



GOVERNMENT EMPLOYEE RELATIONS



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REPORT

JANUARY 18, 2011

HIGHLIGHTS**Driver Fired After Seizure Failed on 'Regarded as' Claim**

An Iowa county highway worker fired after an on-the-job seizure that resulted in temporary suspension of his driver's license has no Americans with Disabilities Act claim because he was unable to perform the essential functions of his job at the time he was terminated, the Eighth Circuit rules. **Page 68**

Worker Fired for Second Job During Sick Leave Lacks FMLA Claims

A Michigan county guardrail installer who was fired for working at his seal-coating business while on extended sick leave cannot proceed with his claims under the Family and Medical Leave Act, a federal district court rules. **Page 74**

Federal Disability Recipient May Pursue Rehabilitation Act Claim

A federal employee who received disability benefits under the Federal Employees' Retirement System based on her alleged inability to work nevertheless may pursue a Rehabilitation Act claim that her employer failed to reasonably accommodate her disability, the D.C. Circuit rules. **Page 71**

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A former deputy sheriff who asserted that he was constructively discharged following an allegedly improper transfer failed to prove breach of contract or that his due process or free speech rights were violated, the Tenth Circuit affirms. **Page 69**

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A deputy commissioner's micromanaging style created friction among Westchester County (N.Y.) corrections staff as well as with outside entities provided a legitimate, nondiscriminatory reason for firing her, the Second Circuit rules. **Page 72**

Demoted EMS Supervisor Raises Jury Issue of Age Bias

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COMPENSATION: California Gov. Brown (D) proposes new pay cuts, but an end to furloughs, for 60,000 state employees in six bargaining units that have not reached contracts. **Page 63**



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GOVERNMENT EMPLOYEE RELATIONS REPORT

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Federal News

Human Capital/Compensation

Proposed CUTS Act Would Save \$153 Billion By Reducing Federal Workforce, Freezing Pay

Federal spending would be reduced by \$153 billion through measures that include freezing federal employee pay for three years and reducing the federal workforce by 10 percent over the next decade under a bill (H.R. 235) introduced Jan. 7 by Rep. Kevin Brady (R-Texas).

In a statement released the same day, Brady said that many of the savings items contained in the Cut Unsustainable and Top-Heavy Spending (CUTS) Act were recommended by the National Commission on Fiscal Responsibility and Reform, which released its final recommendations in early December (48 GERR 1419, 12/7/10).

“Our nation’s budget is out of control. We need to take strong actions today to get it back on track,” Brady said. “Both Republicans and Democrats on the deficit commission agreed these cuts need to be made, so let’s make a down payment on restoring our nation to a balanced budget and leaner government.”

In addition to slashing certain federal grants and programs, the bill would impose an immediate 15 percent cut in the White House and congressional budgets, including a three-year pay freeze for members of Congress.

As the deficit commission recommended, the bill also would freeze federal employee and civilian Defense Department pay for three years. The most recent continuing resolution (H.R. 3082/Pub. L. No. 111-322), signed by President Obama Dec. 22, implements a two-year federal pay freeze through the end of 2012 (48 GERR 1479, 12/28/10).

Brady’s bill additionally would cut the size of the federal workforce by 10 percent over the next 10 years and ensure that the Internal Revenue Service collects all federal income taxes from federal employees. He noted that IRS in 2008 found that approximately 100,000 civilians owed some \$962 million in unpaid income taxes, a figure that jumps to 276,000 individuals owing some \$3 billion when retirees and members of the military are included.

NTEU Calls Cuts ‘Drastic.’ The National Treasury Employees Union Jan. 11 denounced the bill, saying that it would “implement drastic cuts across the federal government with little concern for resulting negative consequences and would seriously undermine critical services to the American people.”

“This legislation includes draconian measures that undermine the federal workforce,” NTEU President Colleen M. Kelley said in a statement. “This bill would

reduce federal agencies’ abilities to meet their missions and would likely result in administrative delays, fewer staff to handle increasing workloads, longer phone waits and lines, and fewer resources to handle everything from food safety to social security disability claims.”

Although NTEU was critical of the deficit commission’s recommendations, Kelley said Jan. 11 that the CUTS Act adopts recommendations that “attack the federal workforce” while at the same time “ignores many commission proposals that would have a far greater impact on reducing our federal deficit, such as cuts to government contracting.”

Brady said in his statement that he expected “serious opposition” to the “serious savings” proposed in his bill.

“If someone objects to these cuts then I expect them to substitute another savings of equal or greater value. We simply can’t allow these dangerous deficits to continue,” he said.

BY LAURA D. FRANCIS

Full text of H.R. 235 is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8czrmg>.

A list of the cuts in the bill and their estimated savings is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8czrhr>.

A description of the spending cuts is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8czrj4>.

Furloughs

Feds Would Face Two-Week Furlough In Fiscal Year 2012 Under House Bill

Federal civilian employees would be subject to a two-week unpaid furlough during fiscal year 2012 and members of Congress would face a 10 percent pay cut beginning in January 2013 under legislation introduced Jan. 12 by Rep. Mike Coffman (R-Colo.).

The measure (H.R. 270) would save taxpayers some \$5.5 billion, according to a Jan. 13 statement from Coffman.

“Furloughs are becoming commonplace for state and local governments, and it’s only reasonable for the federal government to follow suit,” he said, asserting that at least 24 states have enacted similar budget-cutting measures.

An exception is provided in the bill for federal employees whose jobs involve national security or for reasons relating to public health or safety, including law enforcement.

In addition, the measure calls for a reduction in congressional office budgets.

“Last week we put the 112th Congress on the right track by voting to reduce all congressional office bud-

gets by five percent. My plan just takes that intention to the next level, providing even greater cost savings to the American taxpayers at a time when they most need a helping hand in Washington,” Coffman said.

Union Sees Loss of Services. John Gage, president of the American Federation of Government Employees said in a Jan. 14 statement that requiring federal employees to take two weeks of unpaid leave would have a detrimental effect on the government’s ability to provide essential federal services.

“Even though this proposed legislation would exempt employees in positions involving national security, law enforcement, and public health and safety, every federal employee is vital to the effective operation of our government,” Gage said.

BY LOUIS C. LABRECQUE

Full text of H.R. 270 is available at <http://op.bna.com/gr.nsf/r?Open=llbe-8d4nsm>.

Veterans’ Preference

MSPB Seeks Amicus Briefs on Whether VEOA Violated by Student Career Experience Program

The Merit Systems Protection Board Jan. 13 announced that it is seeking amicus briefs on whether the federal government’s Student Career Experience Program violates the Veterans Employment Opportunities Act (76 Fed. Reg. 2422, 1/13/11).

The case, *Denton v. USDA*, No. DC-3330-09-0696-I-1, involves a disabled veteran who applied for a promotion under two separate competitive hiring vacancy announcements, made the list of eligibles in both instances, but was not hired because the vacancy announcements were canceled in favor of hiring through SCEP.

“This appeal raises significant issues regarding whether the agency’s use of SCEP improperly circumvented the competitive examination process, allowing the agency to avoid its obligations regarding veterans’ preference,” the board said, adding that “the material issues are similar in many respects” to those in the cases challenging the Federal Career Intern Program, invalidated by the board last November (48 GERR 1347, 11/16/10).

Questions for Amicus Filers. Questions for those filing amicus briefs include (1) whether SCEP violates veterans’ preference by allowing agencies to use a hiring authority reserved for jobs for which it is not practicable to hold a competitive examination, even after a competitive exam is conducted; (2) whether SCEP violates veterans’ preference because it does not require justification for placing a position under Schedule B of the excepted service; and (3) the impact of President Obama’s Dec. 27 executive order on recruiting and hiring students and recent graduates (49 GERR 5, 1/4/11).

FCIP under Executive Order 13562 will be terminated effective March 1. SCEP under the same order will be terminated once the Office of Personnel Management has issued implementing regulations for the new Pathway Programs for students and recent graduates.

Briefs are due on or before Feb. 7 and must be captioned “Jeffrey Denton v. Department of Agriculture”

and titled “Amicus Brief.” They may be delivered to the Office of the Clerk of the Board, MSPB, 1615 M St. N.W., Washington, D.C. 20419.

For more information, contact Matthew Shannon, MSPB, Office of the Clerk of the Board, 1615 M St. N.W., Washington, D.C. 20419; (202) 653-7200; or e-mail mspb@mspb.gov.

Full text of the board’s *Federal Register* notice is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-01-13/pdf/2011-633.pdf>.

Hiring/Promotions

MSPB Launches New Web Feature: ‘Merit System Principle of the Month’

The Merit Systems Protection Board Jan. 10 announced that it would highlight the “Merit System Principle of the Month” on its website, focusing on the intent of the selected principle, recent MSPB decisions, and other relevant topics.

According to the board, the first principle is recruitment, selection, and advancement: “Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.”

The intent, MSPB explained, is to recruit individuals for federal employment who are representative of the taxpayers, while the selection and advancement segments of the principle are the “core value of a merit-based employment model.” The final aspect of the principle is an assurance against employment discrimination, it said.

Recent Case Law. In terms of recent case law, *Special Counsel v. Lee*, No. CB-1215-08-0014-T-1 (May 14, 2010), involved discipline of agency officials who gave preference to an applicant in violation of the principle that job selection cannot be based on personal or political favoritism, the board noted. *Sausser v. VA*, No. PH-300A-09-0431-I-1 (March 12, 2010), also held that an applicant was entitled to a hearing on his claim that the qualifications used to disqualify him from consideration were not rationally related to the job for which he applied.

MSPB added that the Office of Personnel Management has issued detailed regulations—at 5 C.F.R. Parts 300A, 330, and 332—on merit-based hiring, while the Equal Employment Opportunity Commission’s Management Directive 715 assists agencies in developing a representative workforce.

The Merit System Principle of the Month is available at <http://www.mspb.gov/mspm.htm>.

More information on all of the merit system principles is available at <http://www.mspb.gov/meritsystemprinciples.htm>.

Congress

Rehberg to Chair Budget Subcommittee With Authority Over Labor Department

Rep. Dennis Rehberg (R-Mont.) Jan. 7 was appointed chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies.

In a statement, Rehberg, approved unanimously by the House Republican Steering Committee, said he would "use his position to fight for reduced spending and improved oversight."

The subcommittee has budget authority over the departments of Labor, Education, and Health and Human Services, along with the Food and Drug Administration.

Rehberg, Montana's only representative in the House, said that "so-called government solutions tend to exacerbate existing problems and create entirely new ones to boot. Even as federal spending went through the roof, the quality of health care and education has suffered."

Congressional appropriators "need to spend tax dollars more responsibly and efficiently," Rehberg said. "We need to empower communities, not federal bureaucrats. We need to stop thinking that we can solve every problem by throwing more money at it."

Rehberg has supported a ban on federal earmarks and shrinking the size of the federal workforce.

Other Republican members of the subcommittee include Rodney Alexander (La.), Jeff Flake (Ariz.), Kay Granger (Texas), Jack Kingston (Ga.), Jerry Lewis (Calif.), Cynthia Lummis (Wyo.), and Mike Simpson (Idaho).

Rehberg replaces Rep. David Obey (D-Wis.) as subcommittee chair. Obey did not seek re-election to the 112th Congress.

BY STEPHEN LEE

State and Local News

Compensation

California Governor Proposes Pay Reduction For 60,000 State Workers Without Contracts

SACRAMENTO, Calif.—Furloughs likely would end June 30, 2011, for California state employees in six bargaining units that have not reached agreements, but those 60,000 workers would have their pay reduced by 8 percent to 10 percent in the fiscal year that begins July 1 to reduce payroll costs by \$308.4 million, Gov. Jerry Brown (D) proposed in a budget plan released Jan. 10.

Employees in the six units, representing 36 percent of state general fund payroll, are subject to three-day-a-month furloughs until the end of the fiscal year under executive orders issued by former Gov. Arnold Schwarzenegger (R). The pay cut proposed for the next fiscal year is intended to mirror savings achieved through agreements reached in 2010 with 15 other bargaining units covering 132,000 employees.

Brown said the pay cut will be achieved either through collective bargaining or administrative actions. The payroll reduction is necessary to help close a \$25.4 billion budget deficit over the next 18 months, he said.

Unions without contracts that would be subject to the pay cut are the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; the California Correctional Peace Officers Association; the California Statewide Law Enforcement Association; the Professional Engineers in California Government; the California Association of Professional Scientists; and the International Union of Operating Engineers. The bargaining units have been working under expired contracts for three to four years.

PECG Executive Director Bruce Blanning told BNA that the pay cut proposal does not indicate what may be negotiated between the union and the administration before the new fiscal year begins in July.

"It is a budget proposal and that's all it is as far as we're concerned," Blanning said.

PECG has had informal discussions with the Department of Personnel Administration, but is not formally bargaining now, he said. Because almost all PECG members are paid from special funds, and not the general fund, the union is in a different situation than the other units that have reached contract agreements in recent months.

"We look forward to bargaining," Blanning said.

Cell Phones, Health Care Plans. The new governor's proposed budget contains other cuts for state employees.

In an executive order issued Jan. 11, Brown called for managers to collect and turn in half of the government-paid cell phones state employees now use—about 48,000 altogether. Brown said the state pays for 96,000 cell phones, which is one for 40 percent of all state workers. By cutting usage in half, the state will save \$20 million a year.

