to request a position that would allow her to take intermittent leave or work part time. Lisa was terminated in July 2012 because she was "unable to perform the essential job functions of her position as detention deputy." Lisa sued for disability discrimination, alleging the Wakulla County Sheriff failed to make a reasonable accommodation for her disability.

The Eleventh Circuit Court of Appeals held that Lisa did not have a viable disability discrimination claim because she failed to identify a reasonable accommodation that would allow her to perform the essential job functions of an available position with the Sheriff. The court found that the Sheriff was not required to move Lisa to a non-vacant position or create a new position for her. Furthermore, Lisa's proposed accommodations regarding the detention deputy position where not reasonable because timeliness and working the entire shift were essential functions of the position. Because Lisa bore the burden of identifying a reasonable accommodation and failed to do so, the court held that the Sheriff was not liable to Lisa for employment discrimination.

6.3 *Yost v. City of Sandusky*, 31 AD Cases 786 (Ohio Ct. App. 2015)

While working as a battalion chief with the Sandusky Fire Department, Michael Yost was diagnosed with Parkinson's disease. Several years after his diagnosis, Michael's supervisor started observing and documenting changes to Michael's performance, such as hand tremors and a slowing gait. Michael's supervisors ordered several medical evaluations to determine whether Michael was still fit to serve as a battalion chief firefighter. Initial evaluations determined that Michael was still medically qualified to perform his job. However, a couple years later, several doctors determined that it was no longer safe for Michael to continue working as a firefighter. The City permitted Michael to take sick leave until his retirement a year later.

Michael brought a "regarded as disabled" disability discrimination claim against the City, arguing that he faced undue scrutiny despite being qualified for his position. The trial court and appellate court agreed that the City reasonably found changes in Michael's condition after his diagnosis. The possibility of changes to his abilities supported close monitoring of his functioning, including through physical evaluations. The fluctuation in his condition was a valid reason for the City to place Michael on leave and to eventually seek his retirement.

Around the time of Michael's later evaluations, the City eliminated the battalion chief position. The City allowed Michael to choose whether to accept a retirement package then, or whether to stay with the Fire Department but face a demotion. Michael elected to stay, and was demoted to the position of captain. Michael brought a retaliation claim against the City for his demotion. The trial court and appellate court concluded that the City was justified in terminating the battalion chief position due to a shortage of City funds. The appellate court also noted that Michael was not the only battalion chief affected by the elimination of that job position.

6.4 *Consent Decree, U.S. v. City of Baltimore*, No. 14-2684 (D. Md. Aug. 20, 2014)

The Department of Justice filed a suit against the City of Baltimore, alleging that Baltimore's fire department violated the Americans with Disabilities Act in its hiring practices. The fire department required job applicants to undergo medical examinations and disability-related inquiries prior to being offered employment. Such hiring practices constituted a pattern of discrimination, in violation of federal law. Baltimore and the Department of Justice resolved the case through a consent decree. Under the decree, Baltimore agreed to end discriminatory practices in hiring. Baltimore also agreed to implement training and new policies to ensure compliance with the Americans with Disabilities Act.

6.5 *Martin v. Estero Fire Rescue*, 30 AD Cases 78 (M.D. Fl. 2014)

Christopher Martin, a firefighter suffering from depression and anxiety, brought a claim against the Estero Fire Rescue, alleging discrimination and retaliation against him in violation of his civil rights. One of the symptoms of his chronic depression was drug use. He tested positive for drugs and was fired as a result of the drug test. However, Martin alleges that he was never under the influence of drugs while on duty, and that he has not used drugs for a significant period of time. He sought help from the fire department's Employee Assistance Program in an effort to treat his depression and drug use. Following the drug test, he asked the fire department to provide counseling as an accommodation for his depression-related disability. Thus, his positive drug test does not undermine his claim that he was discriminated against under the Americans with Disabilities Act. He also stated a claim for retaliation, as he was fired only two weeks after requesting accommodation for his disability. Since he brought suit against a government agency, he was not entitled to recover punitive damages.

6.6 *Silva v. Hidalgo*, 575 Fed.Appx. 419 (5th Cir. 2014)

Mary Alice Silva, a SWAT Team member for the Hidalgo police department, was terminated for failing to return to work after taking FMLA leave. She broke her leg while jogging and could not return to work when her FMLA leave expired. She requested light duty or desk duty ahead of her scheduled return date, as her leg had not fully healed. The department

denied her request, so she consulted her doctor for a medical assessment. The doctor concluded that she would need a few more months of physical therapy and was not ready to return to full duty. On the day her FMLA leave expired, she appealed the denial of her request for light duty to the department chief. He responded by informing Silva that no positions of the type she requested were available and that she had been terminated. Silva sued the city for failing to provide reasonable accommodations under the ADA.

The court rejected Silva's ADA discrimination claim, finding evidence that Hidalgo engaged in an interactive process with Silva to find a reasonable accommodation. The court recognized that the department had no positions available that would have accommodated Silva's needs. Moreover, Silva did not provide a reasonable estimate of when she could return to work, instead she told the department she would need "at least" one month, and her doctor's assessment said "at least" three months. The court held that the department need not keep an injured officer's job open for an indefinite amount of time.

6.7 *Wetherbee v. Southern Co.,* 754 F.3d 901 (11th Cir. 2014)

John Wetherbee accepted a job offer as a systems engineer with Southern Nuclear, contingent on the results of a medical examination. During his examination, he revealed to Southern Nuclear's medical team that he suffered from bipolar disorder. The medical team informed Southern Nuclear that Wetherbee could not operate "safety-sensitive systems and equipment" for one year while they verified his compliance with his medication regimen. Southern Nuclear rescinded Wetherbee's conditional offer, since Wetherbee's systems engineer position required working with such equipment. Wetherbee brought suit claiming Southern Nuclear was in violation of the ADA's provisions regarding post-offer medical inquiries. Wetherbee admitted he could not establish that he was a qualified person with a disability under the ADA's definition.

The court addressed whether the ADA protections against post-offer medical inquiries require a claimant to prove he is disabled under the statute. The court followed other circuits in holding that an individual seeking relief under the post-offer medical inquiries section of the ADA must prove he is disabled. The court found that the plain language of the post-offer medical inquiry provisions distinguished it from other sections of the ADA that do not require proof of a disability to bring a claim.

6.8 *Weaving v. City of Hillsboro,* 763 F.3d 1106 (9th Cir. 2014)

Matthew Weaving, a police officer in Hillsboro, Oregon, had difficulty working with his colleagues, and the department terminated him after determining he was tyrannical, unapproachable, arrogant, and vindictive. Among several other incidents, Weaving derogatorily called co-workers "salad eaters," and criticized the language skills of a Latino officer. Although Weaving excelled in the view of superiors, and earned a promotion to sergeant in 2007, several of his peers found him demeaning and abusive. The city placed Weaving on administrative leave, then terminated him in 2009. Prior to his termination, Weaving communicated that his interpersonal struggles resulted from his ADHD, a fact his clinical psychologist confirmed. He requested the department provide him with reasonable accommodations. He had reported a childhood diagnosis of ADHD to the city when he joined the department, but he denied any

ongoing symptoms. Weaving filed a lawsuit claiming the City fired him because of his ADHD disability, seeking relief under the ADA.

The court rejected Weaving's discrimination claim. The court found that Weaving's ADHD did not render him unable to work as a police officer, and thus did not give rise to ADA protection. Rather than being unable to communicate with others, the court determined that Weaving could control his behavior when interacting with superiors, but not peers and subordinates. This fact influenced the court's decision that Weaving's interpersonal problems did not "amount to a substantial limitation on the ability to interact with others within the meaning of the ADA." The U.S. Supreme Court later declined to review Weaving's case.

6.9 *Koch v. Vill. of Schiller Park*, 2014 WL 2744985 (N.D. Ill. 2014)

Daniel Koch, a police officer, filed suit against his department for discrimination under the ADA. He claimed the department demoted from detective to officer because of a heart condition. Koch suffered a heart attack in 2006. After a brief stint of light duty he returned to detective work. He endured several subsequent heart-related episodes while working, all of which his chief knew about. In a worker's compensation proceeding, Koch testified that patrol work caused less stress than detective work. Koch was assigned to patrol work in 2011, nine months after his testimony.

The department contested that Koch was demoted at all, instead arguing his move from detective was merely reassignment. Koch's rank never changed as both detectives and patrol officers carry the rank of "patrolmen." Koch contended that detectives receive a $200 monthly stipend, wear plainclothes and drive unmarked patrol cars. From this evidence the court concluded that Koch could proceed to a jury on his discrimination claims. The court found Koch's evidence that his reassignment was an adverse employment action akin to a demotion sufficient to support a jury finding in his favor.

6.10 *City of Houston v. Proler*, 437 S.W.3d 529 (Tex. 2014)

The Texas Supreme Court overturned a jury verdict for Capt. Shayn Proler, a firefighter who sued the city for discriminating against him for his fear of entering burning buildings. In 2004, a fellow firefighter complained that Proler would not enter a burning building, a fact Proler disputed. He was reassigned to the fire training academy over his objections, and quickly returned to fighting fires. In 2006, he experienced global transient amnesia at a fire, and failed to put on his gear or enter the burning building. He was unable to take orders and had difficulty walking. He was again reassigned to the fire academy and brought claims against the city for disability discrimination.

The court held that Proler's fear did not constitute a disability. A fear of entering burning buildings, the court said, is not a disability, because most people do not possess that job skill. Instead, the court found that firefighters possess unique ability to overcome this natural fear. Thus, Proler did not suffer from a disability and the evidence could not support a jury verdict in his favor.

6.11 *Withers v. Johnson*, 763 F.3d 998 (8th Cir. 2014)

Calvin Withers, an assistant probation officer under the supervision of Judge Leon Johnson, brought claims for ADA discrimination and FMLA interference and retaliation. Johnson terminated Withers for failing to timely notify the court that he could return to work after taking medical leave. Withers suffered from a back injury that initially limited his ability to carry objects over ten pounds, which his work rarely required. Later, he took FMLA leave at his doctor's request. After resting, his doctor certified him to return to work with a lifting restriction of twenty-five pounds. He left two vague phone messages for Judge Johnson but failed to notify him until a few days later that he was ready to return to work. County policy required employees to immediately notify their supervisor when they are able to return to work, or the County assumes the employee has resigned.

The court found no evidence that Johnson had discriminated against Withers for his back injury. Instead, the court held that the undisputed facts demonstrate that Johnson terminated Withers for his failure to comply with the county policy that he provide his supervisor with his medical release and notify him immediately upon clearance to return to work. Moreover, the court found no merit to Wither's reasonable accommodation claim, determining that Johnson had abided by all Wither's lifting restrictions. The court granted summary judgment on each of Wither's ADA claims.

6.12 *Anderson v. Harrison County*, 2015 WL 786940 (S.D. Miss. 2014)

Patricia Anderson, a country corrections officer, suffers from severe anxiety and depression. She sued the county for discrimination under the ADA on a failure-to-accommodate theory. Her doctor recommended that the county reduce her new shift from twelve-hour days back to the eight-hour days she had previously worked. The county refused Anderson's request, claiming it could not reasonably accommodate Anderson's shorter shifts without hiring extra staff. Hiring extra staff was not feasible given county budget constraints.

The court granted the county's motion for summary judgment, holding that Anderson failed to demonstrate that similarly situated employees were treated any differently. All correctional officers in her division switched to twelve-hour shifts. She identified an employee who worked eight–hour shifts, but she admitted in deposition testimony that the employee had different job duties. The court found this evidence insufficient, and dismissed her claims.

6.13 *DeBacker v. City of Moline*, --- F.Supp.3d ----, 2015 WL 351664 (C. D. Illinois 2015)

The City of Moline police department placed Michael DeBacker, a traffic investigator and firearms instructor, on administrative leave and ordered him to undergo a mental health examination after he expressed suicidal and potentially homicidal thoughts. The department's chief thought DeBacker was unfit for duty and required treatment for his mental health problems. After an initial psychiatric evaluation revealed that DeBacker had no suicidal or homicidal tendencies, the City demanded that he undergo voluntary inpatient treatment, or it would seek a court order of civil commitment. DeBacker admitted himself and left treatment three days later. He then took FMLA leave for two months.

After the city cleared DeBacker to return, he worked as a booking officer with several restrictions on his access to firearms, including having his firearm owner's identification (FOID) card revoked. DeBacker requested to return to his previous job and have his firearm rights reinstated. The city denied both of his requests. The city terminated DeBacker based on a state statute that does not allow an individual who has been a patient in a mental health institution in the past five years to obtain an FOID. An exception to the statute allowed a police officer to carry a firearm without an FOID. DeBacker sued, alleging discrimination under the ADA.

The court allowed DeBacker to proceed on his ADA claim, denying the city's motion for summary judgment. While DeBacker could not prove he had an actual disability under the statute, the court found enough evidence that the city perceived him to have a disability. The court also found DeBacker's showing that the departments reason for terminating him based on the lack of an FOID was merely pretextual, since the department actively interfered with DeBacker's request to have his FOID reinstated, and fired him before that process played out.

6.14 *Rabb v. School Board of Orange County*, 590 Fed.Appx. 849 (11th Cir. 2014)

Cynthia Rabb was a full time teacher at Winegard Elementary School in Orange County, Florida. When she suffered a stroke in 2008, the district created a part-time tutoring position to accommodate her medical needs. She held that position for two years until a new principal cut it because of budgetary constraints. The new principal offered Rabb a full time position or a transfer to a different school that had part-time positions available. Medical concerns did not allow her to accept either position. She brought discrimination claims against the district under the ADA for failure to provide reasonable accommodations.

The trial court dismissed Rabb's claims on summary judgment and the appellate court affirmed, ruling in favor of the school board. The court held that Rabb failed to make a sufficient showing that the her proposed accommodation—a part-time job at her original school—was indeed reasonable. The court held that although the district made the accommodation available to Rabb previously, it was not reasonable to offer it indefinitely. The court was persuaded because the district created the position for Rabb in the first place, never considered the position to exist permanently, and only had to cut it because of budgetary reasons. Because a reasonable accommodation could not allow Rabb to return to her position, she is not a qualified individual under the ADA.

6.15 *Howard v. City of New York*, 62 F.Supp.3d 312 (S.D.N.Y. 2014)

Christopher Howard, a New York City police officer, sued the city for discrimination based on his disability. Shortly after joining the force, Howard experienced symptoms related to anxiety. He suffered a panic attack on in February 2011 and his doctor prescribed him Zoloft to treat the anxiety. Howard felt like the Zoloft was not helping and underwent an evaluation with NYPD psychologists. The psychologist referred him to treatment with a psychiatrist. After several treatments with each doctor and several attempts to lessen Howard's anxiety with various anti-anxiety medications, the psychologist recommended that NYPD discharge Howard. After this recommendation, Howard reported that he no longer experienced anxiety or panic attacks. The NYPD followed the psychologists recommendation and discharged Howard.

The court granted summary judgment in favor of the city because Howard could not fulfill the essential functions of work as a police officer. Howard's self-assessment that he no longer experiences anxiety does not create a material issue of fact. Howard is not a medical expert, so his testimony cannot outweigh that of licensed psychologists who treated him several times.

6.16 *Michaels v. City of McPherson*, 30 AD Cases 192 (D. Kan. 2014)

Matthew Michaels, a police officer in McPherson, was fired after a termination hearing at which his supervisor, Chief of Police Robert McClarty, stated that Michaels engaged in insubordination, fell asleep on duty, and was involved in "numerous other circumstances and situations where he was no longer viable to be a Police Officer." Michaels brought a suit against the City, alleging violation of due process, disability discrimination, interference with Michaels' family medical leave, and defamation.

Michaels argued that Chief McClarty's statements about him at the termination hearing impugned his good name. He contended that he was entitled to a name-clearing hearing. The City asserted a qualified immunity defense on behalf of Chief McClarty. Because the court agreed that the City was entitled to qualified immunity, Michaels was not entitled to a name-clearing hearing. Chief McClarty's qualified privilege also protected the City from Michaels' defamation claim.

The court denied summary judgment motions about Michaels' Family Medical Leave claim. Michaels had requested two days of family medical leave in order to care for his stepdaughter, who needed a special medical test. The police department allowed Michaels to take one day of leave, but denied his request for the other day. The department instead required him to stay for a "mandatory" training. It was unclear whether the police department's operations would have been unduly disrupted had Michaels been permitted to miss the training. Michaels was thus permitted to continue toward trial on the claim.

The court further held that a jury needed to decide whether Michaels was terminated because of his alleged disability. Michaels had been disciplined for falling asleep on the job. However, after he was diagnosed with and treated for sleep apnea, the problem fully resolved. Nevertheless, Chief McClarty mentioned Michaels' sleep problems in his termination hearing. It was unclear whether Chief McClarty's statements about Michaels' sleep problems contributed to the decision to fire Michaels.

6.17 *Mendel v. City of Gibraltar*, 11-10496, 2014 WL 2558218 (E.D. Mich. June 6, 2014) *aff'd*, 607 Fed. Appx. 461 (6th Cir. 2015)

Paul Mendel, a former police dispatcher, brought a lawsuit against the City of Gibraltar alleging it unlawfully terminated him in violation of the Family Medical Leave Act. Mendel argues that the city interfered with his 12 weeks of FMLA, and because of that, his 12-week leave limit was suspended. Mendel argues the City interfered with his leave by firing him during the 12 weeks he was on approved leave. The City contended that Mendel had made it clear he would be unable to return by the end of the 12 weeks, and as such, Mendel did not report to work for any dates he was scheduled in February. Mendel was given the opportunity to provide a

doctor's note explaining his absence by February 16th, and Mendel did not return a doctor's note until February 20th. Subsequently, Mendel had an additional surgery in May and was not cleared to work until June.

Mendel argued for a non-traditional counting of weeks under the FMLA. The Court disagreed with counting his weeks in any manner inconsistent with a plain reading of the FMLA statute. Mendel could not have returned to work until June 1, which far exceeded the 12 weeks allowed to him under FMLA. The Court came to this conclusion by relying on previous cases that had determined a plaintiff cannot recover under FMLA, even if s/he is terminated during the 12 week leave, if the employee would not be able to return to work after 12 weeks. Even counting his hours in a manner most favorable to him, because of his part-time status before his injury, Mendel would not have had FMLA leave that would have gone until June 1.

6.18 *Silva v. City of Hidalgo, Tex.*, 575 Fed. Appx. 419 (5th Cir. 2014)

Mary Alice Silva was a SWAT team officer with the City of Hidalgo until she was terminated when she was unable to return. Silva broke her leg during a non-work activity and took 12 weeks of FMLA following the injury and surgery. When she realized she would not be back to full capacity by the time her FMLA leave was up Silva requested light duty. Her request was denied and Silva was told she had to return in her previous capacity or she would be considered to have resigned. Silva's doctor faxed over his prognosis that she would need at least one, possibly two, more months before she could return in full capacity. In response, Silva was told there were no available positions for her and she was terminated for failure to return to work.

In her lawsuit Silva argued that the City failed to engage her in a meaningful process to reasonably accommodate her. The ADA forbids employers from discriminating against a qualified person based on his/her disability. The Court determined that reasonable accommodation did not include holding one's position open indefinitely. An employer committed a violation if it engaged in a process of reasonable accommodation which then directly resulted in termination. The City maintained that it did not fire Silva for taking FMLA leave, but fired her because she was unable to perform the essential functions of her position when the leave expired.

6.19 *City of Port Orange*, Decision of Arbitrator No. 12/0317-3

At issue in this arbitration was whether an employee was separated with just cause after running out of Family Medical Leave time, and was unable to return to work and perform job duties. The aggrieved party, "D," injured his knee during a non-work related triathlon. He immediately advised his employer of the injury and requested FMLA, which was granted. On March 29, 2012, one day before his FMLA was up, D received a letter stating he had two options: contact his employer immediately about returning to work or resign due to inability to return to work. A non-response by April 2 would result in immediate termination. D alleges he tried multiple times to reach out to his employer to discuss his inability to return to work by April 1, returned all necessary medical forms supporting his inability, and attended an April 3 meeting to explain this to his employer. D was informed there was no light-duty alternative and since his FMLA had expired, he was being immediately terminated.

