International Municipal Lawyers Association



e-News: Issue 16 August 29, 2018

Click Here To Print This Issue

In This Issue: 9 Cases

ADA: Pleading that Wheelchair Ramp was Inaccessible due to Obstruction-without Actually Attempting to Navigate Ramp-Suffices to Avoid Dismissal

Due Process: No Property Interest in Registering under Sex Offender Act

Due Process/Equal Protection: Eleventh Circuit Upholds Preliminary Injunction Against Enforcement of Discriminatory Bail Policy

Employment: County's Refusal to Provide SUV for Deputy with Hip Pain, and Transfer to Courthouse Duty Does not Support EEOC Claim

Evidence: Officer's Prior Excessive Force Tasing of Plaintiff is not excluded as "Propensity Evidence" and is Admissible in Subsequent Excessive Force Claim

Qualified Immunity: No Immunity for Photographing Rape Complainant's Body on Personal Cell Phone; Shocking Conduct Vitiates Need for Case Clearly on Point

Searches: Subjecting County Employee to Same Daily Screening as Public Visitors Because Employee once Made Threatening Comment is not Supported by Individualized Determination

Searches: Utility May Track Near Real-time Data about Residents' Electrical Usage, so long as not Provided to Law Enforcement without a Warrant

Speech: Restrictive Guidelines for Advertisements in Non-Public Forum Upheld

Quick Links

IMLA Website

Webinar Calendar

Municipal Jobs Board

Become a Member

Join The IMLA Community

IMLA Podcasts

ADA: Pleading that Wheelchair Ramp was Inaccessible due to Obstruction-without Actually Attempting to Navigate Ramp-Suffices to Avoid Dismissal

Hillesheim v. Holiday Stationstores, Inc., 17-3143 (8th Cir. Aug. 17, 2018).

Reversing the lower court's determination that an ADA plaintiff lacked standing because he could not demonstrate injury-in-fact, the Eighth Circuit has held that merely alleging that a wheelchair ramp was blocked and that attempting to navigate around the blockage could have caused the wheelchair to tip over, was sufficient to state a claim.

Zach Hillesheim (Hillesheim), who is paralyzed from the waist down and uses a wheelchair, visited a Holiday Stationstore in Mankato, Minnesota but because he observed three access issues he did not enter the establishment. He filed suit alleging he was discriminated against under the Americans with Disabilities Act (ADA). The district court determined Hillesheim lacked Article III standing and he appealed.

The Eighth Circuit reviewed that standing requires "(1) a plaintiff must have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable judicial decision," and noted the first prong was at issue here. It acknowledged Hillesheim's evidence was "thin," but found it sufficient for one of the alleged ADA violations. In contrast to his statements about the width of the access-aisle next to the handicap parking space and the fact that there was vertical-signage which only *described* the alleged violations, his statements to the effect that a garbage can was located along the handicap ramp were "a different story." The latter indicated he literally could not safely navigate the ramp without maneuvering in a manner than risked tipping over his wheelchair. The business argued that Hillesheim had to actually attempt navigating the ramp to have suffered an injury-in-fact, but the Circuit disagreed, saying his specific evidence (statements) that the dangerous circumstance caused him not to enter the store was sufficient for standing for an ADA violation. Thus, Hillesheim's claim could proceed.

LINK

Due Process: No Property Interest in Registering under Sex Offender Act

Beley v. City of Chicago, No. 17-1449 (7th Cir. Aug. 23, 2018).

Sex offenders who could not register under the Illinois Sex Offender Registration Act because they were homeless and officials would not deal with them cannot claim deprivation of a Fourteenth Amendment Due Process right, because they had no protectible property interest in such registration.

Michael Beley (Beley) and a class of individuals required to register under the Sex Offender Registration Act (SORA) failed to do so in Chicago (City) because, according to the City, they could not produce proof of address. SORA has a provision for registering homeless people and the two individuals representing the class said they tried to comply with SORA by following those provisions but were told by the City that "it was not registering homeless people right now." This led to them being deemed "noncompliant" or charged for a felony for not registering as required by the law. In a strange twist on the usual SORA case, the class claimed that the City violated their due process rights by *failing to register them* and in so arguing alleged they had a protected liberty interest in registering under SORA. The district court agreed there is a protected interest in the ability to register but held the class did not identify a policy or custom and thus did not hold the City liable for the acts of the individual officers that turned them away. It ultimately entered summary judgment for the City. The lower court was affirmed, but on different grounds.

