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FEATURED CASES:

Schools: Immunization policies satisfy rational basis; no claim by parents failing to comply with exemption requirements

***Goe v. Zucker*, no. 21-0537 (2d Cir. July 29, 2022).**

Denying children access to schooling because they failed to comply with New York's newly limited medical exemption provisions was not a denial of Due Process or a violation of the Rehabilitation Act.

New York State (State) requires that all children must be immunized against certain diseases to attend school—these include "poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease." Prior to June 2019, State law allowed exemptions for both non-medical and medical reasons. That year, after a nationwide measles outbreak, the State repealed the non-medical exemptions and narrowed medical exemptions to cases consistent with guidelines issued by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (Guidelines) or with other nationally recognized evidence-based standards of care.

The new regulations require the use of an approved medical exemption completed and signed by a physician, certifying that "immunization may be detrimental to the child's health." The form must provide "sufficient information to identify a medical contraindication to a specific immunization and specify[] the length of time the immunization is medically contraindicated."

Plaintiffs, a national not-for-profit children's advocacy organization and various parents whose requests for medical exemptions had been denied, sued the State Department of Health and its officials, local school districts, and local school district officials (Defendants) alleging that the new regulations and the enforcement thereof violated their rights under the Due Process Clause of the Fourteenth Amendment and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Rehabilitation Act). Among other things, they argued violations of their "liberty interest in parenting," their "liberty interest in informed consent," and burdening a minor's right to pursue an education.

The district court granted Defendants' motions to dismiss, rejecting Plaintiffs' argument that strict scrutiny applied and concluding that the new regulations were reasonably related to the State's

public health objectives of maintaining high vaccination rates in schools and ensuring that medical exemptions were issued based on evidence-based guidance. The district court also dismissed the Rehabilitation Act claims, concluding that Plaintiffs had failed to plead plausible claims of disability discrimination.

On appeal, the Second Circuit affirmed. It considered Plaintiffs' contention that the new regulations were invalid because they permitted school authorities to deny a request for a medical exemption from school immunization requirements even when a state-licensed physician certified that a child is at risk of serious harm or death from a vaccine. "In other words, they contend that because they have a 'fundamental right to a medical exemption' from immunization requirements in these circumstances, the State must grant the exemption 'without further review or interference' when their physicians certify the need for an exemption."

Two questions were presented by the facial challenge: first, whether a fundamental right was implicated, such that strict scrutiny applied, and, second, once the appropriate level of judicial scrutiny was determined, whether the challenged regulations passed muster. As to the first, the Circuit applied the "shocks the conscience" test to determine in the negative. "Plaintiffs' assertion of rights is overstated. The State is not forcing any child to be vaccinated against her parents' will. Rather, the new regulations continue to *permit* a medical exemption (as required by the statute), and they clarify *when* an exemption is appropriate and specify how parents may seek an exemption."

The Circuit further disagreed with Plaintiffs' assertion that they have a "fundamental right" to obtain a medical exemption based solely on the recommendation -- or say-so -- of a child's treating physician. "But no court has ever held that there is a right to a medical exemption from immunization based solely on the recommendation of a physician. Nor has any court held that such a right is 'implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition'." The court cited *Jacobson v. Massachusetts*, where the Supreme Court explained that medical exemptions from mandatory immunization laws may be limited to cases in which it is "apparent or can be shown with reasonable certainty" that the vaccine would be harmful. Furthermore, as the Circuit had previously noted "no court appears ever to have held" that "Jacobson requires that strict scrutiny be applied to immunization mandates."

And as to Plaintiffs' argument that children were being deprived of their right to attend school because of the vaccine mandates. "[A]s the Supreme Court has made clear, there is no fundamental right to an education." See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Nor is education a fundamental right.")

Given that no fundamental right was involved, strict scrutiny did not apply. Viewed through a rational basis lens, the State's newly-limited immunization exclusions fulfilled a legitimate interest. One rationale the Circuit repeated from the proceedings below was the need to fill an expected loophole:

> There was a real concern that with the elimination of the religious exemption, parents who did not want their children vaccinated would seek a medical exemption even when such an exemption was not warranted. See id. at 428 (noting that, "[i]n 2015, the State of California removed non-medical exemptions to school immunization requirements without taking steps to strengthen the rules governing medical exemptions," and that over "the next three years, the use of [those] exemptions to school immunization requirements more than tripled").

