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Discrimination: In Action By Muslim Police Officer Alleging Improper Refusal to Allow Rearming, Failure to Include Prosecutor As Defendant Was Fatal Error

Mohammad Mahmoud v. City of Paterson, No. 14-3083 (3rd Cir. May 7, 2015).

The Third Circuit has upheld a district court determination that Paterson, New Jersey is not liable for discrimination because it refused to rearm a Muslim police officer who was involved in domestic violence. The court found that, because the decision not to rearm was ultimately made by the city's prosecutor, plaintiff should have named him as a defendant.

Mohammad Mahmoud was hired in 2001 in the Paterson Police Department. In 2004 he was accused of domestic violence and ultimately charged with simple assault. In accordance with the Attorney General's Guidelines on Domestic Violence, his firearm was taken away. Subsequently an investigation was instituted as to whether he should be rearmed – and thus be permitted to be an officer again. The county prosecutor and police chief were both part of this process, though independent of each other. The police chief's recommendation was to not rearm Mahmoud. The prosecutor then performed an independent investigation, under which he reviewed the domestic violence incident, interviewed Mahmoud's wife, mother, and sister, reviewed his initial psychological evaluations, conducted additional and new psychological evaluations, and looked over Mahmoud's duty reports. After all of this, he determined Mahmoud should not be rearmed.

Mahmoud filed suit under §§ 1983 and 1981, positing that the city and police chief discriminated against him. As evidence he argued that non-Muslims that had similar criminal charges were rearmed. Though he recognized that the prosecutor was independent, he argued he "rubber-stamped" the police recommendations. Notably he did not name the prosecutor as a defendant. The district court found that the prosecutor's process was comprehensive and independent, that the final decision was made by the prosecutor, and that the discrimination allegation was simply unsupported by the record.

HELD: The Third Circuit affirmed the lower court.

DISCUSSION: The thrust of Mahmoud's challenge to the lower court order was that qualified immunity was improperly granted and that, as a result, municipal liability was then improperly denied. The Circuit Court essentially relied on the independence of the prosecutor as the lower court had. The one fact in the record that gave the Court some pause was that the prosecutor characterized the police chief's recommendation as "influential" but not "persuasive." It ultimately found that this was not enough participation by the police in the final decision to give rise to the presumption that there was discrimination. Mahmoud simply did "not prove[] what his complaint allege[d] . . . that [the police] caused his termination." The adverse employment action resulted from actions of the prosecutor, and failing to name the prosecutor as a defendant in the case was fatal to it. Since Mahmoud failed to prove the discrimination – e.g. the constitutional violation – qualified immunity was properly granted and there was no need to address the city's liability. The lower court was affirmed.

LINK (last accessed June 3, 2015).

Eighth Amendment: Requiring Ex-inmate to Remain on Parole for 13 Months after Actual Parole Ended May Give Rise to Section 1983 Action

Hankins v. Lowe, No. 14-1751 (7th Cir. May 19, 2015).

The intentional or reckless actions of a parole officer in keeping a parolee in parole for 13 unnecessary months may violate the Eighth Amendment and give rise to claims under 42 U.S.C. 1983, the Seventh Circuit court has held.

Aimee Lynn Hankins was convicted of felony battery in Arkansas and was given three years parole in lieu of prison. She violated her parole in May 2006 and went to jail. She was re-released in March 2007 and she moved to Illinois, which brought her under the supervision of the Illinois Department of Corrections. She met with her Illinois parole officer, Tim Lowe, and asked him when her parole would expire. Mr. Lowe responded that Arkansas would determine that date and that it would be revoked if she asked the Arkansas authorities for that date. She was therefore, upon punishment of violating parole, forbidden to find out the answer to her question through Arkansas.

According to Hankins' records her parole expired in *either* January 2010 or May 2012. The records contain both dates and, apparently, it has, thus far in the case, been impossible to determine which is accurate. In either event though, Lowe told Hankins er parole ended in February 2011. The implication of her being released from parole *between* the two possible expiry dates is that she was subject to parole – which the Supreme Court held in *Cunningham* is custody – for thirteen months longer than she was sentenced.

Hankins, proceeding *pro se*, filed suit against Time Lowe alleging a violation of § 1983. The issue thus became "whether the deliberate decision of a parole officer to delay a parolee's release from parole beyond its termination date can give rise to a claim under 42 U.S.C. § 1983." The district court dismissed the case, holding that Hankins failed to plead facts necessary to give rise to a claim under *Twombly/Iqbal*. Hankins appealed.

HELD: The Seventh Circuit reversed the district court's dismissal of the case, remanded for further proceedings in accordance with that dismissal, and affirmed all other aspects of the lower court's ruling.

