GOLDBERG SEGALLA

Governmental Liability, Civil Rights, and Labor and Employment

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FEDERAL COURT DECISIONS

A Primer on Employment Discrimination Motion Practice

On January 4, 2013, Judge Michael A. Telesca of the Western District of New York filed a concise primer on employment discrimination motion practice. In *Somerville v. Romulus Central School District*, 2013 U.S. Dist. LEXIS 1509 (WDNY 2013) the plaintiff, an African-American female candidate for school superintendant, brought an action alleging she was not selected as a school superintendent on the basis of unlawful discrimination on the basis of race and gender. She was one of six finalists, three female and three male, interviewed for the position by three distinct groups: the Board of Education, a community group, and a district employee group. Three finalists were honed from the group of six to three finalists, two males and a female. A white male was eventually selected as the new school superintendent.

The district court, in dismissing the plaintiff's claim, carefully travelled the road to dismissal. The court first noted the summary judgment standard:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." When considering a motion for summary judgment, all genuinely disputed facts must be resolved in favor of the party against whom summary judgment is sought. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). If, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party, a grant of summary judgment is appropriate. Scott, 550 U.S. at 380 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

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Goldberg Segalla LLP's *Governmental Liability, Civil Rights, and Labor and Employment Newsletter* provides a summary of the latest court decisions shaping the landscape of civil rights, government liability, and employment practice. The intent of our review is to provide local governments, school districts, governmental agencies, governmental officials, private entities, and insurance companies with an overview of the national decisions impacting the representation and defense of all entities that may be subject to claims involving individual civil rights and employment practices. We greatly appreciate your interest in our newsletter and ask for your commentary as well as questions. Please feel free to share this publication with your colleagues. If others in your organization are interested in receiving the publication, or if you do not wish to receive future issues, please contact Jonathan Bernstein at jbernstein@goldbergsegalla.com.

Then the court found the plaintiff had met her burden of establishing a prima facie case under circumstances giving rise to discrimination.

> To establish a prima facie case of discriminatory failure to hire, the plaintiff must show that (1) she belongs to a protected class; (2) she applied for an available position for which she was qualified; and (3) she was rejected under circumstances giving rise to an inference of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The burden of stating a prima facie case sufficient to overcome a motion for summary judgment is de minimis, *Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1114 (2d Cir. 1988). Based on the de minimis standard for stating a prima facie case, I find that plaintiff's claim that a less-qualified white male was hired for the position she sought states a prima facie case of employment discrimination.

The plaintiff was able to allege circumstances giving rise to an inference of discrimination via alleged statements of a preference for hiring a male, despiteher alleged superior credentials.

Thereafter, the burden shifted to the defendant to establish a non-discriminatory reason for the discrimination. The defendant's claims of a lack of history of female or African-American superintendents in the past were insufficient on their face:

> To establish an inference of discrimination based on the historical lack of hiring of minority candidates, a plaintiff must produce evidence that minority candidates actually applied for the position sought and were rejected. As stated by a district court in a case involving teachers, the "absence of African-American [teachers] does not suffice to prove a prima facie case of discrimination without comparison to the relevant labor pool." *Deleon v. Putnam Valley Board of Education*, 2006 U.S. Dist. LEXIS 3337, 2006236744, (S.D.N.Y., January 26, 2006) (citing *Jackson v. University of New Haven*, 228 F.Supp.2d 156, 166 (D.Conn., 2002) ("The mere absence of minority employees in upper-level positions does not suffice to prove a prima facie case of discrimination without a comparison to the relevant labor pool").

In the instant case, the plaintiff has failed to produce any evidence as to whether or not any female or minority candidates had applied to become superintendent of the school district prior to 2008, when plaintiff herself applied for the position. Accordingly, because there is no evidence of whether minority or female candidates ever applied for the position of superintendent, no discriminatory motive or effect can be inferred from the historical lack of a African-American or female superintendent of the Romulus Central School District.

Likewise, the plaintiff's self-serving claims of superior qualifications alone were insufficient to rebut the defendant's non-discriminatory rationale.

> "An employee's subjective opinion about [her] own qualifications is insufficient to give rise to a triable issue of fact concerning whether the employer's proffered reason for its actions is a pretext for discrimination." *Hines v. Hillside Children's Center,* 73 F.Supp.2d 308, (W.D.N.Y. 1999) (Larimer, C.J.) (citing *Shapolia v. Los Alamos Nat'l Lab.,* 992 F.2d 1033, 1039 (10th Cir.1993) (employee's own assessment of his job performance is inadequate to raise issue of fact for trial)); *Anderson v. City of New Rochelle*, 2012 U.S. Dist. LEXIS 125358, 2012 WL 3957742 *12 (S.D.N.Y., September 04, 2012) ("Plaintiff's purely self-serving statement that he was 'clearly the most qualified' for the position, without direct or circumstantial evidence to support the assertion, does not create a question of fact on the issue of discrimination"). Moreover, to rebut an employer's reason for not hiring her, a plaintiff must establish that her qualifications were "so superior to the credentials of the person selected for the job" that "'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Abrams v. Department of Public Safety*, 856 F.Supp.2d 402, 410 (D. Conn., 2012) (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir., 2001)."

In dismissing the case, the district court provided a road map for both plaintiffs and defendants in exactly how summary judgment motions in employment discrimination cases will be handled. The case provides a guide for the proof required of each to either obtain or defeat summary judgment.

While there may be sufficient evidence to properly allege a discrimination case, there must be adequate proof and more than conjecture and surmise to overcome evidence of a legitimate non-discriminatory reason for the employment decision.

