WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2007-08
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Corrections and Courts (AC-CC)

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( )

U.S. Supreme Court

CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, 470 U.S. 532 (1985)

470 U.S. 532

CLEVELAND BOARD OF EDUCATION v. LOUDERMILL ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-1362.

Argued December 3, 1984
Decided March 19, 1985 *

AB 308 File

JUSTICE MARSHALL, concurring in part and concurring in the judgment.

I agree wholeheartedly with the Court's express rejection of the theory of due process, urged upon us by the petitioner Boards of Education, that a public employee who may be discharged only for cause may be discharged by whatever procedures the legislature chooses. I therefore join Part II of the opinion for the Court. I also agree that, before discharge, the respondent employees were entitled to the opportunity to respond to the charges against them (which is all they requested), and that the failure to accord them that opportunity was a violation of their constitutional rights. Because the Court holds that the respondents were due all the process they requested, I concur in the judgment of the Court.

I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents sought in this case. I continue to believe that before the decision is made to terminate an employee's wages, the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence," Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (MARSHALL, J., dissenting). Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety. [470 U.S. 532, 549]

To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional predeprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pretermination proceeding. After wage termination, the employee often must wait months before his case is finally resolved,

during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life.

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing - indeed, in this case nine months passed before Loudermill received a decision from his postdeprivation hearing. During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause. * Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to [470 U.S. 532, 550] cash before becoming eligible for public assistance. Even in that instance

> "[t]he substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted," id., at 221.

Moreover, it is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury. Even if reinstatement is forthcoming, the same might not be true of backpay - as it was not to respondent Donnelly in this case - and the delay in receipt of wages would thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable. Yet in requiring only that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial.

Were there any guarantee that the postdeprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this minimal

predeprivation [470 U.S. 532, 551] process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood. Nor has this Court grounded any guarantee of this kind in the Constitution. Indeed, this Court has in the past approved, at least implicitly, an average 10- or 11-month delay in the receipt of a decision on Social Security benefits, Mathews v. Eldridge, 424 U.S. 319, 341 -342 (1976), and, in the case of respondent Loudermill, the Court gives a stamp of approval to a process that took nine months. The hardship inevitably increases as the days go by, but nevertheless the Court countenances such delay. The adequacy of the predeprivation and postdeprivation procedures are inevitably interwined, and only a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possibility of a wrongful termination of wages.

The opinion for the Court does not confront this reality. I cannot and will not close my eyes today - as I could not 10 years ago - to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

[Footnote *] See U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws 425, 435 (1984); see also id., at 4-33 to 4-36 (table of state rules governing disqualification from benefits for discharge for misconduct).


FORWARD

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-2127

EDWARD FRANKLIN,

Plaintiff-Appellant,

v.

CITY OF EVANSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 8252—**Joan Humphrey Lefkow**, Judge.

ARGUED FEBRUARY 19, 2004—DECIDED SEPTEMBER 27, 2004

Before CUDAHY, POSNER and ROVNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Edward Franklin, an employee of the City of Evanston (the City), was arrested for possession of a small amount of marijuana. Learning of Franklin's arrest in the local paper, the City instituted disciplinary proceedings against him while his criminal case was pending. Franklin unsuccessfully requested that the disciplinary proceedings be continued for a few months until his criminal case was resolved. The City pressed ahead with its disciplinary hearings, questioning Franklin about the criminal charge without warning him, as we have long held to be required by due process considerations, that he would be

could not say anything because he was facing a criminal charge. Franklin indicated that the information in the police report and the newspaper was all he knew. (R. 34, ex. 7.) The City suspended Franklin without pay, pending an investigation.

On November 26, 1997, a "due cause" meeting was held to determine the maximum level of discipline Franklin could receive. Franklin was not present at this meeting. Judith Witt, the Director of Human Resources for the City, was on the committee that authorized Franklin's termination, though the final decision as to what level of discipline to impose was left up to Edwards. The authorization to terminate Franklin was based on Franklin's alleged violation of the 1989 Work Rules imposed by the 1995 Collective Bargaining Agreement (CBA) between the City and the union of which Franklin was a member.[1]

Under the Evanston City Code, after a due cause meeting, an employee is entitled to a pre-disciplinary meeting, to which he may be accompanied by a union representative. On December 12, 1997, the City held such a meeting with Franklin and his union representative. Franklin was again asked at this meeting to respond to the criminal charge pending against him. He neither admitted nor denied possessing the marijuana because he did not want to jeopardize his criminal defense. Instead, he requested postponement of the meeting until after his criminal case—which had been continued to February 5, 1998—was resolved. The City denied his request, and Edwards decided that Franklin should be terminated. On December 17, 1997, Franklin's employment with the City was terminated for violating the

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[1] The Work Rules had been substantially revised in 1991, and the parties dispute which version was in effect at the time of Franklin's dismissal. However, the resolution of this dispute is unnecessary to the outcome of this case.

1989 version of Work Rule 23.1(e), which prohibited the possession of illegal drugs.

