decide whether to formally discipline O'Keefe. Another detective, McCarthy, told Griffin to take responsibility for the botched investigation and say it was his fault. McCarthy was not Griffin's partner, and neither officer was assigned to the case. Griffin told the NYPD Internal Affairs Bureau (IAB) about McCarthy's instructions to lie in an official investigation. The NYPD Patrol Guide provided, in relevant part: "All members of the service have an absolute duty to report any corruption or serious misconduct, or allegation of corruption or serious misconduct...". When word got out that it was Griffin who had reported McCarthy's corrupt overture, colleagues and other police officers allegedly started retaliating against him (e.g., writing "RAT" on his locker, and by refusing to speak or make eye contact with him). McCarthy denied making the demand to Griffin, and the charges against McCarthy were dismissed as unsubstantiated.

Because of the level of animosity towards him by fellow officers, Griffin was transferred to another squad. He claimed that the Deputy Chief there, Reznick, and those under his command, treated him less favorably than other officers. Griffin filed grievances over this, but his workday experiences continued to include anonymous retaliatory actions (threats, vandalism, "poison pen" notes) along with retaliation at more official levels: denials of overtime, delays in approvals of expenses, a greater workload, and other actions apparently designed to drive Griffin to resign or retire. By 2009, Griffin had had enough, and resigned.

He sued under 42 U.S.C. § 1983, claiming that the retaliation he faced as a result of reporting his colleague's misconduct violated his right to free speech as guaranteed by the First Amendment and his rights to procedural and substantive due process under the Fifth and Fourteenth Amendments, and that the City, the NYPD, Reznick, and other individual defendants conspired to deprive him of his civil rights in violation of 42 U.S.C. § 1985. He also asserted claims for intentional infliction of emotional distress and "whistleblower" retaliation under New York State law. The defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted).

As an initial matter, all claims brought solely against the NYPD were dismissed with prejudice, as the NYPD was a non-suable agency of the City. The claim for First Amendment retaliation was "the pivotal issue in this case." There was no dispute that plaintiff had sufficiently alleged that adverse employment action was taken against him, and that a causal connection existed between his speech and such action. The only issue was whether his complaint to IAB constituted protected speech under the First Amendment, pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern, rather than statements pursuant to his official duties). The court ruled that it did: the plaintiff did speak as a citizen addressing matters of public concern. Considering the "class of cases where no clear 'official duty' to speak is present on the record, this Circuit focuses on the subject, manner, and context of the speech to determine whether it relates to topics that are 'indispensable prerequisites to effective' performance of the speaker's 'primary employment responsibility,' and thus not entitled to First Amendment protection."

Addressing the "speech as a citizen" component, the court found McCarthy's alleged misconduct did not directly interfere with the plaintiff's ability to perform his assigned duties. The court was "not at all persuaded that the existence" of the Patrol Guide foreclosed the plaintiff's claim to First Amendment protection. This ignored the fact that, although the plaintiff's reporting may have been required by some broader written policy applicable to all police officers, it had no bearing on whether such reporting was actually expected or permitted, much less tolerated, in practice. Moreover, the defendants' argument "would create an impermissibly broad definition of a public employee's job responsibilities." The fact that the plaintiff directed his alleged speech only to NYPD officials was also not conclusive: the IAB could not be considered as part of the chain of command at the NYPD, and any citizen could report wrongdoing to the IAB. On the "public concern" element, speech relating to the functioning of government was of "particularly great import to the public," and of "greatest significance" was speech related to corruption in the police force. Lastly, the court held dismissal of the claims against the individually named defendants on qualified immunity grounds was inappropriate. *Griffin v. City of New York*, No. 10 CV 2592 (RJD) (MDG), 2012 U.S. Dist. LEXIS 106208 (E.D.N.Y. July 31, 2102).

### Employee Speech: Police & Immigration Policies

Joslyn Johnson was a Sergeant in the City of Houston Police Department (HPD) and the widow of a former HPD officer, Rodney Johnson, who was tragically shot and killed in 2006 by an illegal alien during a routine traffic stop. She brought a 42 U.S.C. § 1983 challenge to certain policies (General Order 500-05, passed in 1992, and HPD Circular 06-1010-298, issued in 2006) maintained by the HPD, which she alleged substantially restricted, if not prohibited, her from communicating with U.S. Immigration and Customs Enforcement (ICE) about matters concerning the status of undocumented aliens and those who were criminally present in the United States as undocumented aliens. Very briefly, these provided that officers would not make inquires as to the citizenship status of any person, nor would they detain or arrest persons solely on the belief that they were in the country illegally; officers had the discretion to check the "wanted" status of any person legally detained, and were required to check the "wanted" status of any person ticketed, arrested, or jailed.