"It is difficult for me to believe that 40 percent of all state employees must be equipped with taxpayer-funded cell phones," Brown said in a statement. "Even with a 50 percent reduction, one-fifth of all state employees will still have cell phones. That still seems like too much and I want every department and agency to examine and justify all cell phone usage."

Brown said the state may have to keep some of the phones longer to avoid early termination penalties under contracts with cell phone carriers, but the goal is to cut the number of phones in half by June 1.

The governor also proposed a new health care option for state workers to reduce the \$2.4 billion the state will spend on health care benefits for active and retired employees in the current fiscal year.

Under what his administration called a Core Health Care option, Brown is asking lawmakers to approve legislation giving the California Public Employees' Retirement System the ability to negotiate a core health plan to add to its existing health plan options, and to have a representative at the bargaining table when negotiating health plan contracts "for the purpose of shaping the core health plan option and identifying and advocating for more economical options within the existing plans." The proposal would result in savings of \$72 million from expected 2012 health plan rates for CalPERS.

A spokesman for CalPERS said the system has not received details of the governor's health plan proposal,

and could not say how it would work. CalPERS has authority to negotiate health plan coverage for state workers under the state Public Employees' Medical and Hospital Care Act.

By LAURA MAHONEY

A summary of the governor's budget proposal for state employees is available at <http://op.bna.com/dlrcases.nsf/r?Open=czon-8czv8v>.

Retirement

New Jersey Gov. Christie Says Pension Reform For Public Employees Is Top Priority in 2011

New Jersey must raise the retirement age for public employees, curb retiree cost-of-living increases, and require government workers to make bigger pension contributions or the public employee retirement system risks becoming insolvent within a decade, Gov. Chris Christie (R) said Jan. 11.

"Benefits are too rich, and contributions are too small, and the system is on a path to bankruptcy," the governor said in his state of the state address to the Legislature.

Christie highlighted reform of what he called "our antiquated and unsustainable pension and benefit system" as one of three critical challenges—along with fiscal discipline and education reform—that state lawmakers have to tackle in the coming year.

Without the changes he has proposed, pension and benefit costs will climb by 40 percent over the next four years and the retirement system's \$54 billion unfunded liability will explode, the governor said.

Rather than emphasizing a theme of shared sacrifice, Christie cast the proposed changes as necessary to ensure that the pension system survives for police, firefighters, teachers, and other government employees who retire a decade or more in the future.

"Without reform, the beneficiaries of the system face a high risk of catastrophe which would place all of their benefits at risk," he said.

Part of Legislative Agenda. Pension and benefit reforms were among 33 legislative proposals the governor delivered to the state legislative leadership soon after he took office in 2010.

The bills are intended to implement Christie's strategy for addressing New Jersey's ballooning budget deficits and rapidly escalating local property taxes by slashing state aid to local governments and schools while giving them tools to hold the line on their own spending.

In his state of the state address, the governor noted that labor costs account for 75 percent of municipal and county government budgets.

Last year, the Legislature approved reforms in police and firefighter arbitration awards that include limits on wage and benefit increases (48 GERR 1494, 12/28/10) and a package of pension and health benefits reforms for new hires (48 GERR 368, 3/30/10).

Now Christie is pressing state lawmakers to take the next step and extend the changes to current public sector workers.

Proposed reforms include rescinding a 9 percent enhancement of the pension benefit formula that was au-

thorized in 2001, basing pensions on the average of a worker's five highest salary years rather than the highest three years, and increasing the age for retirement with full benefits, which is now 62.

The governor also wants to eliminate automatic cost-of-living adjustments and standardize employee pension contributions at 8.5 percent of salary. Contributions now range from 3 percent to 8.5 percent of salary among New Jersey's five public pension systems.

Proposed Health Benefits Changes. Christie has proposed increasing the employee share of health care premiums to 30 percent by 2014, from 8 percent now, requiring workers to pay a percentage of the premium, rather than a percentage of their salary, and making changes in plan design.

Most of the proposed changes for active employees would apply to retirees as well.

Majority Democrats in the Legislature have argued against making any more sweeping pension system reforms until the state resumes making its own statutorily required annual pension fund contributions, which it has not done in more than a decade.

In his state of the state address, Christie said the state should begin making its pension contributions "if we can make real reform a reality."

Last year, the governor closed an \$11 billion budget gap in part by failing to make the state's \$3 billion pension fund contribution, saying he would not fund a broken system. The estimated budget gap in fiscal year 2012 is little changed and Christie has pledged to fill it without raising taxes.

By LORRAINE MCCARTHY IN PHILADELPHIA

Text of the New Jersey governor's state of the state address is available at <http://www.state.nj.us/governor/news/addresses/2010s/approved/20110111b.html>.

Retirement

Maryland Governor Pledges Pension Reform Aimed at Sustainability Before Cost-Sharing

Maryland Gov. Martin O'Malley (D) Jan. 6 announced that he would pursue pension reform measures in the state legislature that focus on improving sustainability of the system rather than shifting the cost burden to the counties.

In a speech presented at a conference of the Maryland Association of Counties, O'Malley said that he considered several options—including shifting 40 percent of the cost of funding teacher pensions to county school boards and shifting costs based on wealth-adjusted formulas.

"We owe it to our police officers, teachers, and other hardworking state employees, and we also owe it to our children, and to our taxpayers to find a sustainable way forward that protects our commitments and maintains fiscal responsibility," O'Malley said. "It is my belief that we cannot have an honest conversation about sharing costs, or even the need to share costs, until we reach an agreement on how we can fix the pension system. While other elected leaders may well offer other approaches, the balanced budget proposal I submit to the General Assembly later this month will not pass pension costs onto the counties."

Commission Recommendations. O'Malley's decision on pension reform comes after the Maryland Public Employees' and Retirees' Benefit Sustainability Commission Dec. 20 recommended among other things phasing in over three years a requirement that the counties pay half of their employees' pension costs, including the employer contribution toward the combined teachers' pension and retirement system as well as the employer share of teachers' Social Security costs. As part of that recommendation, the commission suggested that school boards in wealthier counties pay a greater share of pension costs than those in less wealthy counties.

In a joint statement issued Dec. 20, AFSCME Maryland, AFSCME 67, AFT Maryland, the Maryland State Education Association, and SEIU Maryland said they were "deeply disappointed" with the commission's recommendations.

"The commission's recommendation to shift the cost of teacher pensions to local school systems in particular would have a devastating impact on local funding, resulting in layoffs, additional cuts in local services, critical dollars out of the classroom, and seriously jeopardizing our children's education and future," the unions said.

Debra Garner, a spokeswoman for MSEA, told BNA Jan. 11 that the unions were "very pleased" that O'Malley decided not to adopt that recommendation, stating again that shifting costs to local school boards would have an "adverse impact on our children."

'Basic Principles of Pension Reform.' O'Malley also announced that he would pursue "basic principles of pension reform," including maintaining a public pension system, improving its funding level, seeking greater contributions from members, and establishing milestones to determine whether further reform is necessary.

Still, he said, "the reality is that while our national economy is improving, times are tough in every state. And although we in Maryland are in better shape than our counterparts, a \$1.3 billion hole requires shared sacrifice."

O'Malley spokesman Shaun Adamec declined to elaborate further, telling BNA Jan. 11 that the details of the governor's pension plan were still being worked out and would be released in the near future.

Garner said Jan. 11 that "we're looking for a win-win solution" where pensions are protected and members will not have to "dig deeper into their pockets." She noted that teachers already have been contributing more toward their retirement since their benefits were enhanced in 2006.

She emphasized that "Maryland is the wealthiest state in the country," and its status as first in the nation in education is a result of the commitment of the state's educators. The quality of education will drop if Maryland does not provide benefits that can attract and retain top talent, Garner said.

"We're still not where we should be considering the wealth of our state," Garner added.

By LAURA D. FRANCIS

For more information on the Public Employees' and Retirees' Benefit Sustainability Commission, including its Dec. 20 recommendations, go to <http://subscript.bna.com/UTILS/lk.nsf/r/llbe8d4mtm?opendocument>.

Testing

New Jersey Bill, Resolution Introduced Targeting Police, Firefighter Steroid Use

A bill and resolution introduced Jan. 11 in the New Jersey General Assembly would require fitness-for-duty evaluations for police officers and firefighters who are on prescription steroids and would urge the state attorney general to include testing for steroids and other designer drugs as part of regular police and fire drug testing.

Introduced by Assemblyman John McKeon (D) and Assemblywoman Mila Jasey (D), A3737 would require county and municipal governing bodies and boards of fire commissioners to designate a physician to whom police officers and firefighters must report prescriptions for anabolic steroids or human growth hormone. That physician would be required to conduct an annual fitness-for-duty examination of all officers and firefighters who have reported such prescriptions.

AR136, introduced by McKeon and Assemblyman Herb Conaway Jr. (D), would urge the state attorney general as part of random drug testing to include tests for anabolic steroids, methylenedioxymethamphetamine ("Ecstasy"), gamma-hydroxybutyrate ("GHB" or "Liquid Ecstasy"), ketamine ("Special K"), rohypnol ("Roofies"), and lysergic acid diethylamide ("LSD").

"State taxpayers have been wrongly paying for millions of dollars in insurance costs for prescriptions that were, in many cases, issued illegally," McKeon said in a Jan. 10 statement announcing his intent to introduce the measures. "Taxpayers also have been footing the bill for the side effects of this abuse. It's long past time for this outrage to finally stop. Taxpayers and public safety deserve better."

Spurred by Newspaper Investigation. According to Assembly Resolution 136, the Newark-based *Star Ledger* recently conducted an investigation of steroid, testosterone, and human growth hormone usage among police and firefighters throughout the state. In many cases, officers and firefighters used their government benefits to cover the cost of the drugs, it said.

"In addition to the health issues associated with the misuse of these drugs and the cost to taxpayers, law enforcement officers abusing steroids are susceptible to bouts of increased aggression, referred to as 'roid rage,' thereby posing a threat to the public safety," the proposed resolution added.

However, Ed Brannigan, president of the New Jersey State Fraternal Order of Police, told BNA Jan. 13 that the case of one doctor in Jersey City who improperly prescribed steroids for 248 officers and firefighters was "blown out of proportion" so that it appeared that there was a widespread problem.

There are 44,000 police officers and roughly 10,000 firefighters in the state, and so 248 is a "small number," he said.

The resolution further noted that drug testing for steroids and designer drugs currently does occur upon request, but that law enforcement agencies rarely make such requests and only do so where they have reasonable suspicion that an officer is taking the drugs. Brannigan suggested that the main reason for the infrequency of such testing is the cost.

He said that he has no objection to the additional random drug testing called for in the resolution or to the requirement in the bill that officers report steroid prescriptions to a government-appointed physician.

Fitness Exams a 'Problem.' However, Brannigan said, "I've got a problem" with the annual fitness-for-duty exams that would be required for all officers who have reported their steroid prescriptions, noting that evaluations by county or municipal physicians can be "one-sided" and subject to abuse.

NJFOP plans to take an active role in the legislative process to help shape the bill language, Brannigan added. "There can be common ground," he said.

BY LAURA D. FRANCIS

Full text of A3737 is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8d2mu9>.

Full text of AR136 is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8d2muv>.

Government Operations

Task Force Issues Recommendations For New York City Workforce Reform

NEW YORK—A mayoral task force has completed recommendations for reform of the New York City municipal workforce ranging from abolition of state Civil Service Commission oversight to revamping of more than 1,000 job titles and exams, Mayor Michael R. Bloomberg (I) announced Jan. 7.

The report of the city Workforce Reform Task Force outlines 23 steps the city can take to improve its civil service system, which it said is bound by extensive rules that cramp the ability to hire, promote, train, and develop workers. Separate exams for the hundreds of narrowly classified job titles take an average of 16 months to prepare and cost the city more than \$16 million a year, the report found.

"We have the best workforce in the world, but the civil service is so antiquated that it prevents [city workers] from performing up to their abilities, costs taxpayers millions of dollars in unnecessary expenditures, and prevents us from retaining and promoting our best workers," Bloomberg said in a statement. The report's "concrete, achievable reforms . . . will help modernize the system and strengthen the whole purpose of civil service reform: conducting hiring and promotion based on merit," he added.

Some of the steps will be put into effect immediately, while others will require state action and cooperation from public employee unions, the mayor said.

'Road Map' to Better System. The report "is a road map to a system that is less expensive and less complicated, while providing more flexibility and more worker discretion," Citywide Administrative Services Commissioner Edna Wells Handy added.

The state Civil Service Commission is overburdened by its oversight responsibilities for some 100 municipal civil service entities, and cannot meet the unique needs of a workforce the size of New York City's, the report said.

"As a result, the city's routine applications to the commission often go unanswered," the report noted,

pointing to five efficiency proposals sent by the city since June 2009. "The commission has not issued a response to any of the proposals, despite the fact that the city pays the commission up to \$600,000 per year to handle this workload."

Pointing to "myriad unnecessary and inflexible rules and restrictions on hiring and an inappropriate reliance on testing," the report called for a more flexible system. Due to their complexity and cost, the city can administer only 100 to 120 exams annually out of the more than 1,000 required, it said.

Recommended steps include reducing the number of job titles requiring competitive exams, increasing the use of education and experience as a measure of qualifications, and saving money by purchasing exams from testing companies rather than creating them from scratch.

"Testing companies have been unwilling to sell their exams to the city because the city, unlike other jurisdictions in the state, is required to publish answer keys," the report found, recommending state law changes to eliminate the requirement.