The Circuit was concise in rejecting the idea of a protected liberty interest in the ability to register under SORA: "[S]aying that one has the right to register under SORA is like saying that one has the right to serve a sentence or the right to pay taxes. SORA's registration requirement burdens sex offenders; it is not, as the plaintiffs contend, an aspect of their liberty." The court entertained the thought that the plaintiffs may well have a straightforward claim that the City's officers violated SORA by not registering them but was clear that they could not assert a state-law claim under § 1983 because they lacked a liberty interest to underlie the case. The lower court's conclusion was affirmed, but its reasoning was rejected.

LINK

Due Process/Equal Protection: Eleventh Circuit Upholds Preliminary Injunction Against Enforcement of Discriminatory Bail Policy

Walker v. City of Calhoun, No. 16-10521 (11th Cir. Aug. 22, 2018).

A Georgia City has been found to be responsible for a challenged bail policy set by its municipal court which favors those with money over indigents in misdemeanor cases; the policy violates Equal Protection and Due Process, but does not implicate Eighth Amendment rights.

Maurice Walker (Walker), an unemployed man with a mental health disability whose sole income consisted of Social Security disability payments, was arrested and taken into custody in Calhoun, Georgia (City) for being a pedestrian while under the influence of alcohol. A violation of this provision is a misdemeanor in Georgia and does not provide for any jail sentence. Walker was taken to jail and told he would not be released until he posted $160 cash bond. Walker could not make the payment and filed suit while detained, challenging the bail policy as a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. Walker was released the day after he filed suit on his own recognizance and the municipal court changed the bail policy.

The district court found the new bail policy to be unconstitutional because like the old policy it still permitted those with resources to post bond and be released immediately while indigent individuals had to wait 48 hours for a hearing. The Eleventh Circuit, after deflecting the City's claims that the district court lacked jurisdiction, held in favor of Walker. The Circuit found that the City was ultimately responsible for the bail policy even though the municipal court set the policy: The City is able to regulate bail policy if it so desired and therefore it may be held liable for acquiescing in an unconstitutional policy by its municipal court and police. The Circuit held that there was insufficient information to find the City immune from Section 1983 liability for the bail policy. Additionally, the Eleventh Circuit held that the district court was correct in applying due process and equal protection standards rather than the Eighth Amendment according to *Rainwater*. (The Eighth Amendment framework is inappropriate because Walker's claim is different in that it challenges the conditions of bail including the process by which the terms are set, not the cost of bail). Finally, the Circuit disagreed with the district court, holding that heightened scrutiny under the Equal Protection Clause applied to Walker's challenge of the bail policy.

LINK

Employment: County's Refusal to Provide SUV for Deputy with Hip Pain, and Transfer to Courthouse Duty Does not Support EEOC Claim

Koty v. DuPage County, No. 17-3159 (7th Cir. Aug. 16, 2018).

Where an Illinois county declined to provide an SUV to a Sheriff's Department deputy who complained of hip pain, because his existing squad car was similarly configured, and where it temporarily transferred the deputy to courthouse duty and then night duty

before restoring him to his former day shift, he was not "disabled" for purposes of the ADA and had not suffered an "adverse employment action."

Eric Koty (Koty) worked as a deputy for DuPage County Sheriff's Department (Department). He requested a squad car - "like an SUV" - with more legroom and accompanied the request with a note from his doctor that it would be "preferable" if it were "available." The Department measured the difference between the Crown Victoria he was driving and an SUV it had, found no appreciable difference and denied the request. Koty came back with another letter from his doctor saying "a squad car with more legroom, like an SUV, [was] necessary" to address his hip pain and he included an EEOC complaint alleging discrimination under the ADA. The Department reassigned him to courthouse duty, thus eliminating the driving requirement, and also temporarily relieving him from his work on special operations duty. Koty had hip surgery and applied to be back on law enforcement duty (versus courthouse duty), was so assigned and, after a stint on the night shift, returned to his day shift. He sued alleging he was denied reasonable accommodation and that he was retaliated against for the EEOC complaint filing. The district court denied both, holding he was not "disabled" for the former and that there was no "adverse employment action" for the latter.

