

2014 Annual Conference

Personnel Section Meeting
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What's New in Employee Discipline & Termination? Selected Positions & Issues

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Employee Discipline

What's New in Employee Discipline & Termination?
Selected Positions & Issues

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The Personnel Section Meeting at the 2014 IMLA Annual Conference looks at local government employee discipline and termination with respect to selected positions and issues. Ashley Ubrecht, Assistant City Attorney, Carmel, Indiana, will offer comments and guidance relating to discipline and termination issues involving police department personnel. This paper comments on several issues raised in some recently reported cases or which recently arose in practice.

Law Enforcement – Untruthful Comments – Elected Official Speech Rights

***Swetlik v. Crawford, et al.,* (7th Cir. December 23, 2013)** Swetlik, a police detective in Manitowoc, Wisconsin, sued the City, its mayor, and members of its Common Council, alleging that they violated his First Amendment rights by voting to file termination charges against him with the City Police and Fire Commission (Commission).

The defendants voted after an outside investigation recommended Swetlik's termination based on its finding that he had been untruthful in statements about the police chief. Swetlik argues that the charges actually were in retaliation for his public criticism of the chief, which he made in his capacity as a union member supporting the union's demands for the chief's resignation.

The Commission later dismissed the charges against Swetlik and he was reinstated after a period of paid administrative leave. In the end, it was actually the chief who lost his job. The district court granted summary judgment for the defendants, finding that Swetlik's statements were not protected speech because they did not address a matter of public concern and, alternatively, that the defendants were justified in bringing the charges against him based on the recommendation of the investigation. The Circuit Court agreed on the second ground and affirmed on that basis.

The facts are quite involved, essentially involving a misunderstanding of the chief's instructions to Swetlik in a phone call which he interpreted as instructing him to lie to Sheriff's deputies and threatening him if he did not. A recording of the call showed this was not the case. Nonetheless, Swetlik clung to the allegation that the chief instructed him to lie despite clear and convincing evidence to the contrary contained on the recording. The police union joined in the "chorus" of protest against the chief.

A law firm brought in to investigate presented their report and recommendations to the Common Council which eventually voted to bring formal charges before the Commission. Two aldermen did not agree to file any charges, though they had initially voted in favor. One characterized the charges as frivolous and a witch hunt (clarifying that he meant, by this reference, the concerns brought to the Common Council by the union members which were the main focus of the investigation). The other thought the charges were ridiculous.

After the Common Council voted to pursue the charges, Swetlik was placed on paid leave pending the outcome. Swetlik's case was presented to a Commission hearing officer who recommended dismissal of the charges. He concluded that the chief's statements to Swetlik during the telephone conversation could have been interpreted as instructing him to tell the jailers, not the suspect, that police had additional questions for the suspect even though they did not. The hearing officer also concluded that the chief's statements could have been perceived as threatening. Swetlik was reinstated when the Commission adopted the hearing officer's conclusions. Swetlik sued the mayor and the individual Common Council members who voted to bring the charges. He claimed they retaliated against him in violation of the First Amendment by bringing charges against him for his complaints about the chief, which were protected speech because he raised them as part of his union activities. The district court granted summary judgment for the defendants, and Swetlik appealed.

The court reviewed the defendants' claim of absolute prosecutorial immunity, which was rejected as inapplicable to this civil employment matter. (Review omitted here.)

As to the First Amendment retaliation claim, the court reviewed *Pickering's* basic component test: (1) employee made the speech as a private citizen, (2) the speech addressed a matter of public concern, and (3) employee's interest in expressing that speech was not outweighed by the state's interests as an employer in promoting effective and efficient public service.

Defendants argued first that Swetlik did not speak as a private citizen as his comments were made pursuant to his official duties and therefore were not protected by the First Amendment, under G*arcetti* (full cite omitted). According to defendants, because Swetlik was claiming the chief had violated department policy by ordering him to lie to the jailers, Swetlik was required to report the telephone call to his superiors. On this theory, when Swetlik gave his version of the call to the deputy chief and to the investigators, he acted pursuant to his official duties.

If the only basis for the defendants' taking action against Swetlik were statements he had made as part of his official duties, *Garcetti* would indeed bar the claim, and the court assumed for purposes of argument that the defense theory would apply to Swetlik's statements to the deputy chief and investigators.

But Swetlik also offered evidence that defendants acted on the basis of his other statements on the matter, including the grievances that the union presented to the Common Council and the Commission. Those statements were made in his capacity as a union member, not as part of his official duties as a police detective. Under Circuit precedent, *Garcetti* did not deprive his statements at the union meeting and in the list of grievances of First Amendment protection.