Classifying Managers. The city also should classify more supervisory employees as managers, the report said, noting that many uniformed services commanders, assistant commissioners, agency chiefs-of-staff, and others are considered nonmanagerial under the law despite supervising large workforces.

Of approximately 62,000 uniformed employees at the Police, Fire, Correction, and Sanitation departments, only 90 uniformed employees are classified as managers, the report found. State law changes could be modeled after the "broader standards for management" applied under federal law, it said.

Also recommended were steps to change the city's evaluation system to reward high performance and empower employees with more specialized training, promotional opportunities, bonuses, and shift assignment choices through union agreements. Discipline and arbitration systems also should be made more efficient, the report urged.

BY JOHN HERZFELD

NYC Workforce Reform Task Force: Report and Recommendations is available at http://www.nyc.gov/html/om/pdf/2011/pr008-11_report.pdf.

Organizing

NLRB Invites Amici to File Briefs On Illinois Charter School's Status

The National Labor Relations Board Jan. 10 issued a notice and invitation to file briefs on whether a Chicago charter school is an employer subject to the board's jurisdiction or is a "political subdivision" of the state of Illinois within the jurisdiction of a state agency (*Chicago Mathematics & Sci. Acad. Charter Sch. Inc.*, NLRB, No. 13-RM-1768, 1/10/11).

An NLRB regional director last September dismissed a petition by Chicago Mathematics and Science Academy Charter School Inc. that sought an NLRB-conducted election on whether school employees want to be represented for purposes of collective bargaining by the Chicago Alliance of Charter Teachers and Staff,

but the board granted the employer's request to review the ruling, concluding that there are substantial issues of whether the school is a political subdivision that is exempt from board jurisdiction under Section 2(2) of the National Labor Relations Act.

In a statement issued along with the notice and invitation to file briefs, the board noted that state laws on charter schools vary, and that NLRB regional directors have asserted jurisdiction in some cases involving charter schools, while declining jurisdiction in others. "The decision in this case could provide further guidance as to when charter schools fall under NLRB jurisdiction," the board said.

Briefs must be filed with the board in Washington on or before March 11. The parties and interested amici curiae should file briefs electronically at <http://mynlrb.nlr.gov/efile>. The parties may file responsive briefs on or before March 25. Assistance with electronic filing may be obtained by contacting Lester A. Heltzer, executive secretary.

Text of the notice is available at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-8cyvj9>.

Unions

OLMS Asks Public to Submit Ideas Regarding Internet, Telephone Voting for Union Officers

The Labor Department's Office of Labor-Management Standards is asking the public to weigh in with ideas on the use of internet and telephone voting in union officer elections, according to a Jan. 11 *Federal Register* notice (76 Fed. Reg. 1559, 1/11/11).

The notice identifies several potential benefits of internet voting, including its accessibility for disabled voters and military personnel stationed overseas, its attraction for younger voters, and its lower costs compared with in-person voting.

The Labor-Management Reporting and Disclosure Act establishes democratic standards for the conduct of union officer elections, but does not require a particular method of voting, the notice explained.

The notice defines "electronic voting systems" to include electronic voting machines used for casting votes at polling sites, electronic voting from remote personal computers via the internet, and electronic voting from remote telephones. The term does not include electronic tabulation systems in which votes are cast non-electronically but counted electronically, such as punch card voting or optical scanning systems, the notice said.

Secret Ballots. Title IV of the LMRDA and interpretive regulations codified at 29 C.F.R. Part 452 establish standards for voter secrecy, candidate observers, and preservation of records, the notice said. In particular, it emphasized that "the requirement of a secret ballot in union officer elections is to be interpreted strictly."

OLMS acknowledged that in 2007, the National Mediation Board adopted internet and telephone voting for the elections it conducts under the Railway Labor Act. OLMS pointed out, however, that the LMRDA has "heightened ballot secrecy requirements" and pertains to elections that are run independently by unions rather than by OLMS.

The notice requests information on methods for protecting ballot secrecy during other types of elections that have used internet and telephone voting, including contract ratification votes, National Mediation Board and National Labor Relations Board elections, and national and local political elections. It also asks whether paper audit trails are necessary so a voter can confirm that his vote was recorded accurately or so a recount can be held.

The notice also asks for comments on the role of observers in an electronic voting system. It asks for suggestions on methods for separating voter identification numbers from voted ballots so a voter cannot be connected to his or her vote. Furthermore, it requests suggestions for preventing the embedding of software that could change vote totals and asks for comments on the likely impact of electronic balloting on voter intimidation.

Comments are due on or before March 14 and should be identified by RIN 1215-AB84 and 1245-AA04. Comments may be submitted through the Federal e-Rulemaking Portal at <http://www.regulations.gov> or mailed to Stephen J. Willertz, Director of Enforcement and International Union Audits, OLMS, Labor Department, 200 Constitution Ave. N.W., Room N-5119, Washington, D.C. 20210.

Full text of the notice is available at <http://op.bna.com/dlrcases.nsf/r?Open=gcii-8cynws>.

Labor

LERA Unveils Website Designed to Provide Labor, Employment Research for Public Use

DENVER—The Labor and Employment Relations Association unveiled a new website and research network Jan. 7 designed to provide labor and employment research for policymakers and the public.

The Employment Policy Research Network is aimed at providing easy access to research on labor and employment issues for elected officials, government agencies, businesses, media, academia, and labor organizations, LERA said.

DOL Deputy Secretary Seth Harris said the network "could tell us whether the strategies we are pursuing have had an effect on overall compliance. We want you to tell us if we got it right."

The network features research on topics such as employment regulations, equal employment opportunity, globalization, immigration, industry sector studies, jobs quality, labor force supply and demographics, labor-management relations, regional economic development, social insurance, training and workforce development, unemployment, jobs deficit-growth, wages and compensation, skill and technology development, and work-family policy.

To gain access to the network research, discussions, blogs, reports, and op-eds, users must register and create sign-in names and passwords.

BY TRIPP BALTZ

The website for the Employment Policy Research Network is <http://employmentpolicy.org>.

Legal News

Disabilities Discrimination

Driver Terminated After Seizure on Job Failed to Establish 'Regarded as' Claim

An Iowa county highway worker fired after an on-the-job seizure that resulted in the temporary suspension of his driver's license has no Americans with Disabilities Act claim because he was unable to perform essential functions of his job at the time he was terminated, the U.S. Court of Appeals for the Eighth Circuit ruled Dec. 20 (*Duello v. Buchanan Cnty. Bd. of Supervisors*, 8th Cir., No. 10-2061, 12/20/10).

Affirming summary judgment for the Buchanan County Board of Supervisors, the court said that Roger Duello, who operated dump trucks, road graders, and snow plows for the county for about 10 years before his October 2006 seizure, lacked an ADA "regarded as" claim.

Following the seizure, which occurred while Duello was driving a county dump truck, he was granted leave under the Family and Medical Leave Act through Dec. 29, 2006. He was barred from driving or working near machinery for at least six months and had to relinquish his driver's license and commercial driver's license.

Duello Dec. 18 provided a letter from his treating physician, Dr. Robert Rodnitzky, indicating that Duello should be able to return to work without restrictions within six months if no further seizures occurred. Duello asked the county for additional leave until his work restrictions lapsed, which he anticipated would be around April 2007.

Terminated While on Leave. In January 2007, however, the county board of supervisors voted to terminate Duello on the grounds that he had "a physical disability that prevents him from carrying out his duties of employment" and that there was "no reasonable prospect of recovery that would enable him to resume his duties." Duello formally requested reconsideration and reinstatement, but the board confirmed its decision.

Analyzing Duello's claim under the pre-Jan. 1, 2009, version of the ADA, the Eighth Circuit found that Duello was unable to perform essential functions of his job—driving and working around machinery—at the time he was terminated.

Duello argued that it was not essential for him to drive or work around machinery prior to April 2007 because the county routinely excused employees with temporary restrictions, either with leaves of absences or with exemptions from duties they could not perform. But the court said Duello's evidence did not indicate the county had an ongoing practice of excusing employees in his job category (operator II) from driving or working around machinery while temporarily disabled.

The two county employees granted leaves of absence for temporary disabilities whom Duello cited as comparators were not similarly situated to him because nei-

ther was an operator II and one could still perform the essential functions of his job, Judge Michael J. Melloy wrote.

Failed to Prove 'Qualified' for Job. The parties agreed that Duello was only disabled under the ADA's "regarded as" prong because the effects of his seizure were temporary and unlikely to have a long-term effect on any of his major life activities, the court noted. But the parties disputed whether Duello was qualified for the operator II job when he was fired.

Duello contended that, even if driving and working around moving machinery generally would be considered "essential functions," the county's policy of excusing road department employees from duties they temporarily could not perform showed that it was not "essential" for Duello either to drive or work near machinery prior to his anticipated April 2007 return date.

Duello also contended that because driving was not an essential function of his job prior to April 2007, the possession of a CDL or ordinary driver's license was not an essential function of his position.

The Eighth Circuit, however, said that, even assuming Duello met the essential prerequisites for the operator II job, he was unable to perform the essential functions when he was terminated. It pointed out that the county's job description and testimony from county employees, including Duello's own admission, indicated that Duello's "essential function" was to maintain a specified stretch of county road in all seasons by operating a dump truck, road grader, and/or snow plow.

Sixth Circuit Case Distinguished. The court also distinguished *Workman v. Frito-Lay Inc.*, 165 F.3d 460, 8 AD Cases 1761 (6th Cir. 1999), which said that if an employer regularly provides a benefit to all its employees, such a benefit cannot constitute an accommodation under the ADA. An employer therefore ran afoul of the ADA by terminating a "regarded as" disabled employee rather than providing him with a routine benefit extended to all other employees.

"Here, however, Duello has failed to adduce sufficient evidence to create a material fact as to whether the county had an ongoing practice of excusing Operator II's from driving and working around machinery when they were temporarily disabled from doing so," Melloy wrote.

The county's decision to retain the two temporarily disabled employees cited by Duello "provides no material support" for the plaintiff's argument because one of those employees was a county surveyor, not an operator II, and the other employee was still able to perform essential job functions because he could travel to job sites with co-workers, the court said.

Given those different circumstances, "it is impossible to meaningfully compare" Duello with those other employees, Melloy said.

Judges David R. Hansen and Duane Benton joined the opinion.

Theresa C. Davis and Mark P.A. Hudson of Shuttleworth & Ingersoll in Cedar Rapids, Iowa, represented Duello.

Charles A. Blades and Cynthia S. Sueppel of Scheldrup & Blades in Cedar Rapids represented the county.

BY KEVIN P. MCGOWAN

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8cbrfy>.

Contracts/Due Process/Free Speech

Ex-Deputy Alleging Constructive Discharge, Wrongful Transfer Loses Claims on Appeal

A former deputy sheriff who asserted that he was constructively discharged following an allegedly improper transfer failed to prove breach of contract or that his due process or free speech rights were violated, the U.S. Court of Appeals for the Tenth Circuit affirmed Dec. 13 (*Lauck v. Campbell Cnty.*, 10th Cir., No. 09-8085, 12/13/10).

David Lauck, a deputy sheriff in Campbell County, Wyo., had been a “lead officer” on his shift for a number of years when Sheriff William Pownall transferred him to the Civil Process Division. The transfer would not have caused a loss of pay or rank, but would have resulted in Lauck losing his lead officer status.

Capt. Roy Seeman and Pownall both met with Lauck. During the meeting with Pownall, Lauck refused the transfer, and Pownall said that he must appear for the new assignment or “turn [his] stuff in.”

Lauck did not report and instead left on Seeman’s desk a letter in which he claimed that he had been fired and a list of equipment he had returned. His attorneys requested a hearing, which was granted, but Lauck did not appear.

Instead, he sued the county, the sheriff’s office, and Pownall for breach of contract and for a violation of 42 U.S.C. § 1983, claiming violations of his due process and free speech rights. The district court granted summary judgment to the defendants on all claims.

Manual Provides Contractual Basis. The parties agreed that the county policy and procedural manual provided a basis for Lauck’s breach of contract claim, Judge Harris L. Hartz noted. That manual provides that employees cannot be fired, reduced in rank, or suspended without cause or notice and opportunity for a hearing.

Failing to counter Pownall’s assertion that Lauck did not lose any pay or status when he was transferred, Lauck instead argued that the fact that he no longer would be lead officer meant that he was demoted. Hartz pointed out, however, that the manual states that there is no rank or pay attached to the lead officer role, and the designation of lead officer can be changed at the shift sergeant’s discretion.

“Because the Manual permits the shift sergeant to change the Lead Officer at his discretion and it explicitly states that a change in the shift sergeant in itself is a proper ground for changing the Lead Officer, the Manual provides no justifiable expectation that a Lead Officer can retain the position just by performing the job well,” Hartz wrote.

Lauck also advanced a public policy argument, that transfer to the Civil Process Division was seen as a demotion because it generally is filled with employees with medical problems, it is a “dead-end job” with no chance of a rank increase, civil process servers are not considered law enforcement officers, and the position does not require the skill and experience of a deputy sheriff.

The court said that “neither the Manual nor any statute prohibits transfers to less desirable positions with the same rank and pay.” While such transfers may be impermissible if done with a motive to retaliate against a whistleblower or out of race discrimination, the cause of action in such circumstances is not breach of contract because the employer still could be acting in a contractually permissible manner, the court explained.