The need to comply with national standards and the State's delegation of that authority to school officials were reasonably related to a legitimate state objective, and satisfied rational basis review.

Plaintiffs' as-applied claims also failed. The Circuit agreed with the court below that Plaintiffs did not plausibly allege an infringement of a constitutional right or the deprivation of a property interest in

education, or that the individual school district officials engaged in conduct that was "outrageous," "arbitrary," "irrational," or "conscience shocking."

Finally, there was no cause of action under the Rehabilitation Act, which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Plaintiffs' children had been denied medical exemptions not because of their disabilities, but because they admittedly failed to comply with the new procedures, which, as the Circuit had concluded, were reasonably related to furthering a legitimate state objective.

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Title VII: No liability by Parish for actions of Sewerage District unless District is agent "for employment practices."

Davis v. Parish of Caddo, no. 21-30694 (5th Cir. Jul. 26, 2022).

Affirming the US District Court for the Western District of Louisiana, the Fifth Circuit upholds a determination that the Parish of Caddo is not an "employer" of workers at the Parish's Sewerage District.

Rebecca Davis, an employee of the Sewerage District, brought a claim against her supervisor, James Gavin, for sexual harassment, discrimination, retaliation and other counts under Title VII, naming both the District and the Parish as "employer." One argument she advanced was the "single integrated enterprise" test, which has been applied in a wide variety of contexts including Title VII, ADA, FMLA and others, to aggregate the number of employees and/or revenues from two or more related entities to meet minimum applicability thresholds for those statutes. She also argued that the District was acting as the agent of the Parish.

Under Title VII, for an employer to be considered a "single, integrated enterprise" with another employer, the plaintiff must show: 1) interrelation of operations, 2) centralized control of labor relations, 3) common management, and 4) common ownership or financial control. However, in the Fifth Circuit, this test is not applicable to governmental subdivisions and only applies to private corporations.

The lower court had held that, on the basis of two Louisiana precedents and the plain language of the relevant Louisiana statute, the Parish and the District are separate legal entities; and the single integrated enterprise test is not applicable to governmental entities under the Fifth Circuit's longstanding decision in *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). It also found that the Parish did not exert any influence over the District's employment practices, meaning no agency relationship existed for purposes of Title VII as interpreted in the Fifth Circuit.
On appeal, Davis only raised the agency argument: "The only theory that the Davises properly urged below and now on appeal is that Caddo can be held liable under Title VII because the Sewerage District, its board, or a particular board member was Caddo's "agent." Davis argued that the plain text of Title VII weighed in her favor because "agent[s]" are expressly included in the statutory definition of "employer." **See 42 U.S.C. § 2000e** ("The term 'employer' means a person ... who has fifteen or more employees ..., *and any agent of such a person* ...." (emphasis added)).

The Circuit pointed out that "an agent under Title VII ... must be an agent *with respect to employment practices*." Here, the fact that the District set Davis's compensation and exercised other

management over Davis was dispositive. “[B]ecause Mrs. Davis has failed to show that any putative agent's role encompassed employment practices on Caddo's behalf, we will not disturb the judgment of the district court.”

IMLA provided amicus support in this case via a brief authored by IMLA member Robin Cross and Erich Eiselt, addressing both the single integrated enterprise test and the agency issue. Henry Bernstein represented the Parish and argued the case before the Fifth Circuit, and we congratulate him on his successful outcome.

21-30694.0.pdf (uscourts.gov)

SHORT SUMMARIES:

6th Circuit – Excessive Force – K-9 – No duty to warn

I never thought it would happen, but I’m starting to like the 6th Circuit. The Plaintiff in this case fled at high speeds from a police officer and crashed into a tree. The Plaintiff then fled into a dark wooded area and the officer sought help finding the suspect. An officer arrived with a K-9 and the two began searching for the suspect when Argo (the K-9) while still on the leash uncovered the suspect and bit him. The officer shouted commands to both dog and suspect and while the dog complied the suspect did not. Eventually, the officer hit the suspect several times to protect Argo and then tased the suspect. Apparently, upset with being apprehended in such fashion, the suspect, now Plaintiff, sued and the lower court dismissed the claims against all but the K-9 officer who apprehended the suspect and defended Argo in the process. Among the Plaintiff’s claims: he believed that the Constitution requires a dog handler to announce in advance of setting the dog on a fleeing suspect that it is the handler’s intent to do so. Not so, ruled the court especially in circumstances such as this where the dog is still on leash. A couple of good quotes for your enjoyment and future briefs:

- “Houk did not violate the Constitution when he chose not to shout a verbal warning while tracking Jarvela with Argo on a leash. If Jarvela had wanted to surrender, he should not have fled on foot.”