The plaintiff alleged that under these policies, officers were barred from contacting ICE directly unless an officer's "wanted" check produced a National Crime Information Center (NCIC) "Immigration Hit," indicating that a detained person was the subject of an outstanding ICE-issued warrant. By limiting checks

to only the "wanted" status through the NCIC database of a person who was lawfully detained, ticketed, arrested, or jailed, the subject policies substantially restricted an officer's ability to obtain information from ICE on the person's immigration status, whether legal, illegal, or criminal. The plaintiff further alleged that, even when a person's immigration status was or became known by her (e.g., the person identified himself as an undocumented alien or a previously deported alien), the policies restricted her ability to report that information to ICE or to contact ICE "while on the street," unless that person was arrested or otherwise legally detained. The plaintiff contended that she did not seek to detain or arrest persons in order to make inquires into their immigration status; rather, she sought to use her own professional judgment to determine when it was appropriate to contact ICE to inquire or provide information about a person's immigration status if, in the course of carrying out her duties and responsibilities as a law enforcement officer, she had reason to believe a crime might have been committed. She alleged that the policies prohibited such communications and harmed her ability to carry out her duties and responsibilities; deprived her of her rights, privileges, and immunities guaranteed by the United States and Texas constitutions, including her right to freedom of expression; and violated her federal rights under 8 U.S.C. § 1373 (communication between government agencies and the Immigration and Naturalization Service), 8 U.S.C. § 1644 (communication between State and local government agencies and Immigration and Naturalization Service); and infringed upon her inherent constitutional right as a U.S. citizen to inform federal officials about violations of federal law.

She sued to enjoin the use of the policies and to compel the defendants to comply with federal laws so that she and others might communicate with ICE. The City moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure (failure to state a claim for which relief could be granted).

The court construed the plaintiff's claim to mean that, as a result of the City's policies, she had been forced to censor her communications with ICE for fear of termination or discipline, and noted that "self-censorship constitutes a First Amendment harm that may be realized even without actual termination or discipline." However, applying the legal framework on public-employee speech as set out in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), the court held that these allegations demonstrated that her desired communications with ICE would be made pursuant to her official job duties as a law enforcement officer, and therefore, were not protected under the First Amendment. By the plaintiff's own pleadings, it was "clear that her desired communications with ICE would necessarily owe their existence to her professional responsibilities as a law enforcement officer and that they would be made in the course of performing her official duties as a law enforcement officer."

Regarding the alleged violations of her right to inform federal officials of federal law violations, the court held that her pleadings failed to state a claim because the policies did not restrict such reporting. However, "Plaintiff's inherent right as a U.S. citizen to report federal law violations does not extend to an inherent right for Plaintiff to use her capacity and professional judgment as a law enforcement officer to conduct investigations and ferret out whether individuals she encounters are illegal aliens." 8 U.S.C. § 1373 did not confer any particular individual rights enforceable under § 1983, and the plaintiff did not assert any reasons why the Texas Constitution should be read to offer any free speech protections that were broader than those under the First Amendment. Those claims failed as well. *Johnson v. Hurtt*, No. H-10-366, 2012 U.S. Dist. LEXIS 104362 (S.D. Tex. July 25, 2012).

## *Search & Seizure*

### Excessive Force – Pepperball Gun

On April 16, 2004, approximately 1,000 people congregated at an apartment complex in Davis, California for what one participant described as "the biggest party in history." Timothy Nelson, then a student of the University of California at Davis (UCD), was one of the party-goers. The police station was located on the same street as the apartment complex and officers soon became aware of the traffic, underage drinking, and illegally-parked cars. Sgt. Wilson spoke with the owner of the apartment complex, who asked police to order all non-residents to leave the complex. The police vehicle dispatched to do so was "overwhelmed" by the crowd, and party-goers began throwing bottles at it. As a result, 30 to 40 officers assembled in riot gear, armed with pepperball guns (paintball guns that shot projectiles of oleoresin capsicum powder, at a velocity of 350 to 380 feet per second, and broke open on impact).

The officers alleged they issued a verbal order to the crowd to disperse when they arrived, but acknowledged that they had no means of amplifying their voices above the raucous noise, and the majority of the crowd neither heard the order nor dispersed. The officers gathered in front of a breezeway in the complex, a very narrow and confined space. Nelson was here with his friends, attempting to leave and now blocked in. They claimed the officers did not provide any audible warning prior to shooting towards the unarmed and compliant students, and never informed the party-goers how to appropriately extricate themselves from the complex in order to avoid becoming the target of police force. A pepperball launched from one of the officers' guns hit Nelson in the eye, causing permanent injury.