“Although transfer of Mr. Lauck to the Civil Process Division may have been bad policy, he has failed to show the breach of any contractual obligation,” Hartz found.

No Due Process Violation. Because there was “no statutory or contractual constraint” on the county’s authority to transfer Lauck, he did not have a sufficient property interest to invoke the Due Process Clause of the 14th Amendment to the U.S. Constitution with respect to the transfer, the court ruled.

His due process claim with regard to his alleged constructive discharge met the same fate.

“A constructive discharge differs in essential ways from a true discharge,” Hartz explained. “When an employer decides to fire an employee, there is no ambiguity about the loss that the employee will suffer. If the employee has a property interest in the job, the government employer must provide proper notice and a hearing before the firing is effected.”

“In the constructive-discharge context, however, the employer may not even know that its actions have compelled the employee to quit,” he continued. “When that is the case, the employer can hardly be required to provide notice or a hearing before the resignation; after all, the employer does not realize that the employee’s employment is ending. Moreover, because negligent conduct does not implicate the Due Process Clause, . . . the unintentional, unknowing creation of intolerable working conditions cannot be the predicate of a due-process claim.”

The court stopped short of ruling that there never can be a due process claim based on constructive discharge, noting that such a claim may be based on an employer’s knowing and intentional creation of intolerable working conditions. “An employer cannot circumvent the due-process requirements that would attend a true firing by trying to compel a resignation in a manner that violates the employee’s property (that is, contract) rights,” it stressed.

Elements Not Met. However, it also declined to rule that every constructive discharge implicates an employee’s due process rights. Rather, the court said, a due process claim requires a showing of a violation of a property right through a constructive discharge, that the employer knew that it was creating or intended to create intolerable working conditions, and that the employee was not afforded an appropriate hearing.

The court found that Lauck did not meet any of these elements, noting first that there was no evidence that the working conditions in the Civil Process Division

were objectively intolerable. “Mr. Lauck may not have wanted such work, but that is not the test,” it said.

In addition, there was no evidence that Pownall had knowledge that working conditions in the division would be considered intolerable by a reasonable person, the court held.

“Mr. Lauck may have properly felt slighted—even wounded—by the transfer; and Sheriff Pownall may have anticipated such a reaction,” Hartz wrote. “But the sheriff did not knowingly violate Mr. Lauck’s property rights unless he knew that what he was imposing on Mr. Lauck would cause a reasonable person to resign. Due process did not protect against an injury, even an intentionally inflicted injury, to Mr. Lauck’s pride or ego arising from the transfer unless the sheriff knew that the transfer would be so humiliating to a reasonable person as to make the new position intolerable.”

“Finally, Mr. Lauck has not demonstrated, or even argued, that he was not provided an adequate hearing,” Hartz added.

Speech Claim Fails. Lauck also claimed that he was retaliated against for two statements, in violation of the First Amendment to the U.S. Constitution—an incident report stating that a fellow deputy used excessive force, and a letter from his attorney about the sheriff’s office’s failure to prevent the murder of a witness.

The court quickly disposed of the claim related to the incident report, noting that it was made pursuant to Lauck’s duties and thus unprotected under *Garcetti v. Ceballos*, 547 U.S. 410, 24 IER Cases 737 (2006) (44 GERR 601, 6/6/06).

Assuming without deciding that Lauck’s attorney’s letter was protected, the court ruled that he failed to prove a causal connection with his transfer, which occurred nearly seven months after the letter was sent.

Events in the interim also suggested that the letter was not the cause for the transfer, it said. For instance, it said, although Lauck received a reprimand two weeks after his attorney sent the letter, he later received a positive performance evaluation that qualified him for a 3 percent merit salary increase. “The positive performance appraisal is inconsistent with a retaliatory motive,” Hartz wrote.

In addition, shortly before the transfer, a fellow deputy complained to a sergeant that Lauck had failed to back her up during a traffic stop, which was confirmed after the sergeant reviewed a video of the incident. After receiving a memo about Lauck’s behavior, Seeman asked for other examples of such conduct, which were provided in a subsequent memo. Two weeks later, the court noted, Lauck was transferred.

Judges Terrence L. O’Brien and Timothy M. Tymkovich joined the opinion.

Elbert Allen Dodd Jr. of Scruggs, Dodd & Dodd in Fort Payne, Ala., represented Lauck.

Judith A. Studer of Schwartz, Bon, Walker & Studer in Casper, Wyo., represented the defendants.

BY LAURA D. FRANCIS

Full text of the opinion is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8curz9>.

Jurisdiction/Settlements

Breach of Title VII Settlement Claim Belongs In Federal Claims Court, Ninth Circuit Rules

A Navy employee’s breach of settlement claim was a contract action against the federal government, the resolution of which required no interpretation of Title VII of the 1964 Civil Rights Act, and so it belonged, “if anywhere,” in the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Ninth Circuit ruled Dec. 27 (*Munoz v. Mabus*, 9th Cir., No. 08-16374, 12/27/10).

Vacating in part, the appeals court found that a federal trial court erred when it decided it had jurisdiction over the contract action. “Whether [Ysauro] Munoz’s claim to enforce a predetermination settlement agreement is one over which the district court had jurisdiction because the claim was ‘brought under’ Title VII remains an open question in this court,” it noted.

Joins Other Circuits. “We now join our sister circuits in holding that Congress’s waiver of sovereign immunity under Title VII does not extend to suits to enforce settlement agreements entered into without genuine investigation, reasonable cause determination, and conciliation efforts by the EEOC,” Judge Michael D. Hawkins wrote.

The trial court therefore lacked subject matter jurisdiction over the breach of settlement agreement claim, Hawkins said.

Munoz contended that the Title VII settlement agreement required the Navy to provide him with a particular type of training in exchange for withdrawing his discrimination claim. But the Equal Employment Opportunity Commission decided that the agreement specified only that the training offered be “career-enhancing” and that three of the five classes Munoz attended after the agreement met that obligation.

Munoz, who was based in Japan, claimed he should have training on a new missile launch system. He was refused such training for three reasons: there were no vacancies, he needed an additional 10 years of experience to qualify, and the training was cost-prohibitive.

Under 29 C.F.R. § 1614.504, Hawkins noted, an employee alleging noncompliance may choose between two exclusive remedies—specific performance or reinstatement of his or her original discrimination complaint. On its face, the regulation is silent as to whether an employee may proceed to federal court after an adverse EEOC decision, but any waiver of sovereign immunity must be expressed unequivocally, he said.

The trial court found that other sections of EEOC’s regulations provided an unambiguous path to federal jurisdiction when a complainant chooses to seek specific performance, Hawkins stated. “We thus consider whether those surrounding regulations include a waiver of the government’s sovereign immunity that allows the exercise of jurisdiction over Munoz’s breach of settlement agreement claim,” he wrote.

No Immunity Waiver. The answer was “no,” the appeals court said. “[R]ather, reading 29 C.F.R. § 1614.504 in context only reinforces our conclusion that Congress had no intention of providing a cause of action based on an alleged breach of a predetermination settlement agreement,” it ruled.

The trial court reasoned that Munoz “already filed a complaint”—the underlying complaint resolved by the settlement agreement—and that “this serves as a sufficient gateway for judicial review of all subsequent EEOC actions concerning him,” Hawkins noted. But, “[b]ecause Munoz withdrew this complaint in exchange for securing the settlement agreement, it cannot serve as a basis for jurisdiction,” he said.

“We note, finally, that our reasoning conforms with the [U.S.] Supreme Court’s teaching that a suit to enforce a settlement agreement requires its own basis of jurisdiction independent from the federal source of the underlying claim,” Hawkins stated, citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 62 USLW 4313 (1994). It also conforms with the “Court of Federal Claims’s recent interpretations of its own exclusive jurisdiction over damage actions in contract against the United States worth more than \$10,000, pursuant to the Tucker Act,” he added, citing *Westover v. United States*, 71 Fed. Cl. 635, 98 FEP Cases 1421 (2006).

In light of *Kokkonen*, the Court of Federal Claims has concluded that Title VII’s comprehensive scheme of review does not preclude Tucker Act jurisdiction in the Court of Federal Claims over Title VII settlement agreements, Hawkins noted, citing *Taylor v. United States*, 73 Fed. Cl. 532, 99 FEP Cases 225 (2006). “In other words, the Court of Federal Claims has jurisdiction over such claims because they are not ‘brought under’ Title VII § 706(f)(3),” he said.

“Because Munoz’s breach of settlement agreement claim is essentially a contract action against the federal government, whose resolution requires no interpretation of Title VII itself, his claim cannot seek jurisdictional refuge in Title VII and belongs, if anywhere, in the Court of Federal Claims,” Hawkins wrote. “The plain meaning of the text, the overarching regulatory framework, and the long-held prudential interest in narrowly construing waivers of sovereign immunity all compel this conclusion,” he said.

Retaliation Claim Failed. Munoz also claimed retaliation in the Navy’s refusal to provide him with the specialized training he wanted. The Navy in turn provided legitimate, nonretaliatory, and nondiscriminatory reasons for denying the training.

Munoz was unable to produce more than mere allegations of retaliatory or discriminatory motives, the appeals court said. “Unsubstantiated assertions of retaliatory intent, without more, are insufficient to overcome the Navy’s proffered neutral reasons,” it wrote.

Judges M. Margaret McKeown and Johnnie B. Rawlinson joined the opinion.

Steven M. Spiegel of Alexandria, Va., represented Munoz.

Thomas A. Helper of the U.S. attorney’s office in Honolulu represented the Navy.

BY HELEN IRVIN

Full text of the opinion is available at <http://op.bna.com/eg.nsf/r?Open=hirm-8crn22>.

Disabilities Discrimination

Federal Disability Recipient May Pursue Rehabilitation Act Bias Claim, Court Rules

A federal employee who received disability benefits under the Federal Employees’ Retirement System based on her alleged inability to work nevertheless may pursue a Rehabilitation Act claim that her employer failed to reasonably accommodate her disability, the U.S. Court of Appeals for the District of Columbia Circuit ruled Dec. 21 (*Solomon v. Vilsack*, D.C. Cir., No. 09-5319, 12/21/10).

Reversing summary judgment for the Agriculture Department, the D.C. Circuit rejected a federal district court’s ruling that an individual’s receipt of federal disability retirement benefits precludes a Rehabilitation Act claim that she could have worked if her federal employer had reasonably accommodated her disability.

The district court had reasoned that, because federal regulations provide that individuals able to fulfill the duties of their jobs with reasonable accommodation are ineligible for FERS disability benefits, plaintiff Linda Solomon, a former USDA budget analyst, could not assert a Rehabilitation Act claim consistent with her receipt of FERS benefits.

Cleveland Applicable to FERS. The D.C. Circuit, however, said *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 9 AD Cases 491 (1999), which ruled that an individual receiving Social Security disability benefits might nevertheless have an Americans with Disabilities Act reasonable accommodation claim, applies in the FERS context as well.

Guided by *Cleveland*, the D.C. Circuit ruled that claims for federal disability retirement benefits and disability discrimination claims “do not so inherently conflict” that a federal employee applying for disability benefits is presumptively barred from asserting a Rehabilitation Act claim.

A reasonable jury could conclude that the statements Solomon and her psychiatrist made in applying for her FERS benefits “are consistent with her current claim that she could have performed the essential functions of her position with reasonable accommodation,” Judge David S. Tatel said.

Sound policy reasons also support a holding that federal employees with disabilities should not be forced to choose between seeking disability benefits or pursuing a Rehabilitation Act claim, he added.

“Were we to accept the [USDA’s] argument and require federal employees to choose between immediate FERS benefits and uncertain Rehabilitation Act remedies, many disabled employees might well forego meritorious Rehabilitation Act claims,” Tatel wrote. “Indeed, under the district court’s seemingly inflexible holding, agencies could force employers to seek disability retirement in an effort to escape their legal responsibility to provide reasonable accommodations. That, Solomon claims, is just what happened here.”

No Presumptive Bar. If no inherent conflict exists between the two claims, then the question was whether the department still was entitled to summary judgment because Solomon failed to reconcile her FERS application statements with her claim that she could have

worked if granted reasonable accommodation, the court said.

The district court erred by holding that a FERS disability benefits recipient is presumptively barred from pursuing a Rehabilitation Act claim, the D.C. Circuit decided.

“[T]he district court adopted what appears to be a conclusive, irrebuttable presumption that recipients of FERS disability benefits are ‘precluded’ from asserting disability discrimination claims under the Rehabilitation Act,” Tatel wrote. “In our view, however, disability benefit and Rehabilitation Act claims are not so inherently inconsistent as to justify any sort of special presumption, whether rebuttable or irrebuttable, against recipients of FERS disability benefits who charge their employers with discrimination based on failure to accommodate.”

Reviewing the FERS program, the D.C. Circuit emphasized that the application forms nowhere ask disability benefits applicants whether they can perform the essential functions of their jobs with reasonable accommodations. Solomon’s responses to questions about what accommodations she requested and whether her employer was able to grant such requests do not fatally conflict with her subsequent claim that the department failed to reasonably accommodate her disability, the court said.

“[T]he FERS application forms nowhere require applicants to expressly represent that their disabilities cannot be reasonably accommodated,” the court said. It cited the Merit Systems Protection Board’s conclusion in a similar case that “an individual’s application for and receipt of FERS disability benefits do not necessarily constitute ‘an affirmation . . . that [her disability] could not be accommodated.’”

