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ADA: Requirement to Install Fire Sprinklers in Sober Homes Cannot be Averted as Reasonable Accommodation

Summers v. City of Fitchburg, No. 18-1725 (1st Cir. Oct. 8, 2019).

The operator of four Massachusetts sober homes could not avoid installing fire sprinklers in his facilities on the grounds that such an expense should be circumvented as a reasonable accommodation.

Jeffrey Summers (Summers), through his non-profit organization Jeffrey's House, operated four sober homes in Fitchburg, Massachusetts (City). In 2013, the City began enforcing zoning and building code provisions they claimed Summers violated. Summers requested the City grant an accommodation under the ADA and FHAA to allow operations to continue despite the use restrictions.

The City informed Summers that state law required sprinkler systems to be installed in three of the four sober homes. The City gave Summers six months to bring the homes into compliance, but the plaintiffs failed to do so. As a result, the City fined the homes $1,000 and filed an

enforcement action in state housing court.

Summer and JH filed suit against the City and various City officials alleging violations of the ADA and FHAA, including a disparate treatment theory, disparate impact theory, and a claim alleging failure to provide reasonable accommodations as required by federal law. The district court granted summary judgment for the City on the grounds that the plaintiffs failed to show an exemption from the sprinkler requirement was reasonable or necessary to allow recovering addicts to live in and benefit from the sober homes.

The First Circuit affirmed the district court's grant of summary judgment. According to the First Circuit, because the disparate treatment and disparate impact claims were validly dismissed by the district court, the only preserved claim on appeal was the failure to make a reasonable accommodation claim based on the City's refusal to exempt the sober homes from the state sprinkler law under the FHAA and ADA. Plaintiffs argued that requiring them to follow the sprinkler law would force them to either raise prices or to reduce occupancy, and therefore both options threatened residents and the purpose sober houses serve. The First Circuit found the plaintiffs' argument could not withstand scrutiny because the basis for their request for exemption was unreasonable-it created a threat to public safety. Reasonableness is the first hurdle a plaintiff must overcome in requesting a reasonable accommodation under the ADA and FHAA.

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Short Term Rentals: Santa Monica Short Term Ordinance Does not Violate the Dormant Commerce Clause.

Rosenblatt v. City of Santa Monica. no 17-55789 (9th Cir. Oct. 3, 2019).

Affirming the lower court, the Ninth Circuit rejects an Airbnb host's argument that Santa Monica's short term rental ordinance requiring a minimal 30-day stay impermissibly affects interstate commerce.

Santa Monica resident Arlene Rosenblatt (Rosenblatt) used to rent out her house on Airbnb when she and her husband went on vacation, charging $350 per night. Santa Monica passed an ordinance prohibiting property rentals of 30 days or less ("vacation rentals") with an exception for rentals where a primary resident remained in the dwelling ("home sharing"). In enacting the ordinance, the Santa Monica City Council sought to preserve the "available housing stock and the character and charm which result, in part, from cultural, ethnic, and economic diversity of its resident population," and "its unique sense of community which derives, in large part, from residents' active participation in civic affairs, including local government, cultural events, and educational endeavors."

Rosenblatt brought a putative class action against the city of Santa Monica and Santa Monica's City Council (collectively, Santa Monica), arguing that the ordinance violated the dormant Commerce Clause.

The district court dismissed, and the Ninth Circuit affirmed .The panel first held that the ordinance was not a per se violation of the dormant Commerce Clause because it did not directly regulate interstate commerce; at most, the ordinance had an modest interstate effect because it made lodging in Santa Monica less accessible, available and affordable. But the ordinance penalized only conduct in Santa Monica, regardless of whether the visitors were in-state or from outside California.

The panel rejected Rosenblatt's argument that the ordinance violated the dormant Commerce

Clause by directly regulating booking and payment transactions that may occur entirely out-of-state--the ordinance applied evenhandedly and did not directly restrain interstate commerce although it might regulate transactions with an interstate component. The panel further held that nothing in the ordinance suggested that its advertising ban was intended to have extraterritorial application.

The Circuit held that the ordinance did not discriminate against interstate commerce: Santa Monica's ban on vacation rentals applied in the same manner to persons nationwide, including Santa Monica residents who might be interested in renting a vacation home from another resident. The panel further noted that the ordinance applied equally to renters and property owners from outside California, California, residents outside of Santa Monica, and Santa Monica residents. The court held that the complaint did not adequately allege that the ordinance increases the relative market share of local businesses or that it has a net negative effect on commerce outside of California. Finally, the panel held that the complaint failed to plausibly allege that the home-sharing exception clearly advantages Santa Monica residents at the expense of out-of-state homeowners.

To the extent that the ordinance burdened interstate commerce through incidental effects, the complaint had not adequately demonstrated how the alleged burden would clearly exceed the stated benefits of the ordinance.

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Speech: At-Will Employee has no Protectible Job Interest, but Does Have First Amendment Protection When Reporting Crime

Javitz v. County of Luzerne, no. 18-2389 (3d Cir. Oct. 10, 2019).