Franklin was the first City employee to be discharged for a violation of Rule 23.1(e). (R.34, ex. 9.) He points to a Caucasian employee, Timothy Hartigan, who had been arrested for driving under the influence (DUI) in 1996 but was not discharged. However, the City notes that three African-American employees were also subsequently arrested for DUI and were not discharged.

Franklin's union filed an official grievance on his behalf and presented it to the City on December 31, 1997. (R. 34, ex. 13.) At a January 26, 1998 hearing, the union argued that the City should have waited until after Franklin's criminal charges had been resolved before disciplining him. Franklin's grievance was denied based on the City's determination that his refusal to respond to the criminal charges and his alleged admission to police that he had possessed the marijuana validated the termination.[2] On February 5, 1998, Franklin's criminal case was *nolle prossed*, and the criminal charge against him was dismissed.

Franklin filed suit against the City, seeking damages for the violation of his rights under 42 U.S.C. § 1983 and § 1981. Both parties subsequently filed cross motions for summary judgment. On November 20, 2002, the district court, relying on our decision in *Atwell v. Lisle Park Dist.*,

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[2] Franklin denies having admitted to police that he possessed the marijuana found when he was arrested. Since this is a review of the district court's grant of summary judgment to the City, we must take the facts in the light most favorable to the non-moving party and must resolve disputed facts in Franklin's favor. However, the fact that the City *believed* Franklin had admitted to possessing the marijuana and terminated him (in part) on this basis is not inconsistent with Franklin's denial of having made such an admission.

286 F.3d 987 (7th Cir. 2002), granted summary judgment to Franklin on his § 1983 claim for violation of his right to procedural due process. The district court found that the City had failed to give Franklin a meaningful opportunity to respond in the disciplinary proceedings since criminal charges were pending and Franklin was compelled to respond (by the fear of losing his job) without any guarantee of immunity. (11/20/02 Order.) Although the district court determined that the City had no express policy of requiring an employee to forego his Fifth Amendment rights on pain of losing his job, it found that Witt was a final policymaker who had the authority to set policy for Evanston on issues regarding drug and alcohol use and terminations and who ratified the decision to terminate Franklin, concluding that the City was therefore liable under § 1983. However, the district court granted the City's motion for summary judgment on the other two aspects of Franklin's § 1983 claim, which were based on deprivation of liberty arising from a state statute and on deprivation of equal protection due to the alleged disparate impact of using arrest records in terminating employees. The district court also granted the City's motion for summary judgment as to Franklin's § 1981 disparate treatment and disparate impact claims.

The City subsequently filed a motion to reconsider, arguing that *Atwell* should not apply retroactively and that Witt was not a final policymaker, so the City should not be held liable even if Franklin's rights were violated. (Mot. to Reconsider, R. 47.) On March 31, 2003, the district court reversed its grant of summary judgment to Franklin on his § 1983 procedural due process claim and instead granted summary judgment to the City, accepting the City's "long overdue" fleshing out of its argument that Witt was not a final policymaker. (3/31/03 Order). Franklin now appeals the district court's grant of the City's motion to reconsider as well as the district court's grant of summary judgment against him on all of his § 1983 and § 1981 claims.

II.

We review the district court's grant of summary judgment de novo. *Dykema v. Skoumal*, 261 F.3d 701, 704 (7th Cir. 2001). This standard applies when cross motions for summary judgment are filed. *Metro. Life Ins. Co. v. Smith*, 297 F.3d 558, 561 (7th Cir. 2002). To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In making this determination, "we draw all reasonable inferences from the evidence in the light most favorable to the nonmoving party." *Williamson v. Ind. Univ.*, 345 F.3d 459, 462 (7th Cir. 2003).

A.

A municipality is liable under § 1983 when a deprivation of constitutional rights is caused by a municipal policy or custom. *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658 (1978). Such liability may be demonstrated in three ways: (1) by an express policy that, when enforced, causes a constitutional deprivation; (2) by a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law; or (3) by a showing that the constitutional injury was caused by a person with final policymaking authority. *Baskin v. City of Des Plaines*, 138 F.3d 701, 704-05 (7th Cir. 1998).

Franklin argued to the district court that the City violated § 1983 for four reasons: (1) it denied him procedural due process; (2) it violated his liberty interest in his reputation; (3) it violated a liberty interest arising from Illinois state law; and (4) it denied him equal protection of the laws because Evanston's policy of using arrest records in discharging employees is inherently racially discriminatory.

The district court initially granted summary judgment to Franklin on the first aspect of his § 1983 claim but granted summary judgment to the City on the latter three. Upon reconsideration, the district court reversed itself and granted summary judgment to the City on the first aspect of Franklin's § 1983 claim as well, because the court found that Witt, to whom the injury had been ascribed, did not in fact have final policymaking authority.

1.