Giving a Cop the Middle Finger is Not Grounds for Arrest

Swartz v. Insogna, 2013 U.S. App. LEXIS 186 (2d Cir. 2013)

This case addressed the illegality of arresting a person for giving a police officer the middle finger. The Second Circuit discussed Fourth Amendment seizures, qualified immunity, probable cause, and malicious prosecution.

The plaintiffs, John and Judy, were driving through a New York village when John gave the middle finger to a police officer who was sitting in a police car with a radar device. John and Judy, who were not speeding or committing any other traffic violation, continued on to their destination. When they arrived, they exited their car and then the police officer pulled up behind them and ordered them back in the car. The officer collected Judy's license and registration, called for backup, and three other officers arrived. The officer then told the plaintiffs they were free to go. At that point, John got out of the car and asked to speak to the officer. The three other officers got in his way, and John walked away and said, "I feel like an ass." One of the officers said, "That does it," and arrested him. John was handcuffed and driven to the police station where he was told he had been arrested for disorderly conduct. The charges remained pending for several years, during which time John made three court appearances. The charges were ultimately dismissed on speedy trial grounds.

The plaintiffs filed a civil rights suit against two of the police officers. The trial court granted summary judgment for the officers. The Second Circuit reversed.

The court first analyzed whether there had been a Fourth Amendment seizure, and if so, whether the seizure was legal. Although the police did not stop the plaintiffs' car, the officer's instruction to reenter the car was a sufficient interference with liberty to constitute a seizure. Whenever a police officer restrains a person's freedom to walk away, the officer has seized that person. A seizure is not legal unless the officer reasonably suspects the person of being engaged in illegal activity. Here, the only act prompting the seizure was John giving the middle finger. The officer's explanation for the seizure was that John giving the officer the finger caused him (the officer) to be concerned for Judy's safety. The court scoffed at that explanation; the middle finger gesture is universally recognized as an insult and is not the basis for a reasonable suspicion of impending criminal activity. The seizure was therefore unlawful.

The court then determined whether the officers were entitled to qualified immunity on the Fourth Amendment claim. Qualified immunity protects government officials from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A police officer who has an objectively reasonable belief that his actions are lawful is entitled to qualified immunity. Here, the court held that the officers were not entitled to qualified immunity because a reasonable officer would not have believed he was entitled to initiate the law enforcement process in response to giving the finger.

Next the court analyzed the disorderly conduct arrest. An officer needs probable cause for an arrest. There is probable cause when the officer has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime. The court found that the middle finger alone cannot establish probable cause, nor did any of John's other conduct create probable cause. Because an objectively reasonable officer would not have believed that probable cause existed, the officers were not entitled to the defense of qualified immunity on summary judgment.

Lastly, the court addressed the malicious prosecution claim. To be actionable under § 1983, there has to be the commencement of a criminal proceeding, favorable termination of the proceeding, lack of probable cause, institution of the proceedings with actual malice, and a post-arraignment seizure. There was evidence of each of these elements, thus the malicious prosecution claim survived summary judgment.

Forcing a Pre-Trial Detainee to do Hard Labor Can be a Violation of the 13th Amendment's Prohibition Against Involuntary Servitude

McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012)

In this Second Circuit decision, a plaintiff made it past the motion to dismiss stage where his complaint alleged that prison officials violated his 13th Amendment right to be free from involuntary servitude.

The plaintiff was a pre-trial detainee at a state correctional facility where both pre-trial detainees and sentenced inmates were required to do various work. Over his repeated objections, the plaintiff had to work in the prison laundry for 14 hours per day, three days per week. Prison officials told him that if he did not work, he would be locked up in shackles for 23 hours per day.

The defendants moved to dismiss on the grounds that the work did not violate the 13th Amendment and they were entitled to qualified immunity. The trial court granted the motion but the appellate court reversed.

The 13th Amendment provides that "[n] either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any

place subject to their jurisdiction." The term "involuntary servitude" is not limited to chattel slavery-like conditions; the Amendment was intended to prohibit all forms of involuntary labor, not solely to abolish chattel slavery. The Supreme Court has defined involuntary servitude as "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process." Further, institutions housing pre-trial detainees are not exempt from the amendment's scope. Nor was the plaintiff "duly convicted," thus he did not fall within the category of people to whom the Amendment does not apply.

The court held that the plaintiff's allegations stated a cognizable claim under the 13th Amendment. His work in the prison laundry was allegedly compelled by the threat of physical restraint or physical injury given that he was threatened with being confined in shackles for 23 hours per day if he refused to do the work.

The court also held that the defendants were not entitled to qualified immunity at the motion to dismiss stage. The defendants had sought qualified immunity on two grounds. First, they argued that it was objectively reasonable to believe that they could compel pre-trial detainees to work because the work program advanced a legitimate interest in rehabilitation. But the court easily knocked this argument down on the basis that it has been clearly established for years that a state cannot rehabilitate pre-trial detainees, so it was not objectively reasonable for defendants to conclude otherwise.

The defendants' second argument was that a housekeeping exception for inmates exists under the 13th Amendment and, consequently, it was objectively reasonable to assume that pre-trial detainees can be required to perform housekeeping chores while incarcerated. The court found that, even assuming that correctional facilities can require all inmates to perform personal housekeeping chores (e.g. cleaning their cells), it is clearly established that requiring hard labor of pre-trial detainees violates the 13th Amendment. Compelled work doing other inmates' laundry for 14 hours per day, three days per week, cannot be reasonably construed as a personal housekeeping chore. The defendants were therefore not entitled to qualified immunity.

Teachers Liable for Violating Equal Protection Clause When No Sufficient Action to Stop Student-on-Student Racial Discrimination

Distiso v. Cook, 691 F.3d 226 (2d Cir. 2012)

This Second Circuit decision analyzed the Equal Protection Clause in the context of racially motivated harassment among classmates.