Such a conclusion also accords with Congress’s intent that “continuation of work” for federal employees with disabilities is preferred over disability retirement, and that the federal government should be a “model employer” for persons with disabilities, the court said.

Claims Remanded. Although the district court denied Solomon’s claims before reaching the issue, the D.C. Circuit said she also produced sufficient evidence to raise a triable issue of failure to accommodate under the Rehabilitation Act. “[T]he record in this case is sufficiently developed to allow us to determine whether Solomon has adequately reconciled the statements she made in her FERS application with her accommodation claim,” the court said.

Although the department argued that Solomon’s application answers necessarily contradicted her later assertion that she could have performed her job with reasonable accommodation, the court said, “We think Solomon has sufficiently reconciled any facial tension that might exist between the statements on her FERS application and her accommodation claim.”

For example, it said, Solomon’s statement that she had been “unable to work” since April 2004 “could be perfectly consistent” with her Rehabilitation Act claim that “she could have fulfilled the essential duties of her position if granted her requested accommodation.”

Judges Douglas H. Ginsburg and Merrick B. Garland joined the opinion.

John F. Karl Jr. of Washington represented Solomon.

Harry B. Roback of the U.S. attorney’s office in Washington represented USDA.

By KEVIN P. MCGOWAN

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8ccnp8>.

Race/Sex Discrimination

Micromanaging Style Legitimate Reason For Termination, Second Circuit Decides

A deputy commissioner’s micromanaging style that created friction among Westchester County (N.Y.) corrections staff as well as with outside entities provided a legitimate, nondiscriminatory reason for firing her, the U.S. Court of Appeals for the Second Circuit ruled Dec. 20 (*Gladwin v. Pozzi*, 2d Cir., No. 10-748-cv, unpublished opinion 12/20/10).

Corrections Commissioner Rocco Pozzi and the county submitted numerous instances of disputes with Bridget Gladwin’s subordinates and her colleagues as proof that her management style resulted in conflicts with others, the appeals court noted in a per curiam, unpublished opinion. “While these disputes seemed largely personality clashes, such clashes do not amount to discrimination on the basis of gender or race,” it said.

Gladwin claimed race discrimination under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and sex discrimination under § 1983. A federal trial court granted summary judgment to Pozzi and the county.

Pozzi hired Gladwin, an African American woman, as deputy commissioner of the county’s department of corrections. He hired two men—one African American and one Caucasian—as second deputy commissioners and promoted Gladwin to first deputy commissioner. Five years later, Pozzi fired Gladwin and replaced her with a white male.

‘Deprivation’ at Issue. The deprivation Gladwin alleged was race and gender discrimination, the court stated.

“We agree with the district court that Gladwin satisfied the de minimis burden required to establish a prima facie case,” it found. As a black female, Gladwin was a member of a protected classes who sustained an adverse employment action when she was fired. She also showed that she never was given a negative evaluation and was replaced by a white man, it added.

The court noted that *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 85 FEP Cases 1505 (2d Cir. 2001), held that “the mere fact that plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage.”

The defendants met their burden of presenting a legitimate reason for firing Gladwin—her micromanagement—and she failed to show that the actual reason for her discharge was discrimination, the court ruled.

Gladwin argued that the complaints were untrue, but the truth of the complaints was not at issue, the court said. Her argument that there were different reasons did not support a finding of discriminatory animus.

Gladwin also presented evidence that one of her subordinates routinely yelled at Pozzi. It was not those ver-

bal outbursts, however, that motivated Pozzi to fire Gladwin, the court noted. Instead, it was Gladwin's management style, it said.

"We therefore agree with the district court that no reasonable fact-finder could find that Pozzi fired Gladwin due to an unlawful discriminatory animus," the appeals court wrote. "Because Gladwin's claims against the County were premised on finding Pozzi liable, we dismiss those claims as well," it said.

Judges Rosemary S. Pooler, Barrington D. Parker, and Richard C. Wesley joined the unpublished, unsigned opinion.

Christopher D. Watkins of Goshen, N.Y., represented Gladwin.

Robert F. Meehan and Mary L. Nicolas-Brewster of the county attorney's office in White Plains, N.Y., represented Pozzi and the county.

Full text of the opinion is available at <http://op.bna.com/eg.nsf/r?Open=hirn-8clmzk>.

Race Discrimination/Retaliation

Delaware Cafe Supervisor Failed to Show Retaliation, Race Bias, Third Circuit Says

An African American supervisor at a state-operated eating facility marked by "ongoing racial tensions" failed to show that she was discriminated or retaliated against in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 1981, or 42 U.S.C. § 1983, the U.S. Court of Appeals for the Third Circuit affirmed Dec. 21 (*Peace-Wickham v. Walls*, 3d Cir., No. 09-4690, unpublished opinion 12/21/10).

Jeneka Peace-Wickham claimed that the Delaware River & Bay Authority (DRBA) and the chief operating officer of the Delaware Memorial Bridge Facility Cafe, James Walls, subjected her to a racially hostile work environment, retaliation when she complained, and denial of a promotion because of her race. A federal trial court granted summary judgment against her on all claims.

No Liability. The trial court concluded that Peace-Wickham failed to establish a prima facie case because she did not present evidence from which a reasonable jury could find DRBA vicariously liable.

"[W]e agree with the District Court that Peace-Wickham cannot establish liability on the part of her employer," Judge Franklin S. Van Antwerpen wrote in an unpublished decision. If supervisors create a hostile environment, the employer is strictly liable, although an affirmative defense may be available where there is no tangible employment action. An employer will be liable for harassing conduct by co-workers if the employer was negligent or reckless in failing to train employees, he noted.

"[W]e believe that no reasonable jury could find that her supervisors discriminated against her in the ways required to create a hostile work environment," he said.

Arguing otherwise, Peace-Wickham cited a number of purported discriminatory acts by management, including her reassignment to cooking and cashiering duties for an extended period of time, the frequent inability of African American employees to take allotted breaks, the relative delay she experienced in the final resolution of her complaint against a Caucasian co-

worker, Walls's refusal to reclassify her to a higher position, and her supervisors' continuing failure to address her complaints about understaffing and other work-related issues.

"None of these incidents are sufficiently probative of racial animus to permit a reasonable jury to find her supervisors directly liable for creating a racially hostile work environment," Van Antwerpen wrote. When hired, Peace-Wickham was "well aware" that her duties included cashiering and cooking on an as-needed basis. When she complained of an inability to take breaks, DRBA gave her permission to hire additional labor from an outside agency, he noted.

"The other incidents she points to are similarly lacking," Van Antwerpen stated. Even though resolving her complaint against a white co-worker took more time than the resolution of the white co-worker's complaint, DRBA took "immediate action to address the underlying problem," he said.

Peace-Wickham presented no evidence of a discriminatory motive behind her supervisor's reasons—based on her experience and performance—for refusing to reclassify her to an acting manager's position, Van Antwerpen said. In addition, DRBA's continued inattention to understaffing issues was "not independently probative of racial animus."

Peace-Wickham also could not establish liability by showing that DRBA provided an inadequate remedial response to race harassment by her co-workers, the appeals court ruled. "Here, the record convinces us that the DRBA's remedial measures were adequate as a matter of law," it wrote.

When Peace-Wickham filed a complaint of harassment against a co-worker, DRBA promptly transferred the co-worker, Van Antwerpen noted. It also revised its internal policies in an effort to improve the consistency and speed with which it dealt with such complaints, he added.

Remedial Measures. "The DRBA took similarly adequate measures to respond to Peace-Wickham's complaints about other employees, including investigations and formal reprimands," Van Antwerpen said.

DRBA conducted timely investigations, reprimanded employees, and transferred them as needed, the court noted. In addition, it instituted weekly meetings with Peace-Wickham's supervisors, provided third-party counseling, and, at Peace-Wickham's suggestion, posted warnings and arranged mandatory diversity training and anti-harassment classes, it said.

"Taken together, these steps fall comfortably within the realm of legally adequate remedial measures," Van Antwerpen wrote. He rejected the insinuation that the remedial measures had to be judged according to whether they effectively prevented future instances of workplace harassment. Their legal adequacy had to be judged on whether they were "reasonably calculated" to end the harassment, he said.

The trial court, Van Antwerpen said, also found that Peace-Wickham failed to make a prima facie case of retaliation and that, even if she did, she failed to counter the legitimate, nondiscriminatory reasons provided for the actions taken against her.

The appeals court agreed. Creating or permitting a hostile environment can constitute a materially adverse employment action, but vicarious liability remained

necessary to establish that claim, it said. Peace-Wickham failed to establish vicarious liability, it found.

Her reassignment to cooking duties predated all of her protected activities, the court added, and her reassignment to cashiering duties eight months after her most recent complaint was “too attenuated” a link to establish causality.

No evidence indicated that DRBA failed to investigate Peace-Wickham’s complaints, Van Antwerpen noted. And her allegations of “shunning” did not describe an adverse employment action, he said. She also could not show that a lack of receptiveness to her complaints of continued understaffing and other issues “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination,” he stated.

The appeals court also agreed with the trial court that Peace-Wickham could not rebut Walls’s reasons, based on experience and performance, for not designating her an acting manager. She asserted, but did not prove, that his reasons were pretext for race discrimination, it said. She also could not discredit his explanations for subjecting her to increased scrutiny, as he had assumed supervisory responsibility over her, it noted.

Other Claims. On the failure-to-promote claim, the court said Peace-Wickham could not show that “she possessed even the minimum qualifications required.” The cafe was having financial problems and Walls showed he needed an experienced manager, it noted.

Peace-Wickham’s claim under § 1981 failed because she did not establish a violation of Title VII and the substantive elements of the two claims generally are identical, the court added. She could not establish a claim under § 1983 because she could not show that Walls intentionally discriminated against her on the basis of her race, it ruled.

Judges Kent A. Jordan and Thomas M. Hardiman joined the unpublished opinion.

James P. Hall of Phillips, Goldman & Spence in Wilmington, Del., represented Peace-Wickham.

Adria B. Martinelli of Young, Conaway, Stargatt & Taylor in Wilmington represented DRBA and Walls.

Full text of the opinion is available at <http://op.bna.com/eg.nsf/r?Open=hirn-8csn9e>.

Family and Medical Leave

Employee Fired for Working Second Job While on Sick Leave Lacks FMLA Claims

A Michigan county guardrail installer who was fired for working at his sealcoating business while on extended sick leave cannot proceed with his claims under the Family and Medical Leave Act, a federal district court ruled Dec. 20 (*Collias v. Road Comm’n for Oakland Cnty.*, E.D. Mich., No. 09-12483, 12/20/10).

Granting summary judgment in favor of the Road Commission for Oakland County, the U.S. District Court for the Eastern District of Michigan held that John Collias’s FMLA interference claim failed because he sought medical leave and the commission granted it.

Although the commission failed to designate Collias’s extended sick leave as FMLA-related because of an administrative oversight, that leave, which was more gen-

erous than FMLA leave because it provided payment of 50 percent of an employee’s salary, necessarily included “the substance of FMLA benefits,” the court found.

Judge Stephen J. Murphy III further determined that Collias’s interference claim was without merit because he could not demonstrate that the commission’s failure to designate the leave as FMLA-related caused him harm. Additionally, the court ruled that Collias’s FMLA retaliation claim failed because he could not establish a causal connection between his leave and his termination.

Side Business During Leave. Collias applied for and received extended sick leave between May and August 2008 based on doctor-issued disability certificates stating that Collias was “totally incapacitated” because of insomnia, obstructive sleep apnea, gastroesophageal reflux disease, and anxiety.

Unlike the FMLA, which provides employees with up to 12 weeks of unpaid leave, the commission’s extended sick leave policy provides employees with half their salary for up to 52 weeks, the court said. Although the commission “runs its benefits concurrently with FMLA benefits,” the commission, due to an administrative error, never designated Collias’s extended sick leave as FMLA-related.

While Collias was away from work, the commission learned that he may have been working while on leave at a sealcoating business that he owned and operated. Surveillance conducted by a third-party private investigation service confirmed the commission’s suspicions.

The commission called Collias to participate in a fact-finding meeting, where he admitted to working up to 10 hours per week at his business while on leave. Collias said he performed such tasks as returning phone calls, answering questions, and demonstrating the sealcoating process to employees.

After the meeting, the commission fired Collias for “fraudulently receiving sick leave . . . benefits while working during [his] reported period(s) of disability.” Collias subsequently sued the commission for FMLA interference and retaliation.

At deposition, Collias’s doctor testified that he classified Collias as “totally incapacitated” based on mental disability originating from stress caused by “strife” between Collias and his manager. While Collias could perform physical work, the doctor said Collias’s mental disability made him “totally unable to work” at the commission.

Commission Did Not Deny Leave. Granting summary judgment to the commission, the district court ruled that Collias failed to establish a prima facie case of FMLA interference because the commission never denied him leave benefits.

Although the commission did not technically designate Collias’s extended medical leave as FMLA leave, the court held that Collias nevertheless received the substance of FMLA benefits. Since the commission’s leave benefits were more generous than those under the FMLA, they “necessarily include FMLA benefits,” the court ruled.

“Collias sought medical leave and he was granted it, and that is all the FMLA requires here,” Murphy wrote.

The court said Collias’s interference claim also failed because he “cannot demonstrate any prejudice” from

the commission's failure to designate Collias's leave as FMLA-related.

"He received FMLA benefits ... regardless of whether the leave was formally designated as FMLA-qualifying," the court said. "Collias has not alleged, let alone demonstrated, in any way how he would have acted had his leave been formally designated as FMLA-qualifying. Nor has he alleged that he would not have taken the leave had it been designated under the FMLA, and had he known about the designation."