In keeping with our decision in *Atwell*, the district court found that the City was required either to warn Franklin that he had immunity for any statements made during the disciplinary hearing (in which case he would be required to answer questions), or to continue Franklin's suspension without pay until Franklin's criminal case had been resolved. Although the district court noted that there appeared not to be an official policy with respect to the need for *Atwell* warnings, it declined to infer that there was an express policy to *disregard* the right to *Atwell* warnings. The district court (at least initially) imputed § 1983 liability to the City on the basis that Witt was a final policymaker with the authority to draft rules governing firing decisions and the procedures to be used in firing employees. However, upon reconsideration, the district court reversed itself on the issue of Witt's status as a final policymaker.

The relevant policy here is the City's policy, or lack thereof, with respect to providing *Atwell* warnings to employees threatened with discharge. At oral argument on appeal, counsel for the City admitted the existence of a City policy that we find to be in violation of *Atwell*. Specifically, the City conceded that it had interpreted the line of cases leading up to *Atwell* in an exceedingly narrow manner, determining that *Atwell* warnings did not need to be provided unless the employee was literally told "to speak or face the

loss of his job for exercising his right not to speak." (City's Br. at 15.) The City also admitted that it had consulted an attorney with respect to the circumstances in which *Atwell* warnings are required and that Franklin was, based on advice of counsel, not provided with any such warnings. In addition, the City argued that such warnings were unnecessary because *Atwell* was decided after Franklin's disciplinary hearing and termination. (*See also* Letter to the Court from counsel for the City of Evanston, February 23, 2004.)

We believe that the district court correctly found *Atwell* applicable here, because Franklin was in precisely the position addressed by *Atwell*. Pursuant to an express policy as stated by its appellate counsel, the City refused to continue Franklin's disciplinary hearing until after his criminal case was resolved, and the City asked Franklin to respond at the hearing to the criminal charges against him without advising him that his responses could not be used against him in his pending criminal proceedings. Franklin was thus effectively forced to choose between his job and his Fifth Amendment rights, and this was an impermissible violation of his Fourteenth Amendment right to procedural due process.[3]

The City's argument that *Atwell* warnings were not required because *Atwell* was decided after Franklin's disciplinary hearing gets it nowhere fast. "[A]s a general proposition, a federal court applies the law in effect at the time it renders its decision." *Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 131 (7th Cir. 1991); *see also EEOC v. Vucitech*, 842 F.2d 936, 941 (7th Cir., 1988) ("Judicial

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[3] The district court found, and we agree, that Franklin had a protectible property interest in his job because he was a government employee whose employment could be terminated only "for cause." (11/19/02 Order at 8 (citing, *inter alia*, *Cleveland v. Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Sonnleitner v. York*, 304 F.3d 704, 711 (7th Cir. 2002)).)

decisions normally are retroactive; that is, they apply to conduct that occurred before the decision was rendered."). Thus, the fact that *Atwell* was decided in 2002 and Franklin's termination took place in 1997 is not determinative. We find that the district court erroneously granted summary judgment to the City upon its reconsideration of Franklin's procedural due process claim under § 1983 based on its determination that Witt was not a final policymaker and on its earlier finding that the City did not have an express policy to omit *Atwell* warnings. Now, however, the City, through counsel, has admitted its express policy of not providing *Atwell* warnings to employees such as Franklin.[4]

2.

Franklin next argues that he had a protectible liberty interest in his reputation, which was violated when the City allegedly publicized the reasons for his termination and included that information in his personnel file. However, the district court found that "[t]he undisputed facts show that the only disclosure of the information came through its release in the EVANSTON REVIEW, and that Franklin was able to obtain subsequent employment after being terminated." (11/19/02 Order at 8 n.5.) Thus, the district court found that Franklin had failed to "create an issue of fact as to either the public disclosure of the alleged stigmatizing information or the tangible loss of other employment oppor-

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[4] Because we find that the district court erroneously granted summary judgment to the City on Franklin's § 1983 claim for denial of procedural due process, we decline to address whether it erred in granting the City's motion to reconsider this issue. Additionally, because we find that the City had an express policy of failing to provide *Atwell* warnings in situations where they were required, we decline to address whether Witt and/or Edwards were policymakers with final policymaking authority.

tunities." (*Id.*) Franklin points to no evidence that the City publicly disseminated the reason for his termination, and the fact that his coworkers discussed Franklin's arrest and his subsequent termination does not fill the gap. Since Franklin fails to show that the City "disseminated the stigmatizing information in a manner which would reach future potential employers of the plaintiff or the community at large, [he] cannot show that the defendant['s] actions impinged on [his] liberty interest in pursuing [his] occupation." *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986). The inclusion of information in his personnel file regarding his arrest is similarly insufficient to make out a claim. *See Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("The plain fact is that the mere existence of damaging information in Johnson's personnel file cannot give rise to a due process challenge."); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987).

3.