The plaintiff's mother, on behalf of her minor son, filed a civil rights action against the son's kindergarten teacher, first grade teacher, and principal, alleging violations of the Equal Protection Clause. Classmates of the son, an African-American, used racial epithets and told him his hands remained dirty even after washing. The son was also subjected to physical abuse by the classmates. The verbal and physical harassment allegedly occurred during kindergarten and first grade.

The 14th Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." To prevail on a § 1983 claim of race discrimination in violation of equal protection, the plaintiff has to prove the defendant's underlying racially discriminatory intent or purpose. Claims of intentional race discrimination can be based on the deliberate indifference of school boards, administrators, and teachers to invidious harassment of a student by other students. To succeed on a deliberate indifference to student-on-student harassment claim, the plaintiff has to prove that the child was harassed by other students based on race, the school official had actual knowledge of the race-based harassment, and the official's response to the harassment was so clearly unreasonable as to give rise to a reasonable inference that the official intended for the harassment to occur.

Here, the school officials argued that they were entitled to summary judgment on qualified immunity grounds. The court disagreed, holding that the officials were not entitled to qualified immunity with respect to the verbal harassment that the child had to endure in kindergarten. The use of racial epithets was severe and pervasive enough to fall within a clearly established right of equal protection; the officials had actual knowledge of the harassment given that the child's parents informed them of it; and the officials' response to the harassment — or lack thereof as they did nothing about it — was clearly unreasonable.

The court did, however, hold that the school officials were entitled to qualified immunity with respect to the physical harassment. There was no evidence that the classmates' physical harassment was linked to the racial name-calling. Instead, the evidence indicated that the physical misbehavior was the type commonplace for children of that age. As such, no clearly established law would have alerted the school officials that they could be deemed to have actually known that the physical misbehavior was racially motivated.

Right to Appeal Is Lost if Notice of Appeal Is Not Specific About Which Party Is Appealing

Gusler v. City of Long Beach, 2012 U.S. App. LEXIS 24264 (2d Cir. 2012)

This Second Circuit decision shows how critically important it is to draft notices of appeal correctly. A notice of appeal is a short, simple document that merely memorializes a party's intention to appeal. But draft the notice improperly and you will lose your right to appeal.

In this case, a pro se plaintiff filed a civil rights action against his employer the City of Long Beach, its fire department, police department, and 12 individual officers and officials. The plaintiff alleged retaliation for speaking out about issues involving the fire department. Eight individual defendants won motions to dismiss, three lost their motions, and one died so those claims were withdrawn.

The three defendants who lost filed a notice of appeal within the statutory 30-day time limit. The notice contained the full caption with all original defendants and stated in the body that "the defendant Nassau County hereby appeals." Nassau County was never a defendant. After the 30-day period expired, the defendants — without seeking leave of court — filed an amended notice of appeal listing as appellants all 12 of the individual defendants, without distinguishing between those who had been dismissed and those who had not.

Even though none of the parties raised a jurisdictional issue, the court dismissed the appeal on the grounds that it lacked jurisdiction to hear the appeal. The party(ies) seeking to appeal must be specified in the notice of appeal, and this is a jurisdictional requirement. Rule 3 of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." The purpose of this simple requirement is to provide notice to the opposition and to the court of the appellant's or appellants' identity(ies).

The defendants' notice of appeal erroneously stated that Nassau County, not even a party to the lawsuit, was appealing. And the amended notice of appeal did not fix the problem because it was untimely.

Police Officers Not Liable for Excessive Force

Marquez v. City of Phoenix, 693 F.3d 1167 (9th Cir. 2012)

Two Arizona police officers responded to a home to find a blood-spattered room, a large man who had a motionless three-year-old girl in a choke-hold and a naked screaming woman. This was all due to the man's — the suspect's — attempt to perform exorcisms on the females. When the suspect refused to let go of the child, the officers deployed a TASER, first with seven cycles in the probe mode (two darts shot into the suspect for the purpose of incapacitation) and then two cycles in the drive-stun mode (electrodes in direct contact with the suspect's skin for the purpose of inflicting pain). The tasing had no effect on the suspect so the officers wrestled him into submission. Within a few minutes, the suspect went into cardiac arrest and died. An autopsy revealed that the cause of death was excited delirium, with heart disease as a contributing condition.

The suspect's family filed suit against the two officers for excessive force in violation of the Fourth Amendment, and against TASER International, Inc., the manufacturer, for the strict products liability theory of failure to warn.

The Ninth Circuit upheld summary judgment for all three defendants. Regarding the officers, the court first considered the amount of force used and the extent to which that force intruded on the suspect's Fourth Amendment rights. The tasing and wrestling into submission, said the court, was a potentially significant intrusion on his rights. So the court then balanced the suspect's Fourth Amendment interests against governmental interests. Key to this balancing test was the severity of the crime at issue, the fact that the suspect posed an immediate threat to the two females and the officers, and the fact that the suspect was actively resisting arrest. Given that these factors weighed in the government's favor, the court held that although the officers used significant force, it was justified by the considerable government interests at stake.

The court analyzed the failure to warn claim against TASER under Arizona law, which provides that where a warning is required, the warning must be reasonably readable and apprise a consumer exercising reasonable care under the circumstances of the existence and seriousness of the danger sufficient to enable the consumer to protect himself against it. TASER's warnings met this standard as they warned that prolonged or continuous exposure could contribute to cumulative exhaustion, stress, and sudden in-custody death syndrome.

