which saw things differently. It found that the district court had erred by focusing on the large degree of discretion afforded to the MTTA. The Circuit Court noted it was inconsistent with both Circuit and Supreme Court precedent to find that the MTTA's rules in effect at a given time were irrelevant merely because they could later be changed. Rather, the court found that whether Brown had a protected property interest in continued access to MTTA buses depended upon whether the MTTA's rules "sufficiently constrain its own discretion to deny service in any particular instance." It found that the MTTA had enacted various rules defining the circumstances when transit could be denied. Specifically, the MTTA had stated in an affidavit that Brown's permanent ban was made "pursuant to MTTA's published and written rules against any fighting, throwing of any objects, pushing, rough or loud behavior or vulgar language and pursuant to MTTA's policy to ensure that their customers have a safe and enjoyable ride."

This gave rise to a property interest: because the MTTA had limited itself to a particular set of circumstances under which it could ban riders, the court found that "Brown has a 'legitimate claim of entitlement' to access to MTTA transportation so long as he complies with its rules and regulations, and hence, a protected property interest under the Due Process Clause of the Fourteenth Amendment." The Tenth Circuit reversed and remanded the case to the district court to evaluate the adequacy of the process afforded Brown in denying his right to future MTTA transportation.

Brown v. Eppler, No. 11-5093 (10th Cir. August 2, 2013) http://www.ca10.uscourts.gov/opinions/11/11-5093.pdf (last accessed August 26, 2013)

Volunteer Firefighters Receiving Hourly Wages Are "Employees" Under FLSA and FMLA

In a case which could increase personnel costs for some smaller local governments, the Sixth Circuit has found that purportedly volunteer firefighters who respond to calls when they choose to do so but are paid significant hourly wages for such services are actually "employees" for purposes of the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA).

Plaintiff-appellant Paul Mendel was terminated from his position as a police dispatcher for Gibraltar, Michigan (City). He sued the City for violation of his rights under the FMLA. The City responded that the FMLA does not apply where the workforce consists of fewer than 50 employees, and the City employed a workforce of only 41. Mendel argued that the City's volunteer firefighters should also be included in the employee count, which would drive the number well above the 50-person threshold.

The District Court for the Eastern District of Michigan agreed with the City and denied Mendel's claims.

On appeal, the Sixth Circuit reversed and remanded. It found that in addition to the City's 41 employees, the City had between 20 and 35 "volunteer firemen" who should be considered employees for purposes of the FMLA. The FMLA's definition of "employee" is derived from the FLSA, which defines an "employee" as "any individual employed by an employer." (29 U.S.C. §203(e)(1). The FLSA defines "employ" broadly: "to suffer or permit to work." §203(g).

The Supreme Court has repeatedly given the FLSA's definition of employment an expansive interpretation. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) the Court stated that FLSA definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Earlier the Court had held that under the FLSA "common law employee categories or employer-employee classifications under other statutes are not of controlling significance." The appropriate evaluation required an "economic reality" test, based upon "the circumstances of the whole business activity." (citations omitted).

The City had pointed to the fact that although the volunteer firefighters were paid an hourly rate, they were not required to respond to any particular emergency call. The City did not control the volunteers' hours, they did not work particular shifts or staff a station, and did not receive health insurance, sick or vacation or social security benefits. And the volunteers were required to attend many hours of firefighting training classes, without compensation.

The Circuit Court found the City's arguments unpersuasive.

First, the City clearly "suffered or permitted" the volunteers to work, fulfilling the initial element for FLSA coverage—regardless of whether the City controlled the volunteers' activities. More significant was the fact that the City paid the so-called volunteers wages of up to $19 per hour. This conflicted with FLSA language. In 1986, Congress had expressly excluded "volunteers," from being covered by the FLSA, defining "volunteers" as being paid "no compensation" or only a "nominal fee." Thus the question of whether the firefighters were "employees" or "volunteers" turned on whether their hourly compensation constituted a nominal fee or something more. The regulations provided that a "nominal fee" was "not a substitute for compensation and must not be tied to productivity"~although such a fee could be paid on a "per-call" basis.

Here, the firefighters rendered services with the "promise and expectation" of being paid for those services, based specifically on time expended, not on a per-call basis. They reported hours worked and were paid for those hours, generally receiving Form 1099's. Under the Supreme Court's "economic reality" and "totality of the circumstances" guidance, the firefighters were clearly "employees" under the FLSA, increasing the City's employee pool above the requisite 50 employees and making the FMLA applicable.

DISSENT: A dissenting opinion argued that whether a payment was "nominal" depended on the skills being performed in the particular circumstance: while $15 per hour would be a significant sum for some workers, it would surely be "nominal" for a surgeon providing volunteers services to the community. It made no sense to apply the same calculus to a fast food worker and to a firefighter with the skills and training to save lives. Furthermore, when the full complement of uncompensated additional training and certification hours required of the volunteers was taken into account, the

effective compensation was about $8.60 per hour—barely above minimum wage, and "nominal" for FLSA purposes.

