Annual Legal Update
37th Annual
Civil Service Conference

September 21, 2018

Yakima, Washington

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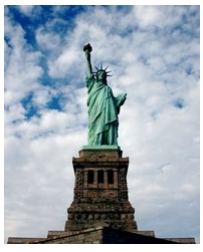
SB 6145

- Authorizes hiring of lawful permanent residents
- Impacts statutes regarding civil service for city firefighters, city police, and sheriff's offices.
  RCW 41.08.070, RCW 41.12.070,RCW 41.14.100.



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Insubordination

Image: NBC

City of Cleveland v. Mun. Foreman & Laborer's Local 1099, No. 105035 (Ohio Ct. App., 2017) (Section 2.1.1)

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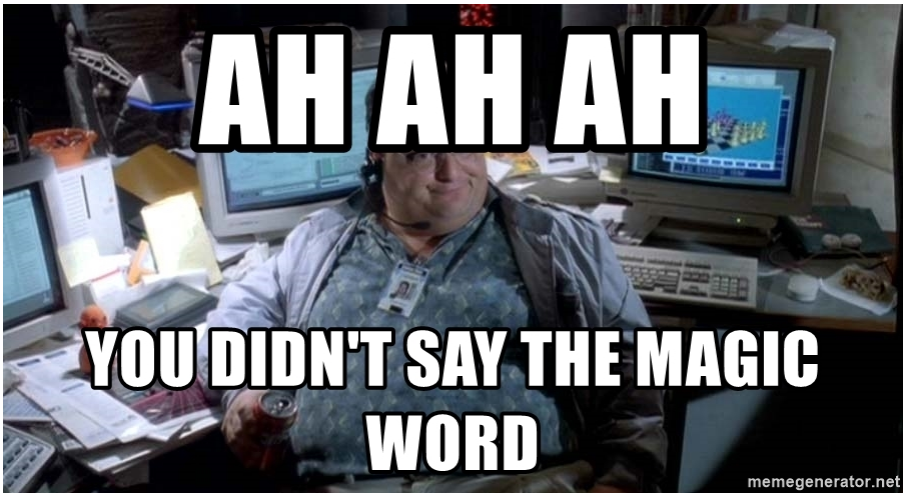

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Image: City of Oklahoma City

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AFSCME
We Make America Happen

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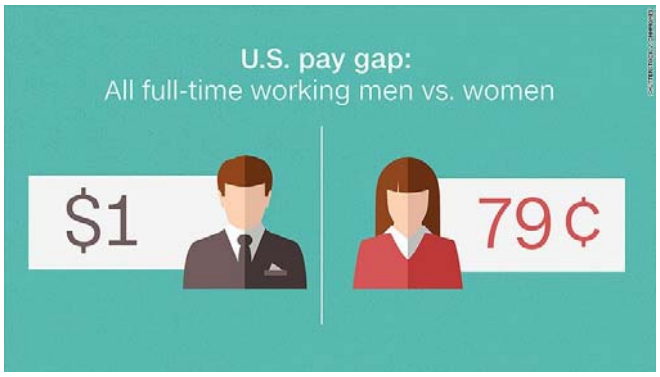

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Lori Franchina - Image: NBC News, www.nbcnews.com

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FOSTER PEPPER PLLC

37th ANNUAL
CIVIL SERVICE CONFERENCE

2018 ANNUAL LEGAL UPDATE

YAKIMA, WA

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1. **Due Process**

1.1 *Forgue v. City of Chicago*, 873 F.3d 962 (7th Cir. 2017)

Police Officer Ronald Forgue sued his employer, the city of Chicago, alleging he was retaliated against for speech protected by the First Amendment, as well as violation the Equal Protection Clause, and his procedural due process rights. Forgue submitted internal complaints during his time as sergeant and lieutenant based on other officers allegedly not following department policies. Forgue alleged that in retaliation for his complaints, he and his sons were harassed; he was transferred to a less desirable unit; and was denied a "retirement card" which was given to department members after ten years' service in good standing. The retirement card would have enabled Forgue to carry a concealed firearm, procure certain benefits, and find other employment in law enforcement.

The Court dismissed Forgue's First Amendment claims because his speech, made as a public employee and not a private citizen, was made pursuant to his official duties and was therefore not protected. As to the Equal Protection Claim, the Court ruled the public employee could not, as a matter of law bring a "class of one" claim that he was fired for arbitrary and vindictive reasons. As to Forgue's due process claim, the Court concluded that Forgue stated a claim that he had a property interest in receiving a retirement card, to be decided by a jury.

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

2.1 **FAILURE TO FOLLOW ORDERS**

2.1.1 *City of Cleveland v. Mun. Foreman & Laborer's Local 1099*, No. 105035 (Ohio Ct. App., June 8, 2017)

An appellate court affirmed an arbitrator's decision that there was not just cause for the termination of a park maintenance worker, Traci Pierson. Pierson had previously been suspended three times, with one suspension held in abeyance. The City had a policy which required employees who were sick to call in at least one hour before their scheduled start time. Employees who failed to do so would be considered absent without leave. Employees would also not be permitted to work if they reported to work more than an hour after the start of their shift. Pierson called in at 5:40 a.m., saying she needed four hours leave. Her shift began at 7 a.m. She reported to work at 9:40 a.m. and swiped her electronic timecard, even though her supervisor told her not to. She was asked to leave for the day, but did not. The City called the police. Pierson left at 11:30 a.m., before police arrived.

The City later terminated Pierson for neglect of duty, incompetence, conduct unbecoming an employee in public service, and insubordination. The arbitrator determined that the termination was for insubordination, and that Pierson was not insubordinate because she was not made aware of the consequences of failing to follow the order to leave for the day. The Court of Appeals rejected the City's contentions that the arbitrator exceeded his authority and affirmed the arbitrator's decision.

2.1.2 *Jefferson County Vocational-Technical School Committee*, 137 LA 681, FMCS Case No. 2016/0349 (May 17, 2017)

An algebra teacher at a vocational school was issued a written reprimand for alleged unlawful harassment and a three-day suspension for alleged insubordination. An arbitrator concluded both instances of discipline were not supported, expunging the reprimand, reducing the suspension to a written warning, and reimbursing the teacher for three days of pay. The school issued a written reprimand after the teacher became emotional and angry during a meeting with administrators, a parent, and student. The student made allegations of abuse against the teacher, which the administration investigated and found unsubstantiated. After the investigation, a meeting took place, during which the family and student continued to make allegations of abuse, and administrators made no mention of the investigation's finding. The teacher became upset and was later reprimanded for "unlawful harassment" for her conduct during the meeting.

The arbitrator concluded that the teacher's conduct in the meeting did not constitute unlawful harassment, and was merely a display of anger and frustration toward the student's mother and the administration in a matter involving a serious and upsetting allegation. The three-day suspension was issued for alleged insubordination after the teacher posted classroom rules at the beginning of the school year. In May of the following year, the administration told her she could not post the rules. In August, the teacher sought clarification, asking whether all of the classroom rules were forbidden, or only some of them. Receiving no response, the teacher posted the rules. When the administration found out, they issued a three-day suspension for insubordination. The arbitrator concluded the teacher was not insubordinate, because although the administration gave an order, it did not make the teacher aware of the consequences, and it had failed to clarify what classroom rules the teacher could implement.

2.2 **DISHONESTY**

2.2.1 *In re Washoe County School District, Reno, Nevada*, 137 LA 149 (J. P. DiFalco, February 7, 2017)

An arbitrator concluded that a school district had just cause to terminate a teacher for gross misconduct and dishonesty after she asked for and took students' prescription painkillers and then lied about it. The teacher's testimony fluctuated, and the arbitrator credited the testimony of three students. The arbitrator also concluded that an admonition and reasonable period to improve performance was not necessary, given the severity of the misconduct. The arbitrator stated that the school district was "not only justified in terminating the teacher's employment, they literally had no other choice. The Employer can simply not risk this happening again, as the consequences of even one such act in the classroom is antithetical to the educational process[.]"

2.3 **OFF-DUTY MISCONDUCT**

2.3.1 *City of Oklahoma City & Fraternal Order of Police Lodge 123*, 137 LA 783 (2017) (Nicholas, Arb.)

An Oklahoma City Police Department Major was permanently demoted to Captain for poor off-duty behavior. The officer's off-duty behavior involved a physical altercation with the father of his stepchildren. On the officer's behalf, the police union challenged the officer's demotion.

The arbitrator held in favor of the officer. He found that the Chief's decision to demote the officer was excessive, based only on hearsay. Furthermore, the arbitrator distinguished this case as the first demotion for committing a Class III violation, whereas one officer merely received counseling and one year of probation after pointing her service weapon at her husband while off-duty. The arbitrator ordered that the officer be returned to his former position of Major and receive back pay.

2.4 **INAPPROPRIATE CONDUCT**

2.4.1 *Ingersoll v. City of Mattawa,* No. 34848-2-III (Wash. App. Apr. 24, 2018)

John Ingersoll appealed a civil service commission decision upholding the termination of his employment as a police officer with the City of Mattawa. Ingersoll was placed on administrative leave after his wife and children were transported to a domestic violence safe house. The City conducted a three-month investigation and then notified Ingersoll of allegations of domestic violence, as well as harassment and intimidation of various citizens. The City learned that Ingersoll had been terminated from prior employment with a county sheriff, contrary to information in Ingersoll's job application. A fitness for duty exam revealed that Ingersoll had Personality Trait Disturbance, was prone to denial of responsibility, and conclude "most law enforcement agencies reviewing these results" would consider the officer "not to be qualified as fit for duty." After the City notified Ingersoll of the inaccuracy on his application as well as the result of the fitness for duty exam, the City held a disciplinary hearing and terminated his employment. After a "contentious" commission hearing, the commission upheld the termination. The Commission entered findings which included that Ingersoll's conduct during the hearing (staring down witnesses, comments during their testimony, and providing testimony totally denying any wrongdoing) was inappropriate.

