



CONSTANGY
BROOKS, SMITH &
PROPHETE LLP

COMPLEX DISCIPLINE AND DISCHARGE ISSUES

Prepared for:
Annual FACT Risk Management and Educational Conference
October 12, 2017

Prepared by:
John F. Dickinson, Esquire
jdickinson@constangy.com
904-356-8900

A wider lens on workplace law



CONSTITUTIONAL CONUNDRUMS



APPLICABLE CONSTITUTIONAL AMENDMENTS

- Fourteenth
- First
- Fourth



GENESIS OF CONSTITUTIONAL CLAIMS AGAINST COUNTIES

- All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

- 14th Amendment



VEHICLE TO SUE COUNTIES

- Section 1983 of the Civil Rights Act of 1871
 - Public employers who deprive employees of rights and privileges secured by the U.S. Constitution and laws shall be liable for injuries.



FIRST AMENDMENT

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.



FIRST AMENDMENT RESTRICTIONS ON DISCIPLINE AND DISCHARGE

- Freedom of Speech
- Freedom of Association
- Political Belief and Affiliation



FREEDOM OF SPEECH

- Not all speech is protected
 - Must be on a “matter of public concern”
 - Must be made as a citizen vs. pursuant to professional duties
 - Must pass balancing test, weighing interests of employee (as a citizen) with interest of County in promoting efficiency



FREEDOM OF ASSOCIATION / POLITICAL BELIEF

- Not all association/belief is protected
 - Depending upon position held, political loyalty may be an appropriate requirement (policy makers, or confidential employees)
 - Nature of duties is determinative factor



QUIZ – 1ST AMENDMENT

- County terminates librarian shortly after she wrote a letter to the Board of County Commissioners complaining that the County had not done enough to prepare citizens for Hurricane Irma.

[Issue: Was termination unconstitutional?]



QUIZ – 1ST AMENDMENT

- County employee is terminated within 2 months after his mother had made complaints to the County Manager about an unfavorable position transfer of her son, and after the mother had filed an ethics complaint against her son's supervisor.
- County contended that termination was the result of poor performance.

[Issue: Was termination unconstitutional?]



QUIZ – 1ST AMENDMENT

- County Public Works employee posts racially insensitive comments on his Facebook page while off duty, and in group text message sent to other employees while on duty, concerning acquittal of George Zimmerman. Employee also texted picture of Paula Deen with racially derogatory caption to co-workers.

[Issue: Can County terminate employee?]



QUIZ – 1ST AMENDMENT

- Animal Control Officer supported a candidate for County Commission who was his friend. Board Chair (who was not running for office, but who was a personal friend of an incumbent Commissioner running against the Control Officer's friend) told the County Administrator to terminate the Control Officer for supporting the opposition candidate.
- County Administrator directs Control Officer's supervisor to "investigate" Control Officer for infractions. Administrator also directed supervisor to lower Control Officer's evaluation.
- Control Officer is called into a meeting and told he would be terminated with no explanation as he was "at will" or he could resign. Control Officer resigns.

[Issue: Does Control Officer have valid First Amendment claim?]



QUIZ – 1ST AMENDMENT

- EMS employee is seen in his off hours putting up political signs for opponent of incumbent County Commissioner. EMS employee claims he received anonymous call from someone who allegedly told him that his job would suffer if he continued to support the opponent. The incumbent Commissioner ultimately wins the race, and the EMS employee is terminated due to a “restructuring.”

[Issue: Does EMS employee have viable First Amendment claim?]





FOURTEENTH AMENDMENT DUE PROCESS

- County disciplinary action that results in a termination or other major change of position involves questions of deprivation of “property” under certain circumstances.
- A County employee has a “property” interest in his/her job if he/she has a “reasonable expectation of continued employment”.
- Such “expectation” arises largely from any policy or statement indicating that the employee can only be terminated “for cause,” “for just cause,” or “for proper cause”.



FOURTEENTH AMENDMENT DUE PROCESS

- If a County employee is found to have a “property” interest in his/her job then he/she must be afforded due process before he/she can be deprived of the property interest.
- Due process involves putting the County employee on notice of the charges against the employee, and providing the County employee an opportunity to present his/her side of the story before the County takes adverse action against him/her.
- A post deprivation due process hearing may also be required.



QUIZ – 14TH AMENDMENT

- County's employee handbook and union contract provide that discipline shall be "for cause," and also state that employees are "at will."

[Issue: Do County employees have a "property" interest in their jobs?]



QUIZ – 14TH AMENDMENT

- County's charter states that employees can be disciplined, up to and including discharge, for "proper cause." County sends EMS employee a letter stating that County "intends to terminate employee, effective November 1, 2017," and gives EMS employee an opportunity to respond either in writing or in a meeting with management.

[Issue: Does this notice satisfy due process requirements?]





