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U. S. SUPREME COURT ISSUES THREE EMPLOYMENT DECISIONS

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The United States Supreme Court has an unusually large number of employment cases before it this term. Recently the Court handed down three decisions that are of interest to public employers. This bulletin provides a brief summary of those decisions.

The first case, *Robinson v. Shell Oil Co.*,[1] involves a question of the scope of protection afforded by Title VII of the Civil Rights Act of 1964. After he was fired by his employer, the plaintiff in this case filed a discrimination charge with the EEOC under Title VII. While that charge was pending, the plaintiff applied for a job with another company, which contacted his former employer for an employment reference. Claiming that his former employer gave him a negative reference in retaliation for his having filed the EEOC charge, petitioner filed suit under Section 704(a) of Title VII, which makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have availed themselves of Title VII's protections. The Fourth Circuit dismissed the retaliation claim, holding that the term "employees" in Section 704(a) refers only to current employees and that as a former employee, the plaintiff had no claim under Title VII.

The U.S. Supreme Court, in a unanimous decision authored by Justice Thomas, reversed the Fourth Circuit and held that the term "employees," as used in Section 704(a) of Title VII includes former employees. Thus, the Court held, the plaintiff could sue his former employer for its allegedly retaliatory post-employment actions.

The significance of this case is that employers may now be held liable for the statements they make about former employees if those statements may be shown to be motivated by retaliation for the employee's engagement in protected activity under Title VII. Although there are already other bases on which former employees may challenge the statements of a former employer (primarily defamation claims), this decision adds one more cause of action to the list.

1. No. 95-1376 (U.S. Sup. Ct. 1997).

The second case, *Board of County Commissioners of Bryan County v. Brown*,[2] concerns the burden of proof a plaintiff must meet to prevail in a Section 1983 claim.[3] The plaintiff in this case brought a Section 1983 claim alleging that a sheriff's deputy had arrested her with excessive force, thus depriving her of her constitutional rights, and that the county was liable for her injuries because its sheriff had hired the deputy without adequately reviewing his background. The deputy had pleaded guilty to various driving infractions and other misdemeanors, including assault and battery. The sheriff knew about the deputy's driving and criminal records but had not closely reviewed either before hiring him. The plaintiff argued, and the lower court agreed, that the county was liable for her injuries based on its sheriff's hiring and training decisions.

The Court reversed the lower court opinion in a five-to-four ruling authored by Justice O'Connor. The Court held that the county was not liable for the sheriff's single, isolated decision to hire the deputy without adequate screening. To establish liability under Section 1983, the Court stated, the plaintiff had to demonstrate that the decision reflected a conscious disregard for a high risk that the deputy would use excessive force in violation of the respondent's federally protected right. In making this ruling, the Court clarified the circumstances in which a local government may be held liable for the misconduct of those it hires.

A local government may not be held liable under Section 1983 solely because it employs a tortfeasor, stated the Court. Instead, a plaintiff must identify a *policy* or *custom* that caused the injury. Rejecting the argument of the plaintiff in this case, the Court held that a policy giving rise to liability cannot be established merely by identifying the conduct of a policymaker (in this case, the sheriff who hired the deputy) that is properly attributable to the local government. The plaintiff must also demonstrate that, through its deliberate conduct, the local government was the "moving force" behind the injury alleged. That is, a plaintiff must show that the local government action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

The effect of the Court's ruling is to make it more difficult for plaintiffs to win Section 1983 claims against local governments. Claims such as this one, the Court stated, which do not involve an allegation that the local government action itself violated federal law or directed or authorized the deprivation of federal rights, require application of rigorous culpability and causation standards in order to ensure that the local government is not held liable solely for its employees' actions. The Court noted that an official's failure to adequately scrutinize the applicant's background constitutes "deliberate indifference" necessary to create liability under Section 1983 only when such scrutiny of the applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right.

The third case, *Auer v. Robbins*,[4] resolves a split in the lower courts over the meaning of part of the Fair Labor Standards Act (FLSA). This matter arose when a number of police officers sued the City of St. Louis for overtime under the FLSA, claiming that they were not salaried exempt employees as the city had designated them to be.

Under the Department of Labor regulations implementing the FLSA, an employee is considered to be paid on a salary basis (a requirement to be exempt) if he or she regularly receives each pay period a predetermined amount of compensation not subject to reductions because of the quality or quantity of work performed.[5] The crux of the officers' complaint was that because the city had a personnel policy that made them subject to reductions in pay (disciplinary suspensions of less than one workweek if they violated work rules), their pay could vary and thus they were not truly "salaried."

The officers had not actually had their pay reduced under this possibility, but they argued that because they were subject to the personnel policy, they might suffer that fate one day. The question before the Supreme Court was thus whether the mere possibility of an improper deduction in pay of a salaried employee defeated that employee's exempt status under the FLSA salary-basis test. The Court held that such was not the case. Rather, the Court stated, an employer must actually make an improper deduction from an

2. No. 95-1100 (U.S. Sup. Ct. 1997).

3. Title 42 U.S.C. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. No. 95-897 (U.S. Sup. Ct. 1997).

5. 29 C.F.R. 541.118(a).

employee's pay or have in place a policy creating a "significant likelihood" of such a deduction for the salary test to be violated.

The effect of this decision for public employers is that they will not automatically be held to have violated the FLSA merely because they have a policy that authorizes deductions from employees' paychecks for rules violations. However, it is recommended that employers review their policies and practices to determine whether an exempt employee could legitimately argue that there is a significant likelihood that he or she is actually subject to such deductions.

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