The district court had not decided if *Garcetti* applied, as it found that Swetlik's speech did not address a matter of public concern. Disagreeing, the Circuit Court said Swetlik's allegations about the chief implicated his effectiveness and integrity specifically with regard to his handling of police procedures, such as transporting and booking.

Swetlik's accusation was not purely personal or vindicating only a personal interest. The claim that the chief directed an officer to lie to other agencies was a serious accusation that implicated the chief's integrity and ability to fulfill his duties as the head of the police department.

Moreover, Swetlik raised the concern along with the other concerns raised by union members to bring public attention to the problems they perceived in the department, which they did by bringing the grievances to the mayor, the Common Council, and the Commission. Swetlik's speech was a matter of public concern in at least some of the contexts in which it was raised, so summary judgment could not be affirmed on that basis.

Although for purposes of summary judgment Swetlik's statements were made as a citizen and addressed a matter of public concern, the third prong applies the familiar balancing test assessing the employee's interest in making the speech against the employer's interest in promoting the efficiency of the public services it performs through its employees. P*ickering* suggested that an employee's statements may fail the test and not warrant protection if they were false and made with knowing or reckless disregard for the truth.

Whether an employee recklessly disregarded the truth in making a statement will often present a disputed factual issue. An employer cannot avoid liability for First Amendment retaliation simply by asserting that an employee's otherwise protected speech was false or was made recklessly. But an employer may defeat a First Amendment retaliation claim if "supervisors reasonably believed, after an adequate investigation, that [the employee's] testimony was false, even if it actually was true."

The defendants are not entitled to summary judgment because a reasonable jury would not be required to find that Swetlik's statements were deliberate lies or were made with reckless disregard for the truth. The Commission's hearing officer found that Swetlik could have been stating his own reasonable

interpretation of the Chief's statements rather than lying. That is a plausible reading of the evidence, even if it is not the strongest reading. Thus, the Court had to determine whether the defendants voted to bring termination charges against Swetlik because they genuinely and reasonably believed, based on an adequate investigation, that Swetlik had lied about his telephone conversation. If so, they were justified in bringing the termination charges.

To show that the defendants did not believe he had lied but instead voted for the termination charges to silence his legitimate complaints about the chief, Swetlik relies heavily on the chief's private attorney's statements that the purpose of the investigation was to quell the union's complaints about the chief. But Swetlik presented no evidence that the private attorney caused any improper bias on the part of the investigators or that the defendants shared his views. The fact that the investigation recommended the termination of the chief himself undermines the claim that its secret purpose was to protect the chief.

The Court then reviewed arguments as to the mayor, the dissenting aldermen, and found a jury could not find that the defendants' belief that he had lied was unreasonable and concluded undisputed evidence thus showed that the defendants were justified in bringing termination charges against Swetlik on the basis of the investigation report. His First Amendment claim therefore failed.

A concurring opinion wondered why the officer, not the chief had brought suit; and raised the interesting point that elected officials have a constitutional right to speak and petition, just as an employee possesses such rights.

Elected officials often express opinions about who should work for the government. Views about how best to run the government are not confined to editorial writers or politicians seeking office; those already in office also have opinions and may have extra knowledge on which to base them. If each elected official has a right to express an opinion, then defendants no less than Swetlik are protected by the First Amendment from penalties for their speech.

Law Enforcement – Untruthful Comments in Internal Investigations

Two situations arose recently in representing local governments in New Hampshire. Because they did not result in reported judicial decisions, identity of the parties cannot be disclosed and factual descriptions here are brief and somewhat altered to avoid improper disclosure of client information. Neither of these cases claimed violations of protected speech, but involved claims of officer statements found to be untrue. New Hampshire statutes require just cause and a pre-termination hearing for permanent, full-time officers.

[Parenthetically, and solely for possible ironic value, the New Hampshire Supreme Court earlier this year overturned a state Division of Motor Vehicle denial of a vanity license plate on the basis that the DMV had not articulated

sufficiently clear criteria on which to make a decision. The plate in question would have read "COPS LIE."]

1. The Brief 10-Second Lie. A police department was investigating the theft of a department store gift card. The primary investigating officer (Doe) showed another officer (Smith) a surveillance video of a transaction involving the stolen card. Smith recognized the individual in the video as a friend and commented that the friend had obtained the card at a local business that sold gift cards at a discount. Officer Doe said he'd call the business to check on that. Smith immediately recanted, saying that he, in fact, had purchased the card not from the business but from a confidential informant. He claimed he had been assured that the card was not stolen but had been obtained from an acquaintance who got it as a present and just needed some quick cash for an emergency.