Additionally, the court rejected an argument Collias introduced for the first time at the summary judgment hearing that, if the commission had given him an FMLA form to complete instead of the extended sick leave claim form, the commission would have learned that his "total incapacitation" was based on a mental disability that did not prevent him from working at his side business. Collias argued that this knowledge would have led the commission to conclude that he did not fraudulently receive sick leave benefits.

"Collias is speculating, and has failed to support this belated theory with any evidence or further argument," Murphy said.

No Causal Connection. Additionally, the court ruled that Collias did not show that his leave was causally connected to the commission's decision to fire him.

The court said the "only relevant evidence" in the record to support a causal connection was the fact that the commission fired Collias two months after taking leave and one week before he was scheduled to return to work.

Generally, Murphy said, temporal proximity, alone, is insufficient to establish causation for retaliation claims. While *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 102 FEP Cases 889 (6th Cir. 2008), held that "extremely close temporal proximity" alone may be sufficient to permit an inference of retaliation, Collias "was not fired 'immediately' or 'very close in time' after the commission learned of his leave," the court held.

The commission fired Collias "well into his leave" and shortly after learning of his work for his sealcoating business. "Indeed, the temporal proximity between the [r]oad [c]ommission's discovery of his sealcoating activities and his termination certainly do not help his cause for causation," the court found.

An inference that the commission terminated Collias because he exercised his rights under the FMLA is further defeated by the fact that the commission provides more generous leave benefits than the FMLA requires, the court said. "If the [r]oad [c]ommission did not want Collias to take leave, they likely would have granted him only the leave required by the FMLA, instead of giving him leave *with pay*," the court said.

Charles Gottlieb and Julian R. Williams of Gottlieb & Goren in Bingham Farms, Mich., represented Collias.

Rick J. Patterson and Steven M. Potter of Potter, DeAgostino, O'Dea & Patterson in Auburn Hills, Mich., represented the commission.

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=jaca-8cdq86>.

Age Discrimination

Demoted EMS Supervisor Raises Jury Issue Of Age Discrimination by County, Court Rules

A county emergency medical services supervisor demoted after an incident in which his team failed to meet response time targets raised a triable claim under the Age Discrimination in Employment Act because a reasonable jury could find the county's stated reasons were a pretext for age bias, the U.S. District Court for the Western District of North Carolina ruled Dec. 22 (*Fox v. Alexander Cnty.*, W.D.N.C., No. 5:07-cv-132, 12/22/10).

Mostly denying summary judgment to Alexander County, the court found that Terry Fox, who has worked for the county's emergency medical services (EMS) unit since 1983 and was promoted to EMS supervisor in 1988, established a prima facie case of age discrimination regarding his April 2006 demotion. He also produced evidence that the county's asserted reasons for demoting him were a pretext for discrimination, the court said.

Prior to 2005, Fox never had received any written warnings for alleged performance deficiencies, but after Russell Greene became the county's EMS director that year, Fox's fortunes changed, the court said. Greene in October 2005 issued Fox a written warning for alleged unsatisfactory work performance based on his response to an emergency call. After Fox appealed, the county dropped the warning and removed it from his personnel file.

Greene and other county managers investigated Fox after a March 25, 2006, incident in which Fox's team took longer than three minutes to respond to an emergency call, they allegedly spent too much time on site, and he failed to promptly order a medical procedure to stabilize the distressed individual. Following a multi-phased investigation, Greene and Sandra Gregory, the county human resources director, recommended Fox's demotion for "grossly inefficient job performance," and county manager Richard French concurred.

In an April 10, 2006 letter, the county informed Fox that Greene was proposing his demotion for "unacceptable job performance" related to the March 25 call, including: excessive response time; unacceptable length of time at the incident scene; failure to take charge and make necessary decisions; and delaying performance of a medical procedure called rapid sequence induction (RSI) to clear the victim's airways.

Fox subsequently was demoted, effective April 28, 2006, and replaced by a 32-year-old employee as supervisor. The county denied his administrative appeal in May 2006. Fox sued in federal district court, alleging violations of the ADEA, the North Carolina Equal Employment Practices Act, and the Employee Retirement Income Security Act. The county moved for summary judgment.

Prima Facie Case Established. Alexander County argued that Fox could not establish an ADEA prima facie because he was not meeting the county's legitimate job performance expectations when demoted. The court said it was "a close call" whether Fox was meeting expectations, but Judge Richard L. Voorhees noted that

the plaintiff's burden is not high at the prima facie case stage.

The county cited a statement from Dr. Joel Inman, the county medical director, that Fox during the emergency call (the "Winter Haven call") "did not take charge of the situation as a supervisor should have." Other county managers testified that Fox and fellow supervisor Connie Meredith, also over 40, had become "complacent" in their duties. Among other things, the managers said Fox failed to complete online training courses and some county residents complained about his speeding and smoking cigarettes while driving the EMS truck.

"Notably missing from Alexander County's argument, however, is any previous documentation or written warnings given before the Winter Haven call that would alert Fox to the fact that he was not meeting the expectations of his employer," Voorhees wrote.

Meanwhile, Fox contended that he had at least raised a jury issue about whether the county's asserted expectations were "legitimate," arguing that the county applied a double standard to Fox regarding his supposedly slow response time, as younger employees with multiple incidents of failing to respond within three minutes never were disciplined.

He also cited Greene's alleged statement to Fox while delivering the demotion letter that "what's contained in this letter is not what this is about but what I need you to do is sit back, be quiet, and be professional," the court said. Fox claimed the statement suggested the real reason for his demotion was something other than his March 25 job performance.

The court said the county's lack of prior warnings about alleged inadequate job performance, the lack of any "egregious violation" by Fox of performance standards, and a former EMS manager's admission that the county did not write up or demote every paramedic or EMS supervisor who failed to meet time targets support a finding that Fox raised a jury issue about whether the county's expectations were "legitimate."

"Though Alexander County presented evidence that [Fox] was not meeting its expectations, [Fox] countered with evidence that is at least sufficient to create a question of fact that Alexander County's expectations were indeed 'legitimate,'" Voorhees wrote.

Triable Evidence of Pretext. The court said Alexander County produced a legitimate, nondiscriminatory reason for demoting Fox, but Fox's evidence raised a jury issue about whether the county's asserted reasons—his alleged performance deficiencies during the Winter Haven call—were a pretext for age discrimination.

The county cited Fox's alleged violations of its policies requiring EMS to respond within three minutes of a dispatcher's call and not spend more than 30 minutes at the scene. It also contended Fox failed to perform supervisory duties on site by not promptly ordering the appropriate emergency medical treatment.

But Fox presented "ample evidence" from which a reasonable jury could find the county's "asserted justification is false," the court said. Fox submitted 13 facts from which a reasonable jury could find pretext, and the court found that "at least three of those arguments" would permit such a finding.

Greene's statement to Fox on handing him the demotion letter, corroborated by another EMS supervisor present at the time, suggests that the reasons stated in

the letter were not the real reasons for Fox's demotion, the court said. "Such evidence provides strong support for Fox's claim of pretext because it was made reasonably close in time to the employment decision and made by a party that was primarily responsible for the decision," Voorhees wrote.

Fox's evidence that other EMS supervisors were not disciplined for "excessive en-route time" also would support a reasonable jury in finding pretext, the court said. The evidence indicated that a 35-year-old county EMS supervisor faced no disciplinary action despite 26 instances of excessive en-route time for his EMS team during a one-month period, the court said.

"In contrast, Fox was demoted based on one violation of the en-route policy, which a reasonable juror could conclude he violated by only seven seconds," Voorhees wrote.

County disciplinary records spanning the past eight years suggested that Alexander County selectively enforced its alleged job expectations, as the only four EMS supervisors who were demoted all were 40 or older, and the one EMS employee receiving an unpaid suspension also was over 40, the court said.

However, Alexander County was entitled to summary judgment under ERISA because Fox never alleged that the county acted with "specific intent" to interfere with his pension rights under Section 510 of the act, the court ruled.

Joshua R. Van Kampen of Patterson Harkavy in Charlotte, N.C., and Adrienne H. Gilman and Edmund L. Gaines of Homesley, Gaines & Dudley in Statesville, N.C., represented Fox.

James R. Morgan Jr., Mary Nell Craven, and Sean F. Perrin of Womble Carlyle Sandridge & Rice in Winston-Salem, N.C., represented the county.

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8clrzp>.

Safety and Health

Court Holds Louisiana State Employee Not Entitled to Relief Under Federal Act

A state employee cannot seek compensation for a workplace injury under the federal Jones Act, the Louisiana Court of Appeal ruled Dec. 22 (*James v. Department of Wildlife & Fisheries*, La. App., No. 10-399, 12/22/10).

The Jones Act, 46 U.S.C. § 30104, entitles a seaman "injured in the course of employment" to sue "the employer." Judge Shannon J. Gremillion explained, however, that "[b]ecause the Jones Act was enacted by Congress, a constitutional question is implicated when the employer is a state."

Joey James, a senior wildlife enforcement agent employed by the Louisiana Department of Wildlife & Fisheries, was injured on a boat in the Gulf of Mexico. He sued the department, alleging a number of deficiencies in the boat and the way it was operated, including its lack of seaworthiness.

The department argued that James's only remedy was workers' compensation, but the trial court disagreed, saying that James could seek damages under the Jones Act.

Gremillion noted that another state circuit court of appeal concluded that a state employee could seek damages under the Jones Act. "We respectfully disagree with our colleagues," she concluded.

Gremillion noted that Section 10(A) of Article 12 of the state constitution says, "Neither the state, a state agency, nor a political subdivision shall be immune from suit in contract or for injury to person or property." However, Section 10(C) qualifies that immunity by saying that the state Legislature "may limit or provide for the extent of liability of the state, state agency, or a political subdivision in all cases," she added.

Limits to State Obligation. Louisiana Revised Statutes 23:1034, "Public Employees; Exclusiveness of Remedies," said state employees' remedies are limited to compensation provided by the state Division of Administration, the court found. On the other hand, La. Rev. Stat. 23:1032 provides an exception where additional remedies are created by statute, such as the Jones Act.

The critical distinction is that Section 1032 applies to private sector employees, and not state employees such as James. The section applicable to him—1034—does not contain the exception for the Jones Act.

"Workers' compensation is the exclusive remedy for state employees without exception," Gremillion ruled.

However, the state's Fourth Circuit saw a conflict between Section 1034 and Section 1035.2, which states, "No compensation shall be payable in respect to the disability or death of any employee covered by" the Jones Act, as well as other enumerated federal statutes. The phrase "any employee" seemed to mean that all employees in Louisiana had recourse to federal statutes.

Gremillion, however, saw no such conflict. The legislature enacted Section 1035.2, she wrote, "to make clear that employees entitled to make federal claims are not entitled to make claims under workers' compensation." Because Section 1034 made state employees such as James ineligible to make federal claims, there was no conflict.

Judges Oswald A. Decuir and James T. Genovese joined the opinion.

Judge J. David Painter, joined by Judge Elizabeth A. Pickett, dissented, calling the Fourth Circuit's opinion "sound and applicable to this case," and supporting that court's expansive reading of the phrase "any employee" in Section 1035.2.

Jere Jay Bice of Bice, Palermo & Veron in Lake Charles, La., represented James.

Henry St. Paul Provosty and Lena Giangrosso of Provosty & Gankendorff in New Orleans represented the department.

Full text of the opinion is available at <http://op.bna.com/env.nsf/r?Open=sbra-8ctqye>.

In Brief

Worker Who Weighed Killing Boss Lacks Bias Claims

An information technology network administrator for the city of Philadelphia who considered using an explosive to blow up a supervisor who previously had laid him off could not show that his termination was unlawfully based on race or retaliation, the U.S. Court of Appeals for the Third Circuit ruled Dec. 16 (*Baker v. Philadelphia*, 3d Cir., No. 09-4355, unpublished decision 12/16/10).

Alonza Baker Jr., a Vietnam veteran who worked for the city's Commission of Human Relations, was laid off after the mayor's office directed commission Executive Director Rachel Lawton to institute departmental layoffs because of budget constraints. Baker was reinstated by the civil service commission after he complained that the layoff was the product of unlawful race bias.

Before his reinstatement, however, Baker informed his counselor that he realized that he could use a Vietnam War-era explosive that he kept in his home as a souvenir to blow up Lawton. The thought "alarmed" Baker, the appellate court recounted, and he asked his counselor to help him dispose of the explosive because "he feared he might act on his thought."

The counselor notified the police, who charged Baker with reckless endangerment. After learning of the incident, the city terminated him because "Lawton was 'extremely afraid' and 'honestly believed' that Baker posed 'a serious threat.'"

Baker sued the city for race discrimination and retaliation under Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1983, and a federal district court granted summary judgment to the city. The Third Circuit affirmed, agreeing that Baker's evidence of Lawton's dislike for him was "insufficient to get to a jury absent some basis for concluding that her animosity was racially based." The appellate court further agreed that "[t]he record clearly shows that Baker was fired because he considered blowing Lawton up with explosives in his possession" and that "no reasonable finder of fact could conclude otherwise."

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=jaca-8ctuj8>.