Government Officials Entitled to Qualified Immunity When the Plaintiff Fails to Sufficiently Allege Violations of His Constitutional Rights

Looney v. Black, 2012 U.S. App. LEXIS 26212 (2d Cir. 2012)

In this case, the Second Circuit addressed whether the appellant government officials (certain Town of Marlborough Selectmen) were entitled to qualified immunity through considering whether the plaintiff, government official (a building official), sufficiently alleged a property right protected under the U.S. Constitution through his 14th Amendment due process claim and whether he adequately alleged that his free speech was impinged through

his First Amendment freedom of speech claim.

The plaintiff, Patrick Looney, was a building official for the Town of Marlborough, Connecticut. He had held this position from 1995 through 2010 through a series of four-year appointments. At the time Looney applied for the position, the job posting stated that the position was full time, salaried, and included a benefits package. At his last reappointment, which was in April 2006, the Marlborough Board of Selectmen "decided to continue his appointment ... for an additional four years" per Connecticut General Statutes.

In 2009, Looney filed a grievance relating to a purported infringement of his First Amendment rights by his supervisor, Peter Hughes, who served as the Town's Planning and Development Director. Looney alleged that Hughes was attempting to limit his communication of information to a town resident regarding wood burning boilers/stoves and smoke discharge as public health concerns. This matter escalated, and Looney retained counsel. The town announced that it would not remove the restriction that Hughes had placed on Looney's speech and threatened to discharge or discipline Looney if he spoke on the matter.

At the beginning of January 2010, the town informed Looney's union that some of its members would be laid off or have their hours reduced and that the building official position would be reduced to 20 hours per week. Looney received a letter confirming the reduction in his hours and stating that he would be paid hourly with no additional compensation for loss of benefits. Looney's appointment ended in April of 2010. Thereafter, he commenced the underlying lawsuit alleging, as against one selectman, a violation of his 14th Amendment rights, based on his reduction to part-time employment, and as against the three selectmen, a violation of his First Amendment rights based on the town's decision not to remove the restriction Hughes placed on him from speaking to citizens about wood burning boilers/stoves and smoke discharge. Although Looney applied for reappointment, the defendant town selectmen decided not to reappoint him because they were uncomfortable appointing an individual involved in litigation with the town. Looney amended his 14th Amendment claim to include the fact that he was not reappointed.

The defendant selectmen moved to dismiss the claims on the ground that they were entitled to qualified immunity. The district court denied their motion; however, the Second Circuit, reviewing this issue de novo, granted their motion.

With respect to Looney's 14th Amendment due process claims, in determining whether the defendant selectman was entitled to qualified immunity, the court first inquired as to whether Looney adequately alleged a property right protected under the Constitution. The next step would have been to examine whether the constitutionally protected property right was clearly established; however, the court did not reach this step. The court determined that Looney did not have a property interest in his full-time position as building official or in his position as building official in general. Looney did not allege that any written or verbal communication to which he was a party indicated that his position as building official necessarily was to continue full-time or that he was guaranteed reappointment to the position. Instead, it was Looney's allegation that the position had always been full time and that he had always been reappointed. The court determined that a unilateral expectation is not sufficient to establish a constitutionally protected property right. Rather, a plaintiff must have a legitimate claim of entitlement to the alleged property interest.

With respect to Looney's First Amendment freedom of speech claims, in determining whether the defendant selectmen were entitled to qualified immunity, the court first analyzed whether Looney's free speech was actually impinged. The next step would have been to analyze whether Looney's right to free speech was clearly established under the law; however, the court did not reach this question, as it answered the first question in the negative. Generally, government employees are entitled to First Amendment protection when they speak as a private citizen addressing matters of public concern. However, public employees speaking pursuant to their official duties are not afforded the free speech protections of the First Amendment. Where the speech at issue owes its existence to a public employee's professional responsibilities, it can properly be said to have been made pursuant to that party's official duties. The inquiry into whether a public employee is speaking pursuant to his official duties is not susceptible to a brightline rule. Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two. It is neither necessary nor sufficient for the court to examine the plaintiff's formal job description because these are typically not accurate reflections of the actual work performed by the plaintiff.

In Looney's case, the court determined that Looney's speech was not protected by the First Amendment. The plaintiff spoke on the issue of wood burning boilers/stoves and smoke discharge as public health concerns since he was in an official position that required or at least allowed him to do so. Further, Looney himself alleged that it was a part of his job to ensure the safety of the townspeople by enforcing the relevant building codes and that smoke discharge from wood burning boilers/stoves was causing the public health concern. Accordingly, the court determined that because Looney did not adequately

allege that his speech was entitled to First Amendment protection, the three defendant selectmen were entitled to qualified immunity as to Looney's First Amendment claim.

In Ascertaining Individual Employee Liability in Deliberate Indifference to Prisoner's Medical Needs Claims, Courts Must Consider the Resources Available to the Employee

Peralta v. Dillard, 2013 U.S. App. Div. LEXIS 389 (9th Cir. 2013)

The plaintiff, Cion Peralta, was incarcerated at California State Prison, Los Angeles County (Lancaster) for approximately two years. Dr. Brooks was a staff dentist at the prison. Within three days of his arrival at Lancaster, Peralta submitted oral and written requests for dental care, asserting that he had cavities, infections, bleeding gums, and severe pain. He received no response and approximately six months later, he filed an inmate appeal, which was partially granted. He was placed on a waiting list to see a dentist. After subsequent appeals, Peralta finally saw a dentist nine months after his initial request. At that appointment, Peralta was examined. However, his only treatment was ibuprofen, and the examination was not thorough. An extraction was scheduled for a later date. The second examination was three months later and was more thorough than the first. Peralta decided not to have his tooth extracted, and ibuprofen and antibiotics were prescribed. The final visit was 11 months later. Peralta had his teeth cleaned. Thereafter he was transferred.

