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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