Ingersoll contended that relying in part on his conduct during the hearing was error. The Court of Appeals concluded that while an employee should have notice of the allegations against them, it was not error for the commission to consider Ingersoll's behavior, as an aid to a credibility assessment as well as consistency with the fitness for duty report. The Court of Appeals concluded that Ingersoll was terminated for his unfitness for duty, not his conduct at the hearing.

2.5 **OTHER TYPES OF MISCONDUCT**

2.5.1 *Brown v. District of Columbia,* No. 14-77 (RBW) (D.D.C. April 19, 2017)

A District of Columbia Metropolitan Police Department sergeant, Dawn Brown, was suspended without pay for ten days following a prisoner escape. The discipline issued to her male co-worker, Jermaine Fox who was on duty as the watch commander at the time of the escape, was dismissed following his appeal. Her co-worker was a civilian supervisor rather than a sworn officer, so the internal appeal procedure governing his discipline was different. Sergeant Brown appealed her suspension through internal department processes, and the suspension was reduced to five days, but the decision imposing the reduced suspension incorrectly stated that Sergeant Brown, rather than Fox, was the watch commander that evening. Following her suspension, the sergeant filed a gender discrimination claim as well as a retaliation claim. The Court concluded

that Sergeant Brown presented sufficient evidence of gender discrimination claim for the claim to go to a jury. The Court noted that the internal appeal incorrectly stated Sergeant Brown was the watch commander, that she received discipline while the actual watch commander Fox did not, and that another male officer knew about the unsecured access door through which the prisoner escaped but also received no discipline. However, the Court dismissed Sergeant Brown's retaliation claim, concluding there was insufficient evidence that the discipline issued was in retaliation for a sexual harassment lawsuit Sergeant Brown filed two years before the imposition of the suspension.

2.5.2 *Billings v. Town of Steilacoom*, No. 49631-3-II (Wash. App. September 26, 2017)

The Town of Steilacoom demoted Joshua Billings from Sergeant to Public Safety Officer. Later, after an internal investigation, Billings was terminated. Billings challenged his termination in an arbitration, arguing his demotion and termination were not supported by just cause. The arbitrator concluded the demotion was not supported by just cause, but that his ultimate discharge was. Later, Billings filed a lawsuit in superior court. The court concluded that Billings had a full and fair opportunity to challenge his discharge in the arbitration, which was final and binding, and precluded his lawsuit in superior court.

3. Unions/Collective Bargaining

3.1 *Janus v. AFSCME, Council 31*, 2018 U.S. LEXIS 4028 (2018)

The U.S. Supreme Court issued an important decision regarding public employee unions. Under Illinois law, public employees were required to pay an "agency fee" to their public union to cover the costs of collective bargaining and related activities, regardless of whether those employees decided to join the union. They were, however, permitted to opt out of the full "union fee" charged to members. This larger fee, in contrast to the "agency fee," included union political and ideological expenditures.

Mark Janus, a child support specialist employed by the Illinois Department of Healthcare and Family services, opposed the union's political positions and argued that being required to pay the "agency fee" was coerced speech prohibited under the First Amendment. The District Court dismissed the case as foreclosed under Supreme Court precedent that upheld a nearly identical state statute decades earlier. The Court of Appeals for the Seventh Circuit affirmed.

The U.S. Supreme Court, however, overruled its prior precedent in favor of Mr. Janus. Specifically, the Court held that the prior ruling was largely inconsistent with its more recent First Amendment cases. As a result, the Court held that this was a rare instance where it would be appropriate to overrule a longstanding precedent. Now, because of this case, states may no longer require public employees who have opted out of their unions to pay "agency fees." In fact, no "payment to the union may be deduced from a nonmember's wages . . . unless the employee affirmatively consents to pay."

3.2 *Barnard v. Lackawanna County*, 2017 LRRM 200280 (3d Cir. 2017)

Michelle Barnard sued her employer, Lackawanna County, after she was suspended without pay for participating in a sympathy strike in support of Lackawanna County Children and Youth

unionized workers. Barnard then brought suit under a federal statute alleging that her First Amendment rights were violated. The County argued that it had the right to suspend Barnard without pay because she violated the collective bargaining agreement (CBA) between her union and the County. Barnard asserted that the CBA language did not meet the "clear and unmistakable" standard for a waiver of rights, a standard that requires a waiver of rights in a CBA to be explicit and unequivocal.

The Court concluded the no-strike pledge was a core provision of the CBA. Barnard argued that because the First Amendment and 42 U.S.C. § 1983 were not explicitly referenced in the CBA, her claims under these laws were not barred. The Third Circuit rejected this argument. In exchange for the County not locking out union employees, the employees waived the right to participate in work stoppages and agreed that the County could take disciplinary action for noncompliance. The court held that it validly did so here, and that Barnard did not express a valid reason for why she should be exempted from the no-strike pledge.

4. **The First Amendment: Religion**

4.1.1 *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 409 P.3d 160 (2018)

Captain Jonathan Sprague was fired for persistently including religious comments in his work emails and on the Spokane Valley Fire Department's internal electronic bulletin board. The Court first concluded that Sprague was speaking not as an employee, but as a citizen, and that he spoke on a matter of public concern. The Court noted that Sprague's emails concerning a religious fellowship were not part of his duties as captain, and the subject of his emails fell outside the scope of fire department business.

The Court concluded that some topics in Sprague's emails (including the mental health and well-being of firefighters, suicide prevention, and leadership) addressed matters of public concern. Other emails did not address matters of public concern, including fellowship logo design and social activities.

The Court next concluded that the Department's interests in effectively fulfilling its responsibilities to the public, and in avoiding violation of the Establishment Clause were outweighed by Sprague's interest. The Court concluded the Department also applied a neutral policy in a discriminatory manner because it prohibited Sprague from addressing otherwise acceptable topics from a religious viewpoint. The Court also determined that the civil service commission's findings regarding the termination decision did not collaterally estop Sprague from litigating his constitutional claims. Justice Yu and three other justices, concurring in part and dissenting in part, raised concerns that the Court resolved a factual question (the existence of an unwritten policy discriminating against religion based on viewpoint), and for its dismissive treatment of the government employer's Establishment Clause concerns.

5. **The First Amendment: Speech**

5.1 *Zucker v. City of L.A.*, 2018 Cal. App. Unpub. LEXIS 4271 (Cal. Ct. App. 2018)

Benjamin Zucker is a former police officer for the Los Angeles Police Department. In 2014, he commented on Facebook, while off-duty, about a fellow police officer who filed a lawsuit against the department for gender and religious harassment. In the comment, he wrote "I was born Jewish, raised Mormon and married to a catholic that is Japanese, Portuguese & German. NOW WHERE[']S MY MONEY? Kiss my ass ya greedy house mouse!" The Police Department's Board of Rights found Zucker guilty of misconduct, and Zucker challenged that finding in state court alleging, among other things, that the Facebook comment was protected under the First Amendment and that he should not have been disciplined because the department did not have a written policy prohibiting Facebook postings by off-duty employees.

The trial court dismissed Zucker's claims. On appeal, the California Court of Appeals affirmed. First, the Court rejected the argument that the prohibition against "conduct unbecoming an employee of the City Service" was unconstitutionally vague: "the required specificity may . . . be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." Second, the Court held that Zucker's speech was not protected under the First Amendment because "the department's showing of the potential disruptiveness of plaintiff's Facebook comment outweighs plaintiff's *First Amendment* right."

5.2 *Jones v. Wilson County*, No. 17-5615 (6th Cir. Jan. 24, 2018)

County parole officer Rachel Jones sued her employer, Wilson County, after she was suspended for not telling the truth when answering questions about probationers under oath. Jones brought suit alleging the suspension violated her First Amendment rights. Part of the standard that must be met for employee speech to be covered under the First Amendment is that it must be on a matter of public concern. Jones argued in her appeal that the trial court erred because "testimony in open court is always a matter of public concern."

The Sixth Circuit rejected this theory. Based on Jones's job as a parole officer, the court found that testifying in court was part of her job duties and the alleged false statements were thus made pursuant to employment. Because the speech was made within her role as an employee, it was not protected by the First Amendment.

5.3 *American Entertainers, LLC v. City of Rocky Mount*, No. 17-1577 (4th Cir. 2018)

American Entertainers, an exotic dancing venue, sued the City, arguing that a licensing regulation violated the First Amendment by being an overbroad, prior restraint which gave government officials "unbridled discretion" to deny license applications. The provisions at issue permitted the police chief to deny a license if either the operation proposed by the applicant would not comply with all applicable laws, or if any license applicants or business principals are not over the age of twenty-one. The court held the licensing provision was overbroad and violated the First Amendment because it required the police chief to choose on a case-by-case basis which particular laws to consider in evaluating applications. Further, the court suggested

that even if the police chief considered every law across all relevant jurisdictions, the police chief would exercise too much discretion in doing so.

6. **Discrimination: Disability**

6.1 *Mosby-Meachem v. Memphis, Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018)

Andrea Mosby-Meachem, an attorney for Memphis, Light, Gas & Water Division (MLG&W), was denied a request to telework for ten weeks while on bedrest due to complications from pregnancy. Mosby-Meachem sued her employer for disability discrimination. MLG&W argued that Mosby-Meachem was not a "qualified individual" under the ADA because in-person attendance was an "essential function" of her job. A jury, however, found in favor of Mosby-Meachem and awarded her compensatory damages.

The Sixth Circuit affirmed the jury verdict and district court ruling in favor of Mosby-Meachem. The court held that she produced sufficient evidence that in-person attendance was not essential for the 10-week period in which she requested to telework, and therefore was entitled to relief and back pay. For example, in her eight year tenure at MLG&W, Mosby-Meachem had never "tried cases in court" or "taken depositions of witnesses," which might require in-person attendance. The court distinguished cases that found for employers where, unlike Mosby-Meachem, the plaintiffs were "tied to" their office desks (e.g., call center employees) or requested accommodation for an indefinite period. The court also found that MLG&W did not engage in an "interactive process" with Mosby-Meachem to determine an appropriate accommodation. Further, the court held that a jury could have reasonably concluded that MLG&W's proposed accommodation of sick leave and short-term disability was not reasonable.