DISCUSSION: The Circuit Court began its analysis by noting that parole is a form of custody and that if a state officer keeps a person in custody beyond the date at which she is to be released, it is a violation of the Eighth Amendment. It then recited the Supreme Court's 1963 *Cunningham* holding that a parolee who shows that her parole was unlawful is entitled to *habeas* relief, which implies a right to obtain damages under § 1983. The Circuit Court then recited the district court's single-paragraph dismissal and labeled it "not responsive" to the issue.

First, the Circuit Court found the district court's focus on the fact that Arkansas controlled the date the parole ended and Hankins' failure to dispute that fact, irrelevant. The onus was on Lowe because as a parole officer the court thought "[he] must have realized that he had to find out when his parolee's parole would expire . . . ." This was especially true in this case since Hankins did not know the date – evidenced by her asking him about it – and since he had forbidden her, on punishment of violating her parole, to ask Arkansas authorities. These facts showed that it was Lowe who had the responsibility and the power to call Arkansas and find out that date, making the case in the Seventh Circuit's eyes, "a classic case of knowledge of a preventable risk coupled with refusal to do anything however trivial to prevent it from materializing." Thus, "so far as [the Seventh Circuit] could tell . . . Lowe deliberately withheld essential information that he was required to obtain" and it reversed the lower court, requiring it delve into the merits.

LINK (last accessed June 3, 2015).

Equal Protection: In Class-of-One Discrimination Claim by Condominium Developers, Plaintiffs' Own Pleadings Reveal Rational Basis for City's Actions

Miller v. City of Monona, No. 13-2575 (7th Cir. May 1, 2015).

Where condominium developers brought a class-of-one discrimination claim against a Wisconsin city, plaintiffs' purported comparator was inappropriate because it was much larger than plaintiffs and did not have asbestos problems. Although class-of-one claims may also be supported by showing a lack of rational basis, in this Seventh Circuit case, plaintiffs' own pleadings served to support a finding of rational basis.

Stephanie and James Miller sought to construct a condominium project in Monona, Wisconsin in 2004. By all accounts their project ran into trouble. First, city officials suggested the Millers purchase the neighboring property and try to build a bigger project. The Millers did this and had a delay due to resubmitting their application for a bigger project. Then the city planning commission suggested changes, which caused the Millers to change plans again. The city then asked for $25,000 in fees for the Millers' use of public property during construction. Then an inspection found asbestos on the property, which ultimately took eighteen months to mitigate. Then the Millers were held up while trying to negotiate with another neighboring property owner, again to try and increase the size of the project. Once the Millers finally won state approval to demolish the buildings with asbestos and began, the city cited them for failing to obtain a demolition permit. After realizing they needed this additional permit, however, the state issued a "stop work" order because of outstanding issues with asbestos debris on the site. Next, the planning commission said the Millers needed to erect a fence around the property since its partial demolition made it a public nuisance. Last, the city issued more citations – two for failing to raze the structures on the property timely and one for improper grading. The Millers requested a trial for all four citations and the municipal court dismissed three and upheld one, fining the Millers $671.00. Ultimately, the project received a satisfactory final inspection.

In 2010, six years after beginning the project, the Millers filed suit against the city and various officials in a class-of-one discrimination suit under the Fourteenth Amendment, alleging the parties intentionally treated them differently than similarly-situated parties. The Millers identified Kevin Metcalf, who developed a 45-unit condominium project without opposition, as a comparator. The district court dismissed the class-of-one-claim because it found two facts distinguished the Millers from Metcalf: 1) the Metcalf project was four times larger and 2) it did not involve asbestos removal. The Millers appealed.

HELD: The Seventh Circuit affirmed the district court, though it did so on alternate grounds. First, it rejected the district court's reasoning that the size of the suggested comparator made it an inappropriate comparator. Second, it recognized that a comparator is not necessary for a class-of-one-claim to succeed in the Seventh Circuit, but instead that the Millers could just have shown that there was no rational basis for

treating them as the municipality did. However, even under this theory, the Circuit Court found the Millers failed to meet the task.

DISCUSSION: The Circuit Court first highlighted that a class-of-one-claim requires a plaintiff to show that there is no rational basis for treating him/her differently than others. This is most commonly accomplished by identifying a comparator, but not the only way, as the Circuit pointed out. However, without identifying a comparator and solely relying on the argument that there was no rational basis for the municipality's treatment, the plaintiff runs the risk of pleading him/herself out of court. The Court found this is precisely what the Millers did.

