Summer 2013

FISHEL HASS KIM ALBRECHT LLP™
Attorneys at Law

PERSPECTIVES

A Periodic Publication of Fishel Hass Kim Albrecht LLP

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Employee Reinstated Following Termination for Comments on Facebook

An arbitrator recently overturned the discharge of a state corrections officer for an inappropriate Facebook post. In re Arbitration between State of Ohio, Dep't of Rehab. and Corr. & OCSEA, Local 11, AFSCME, # 27-11-20111201-0010-01-03 (Pincus, 2013). The Grievant made a Facebook post about Governor John Kasich following the death of Osama bin Laden that included the phrase, "OK, we got Bin Laden…let's go get Kasich next…who's with me?" Seventeen people viewed the post and "liked" it. Four of these individuals were employed by the same correctional facility as the grievant. The grievant's Facebook page was open to the public, identified him as a State employee and mentioned his job location. The State fired grievant for engaging in harassing conduct after the Governor's Office received an anonymous letter complaining of the grievant's behavior and containing a copy of the Facebook comments. The grievant's union appealed.

An arbitrator placed the grievant back on the job without back pay approximately fourteen months following his discharge. In his reasoning, the arbitrator noted "the record failed to establish the comment was anything more than empty words. Nothing in the record supports the view that the grievant's alleged threat was perceived as potentially dangerous to the physical well-being of the Governor. Union and Employer witnesses did not consider the comment as a serious threat." The arbitrator also mentioned that the grievant lacked past discipline and possessed no history of violence. Despite finding a job-related nexus regarding the posts, which is necessary in order to discipline employees for off-duty conduct, the arbitrator still determined grievant's discharge lacked sufficient cause for termination and instead issued the equivalent of a fourteen (14) month suspension. This case illustrates the difficulties in disciplining employees for off-duty and online conduct, but reveals that such discipline can be appropriate and upheld if done in a conservative manner.

For more information on this, or other discipline cases, contact Matt Whitman at mwhitman@fishelhass.com

U.S. Supreme Court Finds DNA Collection of Arrestees Does Not Violate the Fourth Amendment

On June 3, 2013, a divided U.S. Supreme Court held that the Fourth Amendment allows states to collect and analyze DNA from arrestees charged with serious crimes. Maryland v. King, No. 12-207 (October Term, 2012). King was arrested in 2009 for first and second degree assault. Maryland's DNA Collection Act authorized police to collect his DNA at the time of his arrest. The DNA matched a prior set of DNA data collected in a 2003 unsolved rape case. Using the DNA as evidence, a Maryland trial court convicted King of the 2003 rape. The Maryland Supreme Court reversed the conviction, holding the DNA was improperly obtained during an unreasonable search in violation of the Fourth Amendment. According to the Maryland Supreme Court, the government's legitimate interest in solving unsolved crimes did not outweigh the Defendant's privacy expectation to be free from warrantless searches of his biological material and the information contained therein. The DNA collection was considered a warrantless search because it was not done for the direct purpose of obtaining evidence regarding the unsolved rape.

The U.S. Supreme Court considered the case on November 9, 2012 and ruled that DNA samples are a "legitimate police booking procedure" like fingerprinting and mug shots. The Court stated that the police could require arrestees to submit to a warrantless DNA test, intended to match them to unsolved crimes. Information derived from these searches does not violate the Fourth Amendment. This case is one of the most significant decisions regarding the Fourth Amendment protection against unreasonable searches and seizures in some time.

SEC Charges Pennsylvania City with Securities Fraud for Failure to Disclose Information Regarding Financial Troubles

In early May, the United States Securities and Exchange Commission accused the City of Harrisburg, Pennsylvania of making misleading financial statements from 2009-2011, outside its securities disclosure documents regarding bond offerings. These statements were found in the city's budget report and in the mayor's state-of-the-city address. They included outdated representations of the city's bond rating and statements normally considered "political spin," such as the Mayor referring to a troubled incinerator project as "an additional challenge" and an "issue that can be resolved." The SEC considered these statements misleading because they failed to speak in detail about the impact the incinerator debt was having on city finances.

Harrisburg settled with the SEC without admitting or denying the accusations and received no sanctions. This is the first time the SEC has brought these types of charges against a local government. In light of this development, local governments should be careful to ensure publicly available financial information is presented in a timely and accurate fashion and to comply with SEC disclosure rules. Auditor David Yost issued a letter on May 7, 2013 noting that all communications regarding the local government's financial conditions (including CAFR's) "should be carefully scrutinized for accuracy and candor." In addition, statements made during collective bargaining negotiations may be impacted by this new ruling.

Fishel Hass' Motion to Dismiss Section 1983 Claim Granted

In Bright v. Gallia County, et al, 2:12-CV-00800-JLG-EPD, Bright, a former Gallia County Assistant Public Defender, brought suit alleging that the County Commissioners and the County Public Defender Commission had a constitutional obligation to prevent a local judge from removing him from all felony criminal cases in the Gallia County Court of Common Pleas. Bright and the Common Pleas Court Judge had a disagreement regarding a potential settlement offer that resulted in the Judge removing Bright from all his pending criminal cases. According to Bright, this removal rendered him unable to do his job. Subsequently, the plaintiff's employer, a private, non-profit organization created to provide legal services to indigent defendants in Gallia County, terminated his employment.