During arbitration it became evident that the employer's policy did not contain a provision that required the immediate termination of an employee who was going to exceed the 12 weeks of FMLA. The employee was not aware this was his ultimatum. Because of the employer's failure to communicate its expectation that D would return to work at full capacity by April 1, the termination decision could be set aside in arbitration. D was fully restored to his previous position.

6.20 *Gordon v. U.S. Capitol Police*, 778 F.3d 158 (D.C. Cir. 2015)

Following her husband's suicide, Officer Judy Gordon began suffering from depression. As an employee of the Capitol Police, she had available to her a system allowing employees to obtain pre-approval of a "bank" of leave authorized by FMLA, which does not require start or end dates. Gordon had previously applied for a bank of 240 hours of leave, and had been approved. Gordon was told one of her superiors was mad about FMLA requests and vowed to find a problem with hers.

Within two months of gaining approval to have a leave-bank Gordon was ordered to take a fitness for duty exam, based on her request for FMLA. While she waited to take it her police powers were revoked and she was assigned to administrative duties. Gordon passed the exam and was fully reinstated to all previous powers and positions. However, later that year, her sister died. Gordon scheduled therapy overlapped with work training. Gordon sought to draw upon her FMLA leave-bank to miss the training, which enraged her manager. Gordon brought claims against the capitol Police for interference and retaliation.

The district court had dismissed the claims, and the appeals court reversed that dismissal. The appeals court found that Gordon adequately plead facts of retaliation. Gordon's request and draw upon FMLA leave time was protected behavior under the FMLA. Gordon provided evidence that Capitol Police actions resulted in loss of wages, incurring travel expenses and diminished prospects for future pay increases, all of which worked to dissuade her from engaging in protected activity. Furthermore, Gordon did not need to be deprived of FMLA leave in order to bring this suit, it is sufficient that an employer's actions had a "reasonable tendency" to interfere with an employee's rights, even if it did not ultimately happen.

6.21 *Pearson v. Cuyahoga Cnty.*, 596 Fed. Appx. 358 (6th Cir. 2014)

Starting in mid-2008, Derek Pearson began missing work due to several serious medical issues, receiving reprimands for missing more than 10 hours of work without leave (AWOL). After accruing a second round of 10 hours of AWOL, Pearson was reprimanded at a higher degree under the County's attendance control plan. The County twice approved intermittent FMLA leave due to surgeries. In February 2012, Pearson missed four work days in a row; calling in each day to access his intermittent leave bank. In dispute is why Pearson missed those four days. Pearson only had approved intermittent FMLA leave for hip pain, not chest pain. Pearson contends the absence was for hip pain and the County contends it was for chest pain. The County labeled Pearson's absences in February as AWOL thereby accruing further AWOL hours for Pearson. Pearson ultimately underwent a pre-disciplinary conference leading to his termination.

Pearson brought a lawsuit against Cuyahoga County, alleging it interfered with his rights under the Family Medical Leave Act. The County countered that it properly terminated Pearson in compliance with its neutral Attendance Control Plan. There Court determined there were open questions of fact as to what medical reason Pearson missed those days for, specifically relying on discrepancies surrounding when medical re-certification reports were remitted to Pearson's employer. Because of these remaining questions the County was not entitled to summary judgment.

6.22 *Ferguson v. Williamson Cnty. Dep't of Emergency Commc'ns*, 18 F. Supp. 3d 947 (M.D. Tenn. 2014)

Plaintiff Danielle Ferguson was a dispatcher for the Williamson County Department of Emergency Communications. Upon becoming pregnant, Ferguson was no longer able to work 13 hour shifts. Ferguson's schedule underwent a few variations so as to accommodate her restricted work hours. Between August 2012 and December 2012 Ferguson was under restrictions but had not been assigned a new shift, resulting in a deficit of 176.5 hours worked less than had she been scheduled absent her medical restrictions.

Both parties maintain different factual records as to how much FMLA time was required so as to get Ferguson through her intermittent leave based on her scheduling restrictions. However, Ferguson presented evidence of pregnancy discrimination based on the fact that her employer knew of the pregnancy and required her to take FMLA intermittent leave instead of accommodating her with a schedule she could maintain based on her restricted hours. Because of these material questions of fact, the employer cannot be awarded summary judgment.

6.23 *Cook v. City of Philadelphia*, 2015 WL 913201 (E.D. Pa. Mar. 2, 2015)

Michael Cook brought this lawsuit against the City of Philadelphia based on his belief that the City ultimately did not hire him as a police officer because they perceived he had a psychological disability. Cook twice attempted to get hired as a police officer. The first time he did not pass a polygraph examination, which he challenged unsuccessfully. The second time, Cook passed the polygraph and all other milestones, but his employment offer was rescinded based on his psychological exam results. When asked, the City refused to provide Cook with a copy. Cook alleges in his lawsuit that the City "regarded him" as having a psychological impairment or disability within the meaning of both the ADA and Rehabilitative Act (RA).

Cook could not succeed on his ADA claim, because it requires administrative exhaustion before bringing a claim in federal district court. On his RA claim, the Court determined Cook provided sufficient facts and evidence to bring a claim. Utilizing the third definition of "disabled" under the ADA for Cook in this case, "being regarded as having…an impairment," the Court accepted Cook's contention that the City rescinded its employment offer once it regarded him as having a mental or psychological disability. This was sufficient evidence to deny the City's motion to dismiss the complaint entirely.

6.24 *Butler v. State, Louisiana Dep't of Pub. Safety & Corr.*, CIV.A., 2014 WL 6959940 (M.D. La. Dec. 4, 2014)

For 13 years Scott Butler worked as a Louisiana State Trooper for the Department of Public Safety. Butler transferred between divisions during that time, but in 2010 requested to transfer to road patrol from the Intelligence field training program. Butler participated in ride-alongs to acclimate to his new division and received consistently satisfactory performance reviews.

In January 2011, Butler's supervisors requested Butler participates in a Fitness for Duty examination (FFDE). They requested it based on reviewing his performance logs. A third party vendor facilitated the FFDE, and when Butler appeared to take it, he submitted a letter from his private clinician stating he had been diagnosed with Obsessive Compulsive Disorder and been treated for anxiety and depression. However, he no longer exhibited any symptoms. Based on the third party's FFDE, Butler was deemed unfit and relieved of his duties in February 2011. Within a month Butler submitted additional certifications that his condition was neither severe nor bothersome, and was reinstated. Butler filed this lawsuit for disability discrimination, and the Department ordered him to undergo a second FFDE. Butler was ultimately terminated for not complying with the second FFDE order.

The Department contends Butler cannot succeed on an Americans with Disabilities Act claim because he cannot prove discrimination under the "regarded as" disabled theory. Even if Butler argued that successfully, the Department's actions were warranted under "business necessity." The Court disagreed. Butler was able to provide a reasonable argument that he was qualified for the job because of the satisfactory performance reviews he received prior to the FFDE orders. Furthermore, the Court determined that Butler had adequate evidence that he suffered adverse employment actions. This was evidenced by his termination and the ordered FFDEs. The Department was unable to prove their actions were warranted, or that Butler proved a direct threat to others. As a result, the Court did not rule as a matter of law in favor of the Department.

7. **Discrimination: Pregnancy**

7.1 *Wilson v. Ontario Cnty. Sheriff's Dep't*, 2014 BL 220669 (W.D.N.Y. Aug. 08, 2014)

Racheal Wilson was a corrections officer employed by the Ontario County Sheriff's Department ("OCSD"). Wilson alleged that the OCSD discriminated against her after the birth of her son in 2010. Wilson alleged that she could not take compensated breaks over her normal break time to express breast milk. Wilson also alleged that the OCSD retaliated against her for complaining, that she was subjected to a hostile work environment, and that she was deprived of equal protection of the laws in violation of 42 U.S.C. § 1983.

The district court held that Wilson failed to state a claim under 42 U.S.C. §1983 against the sergeant who refused to reassign her from a setting she thought was too dangerous and physically demanding and told her she would have to use leave to take breaks to express her breast milk each day. Wilson's claim fails because she does not allege that similarly situated nonpregnant employees could request reassignment or additional breaks. According to the court,

employers are not required to extend any benefit to pregnant women they do not already provide to other disabled employees.

7.2 *Young v. UPS,* 135 S. Ct. 1338, 191 L. Ed. 2d 279, 2015 BL 82478 (2015)

Peggy Young was a part-time driver for United Parcel Service (UPS). In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her she should not lift over 20 pounds during the first 20 weeks of her pregnancy or over 10 pounds thereafter. UPS required drivers like Young to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage. Young subsequently filed a federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that UPS accommodated other drivers who had similar limitations.

By a 6-3 vote, the U.S. Supreme Court reversed the U.S. Court of Appeals, holding that UPS violated the Pregnancy Discrimination Act (PDA) by not offering light duty when Young was pregnant while still accommodating nonpregnant drivers with the same work restriction. The PDA prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" and requires employers to treat "women affected by pregnancy" the same as other non-pregnant employees with similar work limitations.

8. Discrimination: Race/Ethnicity/National Origin

8.1 *Novielli v. Hudson Cnty. Corr. Ctr.*, 126 FEP Cases 1884 (D.N.J. Apr. 23, 2015) (slip opinion).

Giacomo Novielli, a white man, was employed by Hudson County as a correctional officer. Giacomo exhausted his sick time in 2004 and was often absent from work. Hudson County gave him a warning and required Giacomo to bring a doctor's note for each future sick day or absence. In 2005, Giacomo exhausted his fifteen sick days for the year by February 8 and missed an additional eleven consecutive days during the remainder of the month. Giacomo was charged with chronic or excessive absenteeism, among other charges. Hudson County terminated Giacomo in June 2005. Giacomo sued Hudson County for employment discrimination. Hudson County moved for summary judgment, claiming Giacomo had failed to establish a case for employment discrimination because he was not a member of a protected class.

The district denied the motion for summary judgment after it held Giacomo had established a case for reverse discrimination. Typically, a plaintiff must establish that he is a member of a racial minority in order to establish a case for employment discrimination. For white plaintiffs asserting reverse discrimination claims, however, the court found that the plaintiff must instead "present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably based on upon a [protected] trait," like race. To support his claim Giacomo presented evidence that (a) sixty-two African American officers had greater absences than Giacomo and many were still employed by Hudson County, and (b) Hudson County routinely negotiated or disposed of charges with non-white officers, but did not offer a settlement agreement to Giacomo. The court found that Giacomo had presented sufficient

evidence and, therefore, the court held that Giacomo had established a case for employment discrimination.

8.2 *Thomas v. Johnson*, 123 FEP Cases 144 (S.D. Texas May 22, 2014) (slip opinion).

Jonathan Thomas was an African American border patrol agent intern for the United States Border Patrol. One day on duty, an incident occurred during a physical training session with two border patrol agent interns. Jonathan and two border patrol agents were allegedly present. After the incident, Jonathan made statements that he did not witness what occurred. Video footage made some of Jonathan's factual assertions questionable. After further investigations, Jonathan was terminated for "a lack of candor" and "a lack of good judgment." The border patrol agents present during the incident only received suspensions. Jonathan sued, alleging he was terminated because of his race.

The court held that Jonathan did not satisfy his burden of establishing the reason for his termination was merely pretext. Jonathan attempted to prove pretext by showing disparate treatment of similarly situated employees – the border patrol agents present during the incident. The court, however, did not agree. The court found that the border patrol agents were not similarly situated to Jonathan because Jonathan was still an intern. The court found that the job and work responsibilities for interns were "drastically different" than those for permanent border patrol agents. Furthermore, interns did not receive the same procedural protections as permanent agents. Consequently, the court held that Jonathan had failed to show disparate treatment and failed to satisfy his burden of establishing pretext.

8.3 *Bonenberger v. St. Louis Metropolitan Police Department*, No. 4:12CV21, 2014 WL 5343323 (E.D. Mo. 2014)

David Bonenberger brought a suit against the St. Louis Metropolitan Police Department alleging reverse race discrimination in the department's assignment of a job transfer. Bonenberger is a white male police sergeant. He applied for the position of Assistant Academy Director for the police academy. The position was not considered a promotion from the role of sergeant, but it came with benefits such as prestige, more supervisory responsibilities, and a more regular work schedule. Two other sergeants applied for the position, including Angela Taylor, an African-American female who ultimately got the job. Neither Bonenberger nor Taylor possessed the supervisory experience called for in the job assignment. Bonenberger, however, had more supervisory experience than Taylor, including extensive experience teaching at the Academy and training officers. Despite Bonenberger's experience and interest in the Assistant Director position, the Academy Director and a former Assistant Director discouraged him from applying to the job. He was told that the Academy was not interested in hiring a white male for the position; instead, the Academy wanted a black female in the position. A jury ultimately concluded that the police department discriminated against Bonenberger.

8.4 *Carter v. Columbia Cty.*, 125 FEP Cases 1707 (11th Cir. 2014)

Valinda Carter, an African-American woman, worked as a police dispatcher and shift supervisor for a Sheriff's Office. While off duty, Valinda received a call from her brother, Kavin, who had been stopped by a police officer for a seatbelt violation. At some point during the traffic

stop, police officer Joshua Latimer took Kavin's phone from him. According to Officer Latimer, Valinda yelled at him over the phone and accused him of racially profiling her brother. Officer Latimer submitted a report detailing his interaction with Valinda. The report was added to Valinda's personnel file, and she was given the opportunity to file a rebuttal statement. Valinda submitted a rebuttal, in which she reported that Officer Latimer yelled at her in a hostile manner and refused to let her speak. However, video and audio recordings of the traffic stop showed that Valinda's rebuttal statement was "blatantly false." Valinda was fired for violating a county policy that prohibited lying, falsification of a document, and other dishonesty.

Valinda filed a claim against the county alleging that she was fired due to race discrimination and retaliation. She argued that she was treated differently than a white dispatcher who had been suspended by not terminated for cursing at a deputy and refusing to answer calls from that deputy. The Eleventh Circuit disagreed that the cases were comparable. The court held that the white dispatcher's discourteous conduct was substantially different than Valinda's false accusations, and thus warranted a different level of discipline. The court concluded that Valinda's termination was consistent with the County's disciplinary policy and was not motivated by racial discrimination or retaliation.

8.5 *Thompson v. City of Waco*, 764 F.3d 500 (5th Cir. 2014), reh'g denied, 126 FEP Cases 293 (5th Cir. 2015)

Allen Thompson worked as a detective for the Waco Police Department. Several white officers and Allen, a black officer, were temporarily suspended based on allegations that they had falsified time sheets. When the officers were subsequently reinstated, written restrictions were imposed upon Allen that limited his ability to work with evidence or conduct investigations. The restrictions were not imposed upon the white officers. Allen sued the City for racial discrimination, arguing that the written restrictions stripped him of his ability to perform essential job functions. Allen alleged that the restrictions were functionally equivalent to a demotion. The appellate court agreed that Allen plausibly alleged an adverse employment action. Thus, the court reversed the district court's dismissal of the case and remanded the case for further proceedings.

8.6 *Jones v. City of St. Louis*, 126 FEP 1872 (2015)

Keith Jones, a black electrician for the City of St. Louis, brought three claims of racial discrimination against the City. Jones faced discipline for allegedly poor performance at work. After failing to meet expectations in multiple performance areas, he was placed on a Mandatory Improvement Plan. He suffered a temporary pay cut while on the Improvement Plan. Additionally, following a discrepancy in Jones' paperwork, his supervisor considered terminating him. Instead, she issued a written reprimand. Jones alleges that the stress from this incident caused him to take four months of sick leave. Later, Jones suffered a hypoglycemic episode while driving, which called into question his fitness for duty. He was reassigned to a position that required less driving. The City refused to accept notes from Jones' doctor indicating that he could safely return to a position with more driving.

The court rejected Jones' claims associated with each of these incidents. First, the court determined that the City had an adequate, nondiscriminatory reason for placing Jones on an

improvement plan, given his poor performance across performance areas. Second, the court concluded that Jones' decision to take sick leave following a reprimand from his supervisor did not count as an adverse employment action. Finally, the court held that Jones did not exhaust his administrative remedies regarding the doctor's notes.

8.7 *Hagan v. City of New York*, 124 FEP Cases 198 (S.D.N.Y. 2014)

Special Hagan worked as an Equal Employment Opportunity (EEO) Officer in New York, investigating, training, and advising staff on the City's EEO policy. Based on her interactions with individual defendants—commissioners of various city departments—Hagan brought a suit against the City alleging race discrimination, an environment of cronyism, a hostile work environment, and retaliation. Hagan alleged that she was hired because she was African American. She argued that her hiring was not intended to promote diversity but rather to pacify other employees who had complained about race discrimination. When Hagan attempted to investigate complaints, she experienced resistance and retaliation from various City department commissioners. Hagan was later transferred to a new department. She was replaced by a Caucasian with significantly less experience, but who received a higher rate of pay. Hagan was then terminated from her new position. Most of Hagan's claims survived summary judgment. The court accepted Hagan's argument that a neutral policy of cronyism led to inferior terms and conditions of employment for African American employees.

8.8 *Taylor v. Lee Cnty. Sheriff's Office*, 2014 WL 2565554 (M.D. Ga. 2014)

Taylor, an African-American female detention officer, sued her employer for race discrimination after the county assigned her to the night shift. Her shift assignment did not result in a pay decrease, change in position, or a loss of prestige. In fact, she was eventually promoted to shift supervisor. Prior to her assignment to the night shift, Taylor had told Major Fordham, who was in charge of shift scheduling, that she hoped to be at home to care for her ill husband in the evenings.

The court ruled that Taylor did not suffer an adverse employment action and therefore, could not proceed on her race discrimination claim. While she had personal reasons for preferring the day shift, her assignment to the night shift did constitute a demotion in form or substance. Taylor could not prove that the night shift involved a loss of pay, prestige or any other benefit.

8.9 *Jenkins v. City of San Antonio Fire Dep't*, 12 F.Supp.3d 925 (W.D. Tex. 2014)

Randy Jenkins, an African-American district chief for the San Antonio Fire Department, was not selected for a different district chief position within the department. The position, while equivalent, oversaw different divisions within the department. He sued the department alleging race discrimination.

The court dismissed his discrimination claim, holding that non-selection for an equivalent, lateral position does not constitute an adverse employment action. Jenkins offered no evidence that the position he sought would have resulted in an increase in compensation or prestige, or that it required more skill than his current position. Jenkins subjective belief alone cannot establish that the position carried higher prestige.

8.10 *Johnson v. Baltimore City Police Dep't*, 2014 WL 1281602 (D. Md. 2014)

Richelle Johnson, an African-American police officer in Baltimore sued her department for discrimination based on her race and disability. She suffered several injuries while serving as an officer, and requested a light-duty accommodation. Instead, the department placed her on a medical suspension and eventually forced her to retire. She claims other officers, who were not African-Americans, were assigned to light duty roles.

The court ruled that placing Johnson on medical suspension constituted an adverse employment action, a necessary element to sustain her discrimination claim. While Johnson received her standard salary while on medical suspension, she lost the opportunities for overtime pay and secondary employment, which she alleged caused a reduction in her income. The court held the allegation of a significant loss of income was a proper allegation of an adverse employment action. The court refused to dismiss Johnson's claim.

8.11 *Morgan v. City of Rockville*, GJH-13-1394, 2015 WL 996630, at *1-3 (D. Md. Mar. 4, 2015)

Courtney L. Morgan, an African American male, claimed that he was terminated during his probationary period as chief of the city's inspection division due to racial discrimination. Susan Swift of the city hired Morgan and set up weekly progress meeting for him during the probationary period. Morgan claimed that Swift attended these meetings and never complained about his performance. He testified that other city employees at lower levels were paid an equivalent or higher salary and two such employees made comments about another employee's accent and referred to an African American's hair as "kinky" or "nappy." In his six-month evaluation, Morgan received an unsatisfactory rating in three categories and the city terminated him shortly thereafter. Prior to Morgan's termination, Swift provided a memorandum to the city's manager and human resources director informing them why Morgan should be terminated during his probationary period, giving examples of Morgan's deficiencies. Morgan filed a claim of racial discrimination and the city removed the case to the district court.

