

INDIVIDUAL RIGHTS IN PUBLIC SECTOR EMPLOYMENT

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THE CONSTITUTIONAL OVERLAY

I. FREEDOM OF SPEECH

A. In the Beginning: Pickering, Connick, and Waters.

The Supreme Court has long held that public employees do not surrender all their First Amendment rights by reason of their employment. The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. Over forty years ago, in Pickering v. Board of Education, 391 U.S. 347 (1976), the Court held that in order to determine whether a public employer's adverse action against an employee violates the employee's First Amendment rights, courts must balance the interest of the employee in commenting as a citizen on matters of public concern, against the interest of the public employer in promoting the efficiency of the public services it provides through its employees ("the Pickering balancing test"). In a classic example, the Court found in Pickering that the teacher's letter to a local newspaper addressing the funding policies of his school board could not have interfered either with his performance in the classroom nor with the general operations of the school system, and that the school board's interest in regulating the teacher's speech did not outweigh the teacher's First Amendment rights.

The Pickering analysis is necessarily highly fact-specific. The question is not simply whether an employee's speech actually disrupted the governmental workplace, but also whether the speech had the potential to be disruptive. Connick v. Myers, 461 U.S. 138, 152 (1983) ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). Where the employer who imposes discipline based on others' reports of what the employee said, rather than on personal knowledge of the employee's speech, the balancing analysis also may depend on whether the employer acted reasonably and in good faith in deciding that governmental interests outweighed the employee's speech rights. Waters v. Churchill, 511 U.S. 661, 677 (1994).

Following Pickering, courts have engaged in the following inquiries to determine the extent of a public employee's First Amendment rights:

1. **Matter of Public Concern.**

Does the employee's speech touch upon a **matter of public concern**? If so, then the speech may be entitled to First Amendment protection. Connick v. Myers, 461 U.S. 138 (1983). If it is merely a matter of "personal interest" such as a personnel matter, then the speech will not be protected. *Id.* at 147. The court must consider "the content, form, and context of a given statement, as revealed by the whole record," to determine whether employee speech addresses a matter of public concern. *Id.* at 147-148. Where the speech involves "mixed questions of private and public concern," the court must decide whether it is the private or the public concern that predominates. Bonnell v. Lorenzo, 241 F.3d 800, 812 (6th Cir. 2001). Whether speech to co-workers about union matters reflects merely private interests or matters of public concern generally requires a full "Connick" analysis. Davignon v. Hodgson, 524 F.3d 91, 101-102 (1st Cir. 2008); *cf.* Gregorich v. Lund, 54 F.3d 410, 416 (7th Cir. 1995); Communication Workers of America v. Ector County Hospital, 467 F.3d 427 (5th Cir. 2006)(en banc) (wearing of Union Yes button not a matter of public concern).

2. **Causal Connection – Motivating Factor.**

If the speech touches upon a matter of public concern, did it **motivate** an actionable adverse action? Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287, (1977).

Some cases turn on whether a particular change in employment was sufficiently adverse as to be actionable. *See, e.g.,* Dillon v. Morano, 497 F.3d 247 (2d Cir. 2007)(interference with performance evaluations, "degrading working conditions" – relocating workgroup, reducing resources, lateral reassignment to menial tasks – not sufficiently adverse); Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998)(threatening to transfer plaintiff and berating her not actionable). The more frequent inquiry is the causal connection between employee speech and the adverse action:

If the speech was not a **motivating factor**, then the inquiry necessarily ends. For example, in Doggett v. County of Cook, 255 Fed. Appx. 88, 90 (7th Cir. 2007), the court found that even if a nurse's memoranda to superiors and union officials concerning hospital conditions were protected by the First Amendment, the record showed that the nurse was discharged due to numerous violations of rules of conduct and work policies, defeating any possible First Amendment claim at the summary judgment stage. *See also,* Heil v. Santoro, 147 F.3d 103 (2d Cir. 1998)(no First Amendment claim where police officer fired for insubordination for refusing to cooperate with investigation into his actions that might have been protected speech; his speech was not itself the basis for termination).

3. Adequate Justification – Pickering Balancing Test.

Even if the speech was the basis for the adverse action, the First Amendment claim can be defeated if the public entity had an adequate justification for treating the employee differently from any other member of the general public. This is where the Pickering balancing test comes in. As noted above, the public employer must demonstrate that the employee’s conduct interfered with governmental operations or that it reasonably believed that the speech would interfere with such operations. Preserving harmony within the workforce, Belcher v. City of McAlester, 324 F.3d 1203 (10th Cir. 2003), preventing disruption of school system due to erosion of parental trust, Melzer v. Board of Education, 336 F.3d 185 (2d Cir. 2003), and ensuring workplace efficiency and confidentiality, Sheppard v. Beerman, 317 F. 3d 351, 355-56 (2d Cir. 2003), are all examples of legitimate governmental interests that may outweigh an employee’s speech interest.

B. The Garcetti Test -- Statements Made Pursuant to Job Duties.

In Garcetti v. Ceballos, 547 U.S. 410 (2006), a divided Supreme Court added another factor: Were the public employee’s statements made “**pursuant to the employee’s official duties**”?

The crux of the Court’s holding is that “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Therefore, if the speech was made “pursuant to [the employee’s] official duties,” it is not subject to First Amendment protection.

As the Court explained, at 419-20:

The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

However, the Court held that when a public employee engages in speech pursuant to their official job duties, they are generally not speaking as private citizens, but as public servants, and the employer’s interest qua employer is paramount. The Court rejected “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties,” concluding, “Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.”

While this approach had been presaged in some circuits, *see, e.g., Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999), the *Garcetti* decision dramatically altered the analysis of public employees' First Amendment claims. Now, the first question asked is not whether the speech addresses a matter of public concern, but **whether the speech was made pursuant to the public employee's job duties**. The scope of one's duties may not be limited by the specific enumeration in a job description. *Phillips v. City of Dawsonville*, 499 F.3d 11239 (11th Cir. 2007).

Examples of conduct not protected because of the scope-of-duties rule:

- firearms instructors' sending emails and writing report concerning the hazards of an indoor firing range, *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007);
- memo from athletic director/head football coach to office manager and principal criticizing financial management of sports program, *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007);
- comments by park ranger to third-party consultant about discipline, morale and performance problems in department, *Weisbarth v. Geauga Park*, 499 F.3d 538 (6th Cir. 2007);
- corrections officer report to assistant superintendent of request from her supervisor not to inspect co-employee's car, *Speigla v. Hull*, 481 F.3d 961 (7th Cir. 2007).

Protected conduct, after *Garcetti*, has included the allegations by a public works director that city council was violating open meeting law, *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007); and allegations by an engineer that his supervisors were illegally claiming inappropriate overtime and excess pay. *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007).

C. On Beyond Garcetti.

1. Academic Issues.

One of the major questions left open after *Garcetti* is the interplay between the First Amendment speech rights of a public employee who is employed in an academic role, and the employer's educational mission. In *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), a pre-*Garcetti* case, a university professor who taught a communications and media class was reassigned after he refused to modify the course in response to a student complaint about its religious content. The Third Circuit held that the First Amendment did not restrict the public university's right to control its curriculum. Post-*Garcetti*, the Seventh Circuit has carefully laid out the relationship between academic freedoms and a public school system's rights

as employer, in *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007), with *Garcetti* almost an aside. Noting that the Circuit had long held that a public school system may require classroom teachers to conform to the designated curriculum, Judge Easterbrook observed, 474 F.3d at 479:

This is so in part because the school system does not “regulate” teachers’ speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.

Observing that the teacher must teach what the curriculum mandates, the court continued, *id.* at 479-80:

Beyond the fact that teachers hire out their own speech and must provide the service for which employers are willing to pay – which makes this an easier case for the employer than *Garcetti*, where speech was not what the employee was being paid to create – is the fact that the pupils are a captive audience. . . . The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.

Thus, barely relying on *Garcetti*, the Seventh Circuit concluded that teachers in a public school system with compulsory attendance do not have a First Amendment right to deviate from the official curriculum within the classroom. However, the court noted that the question of restraints on teacher publications and speech outside the classroom remains to be determined.

The Seventh Circuit also specifically left open the question whether academics at public post-secondary education institutions have greater First Amendment rights than public employees in other settings. In *Piggee v. Carl Sandburg College*, 464 F.3d 677 (7th Cir. 2006), an instructor at a community college had argued that the First Amendment allowed her to promote her religious perspective on homosexuality to students in a cosmetology class, but the court held, without application of either *Garcetti* or *Pickering* balancing, that a college may demand that instructors limit their speech to topics germane to the educational mission. Piggee’s speech went beyond her teaching duties, so no “academic freedom” rights were imperiled. The important question yet to be decided, as the Seventh Circuit noted in *Mayer*, is the extent to which constitutional protection of scholarly viewpoints in post-secondary education survives *Garcetti*.

2. “Whistleblowing.”

Garcetti may also shift the balance in another area. Prior to *Garcetti*, speech related to disclosure or protest of corruption, threats to health or safety and fiscal or ethical improprieties were likely to be deemed to touch on matters of public concern, with courts viewing government claims of potential or actual workplace disruption with some skepticism. See, e.g., *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 140 (2d Cir. 1999). However, if the employee speech about such misfeasance is made internally “pursuant to” his or her job duties, the *Garcetti* decision may preclude courts from finding that the employee is entitled to First Amendment protection against his employer’s retaliation. Ironically, employees may find greater protection if they take their grievances outside the workplace and directly to the public, an outcome of questionable benefit to the governmental entity. See, e.g., *Habel v. Township of Macomb*, 258 Fed. Appx. 854, 2007 U.S. App. LEXIS 30207, 2007 WL 4570685 (6th Cir. Dec. 28, 2007)

II. FREEDOM OF ASSOCIATION

A. Political Patronage and Association.

Public employees, like other employees, have a basic right of freedom of association under the First Amendment.

For example, the First Amendment may protect a public employee from retaliation based on his active association with a union. *Davignon v. Hodgson*, 524 F.3d at 107-108.

The First Amendment right to freedom of association also generally forbids government officials from discharging or threatening to discharge public employees for engaging in partisan political activities. *Elrod v. Burns*, 427 U.S. 347 (1976). However, in *Elrod*, while the Supreme Court reiterated that First Amendment protection, the Court held that political affiliation and party loyalty may be permissible considerations in employment decisions involving policymaking and confidential employees.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court went further and held that even for non-policymaking, non-confidential employees, an employer may rely on political affiliation in employment decisions if party affiliation is necessary for the effective performance of the public position in question. “[T]he ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Id.* at 518.

Political nonaffiliation, *i.e.*, simply being apolitical, is also protected by the First Amendment. *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008); *Galli v. New Jersey Meadowlands Commission*, 490 F. 3d 265 (3d Cir. 2007). Moreover, the First Amendment requires that all employees in protected jobs be treated apolitically; it is unlawful to prefer an employee more active politically over a less active one, even if they belong to the same political party. *Hall v. Babb*, 389 F.3d 758 (7th Cir. 2004).

Positions deemed “policymaking” include:

- a police chief, *Wilson v. Moreau*, 492 F.3d 50 (1st Cir. 2007),
- an Assistant Chief Examiner of the Civil Service Board, *Silberstein v. City of Dayton*, 440 F.3d 306 (6th Cir. 2006),
- a sheriff’s deputy in charge of a sensitive training program, *Hadfield v. McDonough*, 407 F.3d 11 (1st Cir. 2005)
- a state transportation department bureau chief in charge of accounting and auditing, *Allen v. Martin*, 460 F.3d 939 (7th Cir. 2006) and
- confidential employees within an auditor’s organization have been deemed subject to political considerations. *Baker v. Hadley*, 167 F.3d 1014 (6th Cir. 1999).

Positions that were not policymaking or confidential included:

- patrol lieutenant and sergeant in a sheriff’s department, *Shockency v. Ramsey County*, 493 F.3d 941 (8th Cir. 2007)(lieutenant who ran against sheriff in election, and sergeant who supported him, could not be demoted in retaliation),
- the clerk in a county tax commissioner’s office, *Epps v. Watson*, 492 F.3d 1240 (11th Cir. 2007), and
- deputy county clerks, *Caudill v. Hollan*, 431 F.3d 900 (6th Cir. 2005).