- “When a person resists arrest—say, by swinging his arms in the officer’s direction, balling up, and refusing to comply with verbal commands—the officers can use the amount of force necessary to ensure submission.” Rudlaff v. Gillispie, 791 F.3d 638, 643 (6th Cir. 2015).”

Jarvela v. Washtenaw County
22a0161p-06.pdf (uscourts.gov)

10th Circuit – Attorney’s Fees – Probable Cause – Section 1983 -TSA

Sometimes you read a case and just whoop for joy. This was one of those. In addition to the really special result, the case arose in Jackson, Wyoming where one of my former students is the Town Attorney. No surprise to me that this brilliant student is a terrific municipal lawyer. Hopefully, she’ll be in Portland where all good municipal lawyers will congregate in October at the IMLA Annual Conference.

The facts involve one of those problematic issues associated with supporting TSA at an airport. A sometime resident of Jackson and of Connecticut sought to pass through security at the airport but triggered the requirement for a closer look (pat down). Apparently, wanting to disprove the old adage that "you can't tug on superman's cape," he became belligerent. Threatening to sue for sexual harassment should the TSA officer pat him down, he refused. The Jackson police were called to assist and one thing led to another when the officer eventually arrested the man for violating a Jackson ordinance that penalized the actions of those who attempted to avoid complying with airport security. When the criminal charges were dismissed by a judge who concluded the officer did not have the jurisdiction to arrest despite having probable cause to do so, the civil suit began. The lower court dismissed the first effort at a civil rights claim suggesting the pleadings were inadequate to assert a constitutional claim and granted leave to amend. The Plaintiff amended and motions were filed to dismiss (the amendment did little to change the original in terms of adding allegations of fact rather than conclusions). After that amendment was filed and the motions briefed, but before the court ruled, the Plaintiff sought to amend again. The judge recognized not only the futility of the second amendment but the chutzpa in trying to amend again after the defense had spent time and money defending that 2nd Amendment, so the court dismissed without leave to amend and assessed attorneys' fees against both the Plaintiff and his lawyers individually. The panel affirmed and made my day. Should you enjoy the good result by reading the case, you'll see that the Plaintiff garnered amicus support from a couple of the groups that routinely support folks with gripes about government and I suppose it will be interesting to see how they put a gloss on this loss. I suppose if there's any justice in the world, a litigious person might want to find a good malpractice lawyer to take a look at how this case was presented.

Frey v. Town of Jackson
Microsoft Word - 20-8000 (uscourts.gov)

11th Circuit – Adult Entertainment – 1st Amendment – 4th Amendment – Preemption

Let's start today's synopsis with a direct quote from the court –

"After a thirteen-year-old victim of human trafficking performed at the City of Miami Beach ("City")'s only fully nude strip club, Club Madonna, Inc. ("Club"), the City came down hard on the Club. It enacted two closely intertwined ordinances (collectively, "Ordinance") that required all nude strip clubs to follow a record-keeping and identification-checking regime in order to ensure that each individual performer is at least eighteen years old -- the records of which the City could demand to see at any time -- or face stiff penalties." 13 years old!

Now, as to the law – Does the law implicate the First Amendment in imposing strict record keeping requirements on the establishment to ensure that its performers are of legal age? Yes, because the law is not of general applicability and only targets adult entertainment establishments and its performers, the court concludes it implicates the First Amendment, but as both parties agreed it only required intermediate scrutiny. Under that analysis the law was deemed narrowly tailored and survives. What about the requirement that the records be available to the city on demand? Because the business is a highly regulated one and because the court concludes that the "on demand" feature of the ordinance only applies when the business is open or administrative staff available to respond, the requirement survives 4th Amendment scrutiny. The city loses however under the Immigration and Reform Control Act in its requirements that the employer assure that its workers are legal.

From the concurring judge, a brief statement that caught my attention and states well my view of things “And if there is any fixed star in my own constitutional constellation, cf. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), it’s that unelected, unaccountable federal judges shouldn’t make stuff up.”

Club Madonna v. City of Miami Beach

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