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Employment: Transfer of Correctional Employee to Less Stressful, Less Important Position Was Not Pretext for Retaliation

Bennett v. Louisville Metro Government, No. 14-6307 (6th Cir. June 25, 2015).

Where prison officials transferred a correctional worker to a less dangerous position which greatly reduced her role and employment satisfaction, such an action was not motivated by retaliatory animus but was actually intended to remove her from a dangerous environment, the Sixth Circuit has confirmed.

In 2011 Sylvia Bennett was working as a social worker at the Louisville Community Corrections Center. In November she complained to the supervisors about a colleague and ultimately told them she felt "unsafe" because she felt the colleague would not act to protect her from inmates if they attempted to harm her. The director of the department of corrections met with Bennett after receiving this formal complaint about safety and, according to Bennett did not let her tell her story about the complaint but instead said "you have concerns, you're not going back there," and transferred her to a different facility. For the supervisor's part, he indicated all he heard was that she had safety concerns and he immediately transferred her to deal with that very serious workplace issue in the corrections department. He opened an investigation into the matter and kept her out of the facility until he "could be sure her safety wasn't being compromised."

Ultimately, Bennett thus had an "involuntary change of assignment," but her salary, schedule, and benefits remained the same. Her work changed so that she no longer

coordinated some treatment programs as she had, and she lacked an office in her new post. While the department characterized her as having "broad autonomy" to work in this temporary position, Bennett characterized the five months she did this work as "reporting to work without having work to do," and said he became depressed, stressed, and felt stripped of her duties. She filed a complaint under Title VII against Louisville. The district court granted a motion for summary judgment for Louisville, holding that (1) Bennett's temporary transfer was not a "materially adverse job action," even though her duties changed, because her pay remained the same and the transfer was temporary, and (2) Bennett had failed to establish that Louisville's stated reason for the transfer—Bennett's safety—was pretext for retaliation.

HELD: The Sixth Circuit affirmed, holding that Bennett failed to rebut Louisville's legitimate reasons for her transfer and failed to place evidence in the record to support her factual theory.

DISCUSSION: Bennett first argued the lower court erred in holding her transfer was not materially adverse because employees would think twice about reporting discrimination if the result was to be transferred to meaningless job with insubstantial assignments for five months as a result. The Court sidestepped an analysis of the merits here by assuming that she was retaliated against as she posited, and looking to the lower court's holding on pretext. Louisville answered her charge by saying it did not retaliate, but rather took her concerns about safety seriously and acted appropriately in addressing the concerns by transferring her and looking into the allegation.

The Court found that Bennett had not substantiated her charge that Louisville's position on safety was a smokescreen for discrimination, and that the lower court correctly held she failed to provide evidence upon which a reasonable juror could hang a hat. For one, her argument that the director only became involved later in the process after his subordinates tried to handle it, did not show pretext; it showed he only got involved once he was aware her safety was at issue, rather than just a conflict between colleagues. Second, her argument that pretext was evident in the "shoddy nature" of the investigation and that, though the investigation only took a month, she was not reinstated for five months, also did not show pretext for the appellate court because the factual allegations were wholly unsubstantiated with any evidence a juror could reasonably rely on. The Court summed this up by saying her evidence was woefully insufficient given that her "briefs cite to several depositions that purportedly support her position, [but] none of them are in the record. [Thus] Bennett did not place any evidence on pretext before the district court; she simply asserted that various individuals had given depositions consistent with her theory without submitting the depositions to the district court for review." With such a posture before it, the Circuit Court affirmed the district court's grant of summary judgment.

LINK (last accessed July 14, 2015).

Prisons: Administrative Remedies Deemed Exhausted Where Failure to File Appeal Was Due to Undated Response to Prisoner Grievance

McClain v. Mason County, No. 14-5983 (6th Cir. June 19, 2015).

Where a Kentucky prison's response to an inmate's grievance form did not clearly indicate a date, the inmate's failure to file an appeal did not prevent his having exhausted all administrative remedies.