Peralta brought suit alleging deliberate indifference to medical needs related to his dental care. The district court's judgment was in favor of the defendants. On appeal, Peralta's argument centered on the individual liability of Brooks. He argued that the district court erred when it instructed the jury that whether Brooks met his duties to Peralta must be considered in the context of the personnel, financial and other resources available to him or which he could reasonably obtain. Peralta argued that Ninth Circuit cases precluded consideration of available resources when an individual is sued for violating a prisoner's Eighth Amendment rights due to deliberate indifference to the prisoner's serious medical needs.

In order to sustain a deliberate indifference claim, a prisoner plaintiff must show a serious medical need by demonstrating that failure to treat the prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. The plaintiff must also show that the defendant's response was deliberately indifferent. Deliberate indifference is shown by (a) a purposeful act or failure to respond to a prisoner's pain or medical need and (b) harm caused by the indifference.

The court determined that where resources are lacking, the individual dentist cannot be held responsible for being unable to reasonably respond to the risk of harm that underserved inmates face when dental problems occur. Furthermore, the court emphasized the fact that there was nothing Brooks himself could do to cure the lack of resources; thus it determined that Brooks could not be held individually liable. The court determined that a proper standard of analyzing deliberate indifference to medical needs must take account of the duties, discretion, and means available to the employee.

Police Officers Entitled to Qualified Immunity

Lynch v. Barret, 2013 U.S. App. LEXIS 290 (10th Cir. 2013)

This case examines qualified immunity and municipal liability in the context of an alleged police cover up. The plaintiff arrestee sued the defendant police officers and the City and County of Denver claiming that officers violated his constitutional right to court access by refusing to disclose who exercised excessive force against him and

that the city violated the same right by adopting a policy of silence.

The plaintiff, Nick Lynch, was arrested after punching an individual outside of a nightclub in Denver. Lynch fled the scene and hid in the bushes. Up to six officers chased him and arrested him upon finding him. One or more officers then threw Lynch to the ground and struck him several times in the back of his left thigh with a baton or flashlight. Because Lynch was face down on the ground, he could not identify the officer or officers responsible. The officers gave testimony that indicated that they witnessed which officers were involved in arresting Lynch; however, none would testify as to which officers participated in the arrest.

With respect to municipal liability, on the cty's motion for summary judgment, the district court determined that Lynch raised genuine issues of material fact for trial on his municipal liability claim against the defendant city. The court decided a reasonable jury could find the defendant city maintained a policy or practice that caused defendant officers' cover up and the plaintiff's consequent inability to obtain legal redress on his excessive force claim. The 10th Circuit did not disturb this decision.

The district court determined that the police officers were not entitled to qualified immunity because the police officers violated Lynch's constitutional right to court access and that right was clearly established at the time of the violation. The 10th Circuit reversed this decision. The defendant officers did not dispute that the intentional concealment of evidence by a police officer that interferes with an individual's ability to obtain redress for police

misconduct is unconstitutional. The 10th Circuit also assumed that the facts set forth in the district court's order were sufficient to warrant a finding that the defendant officers violated the plaintiff's rights.

However, turning to the second prong of the test, the court asked whether a reasonable official might not have understood that such conduct violated the Constitution. After examining decisions from the 10th Circuit, the court determined that at least in the 10th Circuit, the question of whether an evidentiary cover up by police officials may violate an individual's constitutional right to court access was not clearly established at the time of the alleged violation. It determined that a reasonable officer might not have understood that what the defendant officers did (or refused to do) violated that right.

Police Officer Not Entitled to Qualified Immunity

Alman v. Reed, 2013 U.S. App. LEXIS 364 (6th Cir. 2013)

This case arose out of the arrest of a homosexual man in a park and the subsequent seizure of the vehicle that he drove to the park. The court addresses, among other issues, the issues of qualified immunity and a municipality's failure to train.

The plaintiffs, Randy Alman and Michael Barnes, are homosexual men and domestic partners residing in Indiana. Alman was arrested in Hix Park in Westland Michigan during an undercover police operation. Alman was in the park taking a break from helping his mother move into her new apartment, which was nearby. Alman drove Barnes's car to the park. Alman was sitting at a picnic table when he was approached by undercover officer Kevin Reed, a Wayne County Deputy Sheriff. Reed was part of a task force designed to investigate complaints of lewd conduct and possible sexual activity taking place at the park.

Reed struck up a conversation with Alman. Alman walked to a secluded portion of the park and Reed followed without invitation. The course of events that followed were disputed. Reed alleged that Alman touched him inappropriately by grabbing his crotch. Alman alleged that he brushed his hand against Reed's zipper area. Subsequently, Reed showed Alman his badge and placed him under arrest. Other officers, including Sergeant Swope, were waiting near the picnic table and handcuffed Alman and placed him in the patrol car. Reed reported what had happened to Sergeant Swope, telling Swope that he arrested Alman after Alman had "grabbed me or touched my crotch." Swope testified that he did not ask Reed if Alman had used force, whether Alman propositioned him, or whether Reed had said or done anything that might have caused Alman to believe that he had consent to touch Reed. On Swope's orders, the car that Alman drove to the park was towed away and impounded by the Westland Police Department.

The plaintiffs sought relief under 42 U.S.C. § 1983 for alleged violations of their constitutional rights. Alman raised Fourth Amendment and 14th Amendment claims based on his arrest, and Barnes raised a Fourth Amendment claim based on the impoundment of his car. The court's analysis focused on the issues of qualified immunity and municipal liability under § 1983.

