the material was libelous, obscene, or unlawful; advertised products or services for sale; endorsed a candidate for public office; promoted alcohol, tobacco, drugs, or other illegal activity; or was likely to cause substantial disruption at the school. If approved, the material could be distributed either in front of the administrative offices or at a table in a corner of the cafeteria. The plaintiffs amended their complaint to include the new policy. The District argued that plaintiffs were not entitled to a permanent injunction because adoption of the new policy made the challenge to the past practice of Bible distribution moot. The district court applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and concluded that the new policy violated the Establishment Clause because its purpose was "the promotion of Christianity" and its primary effect was "advancing religion by conveying a message of endorsement to elementary school children."

The U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the district court granting a permanent injunction, but reversed the district court's grant of a declaratory judgment. The declaratory judgment – that plaintiffs "shall have judgment against defendants ... on plaintiffs' complaint" was improper because the precise import of the declaratory judgment was "hopelessly obscure. Given its impact on the operations of a state governmental entity, this ambiguity alone require[d] reversal." Second, a declaratory judgment prohibiting implementation of the policy was both unnecessary and inappropriate, as the policy had never been implemented and was "constitutionally permissible in a host of other applications." Turning to the injunction, the court addressed the District's argument that the permanent injunction "impermissibly mandate[d] a content-based restriction on speech in the limited public forum created by the content-neutral [new] policy." The injunction was based on a judicial determination that the District had impermissibly endorsed a particular religion and its scope was facially reasonable. More specifically, it did not address the new policy or prescribe how the District could distribute other materials to students, and left open the possibility that the District might, in a neutral manner, facilitate Bible distribution by private parties, such as the distribution of flyers advertising off-campus or after-school distributions. *Roark v. South Iron R-1 School District*, 573 F. 3d 556 (8th Cir. 2009).

Litigation and Liability
Evidence of "Suicide by Cop"

Boyd was shot and killed by Officer Paine of the San Francisco Police Department after Boyd had attempted two separate kidnappings earlier that day. One of the victims called police and a high-speed chase of Boyd ensued. During the chase, Boyd fired at the pursuing officers. When Boyd pulled over, officers surrounded his car and ordered him to get out with his hands over his head and lie on the ground. Witnesses testified that Boyd put his hands up, walked towards the officers, then returned to his car. When Paine realized Boyd was reaching back into his vehicle with both hands, he fired three times, fatally wounding Boyd. Two weeks previously, police had stopped Boyd and found his rap lyrics, which advocated the murder of police officers; three days before the shooting, Boyd had been apprehended for reckless driving and struggled with the arresting officers, repeatedly screaming at them "kill me," and calling them "filthy white racists." The Boyd family sued San Francisco, alleging the police used excessive and deadly force. In its defense, the municipality relied on the expert testimony of Dr. Emily Keram, a forensic psychiatrist, who concluded that Boyd had been attempting "suicide by cop" – that he had purposefully drawn the police officers' fire to accomplish this result. The plaintiffs objected to the admission this testimony and to other evidence regarding Boyd's past (prior lawsuits filed by him or by his mother on his behalf against law enforcement agencies, evidence of his prior arrests, evidence of the rap music lyrics, and evidence that he was on drugs at the time of the shooting). After trial, a jury ruled in favor of the defendants and the plaintiffs appealed, arguing that the district court abused its discretion in allowing the admission of improper evidence at trial.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. As Officer Paine did not know the evidence of Boyd's past prior to shooting Boyd, the only issue in front of the jury was whether Paine's actions were reasonable based on his perspective at the time. "Under the relevancy analysis prescribed by the Federal Rules, all of [this] challenged evidence was properly admitted, since it had a tendency to make a fact of consequence more or less probable. … police assertions that [Boyd] was acting erratically, taunting police and goading them to shoot him instead of following police commands, is made more probable by [Boyd's] earlier statements to Oakland police, as well as evidence that he was on drugs at the time." His alleged resistance to the police was "also made more probable by evidence, in the form of expert testimony, that his actions were consistent with an attempt to commit suicide by cop." Addressing the expert testimony in light of Federal Rule of Evidence 702, the court below had ultimately concluded that Dr. Keram's testimony was based on a reliable foundation and was relevant to the issues before the court. The "suicide by cop" theory was supported by numerous studies and "Dr. Keram was careful to tie her conclusions in this case to the literature on suicide by cop, noting recognized factors or connections supporting her opinion." The plaintiffs did not dispute the existence of articles in support of the theory or present evidence, outside of their own assertions, that the theory was unreliable. With the exception of part of its ruling on the rap lyrics, the district court did not abuse its discretion in admitting the evidence or Dr. Keram's testimony. *Boyd v. City and County of San Francisco*, No. 07-16993, 2009 WL 2413794 (9th Cir. August 07, 2009).