Of course, if the employee cannot demonstrate a causal connection between her political affiliation and the adverse action alleged, her First Amendment claim must fail. *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1 (1st Cir. 2007); *Langley v. Hot Spring County*, 393 F.3d 814 (8th Cir. 2005). One court has held that a political discrimination claim must fail where the allegedly adverse action, isolated harassment by one official, was not “sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations in favor of the prevailing [political] party.” *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32 (1st Cir. 2007).

B. Other First Amendment Rights – Freedom of Association and Freedom of Religion.

Occasionally, cases arise that implicate public employees’ associational rights beyond the political arena. In *Lawson v. Curry*, 244 Fed. Appx. 986 (11th Cir. 2007) a jail employee alleged she had been harassed, disciplined and ultimately terminated for having interracial relationships and for being pregnant with an interracial child. The Eleventh Circuit held that she had sufficiently pleaded a violation of her First Amendment right to “intimate association,” which encompassed, among other things, personal relationships relating to the creation of families.

In addition, while public employees have the right of freedom of religion, the Fifth Circuit has held that a public school district did not violate a teacher’s First Amendment rights by denying her a promotion on the basis of her refusal to take her children out of a private Christian school, and enroll them in the public schools. *Barrow v. Greenville Independent School District*, 480 F.3d 377 (5th Cir. 2007). The Court found that the basis for the district’s decision was not the religious nature of her children’s school but the fact that it was private rather than public, and would have taken the same action had she sent her children to non-religious private schools.

In contrast, the Ninth Circuit, applying a strict scrutiny standard and upholding a jury award, held that a school district did violate a principal’s First Amendment rights when the district chose not to renew his administrative assignment and transferred him to a teaching position because he had decided on religious grounds to homeschool his children.

However, where a police chief continuously harangued a subordinate to bring her thinking and her conduct into conformity with the principles of his own religious beliefs, admonished her in no uncertain terms that she was at risk of losing her job if she was unwilling to do so, and ultimately fired her because she did not measure up to his religious expectations, the Seventh Circuit held that the chief violated the employee’s First Amendment “free exercise” and “establishment clause” rights. *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1995), citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)(right of free exercise of religion), *Lee v. Weisman*, 505 U.S. 577, 587 (1992)(establishment clause); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)(same).

III. PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

A. Procedural Due Process – Deprivation of Property.

1. Finding the Property Interest.

Under the Fourteenth Amendment, state actors cannot deprive any person of life, liberty or property without due process of law. In particular, public employers must provide their employees with due process protections before depriving the employees of a property interest in their employment or any

constitutionally-protected liberty interests. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Those procedural due process protections take two forms: Procedural due process, and substantive due process.

a. State Law Sources.

A public employee's property right in employment does not arise directly from the U.S. Constitution, but from state law or other external sources. *Id.* An employee may have a protected property right to continued public employment as a result of state academic tenure statutes, *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), civil service laws and systems, *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), or established rules and understandings that effectively create a *de facto* tenure system. *Perry v. Sinderman*, 408 U.S. 593 (1972)(an official faculty guide stating that a teacher could "feel that he ha[d] permanent tenure as long as his teaching services [were] satisfactory" created a property interest in continued employment, even without a tenure statute). The question is whether those tenure statutes, civil service laws or other rules and understanding have created for the employee "a legitimate expectation of continued employment."

b. At-Will Employees.

Employees who are terminable at will, however, generally have no protected property interest in continued employment. *Bishop v. Wood*, 426 U.S. 341 (1976). For example, unless otherwise provided by state law or contract, a non-tenured teacher does not have a constitutionally protected property interest in a job, and may be dismissed without due process protections. See, e.g., *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1397 (3d Cir. 1991); *Goodmann v. Hasbrouck Heights School District*, 2008 U.S. App. LEXIS 8683 (3d Cir. 2008). Probationary troopers and cadets of the Pennsylvania State Police do not have a property interest in their continued employment. *Blanding v. Pennsylvania State Police*, 12 F.3d 1303 (3d Cir. 1993).

c. Other Rights of Employment.

Employees may have a property interest not only in continued employment but also in various rights and benefits related to the employment. For example, a staff psychiatrist may have a constitutionally protected property interest in clinical staff privileges at a state hospital. *Greenwood v. New York*, 163 F. 3d 119 (2d Cir. 1998). However, a state tenure law may provide a public school teacher with a protectible property interest in his employment as a

teacher, without protecting an “extra duty assignment” like an appointment as football coaching. *Lancaster v. Independent School District No. 5*, 149 F.3d 1228 (10th Cir. 1998). In addition, some property interests are so slight as to not deserve due process protections.

d. Volunteers.

An interesting question is whether a person can have a vested interest in the right to work as a volunteer for a public entity. In *Griffith v. Lanier*, 521 F.3d 398 (D.C. Cir. 2008), members of the District of Columbia’s Metropolitan Police Department Reserve Corps, a corps of unpaid volunteers who assist full-time officers of the Metropolitan Police Department in law enforcement, sued to enjoin enforcement of a new Department General Order that stated that Reserve Corps members “shall not be eligible for any benefits normally accruing to employees of the District of Columbia, including health insurance, retirement, life insurance, leave, or the right to organize for collective bargaining purposes, unless such benefits are specifically provided by the laws of the District of Columbia.” This was consistent with the District’s Volunteer Services Act of 1977. The court determined that Reserve Corps volunteers were not “members of the police force” under DC law, were subject to dismissal at will, and therefore lacked a statutorily-protected property interest necessary to support a due process challenge. The court cited two earlier cases reaching opposing conclusions about whether volunteers may have a vested right in continuing to volunteer: *Versarge v. Township of Clinton*, 984 F.2d 1359, 1370 (3d Cir. 1993)(finding no property interest in volunteer service absent some further form of compensation), and *Thornton v. Barnes*, 890 F.2d 1380, 1388 & nn.11-12 (7th Cir. 1989)(suggesting that such an interest may exist).

2. The Nature of the Due Process Right

In *Loudermill*, the Supreme Court held that the principle that an individual must be given an opportunity for a hearing before he is deprived of any significant property interest means that an employee with a constitutionally protected property interest in his public employment must be given “some kind of hearing” prior to being discharged. The employee must be given notice and an opportunity for hearing that is appropriate to the circumstances before deprivation of the property or liberty interest; if provision is made for a “full” post-deprivation hearing, then the pre-deprivation hearing can be limited to a process that enables the public employer to determine whether there are reasonable grounds to support the deprivation. At a minimum, that includes pre-termination notice of the charges against the employee, an explanation of the employer’s evidence, and an opportunity for the employee

to respond, both to the charges and to the action the employer proposes. A more elaborate post-termination hearing must then follow within a “meaningful time.” In general, “notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)(citations omitted).

Three factors are relevant in determining what process is constitutionally due: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (non-employment case applied in the employment context in Gilbert v. Homar, 520 U.S. 924 (1997)) Post-termination remedies, no matter how elaborate, may not relieve management of the obligation to provide a tenured employee with minimal pre-termination due process. Montgomery v. City of Ardmore, 365 F.3d 926 (10th Cir. 2004).

In Samuel v. Holmes, 138 F.3d 173 (5th Cir. 1998), the Fifth Circuit found that an employee had been deprived of his procedural due process rights when he received only twenty minutes’ notice of a pre-termination hearing and had no meaningful opportunity to introduce evidence, call witnesses or contest the charges against him.

However, the Supreme Court has held that the failure to provide any notice or hearing before imposing a suspension without pay did not violate a tenured employee’s constitutional rights, where the state had a substantial interest in removing the employee from his position as a police officer after he had been arrested and charged with drug law violations, and where the arrest and filing of charges provided substantial assurance that the suspension was not unwarranted. Gilbert v. Homar, 520 U.S. 924 (1997)

Similarly, an assistant superintendent in charge of a school district’s finance department was not deprived of procedural due process with the school board suspended him without pay in the midst of a serious financial crisis in the district upon discovery that several accounting errors resulted in an unexpected and dramatic shortfall in the district’s budget, because of the district’s strong interest in removing the employee from that critical position and because of the availability of post-suspension grievance procedures. Kirkland v. St. Vrain Valley School District, 464 F.3d 1182 (10th Cir. 2006).

B. Procedural Due Process – Deprivation of Liberty Interests.

Even employees who do not have a cognizable property interest in continued employment may have employment-related liberty interests. Where a public employee’s name, reputation, honor or integrity are at stake because of an action by

the public employer, or where government action, such as a failure to reemployment the individual, imposes a stigma that limits the person's future employment opportunities, the employee is entitled to notice and a "name-clearing" hearing. *Board of Regents v. Roth*, 408 U.S. 564 (1972). It is not enough that the allegations or action against the person merely damages the person's reputation. "Stigma plus" – a stigma to one's reputation plus deprivation of some additional right or interest – is required.

For example, in *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006), the plaintiff, borough manager, alleged that he resigned after intense harassment and defamatory statements by the mayor. As a policy-making employee, the plaintiff did not have a property interest in his job. However, the Third Circuit concluded that the plaintiff had sufficiently alleged a liberty interest claim, under the "stigma-plus" test. When an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination," it deprives the employee of a protected liberty interest," the court held, and an employee deprived of his protected liberty interest is entitled to a name-clearing hearing, even though he has no protectible property interest in continued employment.

Similarly, in *Ridpath v. Board of Governors of Marshall University*, 447 F.3d 292 (4th Cir. 2006), an employee responsible for the athletic department's compliance with NCAA rules who also held an adjunct teaching position was made the scapegoat for rules violations that he himself had discovered and reported. At the close of the investigation, he agreed to be reassigned to a different department in the university, although it would take him away from his chosen career path in athletic department management and away from his area of expertise, because the university agreed to inform NCAA and the public that the reassignment was not the result of any wrongdoing on his part. However, the university reported to the NCAA, and the NCAA reported to the public that the reassignment was a "corrective action" in response to the violations. Plaintiff was removed from his teaching position due to negative comments about the university that he made during the NCAA investigation. He sued alleging in part that the university's actions have prevent him from obtaining employment in his chosen field due to the "corrective action" label. The Fourth Circuit held that under the circumstances, the label raised a question of fact as to whether it amounted to an accusation of dishonesty or merely incompetence. The court found that the reassignment was a sufficiently adverse action that plaintiff had pleaded a "stigma plus" claim that he was deprived of due process rights when he was demoted and labeled without a name-clearing opportunity.

On the other hand, in *Whiting v. University of Southern Mississippi*, 451 F.3d 339 (5th Cir. 2006) the Fifth Circuit held that the denial of tenure to nontenured professor along with non-renewal of employment did not deprive her of property or liberty interest, despite allegations of academic fraud in the course of her consideration for tenure. The professor did not allege that she lost employment opportunities because of allegedly defamatory statements in her personnel file, and there was no allegation

that the accusations had been published to persons outside the tenure and promotion process.

IV. SUBSTANTIVE DUE PROCESS RIGHTS IN EMPLOYMENT

In *Bishop v. Wood*, 426 U.S. 341 (1976), the Supreme Court expressed what often has been read as a reluctance to recognize public employees' substantive due process rights in the workplace. In response to an "at will" employee's constitutional challenge to the substantive basis for his dismissal, the Court stated, "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 349-350. However, in *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979), the Supreme Court suggested that a public employee with a protected property interest in employment had a substantive due process right to be free from arbitrary and capricious state action. The parameters of that right have not been developed clearly.