Sergeant Swope argued that even if Alman's arrest was not supported by probable cause (the court found that it was not), he was entitled to qualified immunity based on his reasonable mistake. With respect to Swope, the court determined that without more facts at his disposal, he had no reasonable basis to believe that any of the offenses that Alman was charged with had occurred or were about to occur. Thus the court determined that because Alman's clearly established Fourth Amendment rights were violated, qualified immunity did not shield Swope.

The plaintiffs also brought a claim under § 1983 against Swope, Wayne County ,and the City of Westland based on their alleged failure to train police officers on how to enforce laws related to sexual activity. The Supreme Court has approved municipal liability based on § 1983 when the municipal action that is the alleged constitutional violation is derived from "official policy" in one form or another. The plaintiff must demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged. Alman argued that Swope never received specific training about the sexual activity laws or what accosting meant, which created a likelihood that constitutional violations would occur and recur. However, the court held that in itself did not constitute deliberate indifference as there was no allegation that Westland or Wayne County officials had any specific awareness of the potential for violations. Thus, it determined that the allegation was too generalized to support municipal liability because adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Employer Can Offer a Different Religious Accommodation Than the One Requested by Employee

Porter v. City of Chicago, 700 F.3d 944 (7th Cir. 2012)

The plaintiff in this case identified herself as a Christian, and attended church services on Sunday mornings. She was a civilian employee in a section of the records department of the Chicago Police Department. Her section operated 24 hours a day, seven days a week, and its employees worked three shifts, called

"watches." The plaintiff worked the second watch, with hours from 7:30 a.m. to 3:30 p.m.

Prior to the instant dispute, the plaintiff was among a group of employees whose days off were on Fridays and Saturdays; another group of employees was assigned to be off on Sundays and Mondays. The plaintiff asked for Sundays off so that she could attend church services and sing in the church choir, and as a result she was reassigned to the Sunday/Monday days-off group.

After the plaintiff took an extended leave of absence, she returned to work and was assigned to the Friday/Saturday days-off group. This assignment was based on "operational needs" to "balance the workforce," because more civilian employees were in the Sunday/Monday days-off group at that time. The sergeant who made this assignment was not aware that the plaintiff wanted Sundays off to attend church services. The plaintiff asked to be reassigned to the Sunday/Monday days-off group because of her church involvement, and was told that her request would be accommodated when an opening became available in the Sunday/Monday group. A sergeant also asked the employees in the Sunday/Monday group if one of them would switch with the plaintiff, but none of them volunteered. The plaintiff then talked to the director of records, who had the authority to switch employees' schedules. The director said that she wanted to help the plaintiff, and suggested the possibility of the plaintiff "going to 3 to 11" on Sundays, i.e., essentially switching to the third watch for Sundays only. The plaintiff did not express interest in this option or follow up with anyone about it. She simply wanted her Sundays off completely. She started to be absent from work a good deal, apparently including absences on every Sunday during a four-month period. After she was written up for this absenteeism, she took a medical leave and never returned to work.

The plaintiff sued the city on a number of claims, including religious discrimination under Title VII. As the court pointed out, Title VII's provisions "require an employer to make reasonable efforts to accommodate the religious practices of employees unless doing so would cause the employer undue hardship." The court found that the plaintiff made out a prima facie claim by showing that her Sunday work schedule conflicted with her religious observance, and that she had brought this to the city's attention and requested an accommodation. However, the court found that the city had carried its burden to show that it satisfied its duty to provide a reasonable accommodation. The court rested this decision on the suggestion by the director of records, who had the authority to change employees' schedules, to switch the plaintiff to the third watch on Sundays: "As Porter sought to attend church services on Sunday mornings, this change in Porter's schedule would have eliminated the conflict between her work schedule and her religious practice, and there is no evidence that this change would have impacted Porter's pay or benefits in any way." The fact that this offered accommodation was different than the one plaintiff wanted (to be off all day on Sundays) did not matter. Citing case law, the court stated: "[A] 'reasonable accommodation' of an employee's religious practices is 'one that eliminates the conflict between employment requirements and religious practices.' … It need not be the employee's preferred accommodation or the accommodation most beneficial to the employee … Accordingly, '[o]nce the employer has offered an alternative that reasonably accommodates the employee's religious needs … the statutory inquiry is at an end.'"

Employers that are faced with a legitimate request for a religious accommodation should bear in mind that it is not necessary to grant the particular accommodation suggested by the employee, if a different accommodation would be more convenient for the employer and still solve the problem identified by the employee. However, it should be noted that the employer's accommodation will not be "reasonable" if it fails to address all of the plaintiff's demonstrated religious needs. Thus, if the plaintiff in this case had established a need to attend church throughout the day, or for some other religious reason not to work at all on Sunday, the city's suggestion of switching her watch to later in the day might have been insufficient. See *Baker v. The Home Depot*, 445 F.3d 541 (2d Cir. 2006) (shift change allowing the plaintiff to attend services on Sunday insufficient because the plaintiff's religious belief forbade all work on Sunday).

Employers Need Not Give Pregnant Workers Preferential Treatment

Young v. United Parcel Service, Inc., 2013 U.S. App. LEXIS 530 (4th Cir. 2013)

In this case, the Fourth Circuit analyzed the Pregnancy Discrimination Act and held that pregnant employees are not entitled to special treatment.

The plaintiff was a delivery driver for UPS when she became pregnant. Her doctor recommended a lifting restriction of 20 pounds during the pregnancy. UPS had three relevant policies: all drivers had to be able to lift packages weighing up to 70 pounds; employees unable to perform their normal work assignments due to an on-the-job injury were to be given light duty work; and drivers who lost their DOT certification were to be given non-driving duties. Due to the plaintiff's lifting restriction, UPS would not permit her to work — even on light duty — during her pregnancy. She did return to work at UPS after she gave birth.