Doe reported the incident to the Chief who turned it over to an internal affairs investigation. Upon receipt of the IA report, the Chief recommended termination to the governing board. During the pre-termination hearing, the Board reviewed the investigation, Smith's exemplary record as an officer, and several discrepancies and seeming shortcomings in the internal investigation. Naturally, the Police Department had standard operating procedures (SOPs) that barred deception and lying.

One might ask, at this point, was termination justified?

2. The Lost (or Misplaced) Badge and the Cover-Up. Another matter involved an officer who either lost or misplaced his badge (identifying him as a detective). The office also was the Department's evidence officer. The personnel matter arose after someone noticed he was sporting a patrol officer's badge, not his detective badge. When he admitted he could not find his detective "shield," an internal investigation was opened. During interviews, the officer appeared vague and evasive about the circumstances under which the badge was lost or misplaced – so much so that a lie detector test was requested. The results were interpreted to indicate a strong possibility of deception.

Again, in this matter, SOPs clearly prohibited lying (as well as proper care and custody of his badge), so the Chief, based on the IA report, recommended termination, adding that the loss of department property and the failure to timely report the loss was particularly meaningful for the evidence custodial officer.

Again, one can ask, "Is termination justified?"

Law Enforcement - Free Speech - Scope of Duty

Durham v. Jones, __F. 3d__, No. 12-2303 (4th Cir., Dec. 10, 2013). Durham, a veteran deputy sheriff used pepper spray and physical force to subdue a motorcyclist fleeing from a fellow law enforcement officer. The deputy duly prepared his report of the incident and submitted the report to his superiors, who

in turn passed it along to their superiors. Fearing that a possible lawsuit against the Sheriff's Office might result from the deputy's statements, superior officers authorized detectives to interrogate him aggressively, while ordering him to revise his incident report. The deputy opposed this order as factually and legally unwarranted.

After one session with a supervisor, he did revise the report, but then filed an internal grievance. On the same day he was demoted, and later suspended. The county responded to the grievance by saying it would be investigated by, essentially, those in the Sheriff's office who had previously been involved.

In response, Durham sent a set of documents outlining the events to: (1) the Somerset County State's Attorney, (2) the Governor, (3) the Police Academy where he had been trained, (4) the Maryland Police Training Commission, (5) the Maryland State Police, and (6) a number of media outlets.

Durham was charged with violating department rules and had a hearing before a "trial board" which acquitted him of all charges except two relating to unauthorized dissemination of information. It recommended ten days' suspension. The sheriff wanted a longer suspension and eventually terminated Durham's employment. Durham sued the sheriff in his personal capacity who then claimed qualified immunity. [Claims against others are not reviewed here.]

There was no doubt that Durham's speech was a causal factor, so the only prongs of traditional analysis were whether his speech concerned a matter of public concern and whether it outweighed the government's interest in managing the workplace. As to the former, the Court described Durham as publicizing the materials in connection with his overarching allegations of serious and pervasive law enforcement misconduct in the sheriff's office, not to air his internal grievance. As to the latter prong, the court listed nine factors (identified in a prior case) for assessing impact on the workplace, including whether the speech:

> (1) impaired the maintenance of discipline by supervisors, (2) impaired harmony among coworkers, (3) damaged close personal relationships, (4) impeded the performance of the public employee's duties, (5) interfered with the operation of the institution, (6) undermined the mission of the institution, (7) was communicated to the public or to coworkers in private, (8) conflicted with the responsibilities of the employee within the institution, and (9) abused the authority and public accountability that the employee's role entailed.

The court had little difficulty concluding that the law was sufficiently clear.

Employment Termination Claim Premised, *inter alia*, on Free Speech - Sovereign Immunity

Board of Trustees of University of Arkansas v. Burcham*, 2014 Ark. 61 (2014*). Burcham filed an amended complaint against the University and others, claiming that he was wrongfully terminated in violation of public policy, his due-process rights, and his First Amendment rights. The University filed an amended motion to dismiss arguing, among other things, that it had sovereign immunity. The lower court denied the motion, ruling that Burcham's allegations that the University failed to follow a grievance procedure outlined in the employee handbook was sufficient to waive sovereign immunity. The University appealed.

The University contended that none of the limited waivers of immunity asserted by Burcham applied, so that the University's act of firing him without following its grievance policy was *ultra vires*, wanton, capricious, in bad faith, injurious, and arbitrary, allowing him to proceed with a claim against the State.

The Supreme Court noted it had held that sovereign immunity is jurisdictional immunity from suit and arises from article 5, § 20 of the Arkansas Constitution, which provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." It had sovereign immunity to include state agencies, including the board of trustees of a state university.