Personnel and Employment
Employment Discrimination

Hobbs, an African-American woman, had worked for the City of Chicago since 1989 as a "Motor Truck Driver" in the City's Department of Transportation (DOT). In 2000, she was given new responsibilities as a lot supervisor, being

the only African-American woman holding that position. However, her title remained unchanged and she was never paid as a foreman despite performing a foreman's job duties. In 1997 and 2000, Hobbs applied and interviewed for the foreman position, but both times a white male received the job, and in 2004, another white male, Q., was promoted to an acting foreman position (this was not posted as a job opening as the City did not consider this to be a permanent vacancy). In 2005, Hobbs filed a charge of discrimination against the DOT with the Equal Employment Opportunity Commission (EEOC), alleging the City denied her a promotion to the foreman position because of her race and gender. She alleged that shortly thereafter, Q. and other City employees began a campaign of disciplinary enforcement against her for infractions that were ignored in the case of other employees; her car was vandalized; and she was assigned work duties to humiliate her. She sued, alleging race and gender discrimination and retaliation claims in violation of 42 U.S.C. § 1981 against the City and her coworkers; race and gender discrimination and retaliation in violation of Title VII against the City; a hostile work environment claim against the City; and equal protection claims against all defendants pursuant to 42 U.S.C. § 1983. The district court granted the City's motion to dismiss the Section 1981 race and retaliation claims, and the Section 1983 claim against the City. Hobbs appealed.

The U.S. Court of Appeals for the Seventh Circuit affirmed. The district court properly granted summary judgment on Hobbs's Title VII and Section 1981 claims, as on the indirect, burden-shifting method in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the position was not given to someone outside the protected class who was similarly or less qualified than Hobbs. The acting foreman, Q., had at least two more years experience than Hobbs as a motor truck driver; unlike Hobbs, he had experience with the City's snow program; and, although he did not have Hobbs's college education and computer skills, these were not part of the job qualifications for an acting foreman. Even if Hobbs could show a prima facie case of discrimination, the City offered nondiscriminatory reasons for promoting Q., which Hobbs failed to show were pretextual. Although the process used in promoting Q. may have been "questionable," there was no evidence it was motivated by a racial or sexist animus. Hobbs further argued that she proved, through the direct method, that the City took adverse actions against her in retaliation for her discrimination complaints with the EEOC. This the court rejected on the basis that Hobbs failed to show a materially adverse action taken by her employer, or that there was a causal connection between the complaint and any adverse actions. The commissioner who disciplined her did not know that Hobbs had filed an EEOC charge; the assignments she was given were clearly within her job duties; and "[Q's] elevation – not Hobbs's complaints – was the reason her responsibilities changed." The mere fact that the vandalism occurred after the EEOC charge and the same day that Hobbs received notification of a disciplinary action was not enough to survive summary judgment. The hostile work environment claim also failed, as the facts did not rise to the level of the "severe or pervasive" threshold – the alleged vandalism and the failure to investigate it was "disgraceful, but that one act alone [was] not egregious enough to create a hostile work environment." *Hobbs v. City of Chicago*, 573 F.3d 454 (7th Cir. 2009).

Employee Speech Rights – Police

"[W]hen working for the government, saying one's boss is a bully does not necessarily a constitutional case make." Desrochers and Lowes were police sergeants with the San Bernardino Police Department. In 2006, Desrochers was transferred from the Homicide Unit to the Robbery Unit, an action he viewed as a demotion. Lowes was the subject of an internal affairs investigation pertaining to an April 2006 arrest, following which he received a two-week suspension. They claimed that the reason for these employment actions was actually based in grievances that they had made in 2006 respecting their supervisor, Lieutenant K., arising out of ongoing problems that they felt had a negative effect on the department's efficiency and morale. In the initial grievance, they asked the department to, among other things, remove K. from command of their unit and formally investigate the charges in their grievance. K. asked for and received a transfer after learning of the grievance, but the officers felt this was inadequate to address their issues and brought a formal complaint, again indicating that K's management style was destroying morale and created a "hostile work environment," reflected badly on the department, and impeded operating efficiency. When this grievance was denied, Desrochers and Lowes filed a complaint with the City's human resources department, and claimed retaliation at the hands of K's replacement. They alleged that their transfer and suspension were retaliation for engaging in speech protected by the First Amendment. The police department, however, stated that the actions were due to Desrochers botching a murder investigation and Lowes disobeying orders and endangering a suspect in custody. Ultimately, both officers brought a 42 U.S.C. § 1983 lawsuit. The district court granted summary judgment for the defendants after concluding that the plaintiffs' complaints did not address matters of public concern.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, in a decision limited to whether the plaintiffs spoke on a matter of public, as opposed to personal, concern. To address a matter of public concern, the content of the officers' speech had to involve "issues about which information [was] needed or appropriate to enable the members of society to make informed decisions about the operation of their government." Citing *Johnson v. Multnomah*, 48 F.3d 420, 425 (9th Cir. 1995), the court noted that, in "a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest or to co-workers rather than to the press may lead the court to conclude that the statement does not substantially involve a matter of public concern." In this case, the fact that the speech contained references

continued on page 39