The plaintiff filed suit alleging discrimination on the basis of her pregnancy in violation

of the Pregnancy Discrimination Act. The PDA, passed in 1978, added pregnancy-related discrimination to Title VII's general prohibition of sex discrimination. The PDA provides that an employer cannot discriminate "because of or on the basis of pregnancy, childbirth, or related medical conditions" and "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work."

The issue in the case was whether the PDA obligates employers to give special treatment to pregnant workers, or whether it just requires employers to not treat pregnant workers any differently than non-pregnant workers. The plaintiff urged the court to adopt the former interpretation, but the court determined that the purpose of the PDA is the latter, because to find otherwise would be to transform an anti-discrimination statute into a requirement to accommodate pregnant employees, perhaps even at the expense of other, non-pregnant employees. According to the court, interpreting the PDA as the plaintiff urged would require UPS to offer light duty work to employees whose lifting restrictions arise from (off-the-job) pregnancy while denying light duty work to employees who cannot lift because of off-the-job injuries or illnesses. This is not the intent of the PDA, said the court. UPS' policies of providing light duty positions to those sustaining injuries at work and providing non-driving positions to those who lose their DOT certification are pregnancy-blind policies. Summary judgment for UPS was therefore proper.

The Intersection Between Military Service and Employment Discrimination Claims

Murphy v. Radnor Twp., 2012 U.S. Dist. LEXIS 158713 (E.D.Pa. Nov. 6, 2012)

The issue before the court in *Murphy* was whether a township in Pennsylvania improperly discriminated against a potential employee based upon his military service in violation of the Uniform Services Employment and Reemployment Act (USERRA). The plaintiff, John J. Murphy, was an active reserve member of the Air Force, holding the rank of major at the time he applied for the position of township manager. Murphy was one of six individuals who was invited by Radnor Township to interview for the position. During the course of Murphy's interview, a portion of the interviewers appeared to become concerned with the amount of time Murphy would spend performing his military duties. After the interview, Murphy contends he was told the township commissioners who oversaw the interview process "had serious concerns about [Murphy's] ongoing military obligations." Ultimately, another candidate was given the position of township manager.

Murphy subsequently filed an employment discrimination claim against Radnor Township alleging it improperly chose not to hire Murphy as township manager because he was an active reserve member of the military. Under USERRA, an employer, such as Radnor Township, engages in prohibited conduct "if the person's membership [in the military] is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." While Murphy's involvement in the military was a partial focus of his interview, the court concluded Radnor Township established it had a number of legitimate, nondiscriminatory, reasons for refusing to hire Murphy as township manager. These ranged from lack of qualifications to embellishing his prior work experience. As a result, the court, through a motion for summary judgment, dismissed Murphy's employment discrimination claim against Radnor Township.

The decision in *Murphy* is noteworthy for a number of reasons. First, it brings to light what, to many employers, may be a lesser known employment discrimination statute, namely USERRA. A township, or any employer for that matter, must ensure it does not discriminate against actual or potential employees based upon their involvement with the military. Second, and more to the point, the decision in *Murphy* highlights how questions raised during the interview process and a subsequent comment relating to Murphy's active military service were motivating factors for a lawsuit. While the township had legitimate reasons for not hiring Murphy unrelated to his involvement with the military, it still found itself embroiled in costly and time consuming litigation. The implementation of guidelines and training establishing how to properly conduct an interview likely would have gone a long way towards avoiding a lawsuit in the first instance.

STATE COURT DECISIONS

Freedom of Information Law (FOIL) Request Denied if Disclosure Would Endanger Life and Safety of Witnesses

Bellamy v. New York City Police Department, 87 A.D.3d 874, 930 N.Y.S.2d 178 (1st Dept. 2011); affirmed N.Y.3d, 2013 Slip.Op. (Decided February 13, 2013)

The petitioner was convicted of murder of a New York City parole officer. Prior to the conviction, the petitioner made admissions to the police regarding his presence with others during the planning of the murder. In order to obtain a new trial following the conviction, the petitioner sought un-

redacted copies of all statements given to the police. The New York City Police Department opposed the FOIL request for the reason that disclosure would reveal names of witnesses.

The lower court ordered the NYCPD to comply with the FOIL request. On appeal, the First Department reversed the order and held that the public interest privilege would preclude disclosure of the file, for safety of the witnesses. On further appeal, the Court of Appeals has affirmed the First Department's decision and held that the First Department did not abuse its discretion in denying the FOIL request.

School Bus Driver's Failed Drug Test May Not Be Used for Termination if School Does Not Have Zero Tolerance Policy

In the Matter of the Arbitration Between Shenendehowa Central School District Board of Educaion v. Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 864, et al., 90 A.D.3d 1114; 934 N.Y.S.2d 540 (3rd Dept., Dec. 2011); aff'd, N.Y.3d 2013 Slip.Op. (Decided February 13, 2013)

A school bus driver, in her 10th year of employment, failed a drug test by testing positive for marijuana. The district terminated her employment and, as a result, the union filed a grievance on her behalf. Pursuant to the collective bargaining agreement, the matter was arbitrated. The arbitrator held that the district violated the collective bargaining agreement by terminating the bus driver and found that the "penalty of discharge was too severe." The district, thereafter, commenced an Article 75 proceeding and the matter was presented to the Third Department. The Third Department held that the arbitrator's decision did not exceed a specific limitation on his power, and the decision was not irrational. The Court of Appeals also affirmed, indicating that although reasonable minds may not agree with the outcome, there is no legal basis to vacate the award.