6.2 *Wolf v. Lowe's Cos., Inc.*, 2018 U.S. Dist. LEXIS 41135 (S.D. Tex. Mar. 13, 2018)

In 2005, Tamara Wolf started working as a salesperson at Lowe's. Wolf received a promotion in 2012, but was given a disciplinary "final notice" in 2013 for excessive attendance problems. She had received warnings about absence and tardiness throughout her employment. In 2014, Wolf was diagnosed with major depressive disorder and attention deficit disorder. She informed Human Resources of her conditions by submitting two doctor's notes. Lowe's granted Wolf intermittent FMLA leave, but the company terminated her four months later. Wolf sued the company for disability discrimination under the ADA and FMLA.

The court held in favor of Lowe's. Citing Fifth Circuit precedent, the court found that Wolf could not prevail on her ADA claims because "[a]n essential element of any job is the ability to appear for work and to complete assigned tasks within a reasonable period of time." Based on Wolf's long record of absences, tardiness, and inability to complete assignments on time, the court dismissed her ADA claim. The court also dismissed Wolf's FMLA claim based upon the company's legitimate non-discriminatory reasons for her termination.

6.3 *Baxley v. Savannah River Nuclear Sols., LLC*, 2018 U.S. Dist. LEXIS 55253 (D.S.C. Apr. 26, 2018)

Steven W. Baxley worked as a Production Operator at Savannah River Site (SRS) since 1989. In 2009, Baxley was placed on a work restriction due to sleep apnea. Baxley applied for a different position at the Savannah River National Laboratory (SRNL) in 2013, which required him to work night shifts. Accordingly, SRNL initiated a reasonable accommodations process and Baxley's physician granted that his work restriction be lifted for two months. SRNL ultimately declined to offer Baxley the position, stating that no more jobs were available. Baxley retired shortly after this decision, and brought a disability discrimination claim against SRNL under the ADA.

The court reviewed each of Baxley's claims—failure to provide reasonable accommodation and constructive discharge—separately. The court found that it is not certain whether Baxley would be able to perform the new position with the proposed accommodation. Regardless, the court held that Baxley's failure to present evidence that SRNL refused to provide a reasonable accommodation is fatal to his first claim. Furthermore, the court held that Baxley was not constructively discharged nor discriminatorily terminated because he did not provide sufficient evidence that he was forced to retire. Therefore, the court held in favor of SRNL and vacated Baxley's claims.

6.4 *Scholz v. Washington State Patrol*, No. 34919-5-III (Wash. App. May 17, 2018)

Paul Scholz sued the Washington State Patrol in state court for terminating his employment, despite a prior labor arbitration decision concluding his employment was terminated for just cause. Scholz was involved in a six semi-truck crash after stopping his patrol vehicle in the right lane of Interstate 90 during bad weather. Scholz's employment was terminated after it was determined he lied during the investigation about where his car was parked during the crash. During the arbitration hearing challenging his firing, Scholz contended that his perception of the accident was altered by his acute stress triggered by the traumatic accident, and that his testimony during the investigation could have been impacted by a learning disability and dyslexia. However, the arbitrator concluded that this argument was inconsistent with Scholz's self-serving and inconsistent statements made months after the accident.

After Scholz filed his lawsuit, the WSP moved to dismiss his disability discrimination claim. The Court of Appeals affirmed the dismissal, concluding that collateral estoppel barred relitigation of whether Scholz's untruthfulness, as opposed to his mental disability, was the reason for his termination. The court's decision also sets out the additional considerations that apply to the doctrine of collateral estoppel when the prior litigation was administrative in nature.

6.5 *Maubach v. City of Fairfax*, No. 1:17-cv-921 (E.D. Va., April 30, 2018)

A 911 dispatcher, Stefanie Maubach, filed a lawsuit against the City of Fairfax after the City denied her request to bring her dog to work as an emotional support animal and later terminated her employment. Several of Ms. Maubach's coworkers were allergic to the dog. The employer attempted to accommodate Ms. Maubach's anxiety by offering her a day shift position instead of a night shift position, and by offering Ms. Maubach the option of bringing a hypoallergenic dog

as an emotional support animal. Ms. Maubach ultimately failed to engage in the interactive process required by the ADA, and refused these accommodations. As to Ms. Maubach's contention that the City failed to accommodate her, the Court concluded Ms. Maubach was not entitled to her preferred accommodation, only a reasonable accommodation. As to Ms. Maubach's contention that the City terminated her based on her disability, the Court concluded the City terminated her employment after she failed a fitness for duty examination and did not seek a second opinion. Accordingly, the Court dismissed Ms. Maubach's lawsuit. The Court noted that the analysis and potentially the outcome could be different if Ms. Maubach's dog were a service animal (which he was not) or if the issue were of a plaintiff's accommodation in a public space rather than in the employer/employee context.

7. Discrimination: Pregnancy

7.1 *Hernandez v. City of Thomson*, 2016 U.S. Dist. LEXIS 4966 (S.D. Ga. Jan 14, 2016)

Ruth Hernandez was a patrol police officer for the City of Thomson. She worked for eight months before informing the Chief of Police that she was pregnant. Hernandez's doctor recommended that she go on light duty but the police chief placed her on leave. After Hernandez exhausted her accrued leave, the Police Department determined that Hernandez was not eligible for medical leave under city policy or the FMLA due to her short duration of employment. Therefore, she was terminated by the City Administrator. Hernandez sued, claiming that the city violated the Equal Protection Clause of the Fourteenth Amendment by denying her temporary light duty and medical leave while providing non-pregnant disabled employees with such options.

The court held in favor of the city. For this type of constitutional claim, municipalities can only be held liable for decisions by an official if that person has final policymaking authority. In this case, the City Administrator who terminated Hernandez was not the final policymaker. Hernandez could have appealed the termination decision to the mayor or the city council. Therefore, the city could not be held liable for Hernandez's termination and the court dismissed the claim.

8. Discrimination: Race/Ethnicity/National Origin

8.1 *Perkola v. The University of Michigan Board of Regents*, Case No. 16-12602 (E.D. Mich. March 28, 2018).

A white male University of Michigan police officer alleged "reverse discrimination" based on his race and gender after a black female officer was selected for a promotion he also applied for. The Court concluded the claim of race discrimination should survive and be decided by a jury, but dismissed the claim of sex discrimination. The Court noted that in a "reverse discrimination" claim, the plaintiff must satisfy a higher standard, showing evidence supporting the contention that the employer is "the unusual employer who discriminates against the majority." The plaintiff met this burden for the race discrimination claim by showing that the decision maker, the police chief, was also black: some appellate courts have concluded this fact alone can meet the heightened burden in a reverse race discrimination claim. But the plaintiff failed to meet his higher burden for the sex discrimination claim: the police chief who made the promotion

decision was male, and the officer did not present other evidence that the promotion decision was based on sex.

8.2 *Squitieri v. Piedmont Airlines, Inc.*, 2018 U.S. Dist. LEXIS 25485 (W.D.N.C. 2018)

Victoria Squitieri sued her employer, Piedmont Airlines, claiming she received harassment and discrimination from co-workers and employer for comments she made on Facebook about Black Lives Matter. She alleged discriminatory disparate treatment based on race and defamation. The defendants then moved to have the claims dismissed.

Squitieri's claims were dismissed by the court. The Court concluded none of the purported harassment alleged by Squitieri gives rise to a plausible claim that the terms and conditions of her employment were affected. The court concluded her coworkers' statements that the plaintiff was a racist were statements of opinion and not actionable. The court reasoned that the statements amounted to teasing, offhand comments and isolated incidents, which do not amount to discriminatory changes in the terms and conditions of employment.

9. **Discrimination: Gender and Sexual Orientation**

9.1 *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018)

Aimee Stephens was fired from her job as a funeral home director shortly after she informed the owner that she intended to transition from male to female. After her termination, Stephens filed a sex-discrimination charge with the EEOC. The EEOC later filed a complaint against the funeral home and Stephens intervened. In defense, the owner claimed that requiring the funeral home to employ Stephens would constitute an unjustified substantial burden upon his sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act (RFRA).

The Sixth Circuit held in favor of Stephens. Based on its prior decisions, the court held that discrimination based on a failure to conform to stereotypical gender norms was no less prohibited under Title VII than discrimination based on the biological differences between men and women. The owner failed to establish a non-discriminatory basis for Stephens's termination, and therefore violated Title VII. The court held that sex stereotyping violates Title VII when a transgender person is discriminated against based on their failure to conform to stereotypes of how a man should look and behave, *not only* when it results in disparate treatment of men and women.

The court also held that discrimination on the basis of transgender and transitioning status violates Title VII. Specifically, the court found that discrimination "because of sex" inherently includes discrimination against employees because of a *change* in their sex. The court held that Title VII protects transgender persons because transgender or transitioning status constitutes an inherently gender non-conforming trait.

9.2 *Rizo v. Yovino*, 887 F.3d 459 (9th Cir. 2018)

Aileen Rizo was hired as a math consultant for the Fresno County Office of Education. Based on internal policy, the County determined starting salary with an equation including prior salary.

Rizo had been a middle and high school math teacher in Maricopa, Arizona and had earned two educational master's degrees. When Rizo learned that her male counterparts were hired at higher salaries, she sued the County claiming a violation of the Equal Pay Act (EPA) and sex discrimination under Title VII and relevant California laws. The County did not dispute that it paid Rizo less than male employees for the same work, but contended that setting salary based on prior salary was a permissible affirmative defense under the EPA.

The Ninth Circuit affirmed the district court's decision in favor of Rizo, overruling its own precedent. The court found that reliance on past wages simply perpetuates the pervasive discrimination that the EPA seeks to eradicate. The court concluded that prior salary alone or in combination with other factors cannot justify a wage differential. Furthermore, prior salary does not constitute "a factor other than sex" exception under the EPA, and therefore the County failed to set forth an affirmative defense. Moreover, the court held that the EPA's fourth "catchall" exception is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance.