Franklin's third claimed violation of § 1983 was predicated on the deprivation of a liberty interest protected by the Illinois Human Rights Act, 775 I.L.C.S. 5/2-103, which Franklin interprets as prohibiting an employer from inquiring into or using the fact of an arrest as a basis to discharge an employee.[5] Although state statutes may create

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[5] The Illinois Human Rights Act states that "it is a civil rights violation for any employer . . . to inquire into or to use the fact of an arrest or criminal history record information *ordered expunged, sealed or impounded* . . . as a basis . . . to act with respect to . . . discharge [or] discipline . . . ." 775 I.L.C.S. 5/2-103(A). This language is unclear whether the requirement of having been expunged, sealed or impounded applies to arrests or only to criminal history record information, and the courts of Illinois have never had

(continued...)

liberty interests that can implicate the Fourteenth Amendment if a person is deprived of them without due process, *White v. Olig*, 56 F.3d 817, 821 (7th Cir. 1995), Franklin provides insufficient support for his argument why this particular state statute creates such a liberty interest. Franklin asserts that the procedural guarantees of the Illinois Human Rights Act are "no less compelling" than those of prisoner cases, and that wrongful deprivation of employment is a "similarly severe" violation of due process as the risk of convicting an innocent person. (Franklin's Reply Br. at 18, 19.) However, we fail to see how Franklin's claimed violation of Illinois's prohibition against using an arrest as a basis for discharging employees could amount to a due process violation implicating a liberty interest protected by the federal constitution.

Moreover, Franklin did not show that the City had actually violated the Illinois Human Rights Act by relying on his arrest as a basis for his discharge. The district court found that "the evidence is undisputed that it was not because Franklin had an arrest or an arrest record that he was fired." (11/19/02 Order at 15.) Rather, the district court found that Franklin's discharge was based on the City's determination that Franklin had violated a City work rule

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[5] (...continued)
occasion to decide this particular issue. We note that an advocacy group has interpreted this provision of the Illinois Human Rights Act to be inapplicable to arrest records that were not expunged, sealed or impounded. National H.I.R.E. Network Legal Action Center, "Policy Recommendations to Support the Successful Re-entry of Former Offenders Through Employment," available at http://www.hirenetwork.org/pdfs/Illinois%20Policy%20Recommendations.pdf (last visited August 31, 2004). For the purposes of this appeal, however, and lacking any indication from the Illinois courts to the contrary, we will adopt Franklin's interpretation of the statute, because both the City and the district court accepted it without challenge.

prohibiting possession of controlled substances. Franklin does not provide us with any basis for finding that this factual determination is incorrect, and we will not disturb it. Thus, the district court correctly granted summary judgment to the City on this aspect of Franklin's § 1983 claim.

4.

Franklin's fourth claimed violation of § 1983 is an equal protection claim under the Fourteenth Amendment. Franklin argues that the City's use of arrest records in terminating employees has a disparate impact on African-Americans because a higher percentage of them have arrest records. However, Franklin presents no evidence that the City has a policy of using arrest records in disciplining employees, and we have already affirmed the district court's finding that Franklin's own termination was not based on his arrest. Moreover, to make out a prima facie case for an equal protection violation, Franklin may not rely on a disparate impact claim but must show that the City acted with discriminatory intent. *Anderson v. Cornejo*, 355 F.3d 1021, 1024 (7th Cir. 2004); *McPhaul v. Bd. of Comm'rs of Madison County*, 226 F.3d 558, 564 (7th Cir. 2000); *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000). The district court found that Franklin made no such showing, and Franklin again provides no reason for us to disturb this finding on appeal. Thus, the district court correctly granted summary judgment to the City on this fourth aspect of Franklin's § 1983 claim.

B.

Franklin also claims that the City discriminated against him on the basis of his race in violation of 42 U.S.C. § 1981. He advances both disparate treatment and disparate impact theories. Finding that Franklin had failed to show that

there were similarly situated Caucasian employees who were not discharged, the district court granted summary judgment to the City on Franklin's disparate treatment claim. As for Franklin's disparate impact claim, the district court found that § 1981 requires intentional discrimination, and a § 1981 claim is not sufficiently supported by proof of a disparate impact. The district court therefore granted summary judgment to the City on Franklin's disparate impact claim.

1.

In order to make out a disparate treatment claim, Franklin must show that (1) he was a member of a protected class; (2) he was performing according to Evanston's expectations; (3) he suffered an adverse employment action; and (4) similarly situated Caucasian individuals were treated more favorably. *Bratton v. Roadway Package Sys. Inc.*, 77 F.3d 168, 176 (7th Cir. 1996). The district court found that Franklin had established the first three factors, but that he had failed to establish that there was a similarly situated Caucasian employee who had been treated more favorably. (11/19/02 Order at 17-18.)

To show that he is situated similarly to a Caucasian employee, Franklin must show that he is "similarly situated with respect to performance, qualifications and conduct." *Snipes v. Illinois Dept. of Corr.*, 291 F.3d 460, 463 (7th Cir. 2002). This similarly situated employee must be "directly comparable . . . in all material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). Factors courts consider in determining whether two employees are similarly situated include whether the employees shared the same supervisor, whether they were subject to the same standards and whether they "had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's

treatment of them." *Snipes*, 291 F.3d at 463 (quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir. 2000)).

