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Ninth Circuit Says Police Officer Can't Be Fired for Affair

by Scott D. Hagel

In *Perez v. City of Roseville*, 882 F.3d 843 (9th Cir. 2018), the Ninth Circuit Court of Appeals held that constitutional guarantees of privacy and intimate association prohibit the State from taking adverse employment action on the basis of private sexual conduct, unless it demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation.

Janelle Perez, and a fellow police officer, Shad Begley, began a relationship a few months after Perez began her term as a probationary officer. Begley's wife filed a citizen complaint alleging that Perez and her husband were having an affair and engaging in inappropriate sexual conduct while on duty. An internal affairs investigation found no evidence of on-duty sexual contact, but confirmed the two officers made a number of calls and texts on duty, which "potentially" violated Department policy.

Two Department supervisors reviewed the investigation's findings. Both Perez and Begley were reprimanded for violating Department policies against Unsatisfactory Work Performance and Conduct Unbecoming. Significant to the Court, the two supervisors involved in the investigation admitted that they morally disapproved of the extramarital sexual conduct.

Perez appealed her reprimand to the Chief of Police in an administrative hearing. At the conclusion of the hearing, Perez was "released from probation," or discharged. The notice contained no reasons for the discharge and was prepared in advance of the hearing.

The findings were reversed about two weeks later, but Perez was issued a new written reprimand for violating a Department policy on Use of Personal Communication Devices. The police chief later averred that Perez's personal calls during work time did not warrant termination, and stated that he had decided to terminate Perez's employment prior to the administrative hearing, based on the additional information he had learned about her performance since the completion of the initial internal affairs investigation.

Perez filed a lawsuit against the City, the Department, the two supervisors and the police chief, alleging 42 U.S.C. § 1983 claims for violating her rights to privacy and freedom of association and her right to due

process, as well as sex discrimination under Title VII and state law. The District Court granted summary judgment to each defendant. On the Section 1983 claims, the lower court concluded that the defendants were entitled to qualified immunity because Perez did not have a clearly established constitutional right to engage in a personal relationship with Begley while on duty. On her due process claim, the district court found no evidence that "stigmatizing information" about Perez was published in regard to her termination, and therefore no violation of her rights. As to her sex discrimination claim, the District Court found she did not provide sufficient evidence that the chief's stated reasons for terminating her probationary employment were a pretext for sex discrimination or that her gender was a motivating factor.

The three-judge Ninth Circuit panel, which included Montana District Court Judge Donald Molloy, sitting by designation, held that a genuine factual dispute existed as to whether the defendants terminated the officer, at least in part on the basis of her extramarital affair. Relying on *Thorne v. City of El Segundo*, 726 F.2d 459, 468, 471, (9th Cir. 1983), the panel noted that officers and employees of a police department enjoy a "right of privacy in 'private, off-duty' sexual behavior." Further, the Court held that even if it were to find that only rational-basis review needed to be satisfied, *Thorne* required that the Department must do more than cite a broad, standard-less rule against "conduct unbecoming an officer." The Court also noted the importance of *Lawrence v. Texas*, 539 U.S. 558 (2003) in establishing that intimate sexual conduct represents an aspect of the substantive liberty protected by the Due Process Clause.

While the Court found in favor of Perez on the Section 1983 claim, it affirmed the District Court dismissal of her due process claim, because any due process rights she might have had were not clearly established at the time of the challenged action. Further, it affirmed the District Court's dismissal of her sex discrimination claim because the evidence, taken in the light most favorable to Perez, indicates she was discharged due to disapproval of her extramarital affair, rather than gender discrimination.

EMPLOYER TAKEAWAY: While *Perez* specifically dealt with state action against public employees in the Ninth Circuit, private employers in the Ninth Circuit (Montana is included) should proceed with caution before considering romances between co-workers to constitute a fireable offense. While private employers must continue to address non-consensual or unwelcome conduct and conduct that creates a sexually hostile work environment, they should likely not intrude into relationships outside of the work that do not directly impact the workplace.

Implications of New Tax Law on Confidential Settlements of Sexual Harassment or Sexual Abuse Claims

by Vincent G. Kalafat

In the wake of the Harvey Weinstein scandal and the #MeToo movement, sexual harassment and sexual assault in the workplace has received significant national attention. Nondisclosure agreements and confidentiality agreements have come under increased scrutiny because of the concern that they may be used to quietly settle sexual harassment claims and potentially cover up bad behavior or a hostile environment. Taking notice of the concern, Congress added the so-called "Weinstein tax" provision to the Tax Cuts and Jobs Act, which generally disallows a tax deduction for any settlement or payment and attorney's fees related to sexual harassment or sexual abuse if subject to a nondisclosure agreement.

Under prior law, a taxpayer generally was allowed a deduction for ordinary and necessary expenses paid or incurred in carrying on any trade or business. As a result, under prior law, employers generally were allowed a business deduction for settlement payments and attorney's fees to settle employment claims and litigation. Effective for amounts paid or incurred after December 22, 2017, the Tax Cuts and Jobs Act denies a deduction for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such settlement or payment. As a practical matter, the new tax provision generally requires employers settling a sexual harassment or sexual abuse claim to decide whether to retain confidentiality and lose the tax deduction or forgo confidentiality and

retain a tax deduction.

Unfortunately, the uncertainty regarding the scope of the new tax provision will complicate settlement decisions for employers. First of all, the provision does not define the key terms "sexual harassment or sexual abuse" and "nondisclosure agreement". Further, the new provision employs broad language. As a result, there are a number of unanswered questions regarding the scope of the new provision. If an employer settles a clearly asserted sexual harassment or sexual assault claim with an agreement that contains a nondisclosure provision, then the related settlement payments and attorney's fees would be subject to disallowance under the new tax provision. But the new tax provision could be interpreted to cast a much wider disallowance net. The actual language of the statute refers to any settlement or payment "related to" sexual harassment or sexual assault if such settlement or payment is subject to a nondisclosure agreement, resulting in uncertainty regarding the scope of disallowance. For example, if an employee does not allege a sexual harassment claim but facts may support such a claim, would a settlement agreement with a comprehensive release and nondisclosure provision be subject to disallowance under the new tax provision? Also, employment cases often involve multiple claims relating to similar facts. If an employee asserts both a sexual harassment claim and another claim, would a confidential settlement of the other claim be considered "related to" the sexual harassment and subject to disallowance under the new tax provision? Some have even questioned whether attorney's fees related to settlement of a sexual harassment claim without a nondisclosure agreement could be disallowed based on the actual statutory language.

While Congress clearly intended to disallow a defendant's business deduction for settlement payments and attorney's fees for sexual harassment claims subject to a nondisclosure agreement, the actual statutory language is not so limited and could be interpreted to cover the plaintiff's attorney's fees as well. Indeed, the new tax provision in Section 162(q) of the Internal Revenue Code disallows any deduction "under this chapter", a reference that could be interpreted to cover a plaintiff's deduction for attorney's fees related to sexual harassment or sexual abuse settlements subject to a nondisclosure agreement.

Hopefully, the IRS will soon issue guidance addressing the uncertainties regarding the scope of the new tax provision. In the meantime, employers are well advised to consult with their counsel and tax advisers early on regarding the tax considerations relating to any potential settlement. Tax has always been an important factor when assessing settlement structures and agreements. The new "Weinstein tax" provision has only increased the tax stakes. The Tax Cuts and Jobs Act therefore serves as a good reminder to defendants and plaintiffs alike of the importance of considering the tax consequences of settlement structures and agreements.

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