9.3 *Patsalides v. City of Fort Pierce*, 724 F. App'x 749, 750 (11th Cir. 2018)

Nicole Patsalides trained for three months before starting work as a patrol officer for the City of Fort Pierce. She alleged that during her training she was repeatedly touched by a male patrol officer. The male officer would also arrive as backup for calls in order to spend more time with Patsalides. Patsalides reported the officer, and the officer was placed on administrative leave, investigated, and his employment was later terminated. Over a year later, Patsalides was terminated based on excessive absenteeism after missing many weeks of work. Patsalides alleged that she was retaliated against by coworkers and ultimately by the City when it fired her. The Court dismissed Patsalides discrimination claim, concluding the City was not liable for the male patrol officer's harassment because it acted promptly to address the sexual harassment. The Court concluded that remarks made by her other coworkers were not sufficiently severe or pervasive to constitute a retaliatory hostile work environment. The Court also dismissed her claim that she was fired in retaliation for her reporting of discrimination, concluding her termination one year later was based on a substantial, legitimate, and non-pretextual reason, not retaliation.

9.4 *Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (Wash. Sup. Ct., October 19, 2017)

After working for a public utility district for 27 years in accounting and finance roles, the District fired Kim Mikkelsen. She filed a lawsuit alleging age and gender discrimination.

Before her termination, Mikkelsen was the finance manager and the only female member of the management team. Her working relationship with the district's general manager Ward deteriorated over time, and Mikkelsen believed that his treatment of her (including leaving her out of management discussions, talking over her in meetings, and preferring suggestions that came from her male colleagues) was due to gender bias. Mikkelsen met with Ward about these concerns in March 2011, but according to Mikkelsen, Ward's behavior did not improve. A member of the District's board of commissioners called Mikkelsen, aware of the problem, and discussed Mikkelsen creating an anonymous survey to see if other employees shared her

concerns, including concerns of gender discrimination. Mikkelsen created the survey and emailed the survey to the Board. When Ward learned of the survey, he fired Mikkelsen. In a memorandum to the Board, Ward explained that Mikkelsen had disrupted the workplace, undermined his authority and been insubordinate. Ward later told the Employment Security Department that Mikkelsen had been terminated "without cause."

The Washington Supreme Court concluded Mikkelsen did not present sufficient evidence of age discrimination, but her gender discrimination claim could go forward to a jury. Mikkelsen did not present evidence that Ward treated her or other employees differently based on age. The Court clarified Washington law on discrimination claims, stating that a plaintiff need not show that he or she was replaced with a person outside their protected class: therefore, the fact that 57-year-old Mikkelsen was replaced with a 51-year-old employee (also over 40 and a member of the protected class) was not dispositive.

Mikkelsen also argued that the District's corrective action policy modified her at-will employment status, creating a "for cause" requirement for discharge, and that the District breached that policy provision. The Court agreed that looking at the facts in the light most favorable to Mikkelsen, the policy was ambiguous and could constitute a promise of specific treatment, specifically, that cause was required for termination.

10. **Discrimination: Gender and Race**

10.1 *Sampson v. City of Fort Smith*, 255 F. Supp. 3d 873 (W.D. Ark. 2018)

Wendall Sampson has been employed by the Fort Smith Police Department since 1995. Sampson, an African-American, filed suit against the Police Department and several of its supervising officers alleging violations of Title VII of the Civil Rights Act. In particular, Sampson alleged that the Department discriminated against him by investigating and disciplining him when white officers were not investigated for similar conduct, and because he was not promoted when similarly qualified white candidates were. Sampson also alleged that the investigations against him were retaliation for his complaints about racial discrimination, in violation of his First Amendment rights.

The Court ruled in favor of the Defendants' summary judgment motion. The Court concluded Sampson failed to establish that race was the reason for the alleged mistreatment. On the failure to promote claim, the Court concluded that the Department articulated a legitimate, nondiscriminatory reason for promoting other officers: the Department promoted the officers with the highest scores on the promotion exam and Sampson was consistently the officer with the third or fourth highest scores. And because Sampson was unable to establish that this reason was a mere pretext, the Court ruled for the Defendant's summary judgment motion. Further, the Court ruled against Sampson's First Amendment claim because Sampson failed to establish that he made his comments as a citizen on an issue of public concern, and even if he had, Defendants had an adequate justification for their investigation.

10.2 *Green v. City of Hughes*, 2017 U.S. Dist. LEXIS 74976 (E.D. Ark. May 17, 2017)

Kristy Green, an African-American female, started working for the Hughes Police Department as a part-time patrol officer in 2013. After a series of promotions, she became the interim Chief of

Police in December 2014. Grady Collum, a white male, was elected mayor of Hughes in January 2015. Collum demoted Green in February 2015, and then terminated her in March. Green alleged that Collum and the city council discriminated against her based on her race and sex.

The court rejected Green's race and sex discrimination claims. Although Collum did utter a racial slur to Green saying, "go back to the fields," the court deemed it a "stray comment." The court found that the slur was not direct evidence of discriminatory intent because it was not made in connection with Green's termination. Furthermore, the court held that because Collum's sexist comments that "a woman should not run the police department" were made one year before Green's termination and in a different context, it was not direct evidence of unlawful discrimination. Green also failed to overcome the employer's evidence that she was not meeting the City's legitimate expectations—including a "litany" of citizen complaints made about the police department and Green. Ultimately, the court held in favor of the City and the mayor, dismissing Green's discrimination claims.

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

11.1 *Foggey v. City of Chicago*, 2018 U.S. Dist. LEXIS 18225 (N.D. Ill. 2018)

Plaintiff Vincent Foggey, an African-American former police officer, sued the City of Chicago, current and former police employees and members of the Chicago Police Board after he was fired for failing to assist his partner in an incident at a Walgreens Store in 2014. Following the incident, the Police Department commenced an investigation and Foggey reported to his supervisors that his colleagues had violated department policies and procedures in connection with the investigation because they broadcasted video of the incident, which Foggey argued would compromise the investigation.

After filing an EEOC claim and a lawsuit in state court, Foggey filed a lawsuit in federal court alleging racial discrimination, hostile work environment and retaliation, in violation of multiple federal statutes, the First Amendment and Foggey's due process rights. In the preliminary stage of the law suit, the court held that Foggey could proceed on his Title VII Civil Rights Act claims of discrimination and retaliation against the City of Chicago. However, the court dismissed the Title VII claims against the current and former police employees because the Civil Rights Act does not impose individual liability. In addition, among other claims, the court dismissed the hostile work environment claim because Foggey did not show that it was linked to his race; the First Amendment claim because Foggey did not speak as a private citizen on an issue of public concern; and the due process claim because Foggey did not have a protected interest in the investigation of his internal complaints.

11.2 *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018)

Lori Franchina was a lieutenant firefighter in the Providence Fire Department. Over the course of several years, Franchina, who is a lesbian, experienced severe sexual harassment at her job. Most notably, her male colleagues regularly referred to her in extremely derogatory language, including "bitch," and "lesbo." In addition, a male colleague called her his "lesbian lover" while she was assisting people at a hospital, and another male colleague intentionally flung a victim's blood, body debris and brain matter into Franchina's face. Ultimately, Franchina retired on

disability after being diagnosed with severe post-traumatic stress resulting from her treatment at work. She filed charges with the Rhode Island Commission for Human Rights and EEOC, before filing suit in federal court alleging gender-based hostile work environment discrimination and retaliation under Title VII of the Civil Rights Act. A jury found in her favor and awarded her punitive, emotional and front pay damages, but the judge overruled the jury's punitive damage award because the federal statute at issue precludes plaintiffs from recovering punitive damages from municipalities.

The City then appealed to the U.S. Court of Appeals for the First Circuit, and the Court affirmed the District Court's judgment for Franchina. First, the Court rejected the City's arguments regarding statute of limitations and the admission of various kinds of evidence. Second, the Court rejected the City's argument that a "sex-plus" theory of discrimination – discrimination based on gender plus another characteristic like sexual orientation – requires the plaintiff to "identify a corresponding sub-class of the opposite gender and show that the corresponding class was not subject to similar harassment of discrimination." Third, the Court rejected the City's argument that the District Court judge erred in the instructions submitted to the jury.

12. **Discrimination: Age**

12.1 *Joseph v. City of Santa Monica*. 2018 U.S. Dist. LEXIS 21856 (C.D. Cal 2018)

In hiring for a newly created position, the City of Santa Monica created and published a job description that included the sought-after knowledge, abilities and skills for the position. The City also created a Supplemental Questionnaire with four questions that all applicants were required to answer. The City's Senior HR Analyst reviewed applications and recommended to the City Manager which candidates would be interviewed. Plaintiff Joel D. Joseph applied for the position. Of approximately seventy-nine applicants, the Senior HR Analyst recommended four applicants to be interviewed. The City Manager also requested that another candidate, whom the City Manager had known professionally for twenty-five years, be considered. That candidate, who was sixty years of age, was ultimately selected. Joseph, who was sixty-nine years of age, was not.

Joseph filed suit in federal court, alleging that the City discriminated against him because of his age, in violation of the federal Age Discrimination in Employment Act (ADEA). The Court granted the City's motion for summary judgment. To prevail under Supreme Court and Ninth Circuit precedent, Joseph would have had to establish that "(1) he was a member of the protected class of individuals between forty and seventy years of age, (2) he applied for a position for which he was qualified[,] and (3) a younger person with similar qualifications received the position." And then, the burden would have shifted to the City "to articulate a legitimate nondiscriminatory reason for its employment decision." Here, the City articulated three such reasons: "(1) Plaintiff provided unclear and strange answers . . . (2) Plaintiff's application was incomplete; and (3) candidates more promising than Plaintiff were available." Because Joseph did not allege sufficient facts to dispute these three reasons, and instead focused on the personal connection between the City Manager and the candidate ultimately selected, the Court granted the City's summary judgment motion.