FOURTH AMENDMENT SEARCH AND SEIZURE

- The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated



SEARCH AND SEIZURE EXAMPLES

- Requiring a medical examination
- Drug/alcohol testing
- Searching a desk/personal item



WHEN DOES A SEARCH / SEIZURE VIOLATE FOURTH AMENDMENT?

- When the County employee has a “reasonable expectation of privacy”, and
- The search/seizure is “unreasonable.”



Definition: Safety-Sensitive Position

“Safety-sensitive position” means, with respect to a public employer, a job assignment that requires:

- The employee to carry a firearm,
- Work closely with an employee who carries a firearm,
- Perform life-threatening procedures,
- Work with heavy or dangerous machinery,
- Work with children,
- Work with detainees in the correctional system,
- Work with confidential information or documents pertaining to criminal investigations,
- Work with controlled substances, or
- A job assignment that requires an employee security background check, pursuant to §110.1127, or
- A job assignment in which a momentary lapse in attention could result in injury or death to another person.

§440.102(1)(o), Florida Statutes



Definition: Safety-Sensitive Position (cont'd.)

- Various cases have recognized the following as “safety sensitive:” law enforcement; firefighters; EMTs; medical providers; operators of large vehicles and heavy equipment; public transit operators; corrections officers; individuals supervising or instructing children; railroad and dock workers.



Employee Who Operates Motor Vehicle for Work

- Courts have held that the mere fact that an employee operates a city-issued vehicle does not, in and of itself, make the position safety-sensitive.



QUIZ – 4TH AMENDMENT

- While on vacation, a County Human Resource Department employee is investigated for possible work-related sexual harassment. During a search of her office, certain materials are seized from her desk and a file cabinet. The County had no policy or practice concerning County employees' privacy interests.

[Issue: Did the search of the desk and filing cabinet violate the employee's Fourth Amendment rights?]



QUIZ – 4TH AMENDMENT

- County had policy which required:
 - 1) Post job-offer drug testing of all applicants;
 - 2) Reasonable suspicion testing; and,
 - 3) Random testing for all employees.

John Doe submits applications for positions of Solid Waste Coordinator and lifeguard at County pool. He signs a form agreeing to take the drug test and acknowledging that refusal to take, or failure of test, would disqualify him from consideration. Doe tests positive and is not hired.

[Issue: Did the County violate Doe's Fourth Amendment rights?]



QUIZ – 4TH AMENDMENT

- County post-accident drug tests Public Works employee who, while working to repair a washed-out road during Hurricane Matthew, is involved in an accident where a tree is hit by high winds and falls on his County vehicle.

[Issue: Did the County have the right to test the Public Works employee?]





MEDICAL MARIJUANA AND DRUG TESTING

- Florida Constitution amended January 3, 2017 (Amendment 2)
- Legalizes full-strength marijuana for specific diseases/conditions (Parkinson's Disease, MS, Crohn's Disease, etc.)
- Marijuana is still illegal under federal law (a "Schedule I drug")
- Drug testing policies should be reviewed/revised – what is County policy on the medical/recreational use of marijuana?



MEDICAL MARIJUANA AND DRUG TESTING

- Is accommodation required?
- Amendment 2 provides, “[n]othing in this section shall require any accommodation of any on-site medical use [or possession] of marijuana in any . . . place of education or employment.”
- No Supreme Court case yet



MEDICAL MARIJUANA AND DRUG TESTING

- So far no publicized court decision requiring accommodation of employee's off-duty use of marijuana
- What is your County's policy?



MEDICAL MARIJUANA AND DRUG TESTING

- Medical Review Officers (MRO's) and reporting positive drug test results when employee/applicant presents a medical marijuana card ? ? ?
- MRO has no way to verify medical marijuana card status
- MRO usually will report as positive for marijuana/THC, but may refer donor back to County





WHISTLEBLOWER PROTECTION



shutterstock - 308703875



PROTECTED DISCLOSURE / ACTIVITY

- A County may not take adverse action against a County employee in retaliation for the employee's written disclosure to the Chief Executive Officer or other appropriate local official of the County of:
 - 1) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of the County which creates and presents a substantial and specific danger to the public's health, safety, or welfare.



OTHER PROTECTED ACTIVITY

- A County may not take adverse action against a County employee in retaliation for the employee's written disclosure to the Chief Executive Officer or other appropriate local official of the County of:
 - 2) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, . . . or gross neglect of duty committed by an employee or agent of the County or independent contractor.



OTHER PROTECTED ACTIVITY

- County employee who is requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity
- County employee who refuses to participate in adverse action prohibited by the whistle-blower statute
- County employee who initiates a complaint through a whistleblower's hotline



"CAUSAL CONNECTION" EASY TO PROVE

- The causal link element for retaliatory discharge under the PSWA requires plaintiff to prove the protected activity and discharge were not "wholly unrelated"



QUESTIONS



John F. Dickinson, Esq.
jdickinson@constangy.com
904-356-8900