- In the District of Columbia, a plaintiff asserting a substantive due process claim must allege facts showing that District officials are guilty of "grave unfairness in the discharge of their legal responsibilities," *Silverman v. Barry*, 269 U.S. App. D.C. 327, 845 F.2d 1072, 1080 (D.C. Cir. 1988). "Only a substantial infringement of [District] law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Id.* Plaintiff must also show that no rational connection exists between the District's actions and the interests asserted by defendant. *Britton v. District of Columbia*, 2007 U.S. Dist. LEXIS 4573 (D.D.C. Jan. 23, 2007); *see also Yates v. Dist. of Columbia*, 324 F.3d 724, 725-26 (D.C. Cir. 2003)(engaging in substantive due process analysis in wrongful termination context). As the Sixth Circuit has put it, substantive due process concerns "may be implicated when a public employee is discharged for reasons that shock the conscience." *Perry v. McGinnis*, 209 F.3d 597, 609 (6th Cir. 2000).
- The Second Circuit has found that a teacher stated a possible claim for violation of his substantive due process rights when the school board conditioned his return to work on his release of his psychiatric treatment records not only to their designated medical expert, but also to the board members themselves, an act that the court deemed "arbitrary." *O'Connor v. Pierson*, 426 F.3d 187 (2nd Cir. 2005). However, the court could not determine on summary judgment whether the board's action was so egregious as to "shock the conscience," and remanded to the trial court for further proceedings. (The lower court subsequently granted defendants summary judgment as *res judicata*, in light of plaintiff's parallel state court claim. *O'Connor v. Pierson*, 482 F. Supp. 2d 228 (D. Conn. 2007)).
- The Tenth Circuit has also held that a public employee has a claim for relief "[w]hen a public employer takes action to terminate an employee based upon a public statement of unfounded charges of dishonesty or immorality that might seriously

damage the employee's standing or associations in the community and foreclose the employee's freedom to take advantage of future employment opportunities." *Melton v. City of Oklahoma City*, 928 F.2d 920, 927 (10th Cir. 1991). The Tenth Circuit formulated a four-prong test: "first, the statements must impugn the employee's good name, reputation, honor, or integrity; second, the statements must be false; third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities; and fourth, the statements must be published." *Workman v. Jordan*, 32 F.3d 475, 481 (10th Cir. 1994)(citations omitted), quoted in *Darr v. City of Telluride*, 495 F.3d 1243 (10th Cir. 2007).

- Other courts have rejected plaintiffs' claims to substantive due process rights in the workplace. In *Kaucher v. County of Bucks*, 455 F.3d 418 (3d Cir.2006), a county employee and his wife asserted a violation of their substantive due process rights after they contracted a serious staph infection, MRSA, allegedly due to the employee's employment at the county jail. Jail officers allegedly knew of the MRSA outbreaks, but refused to treat the infected inmates with expensive medications, and merely kept them isolated. The employee claimed that he was not informed of their condition, and caught the infection while transporting infected inmates, and that defendants' conscience-shocking creation of dangerous conditions at the jail was the source of plaintiffs' MRSA infections, which necessitated surgery and hospitalization. The court held that in order to show a violation of substantive due process, the government's actions must have been so outrageous as to be "conscience-shocking," and identified four elements of the claim: That the harm caused was foreseeable and fairly direct, that the state actor acted with a degree of culpability that shocks the conscience, that due to the relationship between the state and the plaintiff, the plaintiff was a foreseeable victim, and the state actor affirmatively used his or her authority in a way that created the danger. The court held that the claim failed under the fourth test: the plaintiffs failed to allege facts to establish a direct causal relationship between an affirmative act by the state and the harm to the plaintiffs. The defendants' failure to act was not enough, the court ruled, because the employee was a voluntary employee who was not deprived of his liberty (in contrast to the jailed inmates). The Third Circuit concluded that the plaintiffs did not have a constitutionally-cognizable claim.

V. FOURTH AMENDMENT PRIVACY AND SEARCH/SEIZURE ISSUES.

Searches of public sector employees or their possessions and surveillance of their activities on the job raise constitutional issues not usually found in private sector employment. That is because States and their political subdivisions are subject to the Fourth Amendment prohibition against unreasonable searches and seizures. More than two decades ago, the U.S. Supreme Court held that the Fourth Amendment protects employees from unreasonable searches conducted by governments in their capacities as employers. See *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)(plurality opinion)(applying Fourth Amendment to search of employee's office). An exhaustive, comprehensive and detailed review of the state of the caselaw on this subject is not possible within the confines of this presentation. Cases typically involve fact-intensive, case-by-case determinations. There are, however, general principles that are applied to these facts that can appropriately be summarized. There also

are a workable number of instances when workplace searches and seizures arise, including one recent instance that reflects our rapidly changing technological society.

A. Searches of Employee Offices and Lockers.

1. O'Connor v. Ortega: Searches of Employee Office and Files.

Public sector employers are subject to the Fourth Amendment's prohibition against unreasonable searches and seizures when conducting searches of employee offices, desks, file cabinets, and lockers. According to the U.S. Supreme Court, however, public employers have wide latitude to search the offices, desks, and files of their employees. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court held that hospital officials could search the office of a psychiatrist who was responsible for the psychiatric residency program when they became concerned that: (1) residents may have been coerced into contributing to the purchase of a computer acquired for use in the program; (2) the psychiatrist had sexually harassed female employees; and (3) the psychiatrist had improperly disciplined a resident. The search occurred while the psychiatrist was placed on paid leave pending an investigation. The office was searched several times, and items were seized from his desk and files. The Court made the following observations:

- The operational realities of the workplace may make some employees' expectations of privacy unreasonable when the intrusion is by a supervisor rather than a law enforcement official;
- Such expectations are reduced by virtue of actual office practices and procedures and by legitimate regulation;
- The psychiatrist, however, did have a reasonable expectation of privacy extending at least to his desk and files, so it was necessary that any search be constitutionally "reasonable";
- The reasonableness of a search involves balancing of the employee's legitimate expectation of privacy against the government's need for supervision, control and efficient operation of the workplace;
- Public employers are not required to obtain a search warrant, nor are they required to satisfy the "probable cause" standards required in the criminal context;
- Such searches are judged by the standard of reasonableness under all of the circumstances; this reasonableness standard applies both to the inception and the scope of the search;
- Ordinarily, a search of an office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the

search will turn up evidence of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.

2. Locker Searches.

Several cases since *O'Connor* have established the public employers' right to search employee lockers, as well. See, e.g., *Postal Workers v. U.S. Postal Service*, 871 F.2d 556 (6th Cir. 1989)(employees admitted that lockers were subject to inspection at any time; labor contract permitted locker room inspection in steward's presence; closed containers, e.g., purses, briefcases, lunch boxes, and clothing, not searched; expectation of privacy not created by employer's failure to search lockers or by lack of scrutiny as compared to other areas; *Melton v. United States Steel Corp.*, 1993 U.S. Dist. LEXIS 17233; 143 L.R.R.M. 2056, 8 IER Cases (BNA) 687 (N.D. Ind. 1993)(search conducted in response to anonymous calls to drug hotline indicated that employees were violating employer's drug policy; searches were conducted solely to enforce employer's safety policy and not to gather evidence for criminal prosecution; searches conducted by DEA and local police with use of drug-detecting dogs); *Chicago Fire Fighters, Local 2 v. Chicago*, 717 F. Supp. 1314 (N.D. Ill. 1989) (industry is subject to pervasive regulation, and department regulations made employees aware that lockers were subject to searches to discover rule violations regarding alcohol and drugs).

3. Video Surveillance.

The standards established in *O'Connor* likewise have been used when public employers have conducted video surveillance of employees. See, e.g., *Vega-Rodriguez v. Puerto Rico Telephone*, 110 F.3d 174 (1st Cir. 1997)(soundless video surveillance of telephone company employees permissible under Fourth Amendment; employees did not have objectively reasonable expectation of privacy in open work area that had no work stations for employees' exclusive use; employer's legitimate interest in efficient operation permits supervisors to monitor what is in plain view and could be viewed with the naked eye; employees were notified that video surveillance would occur; soundless video surveillance is less intrusive than most physical searches); *Thompson v. Johnson County Community College*, 930 F. Supp. 501 (D. Kan. 1996) (silent video surveillance of security-personnel locker area is reasonable under Fourth Amendment; locker area was open and public and part of storage room to which other employees had regular access; purpose of surveillance was work-related, i.e., investigating reports of employee misconduct in locker area, and surveillance maintained only long enough to confirm or refute reports); but see *Bernhard v. City of Ontario*, 2008 U.S. App. LEXIS 6404; 27 I.E.R. Cases (BNA) 495 (9th Cir. March 13, 2008) (employer's placement of covert video surveillance camera in an employee locker room following allegations that flashlight had been stolen was unreasonable under Fourth Amendment; employees had reasonable

expectation of privacy; employees never were told that they might be subject to surveillance, and they clearly expected that they would not be secretly videotaped in their locker room; employees engaged in private activities in the locker room, such as changing clothes, using the bathroom, and showering; employer's installation of camera was severe, in that locker room was not open to public and was used for private behavior; common sense dictated that reasonable persons, including police officers, did not expect to be secretly videotaped by other police officers while changing clothes in their workplace locker rooms).

B. Drug/Alcohol Testing.

Shortly after deciding *O'Connor*, the U.S. Supreme Court, not surprisingly, held that where a government employer requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent analysis of such samples are "searches" that must meet the reasonableness requirement of the Fourth Amendment. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)(urinalysis testing of certain U.S. Customs Service employees); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989)(government-ordered drug testing of certain railroad employees).

1. Reasonable Suspicion Testing.

The U.S. Supreme Court has held that for a search to be "reasonable" under the Fourth Amendment, it must be based upon "individualized suspicion of wrongdoing." The standard for conducting such a search need not meet the "probable cause" standard that is imposed upon law enforcement officials, nor are government officials required to obtain a search warrant, for a drug test to be considered reasonable for constitutional purposes. In addition, the constitutional reasonableness of a drug testing program does not turn upon the availability of less intrusive means to achieve the government's goals. *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292, 1305 (9th cir. 1991)(citing *Skinner*, 489 U.S. at 629 n.9). Because a lesser standard is permitted, however, the test results may not be used in a criminal prosecution against an employee who tests positive for illegal drugs. *Von Raab*, 489 U.S. at 666.

a. Reasonable Suspicion Defined.

To satisfy the "reasonable suspicion" standard "requires objective facts which, with inferences, would lead a reasonable person to conclude that drug-related activity is taking or has taken place and that a particular individual is involved in that drug activity. It is the sort of common sense conclusion about human behavior which practical people – including government officials – are entitled to rely." *Caldwell v. New Jersey Department of Corrections*, 250 N.J.

Super. 592, 609 595 A.2d 1118, 1126 (1991). “Although a mere ‘hunch’ does not amount to a reasonable suspicion for an employee drug test, certainty is not required.” State Personnel Board v. State Department of Mental Health & Mental Retardation, 694 So. 2d 1367, 1375 (Ala. App. 1996)(citing American Federation of Government Employees v. Roberts, 9 F.3d 1464, 1468 (9th Cir. 1993).

Among the factors that may affect the reasonableness of the suspicion are:

- the nature of the tip of information
- the reliability of the informant
- the degree of corroboration
- other facts contributing to suspicion or lack thereof.

George v. Department of Fire, 637 So. 2d 1097, 1101 (La. App. 1994); Caldwell, 250 N.J. Super. at 609, 595 A.2d at 1126.

b. Focus Upon Small Group of Suspects.

Although suspicion must be “individualized,” there are certain instances under which a small number of suspects can be tested, event though there was no reasonable suspicion against any one person in that group. Thus, one court has held that:

Since reasonable suspicion requires not only “considerably less” than “proof by a preponderance of the evidence,” but even less than probable cause, it does not require evidence which focuses upon a single individual. Instead, reasonable suspicion may be established by evidence which points to the guilt of at least one of a discrete group of individuals.

Drake v. County of Essex, 275 N.J. Super. 585, 590, 646 A.2d 1126, 1128-29 (1994). In that case, reasonable suspicion was established to search four employees when the odor of marijuana was detected in a bathroom to which a limited number of employees had access, and there was no evidence that any other persons were in the vicinity of the bathroom when the incident occurred.

2. “Suspicionless” Testing.