On appeal, Franklin asserts that Timothy Hartigan, a Caucasian employee who had been arrested for DUI in 1996 but was not discharged, was a similarly situated employee. Both DUI and the possession of a small amount of marijuana are misdemeanor offenses under Illinois law. 720 I.L.C.S. 550/4 (criminalizing possession of more than 10 grams but not more than 30 grams of any substance containing cannabis as a Class A misdemeanor); 625 I.L.C.S. 5/11-501 (criminalizing DUI as, at minimum, a Class A misdemeanor, depending on the other facts and circumstances involved). However, the fact that the City did not discharge three African-American employees who had also been arrested for DUI—Walter Parham, Edgar Walker and William McPherson—indicates that, rightly or wrongly, the City simply treats DUI less harshly than the possession of marijuana. This does not amount to unlawful discrimination. *See Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002) (finding that a pretext for discrimination "means something worse than a business error") (quoting *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001)). Moreover, as the City points out, Hartigan and Franklin had different supervisors, and, according to the City's disciplinary procedures, the employee's supervisor decides on the level of discipline. These are sufficient reasons to support a finding that Hartigan and Franklin were not similarly situated. Thus, the district court correctly granted summary judgment to the City on Franklin's disparate treatment claim under § 1981.

2.

Franklin also argues that the City terminated him because he was arrested for possession of marijuana, and that the

use of arrests in employment decisions has a disparate impact on African-Americans in violation of § 1981. But even assuming *arguendo* that Franklin was terminated pursuant to an "arrest *verboten*" policy of the City rather than because the City determined that he had violated a work rule that prohibited the possession of illegal drugs, Franklin still fails to make out a claim. Franklin argues that, since equal protection claims and § 1981 claims are analyzed using the same framework, the district court erred in granting summary judgment to the City on his disparate impact claim under § 1981. However, as previously noted, equal protection claims, like § 1981 claims, require a showing of discriminatory treatment and cannot be supported by proof of disparate impact. Thus, Franklin fails as a matter of law to make out a prima facie case for a violation of § 1981 based on a claim of disparate impact. *See Gen. Bldg. Contractors Ass'n v. United Eng'rs*, 458 U.S. 375, 391 (1982) ("[Section] 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination."); *Majeske v. Fraternal Order of Police, Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996) (noting that § 1981 is designed to forbid disparate treatment, not disparate impact). The district court therefore correctly granted summary judgment to the City on Franklin's § 1981 disparate impact claim.

III.

On this appeal of the district court's eventual grant of summary judgment to the City of Evanston on all of Edward Franklin's claims, we are not concerned with whether the City may have erroneously determined that Franklin had violated its policy against possessing illegal drugs or, to that end, whether Franklin may have been vindicated by a *nolle prosequi* ending to his criminal case. Our concern is that in determining that Franklin had violated a City policy, the City did not provide him with a meaningful op-

portunity, as required by *Atwell*, to present his side of the story without fear of impairing his criminal defense. This was a violation of Franklin's right to procedural due process. Because it occurred pursuant to an express City policy that skirted the need for *Atwell* warnings, the City is liable for a violation of § 1983.

For the reasons set out above, we REVERSE the district court's grant of summary judgment to the City of Evanston on Franklin's § 1983 procedural due process claim, and we AFFIRM the district court's grant of summary judgment to the City on Franklin's other claims. We REMAND this case to the district court for further proceedings in accordance with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit


FORWARD

AB 308 File

Milwaukee Police Association's Proposed Changes to §62.60, STATS 15-December-2006

Agree To:

- **Paid suspension terminates if bound over for felony criminal charges {§62.50(18) Stats.}**
  - City reinstates and reimburses all wages, benefits, etc., if not convicted
- **FPC retains jurisdiction (w/ no chance for arbitration) on discipline when an officer is charged with a felony and also discharged by the Chief as a result of the same act(s) which constituted the felony criminal charge {§62.50(13) Stats.}**
- **No mandatory adjournment {§62.50(16), STATS}**
  - Adjournment "for cause"
  - Trial to be held between 60 and 120 days after the complaint is filed.
    - ☞ Shortens time for appeals to run their course
    - ☞ No different that other forums (i.e., circuit court, etc.)
- **FPC has "rule making authority" {§62.12, STATS}**
  - Addresses *Casteneda* Decision
    - ☞ Provides FPC with what it presently lacks
    - ☞ Prepare for likely adverse decision by Supreme Court
- **Expand Number of Commissioners from 5-7**
    - ☞ Decreases each Commissioner's work load
    - ☞ Increased availability will shorten time for appeal to run its course, allow more of a focus on citizen complaints and "big picture" matters such as hiring practices/standards, etc.
    - ☞ Quorum will remain at 3, for disciplinary purposes only

In Exchange for:

- **Right to choose between arbitration or FPC for all disciplines <u>other than</u> those where the officer is also charged with a felony and is discharged for the same acts which constituted the felony criminal charge {§62.50(13), STATS.}**