On appeal Koty argued his hip issue caused pain that was "aggravated" by the assigned vehicle the Department put him in. The Seventh Circuit agreed with the lower court that this did not meet the definition of "disability" under the ADA because it did not affect a major life activity - i.e. it did not, for example, *prevent* him from driving, but made him unable to drive *one model* of car. As for the retaliation claim, it had more legs because such a claim is viable under the ADA whether or not Koty was actually disabled. The issue was whether Koty suffered an adverse employment action: he claimed that transfer to courthouse duty, being taken off special operations duty while on courthouse duty, and being assigned to the night shift were all such actions; the Department said none of them were. The court agreed with the latter, holding first that a lateral transfer is not generally "adverse" under Circuit precedent and that this was such a transfer since Koty had no reduction in pay when he was moved to courthouse duty. Second, it determined that removal from special operations was coincidental to his courthouse duty transfer and that, again, his pay was not diminished and that it was only temporary; he was reassigned to special operations when he returned from surgery. Finally, it found that, in accordance with its general rule that a change in employee shifts is not usually considered materially adverse unless the change results in a change in pay or prestige or is particularly harmful to that employee, Koty's move to night shift temporarily was not adverse. Koty did not have a reduction in pay and did not prove a reduction in prestige either. His appeal failed.

LINK

Evidence: Officer's Prior Excessive Force Tasing of Plaintiff is not excluded as "Propensity Evidence" and is Admissible in Subsequent Excessive Force Claim

Burton v. City of Zion, No. 17-1557 (7th Cir. Aug. 24, 2018).

Finding that the lower court improperly applied an outdated interpretation of "propensity evidence," the Seventh Circuit has admitted evidence that an officer had previously unlawfully tased a plaintiff when she brought a case a decade later, again alleging excessive force by the same officer.

Kasey Burton (Burton) was driving through Zion, Illinois (Zion)when a city police officer noticed her and recalled that she was highlighted on a bulletin about driving with a suspended license. The officer pulled behind her and activated his lights and sirens. Burton did not stop. Two more

officers joined, but Burton continued driving - following all traffic and speed laws - all the way to her house and pulled in her driveway. Burton did not stop before getting all the way home because in 2008 she had been pulled over by a Zion officer - who was still on the force and, coincidentally, in pursuit of her in this new case - for sound amplification and by the end of the stop Burton had been tasered and, thereafter, won an excessive force suit and settled with Zion.

In the current incident, once at her house Burton climbed out the passenger side because her driver's side window did not work, which prompted that same officer from the 2008 incident to move toward her and demand she get to the ground. He then toppled her with a "straight-arm take down" that was incorrectly executed and kneed her in the back while arresting her. She filed another suit; at trial the judge ruled the jury could not hear about the 2008 incident that motivated her reluctance and refusal to stop until getting home. The jury ruled in favor of Zion and Burton appealed.

The Seventh Circuit began with the general rule that trial judges have broad authority to rule on motions *in limine* and that there must be a significant chance that the flawed ruling affected the outcome of the trial before such a decision would be reversed. The district court's exclusion of the 2008 facts was based on its holding that it was propensity evidence - i.e. evidence that the officer acted in a way consistent with the character of someone who uses excessive force (Fed. R. Evid. 404(b)). The problem became the lower court's application of an old, superseded Circuit test for determining whether this type of evidence, "other-act evidence," can come in. Though in some cases the new and old tests would produce the same result, here they did not because one of the factors - "similarity and recency" - used to compare the acts (the 2008 and 2014 acts) is dealt with slightly differently in the two tests. Hence, the Court held the lower court erred "by applying a legal test this court has rejected and by rigidly applying the similarity and recency rule . . . ." The Circuit then applied the new test to the case and found the 2008 act was relevant to showing something other than the officer acting in accordance with a propensity - namely, the arresting officer's knowledge of Burton's history and experience being tased in 2008, since he was the one who had tased her - which it found was completely divorced from any propensity argument. The Circuit reversed and remanded the case.