Plaintiff brought claims against the County Commissioners, the County Public Defender Commission, the Common Pleas Court Judge, and Bright's former employer in federal court. He alleged violations of his rights under the First and Fourteenth Amendments to the United States Constitution. Finding that the plaintiff failed to plead any facts that could result in liability on the part of the County or the Commission, the Southern District granted the County Defendants' Motions to Dismiss. Simply, Plaintiff failed to identify any constitutional right that the County defendants even arguably violated. Bright's claims against his former employer were also dismissed.

For more information on this case, or other §1983 actions, please contact Cheri at chass@fishelhass.com

Supreme Court Issues *Garrity* Reminder

In *State v. Graham, et al.*, 2013-Ohio-2114, the Ohio Supreme Court reminded public employers of the importance of *Garrity* warnings in internal investigations. *Garrity* is a U.S. Supreme Court case holding that statements obtained from a public employee under threat of job loss or discipline are unconstitutionally coerced and inadmissible in a subsequent criminal proceeding.

In *Graham*, a Department of Wildlife (DOW) officer engaged in a criminal act by permitting an out-of-state friend to use his address on a fishing application. DOW management employees conducted an internal investigation and issued the employee a verbal reprimand. Acting on a tip, the Ohio Inspector General (OIG) conducted a separate criminal investigation of the matter. A grand jury later indicted the investigating DOW management employees on criminal charges of obstruction of justice for failing to report the conduct to the ODNR director or chief counsel. The management employees moved to suppress their statements in the OIG's interviews on the basis that their *Garrity* rights had been violated. The State argued that the employees were never threatened with job loss and the OIG did not have the authority to discipline the employees.

The Ohio Supreme Court held that for a statement to be suppressed under *Garrity*, the public employee must have reasonably believed that his statement was compelled on the threat of job loss or discipline. To prove that belief, a court must find evidence of an express threat of termination. The Supreme Court held that an undated, unsigned Notice of Investigation from DOW that stated that the failure to cooperate could result in discipline was such a threat. Thus, the statements could not be used against the employees in their criminal proceedings.

Although not the focus of the decision, employers should also be wary of the implication that failure to report employee criminal conduct subjected these decision makers to charges of obstruction of justice.

For additional questions regarding *Garrity*, or for *Garrity* forms, please contact Stacy Pollock at spollock@fishel.hass.com.

Rental Agreements Contain Trade Secrets Exempt from Public Records Law

The Ohio Supreme Court unanimously held in State ex rel. Luken v. Corp. for Findlay Market of Cincinnati, Slip Opinion No. 2013-Ohio-1532 that rents charged by a nonprofit corporation managing Cincinnati's city-owned Findlay Market are trade secrets exempt from disclosure under Ohio's Public Records Act. The Relator requested copies of the lease agreements between merchants subleasing space at the Market and the non-profit corporation managing and operating the Market under a lease with the City since 2004. The City provided him with copies of the agreements with information disclosing the agreed terms and rents charged to vendors for spaces redacted. The City used the trade secret exception to the Public Records Act to explain the redactions. O.R.C. § 149.43(A)(1)(v). Trade secrets are defined as:

> information, including…any business information or plans, financial information, or listing of names…that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Finding that the City of Cincinnati met this test, the Court dismissed the claims against the City, even though the tenants were not required by their lease agreements to keep its terms secret. Exempting information from public records disclosure requires legal justification and citation to authority.

For more information on this case and how to comply with Ohio's Public Records Act, contact Frank Hatfield at fhatfield@fishelhass.com

ACA's Notice Requirements Upcoming

Fishel Hass recently informed you regarding the delay of the Affordable Care Act's required notice to employees regarding the pending availability of government-run health insurance Exchanges. The Department of Labor has now stated in Technical Release No. 2013-02 that employees must be provided with this notice by October 1, 2013, the beginning date for open enrollment on the Exchanges. The DOL has provided a model notice available by clicking here. This notice must be provided to all employees and there are certain requirements for providing the notice. Beginning January 1, 2014, the ACA's provisions establishing Exchanges will take effect, allowing individuals and small businesses the chance to participate in Exchange offered

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health insurance plans. Participation in these plans may make employees ineligible for insurance benefits through their employer. Employee participation may also subject the employer to tax penalties, depending on the cost and quality of the employer-offered plan and the number of hours worked by the employee(s).