  - ☞ FPC maintains control over the outcome of discharge cases that are "high profile"

    - ☞ Preserves "citizen oversight" as to the type of discharge cases that most concerns the public

  - ☞ Arbitration is historically faster than the FPC process

  - ☞ Arbitration will be concluded w/in 90 days

    - Chief gives notice of discipline
    - w/in 10 days of being served, member must appeal (or loose the right)
    - Appeal identifies either FPC or Arb
      - If FPC, notice same as current statute
      - If Arb, notice to Labor Negotiator
    - w/in 10 days of receipt of appeal to Arb, Labor Negotiator coordinates date, time & place for arb w/ Association's President
      - Occur w/in 90 days (unless mutually agreed)

  - ☞ Cost shared equally by both parties (CBA)

  - ☞ Allows FPC to focus on

    - ☞ Big Picture issues (i.e, hiring practices, rules, testing, etc)

    - ☞ High profile disciplines (discharges involving felony charge)

    - ☞ Citizen Complaints & Investigations {§62.50(12), STATS.}
      - ☞ Goal of M.M.P.C.R.
      - ☞ Goal of Park Report

- **Right to Circuit Court Appeal from arbitral decision {§62.50(20)}**

  ☞ Same standard as applied now under §62.50(21), STATS.

  - Under the evidence is there just cause, as described in sub.(17)(b), to sustain the charges against the accused?" ***Section 62.50(21), STATS.***

  - Was the decision reasonable? ***In re Disciplinary Charges Against Younglove,*** *218 Wis. 2d 133, 139, 579 N.W.2d 294 (Ct. App. 1998)*

- **Chief to provide all exculpatory evidence, as well as all evidence relied upon in determination of guilt and discipline, at the same time as disciplinary charges are served on the member.**

  ☞ Whether appealed to FPC or Arb

Milwaukee Police Association's Proposed Changes
to §62.60, STATS
15-December-2006

Agree To:

Suspension of pay → 7

- **Paid suspension terminates if bound over for felony criminal charges {§62.50(18) Stats.}**
  - City reinstates and reimburses all wages, benefits, etc., if not convicted
- **FPC retains jurisdiction (w/ no chance for arbitration) on discipline when an officer is charged with a felony and also discharged by the Chief as a result of the same act(s) which constituted the felony criminal charge {§62.50(13) Stats.}**

Reduce the delays which currently are the cause of the escalating costs. → 7
Give FPC enough time to prepare → 7

- **No mandatory adjournment {§62.50(16), STATS}**
  - Adjournment "for cause"
  - Trial to be held between 60 and 120 days after the complaint is filed.
    - ☞ Shortens time for appeals to run their course
    - ☞ No different that other forums (i.e., circuit court, etc.)
- **FPC has "rule making authority" {§62.12, STATS}**
  - Addresses *Casteneda* Decision
    - ☞ Provides FPC with what it presently lacks
    - ☞ Prepare for likely adverse decision by Supreme Court
- **Expand Number of Commissioners from 5-7**

Easier to get a quorum, which will reduce delays.

  - ☞ Decreases each Commissioner's work load
  - ☞ Increased availability will shorten time for appeal to run its course, allow more of a focus on citizen complaints and "big picture" matters such as hiring practices/standards, etc.
  - ☞ Quorum will remain at 3, for disciplinary purposes only

In Exchange for:

- **Right to choose between arbitration or FPC for all disciplines other than those where the officer is also charged with a felony and is discharged for the same acts which constituted the felony criminal charge {§62.50(13), STATS.}**

  - ☞ FPC maintains control over the outcome of discharge cases that are "high profile"

    - ☞ Preserves "citizen oversight" as to the type of discharge cases that most concerns the public

  - ☞ Arbitration is historically faster than the FPC process

  - ☞ Arbitration will be concluded w/in 90 days

    - Chief gives notice of discipline
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  - ☞ Cost shared equally by both parties (CBA)

  - ☞ Allows FPC to focus on

    - ☞ Big Picture issues (i.e, hiring practices, rules, testing, etc)

    - ☞ High profile disciplines (discharges involving felony charge)

    - ☞ Citizen Complaints & Investigations {§62.50(12), STATS.}
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when evidence is to be provided.

Chief to provide all exculpatory evidence, as well as all evidence relied upon in determination of guilt and discipline, at the same time as disciplinary charges are served on the member.