The court had recognized three ways in which a claim of sovereign immunity may be surmounted: (1) where the state is the moving party seeking specific relief, (2) where an act of the legislature has created a specific waiver of sovereign immunity, and (3) where the state agency is acting illegally or if a state-agency officer refuses to do a purely ministerial action required by statute.. Additionally, "a state agency may be enjoined if it can be shown (1) that the pending action of the agency is *ultra vires* or without the authority of the agency, or (2) that the agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner." But, these exceptions apply only to injunctive relief not damages. The amended complaint did include a request to "enjoin Defendants as specified in this Complaint," but the complaint was devoid of anything relevant to injunctive relief.

Termination Claimed to Violate First and Fourteenth Amendments – Qualified Immunity

Carney v. Miller, 842 NW 2d 782 (NE, 2014). A nurse formerly employed by the State of Nebraska sued a supervisor who terminated her employment, alleging violations of the 1st and 14th Amendments. The supervisor claimed qualified immunity and appealed from the district court's denial of her motion for summary judgment.

In June 2002, Carney began her employment as a "Community Health Nurse III" with Every Woman Matters, a program of the Department of Health and Human Services (DHHS). Her job duties included initiating a Medicaid treatment application upon receipt of documentation of a qualifying diagnosis from a physician, verifying that a potential recipient met the eligibility requirements

under program policies and protocols, and ensuring that all necessary documentation was obtained before applications were submitted to Medicaid.

In 2004, Miller became a deputy director at DHHS. At all relevant times, Miller was either Carney's second- or third-line supervisor. Leypoldt was Carney's immediate supervisor from 2002 until 2006, and Leypoldt's immediate supervisor was Ward. Miller was Ward's immediate supervisor.

Over the course of several years, Carney, Miller and Leypoldt interacted over program operations, including Carney informing Miller of various alleged improprieties by Leypoldt. In February 2006, Leypoldt placed Carney on investigatory suspension with pay. According to the suspension letter, Leypoldt was concerned about Carney's judgment in approving claims for payment of medical expenses. Carney filed a grievance regarding the suspension, with the hearing officer ultimately finding, among other things, that DHHS had properly applied the provisions of the labor contract with regard to Carney's investigatory suspension and had acted in good faith and not exceeded its authority in suspending Carney.

Later Carney was served with a "Written Notice of Allegations," stating that Carney failed to consistently follow program protocols for assessing and certifying individuals for Medicaid, she inappropriately extended eligibility for Medicaid benefits without the proper documentation to make an informed decision, she used her state e-mail for personal reasons, and she used her state computer and Internet access for purposes unrelated to her work. Leypoldt noted on the document that "Carney refused to sign stating[,] 'This is retaliation.'"

Carney filed a charge of discrimination with the Nebraska Equal Opportunity Commission (NEOC) alleging retaliation, discrimination based on disability, and whistleblower violations. She claimed that beginning in approximately 2003, she made multiple requests to work from home as an accommodation due to her disability and the disability of her husband. Carney also stated that Leypoldt asked her to violate "Nebraska Code 469," that Carney refused, that Carney reported Leypoldt to Medicaid, and that Carney was "written up" by Leypoldt as a result. Carney further stated that she reported Leypoldt's use of money to Nebraska's Auditor of Public Accounts in March 2006 and reported Leypoldt's overruling of doctors' decisions about cancer treatment to Nebraska's Board of Nursing in approximately April.

Two months later, a notice of discipline was issued to Carney based on her failure to consistently follow program protocols for assessing and certifying clients for Medicaid, and other problems. The notice of discipline subjected her to a salary reduction and 6 months' probation. Carney filed a grievance, and the hearing officer found that the discipline was not based on just cause and did not represent the application of progressive discipline. The hearing officer allowed the 6-month disciplinary probation and work improvement plan to stand but ordered DHHS to

rescind the reduction in pay, return the lost pay to Carney, and substitute the discipline with a suspension of up to 5 days without pay.

A month later, Carney filed a third grievance, alleging retaliation, disrespectful treatment, and discrimination. Here, the hearing officer found that DHHS had not violated the labor contract and had not discriminated against Carney, finding that although the majority of employees are allowed to work from home, "it is management's right to approve/disapprove a request to work from home" and that "management has chosen to display close supervision of [Carney] and has denied her request to work at home based on this." Then 2006, Carney filed a second charge with the NEOC.

The list of concerns and interactions, problems, and grievances went on for years, until July 25, 2007, when Carney met with Ward, Miller, and a representative from human resources and was given her "Notice of Discipline — Termination." Miller ultimately made the decision to terminate Carney's employment.