While the existence of individualized reasonable suspicion is necessary to conduct drug testing in the public sector employment setting, the U.S. Supreme Court has stressed that, “[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable

component of reasonableness in every circumstance.” *Von Raab*, 489 U.S. at 665. Such “suspicionless” testing is permitted “where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement” *Id.* Thus, “[i]n limited circumstances, where the privacy interests implicated are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.” *Skinner*, 489 U.S. at 624. Under those circumstances, certain “suspicionless” testing procedures, such as pre-employment, promotional, or random testing are permitted.

a. Special Needs.

Not surprisingly, the burden of establishing a special governmental need to justify suspicionless testing is a heavy one. “When such ‘special needs’ – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.” *Chandler v. Miller*, 520 U.S. 305, 314 (1997). In addition, “the proffered special need for drug testing must be substantial – important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” *Id.* at 318.

i. Insufficient Governmental Interests.

Courts have rejected broad-based efforts to require drug testing based upon a general desire to prevent illegal drug use, unless that interdiction is related to a substantial governmental interest. In the employment setting, one court held that:

While an adequate nexus between the nature of the employment and the risk to the public safety by reason of the employee’s impaired judgment due to drug use will thus sustain involuntary drug testing by a governmental employer, it is also clear that the mere desire of a drug-free workplace and the general stability and integrity of the work force do not provide the requisite nexus.

O’Keefe v. Passaic Valley Water Commission, 253 N.J. Super. 569, 576-77, 602 A.2d 760, 764 (1992), *aff’d on other grounds*, 132 N.J. 234, 624 A.2d 578 (1993). In another case,

the court rejected the employer's reasons for attempting to require persons applying to be library pages to submit to suspicionless testing:

Woodburn posits that it has a substantial and important interest in screening library pages for three reasons: drug abuse is one of the most serious problems confronting society today, drug use has an adverse impact on job performance, and children must be protected from those who use drugs or could influence children to use them. No doubt these problems are worthy of concern, but there is scant, if any, indication that on account of them, the City has "special needs" of sufficient weight to justify an exception to the Fourth Amendment's requirement of individualized suspicion.

Lanier v. City of Woodburn, 518 F.3d 1147, 1150 (9th Cir. 2008).

ii. Sufficient Government Interests.

"With regard to the government's interest in testing, the Supreme Court has traditionally focused its analysis on two central factors: (1) whether the group of people targeted for testing exhibits a pronounced drug problem; and if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and (2) the magnitude of the harm that could result from the illicit use of drugs on the job."

Knox County Education Ass'n v. Knox County Board of Education, 158 F.3d 361, 373 (6th Cir. 1998), *cert. denied*, 68 U.S.L.W. 3222 (1999).

To date, the U.S. Supreme Court has identified three governmental interests that are sufficiently important enough to permit suspicionless drug testing:

- ensuring that certain employees "have unimpeachable integrity and judgment," *Von Raab*, 489 U.S. at 670;
- enhancing public safety, otherwise known as "safety sensitive positions," *Skinner*, 489 U.S. at 628; *Von Raab*, 489 U.S. at 670-71; and

- protecting “truly sensitive information.” *Von Raab*, 489 U.S. at 677.

b. Safety-Sensitive Positions.

“[T]he test for whether employees hold safety sensitive positions is whether the employees ‘discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences.’” *Knox County Education Ass’n v. Knox County Board of Education*, 158 F.3d 361, 377 (6th Cir. 1998)(quoting *Skinner*, 489 U.S. at 628). *Accord International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292, 1304 (9th Cir. 1991)(“a single mistake in judgment or momentary lapse of attention can have devastating consequences for others”).

In applying this test, courts “focus on the degree, severity and immediacy of the harm posed. The ‘immediacy’ of the threat of injury and the fact that a single misperformed duty could have irreparable consequences have been determined to be important factors in determining the safety sensitivity of a job. Irreparable consequences result when an employee is not able to rectify his or her mistake and the coworkers of the employee have no opportunity to intervene before harm occurs.” *Smith v. Fresno Irrigation District*, 72 Cal. App. 4th 147, 84 Cal. Rptr. 2d 775, 787 (1999), *cert. denied*, 1999 Cal. LEXIS 6066 (Aug. 25, 1999).

Jobs are considered safety-sensitive if they involve work that may pose a great danger to the public, such as the operation of railway cars, *Ry. Labor*, 489 U.S. at 628-29; the armed interdiction of illegal drugs, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 . . . (1989); work in a nuclear power facility, *IBEW, Local 1245 v. United States NRC*, 966 F.2d 521, 525-26 (9th Cir. 1992); work involving matters of national security, *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 (9th Cir. 1991); work involving the operation of natural gas and liquified natural gas pipelines, *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454, 1461-63 (9th Cir. 1990); work in the aviation industry, *Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990); and work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds, that are used to transport hazardous materials, or that carry more than fourteen passengers at a time, *Int’l Bhd. of Teamsters [v. Dep’t of Transp.]*, 932 F.2d 1292, at 1295 [(9th Cir. 1991)].

Lanier v. City of Woodburn, 518 F.3d 1147, 1151-52 (9th Cir. 2008)

The fact that an accident with irremediable consequences has not yet occurred does not preclude a determination that a position is safety sensitive. “An employer need not wait for an accident to occur prior to instituting policies which address their safety concerns.” Smith, 84 Cal. Rptr. 2d at 786. In addition, “it is not the number of persons who could be injured by a drug-impaired worker that determines the constitutional validity of random drug testing.” Id. at 787.

However, mere contact with the public does not make a position safety sensitive. The public’s safety must be significantly threatened by an employee who tests positive for drugs. O’Keefe v. Passaic Valley Water Commission, 253 N.J. 569, 577-78, 602 A.2d 760, 764 (1992), aff’d on other grounds, 132 N.J. 234, 624 A.2d 578 (1993). Stated differently, the employer “must demonstrate a clear, direct nexus between the nature of the employee’s duty and the nature of the feared violation.” Knox, 158 F.3d at 378 (citations, quotes, and ellipsis omitted).

There is some disagreement among the courts as to the whether the employee must actually perform the safety sensitive functions on a regular basis or if the potential to perform safety sensitive functions is sufficient.

- One court held that the mere possibility that a city transit car cleaner might be called upon to perform safety sensitive functions was enough for him to be considered a safety sensitive employee under OTETA because such employees had been called upon in the past to drive transit vehicles within the yard. United Public Employees, Local 790 v. City and County of San Francisco, 53 Cal. App. 4th 1021, 62 Cal. Rptr. 2d 440 (1997).
- In another case, the suspicionless testing of a mechanic was impermissible where the mechanic had not performed any safety sensitive functions for nine months before he was directed to take a drug test, and the employer had failed to provide any evidence that it was likely the employee would be transferred to a position requiring him to perform such work. Jaramillo v. City of Albuquerque, 125 N.M. 194, 958 P.2d 1244 (N.M. App. 1998).

c. Evidence of Prior Drug Problems Unnecessary.

While “[t]he existence of a pronounced drug problem within the group of employees targeted for testing typically tips the equities in favor of upholding suspicionless testing. . . . [.] the existence of a pronounced drug problem is not the *sine qua non* for a constitutional suspicionless drug testing program.” *Knox*, 158 F.3d at 373-74. As for a suspicionless drug testing program for administrators, teachers and other school officials, the Sixth Circuit has held that, “[A]lthough the record evidence does not reflect that [the school district’s] school teachers and other school officials have a track record of a pronounced drug problem, the suspicionless testing regime is justified by the unique role they play in the lives of school children and the *in loco parentis* obligations imposed upon them.” *Id.* at 375. *Accord Aubrey*, 148 F.3d at 563 (in upholding suspicionless drug testing program for school custodians, court held that “[A]lthough such a showing [of a problem of drug abuse or use in schools] would be of persuasive value, it is not mandatory”); *International Brotherhood of Teamsters*, 932 F.2d at 1305 (in upholding suspicionless drug testing program for commercial motor vehicle operators, court held that, “[E]ven assuming no evidence of substantial drug use among truck drivers existed, the FHWA’s interest in deterring drug abuse and in preventing an otherwise pervasive societal problem fro spreading to the trucking industry would furnish an ample justification for the testing program.”); *see also Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d at 786 (“An employer need not wait for an accident to occur prior to instituting policies which address their safety concerns.”).

d. Privacy Interests of Employees.

When the public interest in suspicionless testing is very strong, the courts must then analyze the employees’ privacy rights to determine which value should prevail. In assessing the privacy interests of employees, courts focus upon two central factors: “(1) the intrusiveness of the drug testing scheme; and (2) the degree to which the industry in question is regulated.” *Knox*, 158 F.3d at 379.

i. Intrusiveness of the Drug Testing Scheme.

In *Knox*, the Sixth Circuit held that the school district’s suspicionless drug testing program did not unduly infringe upon the privacy rights of the safety sensitive employees who were to be tested.

1) Persons Covered.

The testing policy restricted “suspicionless” drug testing to applicants for, and employees who desired to be transferred or promoted into, “safety sensitive” positions, which was defined as positions “where a single mistake by such employees can create an immediate threat of serious harm to students and fellow employees.” The testing policy specifically included principals, assistant principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries, and school bus drivers as “safety sensitive” employees. Persons who tested positive or refused to be tested were disqualified from further consideration. In addition, employee transfer/promotion candidates who refused to be tested faced discipline, including discharge, for insubordination.

2) Testing Procedures.

For the most part, the drug testing policy complied with the procedures outlined in the U.S. Department of Transportation’s (“DOT”) workplace drug testing regulations. The medical review officer (“MRO”), a physician designated by the school district, collected the urine sample, conducted the tests, reviewed the results, and reported the results to the employer’s Director of Personnel. The MRO had to follow the U.S. Department of Health and Human Services’ MRO Manual. The initial test was an EMIT screen that eliminated negative specimens from further consideration. Specimens identified as positive then received the GC/MS confirmatory test. The only significant exceptions to the DOT testing requirements were: (1) the four specific permissible exceptions under the DOT regulations to collecting urine samples in private were illustrative examples under the testing policy; and (2) the DOT regulations restricted testing to seven controlled substances, while the testing policy also included eleven other drugs, many of which could be found in readily available prescription drugs. Information regarding an individual’s test results were strictly confidential. They were excluded from the employee’s personnel file. Moreover, the MRO disclosed such information

to the Director of Personnel only when necessary to address any work-related safety risks occasioned by drug/alcohol use. Further disclosure without the individual's written consent was permitted only for administrative or court proceedings brought by the employee or discipline proceedings resulting from violating the substance abuse policy.

3) The Court's Holding.

The court characterized the drug testing procedures as "fairly circumscribed and unintrusive" for the following reasons:

- It did not include a random testing component, and only tested those people who were candidates for, and attempting to transfer to, a select group of positions;
- There was no ongoing testing once an applicant had received the job and passed the initial test;
- All specimens identified as positive were re-tested and confirmed using an advanced testing procedure;
- The testing procedures included extensive involvement from the MRO, who reviewed every positive result to determine if there was an alternative medical explanation for the result and conducted an interview with the individual testing positive and reviewed his or her medical records to determine if the positive result was caused by a legally prescribed medication; and
- The information regarding an individual's drug testing results was confidential.

Moreover, the drug testing procedures were upheld even though it allowed more exceptions for monitored urine samples because of fears of adulteration, and also required testing of several drugs not included in the D.O.T. regulations. The additional exceptions to monitored specimens were "not unreasonable." Any concerns that the additional drug testing might reveal

legitimate prescription drug use were alleviated by both the extensive review procedures by the MRO to protect against false positives and the confidentiality of the records.

ii. Employee Privacy Expectations.