The court held that Morgan could not show that the city's explanation for terminating him was pretextual nor that he met the city's legitimate performance expectations. According to the court, the city put forth evidence of a legitimate, nondiscriminatory reason for terminating him. The memorandum from Swift included specific reasons and examples for Morgan's termination during his probationary period. Further, the court stated that Morgan had 'a steeper climb' to proving pretext because, where "the firer and hirer are the same individual and termination of employment occurs within a relatively short time space following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." The court granted the city's motion for summary judgment and dismissed Morgan's complaint with prejudice.

8.12 *Price v. Grasonville Volunteer Fire Dep't*, CIV.A. ELH-14-1989, 2014 WL 7409891 (D. Md. Dec. 30, 2014)

Oscar L. Price, who is African American, volunteered with the Grasonville Volunteer Fire Department (Department) for twenty-six years. Although the Department did not

compensate Mr. Price directly for his services, Price claimed he was entitled to certain benefits, amounting to compensation, pursuant to several Maryland statutes. Price alleged that he became the subject of racial discrimination and harassment by the Department's new supervisor and staff, including repeated instances of derogatory race-based comments and acts to embarrass and mock him. Price filed a Charge of Discrimination with the EEOC. Upon notice to the Department, Price claimed the Department retaliated by removing his gear from his locker so he could not respond to fires, effectively discharging him without affording him any due process. The EEOC issued Price a Notice of Right to Sue and Price sued the Department, asserting employment discrimination on the basis of race, a racially hostile work environment, employment discrimination on the basis of race, and retaliation. The Department moved to dismiss, alleging that Price could not recover because he was not an employee.

The court rejected the Department's argument that Price was not a "employee" under Title VII, where under Maryland statutes, Price was entitled to certain benefits that could amount to compensation. Such benefits included "line of duty" benefit available upon injury or death, tuition reimbursement, tax exemptions, and discount on commemorative license place for private vehicle. According to the court, Price had alleged facts, coupled with Maryland law that stated plausible claims under Title VII on the basis of his employment status.

8.13 *Harstad v. City of Columbus, Miss.*, 1:13-CV-004-DMB-DAS, 2014 WL 4913966 (N.D. Miss. Sept. 30, 2014)

Gregory M. Harstad, a Caucasian patrolman for the police department in Columbus, Mississippi, applied for the vacant Chief of Police position. Harstad's prior experience included over 25 years in the United States Air Force and as a trooper for 5 years in the North Dakota Highway Patrol. When Harstad did not pass the initial screening, he met with Patricia Mitchell, the Human Resources Director for the City. Mitchell told Harstad that his military background did not count experience and he therefore failed to meet the position requirements. Harstad asked to be reconsidered and explained in detail why his military experience should be pertinent experience for the position. Harstad then filed a grievance with the Columbus Police Department stating that he had been discriminated against and his application was not given fair and equal consideration. The City Council voted against Harstad's reconsideration for police chief and Harstad then filed a charge of racial discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued Harstad a notice of right to sue letter. Harstad sued the City, alleging that the City discriminated against him based on race in violation of Title VII of the Civil Rights Act of 1964. The City asserted that Harstad lacked the minimum supervisory for Chief of Police and that race was not a factor in its hiring decision. Harstad argued that he was clearly better qualified than the selected candidate and the City amended the job requirements so African–Americans would qualify.

The district court, denying the City's motion for summary judgment, held that Harstad's evidence when viewed in the light most favorable to him called into question the City's proffered reason for not promoting or further considering him for police chief. Mitchell testified that the first draft of the police chief vacancy ad listed graduation from an accredited four-year university or college as a preference, not a requirement. Before publishing the ad, the City's COO directed Mitchell to change the ad from preference to requirement. The evidence showed that after seeing the ad in the newspaper, the Mayor of Columbus, an African-American man, recommended to

the COO that the graduation requirement be changed back to a preference. Harstad also testified that it was well-known that the city planned to hire a black police chief and three officers told Harstad he would not be promoted because of his race. Harstad presented evidence that the Mayor knew the hired candidate, an African-American male, for over twenty years and participated in the initial screening. The district court could not conclude however that Harstad was better qualified than the candidate hired for the position. While Harstad had extensive military experience, he failed to submit evidence that his military experience was comparable to the selected candidate's law enforcement experience.

8.14 *Crape v. City of Battle Creek*, 1:13-CV-1063, 2015 WL 2201563 (W.D. Mich. May 11, 2015)

Jason Crape, an African American firefighter, applied for a Training Officer position with four other applicants, two of which were Caucasian and two were African-American. Prior to his application for promotion, the City of Battle Creek Civil Service Commission promulgated rules for the hiring and promotion of firefighters. Administered by a third party vendor, the process scored an applicant's written and oral examinations, civil service file, and seniority to produce a final ranking score. Eligibility for a promotion required a minimum score of 70. After completing the testing and interview process, Crape ranked fourth on the eligibility list for promotion to Training Officer. The highest ranked applicant accepted the position but resigned after two years. The position was then offered to the next applicant who declined and then to the third-ranked applicant who accepted the position. Shortly thereafter, the Training Officer list expired. Later, when the position again became vacant, the City did not offer the position to Crape. Crape filed a complaint, alleging racial discrimination, disparate treatment, and violation of equal protection.

The district court held that Crape could not show that the city's non-discriminatory, legitimate reason not promoting him was pretextual. According to the court, Crape failed to demonstrate that he was similarly situated to the Caucasian firefighter who received the promotion or to another Caucasian firefighter higher on the list. Both of the Caucasian firefighters had experience training firefighters whereas Crape's experience was as a military instructor. Both had more seniority than Crape and performed differently in the application process. The court found it implausible to conclude that Crape was a plainly superior candidate. Further, the court held Crape could not prove an adverse impact on African-American applicants. The process was administered by an outside vendor and there was no statistical evidence of adverse impact.

8.15 *Martin v. City of Atlanta*, 155 Ga. App. 628, 271 S.E.2d 882 (1980)

Under a new process initiated by Denis Rubin, Chief of the City of Atlanta Fire and Rescue Department ("the Department"), captains that met certain minimum service qualifications, passed an exam, and interviewed with a panel of officials were ranked as "outstanding, "well qualified, or "qualified." The process created a ranked list in 2004 and 2007 and Rubin made promotional appointments from these lists. In 2004, Rubin asked the panel to change one Captain's ranking to "outstanding", so the captain, a Caucasian female, could be promoted to a position for which she was specifically trained and again in 2007, Rubin asked that the panel change an African American Captain's ranking to "outstanding" so he could be

promoted to a position for which he was qualified and in which he alone expressed interest. Russell E. Martin and twenty-seven other Caucasian Captains, the Appellants, filed a complaint against the City of Atlanta and Rubin, alleging that they were denied promotions because of their race. Prior to trial, the parties stipulated that the creation of the lists was not the result of discrimination and appellants agreed not to introduce the individual qualifications of the candidates or challenge the lists' composition. Rather, appellants contended that Rubin's selection from the panel-generated lists resulted in disproportionate under-representation of white candidates. Following a jury trial, the judge granted judgment as a matter of law against Appellants who belonged to lower-ranked categories because Rubin made no promotions from a lower list until he exhausted candidates in a higher-ranked category. The judge found that the Appellants failed to establish pretext but allowed claims from those who were ranked as "well qualified" in the 2004 list and "outstanding" in 2007 to proceed to the jury. The jury returned a defense verdict on the claims, concluding that the promotions were not denied because of race.

The Eleventh Circuit Court of Appeals affirmed the district court, holding that the court did not err in granting city fire department's motion for judgment as a matter of law under the *McDonnell Douglas* framework. The Eleventh Circuit agreed that Rubin testified to a legitimate, non-discriminatory reason for not promoting appellants because they were ranked objectively in lower categories on the 2004 and 2007 lists. The Eleventh Circuit also held that the evidence presented by appellants failed to establish pretext. First, Rubin's comments on race and efforts to balance and diversify the workforce could not alone establish pretext. Second, Rubin's requests to elevate two candidates into the "outstanding" category so he could promote them also failed to establish pretext as one candidate was Caucasian, the same protected class as Appellants, and the other requested promotion to a section that no one expressed interest or desire to be in. The Eleventh Circuit held that since appellants stipulated that the compilations of the 2004 and 2007 lists were race–neutral and agreed the case was a disparate-treatment case, appellants argument that the district judge ignored and excluded evidence was misleading. Because appellants failed to establish pretext, the district judge did not err in partially granting judgment as a matter of law.

8.16 *Abrams v. Dep't of Pub. Safety*, 764 F.3d 244 (2d Cir. 2014)

Frederick M. Abrams, a black detective, unsuccessfully sought to join the Eastern District Major Crimes Unit (EDMCU) crime van (the "Van"), a specialized elite unit comprised of five to six EDMCU detectives. There was no formal application process for assignment to the Van and Abrams received various reasons for his continued non-selection. Although some of the eight detectives selected for the Van from 2004 to 2009 had a college degree, Abrams had more training and seniority. In 2007, Abrams applied for the Van with a strong recommendation from his supervisor. His supervisor reported that despite his recommendation, the deciding Captain found another detective to be a "better fit" for the Van than Abrams. The supervisor stated in his deposition that it crossed his mind that the Captain's statement could relate to race. Similarly, another detective of the Van, consulted during the selection process, stated that Abrams "did not fit in." Abrams filed a series of CHRO (Comm. Human Rights and Opportunities Retaliation/Hostile Work Environment) complaints, including claims for discrimination, retaliation, and hostile work environment. In 2010, Abrams was reassigned to the Casino Unit. There, he no longer participated in Major Crime investigations and his commute doubled. Though Abrams was later assigned back to Major Crime investigations, he was assigned to a

different troop. Abrams then sued the Department of Public Safety ("DPS"), individuals involved in the Van detective selection process, and the DPS's affirmative action officer. Abrams asserted race discrimination for his failure to be transferred into the Van and retaliation based on his transfer to the Casino Unit after his complaints. The district court granted summary judgment in favor of the DPS and the individual defendants as to all but one of Abram's retaliation claims. Subsequently, the district court entered judgment on jury verdict in favor of the DPS on the remaining retaliation claim. Abrams appealed.

The Second Circuit reversed the district court's dismissal of Abrams's claim against DPS, finding that Abrams had produced sufficient circumstantial evidence to support a reasonable inference of discrimination. Central to this finding, however, said the court, was the inclusion of the two statements proffered by Abrams: (1) the comment that Abrams "did not fit in" with the other Van members and (2) the Captain's comment that another detective would "fit in better" than Abrams. The Second Circuit held that neither statement was presented for the truth of the matter asserted, but whether those statements were made and concerned Abrams. The phrasing "better fit" or "fitting in" are such that they might have been about race and when construing the facts in a light most favorable to the non-moving party, those phrases were enough to raise a genuine dispute whether the proffered reasons for Abrams's non-assignment to the Van were pretextual. Finally, the Second Circuit noted that the non-discriminatory reasons for not selecting Abrams, particularly his poor writing reviews and lack of a college education were questionable as the poor reviews were largely from his time in police training many years ago and more than one-third of the persons selected for the Van had no college education.

8.17 *Margerum v. City of Buffalo*, 83 A.D.3d 1575, 921 N.Y.S.2d 457 (2011)

Twelve white firefighter plaintiffs alleged that the City of Buffalo engaged in reverse, disparate treatment and racial discrimination by permitting promotion eligibility lists to expire before their maximum legal duration. The white firefighters alleged that if the lists had been extended to their maximum duration of four years, they would have received promotions. The historical background dated back to 1974 when the United States sued the City of Buffalo alleging the written civil service examination for entry-level firefighters and police officers had a discriminatory adverse impact on minorities. The District Court found that the City's continued use of the State's examination was part of a pattern or practice of discrimination against African Americans, Hispanics and women in the fire and police departments. In 1998 and 2003, Men of Color Helping All (MOCHA), a not-for-profit organization of African American firefighters, brought putative class actions against the City, alleging racially discriminatory practices by the Buffalo Fire Department in violation of Title VII and the New York Human Rights Law (MOCHA), claiming that the 1998 and 2002 examinations used to select firefighters for promotion had an illegal disparate impact against African American firefighters (MOCHA I and II). While MOCHA I & II cases were still pending, the City allowed the promotion eligibility lists to expire before the four-year maximum duration had elapsed. Three weeks later, the United States Supreme Court concluded before an employer could engage in intentional discrimination to avoid or remedy an unintentional disparate impact, the employer had to have a strong basis in evidence to believe it would be subject to disparate-impact liability if it failed to take the race-conscious, discriminatory action. At the direction of the Appellate Division, both sides renewed their arguments to the Supreme Court and cross-moved for summary judgment. The New York Supreme Court granted plaintiffs' motion for summary judgment. The court concluded that the

City had failed to meet the strong basis in evidence standard set forth by the U.S. Supreme Court and the Appellate Division affirmed.

The New York Court of Appeals reversed the grant of summary judgment on the reverse disparate treatment claim of the white firefighters. Ruling 4-1 in favor of the city, the New York Court of Appeals concluded that the central issue in the lower court - whether officials had "a strong basis in evidence" to believe they would lose another discrimination case if they promoted more white firefighters - should not have been decided without a hearing.

8.18 *Williams v. Alabama Dep't of Corr.*, 2014 WL 2968457 (M.D. Ala. July 2, 2014)

Mr. Iran Williams was a corrections officer with the Alabama Department of Corrections (ADOC). He was terminated for using force with inmates including striking an inmate without justifiable cause and not filing an accompanying report, and hitting an inmate on the side of his head with an open hand several times and again not filing an incident report. Williams was dismissed after the second infraction. Williams contends he was racially discriminated against because others had been in similar situations and were not terminated.

In coming to its conclusion that Williams was not terminated for racial discrimination, the Court maintained that Williams had not been treated less favorably than other people in his situation. Williams proffered another employee, who is white, with similar misconduct that was only suspended and not terminated. The Court noted that unlike Williams, this employee had not failed to report his incidents to supervisors, and never attempted to enlist other officers to lie on his behalf. Furthermore, Williams was unable to rebut the ADOC's legitimate nondiscriminatory reasons for terminating him, which included use of excessive force against inmates and prior misconduct issues. For these reasons, Williams could not prove he was treated worse than others similarly situated.

8.19 *Williams v. Georgia Dep't of Corr.*, 2014 WL 3956039 (N.D. Ga. Aug. 13, 2014)

Richard Earl Williams was a probation officer at the Georgia Department of Corrections (GDC) and is an African-American male who wears his hair in a dreadlocks style. In June 2010, the GDC ordered Williams to cut his dreadlocks off, and he refused, because doing so would violate his indelible rights, religious beliefs, and spiritual faith. On January 1, 2012 the GDC promulgated a new grooming policy, prohibiting male employees from maintaining hair below their shirt collar, but not requiring female employees do the same, including permitting females to wear dreadlocks. On January 3, 2012 Williams was ordered to leave work and get his dreads cut within 2 hours. He did not do so, and received a reprimand letter. Williams continued to stay out of compliance with the new policy, receiving an additional disciplinary letter on March 2, 2012, a 5% pay reduction on March 16, 2012 and then was terminated on May 13, 2012.

Williams brought a lawsuit against the GDC for sex-based employment discrimination. The Court maintained that under Title VII, sex discrimination is based on "immutable" or other constitutionally protected characteristics, of which hair length was not. GBC also had a justifiable reason for maintaining its policy, which is to maintain a professional appearance, because officers routinely go to court and meet with members of the public. The Court determined it was permissible for an employer to regulate grooming policies, even for styles that

bear a relation to religiously held beliefs. Therefore, the GBC is allowed to set different grooming policies for male and female employees. Williams also did not have a retaliation claim because he did not engage in any constitutionally protected activity in the first place—since the GDC grooming policy is permissible under Title VII.

9. Discrimination: Gender and Sexual Orientation

9.1 *Houzenga v. City of Moline*, 123 FEP Cases 189 (C.D. Ill. Apr. 14, 2014).

Scott Houzenga began working for the Moline Fire Department in September 1997. Heather Oepping joined the Moline Fire Department in 2004 as the Department's first female firefighter. During his 2008 annual evaluation, Scott noted that he felt Heather created a hostile work environment for him because he had given her poor evaluations. Scott also made two complaints against the Battalion Chief, who was allegedly involved with Heather, in June and August of 2009. In August 2009, Heather filed a sexual harassment claim against another employee. The City of Moline investigated both complaints. As a result of the investigation of Heather's complaint, the investigator recommended additional training for the Department's employees, particularly Scott. Scott filed a complaint against the City of Moline in June 2012 alleging discrimination based on gender. The City of Moline moved for summary judgment on Scott's claim.

The court granted the City's motion for summary judgment on Scott's gender discrimination claim after if found that he had failed to make his case. Specifically, the court found that Scott had failed to produce sufficient evidence that he suffered adverse employment action. The court found that Scott did not experience any disciplinary actions resulting from the investigation of Heather's complaint. The court also found that Scott and Heather's complaints were treated similarly, as both were investigated and neither resulted in any disciplinary action. Therefore, the court found that Scott had failed prove he had suffered adverse employment action and, consequently, had not made out a case for gender discrimination.

9.2 *Gethers v. Harrison*, 123 FEP Cases 534 (E.D.N.C. 2014)

Monifa Gethers worked as a detention officer with the Wake County Sheriff's Office. While working at a detention facility, she interacted with a prisoner who spread feces on his body and around his room. She determined that the prisoner needed to shower. She sought assistance from two male detention officers, and together, they brought the prisoner to the showers. She remained present in the shower room while the male prisoner showered, in violation of a department policy that prohibits detention officers from observing prisoners of the opposite sex showering. She was demoted for remaining present while the prisoner showered. She was later fired for being untruthful when questioned about the incident.

In response to her demotion and termination, Monifa filed a gender discrimination and retaliation lawsuit against the Sheriff. The court rejected Monifa's argument that her demotion was based on a discriminatory motivation. The court noted that gender did play a role in the department policy, but that the policy exists to protect the privacy and dignity of inmates. Monifa failed to show that a male officer observing a nude female inmate would be treated any differently than she was treated. Monifa also failed to show that a male officer took her place

once she was demoted. Nor did she prove that her job performance was satisfactory at the time of the demotion. Ultimately, the court held that Monifa failed to support her gender discrimination claim and her retaliation claim.

9.3 *Joyner v. Town of Elberta*, 123 FEP Cases 171 (S.D. Ala. 2014)

Julie Joyner worked for eleven months as the Interim Police Chief for the Town of Elberta. As Interim Chief, she made approximately $45,000 per year. She offered to become the Permanent Police Chief in exchange for a salary of $53,000. The Town of Elberta claimed that it could not afford to pay her that salary. The Town offered to make the permanent position at her current pay rate, which she rejected. The Town later offered the permanent position to Stanley DeVane, who accepted the position at a salary of $54,000. Joyner then brought this suit, alleging a violation of the Equal Pay Act.

The court held that Joyner established a prima facie case under the Equal Pay Act, since the Interim Police Chief and the permanent Police Chief perform substantially the same work, but she was paid significantly less than DeVane. However, the court also held that the Town had two legitimate reasons for offering DeVane a higher rate of pay that were unrelated to his gender. First, DeVane had more education and about twice as much experience as Joyner. Second, the Town demonstrated that town revenue had declined while Joyner was Interim Chief, but increased dramatically around the time the town made an offer to DeVane. Thus, Joyner's case was dismissed on summary judgment.

