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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on whether a municipality employs a tortfeasor, but rather on whether it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." While he acknowledged no such formal policy or regulation existed, he argued that where three different officers denied his medications, there was at minimum a question of fact as to whether the jail had a custom of ignoring the medical needs of inmates – and whether such behavior was official policy in Douglas County. The Circuit Court required that Johnson demonstrate three elements to win under such a theory, including a "continuing, widespread and persistent pattern" of governmental misconduct, "deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice of the misconduct," and a showing of injury due to acts pursuant to this custom.

The court found that Johnson had failed to prove his case. Despite showing that his medical needs were ignored by three different officers, Johnson did not provide any evidence that other County inmates had suffered a similar denial of care. Johnson countered that multiple incidents involving a single inmate can establish an actionable "custom." While not denying that a single inmate's mistreatment might give rise to a Section 1983 claim, the Circuit Court said Johnson's confinement was not long enough to effect the necessary notice to policymaking officials--or to demonstrate the necessary tacit authorization from them.

Johnson v. County of Douglas, No. 13-1134 (8th Cir. August 2, 2013). http://media.ca8.uscourts.gov/opndir/13/08/131134P.pdf (last accessed August 8, 2013) ML

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permitted in the ALR, regardless of what a municipal zoning bylaw might have to say on the issue.) Others, maybe anticipating a continuation of the problems they have experienced with residential grow-ops but on a much larger scale, are putting new prohibitions in place. Many have remained on the sidelines.

Going forward, there are several issues for local governments to consider:

Land use: Commercial marihuana production and distribution is essentially an agricultural or industrial-type use with some of the usual potential neighbourhood impacts-primarily odour and the noise from exhaust fans, and probably artificial lighting as well (the MMPR specifies that only enclosed and indoor grow operations will be licensed). As with strip clubs and certain kinds of massage parlours, these uses cannot be subject to special zoning prohibitions or regulations merely because they might involve conduct that contravenes the criminal law; zoning must focus on legitimate land use concerns. Note, however, that the MMPR does not require confirmation from local governments that the proposed location of a new commercial operation is zoned to permit the use.

Charter of Rights and Freedoms and the BC Human Rights Code: There is no case law on whether persons requiring medical marihuana have a right to purchase it from a producer in their own municipality. While decisions have found a right to reasonable access to medical marihuana for those with a disability, the extent of those access rights have not been determined. While these rights may extend to growing marihuana for personal use in one's own home where disability has been established, it may be doubted that such a right would extend to the ability to purchase and commercially grow marihuana in one's own municipality. As a result, some individual municipalities may choose to prohibit commercial operations altogether, provided the prohibition relates to land use and not moral or criminal law purposes.

Business licencing and regulation: Non-personal use production under the MMPR would be a commercial use requiring a business licence. It would also be a class of business to which a local government might wish to attach specific kinds of licence conditions, though most that come to mind – requirements for security of the premises, for example – will likely be regulated by Health Canada.

Building form and character: A few municipalities have industrial form and character guidelines, and will want to consider if they are potentially incompatible with Health Canada security requirements for these types of premises.

Local governments should note as well that on December 15, 2012, Health Canada published in the Canada Gazette a "Notice to Interested Persons" regarding the MMPR and certain "research and development activities such as testing marihuana or testing growing conditions" in which interested persons might wish to engage "prior to the MMPR coming into force using existing mechanisms under the *Controlled Drugs and Substances Act* and the Narcotic Control Regulations." In particular these mechanisms are research and development licences and exemptions under the Act for related activities such as testing packaging methods and materials. Health Canada's notice advises applicants that issuance of such approvals is not a guarantee that the applicant will be given a producer licence under the MMPR, and requires applicants to declare that their local municipality, law enforcement and fire officials have been notified about the application. Thus, some local governments may become aware of planned commercial marihuana production enterprises within their jurisdiction well in advance of the April 1, 2014 coming into force of the MMPR. ML