LINK

Qualified Immunity: No Immunity for Photographing Rape Complainant's Body on Personal Cell Phone; Shocking Conduct Vitiates Need for Case Clearly on Point

Kane v. Barger, No. 17-3027 (3d Cir. Aug. 22, 2018).

An officer who asked a rape complainant to come to the police station whereupon he photographed her intimate areas on his personal cell phone could not obtain the benefit of qualified immunity by arguing that the plaintiff lacked "clearly established" constitutional rights to be free of such behavior.

After having been arrested the night before for public intoxication and underage drinking, Brandy Kane (Kane), then 20 years old, went to the hospital to report that she may have been a victim of sexual assault. Officer Shawn Barger (Barger) went to the hospital to interview Kane and collect the rape kit, allegedly instructing her to come to the police department the next day with the clothes she had been wearing during the attack. Upon Kane's arrival at the department, Officer Barger took her to the back of the police station, which was against department protocol. There, he examined intimate areas of Kane's body without her consent and photographed them on his personal cellphone, again in violation of department policy. He ultimately did nothing with the clothing he had asked Kane to bring with her.

Kane filed suit alleging a violation of the Fourteenth Amendment right to bodily integrity. The District Court granted summary judgment for Officer Barger on qualified immunity grounds, under the "clearly established" prong; it could not conclude that "every reasonable police officer in Officer Barger's position would have known that his particular conduct in photographing or attempting to photograph Kane in what is alleged to be a sexually gratifying manner and in violation of [] professional and Departmental standards during an investigation into her possible sexual assault" deprived Kane of her right to bodily integrity.

The Third Circuit reversed, finding that Officer Barger's conduct shocked the conscience. The circumstances evidenced that his behavior was motivated by personal gratification, not to advance prosecution of her case. Even if there was not a specific precedent exactly on point, the Circuit had previously held that photographing female officers as they took showers violated their Fourteenth Amendment rights, and various other Circuits had found that conduct similar to Barger's constituted such a violation. Taken in totality, these factors required a conclusion that Kane's right to be free of such behavior was clearly established.

LINK

Searches: Subjecting County Employee to Same Daily Screening as Public Visitors Because Employee once Made Threatening Comment is not Supported by Individualized Determination

Nickler v. County of Clark, No. 16-17211 (9th Cir. August 15, 2018).

Reversing a lower court dismissal, the Ninth Circuit has found that, although a county employee may have made a comment construed as threatening, the county's subsequent requirement that the employee go through daily screening with members of the public was a proper subject of further judicial scrutiny.

Jacquelynn Nickler (Nickler) was working as one of numerous employees in the Clark County Nevada District Attorney's Office (County) when she was temporarily removed after making a comment that administrators considered threatening. When she was allowed to return to work she was required to undergo the same type of screening as public visitors whenever she entered the facility, unlike all other employees. She sued, alleging her First, Fourth, Ninth, and Fourteenth Amendment rights were violated and arguing for *Monell* liability. The district court dismissed all the claims, but the Ninth Circuit reversed on the Fourth Amendment issue.

The Ninth took little time addressing the Ninth Amendment claim, noting it has never been recognized as a basis for a §1983 claim. It was similarly short with the First Amendment, noting Nickler failed to even allege she was speaking on a matter of public concern. And her failure to assert she was a protected class doomed her Fourteenth Amendment claim. Her *Monell* claim met the same fate since Nickler did not identify an official policy under which the actions against her were taken. The Fourth Amendment claim was the standout. The Circuit found the County mistakenly relied on the administrative search requirement because blanket suspicionless searches must be calibrated to the risk posed by the public entering the courthouse and Nickler was not a member of the public. To daily subject her to different, more intrusive searches than her co-workers, the County had to make an individualized determination that Nickler merited a more intrusive search. The County did not make such a showing. In the alternative, the County had to identify a work-related reason for Nickler's more invasive search as an employee, but the County had not done so at this early point in the litigation either. The Ninth Circuit thus held Nickler's claim survived summary judgment and remanded.

LINK

Searches: Utility May Track Near Real-time Data about Residents' Electrical Usage, so long as not Provided to Law Enforcement without a Warrant

Naperville Smart Meter Awareness v. City of Naperville, No. 16-3766 (7th Cir. Aug. 16, 2018).