9.4 *Kubsch v. Indiana State Police*, 2015 WL 128002 (N.D. Ind. 2015)

Judith Kubsch, a trooper with the Indiana State Police, sued her employer for sex discrimination. She left the force to serve in Iraq, and returned in 2008. Upon her return, the department required her to undergo a mental health fitness for duty examination (FDE). While waiting for the results of the FDE, the department assigned her to administrative duties. The psychologist who performed the FDE allowed her to return to regular duty after four counseling sessions.

After her return, she was assigned to escort a two-day charity bike ride, but made rude remarks to a fellow officer and failed to attend the second day. The department investigated a possible rules violation and required her to undergo a second FDE. The department assigned her to administrative duty pending the results. The psychologist once again recommended counseling. Assignment to administrative duty never resulted in a loss of wages, and the only financial loss Kubsch suffered was payment of insurance co-pays for counseling sessions. She claimed the department discriminated against her based on her sex by requiring her to undergo multiple FDEs and that women were referred to FDEs at a higher rate than male counterparts were.

The court ruled that Kubsch did suffer an adverse employment action, a necessary element of her disparate impact claim. Kubsch did not produce any evidence that the FDEs caused her to lose any pay or job status. The court rejected her argument that temporary placement on paid administrative leave was a materially adverse employment action.

9.5 *Ambat v. San Francisco*, 757 F.3d 1017 (9th Cir. 2014)

A group of 35 sheriff's deputies, comprised of both males and females, challenged San Francisco's jail staffing policy requiring only female deputies to staff female-only jails. The deputies assert that the policy unlawfully discriminates based on gender and that both male and female deputies has received less favorable assignments than they would under a seniority-based system.

The court ruled that the deputies could not prove the discrimination as a matter of law, thus the city was entitled to a trial on its Bona Fide Occupational Qualification Defense (BFOQ). The court ruled that several factual issues remained on whether the single-gender police resulted from reasonable decision-making and whether sex is a legitimate proxy for the desired job qualifications of a female-only prison deputy.

9.6 *Melendez v. Town of Bay Harbor Islands*, 14-22383-CIV, 2014 WL 6682535 (S.D. Fla. Nov. 25, 2014)

Olga Melendez, a female Bay Harbor police officer filed discrimination claims against her employer, the Bay Harbor police department. One of the claims alleged that the department had no suitable changing area for female employees. Melendez had to use a former male lavatory covered with a shower curtain as a makeshift changing room. She claimed a male colleague walked in on her changing multiple times. Melendez filed a Charge of Discrimination with the EEOC and received a Notice of Right to Sue. Melendez initiated a suit, filing an amended complaint alleging six claims for relief, including a sex discrimination claim under the Florida Civil Rights Act.

The court dismissed Melendez's claims of sex discrimination because she failed to allege that she suffered an adverse employment action. The court found that Melendez's claims for sex discrimination were based on the police department's "willful failure to provide suitable changing areas for female employees." According to Melendez, the condition existed when she joined the department over decade ago. To suffer an adverse action, Melendez needed to show a serious and material change in terms, conditions, or privileges of employment. Instead of claiming that her employment conditions were altered, Melendez claimed that they were not changed at all.

10. **Discrimination: Gender and Race**

10.1 *Lewis v. Pennsylvania, Bd. of Prob. & Parole*, 126 FEP Case 706 (E.D. Pa. Mar. 4, 2015) (slip opinion).

Gail Lewis, an African American woman, was employed by Pennsylvania Board of Probation and Parole ("Board") as a probation officer. In March 2010, Gail was suspended without pay after two incidents. First, while visiting the Delaware County Prison in her official capacity, Gail allegedly told staff members that an officer was an "inmate lover" and had children with an inmate. Second, Gail permitted an offender to sit in the front seat of a car, without handcuffs, while she transported him to a halfway house. Gail allegedly was involved in a traffic accident during the transport, but did not take the offender to a doctor upon his request or fill out an accident report. Gail sued the Board for employment discrimination, contending she

was subjected to disparate treatment when she was suspended without pay because of her race and gender. The Board moved for summary judgment.

The district court denied the board's motion for summary judgment after finding Gail had produced sufficient evidence to show a dispute as to whether the Board's reason for disciplining Gail was pretext for discrimination. The court found that Gail had met her burden of establishing a case for employment discrimination and that the Board had met its burden of producing evidence that there was a legitimate, nondiscriminatory reason for the discipline – the incidents in March. In response, Gail presented evidence that the reason for the discipline was merely pretext for discrimination: the Board was unable to identify a similarly situated employee who had received the same amount of discipline as Gail; the Board failed to suspend white male officers who engaged in unprofessional behavior; and the testimony about the facts of the incidents prompting Gail's suspension were in dispute. After find that this evidence was sufficient to show a dispute of material fact, the court denied the Board's motion for summary judgment.

10.2 *Hull v. Cnty. of Schenectady*, 2015 WL 3447568 (N.D.N.Y. May 28, 2015) (slip opinion).

Tanya Hull, an African American woman, was employed as a corrections officer with the Schenectady County Sheriff's Department, beginning in March 2002. In October 2010, Tanya took the Department's promotional exam and received a high score. When she applied for promotion to sergeant, she was the most senior applicant by at least four years. The Department did not promote Tanya to sergeant; instead, the Department promoted a white male applicant. The Department informed Tanya that she was not selected for promotion because of a recent disciplinary incident where Tanya brought a bottle of wine into the Schenectady County Jail as a birthday gift for a nurse in the Jail's medical unit. After the initial denial, Tanya applied for four more promotions; each time, she had the highest test score and was the most senior applicant. Each time, a white male applicant was promoted. Tanya sued the County, alleging race and gender discrimination. The county moved to dismissed Tanya's claims for failure to state a cause of action.

The court denied the County's motion after it found Tanya had pled sufficient facts for her race and gender discrimination claims. The court explained that Tanya's complaint would only be dismissed if "it appears that there are not 'enough facts to state a claim to relief that is plausible on its face.'" Tanya's complaint did not need to allege all facts establishing each element of her case to survive the County's motion to dismiss. The court found that Tanya had alleged sufficient facts to support a plausible inference of discrimination by showing she was treated less favorably than similarly situated employees – the promoted applicants. Because she had alleged sufficient facts in her complaint, the court denied the County's motion to dismiss.

10.3 *Davis v. Washington State Patrol*, 184 Wn. App. 1002 124 FEP Cases 1827 (2014) (unpublished opinion).

Elizabeth Davis, an African American woman, started working for the Washington State Patrol ("WSP") in July 2007 as a Communication Officer Assistant. In June 2008, she was hired as a Trooper Cadet; she began training at the WSP Training Academy a year later. Elizabeth received very positive performance evaluations throughout 2009 and ranked second in her class

academically as of February 2010. In March 2010, Elizabeth participated in two practical exercises with Corporal Ryan Spurling. Ryan failed Elizabeth for both exercises and noted that he had "great concerns for [Elizabeth's] safety and ability to perform under any danger or pressure." When Elizabeth asked to meet with Ryan to discuss his feedback for one of the exercises, he met with her in her dorm room and told her "if [she] was his wife or daughter, he would not want [her] to be a Trooper." Elizabeth retook both practical exercises in April, passing one and failing the other. After review of the video of Elizabeth's failed retake of the exercise, Elizabeth was terminated from the Academy for lack of command presence. Elizabeth sued the WSP for race and gender discrimination. In response, the WSP moved for summary judgment dismissal of Elizabeth's claims. The trial court granted the motion.

The Washington Court of Appeals reversed, holding that Elizabeth had presented sufficient evidence to create a genuine issue of material fact whether race or gender was a substantial factor in her termination. The court first held that Elizabeth had established a case of discrimination, noting that she was the only cadet in the Academy terminated on the roster. The court also held that the WSP had met its burden by articulating a legitimate nondiscriminatory reason for terminating Elizabeth – concerns for officer safety. The court then considered whether Elizabeth had satisfied her subsequent burden of establishing the WSP's reason was merely pretext for discrimination. Under Washington law, a plaintiff can satisfy the pretext burden by showing that discrimination was a strong factor motivating the employer's otherwise legitimate reason. The court found Elizabeth's evidence of failing only one required practical exercise, Ryan's comments wife/daughter comment, and white male cadets receiving more opportunities to retake practical exercises and tests to be sufficient evidence to create a genuine issue of material fact.

After several months of training to become a Washington state trooper, Elizabeth Davis was terminated for failing a skills test. Davis was one of three women in her seven-person cadet class, and the only African-American in the class. For the first few months of the training academy, Davis received consistently high marks on her tests. Then she participated in an exercise graded by Corporal Ryan Spurling. Corporal Spurling failed Davis, and criticized her for being "weak and unsure in voice." The following day, Davis took a skills test with Corporal Spurling. He again failed her. The following week, she retook the test. Corporal Spurling was one of her graders, and again, she failed. The same day, she retook the exercise she had failed, but with a different instructor. She passed. Based on her failure on the retest, Corporal Spurling recommended to Captain Estes that Davis be terminated from the academy. Captain Estes followed Corporal Spurling's advice and terminated Davis.

In her race and gender discrimination suit against the State, Davis showed that Caucasian male cadets who had failed the same exercise as Davis ultimately passed the exercise and graduated from the academy. Other male cadets were given multiple opportunities to retest after failing various tests. Though not all the other cadets graduated from the academy, the class roster listed the other non-graduating cadets as having "resigned" from the academy. Only Davis was "terminated." Based on these facts, Davis raised genuine factual questions as to whether she was terminated based on gender or race discrimination. Additionally, she showed that Corporal Spurling's comments to her – such as comparing her voice to that of a flight attendant – supported her hostile work environment claim.

10.4 *Thompson v. Omaha Pub. Power Dist.*, 8:13CV106, 2014 WL 5481104 (D. Neb. Oct. 28, 2014)

Helen R. Thompson, a protected-age black female employee worked as a Senior Chemistry Technician for the Omaha Public Power District (OPPD). Thompson's supervisor was Timothy Dukarski. Thompson applied for numerous lateral transfers or promotions at OPPD and only selected to be interviewed for three positions. The record showed that OPPD based its hiring decisions, in part, on whether an employee was a "good fit," the hiring manager's personal knowledge of the individual, work samples, past personnel evaluations for previous years, and consultation with the current supervisor. In one of several application processes where other candidates were selected over Thompson, a member of the interview team testified that of the group hired for the position, some tested higher and some lower than Thompson. The interviewer testified there were subjective elements to the interview scoring and acknowledged that the candidates' appearance and attire were a consideration. Thompson filed an NEOC (Nebraska Equal Opportunity Commission) charge, alleging discrimination based on age, gender and race, harassment, and retaliation. Thompson testified that she complained about being "bullied" by Dukarski, observed that younger white males were treated differently than she was by Dukarski, and that she was assigned tasks by Dukarski for which she did not have training and was given unrealistic deadlines.

The Second Circuit held that Thompson proved that a reasonable jury could find that OPPD's explanations for failing to promote Thompson were pretextual. According to the court, Thompson showed she was qualified for the positions for which she interviewed yet people who were either younger, white, or male were hired. Subjective criteria were used at many stages of the hiring process, from drafting the position description to devising the questions and scoring the responses. Affidavits of managers that they did not consider race, age, or gender in making their decisions were of little probative value to the court. The court found that Thompson scored higher in the interview process than the person hired in one instance; she was not interviewed based on the hiring manager's subjective decision in another; she applied for numerous other positions but was not granted interviews; OPPD denied training that would have qualified her for other positions; and OPPD treated her differently than white, male, or younger employees.

11. **Sexual Harassment and Hostile Work Environment**

11.1 *Swindle v. Jefferson Cnty. Comm'n*, 593 F. App'x 919 (11th Cir. 2014).

Lara Swindle worked for the Jefferson County Sheriff's Office ("JSCO") as an at-will laborer. Not long after she started working for the JSCO, Lara began to experience sexual harassment at work. Lara filed a complaint with the JSCO on March 26, 2008, alleging two JSCO employees, her immediate supervisor and another employee with the authority to assign her work, had been sexually harassing her for two years. The JSCO investigated the allegations and terminated the two employees in June and July of 2008. Lara then filed a charge of sexual harassment with the Equal Employment Opportunity Office Commission ("EEOC") on August 21, 2008. The EEOC issued a right-to-sue letter to Lara and Lara brought a claim against the JSCO, alleging the employees' conduct was sex harassment and created a hostile work environment. The district court granted summary judgment in favor of the JSCO.

The Eleventh Circuit Court of Appeals affirmed the lower court's holding that the JSCO was not liable for the harassing employees' conduct. The court found that the JSCO had exercised reasonable care to prevent and promptly correct the harassment because the JSCO had a formal sexual harassment policy, which was reasonable and effectively published, and the JSCO put the harassing employees on administrative leave within two weeks of Lara filing her complaint. The court also found that Lara had failed to take advantage of the JSCO's preventative and corrective opportunities because she did not report the harassment for almost two years, without extenuating circumstances to explain the delay. Therefore, the court held that the JSCO was not liable sexual harassment claim.

11.2 *Arthur v. Whitman Cnty.*, 24 F. Supp. 3d 1024 (E.D. Wash. 2014).

Brenda Arthur was employed by the Whitman County Assessor's Office. Brenda alleged that during her employment, her supervisor, Joe Reynolds, sexually harassed her by making sexual comments to her on a weekly basis. Brenda sued Whitman County in July 2011 for a sexually hostile work environment under the Washington Law Against Discrimination ("WLAD"). The statute of limitations for a claim under WLAD is three years. Whitman County moved for summary judgment on Brenda's claim.

The court denied Whitman County's motion for summary judgment. The court first addressed whether the alleged sexual harassment incidents which occurred before July 2008 could be considered when determining Whitman County's liability. The court found that the incidents could be considered even though they occurred more than three years before Brenda filed her claim because they contributed to Brenda's claim of hostile work environment. Therefore, the incidents were part of the one unlawful practice and could be considered with the other alleged acts, most of which occurred within three years of Brenda filing her claim.

The court also found that Brenda had presented sufficient evidence "to create a genuine issue of material fact whether she was subject to a sexually hostile work environment." The court noted that summary judgment in favor of the employer is "seldom appropriate" in employment discrimination cases under Washington law. Therefore, the court left it to a jury to decide what occurred, whether it was motivated by Brenda's gender, and whether it was severe and pervasive enough to affect Brenda's employment.

11.3 *Porus v. Randall*, 123 FEP Cases 207 (N.D. Ill. Apr. 8, 2014).

Nicole Porus began working as a correctional officer for the Kendall County Sheriff's Office in December 2004. From 2006 to January 2008, Nicole experienced numerous acts of unwanted sexual touching and pressure to engage in sexual relations from her co-workers ("earlier acts"). Nicole reported some of the acts and did not report others. On February 25, 2009, Deputy Edmund Belmonte called Nicole a "fucking bitch" in an office hallway after she did not take a phone message for him ("Belmonte incident"). Nicole filed a written complaint with one of her supervisors, claiming that the hostile work environment she had reported earlier continued. After receiving a notice of right to sue from the Equal Employment Opportunity Commission ("EEOC"), Nicole sued Kendall County for sexually hostile work environment. Kendall County moved for summary judgment.

The Northern District of Illinois granted Kendall County's motion, after it found the 300-day statute of limitations for filing Nicole's claim with the EEOC had passed. As long as an act contributing to the hostile work environment occurred within the 300-day period, all acts contributing to the hostile work environment can be considered in determining liability, regardless of when they occurred. For Nicole, the only act that occurred within the 300-day period was the Belmonte incident. The court found that the Belmonte incident was not sufficiently related to the earlier acts to be considered part of the same allegedly hostile work environment. The court found that the earlier acts mainly consisted of "unwanted sexual touching, repeated pressure to engage in sexual relations, and often public sexual derision." In contrast, the Belmonte incident involved gender-based slur aimed at Nicole publicly. Edmund, the perpetrator of the Belmonte incident, was not involved in the earlier acts. Because of the significant differences in frequency and severity between the Belmont incident and the earlier acts, the court held that no reasonable jury could find that the Belmonte incident contributed to the same hostile work environment. Consequently, Nicole's claim was barred because no contributing acts occurred within the 300-day period for filing a claim.

11.4 *Brooks v. City of Philadelphia*, 2015 WL 505405 (E.D. Pa. Feb. 6, 2015)

Theresa Brooks was a member of the Philadelphia Police Department for nine years before joining the Narcotics Strike Force (NSF). Brooks was the only female member of the NSF, and, according to her, worked in an environment where male colleagues watched porn pervasively in public work space, cursed rampantly—sometimes calling Brooks a bitch to her face—and generally treated her dissimilarly than her male counterparts.

Brooks also had a tumultuous relationship with her immediate supervisor, who would routinely not give her credit as the arresting officer, and credit her male peers instead. Brooks eventually reported her superior for corruption and theft of money, at which point he vowed vengeance. Brooks was demoted to administrative duty and lost her police-issued firearm. As a result of these activities Brooks brought a law suit for gender discrimination and hostile work environment.

In order to defeat the City's motion for summary judgment, Brooks needed to show gender was a substantial factor in the discrimination she experienced and that a man in her position would not have been treated the same way. The Court determined that the presence of pornography, derogatory language from her colleagues, and the "locker room environment" alone were each sufficient to meet Brooks' burden—combined, the evidence overwhelmingly supported a hostile work environment. The Court also determined Brooks provided sufficient evidence to show she received adverse employment action, by the fact she was reassigned to an administrative desk duty, which her male colleagues did not experience when they engaged in the same behaviors she did. Furthermore, a reasonable jury could believe that Brooks' report of her superior's corruption had a causal connection to the demotion. In conclusion the Court denied the City summary judgment in light of the fact that there were significant questions of material fact.

11.5 *New LAFD class is nearly all male; 20% have relatives in the ranks* (L.A. Times)

As of December 2014, the Los Angeles Fire Department incoming class is half white and almost entirely male. This is proffered as evidence of little progress toward the mayor's goal of hiring more women and minorities within LAFD; a process which has been mired by nepotism and mismanagement. The percentage of women has remained around 3%, and half of the roughly 3,200 uniformed LAFD are white, in a city that is half Latino.

12. Discrimination: Age

12.1 *Guild v. Department of Corrections,* 31 AD Cases 178 (Mich. Ct. App. 2014) (Unpublished)

Vaughn Guild worked as a psychologist at a correctional facility in Michigan. He was fired after failing to complete important reports in a timely manner, but he was reinstated pursuant to an arbitration settlement. The Department of Corrections then determined that Guild had falsified documents. The Department again terminated his employment. Guild brought a suit against the Department, alleging retaliation, age discrimination, and disability discrimination. The trial court dismissed Guild's retaliation claims. The appellate court then dismissed his discrimination claims. The appellate court noted that Guild failed to offer evidence that would give rise to an inference of unlawful age discrimination. He even failed to establish the ages of his colleagues, so he failed to show that colleagues younger than him were treated differently than he was. Additionally, Guild could not succeed on his claim of disability discrimination. He failed to show that he had a disability. He also failed to prove that the Department knew about sleep disorder he claimed to have.

12.2 *Anderson v. City of Coon Rapids* --- F.Supp.3d ----, 2015 WL 364669 (D. Minn. 2015)

Wayne Anderson was a career firefighter with the city of Coon Rapids, Minnesota. In 2011, doctors diagnosed him with muscular dystrophy and determined he was not fit for firefighting. Anderson met with city manager Matt Fulton in January 2012, after Anderson heard Fulton had requested to the head of the fire department that Anderson resign. Fulton asked Anderson if he would resign after he turned 55, the age at which he would gain eligibility for full retirement benefits. Anderson informed Fulton that he would not retire, and that planned to use his accrued sick leave to extend his employment. The city found Anderson's tactics inconsistent with past practices under the collective bargaining agreement and terminated him in March 2012. The city hired a 28-year-old to replace Anderson, and Anderson brought suit for age discrimination.