As for the comparator, the Circuit Court disagreed that Metcalf was adequate, because he had no asbestos issues. It found the health and safety concerns and complexities involved with asbestos on the Millers' site were too unique for the comparator theory to hold water. As for pleading themselves out of court, the judges found the Millers had identified a rational basis for the city's decisions. First, the Millers' own pleadings noted that the property contained asbestos and that it had been vacant for years prior to the development; the Court found this justified some of the special treatment and delay. Second, the Millers also stated in their pleadings that they delayed compliance with the local code, and were found by a municipal court ultimately to have violated that code; the court found that these admissions formed the basis of the citations and that they were ultimately justified by a conviction.

The Millers answered that even if the city and its officials had reason to target the property, they did it in an unreasonable way – for example, having them build a fence only to require that they take it down. But the Court rejected this argument, noting again, that their own pleadings provided the basis, including the fact that the state had issued a stop work order before demolition was complete. The Court found a half-demolished property could well be a nuisance from which people needed to be kept at a safe distance, and thus it had reasonable basis to require the fence.
The Millers also countered that the municipal court had thrown out three of four citations. But the Circuit Court highlighted first, that one was upheld and second, that the city's loss in court was not because they were "trumped up" charges. Rather, it was because, in one case, the photos entered into evidence were too "grainy" to be useful in making the necessary factual finding, and, in the other two cases, because the municipal court disagreed with the code officer's interpretation of the usefulness of the structures. The three were thus "a far cry from entirely baseless citations . . . ." The district court was therefore affirmed, albeit on different grounds.

LINK (last accessed June 3, 2015).

Qualified Immunity: No 1983 Action Where Plaintiff Fails to Show Defendants' Active Participation in Malicious Prosecution; Qualified Immunity Applies

Johnson v. Moseley, No. 14-5870 (6th Cir. June 2, 2015).

The Sixth Circuit has reversed a lower court denial of qualified immunity for two Nashville police officers, finding that mere conclusory allegations that they "pressed" for continued prosecution when they should have known better does not rise to the level of blameworthiness or recklessness that would support a malicious prosecution action.

Andre Johnson, a former officer in the Metropolitan Nashville Police Department, was arrested twice in 2012 based on domestic violence complaints by his now-estranged wife. The second arrest was made, pursuant to warrant, by fellow Metropolitan Nashville Police Officers Moseley and Thomas. Johnson stood trial on the domestic violence charges, was acquitted by the jury and brought suit against his estranged wife, Officers Moseley and Thomas, the Metropolitan Government of Nashville and Davidson County.

The complaint alleged federal civil rights violations based on false arrest and malicious prosecution, as well as state law claims for malicious prosecution and intentional infliction of emotional distress. The district court granted defendants' motions to dismiss in part, but denied the officers' motion as to plaintiff's federal and state law claims for malicious prosecution. The officers appealed.

HELD: Reversed. The Sixth Circuit found that plaintiff's incomplete allegations of the elements needed to link defendants to the malicious prosecution prevented a determination that they had violated his clearly established constitutional rights, and qualified immunity applied.

DISCUSSION: Johnson's claim for malicious prosecution was based on allegations that his wife's medical records contained information inconsistent with details in her domestic violence accusations. The complaint also cited police department policies that, if heeded by officers conducting a proper investigation, would have disclosed reasons to question the veracity of her accusations and question whether there was probable cause to prosecute Johnson. By nonetheless "pressing" prosecutors to pursue the domestic violence charges, Officers Moseley and Thomas allegedly participated in malicious prosecution, violating Johnson's Fourth Amendment rights.

Qualified immunity ordinarily applies unless the contours of the asserted right were sufficiently clear that every reasonable official would have understood that what he was doing violated that right. *Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2083 (2011). Qualified immunity "gives ample room for mistaken judgments" by protecting all but the plainly incompetent or those who knowingly violate the law." (citation omitted).

Because the officers raised the qualified immunity defense, plaintiff bore the burden of showing that defendants were not entitled to that defense. This required a showing that each defendant officer, through his or her own individual actions, personally violated plaintiff's rights under clearly established law. Here, plaintiff had to allege facts demonstrating the four elements of malicious prosecution: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. (citation omitted).

While the Circuit Court found that three of the elements were satisfied, it disagreed with the lower court that plaintiff had demonstrated that the defendant officers "influenced or participated" in the prosecutor's decision to continue the prosecution after they had knowledge of facts that would have led any reasonable officer to conclude that probable cause had ceased to exist and that continuing the prosecution would violate plaintiff's clearly established constitutional rights.