Although detailed information about residential electrical usage could reveal when occupants are home, what appliances they are using, and so on, the benefits of smart metering outweigh those concerns if the data cannot be obtained by law enforcement without a warrant or court order.

Naperville, Illinois (City) owns and operates a public electrical utility which converted to "smart" technology using funds from the 2009 American Recovery and Reinvestment Act. The utility now collects residents' energy-consumption data every fifteen minutes and stores the data for three years. This frequency of data collection enables the City to determine many things about each home and resident, which traditional monthly data collection does not--because individual appliances have different energy-consumption patterns, known as "load signatures," that can be compared to a library of appliance load signatures, thus enabling the City (or third parties) to predict what appliances each house has and when they are used. Some City residents formed Naperville Smart Meter Awareness and, concerned about the City's data collection and what it could reveal about residents, sued the City alleging a Fourth Amendment violation. The district court held the plaintiff's complaint did not plausibly allege a Fourth Amendment claim.

The Seventh Circuit broke the case down into two questions: did the plaintiff plausibly allege a Fourth Amendment violation and, if so, would such a search be unreasonable? The Court relied on *Kyllo* for the general proposition that technological advances have pushed the boundaries such that a search of a home can take place without a traditional trespass, but instead with sophisticated technology that enables the government to explore details of the home it could not otherwise know. Given that in *Kyllo* the Supreme Court found a search of the home when the technology could reveal whether an occupant was growing marijuana based on energy readings, the Circuit had little trouble finding data collection from the City's smart meters was also a search given it enabled this precise inference, but also more - including "when people are home, when people are away, when people sleep and eat, what types of appliances are in the home, and when those appliances are used."

The Circuit thus turned to the second question and, using the age-old test, balanced the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." The Court recognized residents have "a privacy interest in their energy consumption data," but found on the other side of the scale that 1) the data was collected by public utility workers, not law enforcement, 2) the City has no prosecutorial intent with regard to the data collection, 3) no physical entry of the home is done by the City, and 4) the "customer bill of rights" from the City prohibits providing the data to a third party, including law enforcement, without a warrant or court order. Finding these "lessened" the privacy interest, the court then concluded that interest was outweighed by the government's "substantial" interest in the modernization of the electrical grid. In conclusion the Circuit found that "[s]mart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability. . . [and] that these interests render the city's search reasonable, where the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences." The court did caution the City that the controversy could have been avoided, and an appeal could still be avoided, by giving residents a true choice in whether or not to opt in or out

of the program.

LINK

Speech: Restrictive Guidelines for Advertisements in Non-Public Forum Upheld

American Freedom Defense Initiative v. Washington Metropolitan Transit Authority, No. 17-7059 (D.C. Cir. Aug. 17, 2018).

Washington DC Transit Authority guidelines restricting issue-based advertisements on buses have again been found to be viewpoint-neutral, this time by the D.C. Circuit-but it has remanded on the issue of reasonableness.

The American Freedom Defense Initiative (AFDI) submitted identical advertisements to Washington Metropolitan Transit Authority (WMATA) to post on a Metro Bus and as part of the diorama at a Metro train stop. The advertisements depicted the prophet Mohammad and called for resistance of Sharia blasphemy laws in the United States. At the time AFDI submitted the advertisements for approval, WMATA had in place a moratorium on all advertising, citing a detailed and complicated history with advertising issues on public buses and trains. AFDI filed suit alleging the moratorium violated the First Amendment. WMATA removed the moratorium and instead put Guidelines in place that restricted the content of advertisements.

AFDI maintained their suit and did not update their filings to reflect WMATA's removal of the moratorium. After determining the issue is justiciable, the D.C. Circuit found that WMATA's advertising space is a nonpublic forum and it became such once the moratorium was issued, and it found that WMATA's restrictions on advertising are viewpoint-neutral. The D.C. Circuit remanded to the district court with instructions to determine whether the restrictions are reasonable and that the lower court should evaluate the issue in light of *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

LINK

IMLA

www.imla.org
51 Monroe Street
Suite 404
Rockville, MD 20850
202-466-5424