12.2 *Brown v. Metropolitan Government of Nashville and Davidson County*, No. 17-5603 (6th Cir. 2018)

Fifty-seven year old Lieutenant Melvin Brown contended that the police department's creation of a hostile work environment amounted to a constructive discharge, and that he was discriminated against based on his age. As to his hostile work environment claims, Brown did not present evidence that his suspension or work restrictions were based upon his age. Brown did not present any evidence that "anyone at [the department] mentioned his age, let alone harassed him based on his age," or that anyone had suggested he should retire. The Court concluded that Brown could not demonstrate he was treated differently than similarly-situated employees, or that the reasons given for his discipline (a cavalier and disrespectful attitude during a use of force investigation) was pretextual.

13. **Whistleblowing**

13.1 *Knopf v. Williams*, 884 F.3d 939, 941 (10th Cir. 2018)

Former City of Evanston Wyoming planner Paul Knopf sued the mayor, Kent Williams, alleging that his firing violated the First Amendment. Knopf was fired after sending an email raising concerns about a friendship between the City's point person on a public project and the selected subcontractor's owner. The First Amendment limits government employers from disciplining employees based on speech, if the employees are speaking outside their job duties as a private citizen on a matter of public concern. But under the doctrine of qualified immunity, the mayor is immune from liability unless the plaintiff could establish that the free speech rights were "clearly established" at the time of the worker's speech. The Court concluded Knopf failed to show that it was clearly established "beyond debate" that the email he sent was outside the scope of his official duties, where Knopf had been involved in the public project for 30 years.

13.2 *Vargas v. City of Asotin*, No. 35093-2-III (Wash. App. April 24, 2018)

Daniel Vargas sued the City of Asotin, alleging that he was fired in violation of public policy. Vargas was a police officer for the City. After a few months of working for the City, his relationship with the police chief deteriorated. Vargas believed the chief was exploiting his position with the City for personal benefit, improperly maintaining evidence, and receiving kickbacks in connection with an illegal gun business. Vargas contended he had reported various improprieties to others at the City as well as FBI, Washington State Patrol, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. Later, the chief allegedly approached one of the councilmembers in a threatening manner, asking if the councilmember had been communicating with Vargas. The next day, the councilmember called Vargas to ask about obtaining a protection order, and Vargas reported the confrontation between the councilmember and the chief to the county sheriff and the Washington State Patrol. Vargas was later counseled for "trash-talking" the chief, and told the mayor he would communicate with the chief and other officers only via email. Vargas was placed on administrative leave, and then informed he had been fired due to his unwillingness to resolve the discord with the chief. Vargas filed a lawsuit alleging wrongful discharge in violation of public policy. The Court dismissed Vargas's lawsuit, concluding that Vargas had not presented any evidence that the mayor, who fired Vargas, was actually aware that Vargas had reported the chief for various improprieties and unlawful activities. The dissenting

judge concluded that the officer had presented sufficient evidence that his supervisor's discriminatory animus (based on Vargas's whistleblowing activities) influenced the ultimate decision to discharge him from his employment.

14. **Retaliation**

14.1 *Michno v. Cook Cty. Sheriff's Office*, 2018 U.S. Dist. LEXIS 19098 (N.D. Ill. 2018)

Gene Michno worked for the Cook County Sheriff's Office as a correctional officer. He alleged that the Sheriff and other Sheriff's Office officials initiated disciplinary proceedings against him in 2011 and terminated his employment in 2015 because he supported a competing political candidate for Sheriff in 2006.

Here, Michno's claims largely survived the Defendant's motion to dismiss. Most notably, the court held that Michno had put forward sufficient facts to state a claim that Michno's political support of another candidate was the reason for the disciplinary proceedings and termination. Further, the court held that the Sheriff and other Sheriff's officials were not entitled to qualified immunity because "the law has been clear for decades that a non-policymaking government employee (like a correction officer) may not be subjected to adverse employment actions because of his political affiliation."

14.2 *Montero v. City of Yonkers*, 890 F.3d 386 (2d Cir. 2018)

Raymond Montero, a Yonkers, New York, police officer and local union vice president, gave a speech at a union meeting criticizing the union's president for agreeing to cuts in police manpower. Montero alleged that, after the speech, the union president, a closely aligned police officer and the acting police chief verbally and emotionally harassed Montero, in violation of Montero's First Amendment right to free speech. The District Court dismissed Montero's claim against all three defendants, holding that Montero's speech was not protected under the First Amendment because it was not made as a private citizen, but rather in his official capacity.

The Second Circuit reversed the dismissal with respect to the claims against the union president, but affirmed the dismissal with respect to the claims against the other police officer, the acting police chief and the city. First, the Court held that Montero's speech was protected because his remarks "did not fall within his employment responsibilities," and they were not "solely calculated to redress [his] personal grievances." The Court, however, declined to hold categorically that "when a person speaks in his capacity as a union member, he speaks as a private citizen . . ."

Second, the Court held that the acting police chief and the other police officer are entitled to qualified immunity because, at the time of the alleged retaliation, "the specific question of whether the plaintiff's alleged union remarks were protected by the First Amendment was not beyond debate" and qualified immunity applies as long as a government official's "conduct does violate clearly established statutory or constitutional rights of which a reasonable person would have known." Third, the Court held that the city itself cannot be held liable because the alleged retaliation was not an official act of the city, but rather improper behavior by individual actors acting outside of the city's official policies and procedures.

14.3 *George v. City of Cincinnati*, 2018 U.S. Dist. LEXIS 40167 (S.D. Ohio Mar. 12, 2018)

Vincent George was a Cincinnati Police Officer for sixteen years. In 2005, he told the media that the department's ticket quota system had a disproportionate adverse impact on African-American citizens. From that point on, George alleged, he was blacklisted, harassed, denied promotions, and given less desirable assignments. Ultimately, George resigned in April 2015. He requested reinstatement in July 2015, and was initially approved by the then-Chief but was later denied by an Interim Chief. George filed a discrimination charge with the EEOC, alleging discrimination based on age and retaliation. He later added claims of hostile work environment and constructive discharge; race discrimination; disability discrimination; and intentional infliction of emotional distress.

The court dismissed all of George's claims except retaliation. Because George filed his retaliation claim in a timely manner with the EEOC, the court found that he exhausted administrative remedies for this claim. Furthermore, the court found that George's retaliation allegations—namely that his complaints and internal grievances caused the Interim Chief to deny his reinstatement request—were sufficient to move the proceeding forward.

15. **Labor Arbitrations**

15.1 *Belleville Educ. Ass'n v. Bd. Of Educ. Of Belleville*, 2017 U.S. Dist. LEXIS 89656 (D.N.J. 2017).

Michael Mignone, a teacher in Belleville, NJ and president of the Belleville Education Association, distributed political campaign material outside of Belleville High School on a day the school was closed. A few days later, Mignone received a letter from the district superintendent informing him that his actions violated district directives and policies and putting him on notice that "further discipline" would be required if Mignone continued to engage in such activities.

The Belleville Education Association, on behalf of Mignone, initially filed a grievance through the Board of Education's administrative process, pursuant to the Association's collective bargaining agreement with the district. The Board of Education of Belleville denied Mignone's grievance, and the Association subsequently filed a request for arbitration with the Public Employment Relations Commission (PERC). However, the Association withdrew the request before the scheduled arbitration hearing. Instead, the Association filed a lawsuit in New Jersey State Court alleging that the policy prohibiting "all political activity on school premises unless permitted in accordance with Board policy" violated its members' First Amendment rights.

The Board of Education removed the case to federal court and subsequently moved to dismiss the case for failure to exhaust administrative remedies. Specifically, the Board of Education argued that the Education Association was required to arbitrate all "grievances based upon the interpretation, application or alleged violation of (1) District policies and (2) the [collective bargaining agreement,]" prior to litigation, pursuant to the collective bargaining agreement. In an unpublished opinion, the District Court ruled for the Board of Education that arbitration was required. The Court relied on Third Circuit precedent that a court must determine "whether there is a valid agreement to arbitrate and, if so, whether the specific dispute falls within the scope of

said agreement." Here, neither party disputed the existence of a valid arbitration agreement. And the Court held the constitutional violation was "rooted in Plaintiff's disagreement with the Board over its interpretation and application of the District Policies vis-à-vis Plaintiff." Therefore, the parties were required to arbitrate before litigating the constitutional claim.

15.2 *In re City [Ohio] and International Association of Firefighters, Local__*, 137 LA 778 (2017) (Lalka, Arb.)

Two firefighters sought promotions to the position of Lieutenant. After taking an examination, the two firefighters were listed fourth and fifth on an Eligibility List certified by the Civil Service Commission. The Mayor promoted the first three candidates on the list. According to local civil service rules, if the list contained less than three names, the Commission could either (a) consolidate the existing list with a new list or (b) declare the existing list expired and create a new list. The Commission opted for the second option, effectively invalidating the eligibility list containing the two firefighters. The union filed a grievance against the Commission's decision on behalf of the two firefighters, calling for arbitration pursuant to the Collective Bargaining Agreement.

The arbitrator held that this grievance is not arbitrable. Because the Civil Service Commission is not a party to the firefighters' Collective Bargaining Agreement, the union's proper recourse pursuant to Ohio law is through the Court of Common Pleas.

16. Family Medical Leave Act

16.1 *Smith v. DuPage Cty. Sheriff*, No. 15 cv 4737, 2017 U.S. Dist. LEXIS 86005 (N.D. Ill. June 5, 2017)

The Northern District of Illinois concluded that four sheriff's deputies could proceed with claims brought under the Americans with Disabilities Act (ADA) for failure to accommodate their disabilities. Each of the plaintiffs was injured at work, and the County provided paid medical leave and benefits, and preserved the plaintiffs' jobs and seniority. However, under the County's policy, after twelve weeks off work, the plaintiffs were required to pay the full cost of their health care premium. The plaintiffs contended the County failed to consider them for light-duty assignments which they could have completed with their workplace injuries, and that failure to do so was a failure to accommodate. The Court concluded there was a factual question about whether the County's offered light duty accommodations when they became available, which must be decided by a jury.