Administrative Rulings

Merit Systems Protection Board

Whistleblowers

Ex-Park Police Chief Reinstated by MSPB; Would Not Have Lost Job Absent Disclosures

Teresa Chambers, the former U.S. Park Police chief who has been pursuing the appeal of her termination for the past seven years, Jan. 11 won her case when the Merit Systems Protection Board ordered her reinstatement after finding that she would not have been fired in the absence of protected disclosures under the Whistleblower Protection Act (*Chambers v. DOI*, MSPB, No. DC-1221-04-0616-M-2, 1/11/11).

“This is a wonderful ruling, not only for Chief Chambers but for thousands who believe that honesty is part of public service,” Public Employees for Environmental Responsibility Senior Counsel Paula Dinerstein said in a Jan. 11 statement. Dinerstein and PEER have been representing Chambers during the appeal process.

The National Treasury Employees Union, which filed amicus briefs on Chambers’s behalf, also applauded the ruling. “It is a victory for the whistleblower rights of all federal employees, and will have a positive impact on them when they feel the need to speak out in the public interest,” NTEU President Colleen M. Kelley said in a Jan. 12 statement.

National Park Service spokesman David Barna told BNA Jan. 12 that the agency was reviewing the decision and had no comment at this time.

Six Misconduct Charges. According to the board, Chambers was placed on administrative leave in late 2003 and ultimately fired in 2004 on the basis of six charges: (1) improper budget communications with House Appropriations subcommittee staffer Deborah Weatherly; (2) public remarks on security on the federal mall, parks, and parkways; (3) improperly disclosing budget deliberations; (4) improper lobbying; (5) three instances of failing to carry out instructions; and (6) failing to follow the chain of command.

In its original decision in 2006, MSPB after sustaining all charges except the first and fourth found that Chambers could not challenge a “gag order” prohibiting her from speaking to the media without prior approval, and that various statements she made to a *Washington Post* reporter and to Weatherly were not protected under the WPA (44 GERR 1044, 10/3/06). On appeal, the U.S. Court of Appeals for the Federal Circuit reversed and remanded, finding that the board used the wrong standard to determine whether Chambers made a protected disclosure regarding a danger to public safety (515 F.3d 1362 (Fed. Cir. 2008)) (46 GERR 267, 3/4/08).

On remand, a split two-member board affirmed its earlier decision upholding Chambers’s termination, with then-Chairman Neil A. G. McPhie finding that Chambers made protected disclosures but the agency would have fired her anyway, and then-Vice Chairman Mary M. Rose finding no protected disclosures (47 GERR 80, 1/20/09).

The Federal Circuit found that the third, fifth, and sixth charges properly were sustained, but that the second charge was based on a protected disclosure. It therefore remanded for the board to determine whether the agency would have fired Chambers in the absence of her protected disclosure and whether the penalty of removal was reasonable for the three remaining charges (602 F.3d 1370 (Fed. Cir. 2010)) (48 GERR 493, 4/27/10).

Further Protected Disclosures. In its present decision, MSPB noted that the Federal Circuit declined to analyze whether Chambers’s remaining disclosures were protected after finding protected her statement to *The Washington Post* about increased traffic accidents on the Baltimore-Washington Parkway as a result of the agency’s decision to divert Park Police officers to national monuments.

However, MSPB said that the court’s remand order did not preclude the board from making its own determination as to the other disclosures. They included statements that the diversion of officers was causing “declining safety in parks and on parkways,” that residents were complaining that smaller parks were being overrun by homeless people and drug dealers, that “there’s not enough of us to go around” to protect green spaces, that officers are being assigned 12-hour shifts with limited bathroom breaks, and that Chambers feared that “harm or death will come to a visitor or employee at one of the parks, or that we’re going to miss a key thing at one of our icons.”

Using the factors laid out in the Federal Circuit’s first decision—(1) the likelihood of harm, (2) when the alleged harm may occur, and (3) the nature of the harm and its potential consequences—the board found the statement about the increase in drug dealing in smaller parks, as well as Chambers’s statements regarding “declining safety” and “there’s not enough of us to go around,” protected under the WPA.

Her other statements, however, were too vague and conclusory to be protected, the board concluded, also finding too vague or speculative most claims that Chambers made in an e-mail to Weatherly about inadequate funding and decreased staffing. The one statement in an e-mail that was sufficiently specific to be protected was her claim that an insufficient number of

officers on the George Washington Parkway was forcing the agency to “turn our backs on drunk drivers.”

In addition, the board ruled that Chambers’s protected disclosures to *The Washington Post* and to Weatherly were a contributing factor in her administrative leave and termination.

Clear and Convincing Evidence Needed. Following the standard in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999), MSPB said that it would determine whether the agency proved by clear and convincing evidence that it would have fired Chambers based solely on charges three, five, and six by analyzing the strength of the evidence that the agency had against Chambers at the time of her removal, the existence and strength of any motive to retaliate, and any evidence of similar action taken against similarly situated employees.

The board ruled that the agency’s evidence on all three of the remaining charges was not particularly strong. In addition, it held, there was “ample evidence” that the officials who placed Chambers on administrative leave and removed her were motivated to retaliate for her protected disclosures.

For example, the board said, the agency placed “great importance” on its relationship with Weatherly and the subcommittee, and Weatherly was concerned over Chambers’s e-mails and the fact that she went to the press, expressing these concerns to Donald Murphy, deputy director of NPS and Chambers’s immediate supervisor.

Murphy also testified that he was concerned about the impact Chambers’s public statements were having on the budget negotiation process with NPS and Congress.

“[W]e are simply not left with a ‘firm and definite conviction’ that the agency would have taken any action based on the sustained charges in the absence of [Chambers’s] protected disclosures.”

Close Temporal Proximity. In addition, MSPB found that the close timing of the administrative leave and proposed removal and Chambers’s statements to *The Washington Post* and Weatherly suggested a retaliatory motive.

“Any argument that Mr. Murphy and [Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks Paul] Hoffman were not implicated in or harmed

by the appellant’s protected disclosures, or did not have a personal motive to retaliate, ignores the fact that Mr. Murphy was the National Park Service Deputy Director directly responsible for the Park Police, and Mr. Hoffman was a high-level political appointee in the Department of the Interior,” MSPB wrote. “The appellant’s disclosures clearly reflected on both of them . . . by addressing the inability of the USPP to effectively perform its mission to protect the public and the failure of the administration to seek sufficient funding for it to do so.”

Finally, the board found no evidence of similar actions against similarly situated employees who did not make disclosures protected under the WPA.

“We therefore find that the agency has not met its burden of proving by clear and convincing evidence that it would have placed the appellant on administrative leave and removed her in the absence of her protected disclosures,” the board ruled. “In fact, we are simply not left with a ‘firm and definite conviction’ that the agency would have taken any action based on the sustained charges in the absence of her protected disclosures.”

MSPB ordered Chambers’s reinstatement, effective July 10, 2004, along with back pay, interest, and other benefits.

Chairman Susan Tsui Grundmann and Vice Chairman Anne M. Wagner issued the decision.

Concurrence Notes ‘Anomaly.’ Member Mary M. Rose wrote a concurrence agreeing that the agency failed to prove that it would have fired Chambers in the absence of her protected disclosures, but pointing out an “anomaly” in the facts of the case.

“Ordinarily an agency head serves at the pleasure of the President or a cabinet Secretary, and is expected to carry out the Administration’s policies faithfully,” Rose said, noting that Chambers publicly disagreed with the administration’s budgetary and staffing policies. “For an agency head to behave in this way is extraordinary and, in all similar instances of which I know, is not tolerated,” she said.

“What makes the present case unique is that, despite the appellant’s status as head of an agency, she was a tenured employee in the competitive service with the right to appeal her removal to the Board,” Rose wrote.

Paula Dinerstein of PEER in Washington represented Chambers.

Deborah S. Charette of the Interior Department in Washington represented the agency.

BY LAURA D. FRANCIS

Full text of the opinion is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-8d2r9l>.

Supreme Court

Taxation

Justices Unanimously Uphold Treasury Rule That Medical Residents Subject to FICA Tax

A unanimous U.S. Supreme Court Jan. 11 ruled that medical residents who spend most of their time working with patients are reasonably classified by the Internal Revenue Service as employees rather than students and therefore are subject to Federal Insurance Contributions Act taxes (*Mayo Found. for Med. Educ. & Research v. United States*, U.S., No. 09-837, 1/11/11).

In the 8-0 opinion written by Chief Justice John Roberts, the justices deferred to an IRS regulation interpreting the student exemption to FICA, in which IRS said employees normally scheduled to work 40 or more hours per week cannot claim a student exemption.

Denying an appeal by the Mayo Foundation for Medical Education and Research and the University of Minnesota, both of which offer medical residency programs and sought refunds of their FICA contributions, the court said IRS reasonably interpreted FICA's student exemption not to apply to medical residents who typically work 50 to 80 hours a week caring for patients.

Justice Elena Kagan, who was solicitor general before joining the court last year, took no part in the decision.

Applying *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), the court said that, given the ambiguity of whether medical residents who take an academic course load in addition to working should be deemed "students," it would defer to IRS's expertise in interpreting FICA. The court rejected the petitioners' arguments that the FICA student exemption unambiguously covers any resident who is enrolled and attending classes or that IRS's 40-hour rule for determining which students are exempt is arbitrary.

"Regulation, like legislation, often requires drawing lines," Roberts wrote. "Mayo does not dispute that the Treasury Department reasonably sought a way to distinguish between workers who study and students who work. Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal."

Ruling Affects Many Hospitals. The case was considered by some to be the highest profile health care matter before the court this term, affecting most hospitals and involving an estimated \$700 million in employment taxes annually.

Health care tax attorneys contacted by BNA, who generally declined to speak on the record, said the opinion marks the end of a long journey that saw wins and losses for both sides and that brought refunds to at least some teaching hospitals that were savvy enough to preserve their claims for refunds of FICA taxes paid before the challenged regulation took effect in April 2005.

American Hospital Association Assistant General Counsel Lawrence Hughes Jan. 11 said the association "is disappointed that the Supreme Court upheld the IRS rule that categorically excludes medical residents from being treated as students exempt from federal payroll taxes solely because they may engage in direct patient care for 40 hours or more per week. We believe that the predominance of the educational aspects of a resident's service in a hospital, and not the mere arbitrary and immaterial fact of number of hours worked, should determine whether the student exemption applies."

Sean P. Scally, counsel with Vanderbilt University and Medical Center in Nashville, called the decision "a grand slam" for IRS. "The nails are in the coffin. We are moving on," he said.

"Mayo does not dispute that the Treasury Department reasonably sought a way to distinguish between workers who study and students who work. Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal," Roberts wrote.

"The good news for teaching hospitals is that the opinion's language makes it clear that the IRS will not change its stance with respect to claims arising before April 2005," he added.

Supreme Court's Reasoning. The ruling focused on regulations providing that medical residents who work more than 40 hours per week do not qualify for the student exception under Section 3121(b)(10) of the Internal Revenue Code. Roberts said the regulations address an area "to which Congress has not directly spoken," and because the regulations were "a reasonable construction of what Congress has said," they had to be upheld.

The court found an appropriate distinction between workers who study and students who work, and a reasonable determination in the challenged regulations that a medical resident who works more than 40 hours per week is predominantly a worker. IRS also acted reasonably in concluding that a line—drawn at 40 hours—rather than requiring a case-by-case analysis would "improve administrability" of the FICA tax assessment regime, the court said.

Under FICA, a student who works for a school, college, or university is exempt from paying FICA taxes as long as he or she also is enrolled in and regularly at-

tends classes at the same institution. The federal government uses the FICA tax to fund Social Security and Medicare.

The ruling affirmed a June 2009 decision by the U.S. Court of Appeals for the Eighth Circuit that found the regulations—T.D. 9167, issued by IRS in 2004, codified at 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii), and effective April 1, 2005—were a reasonable interpretation of the student exception under the FICA.

Chevron Deference Applied. The court noted that some Treasury Department regulations subject to judicial review in the past were subject to an analytical framework borrowed from *National Muffler Dealers Ass'n Inc. v. United States*, 440 U.S. 472 (1979). The court, however, said that it could see no reason not to apply the *Chevron* framework to judicial review of all agency regulations.

“Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency,” Roberts said. “In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only.”

“The principles underlying our decision in *Chevron* apply with full force in the tax context,” the court continued. “Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes.”

Roberts clarified that the standard of deference did not depend on whether Congress had in a given statute delegated “specific” or “general” authority to regulate. The ultimate question, he said, is whether Congress would have intended courts to treat a given regulation as within its delegation to the agency of the authority to fill gaps in the underlying statutory scheme.

Statute Ambiguous. The court agreed with the Eighth Circuit’s conclusion that the statutory text setting forth the student exception to FICA taxation is ambiguous and, therefore, subject to reasonable agency regulatory interpretation. “The statute does not define the term ‘student,’ and does not otherwise attend to the precise question whether medical residents are subject to FICA,” Roberts found.

Although the court noted that the trial court interpreted Section 3121(b)(10) “as unambiguously foreclosing the Department’s rule by mandating that an employee be deemed ‘a “student” so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer,’” the court said, “We do not think it possible to glean so much from the little that § 3121 provides.”

Even if that were the case, “the statutory text still would offer no insight into how Congress intended predominance to be determined or whether Congress thought that medical residents would satisfy the requirement,” the court continued. Medical residents also have been excluded “from exemptions they might oth-

erwise invoke . . . [which] casts doubt on any claim that Congress specifically intended to insulate medical residents from FICA’s reach in the first place,” it said.