Mendel v. City of Gibraltar, No. 12-1231 (6th Cir. Aug. 15, 2013) http://www.ca6.uscourts.gov/opinions.pdf/13a0232p-06.pdf (last accessed August 19, 2013)

Public Employees' Grand Jury Testimony Is Protected by The First Amendment

When a prosecutor testifies as an eyewitness in an internal corruption investigation, he is not acting as a "public employee" speaking in his "official capacity" and is entitled to First Amendment protections.

Kirk Chrzanowski began work as a prosecutor in the McHenry County, Illinois State's Attorney's office in 2006 and was given praise and raises through 2010. In early 2011, however, Chrzanowski's boss, Louis Bianchi, came under investigation for the improper handling of cases connected to his family and friends in the County. Chrzanowski was subpoenaed to testify before the grand jury and then at the trial. Chrzanowski did so and, apparently, told the grand jury nothing but the truth. Throughout the ordeal Bianchi and his allies in the office, as well as his legal team, were concerned about Chrzanowski and tried to contact him – efforts which Chrzanowski consistently resisted. In the same period Bianchi put notes in Chrzanowski's personnel file and, eventually, called him to the office to discuss his grand jury and trial testimony. At the meeting Chrzanowski was asked to resign. When he refused, he was fired.

Chrzanowski responded by filing suit, alleging that he was fired illegally in retaliation for his testimony. Bianchi moved to dismiss the case on the basis that Chrzanowski failed to state a valid First Amendment claim. The district court agreed, based on the logic that Chrzanowski was a public employee speaking in his official capacity and therefore not subject to First Amendment protection. The district court also held that in the alternative, even if there was a constitutional violation, the defendants could avail themselves of qualified immunity.

The Seventh Circuit reversed, although it agreed with the district court that the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), controlled the case: "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." But the Circuit Court disagreed with the lower court's characterization of Chrzanowski's acts as part of his job duties. The district court, analyzing *Garcetti,* had held that there was no doubt Chrzanowski's testimony was within his job duties since "an assistant state's attorney is obligated to pursue all criminal offenses, even those allegedly perpetrated by his supervisors." The Seventh Court, however, deemed this to be an excessively broad interpretation of *Garcetti* and instead held that a court cannot place so much weight on a general job description, such as "state's attorney," and instead must place more weight on the specific tasks an employee is paid to perform in the course of his daily work.

Thus the Circuit Court examined exactly what Chrzanowski's job was--and determined that while it encompassed trial work, and perhaps in limited cases testifying before the grand jury as an investigative witness, it did not include testifying before the grand jury as an eyewitness. Simply put, "the fact that his testimony concerned the subject matter of his employment does not mean that Chrzanowski's speech owed its existence to his official responsibilities as the *Garcetti* court used the phrase."

Second, the court found in the *Fairley v. Fermaint*, 471 F.3d 826 (7th Cir. 2006) line of cases an independent reason why Chrzanowski's speech falls outside of *Garcetti*. In that line of cases the Seventh Circuit set forth a clear rule that "when a public employee gives testimony pursuant to a subpoena, fulfilling the general obligation of every citizen to appear before a grand jury or trial, he speaks as a citizen for First Amendment purposes." Since Chrzanowski had been subpoenaed, under this rule he was not performing official duties.

Finally, the Circuit Court disagreed with the district court regarding qualified immunity. In order to claim the benefits of qualified immunity, the defendants had to establish that the constitutional rights claimed by Chrzanowski were not "clearly established" at the time of the firing. The court had little patience for the argument that it would not be clear that retaliating against a public employee for giving eyewitness testimony before a grand jury violated First Amendment rights.

Chrzanowski v. Bianchi, No. 12 C 50020 (7th Cir. August 2, 2013). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D08-02/C:12-2811:J:Wood:aut:T:fnOp:N:1179973:S:0 (last accessed August 21, 2013)

Multiple Incidents Involving a Single Inmate Do Not Establish "Custom" for Section 1983 Purposes.

A recent Eighth Circuit decision confirms that, for purposes of *Monnell*-based cases, a "custom" or "practice" cannot be inferred from an isolated set of facts.

On January 27, 2009 David Johnson was arrested and placed in the Douglas County, Nebraska jail pending his appearance before a judge the next morning. Johnson suffers from epilepsy and his mother brought his medication to the jail. Officers at the jail verified that Johnson required the medicine as stated on the bottle. But despite separate requests by Johnson to three different officers at three different times during his one-day stay, no one provided him with his needed anti-epilectic medication. Johnson suffered a grand mal seizure and had to be hospitalized.

Johnson filed suit against the individual officers and Douglas County alleging violations of his civil rights. The district court granted summary judgment first for the individual officers and, eventually, for the County, finding that Johnson had failed to present sufficient evidence of "a continuing, widespread, persistent pattern of unconstitutional conduct" at the jail. Johnson appealed, claiming the denial by at least three separate officers established the necessary pattern to support municipal liability under 42 U.S.C. § 1983.

The Eighth Circuit affirmed.

Johnson conceded that municipal liability under Section 1983 hinges not

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