16.2 *Randolph v. Detroit Pub. Sch.*, No. 15-13975 (E.D. Mich. March 22, 2017)

Roderick Randolph was a substitute teacher for Detroit Public Schools. Randolph requested FMLA leave to care for his mother, and was told he did not qualify. Randolph resigned from his position, and came back two weeks later to inquire about being re-hired. The Court rejected Randolph's argument that he was retaliated against in violation of the FMLA, because he failed to present evidence that his mother had a qualifying "serious health condition."

16.3 *Fortino v. Village of Woodridge*, No. 1:2017cv05037 (N.D. Ill. 2018)

Police officer Robert Fortino sued his employer, the Village of Woodridge, alleging he lost a promotion after hurting his knee in a work-related accident and was subsequently fired for taking leave. Fortino alleged the failure to promote and subsequent termination violated the Americans with Disabilities Act and the Family Medical Leave Act. The Village filed a motion to dismiss Fortino's claims, contending the officer was not a "qualified individual with a disability" under the ADA, did not suffer an adverse employment action as a result of opposing unlawful conduct under the ADA, and that the Village had no obligation to continue to employ him under the FMLA because his doctor certified he was unable to work.

The Court rejected the Village's claims, concluding that even though Fortino could not perform the essential functions of the job without accommodation, Fortino's complaint asserted that he could have performed the job with reasonable accommodations. The Court concluded Fortino's complaint stated a claim for retaliation based on Fortino's request for accommodation. The Court concluded that the complaint also stated a plausible claim for retaliatory discharge under a state law workers compensation statute. As to this state law claim, the Court stated that the mere existence of a valid reason for termination does not defeat a retaliatory discharge claim: an employer can still be liable if the actual reason for termination was the employee's exercise of rights protected by the workers compensation statute.

17. **Veteran's Rights**

17.1.1 Engrossed Substitute House Bill 2701 (Laws of 2018, ch. 61) – Veteran Definition

This bill amends RCW 41.04.005(2) to change what constitutes a "period of war." Specifically, it changes the provisions regarding the Persian Gulf War, and adds references in RCW 41.04.005(2)(g) to Iraq and Syria (Operation Inherent Resolve) and Afghanistan (Operation Freedom's Sentinel).

18. **Privacy**

18.1.1 *Perez v. City of Roseville*, 882 F.3d 843 (9th Cir. 2018)

Janelle Perez was a probationary police officer employed by the Roseville Police Department. Perez was fired from her job after an internal affairs investigation into her extramarital romantic relationship with a fellow police officer. Perez was not given an official reason for her termination, even after a Departmental administrative hearing and review. Moreover, there was no evidence of on-duty sexual misconduct. Perez filed suit in federal court, alleging a violation of her constitutional right to privacy and freedom of association and her constitutional right to due process, as well as sex discrimination under state and federal law. The District Court granted summary judgment in favor of defendants on all claims, including that the defendants were entitled to qualified immunity with respect to Perez's privacy and freedom of association claim because Perez did not have a clearly established constitutional right to engage in an extramarital sexual affair while on duty.

On appeal, the Ninth Circuit reversed with respect to Perez's privacy and freedom of association claim. Specifically, the Court held that "the Constitution is violated when a public employee is

terminated (a) at least in part on the basis of (b) protected conduct, such as her private, off-duty sexual activity . . . Perez has provided sufficient evidence of each element to survive summary judgment." The Court's holding centrally relied on four factors. First, there remained a genuine factual dispute about whether the termination occurred "in part" because of the affair. Second, the Ninth Circuit has previously recognized that "police officers enjoy a right of privacy in off-duty sexual behavior" unless there is a "showing that private, off-duty, personal activities . . . have an impact upon an applicant's on-the job performance, and of specific policies with narrow implementing regulations." Third, the Supreme Court has broadly recognized a right to sexual autonomy. And fourth, defendants here are not entitled to qualified immunity because it was sufficiently established at the time of the complaint that police officers' off-duty sexual behavior was constitutionally protected.

19. **Assignment/Classification/Promotion/Compensation**

19.1 Legislative Changes

19.1.1 Senate Bill 6145 (Laws of 2018, ch. 32) – Civil Service Applicants

This bill, effective June 7, 2018, amends the statutes regarding civil service for city firefighters, city police, and sheriff's offices. RCW 41.08.070 (firefighters); RCW 41.12.070 (police); RCW 41.14.100 (sheriffs). The bill permits applicants to be lawful permanent residents, in addition to U.S. citizens.

The bill also changes background investigation requirements, to add that this requires verification of status as either a U.S. resident or a lawful permanent resident.

19.2 Cases

19.2.1 *Richesson v. City of Worcester*, No. G2-17-062 (Mass. Civ. Serv. Comm'n, Aug, 2, 2018).

A District Chief of the Worcester Fire Department, Samuel Richesson, challenged the appointing authority's decision not to promote him to Deputy Fire Chief. The selected candidate, one of two on the "short list" following a written examination, Martin Dyer, was a captain, two rank levels below him. The appointing authority's decision was primarily based on the candidates' performance during the interview. Dyer presented as prepared for the interview, while Richesson by his own admission did not, considering it a mere formality prior to his eventual promotion. And in response to a question about how he would communicate to his department about a City policy he did not agree with, Richesson stated he would tell his team that he would work to persuade the City Manager to change the policy. Dyer, in contrast, stated he would present a united front, informing his team of the policy and the wisdom of the reasoning supporting it. The Civil Service Commission upheld the appointing authority's decision to promote Dyer, not Richesson, based on the convincing evidence regarding the candidates' interview performances. The Commission noted, however: "In other circumstances, when the evidence is not as convincing as it is here, further proof, including but not limited to video recording interviews, may be necessary to convince the Commission that the indicia of impartial, merit driven decision making was the reason for the bypass."

19.2.2 *Steven Achord, et al v. City of New Orleans Department of Fire* (New Orleans Civil Service Commission, May 24, 2018).

The New Orleans Civil Service Commission concluded that the fire department applied Commission rules unconstitutionally in promoting dozens of firefighters to captain, in passing over candidates who scored more highly on a promotion exam. The Louisiana State Constitution requires appointments and promotions in the classified state and city service be made pursuant to a "general system based upon merit, efficiency, fitness and length of service." Based on the process used by the department to test and select individuals for interviews, the evidence "support[ed] the Firefighters' contention that the [department] knew who it wanted to promote before even conducting interviews." The Commission stated that its' "most pressing concern" with the process used was that the department "introduced fifteen different criteria that had little, if any, defined values." The department further did not document how judgments were made on some of these fifteen subjective criteria, or document what questions were posed to candidates in the interview. However, the Commission concluded that demoting those individuals would be improper, as they did not receive their promotions through any misconduct. The Commission determined that the candidates who were passed over did not have any recourse because the department was under no obligation to promote anyone.

19.2.3 *In Re Employer [Ohio] and Union*, 137 LA 767, 200613-AAA (T. Skulina, May 2, 2017)

In a grievance arbitration, an arbitrator addressed whether the employer, a City, violated the collective bargaining agreement by promoting three patrol officers to the rank of sergeant, retained them on the bomb squad, and did not replace them with additional patrol officers. The arbitrator concluded the City did not violate the CBA: no language in the contract required patrol officers on the bomb squad who were then promoted to leave the squad.

19.3 *Smith v. Stafford Township*, Nos. 16-3966 and 16-4231 (3d Cir. 2017)

Drew Smith and Michael Guadalupe worked for the Stafford Township Police Department and went through a promotional assessment for sergeant and lieutenant positions, respectively. The assessment process, adopted by resolution, involved two phases. Neither Smith nor Guadalupe advanced to the second phase of the assessment process, and both contended the process was unfair and violated their due process rights. But neither candidate followed the internal appeals process required by the formal resolution. The Court of Appeals concluded that a procedural process violation could not have occurred where the township provided an adequate procedural remedy that the plaintiffs did not avail themselves of. While the officers contended any appeal would have been futile, because the same decisionmaker presided over the appeal process, they presented no authority or evidence to support their arguments. The officers also raised a substantive due process claim, but the Court concluded that those claims must also be dismissed, citing case law that there is no substantive due process property interest in public employment, let alone procedures for promotion.

20. **Wages**

20.1 Fair Labor Standards Act (FLSA)

20.1.1 *Meeks v. Pasco County Sheriff*, No. 16-16932, 688 Fed. Appx. 714 (11th Cir. 2017)

The Eleventh Circuit concluded that transporting a patrol car from a secure location to a patrol zone is a compensable activity under federal law, the Fair Labor Standards Act (FLSA). Under the FLSA, an employer is not required to pay an employee for travelling to and from the actual place where the employee performs principal activities, or activities which are either "preliminary" or "postliminary" to the employee's principal activities. The Court concluded that the employer must compensate the officer for transporting the patrol car because it was an intrinsic element of the officer's principal activities: "Meek's patrol car was integral to his patrol duties; he relied on the car and its police radio to maintain contact with the Sheriff and to respond to calls assigned by the Sheriff."

21. **Open Public Meetings Act**

21.1 Attorney General Opinion (AGO) 2017 No. 5

Attorney General Opinion (AGO) 2017 No. 5 offers guidance on the confidentiality of information shared in an executive session of a public meeting under the Washington Open Public Meetings Act (OPMA), ch. 42.30 RCW.

The AGO first concludes that participants may not disclose information discussed in a properly-convened executive session under the OPMA. While the OPMA does not expressly state so, the "duty on the part of participants in an executive session not to disclose the information discussed there is part and parcel of the concept of an executive session." The AGO relied on out of state authority, treatises, and legislative history to support its conclusion that maintaining confidentiality "is a legal obligation, and not solely a moral one." This duty only extends to information relating to the statutorily authorized purpose for convening the executive session and not already publicly disclosed.