The court dismissed Anderson's claim on summary judgment, holding that the city's decision to terminate Anderson was not motivated by age. The conversation between Fulton and Anderson in January 2012 was not evidence of the city's discriminatory intent; rather, it was an attempt to determine how to offer Anderson full retirement benefits. The record also failed to show that Fulton used benefit eligibility as a proxy for age. The court also concluded that the city had a perfectly legitimate reason to terminate Anderson, because he could not perform the essential functions of his job.

12.3 *Hilde v. City of Eveleth*, 777 F.3d 998 (8th Cir. 2015)

LeRoy Hilde, a police lieutenant, claims the city denied him a promotion to chief because of his age. Hilde was fifty-one at the time and eight years older than Timothy Koivunen, the detective whom the city eventually tapped for chief. Hilde's age met retirement eligibility requirements while Koivunen's did not. The hiring commission used a scoring system to rank the candidates, and each commission member gave Koivunen a perfect interview score, an unprecedented outcome that tied his overall score with Hilde's. Hilde had the highest score before the interview because of his twenty-nine years of service, fourteen as lieutenant. One commission member admitted colluding with the other members to score the interviews to create a tie between the candidates. Another commissioner testified that Hilde's retirement eligibility might have played a role in the decision, although Hilde had never expressed intent to retire. Hilde sued the city for age discrimination.

The court found enough evidence supporting Hilde's discrimination claim to allow his case to proceed to a jury trial. The department cannot use Hilde's retirement eligible status as a factor in the decision if it is merely a proxy for his age. The court found that the commission's assumption that Hilde was uncommitted to the chief's position because of his retirement eligibility is exactly the type of inference the ADEA prohibits. The department provided no evidence besides retirement-eligible age that caused them to doubt Hilde's commitment. The court also found the two candidates tied evaluation scores and the commission's intentional manipulation of those scores sufficient to defeat the department's argument that Koivunen was unquestionably the more qualified candidate.

12.4 *Winchester v. City of Hopkinsville*, 2015 WL 1117295 (W.D. Ky. Mar. 11, 2015)

William Winchester claims he was discriminated against, based on his age when he was removed from the running for a crime scene technician position with the Hopkinsville Police Department. The job description stated a qualified applicant would have "good moral character" and be a person of integrity. Winchester was 50 years old when he applied, had been unemployed during the few years leading up to this application, and had practiced law for several years before he was disbarred for unethical behavior. During his interview process he did not inform his employers about his disbarment, prior law practice, or two bankruptcies he had entered into when asked directly about his finances.

The Court determined Winchester presented no direct evidence to support his claim of age discrimination. Because Winchester was relying on circumstantial evidence the Court exercised a "burden-shifting" analysis. In this case Winchester did not succeed on his first burden. Not only was Winchester unqualified for a job that required integrity and honesty in its job description, he also withheld his disbarment information from the City. Furthermore the City disproved age discrimination when it interviewed an applicant in the final rounds that was older than Winchester and was only ultimately rejected because she professed fear for her safety at a crime scene. Winchester could not disprove the City's legitimate reason for rejecting him, and as a result, the Court ruled in favor of the City as a matter of law.

12.5 *Lee v. City of Moraine Fire Dep't*, 2015 WL 914440 (S.D. Ohio Mar. 3, 2015)

David Lee was an EMT/firefighter for the Moraine Fire Department. In the face of budget cuts, the Fire Department made adjustments to its physicals program, only requiring firefighters over the age of 40 to undergo a full physical; employees under 40 would only need to complete a particle physical that entailed only a questionnaire. Lee had reservations about being subject to a full exam because of his age, and did not undergo the complete exam. Lee was confronted about not completing it and was ultimately told he had 30 days to complete it or he'd be deemed Unfit for Duty. Lee responded with this law suit, stating he was ready to lose his job over his objections to this program. The Fire Department placed Lee on administrative leave without pay and charged him with insubordination. Lee felt he was being retaliated against, and consented to the test so as to avoid losing his job. Two days before his scheduled exam he was terminated because "after the fact" compliance could not "cure insubordination."

Claims against the Union, Fire Department, and City are barred because the Union's interests could not be aligned to the Fire Department's so as to justify suing them and the Fire Department has immunity. However, the claims against the City under ADEA are valid. A claim for age discrimination will stand if a plaintiff can prove that "but for" his/her age they would not have experienced what they experienced. In this case, it is evident that Lee was subject to the entire physical exam because of his age. But for his 40 years of age he would not have been required to undergo an entire physical exam. Furthermore, Lee also succeeded on his claim that the City violated the law by requesting his genetic information.

13. **Whistleblowing**

13.1 *Bige v. City of Etowah*, 39 IER Cases 905 (Tenn. Ct. App. Dec. 4, 2014) (slip opinion).

Phyllis Bige was a police officer for the City of Etowah. Phyllis received an email from Chief Eric Armstrong, warning her about her lack of citation writing during her shifts. The Chief's email advised Phyllis that, while she did not have a citation quota, she needed to increase her activity. The Chief estimated she would see "at least one violator in a 12 hour shift." Approximately two months later, Phyllis was terminated. In the termination letter, the Chief explained that Phyllis was terminated because she did not increase her level of activity as requested and because of her negative attitude on the job. Phyllis sued the City of Etowah, alleging she was terminated for failing to write unwarranted citations. She alleged that her termination violated Tennessee's Whistleblower statute, which prohibits terminating an employee for refusing to participate in illegal activity.

The Tennessee Court of Appeals held in favor of the City of Etowah after it found that Phyllis had failed to prove that she refused to participate in illegal activity and that her refusal was the sole reason for terminating her. The court was not convinced that Phyllis had refused to participate in illegal activity because Phyllis had presented no evidence that she had been instructed to issue a citation "without probable cause, or for any improper reason." Instead, the court found that the number of citations issued was one indicator of job performance the Chief considered when evaluating employees. Further, the court found that "undisputed proof" established other reasons for Phyllis' termination, like her negative attitude at work.

Consequently, the court held that the Chief's termination of Phyllis did not violate Tennessee's Whistleblower statute.

13.2 *County of El Paso v. Latimer*, 431 S.W.3d 844 (Tex. App. 2014).

Lisa Latimer was hired by the County of El Paso. While still in the probationary period of her employment, Lisa was terminated by the County, allegedly for poor work performance. The day she was terminated, Lisa submitted an "El Paso County Sheriff's Department Multi-Purpose Report" in an attempt to use the County's grievance procedures. In the report, Lisa alleged she was terminated because of her good faith reporting of alleged violations of the law. The next day, Lisa also attempted to discuss her termination with Sergeant Esparza. Eleven months later, Lisa sued the County under the Texas Whistleblower Act. The County responded by asserting Lisa's suit was untimely filed, because she did file the suit within ninety days.

The Texas Court of Appeals held that Lisa had raised an issue of fact as to whether her suit was timely filed. Because Lisa was a probationary employee, she could not use the County's grievance procedure; instead, she needed to file her lawsuit within ninety days for timely filing. However, the court found it was unclear to Lisa whether she could use the county's grievance procedure because the County received her report and noted that the report would be forwarded for investigation. The court also found that Sergeant Esparza was put on notice of Lisa's intent to contest her termination when Lisa tried to discuss it with her. Because it was unclear whether Lisa could use the County's procedure and because her employer had notice she was going to contest the termination, the court found that there trial court reasonably determined Lisa had filed her suit in time.

13.3 *McIver v. City of Spokane*, 182 Wn. App. 1034 (2014) (unpublished opinion).

The City of Spokane hired Amanda McIver as a temporary season worker in Summer 2008. The City assigned Amanda to transport children for the Northeast Community Center ("NEYC"). While transporting children in April 2009, another car struck Amanda's van. Several children in the van were not in required booster seats. After the accident, the NEYC Director made a comment to the *Spokesman-Review*, stating "I don't know why [the children] weren't in their booster seats." Amanda remained employed by the City until her position was eliminated in September 2011 because of a seasonal reduction. Amanda sued the City, alleging the City fired her in retaliation for whistleblowing after she complained to the NEYC Director about the lack of booster seats. The City moved for summary judgment and the trial court granted the motion, dismissing Amanda's whistleblower claim.

The Washington Court of Appeals affirmed the trial court's summary judgment dismissal of Amanda's whistleblower claim. The court found that Amanda had failed to establish her whistleblower case because she did not meet the statutory definition of a whistleblower. Under RCW 42.40.020, an employee must provide information to an auditor or another public official in connection with an investigation to be a whistleblower. Because Amanda presented no evidence that she filed a complaint with an auditor or another public official in connection with an investigation, the court found she was not a whistleblower. Further, the court found Amanda had presented no evidence of retaliation or adverse action because she continued to work for the

City for two years, receiving two raises during that period. Therefore, the court affirmed the trial court's dismissal of Amanda's whistleblower claim.

13.4 *McCormick v. District of Columbia*, 752 F.3d 980 (D.C.C. 2014).

Emmette McCormick was employed as a correctional officer for the District of Columbia Department of Corrections ("DOC"). During a disturbance at the central detention facility, a handcuffed inmate threw a bucket of ice water over Emmette. After the disturbance was over, Emmette allegedly brought that inmate to an enclosed security area and struck the inmate while the inmate was handcuffed. Once the Office of Internal Affairs became aware of the allegation, it conducted an investigation. The investigator concluded Emmette struck the inmate. The Internal Affairs Chief reviewed the investigative report and submitted it to the DOC Director without substantive change. The DOC Director terminated Emmette because of the investigative report. Emmette sued the District of Columbia, alleging he was wrongfully discharged in violation of the District of Columbia's Whistleblower Protection Act. Emmette alleged he was fired in retaliation for a protected disclosure he made to the DOC Deputy Director ten months earlier when the Internal Affairs Chief improperly allowed violent inmates to access unredacted statements of police officers. The district court entered summary judgment in favor of the District of Columbia.

The Court of Appeals affirmed the district court's ruling after it held Emmette had not established a case of retaliation. The court found that the ten months between Emmette's protected disclosure and the negative employment action was too long to serve as circumstantial evidence of a causal link. The court also found Emmette had failed to rebut the evidence that he was terminated for an independent, lawful reason. The court explained that it would not review the truthfulness of the witnesses relied on in the investigation, because the court's question was whether the DOC terminated Emmette because of the investigation results, not whether Emmette actually struck the inmate. Because the investigation disclosed a dischargeable event, the court affirmed the lower court's ruling in favor of the District of Columbia.

14. **Retaliation**

14.1 *Burton v. Martin*, 126 FEP Cases 352 (E.D. Ark. Feb. 13, 2015) (slip opinion).

Richard Burton was employed by the Arkansas Secretary of State as a certified law enforcement officer for the State Capitol Police. Richard was hired on June 9, 2009. While working a shift with Office Norman Gomillion, Richard heard Norman using racial epithets and making other offensive remarks. Richard submitted a written complaint to the Chief of the State Capitol Police regarding Norman's offensive behavior on December 9, 2009. Richard inquired about the status of his complaint on January 22, 2010. The Chief denied receiving the inquiry, but the Chief inquired about the status himself three days later. On February 17, 2010, Richard inquired about the status of his complaint again during a meeting with the Assistant Chief. The Assistant Chief gave Richard a copy of the at-will employment policy and drew particular attention to a new policy regarding bickering amongst officers. Richard was terminated on April 12, 2010 for failing to complete the twelve month probationary period in a satisfactory manner. Richard sued the Secretary of State for retaliation.

On remand, the district court affirmed its previous holding that Richard had made his case of retaliation. The court held that Richard presented sufficient evidence for a jury to find a causal link between Richard's termination and the complaint Richard filed against Norman. The Assistant Chief's actions regarding the at-will employment policy were particularly important to the court. While substantial time had elapsed between the filing of the complaint and Richard's termination, the Assistant Chief's February 17 response to Richard's inquiry about the complaint "demonstrate[d] more evidence of retaliatory intent than mere temporal proximity. Consequently, the court denied the Secretary of State's motion for summary judgment on Richard's retaliation claim.

14.2 *Barrett v. Salt Lake Cnty.*, 754 F.3d 864 (10th Cir. 2014).

Michael Barrett was an employee of Salt Lake County. Michael had received several promotions and good reviews while working for the County. However, Michael's reviews began to change when he helped a colleague pursue an "entirely warranted" sexual harassment complaint against her boss. When Michael's supervisor learned of Michael's involvement in the complaint, the supervisor began a disciplinary investigation. As a result, Michael was demoted and three other employees who served as witnesses for the sexual harassment victim also received disciplinary action. Michael sued the County, alleging he was demoted in retaliation for helping his coworker with her complaint. At trial, the jury found in favor for Michael; the County appealed.

The Tenth Circuit Court of Appeals affirmed the jury's finding that Michael suffered unlawful retaliation. The court found that the circumstances surrounding Michael's demotion, including that the supervisor lost or destroyed the records justifying Michael's demotion and that the supervisor was close to the alleged perpetrator of the sexual harassment, were sufficient to support "a rational inference that the unlawful retaliation *in fact* took place." Therefore, the court upheld the lower court's holding in favor of Michael on his retaliation claim.

14.3 *Sievert v. City of Sparks,* 126 FEP Cases 458 (D. Nev. Feb. 5, 2015).

Ginny Sievert was the first female firefighter employed by the City of Sparks. She was promoted to captain after fifteen years of employment and received largely positive performance evaluations each year until 2011. In 2011, Ginny served on a promotion board. When reviewing one applicant for promotion, Christopher Jones, Ginny brought to the board's attention her past confrontations with Christopher and some of Christopher's prior inappropriate sexual comments and gestures while at work or work-related events. By a vote of three to one, Ginny and two others on the promotion board decided not to promote Christopher because of "his immaturity and lack of professionalism." Christopher filed a Union grievance against the City of Sparks for failing to provide an unbiased promotion board. The arbitrator issued an award in favor of Christopher and the Union posted the arbitration decision on its website. In response, Ginny wrote emails to her supervisors, complaining of harassment and retaliation because of her participation on the promotion board. Following the complaints, Ginny received an unfavorable performance review in January 2012. The notes in the performance review expressly mentioned that Ginny was "involved with a grievance concerning the FAO promotional interview process." Ginny filed a claim against the City for retaliation. The City moved for summary judgment.

The court ruled in favor of the City of Sparks after it held that Ginny had not met her burden to establish that the City's reason for her negative performance review with merely pretext for retaliation. The court found that both Ginny and the City had satisfied their respective initial burdens of establishing a case of retaliation and articulating a legitimate, nondiscriminatory reason for the employment actions. Therefore, the burden shifted back to Ginny to show that the reason for the negative performance review was merely pretext for retaliating against Ginny. The court found that Ginny's history of positive performance reviews was insufficient to satisfy her burden. Further, Ginny herself stated that she was treated well by other captains and firefighters, and that the tension in her past interactions with Jones had dissipated. While the timing of her negative review was suspicious, it was not enough on its own to establish that the City's stated reason for Ginny's negative review was merely pretext.

14.4 *Keefe v. City of Minneapolis*, 785 F.3d 1216 (8th Cir. 2015).

Michael Keefe was a lieutenant of the Minneapolis Police Department ("MPD"). He was assigned to the Violent Offenders Task Force, which worked collaboratively with federal agencies like the FBI. After multiple federal agencies complained about Michael's disclosures of sensitive information, which they found detrimental to the investigation, MPD officials removed Michael from the task force. After being reassigned, Michael lodged an unfounded misconduct complaint against a sergeant, made an anonymous phone call to the Police Chief's wife, and failed to carry his gun and badge while serving for months. The MPD brought multiple internal affairs cases against Michael, which resulted in him being placed on administrative leave, subjected to two fitness-for-duty examinations, and demoted to sergeant. Michael sued the MPD, alleging he was demoted in retaliation for attempting to vindicate the rights of four other officers under investigation.

Without deciding whether Michael had established a case of retaliation, the court held that Michael's claim failed because he did not established a genuine issue of material fact as to whether the MPD's reasons for his demotion were merely pretext. The court found that the MPD presented legitimate, nondiscriminatory reasons for each of the adverse employment actions Michael experienced. Michael failed to rebut the MPD's reasons because he failed to supply specific evidence demonstrating that the MPD's reasons were merely pretext for retaliation. The court affirmed the district court's grant of summary judgment in favor of the MPD on Michael's retaliation claim.

14.5 *Avila v. Los Angeles Police Dep't*, 758 F.3d 1096 (9th Cir. 2014).

Leonard Avila was employed as a police officer for the Los Angeles Police Department ("LAPD"). Leonard was a "model officer." One of Leonard's fellow officers brought a lawsuit against the LAPD for overtime pay. Leonard testified in the lawsuit for his fellow officer. After he testified, the LAPD fired Leonard for insubordination because he worked through his lunch breaks without claiming overtime. Leonard sued the LAPD for retaliation. The jury ruled in favor of Leonard.

During the trial, the district court declined to give the jury two supplemental instructions requested by the LAPD. On appeal, the LAPD alleged that the district court abused its discretion when it refused to give the jury the supplemental instructions. The Ninth Circuit Court of

Appeals disagreed, upholding the district court's decision. The court found that the supplemental instructions would have done more to confuse the jury than to clarify because the instructions would raise issues not supported by evidence in the case. Therefore, the Ninth Circuit affirmed the district court's judgment.

14.6 *McCowen v. Vill. Of Lincoln Heights*, 125 FEP Cases 1058 (S.D. Ohio Dec. 17 2014) (slip opinion).

Earnest McCowen and Jamil Turner were well associated with the Lincoln Heights Fire Department ("LHFD"); both of their fathers had worked for the LHFD as firefighters. Earnest and Jamil were originally hired as volunteer firefighters and later promoted to part time firefighters after a friend of their fathers', Michael Solomon, recommended promoting them. The promotion caused some tension, resulting in a requirement that Earnest and Jamil obtain EMT certification by the end of 2012. Neither Earnest nor Jamil obtain certification within the required time period. Earnest and Jamil were terminated by the Village Manager. Michael and the Village Manager were involved in a dispute around the same time. Earnest and Jamil sued Village, alleging third-party retaliation for Michael's dispute with the Village Manager.

The granted summary judgment in favor of the Village after it held that Earnest and Jamil could not meet their burden of proving retaliation was the only factor motivating their termination. The court presumed Earnest and Jamil had established a case and declined to decide whether they were sufficiently closely connected to Michael for a third-party retaliation claim. Instead, the court found that Earnest and Jamil could not prove retaliation was the only factor in their termination when they were required to obtain EMT certification by the end of 2012 and failed to do so. According to the court, no reasonable jury could conclude that Michael's dispute with the Village Manager was the only factor motivating Earnest's and Jamil's termination.

14.7 *Amthor v. Cnty. Of Macomb*, 126 FEP Cases 1581 (E.D. Mich. Apr. 20, 2015) (slip opinion).

Scott Amthor worked as a Youth Specialist for the Macomb County Juvenile Justice Center. In 2011, Scott testified in an investigation into a coworker's complaints against the Center. The content of Scott's testimony was not disclosed to the Center Director. Two weeks after the testimony, the Center Director yelled at Scott, publicly reprimanding him for eating food he brought from home in the cafeteria with the kids. Two months later, Scott was moved from the day shift to the midnight shift. Scott sued the Director and the County for retaliation.

The court held that Scott established a case of retaliation. The court found that the director's public reprimand was not an adverse employment action because it did nothing more than hurt his feelings. In contrast, the court found that a reasonable jury could find moving Scott to the midnight shift was an adverse employment action because the day shift is a more coveted shift and because moving Scott to the midnight shift reduced his ability to interact with the children, one of Scott's express focuses in his work. The court also found a reasonable jury could find a causal link between Scott's testimony and the adverse employment action. The court noted that, while the public reprimand was not an adverse action itself, the reprimand could serve as a temporal connection between the testimony and shift change to strengthen the causal link.

15. **Labor Arbitrations**

15.1 *In Re City of Rockford and Police Benevolent & Protective Association*, 133 LA 587

The City of Rockford Police department terminated Officer P, finding him unfit for duty despite conflicting psychological evaluation reports. Officer P and his partner were involved in the fatal shooting of a suspect who struggled with P and attempted to control his weapon. After the shooting, Officer P took medical leave. Eventually, Chief Epperson ordered him to submit to a fitness for duty psychological evaluation in November 2010. The psychologist determined him unfit for duty. The police union retained its own psychologist to conduct a second examination, and this time the psychologist determined Officer P was fit to return to duty. Despite the conflicting determinations, Chief Epperson terminated Officer P.