He brought a 42 U.S.C. § 1983 action, alleging that his Fourth Amendment rights had been violated. The officers moved for summary judgment on the basis of qualified immunity. (The actual officer who fired the shot was not identified.) The district court denied qualified immunity on the basis that the officers' actions amounted to an unconstitutional seizure, and that the law at the time of the incident should have placed the defendants on notice that the shooting of pepperballs under the circumstances was an act of excessive force.

On further appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. "We hold that Nelson has succeeded in alleging facts that, if true, would support the finding that the officers' conduct constituted a violation of clearly established law." Nelson was seized under the Fourth Amendment because he was both an object of intentional governmental force and his freedom of movement was limited as a result. "Although the officers may have

*Continued on page 36*

## Occupy Movement *Cont'd from page 9*

lives/2011/12/27/gIQAwCtNRP_story.html (last accessed May 8, 2012).
31. Meghan Barr, *Occupy Wall Street: 6 Months Later, What Has Occupy Protest Movement Achieved?*, The Huffington Post, Mar. 16, 2012, at http://www.huffingtonpost.com/2012/03/16/occupy-wall-street-6-months-later_n_1352752.html (last accessed May 8, 2012).
32. Colin Moynihan, *Evicted From Park, Occupy Protestors Take to the Sidewalks*, The New York Times, Apr. 12, 2012, at http://www.nytimes.com/2012/04/13/nyregion/evicted-from-park-occupy-protesters-take-to-the-sidewalks.html (last accessed May 8, 2012).
33. Gene Policinski, *Government must be careful with tactics against Occupy camps*, First Amendment Center, Mar. 02, 2012, at http://www.firstamendmentcenter.org/government-must-be-careful-with-tactics-against-occupy-camps (last accessed May 13, 2012).
34. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650, (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). ML

## Public Employer *Cont'd from page 13*

against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Age Discrimination in Employment Act of 1967 (prohibits age discrimination against workers 40 or older and also makes it illegal to retaliate against a person because the person complained about age discrimination), Title VII of the Civil Rights Act of 1964 (discrimination on the basis of race, color, religion, national origin, or sex prohbited; the law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Genetic Information Nondiscrimination Act of 2008 (this makes it illegal to discriminate against employees or applicants because of genetic information).
8. Macy v. Holder, Appeal No. 0120120821, April 20, 2012 at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (transgender complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status held cognizable under Title VII).
9. As an example, the Civil Service Reform Act of 1978, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. *See* U.S. Office of Personnel Management, Addressing Sexual Orientation Discrimination In Federal Civilian Employment, A Guide to Employee's Rights, at http://www.opm.gov/er/address2/Guide01.asp (last visited July 22, 2012) and U.S. Equal Employment Opportunity Commission, Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, at http://www.eeoc.gov/federal/otherprotections.cfm (last visited July 22, 2012). ML

## Supreme Court *Cont'd from page 23*

rantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment.

The Florida court granted the motion to suppress. "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected." Instead, it was a "public spectacle," "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." Accordingly, given the special status accorded a citizen's home under the Fourth Amendment, the "sniff test" was a "substantial government intrusion into the sanctity of the home" and constituted a search within the meaning of the Fourth Amendment. As such, the search had to be preceded by an evidentiary showing of probable cause. ML

## Code Enforcement *Cont'd from page 31*

I do believe in making the penalties as stiff as possible. The penalty provision should also include attacking municipally-issued licenses, such as a tobacco dealer's license. This provision would allow pursuing businesses, such as gas stations and convenience stores selling these substances, which would be the likely places for teens and young adults to purchase the drugs.

Folks, the war on drugs just got bigger and more problematic. If the thinking on the previous version of the war on drugs is that it is unwinnable, what position are we in now as we deal with synthetic drugs, a moving target? We all need to work in concert to wage this war, as best we can. ML

## Ordinances *Cont'd from page 29*

"Legislature's intent to allow not only local regulation of the geographic placement of collectives and the manner in which they conduct operations, but also local regulation of the creation of collectives. The local power to regulate creation, by definition, carries with it the power to regulate the number of collectives in existence." The trial court's order granting the preliminary injunction was therefore reversed. *420 Caregivers, LLC v. City of Los Angeles*, No. B230436, 2012 Cal. App. LEXIS 780 (Cal. Ct. App. July 03, 2012). The League of California Cities and California State Association of Counties participated as Amici Curiae on behalf of the City in this case. ML

## Cases *Cont'd from page 35*

intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement."

Regarding the reasonableness of the use of force, Nelson and his friends did not