The AGO also concludes that any officer covered by the Code of Ethics of Municipal Officers, RCW 42.23 RCW, violates that statute by disclosing information made confidential by the OPMA. The Code of Ethics prohibits disclosing "confidential information gained by reason of the officer's position" and applies to "all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer." RCW 42.23.070(4), RCW 42.23.020(2).

According to the AGO, disclosing information from executive sessions could also constitute a misdemeanor under RCW 42.20.100 or official misconduct under RCW 9A.80.010.
RCW 42.20.100 provides, "Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their willful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor." RCW 9A.80.010 provides that a public servant is guilty of official misconduct, a gross misdemeanor, if " with intent to obtain a benefit or to deprive another person of a lawful right or privilege" he

"intentionally commits an unauthorized act under color of law." The AGO notes that this remedy may not be pursued often due to prosecutorial discretion, the heightened standard of proof in criminal proceedings, and difficulty in proving the required mental state.

A governing body could enforce the confidentiality of executive sessions by obtaining a court order under RCW 42.30.130. That statute provides an action for mandamus or injunction to stop OPMA violations. The AGO cautions that without a court order, any effort to exclude a member of a governing body of a public agency from executive session based on concerns about confidentiality would be "legally risky." The AGO notes that "sufficiently extreme facts might arise that would make exclusion appropriate even without a court order." For example, where a board member is suing the board, courts have upheld the board's ability to exclude the member from executive sessions discussing the litigation.

22. **Public Records Act**

22.1 *SEIU Local 925 v. Freedom Foundation*, No. 76630-9-I (Wash. Ct. App. June 11, 2018)

The Washington Court of Appeals, Division One, concluded that emails of University of Washington professors relating to faculty union organizing were not "public records" under Washington's Public Records Act, Chapter 42.56 RCW. Although the emails were sent to UW email addresses, the Court concluded that emails relating to faculty concerns and unionizing efforts were not created "within the scope of employment" and were therefore not "public records" under the Washington Supreme Court's decision in Nissen v. Pierce County.

In Nissen, the court addressed text messages on an employee's private cell phone, and determined that records on private cell phones were only "public records" if created within the scope of employment. The Court of Appeals' new decision applies that test to records sent and received from a public employees' official work email account, retained on a public agency's server.

In reaching its conclusion that UW employee emails regarding unionizing efforts were not public records, the court reasoned that UW had no authority to control employee actions regarding union activity under state law. The court cited the Educational Employment Relations Act, chapter 41.59 RCW, and the Personnel System Reform Act, chapter 41.80 RCW, which make it an unfair labor practice to interfere with or control employees' union activities. The Court concluded, "Documents relating to faculty organizing and addressing faculty concerns are not within the scope of employment, do not relate to the UW's conduct of government or the performance of government functions, and thus are not 'public records' subject to disclosure."

22.2 *Zink v. City of Mesa*, No. 34599-8-III (Wash. Ct. App. June 14, 2018)

In the third appeal related to a 2003 public records request, the Washington Court of Appeals concluded that in setting a penalty for violations of the Public Records Act, Chapter 42.56 RCW (PRA), the trial court did not abuse its discretion in considering the small size of the City of Mesa and the burden the penalty imposed per capita on its taxpayers.

Courts have authority to enter penalties of up to 100 dollars per day for wrongful withholding of public records under the PRA. The Washington Supreme Court has adopted a sixteen-factor test

to determine the size of the penalty. One of these factors is deterrence considering the size of the agency and the facts of the case.

Here, the trial court calculated a penalty based on the sixteen factors, and then reduced the overall penalty amount from approximately $350,000 to $175,000, an amount the court deemed "sufficient to deter future conduct" without financially crippling the agency, the City of Mesa. The population of the City is under 500, and the court concluded a per-capita penalty of $350 was sufficient to deter misconduct. The Court of Appeals concluded that giving greater weight to the deterrence factor and size of the agency in this case was reasonable given the City's limited budget and resources.

The Court also addressed the retroactivity of amendments to the PRA provision regarding penalties. In 2011, the legislature amended the penalty provision, RCW 42.56.550(4), to remove language that penalties should be between five and 100 dollars per day. Under the current language which permits penalties "not to exceed one hundred dollars" per day of wrongful withholding, courts have discretion not to impose penalties if appropriate. The Court determined that this amendment was remedial and therefore retroactive, and could be applied to the calculation of penalties for the 2003 public records request.

22.3 *Kittitas County v. Sky Allphin*, No. 93569-9 (Wash. Sup. Ct. May 17, 2018)

In a five to four decision, the Washington Supreme Court concluded that emails exchanged between two separate public agencies – Kittitas County and the Washington State Department of Ecology – were protected under the work product doctrine and therefore exempt from disclosure under the Washington Public Records Act, Chapter 42.56 RCW.

Kittitas County and the Department of Ecology both investigated a company, Chem-Safe, for violations of waste-handling requirements. During litigation regarding the Notice of Violation the County issued to Chem-Safe, emails were exchanged between the County and Ecology. The County later withheld these emails from production under the Public Records Act, claiming work product protection.

A five-justice majority opinion of the Washington Supreme Court, authored by Justice Wiggins, concluded the emails were protected by the work product doctrine and then adopted a new rule to determine whether the protection was waived: "a party waives its work product protection when it discloses work product to a third party in a manner creating a significant likelihood that an adversary will obtain that information." Applying this rule, the Court concluded that Kittitas County did not waive work product protection by exchanging emails with employees of the Department of Ecology because the disclosure was to a party aligned on a matter of common interest and the disclosure "never created a circumstance in which it was significantly likely that Chem-Safe would be able to obtain the work product."

Justice Yu dissented, joined by two other justices. While agreeing with the rule adopted by the majority regarding waiver, Justice Yu would have held that because both the County and Ecology are public entities subject to the PRA, "the circumstances under which the County voluntarily disclosed the disputed e-mails to Ecology in this case did create a significant likelihood that an adversary would obtain them and, therefore, that the County presumptively

waived the protections of the work product doctrine." Justice Madsen separately dissented, contending that government parties should be treated the same as private parties, but that parties must have a "mutual understanding that the parties will maintain confidentiality" to avoid waiver of work product protection.

22.4 *Lee v. City of Seattle*, No. 75815-2-I (Wash. App. May 14, 2018)

The Washington Court of Appeals, Division One, has held that death-scene images of Kurt Cobain are exempt from public disclosure under the Washington Public Records Act, ch. 42.56 RCW ("PRA").

Richard Lee, a "local conspiracy theorist who believes that Mr. Cobain was murdered," made a public records request to the City of Seattle for the investigative file regarding Cobain's death. The City provided records but withheld death-scene photographs. Lee filed a lawsuit alleging that withholding these photographs violated the PRA. Cobain's daughter and widow intervened in the lawsuit. The trial court concluded the records were properly withheld and granted the Cobains' motion for a permanent injunction to prevent release of the photographs.

On appeal, the Court concluded that releasing death-scene images would shock the conscience and "offend the community's sense of fair play and decency," violating the Cobains' substantive due process rights under the Fourteenth Amendment. The Court held that permanently enjoining release of the photographs was a reasonable way to prevent such a violation. Further, the Court held that the Fourteenth Amendment's privacy protections are "necessarily a part of the PRA's 'other statute' exemption" under RCW 42.56.070(1). Mr. Lee's remaining challenges to the City's withholding or redacting of other information in the investigative file were also rejected by the Court.

22.5 *Zabala v. Okanagan County*, No. 34961-6-III (Wash. App. Apr. 3, 2018)

Under Washington state law, "the records of a person confined in jail shall be held in confidence" and made available only to criminal justice agencies as provided by law. RCW 70.48.100(2). In *Zabala v. Okanogan County*, the requester submitted five Public Records Act requests to the Okanogan County Sheriff's Office and the Okanogan County Prosecuting Attorney's Office. In combination, the requests sought any and all records, created in the last three years, related to monitored or recorded phone calls of inmates in the Chelan, Douglas, or Okanogan County jails, including voicemail, e-mail, audio, notes, reports, transcripts, arguments, pleadings, motions, briefs, memos, and letters. The agencies denied the requests as not being for identifiable records and because any responsive records were exempt from public disclosure.

The Washington Court of Appeals held that, while RCW 9.73.095(3) (covering recordings created by the Department of Corrections) did not apply, RCW 70.48.100 was an "other statute" under the Public Records Act that exempted the requested records in their entirety. Specifically, the court held that the exemption "extends to all recordings and documents related to the recordings even when in possession of the Okanogan County prosecuting attorney." And, since the exemption "does not disappear when an agency other than the jail creates the records concerning the inmate, the exemption further extends to records created by the Okanogan County prosecuting attorney concerning the jail inmate, which would include all records surrounding the

telephone recordings." The court noted that the prosecuting attorney likely played some of the inmate telephone recordings or filed related records with the court clerk and that the public has a right to access court records (citing Washington Constitution art. I § 10, and *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)). However, the requester had not sought access to court clerk records in this case. Because the Court of Appeals upheld dismissal of the case based on application of the exemption, it did not reach the county's argument that the requester had not sufficiently identified the records requested.

22.6 *West v. City of Puyallup*, No. 49857-0-II (Wash. App. Feb. 21, 2018)

The Washington Court of Appeals, Division Two, held that a Puyallup City Council member's Facebook posts were not "public records" under Washington's Public Records Act, Chapter 42.56 RCW, because the council member did not prepare the records within the scope of her official capacity as a member of the City Council.

The litigation centered on plaintiff Arthur West' public records request to the City asking for all records sent to or received by City Council Member Julie Door's "Friends of Julie Door" Facebook site. The City conducted a search of its own records and located one email, which it disclosed. The City did not disclose any posts on the "Friends of Julie Door" site.

To be a "public record" subject to disclosure under Washington's PRA, among other requirements, a record must relate to "the conduct of government or the performance of any governmental or proprietary function." In West's action under the PRA alleging the City wrongfully withheld the Facebook posts, the City contended that the Facebook posts did not contain any information relating to the conduct of government or the performance of any government function. The trial court agreed that the records were not "public records" because they did not meet this element and dismissed West's claim on summary judgment.