The Sixth Circuit cautioned that plaintiff was required to plead facts making out a violation of a constitutional right clearly established in a "particularized sense." That is, the right said to have been violated must be defined "in light of the specific context of the case, not as a broad general proposition." (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Plaintiff had attempted to overcome its lack of specific factual pleadings by citing the Sixth Circuit's decision in *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010) which held that a showing of "malice" was not necessary for a finding of malicious prosecution. *Sykes* had resulted in an award of over $1 million to each of two plaintiffs after being maliciously prosecuted. But the Circuit Court found the instant case to be very different from *Sykes*. There, both defendant officers had testified for the prosecution and each made false statements, made flagrant misrepresentations, or failed to disclose key items of evidence.

The essential principal, said the Circuit Court, was that "a defendant's participation must be marked by some kind of blameworthiness, something beyond mere negligence or innocent mistake, to satisfy the elements of a malicious prosecution claim under the Fourth Amendment."

When plaintiff's allegations were evaluated in light of this clearly established law, they clearly failed to pass muster. Plaintiff had not alleged that Moseley or Thomas participated in the investigation after his arrest. He had not alleged that Moseley or Thomas actually knew of grounds to question probable cause after the arrest. He had not alleged that Moseley or Thomas testified for the prosecution at any stage, much less that either of them testified falsely or recklessly. He had not alleged that Moseley or Thomas "pressed" for prosecution in any non-neutral or blameworthy way.

Merely alleging that defendants collectively pursued the prosecution when they "should have known" otherwise did not rise to the necessary "deliberate or reckless falsehood" or otherwise blameworthy conduct needed to make out a malicious prosecution claim.

The Circuit Court also noted that the lower court had given plaintiff's counsel leave to conduct additional investigation to substantiate the malicious prosecution claim, and counsel could easily have amended his complaint to introduce such evidence. "That counsel made no such motion is telling."

LINK (last accessed June 3, 2015).

Sovereign Immunity: Eleventh Amendment Bar on Suits Against States Does Not Prevent Suit to Enforce Federal Law Under *Ex parte Young* Where Future Damages are Conjectural

Town of Barnstable v. O'Connor, No. 14-1597 (1st Cir. May 18, 2015).

The First Circuit has reversed a district court decision that, based on the Eleventh Amendment, a dispute between various utility stakeholders and the Massachusetts Department of Public Utilities could not be heard in federal court. The Circuit Court found that *Ex parte Young* applied to allow federal court jurisdiction, and that an exception to *Ex parte Young* where a suit against a state will result in full-fledged federal damages or restitution did not apply, because damages were wholly conjectural.

Cape Wind is a federally-approved project that would see wind turbines constructed in the Nantucket Sound off the coast of Massachusetts. As can be imagined, this project has both engendered immense support and developed fierce opposition. Lawsuits concerning the project have been numerous and the legal wrangling has appeared, at times, endless. One case involved opposition to the project by a nearby municipality, Barnstable, Massachusetts, local residents in the area, and a non-profit. The claimants filed against the Massachusetts Department of Public Utilities (others were added as necessary parties); the heart of their charge was that the power purchase agreement between the company building the project, Cape Wind Associates, and the seller of the power, NSTAR LLC, required the users of the energy produced to incur higher electricity rates than the market would normally allow. They alleged the state, by approving this agreement, violated the dormant Commerce Clause and the Supremacy Clause. The state defended on a variety of grounds, but only its sovereign immunity argument became relevant for the appeal because, as the district court put it, "the debate beg[an] and end[ed] with the Eleventh Amendment." It held the Eleventh Amendment barred federal jurisdiction. The plaintiffs appealed.

HELD: The First Circuit reversed the lower court, holding that the Eleventh Amendment did not bar federal jurisdiction and remanded the case for consideration on the merits.

DISCUSSION: The Circuit Court began by noting that the Eleventh Amendment bars citizens from bringing suit against their own states, but that *Ex parte Young* memorializes the well-known exception that suits forcing states to conform to federal law are not barred. The *Ex parte Young* exception itself has two exceptions. First, no suit can be brought by citizens against their state if its effect is a "full-fledged award of damages or restitution by the federal court." (citing *Mills v. Maine*, 118 F.3d 37, 55 (1st Cir. 1997). Second, suits are barred when Congress creates a comprehensive remedial scheme to provide enforcement against a state of a statutorily-created right.

The Circuit Court, in looking for a rule to apply in the case, relied on *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), wherein the Supreme Court held "[i]n determining whether the doctrine of *Ex parte Young* avoids an

Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." The Supreme Court also specifically noted that inquiries into whether the *Ex Parte Young* exception applies do not include assessing the merits of the underlying claims.