☞ Whether appealed to FPC or Arb


FORWARD

Barbara L.
TOLES

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P.O. BOX 8953
MADISON, WI 53708

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17TH ASSEMBLY DISTRICT

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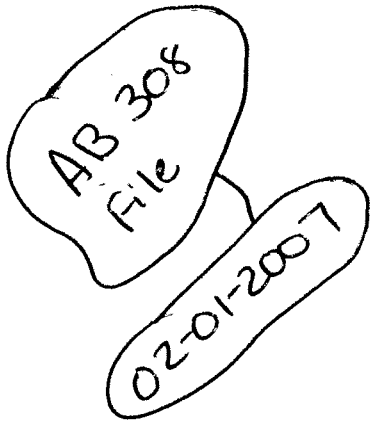

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Police pay on state agenda

End of wages for fired officers sought

By JOHN DIEDRICH and STACY FORSTER
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Posted: Jan. 27, 2007

The issue of pay for fired Milwaukee police officers will surface again in the Legislature this session, but the newest proposal will likely include changes to the city's Fire and Police Commission.

Although the players in the debate - including the powerful police union - are coming to the table to negotiate, they haven't shown all their cards yet.

"Let's look at the whole thing and fix what needs to be fixed. If you fix something, let's fix it right," said John Balcerzak, president of the Milwaukee Police Association, the union that represents officers.

Fired Milwaukee officers are paid while they appeal to the commission, under a state law that applies just to the city. Only Milwaukee's chief has the power to fire.

Elsewhere in the state, chiefs can recommend officers be dismissed, but the local commission does the firing.

State lawmakers said they intend to bring back legislation similar to that introduced last session, which would have ended the pay for fired Milwaukee police officers.

"We hope we can reason with MPA, but the real bottom line is we're going to introduce a bill, and hopefully they can see the efficacy of it," said Sen. Spencer Coggs (D-Milwaukee), who expects a bill to be introduced in the coming weeks. "Nobody believes that once you get fired you should still collect pay."

Assembly Speaker Mike Huebsch (R-West Salem) said a solution will have to come from Rep. Barbara Toles (D-Milwaukee), the bill's lead sponsor in the Assembly; the city; the police union; and other interested parties.

"This is something that truly is a Milwaukee city issue, and while the Legislature will ultimately have to deal with it, the answer should come from the city of Milwaukee, the representatives there and those

who are directly influenced," Huebsch said.

Toles said it is a challenge to broker a compromise because there isn't agreement on how to handle the matter.

Push falls short so far

A push to change the law gathered momentum in recent years as a steady string of Milwaukee officers charged with crimes and accused of other misconduct were fired by Chief Nannette Hegerty. The city said it has paid about $3.3 million in pay and benefits to fired officers since 1990 - $800,000 since March.

A version of the bill passed the Assembly last session, but its sponsors and city officials said it had been changed too much to be effective. It would have required only fired officers convicted of felonies to repay the city for wages since their firing.

Coggs and Toles objected to the changes, and the bill never came up in the Senate. With Democrats now in control of the Senate, the police union might be more willing to negotiate, Coggs said.

Toles is guarded because of efforts last session to scuttle the bill.

"Right now there are some people who don't want the legislation even brought forward, let alone passed," Toles said.

All sides agree that the commission, which hears termination appeals, can resolve cases more quickly. The law calls for cases to be come to an end in a matter of weeks, but they always take months and sometimes years.

To fix that, the city is prepared to push for a larger commission, from five to seven, while keeping the panels that hear appeals at three commissioners, meaning two panels could hear cases at the same time, said Patrick Curley, chief of staff to Mayor Tom Barrett. The city also agrees with the union that there should be more realistic deadlines for hearings in the law and that they should be followed.

Toles said it takes Milwaukee's firefighters half as long as police officers to move through appeals because they aren't being paid after termination.

"People have been taking advantage," Toles said, adding that everyone would benefit from a faster process.

Curley also predicted both sides would accept getting rid of the so-called free adjournment that allowed either side, but most often used by the fired officer, to delay the case. Adjournments would be granted only for a good reason.

The sticking point will be pay for fired officers, Curley said. He wouldn't commit to what the city will accept, but there will have to be a change in the law, he said.

"The pay and benefit of discharged officers I think, frankly, is going to be more difficult to come to agreement on unless the MPA is willing to come our way a little bit more," Curley said.

Balcerzak said he wasn't willing to talk about the union's position until union officials talked more with

the city.

Steven Walters of the Journal Sentinel staff contributed to this report.

From the Jan. 28, 2007 editions of the Milwaukee Journal Sentinel

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Woman tells of sex assault by Milwaukee police officer

Trial begins; his lawyer says he was set up

By JOHN DIEDRICH
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Posted: Jan. 29, 2007

A woman testified Monday that former Milwaukee police officer Steven Lelinski pursued her aggressively in 2005 before showing up unannounced at her house at 2 a.m. and sexually assaulting her in front of her 18-month-old daughter.

Afterward, she said, Lelinski threw a $20 bill at her and told to expect to be arrested on a warrant.

The woman, 23, said she took a bath and tried to forget about the matter.

"As long as I didn't say nothing, it was like it didn't happen," said the woman, who later decided to report the attack. The Journal Sentinel is not identifying her because she is considered a sexual assault victim.

Lelinski is charged with assaulting three women he met while on duty. In addition, prosecutors allege that Lelinski, 42, assaulted six other women whose cases are too old to prosecute, but which prosecutors plan to present as evidence of a pattern or method. His trial, expected to last a week, began Monday before Circuit Judge Jeffrey A. Wagner and a jury.