RECENT VICTORIES

Jury Verdict for Town in Sanitation Truck Accident Case

Brian McElhenny successfully defended a Long Island town by receiving a favorable jury verdict in Suffolk County. The town was sued by a college student who alleged that a town sanitation truck struck the rear passenger side of his vehicle, thereby causing him to sustain a fracture to his left leg. The evidence presented established that the town garbage truck was backing up from a side street and a traffic stop sign controlled at that intersection. The plaintiff alleged that he had the right of way, and the garbage workers alleged that the plaintiff was speeding up to the point that he approached the truck. The workers, who were on the back of the truck at the time, testified that there was no traffic and the plaintiff could have avoided the truck. After hearing the evidence, the jury rendered a verdict in favor of the defendant town, finding that the plaintiff was completely liable for the accident.

Public Insurer Successfully Defended in Compensation Claim

Brian McElhenny also successfully defended a provider of workers' compsensation for public employers in a supplementary uninsured/underinsured motorist (SUM) arbitration instituted by an injured police officer. In this matter, the claimant sought additional compensation from the SUM coverage applicable to him in this matter as a result of injuries sustained while responding to a call for assistance. The claimant, Gagnon, while on duty as a police officer, was operating a patrol car and was struck by a van making a U-turn. He complained of neck, shoulder, and knee pain; received a course of treatment; and was ultimately submitted to arthroscopic surgery to his shoulder. His pain continued and he was again subjected to surgery by undergoing joint reconstruction. Continued pain also resulted in steroid injections after both surgeries. The claimant claimed that as a result of continued pain, he was forced to retire.

The claimant instituted an action against the van driver and settled for $293,000. After settlement, it was agreed that there was $1 million in SUM coverage applicable to this underinsured claimant. The matter was presented to an arbitrator through the New York SUM Arbitration Tribunal. After presenting numerous medical exhibits and hearing testimony of the claimant, the tribunal held that the $293,000 was adequate compensation and the SUM coverage would not come into play. It was found that he would have retired based upon his age, and the medicals did not substantiate any permanent incapacity to engage in the performance of his duties.

Goldberg Segalla Helps City Return Police Officer to Work

Matthew C. Van Vessem obtained a favorable determination for a city with regard to a police officer on General Municipal Law Section 207-c status. Matt convinced an arbitrator to return an officer to work who had been off the job for several years. This victory for the city was the most recent in a series of favorable decisions rendered during the year which saw Goldberg Segalla help the city return at least 10 officers to work who had been out of work for an extended period under the General Municipal Law.

Deficiencies Found to Be Beyond Municipality's Control

Christopher Kendric obtained a favorable decision on behalf of a Long Island town and its Department of Planning and Development from the Eastern District of New York. This matter involved a lawsuit filed by a purchaser of a home that was found to have a number of structural deficiencies. The alleged deficiencies were discovered after a heavy rain resulting in substantial flooding to the home. These deficiencies resulted in a number of building code violations and subsequent loss of the value of the purchase price of the home. The plaintiff claimed that this action involved evidence of "greed, avarice, a builder's incompetence, and deliberate conduct of a town that enabled it all to happen." The town believed this matter was nothing more than "buyer's remorse."

After lengthy motion practice, the court dismissed all claims except for the 28 U.S.C. §1983 claim brought against the town, the planning department, and its employees. More specifically, the plaintiff alleged that once the building deficiencies were discovered, the town issued numerous building code violations. The plaintiff was called into court on numerous occasions and missed court on at least three occasions, resulting in arrest warrants. The plaintiff alleged that the court appearances and warrants were in retaliation for her threatening legal action against the town.

With respect to the claims against the town, the 1983 claims were based on theories of "selective enforcement" and "class of one equal protection." Regarding the selective enforcement claim, the court held that since there was no evidence that the town was aware of any building code violations attributable to the prior homeowners, the selective enforcement code theory cannot succeed. The "class of one" theory was also dismissed. This theory exists where a plaintiff alleges that he or she has been treated differently from others similarly situated and there is no rational basis for the treatment. Since the plaintiff could not establish differential treatment in the selective enforcement claim, the court held that the "class of one" claim must also fail. The plaintiff also attempted to seek a 1983 action based on a substantive due process claim. Again, the court found no basis for this claim. The court held that the plaintiff would have to establish conduct that is "conscience shocking" or "oppressive in the constitutional sense." The plaintiff had failed to establish that. The court also found that the plaintiff failed to establish any further violation of any protected constitutional rights of the defendant town, its planning department, and its employees.

This case is a clear example of how a municipality must continue to fight frivolous claims brought by taxpayers based upon complaints beyond a municipality's control. Chris Kendric was able to convince the Federal court, through extensive litigation and motion practice, as to the Town's position that it would fight to the end to avoid a judgment stemming from a baseless claim.

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Goldberg Segalla's Municipal and Governmental Liability Practice Group has worked as counsel to a number of municipalities throughout New York, Pennsylvania, New Jersey, and Connecticut. We have the skills to guide municipalities in the full compliance of the applicable codes and laws of each state, and we have successfully defended the municipalities (including school districts) in all claims stemming from alleged violations of the codes/statutes. Our dedication to representing municipal clients involves our willingness to vigorously defend as well as prosecute any lawsuit or appeal that the municipality may face. We are able to negotiate contracts for municipalities, assist in public works projects, counsel clients on labor relations, and provide training for municipal governments for compliance with state and local human rights laws. In addition, our lawyers have presented many training seminars to municipal groups and school districts in a wide variety of areas, such as employment. We have also worked with municipal governments' insurance carriers to satisfy the carrier's required compliance with training procedures.

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