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FEATURED CASE:

Fourth Circuit: Police Officer Fails to Establish Causal Connection in Retaliation Claim.

***Massaro v. Fairfax County*, No. 22-1287 (4th Cir. Mar. 19, 2024).**

The Fourth Circuit held that a police officer failed to establish a causal connection between his discrimination complaint and subsequent disciplinary transfer, affirming the district court's grant of summary judgment on his Title VII and ADEA retaliation claims. The court also found that the officer's complaint did not address a matter of public concern and was therefore not protected speech under the First Amendment. This decision emphasizes the importance of presenting sufficient evidence to support retaliation claims and highlights the need to balance employee protection from retaliation against the ability of public institutions to address misconduct and implement necessary reforms.

Background: Peter Massaro ("Massaro"), a police officer with the Fairfax County Police Department since 1996, served as the supervisor of the firearms training range at the Fairfax Criminal Justice Academy ("Academy") from February 2018 to May 2020. In April and September 2018, Massaro was passed over for promotion to First Lieutenant in favor of two women he believed were less qualified. In response, Massaro filed a discrimination complaint with Fairfax's Office of Human Rights and Equity Programs ("OHREP") in September 2018, alleging that Chief Edwin Roessler had discriminated against him based on sex, age, and race.

In May 2019, as part of departmental reform efforts, Chief Roessler transferred Major Paul Cleveland to the Academy. Later that month, an incident occurred between Massaro and First Lieutenant Loriann LaBarca, one of the women promoted instead of Massaro. LaBarca visited the Academy and engaged in a conversation with Massaro in his office. During the conversation, LaBarca asked Massaro if he believed she was promoted solely because of her sex. Massaro responded that there were others more qualified than her and that he believed sex was a "decisive factor" in her promotion. Upset by Massaro's comments, LaBarca reported the incident to her supervisor and Major Cleveland. Major Cleveland testified that he felt obligated to report the incident

to the Internal Affairs Bureau (“IAB”), as LaBarca's complaint was an "HR-specific type complaint" that was "pretty severe." In fact, departmental regulations required Major Cleveland to report such incidents to the IAB.

The IAB launched a formal investigation into the incident between Massaro and LaBarca. During his IAB interview, conducted by Second Lieutenants Andrew Hirshey and Dana Ferreira, Massaro defended his actions and made disparaging remarks about LaBarca's leadership abilities. He questioned whether she could lead the organization effectively and stated that coddling her would result in a deficient command staff. Massaro's behavior during the interview was described as inflamed, with him pacing about the room in a fury. Following the interview, Hirshey recommended that Massaro be found in violation of two departmental policies (the Unlawful Discrimination Regulation and the Human Relations Regulation). As a result, Massaro was relieved of duty and placed on administrative leave.

Massaro sued Fairfax County in federal court, alleging retaliation in violation of Title VII, the Age Discrimination in Employment Act (“ADEA”), and his First Amendment rights under 42 U.S.C. § 1983.

After discovery, both parties moved for summary judgment. The district court granted summary judgment in favor of Fairfax County on all claims. Regarding the Title VII and ADEA claims, the court found that Massaro failed to establish a causal relationship between his protected activity (filing the discrimination complaint) and the adverse employment action (disciplinary transfer). The court determined that the evidence showed the disciplinary actions were the result of the IAB investigation process and not related to Massaro's September 2018 complaint. Similarly, on the First Amendment claim, the court found no evidence to support the conclusion that Massaro's protected speech was a substantial factor in the Police Department's decision to discipline him.

Appeal: On appeal, Massaro argued that the district court erred in granting summary judgment to Fairfax County on his Title VII, ADEA, and First Amendment retaliation claims. He contended that he had presented sufficient evidence of a causal connection between his discrimination complaint and the disciplinary transfer, citing the temporal proximity between the events and alleged instances of retaliatory animus by Major Cleveland. Massaro also argued that his discrimination complaint addressed a matter of public concern and was thus protected speech under the First Amendment.

Holding: The Fourth Circuit affirmed the district court's grant of summary judgment to Fairfax County on all claims, finding no reasonable juror could conclude that Massaro met his burden of establishing a causal connection between his discrimination complaint and his disciplinary transfer under the Title VII and ADEA retaliation framework. The temporal proximity between the complaint and the transfer was too great to support an inference of causation, and Massaro failed to present sufficient evidence of recurring retaliatory animus or direct evidence of retaliation.
Massaro's discrimination complaint did not address a matter of public concern, as it focused on his personal grievances and was made through an internal process rather than a public forum. Therefore, his speech was not protected under the First Amendment, and his retaliation claim fails.