An arbitrator ruled in favor of Officer P and the union, determining that no just cause for firing Officer P exists without a current, neutral evaluation. The collective bargaining agreement required the department have just cause to terminate an officer. The arbitrator reinstated Officer P and ordered the city and union to agree on a neutral, independent psychologist to decide Officer P's fitness for duty.

15.2 *In re City of Memphis and Memphis Police Association*, 133 LA 612

The grievant (terminated police officer) discussed a potential labor strike with fellow officers within earshot of several supervisors. The department's collective bargaining agreement barred officers from striking, and the department terminated the grievant. The grievant reported that his discussions involved a previous strike, not a potential one.

An arbitrator found that the grievant had been discussing past strikes, and did not attempt to recruit other officers for a strike. However, the arbitrator determined that discussing sensitive matters in front of other officers was improper, but such a minor indiscretion does not justify the department to terminate his employment. The arbitrator awarded reinstatement of the officer following a ten day suspension.

15.3 *Spokane School Dist. No. 81 v. Spokane Education Ass'n*, 181 Wash. App. 1013 (Wash. Ct. App. 2014)

Nikki Easterling began working as an elementary school counselor for the Spokane School District in August 2010. Her principal, Mallory Thomas, reprimanded Easterling over attendance issues at her first year-end review. In December 2011, Thomas again warned Easterling about attendance issues, specifically her habitual late arrivals. In January 2012, after Easterling took bereavement leave following the death of her Aunt, the relationship between Easterling and Thomas broke down. Easterling alleges that Thomas sent harassing emails, required Easterling to wear a walkie-talkie, reprimanded her for taking a student on a therapeutic walk and required her to operate the dunk-tank at the school carnival. In May of 2012, the district notified Easterling that the district would not renew her employment for next year. The union, on Easterling's behalf, filed a grievance with the district and attempted to compel arbitration. The district refused to participate, claiming the dispute was not subject to arbitration under the collective bargaining agreement (CBA).

The court ruled that union's dispute with the district on Easterling's behalf was not arbitrable under the CBA. The court ruled that the CBA's arbitration clause explicitly excluded issues of non-renewal of employees and matters related to evaluation. The court also rejected the Union's claim that its grievance addressed issues not related to evaluation or non-renewal, deciding that the core of the claim was Easterling's non-renewal, since the remedy she sought was reinstatement to provisional status for one year. Allowing the union to arbitrate non-renewal claims by also characterizing minor allegations as unrelated to non-renewal would render the express limitation on arbitration eligible grievances in the CBA meaningless. The union also claimed that the district should have notified Easterling of her FMLA rights, and that this grievance is subject to arbitration. Aside from the union seeking a remedy related to non-renewal, the court rejected the arbitrability of this grievance because it was not contract related. FMLA rights are based in federal statutes, and the CBA arbitration process exists for disputes arising under the CBA.

15.4 *R.I. Dept. of Corr. V. R.I. Bhd. Of Corr. Officer*, 115 A.3d 924 (R.I. 2015)

The Rhode Island Department of Corrections terminated James Maddalena for dishonesty about a fellow officer's marijuana use while on duty. Maddalena did not smoke any marijuana, but sat in the vehicle while Officer Gene Davenport smoked. During the department's investigation, Maddalena lied to several officials, denying that Davenport had smoked marijuana. Davenport admitted to smoking marijuana before officials questioned Maddalena.

Maddalena appealed his termination, and an arbitrator reinstated him after determining that the department did not generally punish dishonesty with termination. The Court ruled that the arbitrator overstepped his authority in reinstating Maddalena. The arbitrator relied too heavily on insufficient evidence of past incidents and wholly ignored key provisions of the collective bargaining agreement in making his decision. The relevant provision gave the employer the exclusive right to discharge or make disciplinary decisions to officers in the bargaining unit.

15.5 *In re City of Springfield and IAFF Local 33*, 134 LA 1017

Captain M, a captain with the City of Springfield was the only applicant for a staff position as a training officer. The position entailed a normal 40-hour workweek compared to a standard firefighter's tour schedule. The city rejected Captain M's transfer and assigned a more junior officer who did not apply to the post. Captain M failed to meet the minimum certification requirements for the position at the time he applied. The chief emailed the department listing the required certifications an applicant had to acquire before applying. The union claimed the chief's email failed to state clearly a change in past practice, which the Union claimed had been that an applicant needed only to acquire the certifications before the new assignment began not at the time of application.

The arbitrator found that the chief's email was ambiguous as to whether the certifications were required before application or before an assignment occurred. However, the arbitrator concluded that the past practice was not to not assign and transfer employees before they met certification requirements, although some assignments were scheduled in advance. Since the policy did not break from past practice, the chief did not need to clearly articulate anything to the

department. Thus, the arbitrator rejected Captain M's grievance, since he could not have met the certification requirements at the time of assignment.

15.6 *American Federation of State, County and Municipal Employees, Council 75 Local 2043 v. City of Lebanon,* 336 P.3d 519 (Or. Ct. App 2014)

The public employee's union for Lebanon, Oregon filed an unfair labor practices complaint against the city after a city councilmember, Margaret Campbell, wrote an anti-union opinion piece for the local newspaper. Campbell clarified in the letter that she was expressing a personal opinion, not the city's official position. The unfair labor practices claim alleged that the city had an anti-union animus.

The court held that the city did not engage in an unfair labor practice because Campbell was not the city's "designated representative" for collective bargaining purposes, nor speaking as the city's agent. The court found that, essentially, no reasonable person would assume that Campbell was speaking in official capacity on behalf of the city, in part because she disclaimed that she was expressing a personal opinion.

16. Veteran's Rights

16.1 VETERAN'S PREFERENCES

16.1.1 *Brennan v. Miami,* 146 So.3d 119 (Fla. Dist. Ct. App. 2014)

Louis Brennan, a former Marine and current Miami firefighter, failed to receive a five point veteran bonus on a promotional exam. Brennan started with the department in 1999, but served on active duty as a Marine in 2003, returning to the department in 2004. In 2008, he applied for a Lieutenant position. The city did not afford him a veteran's preference on his application, because he did not submit sufficient documentation of his service along with his application. Brennan had filed documentation with the department when he was a reservist in 1999 and after he returned from active duty in 2004, but did not submit the documentation on his application. Brennan filed suit under a state law that afforded veteran's preferences to firefighters.

The court held that Miami improperly denied Brennan a veteran's preference he was entitled to under the state statute. It found the department's documentation requirements inconsistent with the purpose of the state law, because they created barriers for eligible veterans that would not otherwise exist. The court ordered the city to award Brennan his five bonus points for military service and to promote him to Lieutenant with back pay if his revised test score would have entitled him to that position.

16.2 UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

16.2.1 *Wright v. City of Horn Lake,* 63 F.Supp.3d 651(N.D. Miss. 2014)

Joshua Wright was a member of the Air National Guard and a firefighter with the Horn Lake Fire Department. In 2002 he was called to active duty. His Lieutenant in the fire

department, David Linville, made several negative remarks about his military service throughout his employment. In 2011, Wright was on active duty leave while the position of fire battalion chief became open. He applied for the position, but did not pass a required out-of-rank test and failed to qualify for the promotion. Shortly after he returned from active duty leave, Wright received six disciplinary write-ups in a short time period, and was terminated just a few weeks after he returned. Complaints against Wright included dress code violations, disrespect of a supervisor, blocking a traffic lane for non-work activities, disrupting neighbors with loud noise, wearing a gun to the station while off-duty, and abandoning his work post.

Wright sued Horn Lake for discrimination and wrongful retaliation based on military service under USERRA. The city argued that it terminated Wright for conduct unrelated to his military service. The court refused to dismiss Wright's case, ruling he had enough evidence to proceed to trial. The court emphasized Linville's negative comments about Wright's military service, as well as the temporal proximity of Wright's active duty leave with the several disciplinary complaints he received. The court also noted testimony regarding a rumor circulating among the fire station while Wright was on leave that Wright was abusing his military leave and would be terminated upon his return.

16.2.2 *Croft v. Vill. of Newark*, 35 F.Supp.3d 359 (W.D.N.Y 2014)

William Croft, a village of Newark police officer, sued his department under USERRA, claiming the department denied him a promotion because of his National Guard service. Croft served multiple active duty deployments in Afghanistan and Iraq in 2003–04 and 2010. The police chief decided not to recommend Croft for promotion to investigator in 2008 and sergeant in 2007 and 2009.

The court found enough evidence that Croft's military status was a motivating factor in the chief's decision not to recommend Croft for promotion, and that the village board relied on the recommendation. The court found that the chief had previously stated he thought it was too difficult for officers to excel in two demanding jobs, and that those who spent time with the National Guard were not able to meet the demands of police work. The court also found persuasive the fact that the Chief had actively sought other candidates because he questioned Croft's commitment to the department. Because of this evidence, the court decided a reasonable jury could find in Croft's favor.

16.2.3 *Carroll v. Del. River Port Auth.*, --- F. Supp.3d ---- (D. N. J. 2015); 2015 WL 865121

Anthony Carroll filed a discrimination claim against his employer under USERRA for failure to promote him to a police sergeant's position. Carroll suffered a shoulder injury while serving in Iraq, which rendered him physically unable to perform patrol work. He claimed the department discriminated against him for his military service, not for his disability. The Social Security Administration classifies Carroll as totally disabled.

The court denied Carroll's motion for summary judgment, holding that a reasonable person could conclude that he would have been denied the promotion regardless of his military service. A physical disability preventing a person from performing the job is a non-discriminatory reason under USERRA for failing to promote him, the court said. It does not

matter whether the applicant's service caused the disability. A plaintiff must prove his military service was a motivating factor in the employer's decision.

16.2.4 *Ward v. UPS*, 580 Fed.Appx. 735 (11th Cir. 2014)

James Ward, a UPS employee, left his job for an active-duty military deployment in Iraq in 2003. He suffered a combat injury that left him unable to return to his job at UPS in 2005. He filed a complaint with the Department of Labor seeking reinstatement, but settled with UPS out of court. In 2006, UPS found him an alternate job as an operations clerk, but he lost that job when a more senior military veteran returned from service in 2009. Ward was out of work for fourteen months until UPS employed him in two concurrent part-time positions scanning and loading packages. He filed USERRA discrimination and retaliation claims against UPS for the time he spent unemployed.

The court rejected Ward's claims. First, the court held that Ward failed to offer any evidence of UPS's hostility toward military members or any evidence of disparate treatment of military members. To the contrary, UPS offered evidence that it could not combine two part-time positions in 2009 because Ward could not physically perform one of them and they had to be performed at the same time. Second, the court rejected Ward's retaliation claim because the temporal distance between his 2005 Department of Labor claim and his unemployment period in 2009 was not close enough to establish causation between the two events.

16.2.5 *DeLee v. City of Plymouth*, 773 F.3d 172 (7th Cir. 2014)

Robert DeLee, a police officer in Plymouth, Indiana, took an eight month-leave of absence to serve in the U.S. Air Force Reserves. Plymouth had a policy under which police officers received "longevity pay", increasing with each year they spent on the force, prorated for a leave of absence in any given year. Since DeLee spent two thirds of the year in the service, he only received one third of his longevity pay for the year. He sued the city under USERRA, arguing that the statute entitles him all benefits based on seniority, including full longevity pay for the year.

The court overturned the trial court's grant of summary judgment and allowed DeLee's claim to proceed because longevity pay is a reward for lengthy service, not pay for work performed the previous year. USERRA entitles reemployed veterans to seniority and other benefits accruing during their service time. The court relied on a U.S. Supreme Court precedent holding that whether a certain benefit is a right of seniority turns on the nature of the benefits, not the manner in which they are calculated. Applying that precedent, the court determined the longevity pay sought to incentivize experienced officers to stay with the service and reward longevity, making the pay less like wages and more like a seniority bonus. The only reason the benefit was prorated for time of service was to make the plan sustainable and feasible, the court determined.

16.2.6 *Roth v. West Salem Police Department*, 2014 WL 2945802 (N.D. Ohio 2014)

Kenneth Roth, a West Salem, Ohio police officer, filed claims under USERRA alleging that the department failed to promote him and ultimately terminated him because of his military service. While employed, Roth also served as a Marine Corps Reservist and served two tours of

active-duty in Iraq, one in 2005 and one in 2008–09. After Roth returned from his second deployment, he received complaints from fellow officers and civilians about his aggressive demeanor. Chief Sims, head of the West Salem Police Department, informed Roth that he must complete an anger management class and obtain a psychological exam before he could return to the street as a patrolman.

Roth completed anger management and saw a psychologist, who determined that Roth was unable to return to active duty and that he did not want to return to the department. Chief Sims sent a letter to Roth seeking confirmation that he did not want to return. Roth did not respond and Chief Sims sent a follow-up letter notifying Roth that his silence had been construed as a resignation and to notify the department if he did not wish to resign. Roth failed to respond once again.

The court rejected Roth's first claim—that the department failed to promote him to sergeant while he was deployed. Roth failed to offer any evidence that the decision to promote another officer involved anything more than Chief Sims exercising his discretion to choose the most qualified candidate. No evidence suggested Roth's military service factored into the decision. Next, the court rejected Roth's discrimination claim based on his termination. The court found that Roth voluntarily abandoned his employment, and that if he wanted to remain on the force, he could have easily done so with a simple letter to Chief Sims.

16.2.7 *Bello v. Vill. of Skokie*, 2014 WL 4344391 (N.D. Ill. 2014)

Baldo Bello, a Skokie police officer and Marine reservist, filed suit against the Skokie Police Department under USERRA for changing its policy regarding military leave and "regular days off" (RDOs). An officer normally has nine RDOs a month. Prior to September 2012, Bello would request his nine RDOs along with an additional three or four days for military leave. In September 2012, the department announced a proposed change to its policy, requiring officers to use their RDOs for military leave purposes. Bello filed grievances with the department claiming that the policy violated USERRA. In June, the department implemented the policy. In October 2013, the department placed Bello on administrative leave and suspended him from one day for using a vulgar expression commonly used in the Marine Corps. He filed a lawsuit alleging violations of USERRA.

The court ruled that Bello properly pleaded his claims, and refused to dismiss his case. The court found that the department's scheduling and RDO policy could constitute a benefit of employment, since all officers were previously entitled to select their RDOs. The old policy treated military members similarly to all other officers, while the new one does not, since military members must schedule RDOs on the days they have military training. The court also upheld Bello's retaliation claim regarding his suspension, because the temporal proximity of the suspension, two months from the filing of his grievance, could plausibly support an inference of a causal connection between the two events.

16.2.8 *Hanson v. Cnty. Of Kitsap*, 21 F.Supp.3d 1124 (W.D. Wash. 2014)

In 2007, Kitsap County hired Craig Hanson as a Deputy Fire Marshal 1 (DFM 1). He was also a member of the Washington National Guard. Hanson performed building inspections as a

DFM 1, but also did some "out-of-class" work as a DFM 2, a higher rank, which does fire inspections. During the recession years, Kitsap County reduced DFM 1 positions to 36 hours a week, or .9 FTE. In October 2009, Hanson went on active duty and served overseas from October 2009 to December 2012. While he was overseas, Kitsap County made further cutbacks to the Fire Marshall division because of budget constraints.

Plaintiff returned to his DFM 1 position in 2012. Upon his return he complained about his duties and the work environment. Since two DFM 1s had since been hired, Hanson claimed he performed fewer fire investigations, although the evidence did not bear this out. He also lost his old radio call signal. As to the work environment, Hanson claimed that the other workers ostracized him.

In 2013, the County passed over Hanson for a promotion to DFM 2. The interviewers found him overly confident and arrogant, lacking integrity, and that he gave conflicting answers and demonstrated an insufficient knowledge of the fire code. The interviewers were especially alarmed by his self-professed leadership style, where he unites others against a "common enemy." After another DFM 1 was promoted instead, she complained that Hanson spoke rudely to her and lost his temper with her. At this point Hanson ceased performing fire investigations as he now bore most of the responsibility for DFM 1 work. He resigned in 2013.

Hanson brought claims against the county under USERRA, alleging that the county failed to reemploy him in his old position, failed to provide seniority benefits that he was entitled to, and discriminated against him and constructively discharged him because of his military service. The court granted summary judgment for the county on the first two claims, but found material issues of fact on the discrimination claim. The court denied summary judgment on the discrimination claim.

As to the reemployment claim, the court rejected Hanson's argument that he should have been employed as a DFM 2 or at least have similar out-of-class hours as he did before his service. He could not prove he had ever performed all the responsibilities of a DFM 2, and the court found he performed a similar percentage of the total fire investigations as he had before his deployment. As to benefits, the court held that new boots, his old radio call sign, and a fire marshal specific badge were not benefits under the statute and that the county had rectified an error in calculating his longevity bonus.

The court found enough evidence for a reasonable person to find that the county had discriminated against for his military service Hanson. Although the interviewers for the DFM 2 position noted several of Hanson's shortcomings, the fact that he had more fire investigation experience than the employee who received the promotion created an issue of material fact for trial. The court rejected plaintiff's constructive discharge claim as lacking any evidentiary support, because the work conditions he complained of did not rise to the level that would have forced a reasonable person to quit.

17. **Privacy**

17.1 *Miller v. Johnson & Johnson, Janssen Pharm., Inc.*, 6:13-CV-1016-ORL-40, 2015 WL 179269 (M.D. Fla. Jan. 14, 2015)

Job applicant, Thomas Miller, received an offer of employment from Johnson & Johnson & Janssen Pharmaceuticals, Inc. (J&J). The offer was contingent on Miller's successful completion of a background check by Yale Associates, Inc. (Yale). J&J received the background report from Yale and flagged Miller's application for further review because of criminal history information. J&J then notified Yale of its intent to rescind Miller's job offer which caused Yale to mail Miller a pre-adverse package containing a copy of the report and a summary of Miller's rights. Since Miller did not contact Yale within a reasonable time to dispute the inaccurate criminal history, Yale mailed an adverse action to Miller and notified him that the offer of employment with J&J had been withdrawn. Yale, upon Miller's request, later reinvestigated Miller's criminal background and corrected the inaccurate report. By then, however, the job was no longer available. Miller sued J&J and Yale under the Fair Credit Reporting Act (FCRA).

The District Court held that J&J violated the FCRA by failing to provide pre-adverse action notice prior to rescinding Miller's employment offer. The court found that the evidence, including email communication, showed that J&J went beyond an internal decision to rescind Miller's offer, allegedly telling Miller that the offer had been revoked before Yale mailed the package.

17.2 *Freckleton v. Target Corp.*, CIV. WDQ-14-0807, 2015 WL 165293 (D. Md. Jan. 12, 2015)

Job applicant, Charmaine Freckleton, brought a class action against Target Corporation (Target), the potential employer, and First Advantage LNS Screening Solutions, Inc. (First Advantage), the employment background screening company. Target used First Advantage's background checks and scoring service to screen candidates. Freckleton applied for a job at Target in early 2012 and consented to consumer report searches. One of First Advantage's databases consisted primarily of purported admissions of theft from former employers. First Advantage searched for Freckleton in the database and discovered a match. First Advantage reported to Target that Freckleton had been involved in a theft and deemed her in-eligible for hire. Several days later, First Advantage transmitted a copy of the consumer report to Freckleton with a standardized notice that the report might have an adverse effect on her employment. Another notice explained her right under the FCRA to dispute the accuracy of the report. Freckleton sued Target and First Advantage, alleging they violated the Fair Credit Reporting Act (FCRA) by using consumer information to make an adverse decision against her without giving her prior notice.