In 2011 Gary McClain was arrested and charged with drug distribution. He was booked into the Mason County Detention Center in Kentucky. The county jail has a printed grievance policy providing that grievances must be filed within 48 hours after the event complained about, that grievances will be answered within five business days, and that if no answer is received within ten days, then the grievance is "deemed . . . filed regarding an event or act that is not eligible for [the grievance] process." The policy also provides that appeals must be filed within 48 hours after the initial response from the jail, that a response is due within ten days after the appeal, and that if no response is received within ten days, the appeal is "otherwise" denied.

McClain used this process numerous times during his incarceration. In January 2012 he, along with other inmates, complained that the heat was too high in their area of the jail. In April 2012 he complained that he was refused medical treatment for high blood pressure and acid reflux after he reported the conditions during intake, along with the fact that he was never taken to a doctor's appointment. In late April 2012 he again complained about the temperature in his jail area.

Late in 2012 McClain filed a complaint in district court, asserting that his Eighth and Fourteenth Amendment rights were violated via deprivation of adequate medical treatment. He sued the County as well as jail staff and the jail physician. Defendants moved for summary judgment, positing that since McClain did not appeal his April 8, 2012 grievance, he failed to exhaust his administrative remedies prior to filing suit, as required under the Prison Litigation Reform Act. McClain answered this challenge by filing an affidavit in which he said 1) he was not given a verbal or written orientation to the grievance or appeal process, 2) that prior to the lawsuit he did not know how to appeal a response to his initial grievance, and 3) that he filed a fourth grievance around February 22, 2012. He also filed a formal and timely response to the motion for summary judgment, in which he said he never saw responses to the February 22 and April 8 grievances so he could not appeal them – e.g. he could not exhaust his remedies. The District Court agreed with the defendants and granted their motion for summary judgment. McClain appealed.

HELD: The Sixth Circuit reversed, holding that with respect to the April 8, 2012 grievance McClain did not fail to exhaust his administrative remedies. It thus remanded the case to the district court for consideration of the merits.

DISCUSSION: The Court cited the Prison Litigation Reform Act: "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." It then looked to the Mason County Detention Center policy and the testimony of the deputy jailer. The policy provides that jail officials have ten days to respond to a grievance and that if they fail to respond in that time it is "deemed . . . filed regarding an event or act that is not eligible for [the grievance] process." The deputy jailer confirmed that the latter clause of this policy is interpreted by the jail to mean there is no right to appeal in these cases. The response McClain received from his initial April 8 grievance had no date stamp. Neither McClain nor the jail staff could recall when it had been sent, leaving the Sixth Circuit "unable to determine whether the prison officials complied with their rules, as interpreted by them, that trigger McClain's right to appeal." Thus the Court was unable to "conclude that defendants established that McClain failed to exhaust his administrative remedies—which was their burden" and reversed the district court.

The Court then evaluated the district court's refusal to consider McClain's post-deposition affidavit, which had been filed after McClain's deposition and after the defendants' motion for summary judgment--and contradicted McClain's deposition testimony. The affidavit contained three statements: it alleged McClain filed a grievance on or about February 22, that no jailer ever gave McClain a verbal or written orientation to the grievance procedure, and that he did not know that he could appeal while incarcerated, or how to do so. The Circuit characterized the affidavit as an attempt to create a "sham issue of fact," citing the "well-established" rule which prohibits a party from "creat[ing] a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts h[is] earlier deposition testimony." The remedy where a post-deposition affidavit directly contradicts deposition testimony is to strike it from the record "unless the party opposing summary judgment provides a persuasive justification for the contradiction." The Circuit concurred with the district court that the affidavit contradicted McClain's earlier deposition testimony since the affidavit cited an additional grievance (February 22, 2012), ostensibly filed when McLain had been too sick to file. The Circuit also found that Mclain's other statements - that no jailer ever gave him a verbal or written orientation about the grievance procedure and that he did not know that he could appeal while incarcerated- were contradicted. It held all three statements were appropriately denied consideration by the district court.

LINK (last accessed July 14, 2015).

Speech: County Prosecutor Who Blogs About Political Matters Is Not Acting Under Color of State Law

Naffe v. Frey, No. 13-55666 (9th Cir. June 15, 2015).