Analysis:

Retaliation Claims under Title VII and ADEA
The Fourth Circuit applied the *McDonnell Douglas* framework, which requires a plaintiff to establish a prima facie case of retaliation by showing (1) protected activity, (2) adverse employment action, and (3) a causal nexus between the two. The court found that while Massaro engaged in protected activity by filing his discrimination complaint and suffered an adverse action through his disciplinary transfer, he failed to establish the requisite causal connection.

The court emphasized that the eighteen-month gap between Massaro's complaint and his transfer was too long to support a causal inference based on temporal proximity alone. Massaro attempted to overcome this by arguing that he was subjected to recurring retaliatory animus, citing Major Cleveland's alleged statements and actions. However, the court found that these events lacked the continuity and regularity required to establish causation, as they began eight months after Massaro's complaint and did not demonstrate a choreographed scheme of retaliation.

Furthermore, the court determined that the record supported the conclusion that Massaro's disciplinary transfer was a result of his own conduct and violation of departmental policy, rather than retaliation for his complaint. The court noted that Chief Roessler's decision was based on the recommendations of multiple independent reviewers who had concluded that Massaro violated the human relations regulation.

The court also rejected Massaro's arguments that he presented direct and indirect evidence of retaliation. It found that Major Cleveland's actions and statements did not conclusively demonstrate retaliatory intent and that the IAB investigation was conducted independently, without interference from Chief Roessler or Major Cleveland.

First Amendment Retaliation Claim

To establish a First Amendment retaliation claim, Massaro had to show that (1) he spoke as a citizen on a matter of public concern, (2) his interest in the speech outweighed the employer's interest in efficient public service, and (3) the speech was a substantial factor in the adverse employment action.

The court determined that Massaro's discrimination complaint did not address a matter of public concern, as it focused on his personal grievances and desire for promotion rather than seeking to expose discriminatory institutional policies or practices. The court also noted that the form and context of the complaint, filed through an internal grievance process, further indicated that it was a private matter between employer and employee. In rejecting Massaro's First Amendment claim, the court emphasized the need to distinguish between private complaints and protected speech, asserting, "In sum, we cannot casually transform run-of-the-mill employee complaints into social and political commentaries backed by the full weight of the Constitution. To do so would turn the workplace into a constitutional landmine, while offering public employees inflated speech rights not shared by their private counterparts."

Massaro v. Fairfax County

SHORT SUMMARIES:

3rd Circuit – A higher calling

An article commenting on a recent 3rd Circuit case offers a reminder that we government lawyers have a duty to a higher calling that demands we adhere to the highest ethical standards. The case involved a person convicted of murder some 40 years ago. The 3rd circuit remanded a case to the District Court to investigate the sentencing on the basis of inadequate assistance and also the Defendant's rehabilitation and remorse. According to the decision the District Attorney conceded that the death penalty should not have been applied and intimated having talked with the victims' family, the victim and reviewed the defendant's record. Apparently, that was not the case. The facts of the crime are horrific and among those facts the killers of two parents left their 7 month old child to die, turning off the heat in the house in the dead of winter. Only by luck was the child saved. She was not consulted about the decision to change the sentence.

This case reminds us of our duty of candor to the court and our duty as officers of the court to deal with all persons honestly.

Wharton v. Superintendent

The Third Circuit Affirms Sanctions Against the Philadelphia D.A.'s Office for Failing to Confer with Crime Victims (reason.com)

6th Circuit – Monell liability – Failure to screen when hiring

In this police case, the facts involved an off-duty officer who allegedly acted inappropriately and illegally seized (arrested) a man. The court concluded that the plaintiff did not plausibly plead facts sufficient to support the claim. The panel noted on appeal that the counsel for the plaintiff essentially conceded that the facts were insufficient. Nevertheless, the court discussed the requirement for a failure to screen claim to be successful: "Instead, the plaintiff must show that "this officer was highly likely to inflict the particular injury suffered by the plaintiff.""

Kovalchuk v. City of Decherd, et al.

6th Circuit – Appeals – Issue of Law

In this case a juvenile in detention claimed a correctional officer used excessive force thereby injuring the juvenile. The officer's version of the facts changed and the internal investigation raised some additional versions of the events. Qualified Immunity denied. The panel dismissed the appeal for lack of jurisdiction noting that while qualified immunity denial can support an interlocutory appeal only an issue of law supports such an appeal.

Anderson-Santos v. Kent Cnty., Mich.