The District Court held that Target's use of the First Advantage information constituted a consumer report subject to protection by FCRA. The court rejected Target's argument that the check was excluded from FCRA because Target performed it as part of an investigation into misconduct. The court stated that the FCRA prohibits using consumer information to make an adverse decision against an employee without giving the employee prior notice, including evaluating a consumer for employment.

17.3 *Pearce v. Whitenack*, 440 S.W.3d 392 (Ky. Ct. App. 2014)

Jeffrey Pearce was a former city police officer with the City of Harrodsburg who posted a comment on his Facebook page about a fatal accident he had worked on that day. The Facebook comment read "rough night investigating a fatal accident. The family has my prayers." Because of the comment, Pearce received a Notice of Verbal Counseling from Police Chief Billy Whitenack. Due to a subsequent citizen's complaint against Pearce, Whitenack suspended Pearce with pay pending. Following the suspension, Pearce tendered his resignation to the Harrodsburg City Clerk and then sued Whitenack and other public officials, alleging violation of statutory due process rights and invasion of privacy. The Mercer Circuit Court dismissed Pearce's complaint due to failure to exhaust administrative remedies. Pearce appealed.

The Court of Appeals affirmed the circuit court's decision that all of Pearce's claims, except his claim for invasion of privacy, were precluded by his failure to exhaust his administrative remedies. Pearce claimed Whitenack's action against him was an invasion of privacy because Pearce posted the comment to his Facebook page in the privacy of his own home. The Court of Appeals held that Pearce lost his expectation of privacy when he transmitted the information to his social networking website, a public forum. As with all public internet communications, Pearce ran the risk that even a posting or communication he intended to remain private could be further disseminated by an authorized recipient.

17.4 *Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc.*, 962 N.E.2d 29 (Ill. App. Ct. 2011)

Diane Borchers served as the food service director for Mayslake, a not-for-profit corporation that operated Mayslake Village, a housing community for low and moderate-income senior citizens. Borchers brought a sexual harassment claim against her supervisor, Michael Frigo. After an internal investigation, Borchers claimed her relationship with Frigo deteriorated. She took sick leave from work and then went on long-term disability. Mayslake had a written policy that users should only use the food service computer for business purposes and should have no expectation of privacy for the creation or storage of information. Using the computer, Katherine Maxwell, Frigo's administrative assistant, accessed Borchers's personal AOL account and read part or all of various personal e-mails. Although Maxwell also checked Borchers's work-related email account, she only printed out e-mails from the AOL account. These emails were given to Mayslake's attorneys who filed a response to Borchers's sexual harassment claim and attached the e-mails. Borchers withdrew her sexual harassment charge shortly thereafter and then sued Mayslake, Frigo, and Maxwell for violating Title II of the federal Electronic Communications Privacy Act of 1986 and the tort of intrusion upon seclusion (when one person intentionally intrudes upon the seclusion of another in a manner offensive to a reasonable person). The Circuit Court granted employer's motion for summary judgment and granted individuals' motions to dismiss the complaint against them. Borchers appealed.

The Appellate Court held that the trial court acted improperly when it found "as a matter of fact" that the accessing of former employee's e-mails by other employees was "more likely an accident" rather than intentional. The Appellate Court held there was a genuine issue of material fact as to whether Maxwell and Frigo intentionally accessed, printed, and shared Borchers's emails. The court found that intent could be gleaned from circumstances and actions: Frigo and

Maxwell testified they knew of Borchers's sexual harassment allegations at the time the email were accessed; Maxwell knew that Borchers used Comcast for work-related purposes but only read and printed certain e-mails from the AOL account, including sent emails; and Frigo read and examined the emails, sharing them with Maylake's attorneys rather than destroying them. Finally, the attorneys, as Mayslake's agents, attached copies of the emails to Mayslake's response filed in the sexual harassment proceedings.

17.5 *Hurst v. Bd. of Fire & Police Comm'n*, 952 N.E.2d 1246 (Ill. App. Ct. 2011)

A police chief filed written charges alleging that police officer, Billy Hurst, viewed pornography on the employer-owned mobile data terminal while on duty. Hurst filed a complaint against the police chief and board of city's fire and police commission seeking a declaration that the evidence was obtained in violation of the eavesdropping statute and that the board had to conduct a fair and impartial hearing. In a hearing on the charges, the board discharged Hurst from his position as a police officer. Hurst sought leave to file an amended complaint adding a count for administrative review. After granting the motion for leave to amend, the Circuit Court granted police chief's and board's motions to dismiss. Hurst appealed.

The Appellate Court held that the board did not unlawfully consider evidence prohibited by the eavesdropping statute when it installed surveillance software on Hurst's mobile data terminal. For a communication to constitute a protected "electronic communication," both the sending and receiving parties must intend it to be private. The court found that nothing in the record suggested that senders of the pornographic images intended to keep them private. Hurst also had no reasonable expectation of privacy in his communications because the police department policy and procedures manual disclosed that messages sent on the terminal were retrievable.

18. **Assignment/Classification/Promotion/Compensation**

18.1 *Thompson v. City of Waco*, 38 IER Cases 858 (Tex. App. 2014)

A city ordinance in Waco provides for thirty-five fire station lieutenant positions. After a lieutenant was placed on an indefinite suspension, Chad Thompson was promoted to the position of lieutenant. A few months later, a hearing examiner reinstated the suspended lieutenant to his former position. Thompson was then demoted to his previous rank. Thompson requested to be reinstated. When his request was denied, he sued the City.

The court determined that the City properly demoted Thompson once the suspended lieutenant had been restored to his position. The ordinance authorized only thirty-five lieutenant positions. Once the hearing examiner reinstated the other lieutenant, the City had thirty-six lieutenants, exceeding the authorized limit of thirty-five positions. The city council could have voted to add another lieutenant position. However, in the absence of such action, the City was obligated to implement force reduction procedures. The City properly followed its force reduction procedures when it demoted Thompson.

18.2 *McDaniel v. Ezell*, 1130372, 2015 WL 403076 (Ala. Jan. 30, 2015)

Two positions for promotion to the job of battalion chief became available within the Florence Fire and Rescue Department. Benjamin Cochran, Melvin Brown, Tim Clanton, John T. Muse, McDaniel, and Ezell applied for the positions. The Civil Service Board (CSB) conducted interviews with the candidates and promoted Cochran and McDaniel to the two battalion-chief positions. Ezell filed a two-count complaint against the City and the CSB. The court, viewing the other applicants as indispensable parties, ordered Ezell to add Cochran, Brown, Clanton, Muse, and McDaniel. Ezell requested a jury trial. The jury returned the following verdict: "We are not reasonably satisfied that the decision of the [CSB] was correct and we find that the following 2 individuals should be promoted to Battalion Chief (pick two) ... Benjamin Cochran ... William Ezell." The trial court entered a judgment on the verdict and ordered that the status quo be maintained during the pendency of any appellate proceedings. The City and the CSB appealed.

The Alabama Supreme Court held that Ezell failed to establish that he was an aggrieved party of a decision of the CSB. Ezell presented no argument or evidence to establish that his legal rights had been adversely affected by the board's promotion decision. Rather, his argument and evidence focused on his personal dissatisfaction that the board exercised its discretion in considering other factors in its decision. Because Ezell failed to demonstrate that he had a right to appeal the board's decision, the supreme court held that the trial court lacked subject matter jurisdiction to entertain the appeal and should have dismissed it.

18.3 *Arnold v. City of Seattle*, 186 Wn. App. 653, 345 P.3d 1285 (2015)

Appellant Georgiana Arnold was employed as a manager with the Aging and Disabilities Services division of the city of Seattle's Human Services Department. Arnold was demoted after a state audit revealed embezzlement and criticized Arnold because one of her subordinates failed to properly respond to a whistleblower complaint. Arnold appealed her demotion to the Seattle Civil Service Commission. The hearing examiner concluded that demoting Arnold contradicted discipline imposed in comparable cases and converted it to a two-week suspension. Arnold then requested an award of attorney fees. The Seattle Municipal Code provides that an appellant "may be represented at a hearing before the Commission by a person of his/her own choosing at his/her own expense." On this ground, the examiner denied Arnold's request for attorney fees, and the commission affirmed the examiner. Arnold sued in superior court. The court granted the City's motion to dismiss the case on summary judgment. Arnold sought direct review in the Supreme Court. The Supreme Court transferred her appeal to the Court of Appeals.

The Court of Appeals reversed the lower court and interpreted an "action" under RCW 49.48.030 to include Arnold's appeal to the civil service board. RCW 49.48.030 provides for an award of reasonable attorney fees in any action in which any person succeeds in recovering a judgment for wages or salary owed to him or her. The court held that because the statute is interpreted liberally in favor of employees, the "action" where the person succeeds in recovering judgment for wages or salary owed is not restricted to lawsuits filed in a court. According to the court, it was irrelevant that the commission itself could not award attorney fees as the superior court could exercise such authority in a separate suit brought by an employee.

18.4 *Barlett v. City of Chicago*, 14 C 7225, 2015 WL 135286 (N.D. Ill. Jan. 9, 2015)

Robert Bartlett, a police officer with the SWAT team of the Chicago Police Department ("CPD"), claimed that the City through its procedures willfully violated the Illinois Wage Payment Collection Act (the "IWPCA") by intentionally failing and refusing to pay Bartlett all compensation due to him and implementing unlawful regulations. According to Bartlett, the City restricted him from: (i) leaving his personal vehicle unattended while his SWAT gear and weapons were inside the vehicles; and (ii) having any non-police personnel in his personal vehicle while transporting SWAT gear and weapons to and from work. The City also required that Bartlett be available to answer and respond to assignments with his SWAT gear and weapons in his personal vehicle to reduce response times. Bartlett contended that he received no compensation, wages, or mileage expenses for the use of his personal vehicle. He cited the collective bargaining agreement (the "CBA") that required the City to provide overtime compensation for all time over the normal 8 hour work day and 40 hour work week. The City requested dismissal of Bartlett's complaint, insisting that Bartlett did not and could not identify any promise or agreement by the City to pay for home to work travel time and that his claim was preempted by the grievance procedures in the CBA.

The district court held that Bartlett had sufficiently pleaded he was an employee covered by the protections of the IWPCA. The court found the City knew Bartlett performed work that required payment of wages and/or overtime compensation, and that the parties contracted to pay Bartlett wages and/or overtime for hours worked. The court also held that Bartlett's complaint was not preempted by the CBA because Bartlett did not contest the interpretation or application of the CBA but sought to enforce an individual statutory right under the IPWCA as a judicial remedy, separate from the CBA.

18.5 *Matthews v. City of Mobile*, 2130721, 2014 WL 6844138 (Ala. Civ. App. Dec. 5, 2014)

After a pre-disciplinary hearing, the City of Mobile notified Cassandra Matthews that it would suspend her without pay for 24 hours. In response to the Board's decision, Matthews timely filed a written notice of appeal with the Board's personnel director. While Matthews's appeal was pending before the Board, Matthews received another pre-disciplinary hearing notice that the City intended to terminate her employment. The City subsequently terminated Matthews and Matthews received a notice of the termination. To appeal the decision, Matthews had to file a "written answer" or explanation of the charges, admit or deny guilt, and state why the termination should not become effective. Matthews attempted to satisfy the requirement for a "written answer" by sending an e-mail communication purporting to appeal the City's termination decision.

The Alabama Court of Civil Appeals held that Matthews did not "file" an administrative appeal of her termination when she e-mailed staffer in the board's office indicating her wish to appeal the termination. The court noted that the parties made no argument whether an e-mail communication was a "written answer" and therefore, the court did not reach that issue. The court held that even assuming, that Matthews's e-mail communication constituted a "written answer," both the Act and rules required that Matthews "file" the written answer or explanation of the charges with the Board. Since Matthews's e-mail communication to the trial court did not

constitute a "filing" of a notice of appeal, it did not invoke the jurisdiction of the trial court to consider her appeal of her termination.

18.6 *Jennings v. City of Memphis*, No. W2013-02570-COA-R3CV, 2014 WL 3696264 (Tenn. Ct. App. July 24, 2014)

Bryant Jennings worked as a temporary, full-time research associate with the Memphis police department until he became a full-time commissioned police officer on June 11, 1979. Article 10, §67 of the city charter stated that firefighters or police officers employed before February 1, 1979 were automatically promoted to captain after thirty years of service. Relying on this section, Jennings filed a complaint for declaratory judgment. Jennings claimed that although the City had previously determined he was eligible for promotion to thirty-year captain, it had refused to promote him. Jennings sought a declaration he "be promoted to the rank of Captain with full back pay and benefits to the date of his eligibility for the same." The chancery court granted summary judgment in Jennings's favor and the city appealed.

The court of appeals held that Jennings, as a temporary employee prior to 1979, was not employed as a police officer before February 1, 1979 and therefore, not entitled to automatic promotion under Article 10, § 67 of the city charter. The court of appeals reversed the trial court's grant of summary judgment in Jennings' favor, granted summary judgment in the city's favor, and remanded the case for further proceedings.

18.7 *Hauck v. City of Indianapolis*, 17 N.E.3d 1007 (Ind. Ct. App. 2014) transfer denied, 26 N.E.3d 981 (Ind. 2015)

In 2006, the Indianapolis Metropolitan Police Department (Metropolitan) was created through the consolidation of the Indianapolis police department (PD) and the Marion County Sheriff's Department (MCSD). The City code provided that for three years, the chief would endeavor to promote members of the department to achieve proportional representation of former police officers and sheriff's deputies from each department. Albert L. Hauck and Mark Wood were former Marion County deputies who became Metropolitan officers. In 2008, Metropolitan conducted a promotional process for the ranks of sergeant, lieutenant, and captain. Both Hauck and Wood signed up to participate for the rank of captain. A certain number of points were assigned to the components of the promotion process, including a multiple-choice examination, oral interview, and the assessment exercises. Wood placed in the tenth position and Hauck placed in the thirteenth position on the list. Of the twenty-one candidates named on the promotional list, four were former members of the MCSD and Hauck and Wood were the highest scoring former MCSD members. Thirty-seven total promotions were made and no former members of the MCSD were promoted to the rank of captain, one former member of the MCSD was promoted to the rank of lieutenant, and five former members of the MCSD were promoted to the rank of sergeant. Hauck and Wood filed a complaint alleging the City failed to achieve or maintain proportional representation of former MCSD deputies to former IPD officers, and the failure to promote Hauck and Wood to the rank of captain constituted a breach of their employment contract and City code.

The Indiana Court of Appeals held that the City demonstrated that the Metropolitan Chief of Police endeavored to promote members in a manner to achieve proportional representation of

former IPD and MCSD members. The criteria and components of the scoring process gave equal opportunity for advancement. Wood placed in the tenth position and Hauck placed in the thirteenth position in the promotional process. Had the scores been equal or close to equal between a candidate who was a former IPD member and a candidate who was a former MCSD member, the ordinance may have required that the former MCSD member be given the promotion. But, to have overlooked the much higher-scoring candidates would have shown a favoritism not contemplated by the ordinance. Hauck and Wood also could not show damages given the total number of former MCSD members holding the rank of captain was merely 1.2 percent less than the pre-promotion percentage.

19. **Agency Discretion**

19.1 *Alaska Police Standards Council v. Parcell*, 348 P.3d 882 (Alaska 2015).

Lance Parcell was employed as a police officer for the Alaska Department of Transportation. Lance was terminated for making sexually offensive comments to female officers, abusing alcohol, and allegedly acting dishonestly during the investigation of his offensive remarks. While the Lance's termination was pending, the Alaska Police Standards Council also began proceedings to revoke Lance's police certificate. The Council revoked Lance's certificate for lack of "good moral character." The superior court reversed the Council's determination, finding it was not entitled to deference and was unreasonable.

The Alaska Supreme Court reversed the superior court's decision and upheld the Council's revocation of Lance's police certificate. The Court found that Council had discretion to revoke an officer's certificate for lack of "good moral character," and that courts should defer to the Council's determination as long as there was a reasonable basis for the revocation. The Council had a reasonable basis for the revocation because Lance's pattern of behavior showed a lack of good moral character; the Council was not required to consider all positive aspects of Lance's character in its determination. Because the Council had a reasonable basis for revoking Lance's certificate, the Court deferred to the Council's determination and upheld the revocation.

19.2 *Denning v. Johnson Cnty.*, 299 Kan. 1070, 329 P.3d 440, 441, 2014 BL 192672 (2014)

Johnson County Sheriff's Department Master Deputy Michael Maurer cracked a department vehicle's windshield with a binder while attempting to shoo a bothersome horsefly. Maurer initially reported the incident by writing "Crack in windshield — rock" on a yellow sticky note and leaving the note for his commanding officer. Maurer briefly spoke with the officer the next morning and advised him the crack on the windshield had "spiderwebbed" due to a rock chip. But another deputy who witnessed the horsefly incident soon reported that Maurer caused the damage. Maurer eventually responded to questions regarding the incident in two separate written reports and disclosed additional facts regarding his role in damaging the windshield. After an internal investigation and hearing before an internal review board, Johnson County Sheriff Frank Denning terminated Maurer for violating the department's professional standard on truthfulness. Maurer appealed to the Johnson County Sheriff's Civil Service Board (CSB), and the CSB reversed Denning's decision.

The Kansas Supreme Court, affirming the Court of Appeals, upheld Denning's decision to terminate Maurer. The court found that the CSB had statutory authority to review sheriff's personnel decisions and its role was not limited to whether the deputy was terminated "for reasons of race, religion or politics." Based on its authority, the CSB did not act reasonably when it failed to consider the primary basis for Denning's decision — i.e., Maurer's two false statements to Greenwood as well as his failure to disclose relevant information in those initial reports. The supreme court held that the CSB improperly substituted its judgment for that of the sheriff in finding that deputy's two written reports were truthful and that he "at all times took responsibility," ignoring evidence that Maurer violated policy when he initially reported that a rock damaged the windshield. Further, because the CSB's decision was not substantially supported by the evidence, the Kansas Supreme Court held that the CSB's decision was itself unreasonable, arbitrary, and capricious.

20. **County Meetings**

20.1 Whether A County Legislative Authority Can Meet Outside the County to Hold a Joint Meeting with Another County's Legislative Authority, AGO 2014 No. 7 (Wash. 2014).

In November 2014, the Washington Attorney General issued an opinion on the required location for county meetings. The question posed to the Attorney General was whether a county legislative authority could meet outside of its county limits to discuss joint bi-county projects. The Attorney General concluded that the county legislative authority must hold its meeting within county limits, unless a specific exception applies. However, if multiple counties want to have a joint meeting, each county legislative authority can meet within its respective county limits and use video conferencing technology to connect to the other county legislative authorities for a joint meeting. In approving this logistical solution, the Attorney General noted that counties have implied legislative authority to take step necessary to carry out their express duties and that courts have recently remarked favorably on using video conferencing technology.

21. **Administrative Hearings — Jurisdiction on Untimely Appeals**

21.1 *Hall-Villareal v. City of Fresno*, 125 Cal.Rptr.3d 376 (Cal. Ct. App. 2011)

Joy-Hall-Villareal worked as an administrative clerk for the Fresno Police Department. The department terminated her for accessing files for personal interest. Two days after her termination, she submitted an application for retirement benefits. She retained counsel and filed an appeal of her termination, but the Civil Service Board (CSB) rejected her appeal as untimely filed, since she filed it one day late. She then obtained a court order directing the CSB to hear her appeal on the merits. The CSB appealed, arguing the CSB has no jurisdiction because of Hall-Villareal's retirement application and because the appeal was untimely filed and no good-cause exception exists for late appeals.

The court ruled that the CSB had jurisdiction to hear Hall-Villareal's appeal. The court distinguished cases where employees had resigned and ruled that filing for retirement benefits did not abrogate a terminated employee's right to appeal. Moreover, the court found that when a civil service employee shows good cause for filing a late appeal of termination, due process concerns requires the CSB to hear that appeal on the merits.