For more information on how to ensure compliance with the ACA, contact Matt Whitman at mwhitman@fishelhass.com

Sixth Circuit Indicates Employers Should Conduct an "Individual Assessment" of Disabled Employees, Regardless of Expert Findings

In Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013), the federal Sixth Circuit, which encompasses Ohio, ruled that an employer's doctor (and therefore the employer) failed to make an adequate inquiry into whether a deaf individual could perform the essential functions of a lifeguard position, with or without reasonable accommodation, as required by the Americans with Disabilities Act. 42 U.S.C.A. § 12112(a). In *Keith*, the doctor examining the plaintiff "entered the exam room, briefly reviewed applicant's file, and declared, 'He's deaf; he can't be a lifeguard.'" The doctor had no education, training, or experience in assessing the ability of deaf individuals to work as lifeguards. In addition, one of the employer's supervisors wrote a memorandum listing several accommodations she believed could allow *Keith* to function as a lifeguard.

Although the employer relied on its medical professional's opinion, the Court found a genuine issue of material fact as to whether the plaintiff could perform the essential functions of the job with or without reasonable accommodations and remanded the case to the lower court. The Court also hinted that an employer's failure to engage in the interactive process of discussing potential accommodations for disabled employees may be an independent claim under the ADA. This case shows the importance of choosing qualified medical professionals to perform medical evaluations and also underscores the ADA's interactive process.

For additional information on how to comply with the ADA, contact Frank Hatfield at fhatfield@fishelhass.com

For Workers' Comp Claims, Psychiatric Trauma Must Arise from Physical Injury

Recently, the Ohio Supreme Court held that within the Ohio workers' compensation system, an employee suffering from a psychiatric injury can only receive compensation if that injury was caused by a physical injury. *Armstrong v. John R. Jurgensen Co*., Slip Opinion No. 2013-Ohio-2237. While working as a driver for the John R. Jurgensen Company, Mr. Armstrong, sitting in a yield lane in a dump trunk, was hit by a car. He suffered spinal injuries and developed post-traumatic stress disorder (PTSD) from witnessing the other driver's injuries. He submitted his claim to the Bureau of Workers' Compensation (BWC), and a hearing officer initially allowed his PTSD claim in addition to his claims for physical injuries. On appeal, both parties offered expert witness testimony on the PTSD diagnosis. The common pleas court rejected the PTSD claim, holding that it was not compensable because it did not "arise from" his physical injuries. The court considered the employer's witness who testified that Armstrong likely would have developed PTSD from the accident even without incurring physical injuries.

The Ohio Supreme Court affirmed the PTSD rejection by refusing to soften the clear standards for what makes an injury compensable. The Court highlighted the need to determine the legislative intent within the workers' compensation statute and declined to substitute a clear definition of "injury" in R.C. 4123.01(C) with its own interpretation. This case demonstrates the importance of understanding the workers' compensation system within the context of a changing medical landscape and potential for the legislature to change current law.

For more information regarding this case, workers' compensation matters or to request a copy of the decision, contact David Riepenhoff at driepenhoff@fishelhass.com

Rough Sex While Off Duty Leads to Officer's Termination

In Murphy v. City of Richmond, 2013 WL 1163802 (Ky. App., Mar. 22, 2013), the Kentucky Court of Appeals upheld the termination of a Kentucky police officer for engaging in off-duty rough group sex. One of the participants was another officer from the Police Department. The female involved, who Murphy had met when responding to a domestic violence call at her home, suffered a split lip and bruising on her body. A neighbor urged her to go to the hospital, where she refused a rape kit, stating that she had not been raped. The same neighbor, with the assistance of others, reported the incident to the Madison County Sheriff's Department. Murphy and the other officer were indicted on several criminal charges; however these were dismissed following not guilty jury verdicts.

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Both officers were terminated, but only Murphy challenged the decision. His initial appeal went to the Kentucky equivalent of a civil service commission, which upheld the termination for violations of policies relating to Conduct Impairing the Police Department and Conduct Unbecoming an officer. Murphy appealed and the Kentucky Court of Appeals upheld the termination. The Court reasoned that even though the conduct was private and consensual, it was still "likely to be viewed as aberrant by the community at large" and Murphy "took the risk that his conduct would become public." Even though none of the participants took steps to make the conduct public, "to hold otherwise would render the Conduct Unbecoming and Conduct Impairing the Police Department policies and procedures meaningless."

For more information on the law related to disciplining employees for off-duty conduct, contact Matt Whitman at mwhitman@fishelhass.com

Free! You Don't See That From A Law Firm Very Often, Do You?

Do you have a legal question you've been itching to ask? Now is the time. Our next "Free Fridays" Benjamin Albrecht will be on standby to answer your calls – on the house. You can submit your questions to Benjamin on Friday, August 2, 2013 from 9 am- 4 pm by calling (614) 221-1216. Please no emails as we will only be accepting and responding to phone calls.

Mark your calendar for our future "Free Fridays" –**9/6** – Marc Fishel, **10/4** – Dave Riepenhoff, **11/1** – Cheri Hass, **12/6** – Edward Kim.

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FHKA welcomes information from interested individuals regarding court decisions, arbitration decisions, and other matters. If you have any information which you believe to be of interest, please feel free to contact us.

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