In determining whether an employee's expectations of privacy are sufficiently diminished to permit what otherwise is considered an intensely private and personal act, courts have assessed the following factors:

- whether the employee was notified in advance that suspicionless testing would be implemented, *Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d at 785 (employee's expectation of privacy diminished when employer informed employees in advance of drug testing policy's implementation and provided a six-month grace period in which employees could seek substance abuse treatment and counseling without any termination consequence);
- whether an applicant was informed on the job application that drug testing was a condition of employment, *McKenzie v. Jackson*, 152 A.D.2d 1, 547 N.Y.S.2d 120 (1989), *aff'd*, 75 N.Y.2d 995, 556 N.E.2d 1072, 557 N.Y.S.2d 265 (1990); *Dozier v. New York City*, 130 A.D.2d 128, 519 N.Y.S.2d 135 (1987)(while applicant was not expressly told that he would be tested, adequate notice was provided when: (1) notice of examination for civil service examination stated, under subtitle "medical standards," that "eligibles on a list shall be required to pass a qualifying medical test prior to appointment," that "any impairment which will adversely affect ability to perform the duties of the position of failure to meet medical standards set for the position shall constitute grounds of disqualification," and that "if an investigation disclosed that the candidate does not meet the requirements for appointment he or she shall be disqualified"; (2) one of the medical standards, which were shared with applicants, stated that a basis for rejection would be the use of drugs or chemicals, which interferes with normal functions"; and (3) applicants were required to supply a urine sample and were required to complete a questionnaire that asked

them if they suffered from “alcoholism or use of any narcotic, addictive or hallucinatory drug”);

- whether employees are required to comply with rules and regulations bearing upon their health and fitness for their jobs, *Doe v. City and County of Honolulu*, 8 Haw. App. 571, 816 P.2d 306 (1991); and
- the degree to which the position of employment is regulated by government entities. *Knox*, 158 F.3d at 382.

In concluding that teachers and school administrators have a diminished expectation of privacy that is outweighed by the important government interests that are served by suspicionless drug testing, the Sixth Circuit held that the field of education is highly regulated, citing the following facts:

- State law recognizes the position of schools *in loco parentis* and the responsibility this places on principals and teachers to secure order and to protect students from harm while in their custody;
- State regulations apply to the implementation of drug abuse education, school safety and security, discipline, drug use among students, the search of students’ lockers for drugs and weapons (which authorizes such searches based upon information received from a teacher), and a requirement that local school boards formulate a code of acceptable behavior and discipline, as well as attendance, curriculum and report cards;
- State law requires teachers and principals to report assault and battery or vandalism endangering life, health or safety committed by a student; and
- State law regulates teachers and principals, setting forth their duties, responsibilities, certification, qualification and licensing requirements, and it includes “improper use of narcotics and intoxicants” as a basis for discipline.

Likewise, another court held that school custodians had a diminished expectation of privacy because:

- the custodians had notice that their position was specifically designated as safety sensitive and that they would be subjected to suspicionless testing after they attended the in-service training program; and
- because the custodians handled potentially dangerous machinery and hazardous substances in an environment including a large number of elementary-age children, the custodians reasonably should expect “effective inquiry into their fitness and probity to operate and use such material in a school setting.”

Aubrey, 148 F.3d at 564.

e. Types of Suspicionless Testing.

i. Annual Physical Examinations.

At least with regard to employees in safety sensitive positions, it is permissible to require a drug test as part of a routine employment-related medical examination, such as an annual physical. *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *vacated on other grounds*, 490 U.S. 1001 (1989), *modified on other grounds on remand*, 878 F.2d 1476 (D.C. Cir. 1989).

ii. Pre-Employment Physical Examinations.

Courts are divided on the issue of whether an employer can require all job applicants to take a pre-employment drug test, including applicants for positions that are not safety sensitive.

Courts that have prohibited such testing have concluded that a generalized desire to maintain a drug-free workplace is not a sufficiently important government interest to permit testing other than for individualized reasonable suspicion. *Georgia Ass’n of Educators v. Harris*, 749 F.Supp. 1110 (N.D. Ga. 1990); *O’Keefe v. Passaic Valley Water Commission*, 253 N.J. Super. 569, 602 A.2d 760 (1992), *aff’d on other grounds*, 132 N.J. 234, 624 A.2d 578 (1993). The one court that upheld such testing did so because: (1) the applicants already were required to undergo a physical examination, so the applicants’ privacy expectations already were diminished; and (2) the employer’s interest in conducting the test were heightened by the fact that it never had the opportunity to observe and assess the applicant’s job performance. *Loder v. City of Glendale*, 14 Cal. 4th 846, 927 P.2d 1200, 59 Cal.

Rptr. 2d 696 (1997), *cert. denied*, ____ U.S. ____, 118 S. Ct. 44, 139 L. Ed. 2d 11 (1997).

Courts appear to agree, however, the pre-employment drug testing for safety sensitive positions is permissible. *Knox, supra*; *Dozier v. New York City*, 130 A.D.2d 128, 519 N.Y.S.2d 135 (1987); *Middlebrooks v. Wayne County*, 446 Mich. 151, 521 N.W.2d 774 (1994). In fact, for employees covered by OTETA, such testing is required by law.

iii. Promotional Physical Examinations.

This distinction also is made for drug testing when an employee applies for a promotion. *Compare Knox, supra* (permitting drug testing of persons who apply for promotion to safety sensitive position) *with Loder, supra* (prohibiting drug testing for employees who apply for promotion regardless of type of position).

iv. Random Testing.

Excluding employees who are covered by OTETA, where random drug testing is required, courts have looked with disfavor upon random testing of school employees. In *Knox*, the absence of random drug testing of teachers and school administrators was one of the reasons why the Sixth Circuit concluded that the school district's suspicionless testing program did not unduly interfere with the employee privacy expectations. Several years ago, another court invalidated a school district's requirement that teachers submit to random testing as a condition for obtaining tenure. *See Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987). The only exception seems to be one court decision that upheld random testing for school custodians. *See Aubrey, supra*. Until a definitive ruling is made by the Sixth Circuit, it is not advisable to conduct random testing of non-transportation school employees unless there is substantial evidence of a drug abuse problem within the workforce.

C. Searches of Employee Text Messages.

The latest issue involves searches by public sector employees of employee computers and hand-held devices that transmit and receive electronic mail and text messages. "The extent to which the Fourth Amendment provides protection for the contents of

electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.” *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904 (9th Cir. 2008).

In *Quon*, the court held that the employer’s search of the employees’ text messages violated, among other things, their Fourth Amendment privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. The court reached this ruling even though the text messaging pagers were issued by the employer and the employer had a policy that reserved the right to monitor and log all network activity, including e-mail and Internet use.

1. Reasonable Expectation of Privacy.

The employer did not have an explicit policy that addressed use of the pagers, and its “informal policy” provided that employees would pay for any overage charges exceeding 25,000 characters per month. The plaintiff exceeded his limit three or four times and paid the overage charges each time. When the overage charges, and the collection of same from employees, became unacceptable, the employer requested transcripts of the pagers for auditing purposes. The audit of the plaintiff’s message transcripts revealed that he had many personal messages that often were sexually explicit in nature. The court first analogized to two prior scenarios that had been well regulated: pen registers (a device that records the phone numbers that one dials) and inspecting letters and packages. The use of pen registers does not violate the Fourth Amendment. While opening a package would be improper, a person does not have a reasonable expectation of privacy on what is on the outside of the envelope or box or the size and shape of the box. The court also borrowed from a more recent example – e-mails, noting that persons do not have a reasonable privacy interest in the to/from addresses in their e-mails, but they do have a privacy interest in the contents of the e-mails. Thus, persons who text message could have a reasonable expectation in the contents of the text message, but not the “addresses” of the messengers. Of course, any such privacy interest would have been erased if the employer had a policy that reserved the right to review the contents of text message without notice. However, the employer had no such express policy, and the “informal policy” implicitly permitted employees to use the pagers for personal text messages if the employee paid the overage charges, which the plaintiff had done three or four times before without incident.

2. Unreasonableness of Search.

The court then held that the reason for the search (*i.e.*, to ensure the efficacy of the character limit to ensure that employees were not required to pay for work-related expenses) made the search reasonable at its inception. By

contrast, a search conducted simply to uncover employee misconduct would have been unreasonable from the inception because of the informal policy that allowed any text messaging if the employees paid the overage charges. However, the search was not reasonable in scope because less intrusive methods were available to achieve the employer's purpose for the search. The court offered two alternatives:

- a. The employer could have warned the employee that for a one-month period he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame.
- b. If the employer wanted to review past usage, it could have asked the employee to count the characters himself, or asked him to redact personal messages and grant permission to the employer to review the redacted transcript. Under this process, the employee would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future.

The court added that, "These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope."

VI. ELEVENTH AMENDMENT ISSUES FOR STATE EMPLOYEES.

The Eleventh Amendment to the United States Constitution, which was ratified in 1798, provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This provision overruled a 1793 U.S. Supreme Court decision that broadly construed the federal courts' jurisdiction under Article III. Section 2 of Article III provides that, "The judicial Power shall extend to all Cases, in Law and Equity, . . .between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The U.S. Supreme Court held that this provision abrogated the sovereign immunity of a state from being sued by the citizen of another state. See *Chisholm v. Georgia*, 2 Dall. 419 (1793).

A. Scope of Immunity.

1. Purpose.

“One of the primary purposes of the Eleventh Amendment is the protection of the states’ fiscal integrity. This amendment established a jurisdictional bar which prevents federal courts from imposing monetary judgments against sovereign states.” *Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976). Consequently, lawsuits against a State for money damages generally are barred by the Eleventh Amendment, unless one of the exceptions, discussed below, are applicable.

2. Protection of State Officials.

The Eleventh Amendment also protects State officials, who are acting in their official capacities, from lawsuits for money damages. That is because any money judgment in such instances would not be paid by the individuals, but by the State, itself. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984); *Edleman v. Jordan*, 415 U.S. 651, 663 (1974).

B. Exceptions to Immunity.

1. Waiver.

a. Test.

While a State may voluntarily waive its Eleventh Amendment immunity, the test for determining whether a waiver of immunity has occurred is very strict. Waiver is established only “where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.” *Edelman*, 415 U.S. at 651.

b. Consent to be Sued in State Court.

Moreover, a State may maintain its Eleventh Amendment immunity from lawsuits in federal court while simultaneously waiving its immunity, and consenting to be sued, in its own courts. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

c. Consent by Removal to Federal Court.

A State waives its Eleventh Amendment immunity when it removes a case from state court to federal court. *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

2. Abrogation by Congress.

In certain limited instances, discussed below, Congress is authorized to abrogate a State's Eleventh Amendment immunity from suit in federal court.

Such abrogation of Eleventh Amendment immunity must be both explicit and within Congress' constitutional authority to do. *Quern v. Jordan*, 440 U.S. 332, 344 (1979).

3. Prospective Injunctive Relief Against State Officials.

Because the primary purpose of the Eleventh Amendment is to protect State treasuries from monetary judgments for prior conduct, the Eleventh Amendment does not bar lawsuits against a State, or against State officials in their official capacities, where the relief sought is prospective in nature, such as an injunction or reinstatement to a job. *Ex Parte Young*, 209 U.S. 123, 150 (1908). Moreover, the Eleventh Amendment is not violated even when the expenditure of State funds may be required by a prospective court decree. *Id.*

4. State Officials Sued in Their Individual Capacities.

For similar reasons, the Eleventh Amendment does not bar suits for money damages against State officials who are sued in their individual capacities, because any monetary relief will come from the State official and not from the State's treasury. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

C. Immunity/Liability of Political Subdivisions.

While States and State officers acting in their official capacity receive Eleventh Amendment immunity, most political subdivisions of a State do not. "When an action is brought against a public agency or institution, and/or the officials thereof, the application of the Eleventh Amendment turns on whether said agency or institution can be characterized as an arm or alter ego of the state, or whether it should be treated instead as a political subdivision of the state." *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985).

In determining whether Eleventh Amendment immunity is appropriate, "Most [court] decisions have emphasized that the most important factor is whether any judgment would have to be paid from the state treasury, but these decisions have also considered, to varying degrees, the state law characterization of the entity, the source of funding, the degree of functional autonomy, the power of the agency to sue and be sued and to enter into contracts, immunity from state taxation, and the state's responsibility under state law for the agency's operations." *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807, 818 (3d Cir. 1991)(citing *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1 (1st Cir. 1990);

Stewart v. Baldwin County Bd. of Education, 908 F.2d 1499 (11th Cir. 1990); Feeney v. Port Authority of Trans-Hudson Corp., 873 F.2d 628 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990); Mitchell v. Los Angeles Community College District, 861 F.2d 198 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988); Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (D.C. Cir. 1986); Foremost Guaranty Corp. v. Community Savings & Loan, Inc., 822 F.2d 1383 (4th Cir. 1987); Jensen v. State Board of Tax Commissioners of the State of Indiana, 763 F.2d 272 (7th Cir. 1985); Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985).