22. **Anti-SLAPP**

22.1 *Gotterba v. Travolta*, 228 Cal. App. 4th 35, 175 Cal. Rptr. 3d 47 (2014)

John Travolta, Atlo, Inc. (Atlo) employed Douglas Gotterba as an airplane pilot between 1981-87. When Gotterba voluntarily left his employment, Gotterba and Atlo entered into a written termination agreement. Twenty-five years later, Gotterba wished to "tell the story of his life and those involved in it," including his personal relationship with Travolta. Gotterba and Atlo then disagreed on which termination agreement was enforceable. Gotterba asserted that an unsigned three-page March 1987 termination agreement without a confidentiality clause was enforceable while Atlo insisted that an executed four-page April 1987 nondisclosure agreement was enforceable. In response, Atlo's attorney, contacted the National Enquirer, informing it of Atlo's nondisclosure agreement. Gotterba sought a judicial declaration on whether the three-page or the four-page agreement was enforceable. In response, Atlo filed an anti-SLAPP (strategic lawsuit against public participation) motion to strike, alleging that Gotterba sued to prevent Travolta from sending prelitigation demand letters. Following written and oral argument by the parties, the trial court denied the motion. Atlo appealed.

The Court of Appeal held that the action for declaratory judgment on authenticity and enforceability of the nondisclosure agreement was not SLAPP. Contrary to Atlo's position and arguments, the court found that Gotterba's complaint sought declaratory relief regarding the validity of the asserted termination agreements. It did not seek a declaration regarding Atlo's communication with the news agencies or a declaration that any specific conduct by Gotterba or Atlo was permitted. The lawsuit also did not seek to curtail Atlo's right to send demand letters. According to the court, in deciding whether a lawsuit is a SLAPP action, the trial court must distinguish between speech or petitioning activity that is mere evidence related to liability and liability based on speech or petitioning activity.

23. **Public Records Act**

23.1 *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 346 P.3d 737, 2015 BL 94708 (2015)

Anthony J. Predisik and Christopher Katke were longtime employees of the Spokane School District No. 81 (District). In late 2011 and early 2012, the District investigated Predisik and Katke after individuals made separate, unrelated allegations against the two employees. The District placed Predisik and Katke on administrative leave and paid salaries to both employees while it investigated. In the spring of 2012, two media outlets submitted requests under the Washington Public Records Act (PRA) to the District. One request sought the administrative leave letter given to Anthony Predisik. The other request asked for "information on all district employees currently on paid/non-paid administrative leave." The requests returned three public records– a leave letter and spreadsheets that documented the leave pay Predisik and Katke had accumulated. None of the records explained the allegations. Predisik and Katke separately sued the District to enjoin disclosure of the leave letter and spreadsheets. The District opposed the injunction. The trial court found that Predisik's and Katke's identities, but not the records themselves, were exempt from disclosure and ordered all three records disclosed with names redacted. The Court of Appeals affirmed.

The Washington Supreme Court ordered the records disclosed in their entirety without redaction. The court held that public employees funded by public tax dollars have no privacy right when they are being investigated by their public employer. The public has a right to know who their public employees are and when those employees are not performing their duties. Such an investigation is merely a status of their public employment, not an intimate detail of their personal lives. The exemptions for personal information and investigative records under the PRA thus did not apply, given that the records disclosed only that two employees were being investigated—as opposed to details of investigation.

23.2 *Wis. Prof'l Police Ass'n v. Wis. Cntys. Ass'n*, 357 Wis.2d 687, 689-690, 855 N.W.2d 715, 716, 2014 BL 260101

The Wisconsin Professional Police Association (WPPA) is a not-for-profit labor organization, and the Wisconsin Counties Association (WCA) is an unincorporated not-for-profit association. The WPPA submitted to the WCA two requests for records under the public records law. The WCA responded that the public records law "does not apply to the WCA." The WPPA sued to enforce the public records law against the WCA. The parties filed cross-motions for summary judgment. The circuit court granted the WCA's motion for summary judgment and dismissed the WPPA's complaint. The WPPA appealed, contending that the circuit court erroneously "held that [the WCA] does not constitute an 'authority' for the purpose of Wisconsin's" public records law."

The Wisconsin Court of Appeals held that the WCA was entitled to dismissal of WPPA's lawsuit because the public records law imposed the duty on an "authority" as defined by statute and the WCA is not a corporation and, therefore, not an "authority" by being a "quasi-governmental corporation." The court of appeals rejected the WPPA's argument that the WCA was an authority based on a dictionary definition of "corporation" because Wisconsin defined corporation under state law and the WPPA did not assert that the WCA was "created by or under the authority of that law."

24. **Procedure/Discovery**

24.1 *Jenkins v. City of Cedar Park*, 2014 BL 204213 (Tex. App.-Austin July 24, 2014)

Under suspension for rule violations, Christopher Jenkins, a fire fighter employed with the Cedar Park Fire Department for over eight years, was charged with driving while intoxicated (DWI). The conduct that led to his arrest and DWI charge included blocking two lanes of a roadway at a red light. Jenkins pleaded no contest to a charge of blocking a roadway, and received deferred adjudication. Subsequently, the fire chief issued Jenkins a notice of indefinite suspension, discipline equivalent to dismissal from the department. Jenkins exercised the option to appeal his indefinite suspension to an independent hearing examiner. The hearing examiner held the suspension was appropriate and denied the appeal. Jenkins appealed to the district court, claiming that the examiner exceeded his jurisdiction by upholding the suspension on improper grounds. The City contended that the hearing examiner did not exceed his jurisdiction because Jenkins's claims did not fall within the narrow right to appeal under city code section 143.057(j). The district court granted the City's plea to the jurisdiction and did not rule on the motions for summary judgment. An appeal followed.

The Texas Court of Appeals held that the trial court properly granted plea to jurisdiction. Even though the hearing examiner upheld suspension based solely on violation of the Texas Fire fighters' and Police Officers' Civil Service Act and made no finding that Jenkins also violated the City's Local Civil Service Rules, the examiner was within his jurisdiction. The Civil Service rules were adopted under the act and contained virtually identical language.

25. **Arbitrator Authority**

25.1 *Fire Fighters Local 136 v. City of Dayton*, 2015 BL 68532 (App. 2d Dist. 2015)

The City of Dayton discharged Lieutenant Brian Monaghan and the City's director of human resources sent a letter to the president of the International Association of Firefighters (IAFF), notifying her that the City intended to abolish Monaghan's position. Despite the letter, Chief Redden ordered Assistant Chief Payne to draft a form for a new lieutenant position. Redden and Payne signed the form for the new lieutenant position and the human resources director signed it the next day, but the city manager did not sign the form until the following year. While the form sat on the City Manager's desk, the list that set the order of promotion-eligible candidates to lieutenant expired. The firefighter at the top of the list, David Christian, believed that he should have been promoted to the new lieutenant position, although it had not yet been created, and filed a grievance. The IAFF elected to take it to arbitration. The arbitrator granted the grievance and ordered the city to promote Christian to the rank of lieutenant. The city filed a motion in the court of common pleas to vacate the arbitrator's award and the court overruled the IAFF, finding that the arbitrator had exceeded his power under the collective bargaining agreement.

The Second Appellate District of the Ohio Court of Appeals agreed with the lower court and held that the arbitrator exceeded his authority. The city could not be held responsible for what a higher-ranking union member told a subordinate – in this case, Redden telling Christian he would be promoted. The CBA stated that "vacancy" did not occur until a position was created and funded, and under the City Charter, only the city manager had the power to appoint employees. The city manager did not sign the form until after the promotion eligible list expired and the City was correct that at the expiration of the list, there was no "vacancy" to fill.

26. **Miscellaneous**

26.1 *Columbus firefighter axed for marrying co-worker's niece* (The Dispatch)

Jonathan Goodman, a Columbus City firefighter, was terminated after marrying another firefighter's niece, violating the City's nepotism policy. Even though Goodman and his wife's uncle are the same rank within the department, the policy prohibits conflicts of interest that may arise because of relationship between employees, even if there is no authority or line of reporting involved. Goodman's only options were to resign or transfer to the police department. City Council members argue he terminated himself. Goodman contends the policy is untenable, as he was told he could date her, and live with her, but could not marry her. In response to complying with the policy, council members are reconsidering the policy.

26.2 *Ruling goes against Las Vegas fire recruits in cheating scandal* (Las Vegas Review-Journal)

The Nevada Employee Management Relations Board found for the City of Las Vegas and its right to dismiss a dozen trainees who were investigated for cheating during a hazardous materials test. The City is also not required to pay damages or lost wages to the recruits. Applicants who had been dismissed were able to reapply, many of which have now successfully completed it.

26.3 *Are Workplace Personality Tests Fair?* (Wall Street Journal Online)

Work place personality tests are coming under scrutiny. Their use has surged recently, providing employers with valuable information that may directly correlate to enhanced customer service abilities. However, they are also raising issues of effectiveness and fairness. In the case of Whole Foods Market, the chain discontinued using the tests after learning people who scored highly lacked basic food preparation skills. For other employers like CVS, questions have been removed from its test after facing civil charges of discrimination, alleging the tests can discriminate against applicants with mental impairments of disorders.

26.4 *Dollar General, Job Applicants Agree to Settle Background Check Class Claims for $4 Million*

The Dollar General did not admit or deny liability, but agreed to settle a claim with class members who allege they were victimized by the company's failure to follow the Fair Credit Reporting Act. The Company did not give applicants appropriate notice and opportunity to correct mistakes in their credit reports before they were denied jobs based on background checks.

26.5 SOCIAL MEDIA POLICY
Boch Imports, Inc, 362 N.L.R.B. No. 83, April 30, 2015

The National Labor Relations Board determined that Boch Imports, Inc. was improperly maintaining a social media policy that required employees to identify themselves online when posting a comment about the employer. The company also failed to lawfully support its dress code that prohibited wearing union insignia. The social media policy was overly broad so as to interfere with employees engaging in protected activity online, and the union insignia policy was not narrowly addressed to accommodate any employer concerns about safety or professionalism.

26.6 OUTSIDE EMPLOYMENT
In re Saline County Sheriff and Illinois FOP Labor Council, Decision of Arbitrator, 133 LA 1533

At issue in this arbitration is the Sheriff's Department's new policy to preclude employees from pursuing secondary employment opportunities. Prior to this rule change, employees were permitted to take on second jobs in law enforcement, subject to the Sheriff's approval. Two employees in the arbitration precipitated this policy change: one was doing secondary work tasks during his primary job and the second was leaving work early without permission because of extreme fatigue from working two jobs. The Union contends that rule changes must be reasonable, and precluding secondary employment is not reasonable. The

Sheriff's Department contends it does have the power to make such a policy change based on the management rights provision of the collective agreement, and the behavior of the two employees in question.

The arbitrator determined that the policy needed to be rescinded because it was not fully in compliance with the Sheriff's management rights. The Sheriff does retain the right to re-issue a reasonable policy, or condition permission on reasonable grounds consistent with the collective agreement. However, a blanket policy such as the one implemented was not reasonable.

26.7 PHYSICAL ABILITY TESTING

Bauer v. Holder, 25 F. Supp. 3d 842 (E.D. Va. 2014)

Jay Bauer is a 40-year old applicant to the Federal Bureau of Investigations (FBI) special agent program. As part of his application and training process Bauer attended the FBI Academy where all applicants are required to undergo a physical fitness exam, which has separate minimum requirements for male and female candidates. During week 22 of the Academy, Bauer was unable to complete the required 30 push-ups in the time allotted—completing only 29. Immediately following that exam, Bauer was approached by FBI personnel who said his only options were to resign immediately and he could either retain or forfeit the option for future employment with the FBI. Bauer chose resignation with the option to retain future employment and was immediately required to hand-write his resignation letter, using FBI-chosen language. Subsequently, Bauer accepted a desk job as an FBI intelligence analyst.

Bauer brought this law suit to gain reinstatement to the special agent program. He argued that he'd suffered adverse employment action and that the gender-normed physical fitness standard was discriminatory. Typically, to succeed on an adverse employment action claim, a plaintiff must have been terminated. Bauer argued his immediate forced resignation acted as a constructive termination from the special agent program, and specifically that the resignation was coerced and/or involuntary. The court agreed that Bauer experienced a "lack of free choice" because he had no alternatives other than immediate resignation. Furthermore, it is not dispositive that the plaintiff later received employment with the FBI, because he first resigned and later was offered a different position within the FBI, he was not "reassigned" within the FBI.

The Court wrestled with the question of whether the FBI's test was discriminatory because of its different standards for males and females. It ultimately concluded that this particular test was indeed discriminatory by relying on the plain meaning of Title II, which states, "it shall be an unlawful employment practice for an employer…to discriminate against any individual…because of such individual's sex." Under this statute the court determined that not all gender-norm tests are illegal, but that they are not all *per se legal*. The FBI was unable to demonstrate that the fitness standard disparity had any relation to the completion of the special agent job. Specifically, incumbent agents did not need to undertake the physical fitness exam, and once a candidate entered the program they were not required to undergo further testing later down the road. This indicated to the Court that the fitness test wasn't actually testing a candidate's physical strength in relation to future tasks—it was just testing current strength for no future purpose. For this reason, the Court maintained the FBI's disparate gender standards were not in compliance with Title II.

26.8 PHYSICAL ABILITY TESTING

FDNY drops physical test requirement amid low female hiring rate (NY Post)

The New York Fire Department is no longer requiring probationary fire fighters to pass a physical-skills test before becoming permanently hired. The FDNY has purportedly had a sharp decrease in its hiring rate of women. At the time of the announcement, the FDNY had 10,500 employees, 44 of which were women. Officials familiar with training protocol argue that to remove these physical skills tests lowers standards across the board, and the only thing that matters is the performance of firefighting tasks.

26.9 FIT FOR DUTY EXAM

Down v. Ann Arbor Pub. Sch., 29 F. Supp. 3d 1030 (E.D. Mich. 2014)

Plaintiff Dianne Down alleges that the Ann Arbor Public Schools (AAPS) violated her Fourth Amendment right by requiring her to undergo an independent medical examination. Down obtained employment with AAPS in 1999. Over the course of her teaching career at AAPS Down had numerous disciplinary issues, receiving reprimands for her conduct toward students and failing to maintain appropriate standards of professional behavior. At times, multiple parents would email and call the school to express their concerns with Down's teaching.

In December 2013 Down was placed on administrative leave, pending an investigation of verbal abuse of students. Two days later Down was sent a notification that she had been scheduled for an independent medical exam. At the time of her initial employment in 1999 Downs had signed a Master Agreement whereby she consented to undergoing psychological/psychiatric evaluation should the AAPS Board suspect a teacher is unable to perform their duties. The results of such an exam are only revealed to the Executive Director of Human Resources, AAPS General Counsel, and with Down. Down denied all of the behavior that resulted in the demand for the exam, and refused to undergo the exam.

In order to succeed on her request for a preliminary injunction against the medical exam, Down has to show the likelihood that she'd succeed on the merits of her case. The Court determined Down was unable to prove that AAPS requiring a public school teacher to submit to a mental exam is an unreasonable search in violation of the Fourth Amendment. While the Court predicted that the Sixth Circuit would most likely find that a compelled mental exam is indeed a search under the Fourth Amendment, the school district had a compelling and reasonable interest in doing so, which outweighed Down's resistance to the exam. Therefore, while the compelled exam may be a search under the Fourth Amendment, Down's Fourth Amendment rights were not violated by the compulsion of the exam.

26.10 FIT FOR DUTY EXAM

Kao v. Univ. of San Francisco, 229 Cal. App. 4th 437, 177 Cal. Rptr. 3d 145 (2014), *review denied* (Nov. 25, 2014)

Dr. John S. Kao was a tenured professor at USF who was very concerned about a lack of diversity within the faculty of the math and computer science departments. Starting in 2008 Kai began to meet with deans and faculty to express his concern for the school's failure to properly advertise and attract diverse candidates. The coworkers and superiors Kao met with found him to

terrifying, one testifying that their meeting was "the most upsetting thing that's ever happened to me at my job." Employers of the Defendant testified to Kao's sudden and explosive emotion, clenched fists, and yelling and screaming during their interactions. Quickly, Kao's presence and interaction with the faculty was inciting general fear. USF began an investigation into Kao's behavior. It was determined that Kao should undergo an independent medical exam by an independent physician to determine if he is fit for duty (FFD). Kao was sent a consent form to complete, which included a "do not authorize" provision such that no one but the physician would receive his results. Kao immediately and adamantly resisted the exam; instead requesting an informal meeting with the faculty to talk things over and clear the air. Kao's lawyer advised USF repeatedly Kao would not consent to the exam, which ultimately led to his termination after several months of delay.

Kao's main concern during the litigation was that USF had to engage in an "interactive process" with him before referring him for a FFD. However, the Court contends that this interactive process was not required. The only time this process is required is when the subject of the process acknowledges having a disability or seeks an accommodation for one. Furthermore, the exam was "job-related" because USF unquestionably has a duty to maintain a safe work environment for faculty and students. The Court disregarded Kao's claims for defamation, USF's breach of Confidentiality of Medical Information Act, mitigation of damages and spoliation of evidence.

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Litigation & Dispute Resolution

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Right-of-Way (Chair)

School Districts

Sports Law

Transportation

Wine, Beer & Spirits

PRACTICE OVERVIEW

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

REPRESENTATIVE WORK

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

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

RECOGNITION

- *The Best Lawyers in America*®, Appellate Practice, 2012-2015
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine, Appellate Practice, 2013
- Washington Super Lawyers list, 2002-2015
- 2010 Top Lawyer, *Seattle Metropolitan* magazine
- Martindale-Hubbell AV rating

ACTIVITIES

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

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

PUBLICATIONS

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

PRESENTATIONS

– "Is Your Employee Handbook Ready for Prime Time?" Speaker, Foster Pepper Client Briefing, April 2015
– "Basic Training for New Commissioners and Staff; Annual Legal Update," Presenter, Civil Service Conference, 1986-2014
– "Labor Relations and Public Record Disclosure," Speaker, Washington State Office of the Attorney General CLE, December 2014
– "The Okanogan PUD Litigation: The Pitfalls of Life in One of Washington's Great Scenic Locations and Condemnation of State Lands," Speaker, PUD-Municipal Attorney Conference, June 2014
– "Infrastructure Development - Managing Property Acquisition and Procurement," Speaker, Washington Public Utility District Association, Managers Committee Meeting, May 2014
– "Labor Relations and Public Record Disclosure," Speaker, Washington Association of Public Records Officers Spring Training, May 2014
– "Litigating Open Government Cases: A Well-Stocked Tool-Kit for Public and Private Practitioners"
  + Program Co-Chair and Speaker, February 2014
    ▪ Legal Ethics: Managing Conflicts and Understanding Privileges; What To Do When The Client Does Not Disclose
    ▪ Continue the Exchange of Ideas: Reception for Faculty and Attendees
– "Privilege and the PRA: Freedom Foundation v. Gregoire," Speaker, Law Seminar International, One-Hour Expert Analysis, December 2013
– "Wage & Hour Compliance – Beyond the Basics (Part I)," Presenter, Foster Pepper Client Briefing, February 2013

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- "LIDs: Nuts and Bolts," Speaker, Washington State Association of Municipal Attorneys (WSAMA), May 2008
- "Newly Elected Officials Workshop," Speaker, Association of Washington Cities, January 2008
- "Eminent Domain," Speaker, Lorman Seminar, September 2006
- "Knowing the Legal Territory," Association of Washington Cities, 1988-2006 (Newly Elected Officials Workshop)
- "Road and Access Law in Washington," National Business Institute, 1999 and 2001
- "Inverse Condemnation Issues in the Direct Condemnation Setting," Law Seminars International, December 2000; December 1999; December 1998
- "Washington State Association of Fire Chiefs," Executive Officer Labor Relations Training Courses, 1998, 1993, 1992, 1989
- "The People's War: In the Trenches with Nuisances, NIMBYs, and Essential Public Facilities," Washington State Bar Association, Environmental & Land Use Law Section, May 1997
- "The ABCs of LUDs," Washington Public Utility Districts Association, July 1996, 1997

EXPERIENCE

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

BAR ADMISSIONS

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

EDUCATION

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