Reversing in part, the Third Circuit holds that a county employee whose responsibility to report a crime to her supervisors only arose due to a general ethics guideline applicable to all employees-and not due to any specific duties in her employment description-was acting as a private citizen on a matter of public concern.

Donna Davis-Javitz (Javitz) was hired as the Director of Human Resources for Luzerne County, Pennsylvania (County), as an "exempt" and "at will" employee in August 2014. Among her responsibilities were dealing with employee complaints, responding to grievances, and conducting investigations. Javitz participated in two investigatory meetings with the American Federation of State, County, and Municipal Employees (AFSCME), which eventually resulted in ASFSCME filing an unfair labor practices suit in March 2015. Javitz claimed that a document filed in the ASFSCME lawsuit was a transcript of the investigatory meetings in which she participated. She suspected that another county employee had recorded the meeting without Javitz's consent-a crime under Pennsylvania law.

Javitz reported her concern to her supervisor, who agreed that the meeting may have been recorded. They two met with the District Attorney, who indicated that she would refer the matter to the Office of the Attorney General due to a conflict of interest. But, Javitz claims, the County Manager intervened and instructed the District Attorney to drop the matter. No further action was taken.

After making her report to the District Attorney, Javitz alleges that county employees retaliated against her--her supervisor assigned work to her subordinates and cut her out of assignments for which she would have been responsible. In October 2015, she was fired.

Javitz filed a Section 1983 claim for violation of her Fourteenth Amendment right to procedural due process and for retaliation in violation of her First Amendment rights. The district court granted summary judgment in favor of the defendants, finding that Javitz did not have a property interest in her employment, and that her speech was that of a public employee, and not a private citizen. private citizen, stating: "[Javitz] became aware of the information through her employment, was encouraged to report the information by the policies of her employer, and reported the information only to other County employees."

The Third Circuit agreed with the lower court's due process analysis. To have a protectible property interest in a job, a person must have "a legitimate entitlement to such continued employment." Under Pennsylvania law, employees are at-will by default; a contract or applicable state law must be shown to rebut this default status and establish a property right. The terms of Javitz's employment clearly defined her position as "Exempt," and her employment as "At Will." The Circuit affirmed on this point.

But the Circuit did not agree as to the First Amendment result below. It reviewed Supreme Court standards under *Pickering, Garcetti,* and *Lane v. Franks*: "To prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983, a plaintiff must prove that (1) he engaged in constitutionally protected conduct, (2) the defendant engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link [existed] between the constitutionally protected conduct and the retaliatory action." Because the district court had ruled that Javitz's communication about the crime was not constitutionally protected speech-by finding that she spoke as a public employee and not a private citizen-the Circuit focused only on the first factor. The fact that she had acquired her knowledge of the crime in her capacity as a public employee was not dispositive: "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee-rather than citizen-speech;" the "critical question" is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

The Circuit concluded that "*Who* Javitz spoke to, *what* she spoke about, and *why* she spoke at all each fall outside the scope of her primary job duties and evidence citizen speech." While she had access to high-ranking officials as a function of her employment and could readily interface with them, her job duties did not include reporting an alleged crime committed against her-that obligation only arose under a County Ethics Code that encouraged reporting of wrongdoing by all public employees:

> Javitz was allegedly the victim of a crime, which she reported. The crime, subsequent contact with local authority figures regarding that crime, and the lack of any formal duty to report that crime are evidence that she was not experiencing or acting within the primary functions of her employment. Thus, we hold that Javitz's speech was that of a citizen speaking to a matter of public concern.

The First Amendment holding below in favor of the County was reversed.

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State Action: Officer Who Uses Service Revolver While on Duty to Collect Personal Debt is not Acting Under Color of Law

Morris v. City of Detroit, No. 19-1386 (6th Cir. Oct. 16, 2019).

A police officer who was on duty and used her service revolver after entering an

acquaintance's home to collect a personal debt was not acting under color of law, because the purpose of the interaction did not involve her official capacity.

While on duty Jennifer Adams (Adams), an officer with the Detroit (City) police department, went to the residence of Keri-Yakei Morris (Morris) and Calvin Galloway (Galloway) seeking repayment of a $300 personal debt Morris owed. According to Morris, Adams placed her foot in the door so Morris could not close it, then proceeded inside and initiated a physical altercation by pointing her finger in Morris' face. During the physical altercation, Morris sprayed Adams with mace and in response Adams discharged her firearm. The bullet did not hit Morris. During the physical conflict, Galloway went downstairs and upon his descent Adams threatened she would physically harm him. Galloway did not make it downstairs, but he was grazed by the bullet Adams discharged during the altercation.

The police department suspended Adams during their internal investigation. The department determined Adams that violated several department policies and procedures. At the time of the incident, Adams was not wearing her uniform but did have her badge and a waistband holster displaying her department-issued firearm. According to the department, she was technically on duty because although she clocked out early, she was scheduled to work until later that evening.