Regulation Reasonable. The court also found that the regulation “easily satisfies” the requirement that the rule be a reasonable interpretation of the statute. Roberts acknowledged Mayo’s argument that the more a resident works, the more he or she is in effect a student, and also noted that the determination of the FICA status of any given resident might be different in different cases.

Nevertheless, the fact that the department drew a line at 40 hours did not render the regulation unreasonable under *Chevron*, he said. “Regulation, like legislation, often requires drawing lines,” Roberts wrote.

The court noted that Mayo conceded that it was reasonable for the department to look for a way “to distinguish between workers who study and students who work.” It also said that, “Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal.”

The regulatory approach also serves to ease administration, helps avoid “wasteful litigation,” and furthers the purposes underlying the Social Security Act by ensuring medical residents and their families both contribute to, and benefit from, the Social Security system, the court said.

“We do not doubt that Mayo’s residents are engaged in a valuable educational pursuit or that they are students of their craft,” the court reasoned. “The question whether they are ‘students’ for purposes of § 3121, however, is a different matter.”

“Because it is one to which Congress has not directly spoken, and because the Treasury Department’s rule is a reasonable construction of what Congress has said, the judgment of the Court of Appeals must be affirmed,” the court concluded.

Finality, Standard Clarified. Some tax attorneys commenting on the ruling focused on the standard of review issue, noting that the decision clarified that *National Muffler* no longer applies to judicial review of tax regulations.

According to Kristin E. Hickman of the University of Minnesota Law School in Minneapolis, the court’s opinion “clearly and unequivocally adopts *Chevron* and rejects *National Muffler* as the standard of review for general authority Treasury regulations. I do not see how anyone could read the opinion otherwise.”

Hickman said the ruling also “counsels uniformity with other areas of administrative law rather than tax exceptionalism in judicial review of tax administrative action” and that the court’s position “may substantially influence the outcomes of other pending challenges to Treasury regulations and IRS rulings on other administrative law grounds.”

Full text of the opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8czlifu>.

Summaries of Selected Employment Cases Denied Review Jan. 10, 2011

Irregularities in Court Clerk's Office—Due Process

10-457 *Chesney v. Valley Stream Union Free Sch. Dist. No. 24*
Ruling below (2d Cir., 5/5/10):

A former public school employee's appeal from the dismissal of his employment-related lawsuit against various defendants is dismissed. While his appeal could be dismissed solely because he failed to file an appellate brief, no part of his appeal, or his charge of docket tampering, has an arguable basis in law or fact. The employee has made no showing that any record tampering occurred, or that any docketed documents have been destroyed or otherwise altered.

Gender—Retaliation—Comparators

10-471 *Miller-Goodwin v. Panama City Beach*
Ruling below (11th Cir., 7/8/10) (48 GERR 922, 8/3/10):

A former police officer who alleged disparate treatment based on her gender in violation of Title VII of the 1964 Civil Rights Act failed to establish a prima facie case with respect to her discipline/termination claim. When a Title VII plaintiff alleges discriminatory discipline, to determine whether the plaintiff and her comparators are similarly situated the court evaluates whether the employees—both the plaintiff and the comparators—are involved in, or accused of, the same or similar conduct and are disciplined in different ways. In so doing, the quantity and quality of a comparator's misconduct must "be nearly identical [to that of the plaintiff] to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." In this case, the former police officer failed to identify any similarly situated male employee who engaged in conduct nearly identical to the conduct for which she was disciplined, but who received less severe disciplinary sanctions, and thus she failed to present proper comparators necessary for a prima facie case regarding her discriminatory discipline claim.

Exposure to Radiation

10-584 *Jasso v. California Dep't of Forestry & Fire Prot.*
Ruling below (9th Cir., 6/22/10, unpublished):

The district court properly dismissed claims alleging that the defendants—California state agencies and officials—violated the plaintiffs' civil rights, various federal statutes and regulations, and state common law by permitting the plaintiffs' exposure to harmful levels of electromagnetic radiation at their workplace and then engaging in a coverup. State agencies and individual defendants acting in their official capacities are not susceptible to suit under 42 U.S.C. § 1983. Causes of action against individual defendants in their personal capacities are barred in this case, either by res judicata or because the plaintiffs failed to allege facts that would establish deprivation of any constitutional rights. Moreover, the criminal statutes and federal regulations cited by the plaintiffs do not confer a private right of action. Finally, certain other claims are barred by collateral estoppel.

Retaliation—Consideration in Light of Burlington Northern

10-586 *Johnson v. Potter*
Ruling below (2d Cir., 9/30/10):

A postal employee's lawsuit alleging retaliation and constructive discharge in violation of Title VII of the 1964 Civil Rights Act properly was dismissed, despite the employee's contention that the district court insufficiently considered the employee's claims in light of *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 74 USLW 4423, 77 FEP Cases 1 (2006)

(44 GERR 697, 6/27/06). All claims previously litigated in a prior lawsuit between the parties are barred by res judicata. Two additional allegations of retaliation are without merit. Specifically, no discriminatory animus was evident regarding requests for allegedly "excessive documentation" for plaintiff's claim under the Family and Medical Leave Act, and allegedly threatening statements did not constitute material adverse action under *Burlington Northern*.

Hiring of Retired Federal Employee—Salary Reduction

10-600 *Piper v. United States*
Ruling below (Fed. Cir., 374 Fed. Appx. 957, 16 WH Cases2d 227) (48 GERR 678, 6/8/10):

The U.S. Court of Federal Claims properly dismissed, for lack of jurisdiction under the Tucker Act, a federal retiree's complaint that, contrary to assurances he received prior to being hired as a security officer by the Homeland Security Department's Transportation Security Administration, his pay as a security officer was reduced by the amount of his federal retirement benefits. The Tucker Act does not create any substantive rights, but merely confers jurisdiction on the Court of Federal Claims only when a substantive right, derived from another source, is enforceable against the government for damages. In this case, there was no contract that would grant Tucker Act jurisdiction; the retiree's employment by TSA was by appointment and not by contract. The retiree's claim is best characterized as one for misrepresentation, which is a tort over which the Court of Federal Claims does not have jurisdiction.

Wrongful Discharge of Teacher

10-608 *Green v. Rhee*
Ruling below (D.C., 5/20/10):

The appellant's motion for summary reversal is denied because this court's review is limited to the record on appeal, and the appellant is attempting to raise factual assertions not previously raised before the trial court.

Discipline

10-642 *Kone v. Virginia Dep't of State Police*
Ruling below (Va. Ct. App., 11/24/09):

An assertion by a state employee that a hearing officer's decision—in the employee's challenge to his receipt of a written notice that he was not following his supervisor's instructions, performing assigned work, or otherwise complying with applicable policy—was contradictory to law was not supported by reference to any applicable law, and the trial court's dismissal of the employee's lawsuit therefore is summarily affirmed.

Allowable Scope of Complaint—Vacatur of Award—Law of the Case

10-654 *Morales-Vallellanes v. Potter*
Ruling below (1st Cir., 605 F.3d 27, 109 FEP Cases 491) (48 GERR 647, 6/1/10):

A U.S. Postal Service employee whose claims against his employer included allegations that, inter alia, he was retaliated against for filing claims with the Equal Employment Opportunity Commission and that he was discriminated against on account of his gender—all of which were formally brought to EEOC and ultimately dismissed—failed to prove that he suffered any material adverse employment action within the meaning of the discrimination or retaliation provisions of Title VII of the 1964 Civil Rights Act.

Analysis & Perspective

Privacy

Employer Policies to Not Hire Smokers Raise Privacy, Discrimination Issues, Attorneys Say

The issue of whether an employer can take an adverse employment action against an employee or applicant who uses tobacco touches on many legal areas, including privacy and off-duty conduct, as well as disabilities, retirement security, and perhaps even disparate impact discrimination, according to legal practitioners.

Susan Lessack, a partner in the labor and employment group of Pepper Hamilton LLP in Philadelphia, told BNA Nov. 29 that there are at least 10 large U.S. employers that refuse to hire smokers.

As an example of such a policy, the Saint Francis Medical Center in Cape Girardeau, Mo., said in a statement provided to BNA Nov. 30 that it no longer will hire smokers effective Jan. 1, 2011.

New hires will be subject to nicotine and other drug testing as part of "routine" employment screenings, Teri Kreitzer, the center's human resources director, said. The policy will not affect current employees, Kreitzer said in the statement.

Off-Duty Conduct Concerns. The main concern for employers that wish to ban smoking is whether they have employees in a state with an off-duty conduct statute, Lessack said.

About 30 states forbid employers from making employment decisions based on what applicants or employees do in their time away from work, she noted.

Some statutes in tobacco-producing states expressly bar employment discrimination against smokers, while other statutes cover off-duty behavior in general, she added, noting that the laws also have some exceptions.

Mendy Mattingly of Littler Mendelson in San Diego told BNA Nov. 30 that Missouri, where Saint Francis is located, is one of the states with a law specifically protecting tobacco users from discrimination. But the law exempts religious organizations, church-operations institutions, and not-for-profit entities that have health care promotion as a principal business, she said.

Lessack warned that one problem employers face when they go to the extent of banning off-duty smoking by employees is that it can raise the hackles of observers who wonder "What's next?" Will obesity become a firing offense?

An alternative to refusing to hire smokers, Lessack said, is incorporating smoking cessation plans and incentives into a company wellness program. To stay on solid ground, an employer should make sure it follows Health Insurance Portability and Accountability Act regulations, she said.

Limited Case Law. Employer restrictions on smoking have been challenged only a few times by workers on the basis of alleged violations of constitutional privacy rights, state lifestyle discrimination statutory guarantees, and state and federal discrimination laws.

In one often examined case—*Rodrigues v. EG Sys. Inc.*—the U.S. District Court for the District of Massachusetts ruled that a company ban on smoking on and off the job did not violate a worker's privacy rights when it fired him two weeks after hiring him because he tested positive for nicotine.

In ruling for the employer, the court rejected the plaintiff's Massachusetts Privacy Act claim, ruling that he lacked a "protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private."

The court also held that the employer's actions did not interfere with the plaintiff's Employee Retirement Income Security Act rights to benefits because he had not worked at the company long enough to qualify for benefits or to be a "plan participant."

At the time of the ruling, the plaintiff's counsel told BNA that he was unaware of any other case involving an employee being fired for off-duty tobacco use.

Commenting on the case, Lessack said, "My understanding is that Massachusetts has a pretty liberal reach of privacy laws, so if you can make such a claim anywhere, you might expect it to be there."

But both she and Mattingly emphasized that the specific facts can make a big difference in this type of case.

Are Smokers Protected Class? The Saint Francis Medical Center asserted in its statement that smokers are not protected as a class by Equal Employment Opportunity Commission rules or under the Americans with Disabilities Act.

But Lessack said the question of whether a smoker could make a claim under the ADA has not been settled.

She said EEOC might see a smoking addiction as it does addictions to alcohol and illegal drugs. In that case, she said, employers would not be able to discriminate against employees with an addiction to smoking but obviously would not be required to allow the behaviors at work.

A more likely ADA claim, however, might be that an employer regarded a smoker as having a disability, Lessack said. The most likely "regarded as" claim, Lessack said, would be that the smoker was perceived as being less productive.

Mattingly said it would be theoretically possible for a company's policy not to hire smokers to have disparate impact on a protected class.

Given the complexity of the issues, she said, an employer determined to ban smoking by employees needs to do its homework.

By CATHLEEN O'CONNOR SCHULTZ



BNA

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Electronic Resources

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INTERNET SOURCES

Listed below are the addresses of World Wide Web sites consulted by editors of BNA's Government Employee Relations Report and also WWW sites for official government information.

American Federation of Government Employees

<http://www.afge.org>

American Federation of State, County and Municipal Employees

<http://www.afscme.org>

Bureau of Labor Statistics

<http://stats.bls.gov>

Congressional Record

<http://www.gpoaccess.gov/crecord/index.html>

Equal Employment Opportunity Commission

<http://www.eeoc.gov>

Federal Labor Relations Authority

<http://www.flra.gov>

Federal Managers Association

<http://www.fedmanagers.org>

Federal Mediation and Conciliation Service

<http://www.fmcs.gov>

Federal Register

<http://www.gpoaccess.gov/fr/index.html>

Government Accountability Office

<http://www.gao.gov>

Justice Department, Civil Rights Division, Employment Litigation Section

<http://www.usdoj.gov/crt/emp>

Merit Systems Protection Board

<http://www.mspb.gov>

National Active and Retired Federal Employees Association

<http://www.narfe.org>

National Air Traffic Controllers Association

<http://www.natca.org>

National Association of Government Employees

<http://www.nage.org>

National Federation of Federal Employees

<http://www.nffe.org>

National Treasury Employees Union

<http://www.nteu.org>

Office of Management and Budget

<http://www.whitehouse.gov/omb>

Office of Personnel Management

<http://www.opm.gov>

Office of Special Counsel

<http://www.osc.gov>

Partnership for Public Service

<http://www.ourpublicservice.org>

Service Employees International Union

<http://www.seiu.org>

Society of Federal Labor & Employee Relations Professionals

<http://www.sflerp.org>

Thomas (congressional legislative information)

<http://thomas.loc.gov>

U.S. House of Representatives

<http://www.house.gov>

U.S. Senate

<http://www.senate.gov>

U.S. Supreme Court

<http://www.supremecourtus.gov>

White House

<http://www.whitehouse.gov>

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Government Employee Relations Report

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