1. State Universities.

Courts repeatedly have held that state universities and colleges are entitled to Eleventh Amendment immunity because they are considered an “arm of the State.” See Raygor v. Regents of University of Minnesota, 534 U.S. 533 (2002).

2. Counties.

Counties generally are not entitled to Eleventh Amendment immunity. See Jinks v. Richland County, 538 U.S. 456 (2003); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973); Workman v. New York City, 179 U.S. 552, 565 (1900); Lincoln County v. Luning, 133 U.S. 529, 530 (1890). . This is true even when “such entities exercise a ‘slice of state power.’” Lake Country Estates, 440 U.S. at 401. *see also*.

3. Municipalities.

With their constitutionally-created “home rule” authority, municipalities clearly do not enjoy Eleventh Amendment immunity. Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978); Sonnenfeld v. City and County of Denver, 100 F.3d 744, 749-50 (10th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997).

4. School Districts.

Whether a school district and/or school is entitled to Eleventh Amendment immunity depends upon whether the board/district “is more like a county or city than it is like an arm of the State.” Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977) (finding that Ohio school districts were not entitled to Eleventh Amendment immunity because: (a) under Ohio law the “State” does not include “political subdivisions,” and “political subdivisions” do include local school districts; and (b) although school boards are subject to some guidance from the State Board of

Education, and receive a significant amount of money from the State, they have extensive powers to issue bonds, and to levy taxes within certain restrictions of state law).

D. Recent Developments.

During the past several years, the U.S. Supreme Court has issued a series of decisions that have expanded the States' Eleventh Amendment immunity, and correspondingly decreased Congress' authority to regulate States and subject them to judicial liability for violating those regulations.

1. Commerce Clause Powers.

At one time, it was believed that Congress' constitutional authority to regulate interstate and foreign commerce prevailed over any Eleventh Amendment immunity that the States possessed. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), however, the Supreme Court, expressly overruling prior precedent, held that Congress' power to regulate commerce did not give Congress the power to abrogate an unconsenting State's Eleventh Amendment immunity.

2. Fourteenth Amendment Powers.

In *Seminole Tribe*, the Supreme Court did reiterate prior caselaw that Congress could abrogate Eleventh Amendment immunity pursuant to its authority under Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. *See Fitzpatrick v. Blitzer*, 427 U.S. 445 (1976). In *City of Borne v. Flores*, 521 U.S. 507 (1997), the Supreme Court imposed limits upon that authority, as well. The Supreme Court struck down the Religious Freedom Restoration Act ("RFRA") as an unconstitutional expansion of Congress' Section 5 authority, reasoning that:

- a.** "The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."
- b.** In determining "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law[,] . . . [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."

- c. “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of perception in this county detailed in the hearings mentions no episodes occurring in the past 40 years. . . . Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.”
- d. “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”

3. Lawsuits Under Federal Law in State Courts.

Although the precise wording of the Eleventh Amendment addresses only lawsuits involving a State and the citizen of another State, the Supreme Court has extended immunity to lawsuits arising under federal law between a State and its own citizens. In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that a state court may refuse to entertain a federal statutory private party cause of action against a state or state agency – such as an action against the State under the overtime provisions of the Fair Labor Standards Act – on the basis of state sovereign immunity. The Supreme Court reasoned that:

- a. The States’ immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution’s ratification and retain today except as altered by the plan of the Constitutional Convention or certain constitutional amendments. Sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution. Since the Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principal, it follows that the immunity’s scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.
- b. The States’ immunity from private suit in their own courts is beyond congressional power to abrogate by Article I legislation.
- c. A State’s constitutional privilege to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. Limits implicit in the constitutional principle of sovereign immunity strike the proper balance between the supremacy of federal law and the separate sovereignty of the States, including: (i) sovereign immunity bars suits only in the absence of consent; and (ii) sovereign immunity bars suits against States but not against lesser entities, such as municipal

corporation, or against officers for injunctive or declaratory relief or for money damages when sued in their individual capacities.

E. Impact Upon Federal Employment Laws.

Not surprisingly, the Supreme Court's decisions have opened a floodgate of litigation in which virtually all of the federal employment statutes have been exposed to attack by State defendants on Eleventh Amendment grounds. The results have been mixed, but the emerging trend is to sustain these constitutional challenges.

1. Age Discrimination in Employment Act.

In what was a sign of things to come, the U.S. Supreme Court held that the Eleventh Amendment precludes enforcement of the Age Discrimination in Employment Act ("ADEA") against the States. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Supreme Court held that while Congress clearly intended to abrogate the States' Eleventh Amendment immunity when it extended ADEA coverage to the States in 1974, it did not have the authority under Section 5 of the Fourteenth Amendment to do so. The Supreme Court reasoned that:

- a. The substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the ADEA.
- b. Because age is not a suspect classification under the Equal Protection Clause. States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.
- c. A review of the ADEA's legislative record as a whole reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation. That failure confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

2. Americans with Disabilities Act.

In *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) the U.S. Supreme Court similarly held that suits in federal court by state employees to recover money damages by reason of the State's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. The Court reasoned that:

- a. Congress' legislative authority under Section 5 of the Fourteenth Amendment is limited by the equal protection obligation imposed upon States by Section 1 of the Fourteenth Amendment.
- b. Based upon prior caselaw, protection of persons with disabilities is not entitled to heightened judicial scrutiny. The Fourteenth Amendment does not require States to make special accommodations for the disabled, so long as their actions toward such individuals are rational.
- c. The requirements for private individuals to recover money damages against the States -- that there be State discrimination violative of the Fourteenth Amendment and that the remedy imposed by Congress be congruent and proportional to the targeted violation -- are not met here.
 - The ADA's legislative record fails to show that Congress identified a history and pattern of irrational employment discrimination by the States against the disabled. Congress made a general finding in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination . . . continue to be a serious and pervasive social problem." Although the record included instances to support such a finding, the great majority of those incidents did not deal with State activities in employment. In fact, statements in House and Senate committee reports indicated that Congress targeted the ADA at employment discrimination in the private sector.
 - In addition, the rights and remedies created by the ADA against the States raise concerns as to congruence and proportionality. While it would be entirely rational (and therefore constitutional) for a State employer to conserve scarce financial resources by hiring employees able to use existing facilities, the ADA requires employers to make such facilities readily accessible to and usable by disabled individuals. Although the ADA does except employers from the "reasonable accommodation" requirement where the employer can demonstrate that accommodation would impose an "undue hardship" upon it, the accommodation duty far exceeds what is constitutionally required.

3. **Rehabilitation Act, § 504.**

Section 504 of the Rehabilitation Act (“Section 504”) prohibits disability discrimination by recipients of federal funds. Moreover, the statute contains an explicit Eleventh Amendment abrogation provision that requires any State that receives federal funding to waive any Eleventh Amendment immunity.

Several courts have upheld the enforcement of Section 504 against the States, focusing upon the conditions delineated in Section 504 for receiving federal funds. They have reasoned that a State’s willingness to receive federal funds upon the condition that it consent to be sued for violating Section 504 constitutes a waiver of Eleventh Amendment immunity. *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000), *cert. denied sub. nom. Arkansas Department of Education v. Jim C.*, 533 U.S. 949, (2001); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied sub. nom. Wilson v. Armstrong*, 524 U.S. 937 (1998); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Nihiser v. Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002); *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002); *A.W. v. Jersey City Public Schools*, 341 F.3d 234 (3d Cir. 2003); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003); *Garrett v. University of Alabama at Birmingham*, 344 F.3d 1288, 1292 (11th Cir. 2003); *Shotz v. City of Plantation*, 344 F.3d 1161 (11th Cir. 2003); *Shepard v. Irving*, 77 Fed. Appx. 615, 2003 U.S. App. LEXIS 17049 (4th Cir. Aug. 20, 2003), *cert. denied sub nom., Rector & Visitors of George Mason Univ. v. Shepard*, 542 U.S. 959 (2003); *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005); *Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir.) (en banc) *cert. denied sub nom., Louisiana State Board of Elementary v. Pace*, ____ U.S. ____, 126 S. Ct. 416, 163 L. Ed. 2d 317 (2005).

However, one circuit court of appeal has held that while States can waive Eleventh Amendment immunity as a condition for receiving federal funds, States did not knowingly consent to waiving Eleventh Amendment immunity under the Rehabilitation Act. *Garcia v. State University of New York Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001).

4. **Family and Medical Leave Act.**

The Family and Medical Leave Act (“FMLA”) provide unpaid leave benefits in two instances: care for family members with a serious health condition (“family leave”); and leave by employees for their own serious health condition (“medical leave”). With significant assistance from the U.S. Supreme Court, courts have resolved Eleventh Amendment challenges to these two leave benefits in diametrically opposite ways.

a. Family Leave Benefits.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the U.S. Supreme Court held that State employees may recover money damages in federal court when a State fails to comply with the FMLA's family-care provision. The Court reasoned that:

- i.** Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. The FMLA satisfies the clear statement rule.
- ii.** Congress also acted within its authority under Section 5 of the Fourteenth Amendment when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision. In exercising its Section 5 power, Congress may enact prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct, but it may not attempt to substantively redefine the States' legal obligations. The test for distinguishing appropriate prophylactic legislation from substantive redefinition is that valid Section 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."
- iii.** The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. When it enacted the FMLA, Congress had before it significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the States, which is weighty enough to justify the enactment of prophylactic Section 5 legislation. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, in that they must serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test, it was easier for Congress to show a pattern of state constitutional violations. The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only

women are responsible for family caregiving and that men lack domestic responsibilities, is significant.

- iv. Congress' chosen remedy under the FMLA's family-care provision is "congruent and proportional to the targeted violation." Congress had already tried unsuccessfully to address this problem through Title VII and the Pregnancy Discrimination Act. Where previous legislative attempts have failed, such problems may justify added prophylactic measures in response. By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. In addition, the FMLA is narrowly targeted at the fault line between work and family--precisely where sex-based overgeneralization has been and remains strongest--and affects only one aspect of the employment relationship. Also significant are the many other limitations that Congress placed on the FMLA's scope. The FMLA requires only unpaid leave, applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, and does not apply to employees in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers.

b. Medical Leave.

The U.S. Supreme Court, however, did not address the Eleventh Amendment constitutionality of the FMLA's "medical leave" requirements. For now, it appears that the numerous lower court decisions that repeatedly have held that the FMLA is an unconstitutional application of Congress' authority under Section 5 of the Fourteenth Amendment still is good law. *See Hale v. Mann*, 6 W&H Cases 108 (2d Cir. 2000); *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d at 1219-20; *Laro v. State of New Hampshire*, 6 W&H Cases 27 (D.N.H. 2000); *Philbrick v. University of Connecticut*, 90 F. Supp. 2d 195 (D. Conn. 2000); *Cohen v. Nebraska Department of Administrative Services*, 83 F. Supp. 2d 1042 (D. Neb. 2000); *Darby v. Hinds County Department of Human Services*, 83 F. Supp. 2d 754 (S.D. Miss. 1999); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Driesse v. Florida Board of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *Post v.*

Kansas Department of Human Resources, 5 W&H Cases 314 (D. Kan. 1998).

5. Fair Labor Standards Act.

Several appellate courts have held that the provisions of the Fair Labor Standards Act (“FLSA”) that give federal courts jurisdiction over an action against a State for violating the FLSA’s minimum wage and maximum hour provisions is unconstitutional. *See Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996); *Powell v. State of Florida*, 132 F.3d 677 (11th Cir.), *cert. denied*, 524 U.S. 916 (1998); *Abril v. Commonwealth of Virginia*, 145 F.3d 182 (4th Cir. 1998); *Quillen v. State of Oregon*, 127 F.3d 1137 (9th Cir. 1997); *Close v. State of New York*, 125 F.3d 31 (2d Cir. 1997); *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997); *Raper v. State of Iowa*, 115 F.3d 623 (8th Cir. 1997). These courts have reasoned that:

- a. Congress’ authority to enact the FLSA under its Article I Commerce Clause powers does not abrogate Eleventh Amendment immunity;
- b. While Congress is authorized to abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment, there is no evidence that Congress intended to invoke its Fourteenth Amendment powers when it enacted the FLSA. In addition, such an invocation of authority would be an inappropriate basis to support the FLSA.