On June 11, 2008, the NEOC found that the evidence was insufficient to support Carney's allegations of discrimination and made determinations of "no reasonable cause" on each of Carney's cases.

On July 18, 2011, Carney filed a lawsuit against Miller in Miller's individual capacity. Her amended complaint in October 28 stated that she brought the action to redress her civil rights under (1) the 1st Amendment; (2) the 14th Amendment, providing for due process and equal protection; (3) 42 U.S.C. § 1983 (2006), providing for redress of deprivation of her civil rights and providing for damages; (4) 42 U.S.C. § 1988 (2006), providing for attorney fees; and (5) the common law of Nebraska, providing for protections from any deprivation of rights. She subsequently moved to dismiss all due process claims and reserved for trial the claims involving First Amendment speech and retaliation and equal protection under the federal and state Constitutions.

Carney alleged that she spoke out on matters of public concern by opposing wrongful cancellation of services to clients and by filing grievances and claims of discrimination. She alleged that she was treated differently than similarly situated employees who had not opposed unlawful activity. Carney alleged that Miller knew at the time of Carney's termination of employment that Carney had been treated differently than other similarly situated employees who had not engaged in protected speech. Carney claimed that she had been subjected to retaliatory discipline actions because of the protected speech and that other similarly situated employees who had not engaged in protected speech were allowed to work at home, contrary to articulated policies.

Miller claimed qualified immunity as a state employee and that Carney failed to state a claim upon which relief could be granted and that some or all of the claims were barred by the statute of limitations. The district court denied her motion and

she later filed for summary judgment which also was denied, with the trial court finding that numerous material factual disputes existed, which prevented judgment as a matter of law. Miller appealed, asserting the trial court failed to conduct an appropriate qualified immunity analysis (and statute of limitations issues not reviewed here).

The appellate court first questioned whether it had jurisdiction at this point noting that interim orders may be reviewed on appeal only if it affects (1) a substantial right and determines the action and prevents a judgment, (2) a substantial right made during a special proceeding, and (3) a substantial right made on summary application in an action after a judgment is rendered. Since none of these applied here, the court considered the collateral order doctrine, an exception to the final order rule.

Under this doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment, if the denial of immunity turns on a question of law. Qualified immunity provides a shield from liability for public officials sued under § 1983 in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law. Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.

To determine whether a case presents an order reviewable under the collateral order doctrine requires a three-part inquiry:

- Whether the plaintiff has alleged the violation of a constitutional right;
- Whether that right was clearly established at the time of the alleged violation;
- Whether the evidence shows that the particular conduct alleged was a violation of the right at stake.

The Court determined that Carney's speech on the cancellation of services to clients was a matter of public concern, so it proceeded to balance her employer's interest in "promoting the efficiency of the public services it performs through its employees." Factors relevant in determining whether an employee's speech undermines the effective functioning of the public employer's enterprise are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his or her duties, or impairs working relationships with other employees. It appears that Miller did not present any specific evidence to demonstrate that Carney's speech adversely affected the efficiency of the Every Woman Matters program and substantially disrupted the work environment. [The Court then reviewed the 14th Amendment claims, not reviewed here.]

Because Carney alleged a cognizable First Amendment violation, the next step was to determine whether her free speech rights were clearly established at the time. The Court concluded that at the time of Carney's termination of employment, the law was clearly established that a public employee cannot be terminated for speaking about a matter of public concern.

The last step in the three-part inquiry into whether the collateral order doctrine applies calls for a determination of whether the evidence shows that the particular conduct alleged was a violation of the right at stake. This this inquiry could require factual determinations to the extent that evidence is in conflict.

The district court found, and the appellate court agreed, that genuine issues of fact exist. The U.S. Supreme Court has held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Here, the district court noted the existence of numerous material factual disputes. The district court's denial of Miller's motion did not turn on a purely legal question. Instead, the court's order determined that several material issues of fact existed, including whether Miller's conduct was reasonable. Such an order is not immediately appealable. Accordingly, as to Carney's First Amendment claim, we dismiss Miller's appeal for lack of jurisdiction.

Conclusion and Guidance.

- The First Amendment speech cases reviewed here demonstrate that court analysis will require fact-intensive analysis. Cavalier disregard of employee speech rights, though, will not require much in-depth review.
- Public employer supervisors, human resources personnel, and "decision-makers" need to be "schooled" in public employee speech rights
- While those responsible for public employer personnel decisions ought to develop a "thick skin" with regard to employee speech, they are not helpless to respond to speech which is not protected and also may act when speech truly does adversely impact the workplace.