With this standard in mind, the First Circuit reviewed the fact that the plaintiffs did allege a violation of federal law – that the power purchase agreement violated the US Constitution. It then looked to the relief requested – preventing future contract performance – and recognized that the district court properly identified the nature of the relief requested as the key issue. However, it disagreed with the district court's holding. The district court had found that the relief requested was not prospective because the "effect of a declaration that Massachusetts had illegally compelled NSTAR and Cape Wind to enter an above-market price contract for wind energy would inevitably lead to restitutionary claims against the Commonwealth by NSTAR and Cape Wind, while an injunction ordering [the Department of Public Utilities] to cease enforcement of the [Power Purchase Agreement] and to take remedial measures for the alleged constitutional harms would restrain the State from acting by frustrating its efforts to implement the policies enunciated in [state law], while further bleeding the treasury."

According to the appellate court the "restitutionary claims" the district court relied on were entirely "conjectural and capable being addressed on their own terms." Thus, whether some future claim would draw money from the treasury in violation of the Eleventh Amendment was not necessary to decide the case. Second, the Circuit found the district court's conclusion that granting the injunctive relief sought would "frustrate" the state's efforts to implement its policy choices, as set forth in state statute, irrelevant to the Eleventh Amendment inquiry since the very purpose of an Eleventh Amendment claim is often to ensure that state policy and law conform to federal law. If this is the common purpose of the precise type of claim at issue, the Court found it could not be the basis to also reject it. The Court thus reversed the lower court as to the Eleventh Amendment and remanded the case for an evaluation of other threshold issues and, if necessary, the merits.

LINK (last accessed June 3, 2015).

THIS JUST IN – GRAND RAPIDS WINS HIGHLY PUBLICIZED "OPEN CARRY" FIREARM CASE

Deffert v. Moe, No. 1:13-cv-1351 (W.D. Mich. June 1, 2015).

Catherine Mish, City Attorney of Grand Rapids, Michigan and Bill Mathewson, IMLA Director and General Counsel of the Michigan Municipal League brought this decision to our attention yesterday. The case was instigated by Second Amendment proponents seeking to test the limits of Michigan's open carry laws. Following his brief stoppage by Grand Rapids law enforcement, Johann Deffert brought suit alleging a variety of state and federal constitutional violations and false arrest, and sought upwards of $600,000 in damages.

Catherine Mish provided the following description:

This is an important court decision that should be helpful to every city and every police officer in the state, as we deal with people "open carrying" firearms in our public places.

This case involves a man who was walking down the sidewalk on a Sunday morning, openly carrying a handgun in a leg holster.

After receiving a 911 call, a GRPD officer was dispatched to the scene.

The federal court ruled that the Grand Rapids police officers acted properly in briefly stopping and detaining Deffert on Sunday, March 3, 2013. Deffert was walking down the public sidewalk on Michigan Avenue between Mayfield and Lakeside Drive in Grand Rapids, openly carrying an FNP-45 tactical pistol strapped to his leg in a drop leg tactical leg holster, with a TLR-2 rail mounted tactical light with a laser sight attached to the pistol. At the time, Deffert was walking in a residential neighborhood across the street from a church in service on a Sunday morning.

Officer William Moe was dispatched to the call involving a man with a gun. He encountered Deffert loudly singing "Akuna Matata" from the Lion King movie as Deffert walked down the sidewalk with his handgun. Believing that Deffert might be mentally unstable, Officer Moe stopped his police cruiser, drew his service weapon, approached Plaintiff on foot, ordered him to the ground at gunpoint, and removed his firearm. Deffert was briefly handcuffed and seated in the police cruiser while Officer Moe checked the LIEN system to determine whether Deffert was legally in possession of the handgun. After completing the LIEN check, Deffert was released without further incident and his handgun and ammunition were returned to him on the scene. The entire contact between Grand Rapids police officers and Deffert lasted only 13 minutes.

The federal court held that Officer Moe's actions in stopping Deffert at gunpoint and detaining him for 13 minutes were fully justified by exigent circumstances because "there was a risk of serious injury posed to himself or his fellow officer or others that

required swift action." The federal court found that Officer Moe had reasonable suspicion to detain Deffert and held that "Officer Moe was justified in following up on the neighbor's 911 call and using swift action to determine whether Plaintiff's behavior gave rise to a need to protect or preserve life or avoid serious injury, either of Plaintiff or of others in the neighborhood." The federal court held that "Officer Moe diligently pursued a means of investigation likely to quickly confirm or dispel his suspicions" and that "given the risk to the officer or others posed by a loaded weapon, Officer Moe's decision to first disarm Plaintiff was a prudent and objectively reasonable decision."

LINK (last accessed June 3, 2015).