The Court of Appeals affirmed on different grounds. On appeal, the Court assumed without deciding that the posts "related to the conduct of government or a government function." However, the Court concluded that the posts did not meet another element of the definition of a public record, because the posts were not "prepared" by the City. In order for the posts to have been prepared by the City, under Nissen v. Pierce County, the post would have to be prepared by Door acting within the "scope of her employment," or her "official capacity."

Because Door's position did not require the posts, the City did not direct the posts, and because the posts did not further the City's interests, the Court concluded that the posts were not prepared by Door within the scope of her employment. The Court concluded that informational posts about City events and activities furthered the City's interests to a "minimal extent" but that this "tangential benefit to the City" was insufficient to establish Door was acting in the scope of her employment.

While the City prevailed, the Court noted that Facebook posts on personal sites can constitute public records, and that the inquiry was "case- and record-specific."

22.7 *Williams v. Department of Corrections*, No. 50079-5-II (Wash. App. Feb. 21, 2018)

The Washington Court of Appeals rejected plaintiff's contentions that the Department of Corrections violated the PRA by providing an unreasonable estimated response time and unduly delaying production. The court agreed, however, that DOC improperly redacted portions of records under RCW 42.56.240(1) and RCW 42.56.420, which exempts specific intelligence and investigative records. DOC had redacted information in a contract with J-Pay, a company providing money transfer and email service to correctional facilities. The redacted information involved keyword searches an offender could perform at the J-Pay kiosk, which the court concluded was not intelligence or investigative information, and was not a vulnerability assessment or part of an emergency and escape response plan.

23. Arbitrator Authority

23.1 *Soules v. Connecticut*, 882 F.3d 52 (2d Cir. 2018)

Gary Soules was a police officer in Oxford, Connecticut. He filed an administrative complaint and a federal lawsuit alleging that he was repeatedly discriminated against due to mental and physical disabilities or perceived disabilities, military service and in retaliation for complaints. Soules was then fired, after Soules submitted an amended complaint but while the motion to dismiss was still pending. In a court filing in opposition to the motion to dismiss, Soules cited his firing as further evidence of discrimination. Nonetheless, Soules' case was dismissed for failure to state a claim. Soules then filed a second lawsuit – this time with the termination as a central piece of evidence in the complaint itself. However, the District Court held that Soules was precluded from litigating this matter under the doctrine of *res judicata* because the Court had previously spoken to the question at hand in the prior litigation.

On appeal, the Second Circuit affirmed the District Court's holding because although "the scope of litigation is framed by the complaint at the time it is filed," Soules' "post-complaint conduct . . . effectively amended his complaint" and "the district court implicitly permitted Soules to amend the initial complaint." The Court also rejected Soules' argument that he was precluded from litigating the termination in the first litigation because he had not exhausted administrative remedies and therefore could only litigate the termination in the second litigation. To the contrary, the Court held that Soules could have litigated the termination in the first litigation because the termination was "reasonably related" to the administrative claims that he had already filed.

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Andrea Bradford is a litigation associate at Foster Pepper PLLC. Andrea focuses her practice on the representation of local governments on issues including the Public Records Act, employment and labor matters, and public works. She also has experience advising public school districts on various school law matters. Andrea serves as a member of the WSAMA amicus committee as well as a board member of the Washington Council of School Attorneys. After graduating from the University of Washington School of Law with honors in 2012, Andrea clerked for two years for the Honorable Ann Schindler at the Washington Court of Appeals, Division One.

REPRESENTATIVE WORK

- *Kanany v. City of Bonney Lake No. 46340-7-II*, Successfully argued appeal of denial of land use petition (2015)

ACTIVITIES

- Washington State Association of Municipal Attorneys, Amicus Committee, Member
- Washington Council of School Attorneys, Board Member
- Seattle Girls' School, Mentor, 2015-Present

PRESENTATIONS

- "Top New Employment Law Developments Affecting Washington Housing Authorities," Speaker, Association of Washington Housing Authorities, May 2018
- "Is Your Workplace Ready for Washington State's New Employment Laws?" Speaker, Foster Pepper Client Briefing, May 2018
- "District Resolution Writing," Speaker, Washington Association of School Business Officials Annual Conference, May 2018
- "The Insiders View of Washington's Appellate Courts," Panelist, Washington State Association of Municipal Attorneys 2017 Fall Conference, October 2017
- "Pre-Employment Credit Checks," Speaker, 36th Annual Civil Service Conference, September 2017

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EXPERIENCE

- Foster Pepper PLLC, Associate, 2017-Present
- Porter Foster Rorick LLP, Associate, 2014-2017
- Washington Court of Appeals, Division I, the Hon. Ann Schindler, Judicial Clerk, 2012-2014
- Federal Trade Commission, Bureau of Competition, Summer Law Clerk, 2011
- U.S. District Court, Western District of Washington, the Hon. Thomas S. Zilly, Legal Extern, 2010
- Department of Justice, Antitrust Division, Paralegal Specialist, 2007-2009

BAR ADMISSIONS

- Washington, 2013

EDUCATION

- J.D., University of Washington School of Law (with honors), 2012
  - Order of the Coif
  - *Washington Law Review*, Managing Editor
  - CALI Excellence for the Future Award
- B.A., Tufts University (*magna cum laude*), 2006
  - National Merit Scholar
  - *Tufts Daily Newspaper*, Assistant Features Editor

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PRACTICE OVERVIEW

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

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

SELECTED REPRESENTATIVE WORK

- *Brower v. State/Football Northwest*, 137 Wn.2d 44 (1998) (Successful defense of Seattle Seahawk stadium project and legislative referendum)
- *Washington Securities v. Horse Heaven Heights*, 132 Wn. App. 188, 149 P.3d 379 (2006), rev. denied, 158 Wn. 2d 1023 (successful prosecution of quiet title action for rail right of way)
- *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403 (2006) (successful defense of Sound Transit eminent domain action)
- *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008); 170 Wn.2d 1, 239 P.3d 589 (2010) (successful defense of water fluoridation program)
- *HTK v. Seattle Popular Monorail*, 155 Wn.2d 612 (2005) (successful defense of municipal condemnation authority)
- *Public Utility District No. 1 of Okanogan County v. State of Washington, Peter Goldmark*, 174 Wn. App 793, 301 P.3d 472 (2013); 182 Wn.2d 519; 342 P.3d 308 (2015) (successful prosecution of utility corridor acquisition)
- *Servais v. Port of Bellingham*, 127 Wn.2d 820 (1995) (amicus for Washington Public Ports Association in defense of protected public records
- *Klickitat Citizens v. Klickitat County*, 122 Wn.2d 619 (1993) (Defense of comprehensive plan and environmental impact statement for regional landfill)
- *Rabanco v. King County*, 125 Wn. App. 794 (2005) (successful defense of county solid waste management authority)

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- *Wong, et al. v. City of Long Beach*, 119 Wn. App. (2004) rev. denied 152 Wn.2d 1015 (2004) (successful defense of city trail project)
- *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74 (1990) (Defense of multi-million dollar government contract procurement)
- *Grant County Fire District No. 5 v. Moses Lake*, Supreme Court, 150 Wn.2d 791 (2004) (Court reconsiders and unanimously reverses earlier ruling; affirms city annexation authority)
- *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)
- *City of Seattle v. Shepherd*, 93 Wn.2d 861, 613 P.2d 1158 (1980) (upholding crime victims' rights to recovery of stolen property)

RECOGNITION

- *The Best Lawyers in America*© Appellate Practice, 2012-2019
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine, Appellate Practice, 2013
- Washington Super Lawyers list, 2002-2018
- 2010 Top Lawyer, *Seattle Metropolitan* magazine
- Martindale-Hubbell AV rating

ACTIVITIES

- Municipal League, Board of Trustees, 2010-2013
- Washington State Association of Municipal Attorneys
- International Municipal Lawyers Association
- American Bar Association, State and Local Government Law and Employment Law Sections, Member
- Washington State Bar Association
  - Environmental and Land Use Law and Administrative Law Sections, Member
- King County Bar Association
  - Foundation Trustee, 1986-1989, 2018-Present
- South King County Bar Association, Trustee, 1986-1988
- South King County Legal Clinic
  - Founder and Attorney Coordinator, 1985-1986
  - Volunteer, 1978-1989
- University of Washington
  - Lecturer, Evans Graduate School of Public Affairs

QUOTED

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

SELECTED PUBLICATIONS

- Foster Pepper Local Open Government Blog
  - Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
- Washington Real Property Deskbook: Causes of Action, Taxation, Regulation, Chapter Editor (WSBA)

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- Washington Public Records Act Deskbook, Chapter 14, Attorney Client Privilege, Co-Author (WSBA)
- Washington Administrative Law Handbook, Chapter 14, Judicial Review of Administrative Proceedings, Author (Butterworth)
- "Washington Supreme Court Levels the Playing Field in Real Estate and Land Use Litigation," Co-author, Foster Pepper News Alert, June 2015
- "U.S. Supreme Court Decision Expands Scope of Takings Clause," Co-author, Foster Pepper News Alert, June 2013
- "A Blessing on Your Meeting?" Co-Author, MRSC In Focus: Council/Commission Advisor, April 2012
- "Giving for the City: Constitutional Limits on Municipal Economic Development Programs," Cityvision Magazine, March/April 2012
- "Council Meeting Conduct and Citizen Rights under the First Amendment," Author, Municipal Research and Services Center of Washington, November 2009

EXPERIENCE

- Foster Pepper PLLC
  - Chair, Executive Committee, 2017-Present
  - Member, 1990-Present
  - Associate, 1986-1990
- City of Kent, City Attorney, 1982-1986
- City of Seattle, Assistant City Attorney, 1977-1982

BAR ADMISSIONS

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

EDUCATION

- J.D., Seattle University, 1976
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