John Patrick Frey is a conservative political activist who blogs about criminal law, liberal media bias, and politics. He is also a criminal prosecutor in Los Angeles County. While he often mentions his job, his blog includes a disclaimer that the views expressed there are his own and not made in any official manner.

Nadia Naffe is also a conservative political activist. She associated with James O'Keefe, another conservative colleague, and they worked together on various undercover exposés of liberal political misdeeds. In mid-2011 Naffe and O'Keefe had a falling out after she accused him of sexually assaulting her. After the accusation, Frey – a friend of O'Keefe's – filed stories about Naffe calling her a liar, illiterate, callous, self-absorbed, despicable, a smear artist, dishonest, and absurd. He also tweeted a few dozen threatening and harassing statements about Naffe. He also implied that Naffe broke the law at some point by accessing O'Keefe's emails, and obtained 200 pages of a deposition Naffe gave and posted it online, including her social security number and her mother's maiden name--after which Naffe was told by a credit company that her identity had been compromised.

In 2012, Naffe filed suit against Frey and Los Angeles County, arguing that Frey abused his position as a Deputy District Attorney and acted under color of state law when by continuing to harass her through his blog, website, and twitter account. She claimed the harassment violated her First Amendment right to petition the government. She alleged she suffered more than $75,000 in damages. Frey and the County filed motions to dismiss. The judge held that Frey did not act under color of state law, and that Naffe did not sufficiently support her allegation of the amount in controversy, and dismissed. Naffe appealed.

HELD: The Ninth Circuit affirmed the lower court's holding that Frey did not act under color of state law, but reversed the lower court's finding on the amount in controversy, holding it used an inappropriate standard to assess the Naffe's monetary claim.

DISCUSSION: Naffe challenged the determination that Frey did not act under color of state law, arguing that Frey threatened to prosecute her for her illegal activities when she was working with O'Keefe and for her alleged illegal access of O'Keefe's email, and that this pressure was, in turn, intended to intimidate her to keep quiet about O'Keefe's illegal activities. Thus, she argued, Frey used his position – his state authority – to violate her constitutional right to petition the government for redress of grievances.

The Ninth Circuit disagreed. As a general rule, the Court noted, an individual acts under color of state law if he wrongs someone "while acting in his official capacity or while exercising his responsibilities pursuant to state law." Looking at the facts, the Court found Naffe did not show Frey harmed her while exercising his official duties. His job as a prosecutor simply did not include commenting on politics, and though deputy attorneys sometimes speak on behalf of the state, that was clearly not the case with Frey. Importantly for the Court, Frey included a straightforward disclaimer that he was speaking personally and not as a district attorney on his website and blog.

The Court was also critical of Naffe's attempt to link Frey's comments about her to his work. While Naffe theorized Frey threatened to prosecute her to keep her quiet about allegations against O'Keefe, she failed to point to any evidence that Frey used his job to do that – for example, his power to access law enforcement or his power to investigate. The Court also flatly disagreed with Naffe's characterization that Frey "purported or pretended" to act under color of state law in his blogging about her. To the contrary, it found Frey frequently told readers that he was acting in his personal capacity and had a disclaimer and used his personal twitter account, not the Los Angeles County Attorney's account, to tweet about her.

Despite having lost on the §1983 suit against Frey and the County, Naffe succeeded in arguing that the district court erred with regard to the amount in controversy. The district court required Naffe prove the amount in controversy by a preponderance of the evidence, but the Circuit held this was a clear mistake of law. Whether an individual has met the $75,000 minimum is instead governed by the "legal certainty" test, under which the "sum claimed by the plaintiff controls if the claim is apparently made in good faith." While the Court recognized that in some cases a thorough inquiry into the alleged sum is warranted, such an inquiry was not needed here, given that the case was originally filed in federal court – e.g. the defendant was not using an alleged amount in controversy to remove the case – and Naffe had affirmatively alleged the amount was over $75,000.

LINK (last accessed July 14, 2015).

USERRA: County's Statements Suggesting Bias Against Veterans as Police Officers is Outweighed by Independent Evidence of Non-Performance

Roth v. West Salem Police Department, No. 14-3704 (6th Cir. June 19, 2015).