A politically connected 16-year veteran, Lelinski was charged in February and fired in August, though he continues to be paid under a state law unique to Milwaukee police. If convicted of all charges, he faces up to 80 years in prison.

In her opening statement, Assistant District Attorney Miriam Falk called Lelinski a "sexual predator in a police officer's uniform."

Falk said Lelinski targeted women whose credibility wouldn't stand up to his own - prostitutes, exotic dancers and drug addicts - and then used his authority to pursue them. "Officer Lelinski abused his power as a police officer, using his power over women who were vulnerable to him because of who they were and who he was," Falk said.

Lelinski's attorney, Steven Kohn, said two of the three women Lelinski is charged with assaulting were trying to set him up so they could make money. The third, Kohn said, learned about Lelinski in the media and wasn't credible.

"I beg you to wait until you hear all of the evidence before you begin to judge a fellow human being," Kohn said.

Monday's witness, who formerly worked as an exotic dancer, said she met Lelinski when he responded to a house party she was attending in July 2005. A month later, she saw Lelinski when police were called over an argument she was having with her mother's boyfriend. Both encounters were professional, she said.

In October 2005, she said, Lelinski and a partner were driving by when they stopped and Lelinski asked if he knew her from somewhere. Two days later she saw an officer looking at her car and realized it was Lelinski. He said he had been called for a possible stolen or abandoned car. He took down the woman's phone number and started calling, she said. He also ran her name and learned she had a warrant for an unpaid traffic citation in Winnebago County.

The calls continued. She asked why the warrant mattered to him and he said, "because he didn't want to see a single mother go to jail."

In one call, he asked her bra size, she said, and said he was "intrigued" by her.

Early one morning in October 2005, the woman heard what she thought was her boyfriend arriving. She opened the door and it was Lelinski, in street clothes. He walked in uninvited and sat on the couch, she said. He pulled her down and began touching her breast, she said. Her daughter got out of bed.

"I asked if he was going to do what he was going to do in front of my daughter. He acted like it didn't matter that my daughter was there," she testified.

He exposed himself with one hand and grabbed her hair with the other, trying to force her to perform oral sex, she said. Meanwhile, her daughter watched and cried, she said.

The woman said she resisted as he tried to pull her head down six times.

After Lelinski threw the $20 at her, she said, she threw it back at him.

The woman is expected to continue her testimony this morning.

From the Jan. 30, 2007 editions of the Milwaukee Journal Sentinel

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http://www.jsonline.com/story/index.aspx?id=560191

4 more women testify against fired officer

By JOHN DIEDRICH and DERRICK NUNNALLY
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Posted: Jan. 31, 2007

Four more women testified Wednesday that fired Milwaukee police officer Steve Lelinski sexually assaulted them.

Among them was a woman who said Lelinski raped her in 1998. The woman, 27, had called police after she was robbed at a gas station where she worked. Lelinski responded, but when he learned there was a warrant for the woman's arrest, he took her in his Jeep to a park where he assaulted her, she said.

"He told me not to tell anyone because it wasn't hard to find me or my family," said the woman, who didn't come forward until after Lelinski was charged in February 2006.

Lelinski, 42, is charged with assaulting three women he met on duty in recent years. In addition, prosecutors allege six other women were assaulted by Lelinski, going back to the mid-1990s. The cases are too old to charge now, but prosecutors are introducing them in the effort to show a pattern and method by Lelinski.

Several of the older cases had been brought to the district attorney's office by Milwaukee police internal investigators, but prosecutors declined to issue charges at the time, saying the accusers were not credible.

The prosecution has alleged that Lelinski targeted women who were prostitutes, strippers, drug addicts or were wanted on warrants, using his position to pursue them and ultimately assaulting them. Two women testified Monday and Tuesday that they had been victims.

Lelinski's attorney, Steven Kohn, said in his opening statement that the accusers were trying to set up Lelinski so they could sue the city and make money.

A 44-year-old woman testified Wednesday that in 2002, Lelinski came to her house over a family dispute and then began pursuing her. He showed up at her home unexpectedly late one night, she said. He went into her bedroom and began performing a sexual act and directed her to do the same, which she did.

The woman said she was intimidated by Lelinski, who she said was in uniform and had his gun.

Three months after that encounter, the woman testified, she went to police, and investigators began recording her conversations with Lelinski. A report from that investigation indicates she said Lelinski had propositioned her during a meeting at the Milwaukee Police Academy, asking her to go to the basement with him for sex. She testified she didn't remember hearing him ask that or telling an investigator about it.

Kohn asked her if she was flirting with Lelinski and why she had hired a lawyer. The woman has filed a notice of injury against the city, the first step toward a possible lawsuit.

The day ended with a police detective testifying about several reports that showed Lelinski had police contact with one of the accusers in the case.

From the Feb. 1, 2007 editions of the Milwaukee Journal Sentinel