6th Circuit – QI – Minimal Force – 4th Amendment

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of the defendant deputies and Oakland County in a case involving claims of unlawful arrest, excessive force, and state-law violations. Kellie Farris, the plaintiff, alleged that deputies unlawfully arrested her and used excessive force when transporting her to the Oakland County jail after she called 911 to report damage to her car by another woman, Danniqua Franklin.
The court held that the arresting deputies had probable cause to arrest Farris for felonious assault based on Franklin's eyewitness account and the presence of a knife and scissors in Farris's car, which corroborated Franklin's story. The court also found that the deputies at the jail were entitled to qualified immunity on Farris's excessive force claims because their use of force, including removing Farris from the vehicle, using a spit hood, holding her head, and removing her clothes, was not clearly established as unconstitutional under the circumstances, given Farris's suicidal and uncooperative behavior.

The court rejected Farris's Monell claim against Oakland County, finding that she failed to demonstrate a county policy or custom that caused the alleged constitutional violations. Farris's state-law claims for false arrest, false imprisonment, assault and battery, intentional infliction of emotional distress, and ethnic intimidation also failed due to the presence of probable cause, governmental immunity, and lack of evidence of discriminatory intent.

Farris v. Oakland County

9th Circuit – Utilities – Relocation – Takings Clause – Governmental vs Proprietary

If a utility is required to relocate its equipment to serve the needs of a public transit agency, does the takings clause require compensation. In California, the answer seems to be – no; if the relocation is for a governmental, rather than a proprietary purpose. In this case a transit agency sought to build a line that required the utilities to relocate their equipment and the agency refused to pay for the relocation. The panel concluded that in California a utility holds a franchise that does not entitle it to the expectation of compensation if it is directed to move or relocate its equipment within the franchise. The court distinguished an earlier case that found San Francisco liable for compensation on the basis that there the city was operating a bus system which under its charter was considered a proprietary function, not a governmental function.

Southern California Edison v. Orange County Transportation Authority

9th Circuit – Professionalism – Appeals

In Grant v. City of Long Beach, the Ninth Circuit dismissed an appeal brought by Larry Grant and his daughter P.C., who alleged violations of their constitutional rights to association and due process, as well as several state-law claims, against the City of Long Beach and Gabriela Rodriguez. The court struck the appellants' opening brief in its entirety and dismissed the appeal due to the brief's material failure to comply with the court's rules.

The court found that the appellants' opening brief contained numerous misrepresentations and fabricated case law. Many of the cases cited in the brief were either misrepresented in their facts and holdings or did not exist at all. During oral argument, the appellants' counsel failed to acknowledge or adequately address these deficiencies when questioned by the court.

The court noted that the brief included only a few accurate citations, most of which were of little use because they lacked coherent explanations of how they supported the appellants' claims. Furthermore, the appellants did not file a reply brief. The court determined that these deficiencies violated Federal Rule of Appellate Procedure 28(a)(8)(A), which requires appellants to provide their contentions and the reasons for them, with citations to relevant authorities and parts of the record. Consequently, the court exercised its discretion to strike the brief and dismiss the appeal.

Grant v. Long Beach

11th Circuit – FLSA – Volunteers – compensation

Those of us who play golf know that courses often employ people to serve as attendants; people who load golf carts, clean them, charge them, carry bags, act as marshals, etc. So, do people who "volunteer" to do these jobs for a public entity become employees under the FLSA when they receive free rounds of golf for their services? It depends. In this case the court concluded that the amount of "freebies" the attendants received did not convert them from volunteers to employees under the FLSA. Nice discussion of the issues for those dealing with these cases. As a reminder, while a volunteer may not be an employee for FLSA the same may not be true under state law or under state workers compensation laws. Congratulations to Palm Beach County for a great win.

Adams v. Palm Beach County

Religious Land Use And Institutionalized Persons Act – DOJ

On March 19th, the DOJ issued a letter to state, county, and municipal officials reminding them of their obligations under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and providing information about the DOJ's efforts to enforce this federal civil rights law.

The letter emphasizes that RLUIPA, enacted in 2000, protects religious individuals and institutions from unduly burdensome, unreasonable, or discriminatory land use regulations. It highlights five key provisions of RLUIPA:

1. Protection against substantial burdens on religious exercise
2. Protection against unequal treatment for religious assemblies and institutions
3. Protection against religious or denominational discrimination
4. Protection against total exclusion of religious assemblies
5. Protection against unreasonable limitation of religious assemblies

The DOJ has been actively enforcing RLUIPA since its enactment, opening over 155 investigations and filing nearly 30 lawsuits related to the law's land use provisions. The letter provides examples of

cases where the DOJ has intervened to protect the rights of religious organizations and individuals under RLUIPA.

The letter encourages local officials to work with the DOJ to ensure compliance with RLUIPA and to prevent discrimination against religious individuals and organizations in land use decisions. It also offers the assistance of the DOJ's Civil Rights Division in answering questions and addressing issues related to RLUIPA. A link to the letter and the press release are available below.

March 19 DOJ Letter

DOJ Press Release