Moreover, in *Alden v. Maine*, 527 U.S. 706 (1999), the U.S. Supreme Court held that a State could not be the subject of a private FLSA lawsuit in its own courts without its consent. Consequently, the Supreme Court articulated only two circumstances under which the FLSA may be enforced against States: (a) a private lawsuit in federal court for an injunction ordering a State official to comply prospectively with the FLSA; and (b) a lawsuit by the federal government in federal court for money damages and/or injunctive relief.

6. Equal Pay Act.

Many courts have carved out a constitutional exception for one portion of the FLSA – the Equal Pay Act (“EPA”), upholding the EPA as a valid exercise of Congress’ powers under Section 5 of the Fourteenth Amendment. Indeed, the U.S. Supreme Court vacated and remanded two of those decisions in light of its ruling in *Kimel*, but the lower courts reaffirmed their prior rulings. *See Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Hundertmark v. State of Florida Department of Transportation*, 205 F.3d 1272 (11th Cir. 2000); *O’Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999); *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir. 1999), *vacated and remanded*, 528 U.S. 1111 (2000), *reinstated on remand*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000); *Varner v. Illinois State University*, 150 F.3d

706 (7th Cir. 1998), *vacated and remanded*, 528 U.S. 1110 (2000), *aff'd on remand*, 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001); *Ussery v. State of Louisiana, Louisiana Department of Health & Hospitals*, 150 F.3d 431 (5th Cir. 1998), *cert. dismissed*, 526 U.S. 1013 (1999).

7. **Uniformed Services Employment & Reemployment Rights Act.**

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) forbids employment discrimination on the basis of membership in the armed forces, and it authorizes private suits for damages or injunctive relief against employers, including State employers. The statute does not purport to be based upon Congress’ powers under Section 5 of the Fourteenth Amendment.

Several court decisions have held that USERRA does not abrogate Eleventh Amendment immunity. *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999); *Palmatier v. Michigan Department of State Police*, 981 F. Supp. 529 (W.D. Mich 1997); *Garcia v. Illinois State Police*, 2006 U.S. Dist. LEXIS 52538 (C.D. Ill. July 31, 2006); *Morris-Hayes v. Board of Education of Chester Union Free School District*, 2004 U.S. Dist. LEXIS 30157 (S.D.N.Y. March 16, 2004), *app. dismissed*, 423 F.3d 153 (2d Cir. 2005); *contra*, *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609 (1st Cir. 1996)(predecessor to USERRA abrogates Eleventh Amendment immunity). In response, Congress amended USERRA to require that private litigants file their lawsuits in state court. *See Larkins v. Department of Mental Health, State of Alabama*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. Feb. 3, 1999).

8. **Education Amendments Act, Title IX.**

All of the appellate courts that have addressed the issue have held that the Eleventh Amendment does not bar enforcement of Title IX of the Education Amendments of 1972 (“Title IX”) against the States, but for different reasons. Two courts have held that Title IX is a valid exercise of Congress’ powers under Section 5 of the Fourteenth Amendment. *See Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), *vacated*, 526 U.S. 1142 (1999), *reinstated*, 200 F.3d 499 (7th Cir. 1999). Two other appellate courts have held that conditioning the receipt of federal education funds upon compliance with Title IX, and a State’s acceptance of those conditions, constitutes a waiver of Eleventh Amendment immunity. *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000).

9. Civil Rights Act of 1964, Title VI.

Title VI of the Civil Rights Act of 1964 (“Title VI”) prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. A 1986 amendment provides that “[A] State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation . . . of Title VI . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of federal financial assistance.” One federal appellate court recently held that a State’s receipt of federal financial assistance constitutes a waiver of Eleventh Amendment immunity from Title VI actions. *See Sandoval v. Hagan*, 197 F.3d 484 (7th Cir. 1999).

COLLECTIVE BARGAINING PROTECTIONS

I. STATES WITH PUBLIC SECTOR COLLECTIVE BARGAINING LAWS

Nearly three dozen States and the District of Columbia have enacted some form of comprehensive legislation that grants collective bargaining rights to public sector employees.

Within the collective bargaining context, the concepts of “individual rights” and “concerted activity” appear to be mutually exclusive. Still, there is one instance when the concepts merge in a very important way – the right of individual employees to be represented in certain employment proceedings by a designee of the employee organization that represents the bargaining unit employees. This right, first developed in the private sector more than three decades ago, has been readily adopted by numerous public sector jurisdictions. However, there is one recent glaring exception to this trend.

A. The “Weingarten” Right.

1. In *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (“*Weingarten*”), the U. S. Supreme Court granted employees the right to representation during certain interviews. Specifically, an employee has a right to request union representation during any investigatory interview in which it is reasonably likely that discipline or other adverse consequence will follow. An investigatory interview is one in which a Supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his/her conduct. If an employee has a reasonable belief that discipline or discharge may result from what s/he says, the employee has the right to request Union representation. Examples of such an interview are:

- The interview is part of the employer’s disciplinary procedure or is a component of the employer’s procedure for determining whether discipline will be imposed.

- The purpose of the interview is to investigate an employee's performance where discipline, demotion or other adverse consequences to the employee's job status or working conditions are a possible result.
- The purpose of the interview is to elicit facts from the employee to support disciplinary action that is probable or that is being considered, or to obtain admissions of misconduct or other evidence to support a disciplinary decision already made.
- The employee is required to explain his/her conduct, or defend it during the interview, or is compelled to answer questions or give evidence.
- An employee has a right to union assistance during the pre-examination interview for a polygraph test and the test itself.
- If management asks an employee if he will submit to a test for alcohol, the employee must be allowed to consult with a union representative to decide whether or not to take the test.
-

2. Requirements.

The specific requirements of Weingarten doctrine are as follows:

- The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request.
- After the employee makes the request, the employer must choose from among three options. The Employer must either:
 - (a) grant the request and delay questioning until the union representative arrives and has a chance to consult privately with the employee;
 - (b) deny the request and end the interview immediately; or
 - (c) give the employee a choice of having the interview without representation or ending the interview.
- If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal.

3. Role of the Union Representative.

The union representative has the right to counsel the employee during the interview and to assist the employee to present the facts. Union representatives have the following specific rights and obligations during the interview:

- If an employee's union representative is not available, another representative or union officer can be asked to attend. Employees also have the right to ask for a particular union representative, if both are equally available.
- When the union representative arrives, the supervisor must inform the employee and the union representative of the subject matter of the interview: for example, the type of misconduct, which is being investigated. The supervisor does not, however, have to reveal management's entire case.
- The union representative can take the employee aside for a private pre-interview conference before the questioning begins.
- The union representative can speak during the interview, but has no right to bargain over the purpose of the interview or to obstruct the interview.
- While the interview is in progress the representative can not tell the employee what to say but he may advise them on how to answer a question.
- The union representative can advise the employee not to answer questions that are abusive, misleading, badgering, confusing or harassing.
- When the questioning ends, the union representative can provide information to justify the employee's conduct.

4. Limits of Weingarten Rights.

Employees do not have Weingarten rights in the following situations:

a. Job-Related Inquiries.

The meeting is merely for the purpose of conveying work instructions, training, or communicating needed corrections in the employee's work techniques. A supervisor may speak to an employee about the proper way to do a job. Even if the supervisor asks the employee questions, this is not an investigatory interview as the use or possibility of discipline is remote. However a routine

conversation changes character if a supervisor becomes dissatisfied with an employee's answers and takes a hostile attitude. If this happens, the meeting becomes an investigatory interview and the Weingarten rules apply.

b. Employer's Assurances of No Discipline.

The employee is assured by the employer prior to the interview that no discipline or employment consequences can result from the interview.

c. Announcing Discipline Decision.

When a supervisor calls an employee to the office to announce a warning or other discipline that has already been decided it is not an investigatory meeting since the supervisor is just informing the employee of a previously arrived-at decision. Such a meeting becomes an investigatory interview, however, if the supervisor asks questions that are related to the subject matter of the discipline.

d. Discussing Previous Discipline.

Any conversation or discussion about the previously determined discipline which is initiated by the employee and without employer encouragement or instigation after the employee is informed of the action.

e. Routine Medical Examinations.

A routine medical examination, such as a return-to-work physical for an employee returning from a leave of absence is not an investigatory interview.

f. Locker Searches.

A locker search is not an investigatory interview.

g. Certain Counseling Sessions.

If management gives a firm assurance that the meetings will not be used for discipline, and promises that the conversations will remain confidential, Weingarten rights would probably not apply. However if notes from the sessions are kept in the employee's permanent record, or if other employees have been disciplined for what they said at counseling sessions, an employee's request for a steward would come under Weingarten.

h. Demands for a Private Attorney.

An employee is entitled only to a union representative and cannot insist upon a private attorney before answering questions.

B. Public Sector Collective Bargaining Jurisdictions Adopting Weingarten.

Many, and probably nearly all, public sector employment relations boards have adopted the Weingarten doctrine. Online research reveals the following jurisdictions:

- **California:** Rio Hondo Community College District, (1982) PERB Dec. No. 260;
- **Florida:** Seitz v. Duval County School Board, 4 FPER ¶4154 (1978), rev'd in part on other grounds, 366 So. 2d 119 (Fla. 1st DCA 1979); Lewis v. City of Clearwater, 6 FPER ¶11222 (1980), aff'd, 404 So. 2d 1152 (Fla. 2d DCA 1981);
- **Illinois:** Summit Hill School District 161, 4 PERI ¶1009 (IELRB, December 1, 1987);
- **Indiana:** North Montgomery Community School Corp., 26 IPER (LRP) ¶32,012 (IEERB ALJ Sept. 10, 2001);
- **Michigan:** University of Michigan, 1977 MERC Lab. Op. 496;
- **New Jersey:** University of Medicine and Dentistry of New Jersey, (School of Osteopathic Medicine), and Committee of Interns and Residents, 144 N.J. 511; 677 A.2d 721 (1996);
- **Ohio:** In re Davenport, SERB 95-023 (12-29-95); City of Cleveland, SERB 97-011 (6-30-97);
- **Pennsylvania:** Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007); Conneaut School District, 12 PPER ¶12155 (Final Order, 1981).

C. The New York Exception.

In what can only be considered a surprising decision, the New York Court of Appeals recently held that the Taylor Law does not contain the Weingarten doctrine. In New York City Transit Authority, v New York State Public Employment Relations Board, 8 N.Y.3d 226; 864 N.E.2d 56; 832 N.Y.S.2d 132 (2007), the Court of Appeals reasoned that:

- The Taylor Law provides only that, “Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.” Absent from the statutory language is the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” that is found in Section 7 of the NLRA. It is this absent language that is the basis for the *Weingarten* doctrine and the rights and responsibilities flowing from it.
- The *Weingarten* right cannot be inferred from language in the Taylor Act that employees have “the right to . . . participate in” labor unions. “The right to union representation at disciplinary interviews, however, is not inherent in the right to participate in a union. Of course, employees may seek such a right of representation in collective bargaining; in doing so, they are protected by the Taylor Law’s provision . . . that they “shall have the right . . . to negotiate collectively with their public employers in the determination of their terms and conditions of employment.””
- The legislative history of the Taylor Act also supports this conclusion. In 1993, New York’s Civil Service Law was amended to provide employee’s with a representation right during investigatory interviews. The remedy for violating this right, however, was that any information obtained during an interview where an employee was unrepresented and did not have a reasonable period of time to obtain a union representative could not be used in a disciplinary proceeding against the employee. This amendment was different from the *Weingarten* rights that the union was asserting. It also demonstrated that New York public sector employees did not have any *Weingarten* rights under the Taylor Law before 1993.