Where a veteran was discharged from a police department for a litany of documented behavioral and performance problems, the fact that one supervisory officer made a single comment suggested bias against veterans did not trigger a USERRA violation.

In February 2001 Kenneth Roth became a part-time officer with the West Salem Police Department. He was a member of the Marine Reserves at the time. He underwent an initial six-month probationary period which, for unknown reasons, was extended for another six months. During this year-long probation he was written up for failing to obey an order. Thereafter, he received a complaint from a motorist he had stopped for circling the block; the chief discussed the standard of probable cause with him but did not issue a written reprimand on the matter. (Roth never worked full time as an officer, he instead had a full time job as security contractor for NASA and served as an officer part time).

Roth took three leaves of absence while at the department. He was deployed to Iraq from February 2005 to September 2005, then he took a break to receive counseling at the VA in 2007, then he was deployed to Iraq from May 2008 to April of 2009. After the first deployment, Roth's coworkers noticed changes in his policing and personality. He was critical of the chief of police and "extremely sensitive" to decisions he felt put officers at risk. He was noticeably dissatisfied. He received one more warning at this time - about not working extra hours beyond those scheduled without prior approval because of budget constraints.

While on his second deployment Roth learned that a colleague was promoted above him. According to the chief of police and captain, who made the choice in consultation, they promoted Roth's colleague because he unlike Roth, he was easy to work with, had no citizen complaints, could be relied on to follow orders, and was a fulltime patrolman who did not have a second job. Roth returned to work upon coming home. But he told his captain that he was disappointed in not being promoted and that he thought the promotion violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Roth testified that he recalled the captain replying with "[c]ombat veterans probably shouldn't be promoted anyway because they don't understand, because it's a different world between the military and law enforcement."

Roth's return to work only lasted a few shifts. The chief of police, in consultation with the captain, suspended Roth pending his undergoing an anger management class and passing a psychological examination. This order came in a letter specifically listing the chief's concerns, including that he displayed an aggressive demeanor; was rude to colleagues and insubordinate with administration; violated department policy by taking a radio home, working extra hours without permission, and stopping a motorist without reasonable suspicion or probable cause (the final two actions he had already been warned about once before). The letter concluded by noting he could be reinstated if he obtained the evaluation and completed the class required, and met with the chief and mayor thereafter. Roth did not complete this procedure. The chief sent Roth two letters asking if he intended to return to work, but they went unanswered despite being received. Roth was ultimately terminated.

Roth filed suit in February 2013, arguing the West Salem Police Department violated his rights under USERRA by failing to promote him. The district court granted West Salem summary judgment, holding nothing in the record indicated Roth's colleague was promoted above him based on Roth's military service. Roth appealed.

HELD: The Sixth Circuit affirmed the district court's holding that the police department's actions were justified by valid, non-discriminatory reasons.

DISCUSSION: The Court began by noting that the one sentence Roth testified to that hinted at discrimination – the captain's comments about military personnel not being suited to police work – could have swayed a reasonable juror that Roth was discriminated against. But it found West Salem met its burden of showing Roth was not

promoted for a slew of non-discriminatory reasons, thus even if this one sentence was enough to support a cause of action, Roth still would have lost. The Court highlighted in particular the chief's statements about why the colleague was preferred over Roth for the promotion – his availability since he did not have a second job, his success in getting along with colleagues and superiors, and his lack of citizen complaints. Similarly, as to Roth's suspension – which is an adverse action under USERRA – the Court found, even if Roth presented a plausible case that there was illicit animus motivating this action, he could not rebut the town's stated, legitimate reasons. It was undisputed that he worked extra hours without obtaining prior approval, as he wrongly did before and was warned against, and there was reliable testimony of an administrative staff member that Roth was aggressive, insubordinate, hard to get along with, and made others feel unsafe. Lastly, the Court found there was substantiated evidence that the citizen complaint about his stopping a motorist in violation of the Constitution – his second for the same issue – was accurate.

Simply put, Roth was "unable to provide evidence rebutting the majority of the issues identified in the Chief's letter, including what appear to be the most serious ones . . . [and a]s a result, there is no triable issue of fact as to whether Roth would have been suspended even absent his military status." West Salem succeeded on appeal.

LINK (last accessed July 14, 2015).