Plaintiffs brought Fourteenth and Fourth Amendment claims, alleging wrongful arrest and excessive force by Adams, the City and the police department. They also argued that the City should be held liable because it failed to properly train and supervise Adams. Total damages sought were $1,000,000 plus legal fees.

The district court granted summary judgment to the defendants.

The Sixth Circuit affirmed. When determining whether a person acted under color of state law, " [t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling. 'It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law.'" According to the Circuti, Adams was not acting under color of law at the time of the incident, but instead acting in her personal capacity. Although Adams was on duty at the time of the incident, she was not acting under color of law because she did not purport to conduct police-related business nor did she attempt to use her status as an officer during the altercation. The fact that Adams used her service weapon was not enough to find that she was acting under color of law.

That determination doomed plaintiffs' claims against the City-for liability to attach, Adams would have to be a state actor operating under color of law. Given that she was operating as a private person, the City had no liability.

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Statutes: Despite Ambiguity, New York City Law Requires Vendors to Remain within Three Feet of Curb

Crescenzi v. City of New York, no. 18-2002 (2d Cir. Oct. 3, 2019).

Disagreeing with the district court, the Second Circuit finds that, despite some ambiguities between two sections of a law regarding veterans' rights to operate vending carts on city sidewalks, that law cannot be construed to mean that carts can be operated more than three feet away from a curb.

New York's General Business Law entitles "any honorably discharged member of the armed

forces of the United States who is physically disabled as a result of injuries received while in the service of said armed forces" to vend in "any street, avenue, alley, lane or park" of the City, so long as he or she has been issued a license to do so. (GBL § 35). A subsection thereof GBL § 35-a(7)(i), provides that no disabled veteran vendor "shall occupy more than eight linear feet of public space parallel to the curb in the operation of a vending business." A second clause provides that "in addition, no [disabled veteran vendor] operating any vending business on any sidewalk shall occupy more than three linear feet to be measured from the curb toward the property line."

Five disabled veterans (Plaintiffs) were issued a total of 298 summonses between 2011 and 2013 while vending in front of the Metropolitan Museum of Art, in each case because they were operating. their carts more than three feet from the curb. In February 2013, Plaintiffs-sued the City of New York (City) under 42 U.S.C. § 1983 in the Southern District of New York., alleging false arrest. They claimed that they were in compliance with § 35-a(7)(i), because the second clause, if properly interpreted, merely meant that carts could not be wider than three feet. They alleged that there was no probable cause to issue the summonses. Their complaint also alleged a claim of selective enforcement.

In July 2017, the district court dismissed the selective-enforcement claim but ruled for Plaintiffs-on the false arrest issue. It deemed the "central question" to be "whether Section 35-a(7)(i) restricts a . . . cart's distance from the curb, or whether it simply restricts the size and dimensions of the cart." The court determined that § 35-a(7)(i) restricts only the dimensions of vending carts, reasoning primarily that because the provision's first clause restricts only "the *length* of a cart and not its placement," it is therefore "logical that the next clause . . . should be interpreted in the same manner-that is, restricting only a cart's *width* between the curb and the property line and not its distance from the curb."

Based on this interpretation, the court concluded that Plaintiffs-had "plausibly alleged that the officers who issued [the] summonses lacked probable cause to believe a violation" of § 35-a(7)(i) had occurred.

The Second Circuit reversed. It viewed the second clause differently-while the language stating that no vendor "shall occupy more than three linear feet to be measured from the curb toward the property line," presented some ambiguity, the City's reading was the more plausible. "According to the City, § 35-a(7)(i) does two things simultaneously: first, it limits the dimensions of vending carts to eight feet in length by three feet in width; second, it requires that carts be positioned lengthwise *alongside the curb*, out of the way of pedestrians." In other words, carts could only occupy the three feet nearest the curb.

The Circuit found Plaintiffs' interpretation implausible: "If all the legislature had wanted to do was limit the dimensions of vending carts, it could have written a straightforward provision reading "no vendor's operation shall occupy more than eight feet in length by three feet in width. . . . [Plaintiffs] offer no rationale for why the legislature would use such convoluted language if all it intended to do was limit cart width, and their interpretation renders the phrase 'to be measured from the curb toward the property line' meaningless."

Plaintiffs' primary textual argument was that § 35-a(7)(i)'s two clauses used "similar expressions," meaning that the legislature intended the second clause to operate "in the same manner" as the first. But the two clauses were not similarly phrased- the first clause expressly measured *parallel* to the curb; therefore, in order to be consistent the second clause should have explicitly measured *perpendicular* to the curb.

Dissent: Chief Judge Katzman dissented. He opined that the statutory provision at issue was ambiguous, and involved an unsettled question of state law. He found Plaintiffs' interpretation of clause 2 to be plausible: "The legislature could have written a straightforward provision stating explicitly that vending must occur within three feet of the curb or that vendors are prohibited from vending farther than three feet from the curb. The simple fact is that subsection (i) is unclear, and,

while both parties' interpretations could explain the words used, neither renders the phrasing natural."

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