II. COLLECTIVE BARGAINING IN STATES WITHOUT BARGAINING LAWS

A. The State of Collective Bargaining

1. States with mandatory bargaining statutes = 34 + D.C.
 - These vary as to what are subjects of mandatory bargaining
2. States without Statutes = 13
 - Of these, 10 states permit bargaining to varying degrees
3. States with statutes prohibiting bargaining = 3 (NC, TX, VA)

B. Colorado: No bargaining law for public sector employees

1. Bargaining with public employee unions is permitted, but no duty to engage in collective bargaining. See Littleton Education Association v. Arapahoe County School District, 553 P.2d 793, 796-97 (Colo. 1976)

But see Exec. Order No. D 028 07, Authorizing Partnership Agreements with State Employees, § III(D) (2007) (creating mandatory bargaining with certain “Certified Employee Organizations”)

2. Collective bargaining agreements must comport with state and federal law. See Littleton Education Association, 553 P.2d at 797.

3. Collective bargaining agreements, once entered into, are enforceable as contracts. See Jefferson County School District v. Shorey, 826 P.2d 830, 841-43 (Colo. 1992).

- a. Union is first party of interest.

- b. Employee may sue to enforce as third party beneficiary, but generally must exhaust grievance process. *Id.* at 845

4. **Agreements to Arbitrate**

- a. Distinction between interest and grievance arbitration. See *id.*; City and County of Denver v. Denver Firefighters, 663 P.2d 1032, 1037 (Colo. 1983)

- i. Interest arbitration involves disputes over the terms and conditions of employment arising during negotiations

- ii. Grievance arbitration involves individual employee claims arising under the terms of a previously executed collective bargaining agreement.

- b. **Binding Arbitration**

- i. Binding interest arbitration is permitted under Colorado Constitution only if the arbitrator is politically accountable to elected officials and if there are sufficient safeguards against the exercise of discretionary power. See Fraternal Order of Police, Colorado Lodge No. 19 v. City of Commerce City, 996 P.2d 133, 138-39 (Colo. 2000); RTD v. Colorado Department of Labor and Employment, 830 P.2d 942, 948-49 (Colo. 1992).

- ii. Binding grievance arbitration is permitted so long as the parties agreed to it in the collective bargaining agreement. Denver Firefighters, 663 P.2d at 1037-38.
 - iii. *But see* Exec. Order D 028 07, Authorizing Partnership Agreements with State Employees, § III(E) (2007) (prohibiting the inclusion of binding arbitration in any “Partnership Agreements”)
5. Public employees have qualified right to strike. *See* Martin v. Montezuma-Cortez Education Association, 841 P.2d 237, 241, 243-45 (Colo. 1992); *but see* Exec. Order D 028 07, § III(F) (requiring a no-strike clause in all Partnership Agreements and prohibiting Certified Employee Organizations from engaging in or threatening “a strike, work stoppage, work slowdown, sickout, or other similar disruptive measure”)

C. Arizona

- 1. As in Colorado, the governing body may consult and negotiate with the union, but there is no duty to do so. *See* Board of Education v. Scottsdale Education Association, 498 P.2d 578, (Ariz. App. 1972) vacated on other grounds
- 2. Union can’t engage in “actions to compel or coerce the Board” to negotiate. *Id.*
- 3. Board may not exceed in a collective bargaining agreement its powers to contract with individual employees. *Id.*
 - a. Cannot dictate procedure for reaching agreement. *Id.*
 - b. Agreements for binding arbitration are void whether interest arbitration, *see id.*, or grievance arbitration. *See* Tucson Unified School District v. Tucson Education Association., 747 P.2d 602 (Ariz. App. 1987)
 - c. Seen as unlawful delegation of Board powers

Note: The AZ caselaw cites Colorado’s earlier precedent of Fellows v. La Tronica, 377 P.2d 547 (Colo. 1962), *overturned by* Littleton Education Association, *supra*

D. Louisiana

- 1. No mandatory bargaining law

2. However, bargaining is a preferred public policy
 - a. Recognized in LA. CONST. art. X, § 10(3)
 - b. Recognized in case law. *Davis v. Henry*, 555 So. 2d 457, 459 (La. 1990)
3. Only 5 of 66 parishes have collective bargaining agreements
4. Some rights are granted by state law. *See generally* LA. REV. STAT. § 17 (applicable to educators only), including:
 - a. Leave policies (sabbatical, sick, personal, maternity, military)
 - b. Personnel file policies (notice and chance to rebut)
 - c. Boards must create fair and objective grievance procedures after consultation with associations
5. Public employees have a qualified right to strike and engage in other concerted activity. *Davis*, 555 So. 2d at 459 (applying state’s “Little Norris-LaGuardia Act” to public school employees).

E. Options for Advocacy in Non-Bargaining States

1. Negotiating for a collective bargaining agreement

- a. Because negotiating is optional, the employer governing body must conclude that it is their interest to have a master agreement
 - i. The Employer must recognize this is dependent on the potential negative aspects of not having collective bargaining agreements
 - (1) low morale
 - (2) arbitrary managerial actions
 - (3) poor communication
 - (4) potential employee mobilization
 - (a) political action – employee involvement or influence in governing board elections
 - (b) economic action – employee engagement in strikes, slowdown, sick-ins, etc.

(**Note:** Colorado is one of 13 states where teachers have the right to strike under certain conditions)

- ii. The Employer must recognize the potential benefits of a collective bargaining agreement
 - (1) greater certainty, clarity
 - (2) increased communication
 - (3) ability to deal comprehensively as opposed to ad hoc fashion
- b. **Note:** Some governing boards use an Interest Based Bargaining (IBB) model as opposed to a more traditional, adversarial approach to reach agreement on a contract. *See Sally Klingel, Interest Based Bargaining in Education: A Review of the Literature and Current Practice* (2003) (commissioned by the National Education Association)
- c. **Success Rate.**
 - i. **Colorado:** 44 of 187 districts have collective bargaining agreements
 - ii. **Arizona:** at least 25 of 220 districts have collective bargaining agreements
 - iii. **Louisiana:** 5 of 66 parishes

2. **Seeking Statewide Legislation – other types of legislation establishing working conditions**

- a. **Pros**
 - i. All governing boards are bound by the same rules
 - ii. Applies to all public employees
 - iii. A floor, not a ceiling, for terms and conditions of employment
- b. **Cons**
 - i. Requires greater organization on the part of the employer and the union
 - ii. Harder for either party to change

iii. Diminishes the amount of local control to some degree

c. **Examples from Colorado**

i. **Teacher Employment, Compensation, and Dismissal Act**
(COLO. REV. STAT. § 22-63-101 et seq.)

- (1) Provides non-probationary teachers with due process rights
- (2) Provides probationary teachers with due process rights if employment is to be terminated during the contract year
- (3) Limits the grounds for termination
- (4) Allows non-renewed probationary teachers to request reasons for non-renewal
- (5) If teacher is transferred to another position during the school year, entitled to same pay (some exceptions)
- (6) Salary schedules can not be changed during the school year if it results in decreased pay
- (7) **NOTE:** All 50 States have some version of teacher tenure laws that provide varying degrees of substantive/procedural rights. *See* Education Commission of the States, *Teacher Tenure/Continuing Contract Laws* (updated 2007), available at <http://www.ecs.org/clearinghouse/75/64/7564.htm>

ii. **Public Employees' Retirement Association** (COLO. REV. STAT. § 24-51-101 et seq.)

- (1) Creates pension and disability fund for certain public employees
- (2) All 50 states have some kind of pension fund for employees. Most are defined benefits plans. *See* GAO Report, *State and Local Government Pension Plans: Current Structure and Funded Status* (2008)

iii. Civil Service Protections

(1) COLO. CONST. art. XII, §§ 13-15

- (a)** Creates State Personnel System
- (b)** Appointments and promotions are made according to a merit system through the use of competitive tests of competence
- (c)** Includes just cause protection, including due process
- (d)** Applies to almost all state employees of the Executive branch

(2) COLO. REV. STAT. §§ 24-50-101 et seq.

- (a)** The “State Personnel System Act” establishes
- (b)** Implements the Constitutional personnel system
- (c)** Requires establishment of
 - i.** pay system
 - ii.** evaluation system
 - iii.** sick leave
 - iv.** selection system
 - v.** grievance procedures
 - vi.** reemployment list for laid off employees
- (d)** Requirements for disciplinary action
 - i.** enumerates specific grounds for disciplinary action
 - ii.** within five days following any disciplinary action, employee must be notified in writing of the action, the charges giving rise to the action, and the right of appeal to the personnel board
 - iii.** hearing and other due process rights

- Some are in statute
- Some are in Administrative Proceedings Act. *See* COLO. REV. STAT. § 24-4-105
- Others are by regulation. *See* 4 CCR 801

(3) Nearly all states have civil service protection laws; however, these laws are subject to increasing reform efforts. Georgia, for example, has done away with civil service protections for new hires who are at-will employees.

3. Seeking Executive Orders – The Colorado Example

a. Governor Ritter’s Executive Order Authorizing Partnership Agreements with State Employees. *See* Exec. Order D 028 07

- i. Provides means by which state employees can elect “Certified Employee Organizations” to represent them in the workplace
- ii. State officials must bargain with these organizations in good faith in an effort to create “Partnership Agreements”
- iii. Contains Limits
 - (1) Governor retains discretion to prepare proposed budget
 - (2) No agreement can expand authority of Office of Governor, Department of Personnel, or Department of Labor beyond what is authorized in Colorado Constitution or Colorado statute
 - (3) Department heads, university presidents, etc., retain responsibility and accountability for operations and management
 - (4) Parties can’t negotiate on following:
 - (a) Matters constitutionally or statutorily delegated to State Personnel Board,
 - (b) Statutory function of any department or agency, or

- (c) Matters related to PERA (state and public employees retirement system)
- (d) Provisions guaranteeing binding interest or grievance arbitration
- (e) Provisions guaranteeing right to strike

b. Potential problems

- i. May be perceived as usurping legislative authority and could be reversed by legislative action
- ii. May be repealed at anytime by existing or future governor

4. Seeking Favorable Employer Policy

a. Where a public employer is authorized by statute to create employment policies which might limit its discretion, these policies can be enforced under theories of implied contract or promissory estoppel. *See Adams County School District v. Dickey*, 791 P.2d 688, 693-94 (Colo. 1990); *see also Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987)

b. There are limits to relying on employer policy

- i. Employer must have statutory authority to limit its discretion, *i.e.*, the policy cannot interfere with other statutory authority. *See, e.g., Dickey*, 791 P.2d at 691; *Seeley v. Board of County Commissioners*, 791 P.2d 696, (Colo. 1990) (statute granting sheriff power to terminate deputies at pleasure could not be trumped by policy manual where sheriff lacked statutory authorization to limit his discretionary power).
 - ii. Policies can be changed unilaterally provided that some reasonable notice is given. *See Dickey*, 791 P.2d at 693 (quoting *In re Certified Question*, 443 N.W.2d 112, 113 (Mich. 1989)).
 - iii. Policies must be read as a whole. *Collins v. Colorado Mountain College*, 56 P.3d 1132, 1134 (Colo. App. 2002)
- (1)** Subject to grievance procedures. *See id.* (holding that where grievance procedures provide for a “final and binding determination” of the dispute, extent of

employee's contract right was a suit to enforce the grievance procedure itself).

- (2) Subject to disclaimers. *See id.*; *Axtell v. Park Sch. Dist. R-3*, 962 P.2d 319, 322 (Colo. Ct. App. 1998) (citing *Keenan*).

- c. If an employee can get around these limitations and a property right is conferred, then constitutional protections kick in. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (holding that the extent of due process protection can not be bound by the instrument which created the interest)

5. Meet and Confer Agreements

- a. Still subject to unilateral change because they are memorialized in employer policy, not a collective bargaining agreement
- b. May get a discussion, but no obligation to agree
- c. May limit ability to engage in comprehensive negotiation and trade-offs
- d. Employer still gets to make ultimate decision.

6. **SUMMARY:** Success for both the union and the employer, depends upon the extent of each party's power and credibility