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Due Process: Law Not Clearly Established Regarding Municipal Officials' Right to Ban Troublesome Resident from City Owned Properties without Notice and Hearing

Vincent v. City of Sulphur, No. 15-30182 (5th Cir. Oct. 28, 2015).

The Fifth Circuit has reversed a lower court holding that a plaintiff's constitutional rights were violated where a Louisiana municipality banned him from city properties without notice and hearing after he threatened to kill the Mayor, finding that cited precedents did not clearly establish a violation of procedural process.

Carol Vincent got involved in a heated argument in August 2012 and, in the course of it, threatened to kill and harm Sulphur, Louisiana's mayor and one city council member. Thereafter a police officer informed Vincent that a no-trespass order had been issued and he was prohibited from entering the majority of city-owned properties. In October the district attorney's office determined, after an investigation, that there was insufficient evidence to prosecute the case and thus terminated the no-trespass order. Vincent filed suit against the city, claiming a violation of his civil rights under a variety of theories. The district court dismissed everything at the summary judgment stage except Vincent's procedural due process claim, for which the court found the law was clearly established, and thus the city liable. The city appealed.

HELD: The Fifth Circuit reversed the lower court, finding the law was not clearly established as to whether officials can ban individuals from public areas without notice and opportunity to be heard.

DISCUSSION: The Court began with the well-trodden ground that in order to find a civil rights violation the Court needed to affirmatively answer both that a constitutional right was violated and that the right was clearly established. The Court then launched into a review of the district court's reasoning and found it flawed as to whether the law was clearly established. The district court evaluated a variety of cases, including *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958). The Court found that these cases, though not required to be precisely on-point, did not support the proposition that a person who threatened city officials with deadly violence has a right to notice and hearing before being prohibited from entering public property. It noted *Morales* deemed a city ordinance on loitering unconstitutionally vague because it did not provide enough specificity to be enforced, that *Papachristou* found an anti-vagrancy ordinance unconstitutionally vague, and that *Kent* was about the denial of passports to suspected communists. Ultimately it found none of these cases were about the *Eldridge* test – on which procedural due process rights hinge – and that, as a general rule, they simply did not provide the specificity needed to put the city on notice about Vincent's right to notice and opportunity before being banned from city property. The Court thus reversed the district court.

LINK (last accessed Nov. 5, 2015).

Due Process: Private Gun Shop is Not "State Actor" Where It has Not Assumed Traditional State Function, Has Not Been Coerced and is Not Overly Entwined with the State

Jarvis v. Village Gun Shop, Inc., No. 14-2249 (1st Cir. Oct. 30, 2015).

Three Massachusetts gun owners were unsuccessful in their "state actor"-based § 1983 action against a gun store which had sold their confiscated guns because they could not show that the store had been coerced by the state, that the store had become inextricably entwined with the state, or that the store had assumed a role traditionally held by the state.

Massachusetts law requires individuals subject to an abuse prevention order to surrender all his/her guns and his/her state gun permit. The gun owner's ownership rights, however, are not terminated and the individual may retain ownership (though not possession) while the order is in effect – or may arrange for a sale of the guns.

Three individuals in Massachusetts were required to surrender their guns under this statutory scheme and, after the police took possession of the guns, they were sent to the Village Gun Shop Inc. This store has a state license to provide a repository for guns surrendered under state law – which is an optional license. Once the guns were secured at the Village Gun Shop, it sent letters to each of the three individuals stating the fees and costs for retaining the guns. In each instance, the gun owner failed to pay

these costs and fees and the Village Gun Shop sold the individuals' guns at public auction.

In 2012 the gun owners filed suit against the Village Gun Shop, alleging they had been deprived of their Fourteenth Amendment rights to due process and that the Village Gun Shop was liable under § 1983. The district court held that the Village Gun Shop was not a state actor and dismissed the case. The gun owners appealed.

HELD: The First Circuit affirmed the district court, holding that, though private parties can be state actors under § 1983, the Village Gun Shop was not one in this case.

DICUSSION: § 1983 provides "a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law." The Court, using its prerogative to consider either element of § 1983 first, delved into whether the Village Gun Shop could be classified as a state actor. It noted the three circumstances under which a private party could be a state actor are rare, but include "if the private party assumes a traditional public function when performing the challenged conduct, or if the private party's conduct is coerced or significantly encouraged by the state, or if the private party and the state have become so intertwined that they were effectively joint participant[s] in the challenged conduct."

As for the joint action theory the Court noted the plaintiff would have to show that the state "has so far insinuated itself into a position of interdependence with the [private party] that it is a joint participant in the [challenged activity]." The totality of the circumstances test looks at factors such as whether the private party is independent from the state in the conduct of its daily operations, shares profits generated from the challenged conduct, and/or whether the private party uses public facilities. The plaintiffs could meet none of these factors in this case – the Village Gun Shop is a privately-owned facility, is a completely private business that is permitted by the state to serve as a repository for surrendered guns, and keeps all profits made from its provision of this service. The plaintiffs argued that since the police are the but-for cause of the Village Gun Shop's challenged conduct – e.g. if the guns were not confiscated under Massachusetts law by the police, the shop would never have had possession of the guns and could not have imposed the storage fees and costs that ultimately led to the deprivation of their Fourteenth Amendment rights – it is a joint venture. The Court rejected this argument, noting that if but-for causation could serve as the basis for finding a joint venture, "the line between state and private action would be blurred beyond recognition."

As for the second potential route to state-actor status for the Village Gun Shop, the Court was equally unimpressed with the plaintiffs' theory. Under the public function route the plaintiffs had to show that the Village Gun Shop was performing a service that traditionally was performed by the state and falls within the state's exclusive preserve of authority. The Court noted, however, that plaintiffs themselves admitted that the service the Village Gun Shop provided was permitted under a statutory scheme that police departments do not enjoy – specifically, the ability to charge the storage fees.

Lastly, the Court dealt with the "state compulsion" theory, under which the Village Gun Shop could be a state actor if the state used its coercive power to influence the Shop to provide the storage service. However, the facts showed that gun shops can choose to get into the storage business – a process which requires state sanctioning and is voluntary – and police have the choice to use any gun shop that happens to choose to get into the storage business.

With this degree of choice in the storage service process, the Court easily denied the plaintiff's allegation that there was coercion at work here and affirmed the district court.

LINK (last accessed Nov. 5, 2014).

Education: Recovery Under Title VI of Civil Rights Act for Race-Based Bullying Requires Showing More than School's Knowledge

Fennell v. Marion Independent School District, No. 14-51098 (5th Cir. Oct. 13, 2015).

Where a school district may have had knowledge of racially-based bullying, but could not be shown to be "deliberately indifferent" to it, the victims of the bullying could not recover under Title VI of the Civil Rights Act of 1964.

Starting in kindergarten three sisters – Kyana, Kyrianna, and Kavin – began suffering racial bullying and discrimination in their majority-white Texas school. This included hearing racial epithets and slurs for years, finding nooses at their lockers and on their cars more than once, the school athletic director telling one of the girls that he knew "how much you people spend on your ethnic hair styles" and asking "why [she] wanted to bring attention to herself," a text with KKK members chasing a caricature of President Obama, being told to "go back where you came from," and when trying out for the cheerleading team, being told "black girls aren't pretty enough to be cheerleaders." For each of these, and other incidents, the girls complained and the school took a variety of actions, some stronger and swifter than others.

The girls' mother ultimately sued the school alleging their constitutional rights were violated and arguing their case under Section 601 of Title VI of the Civil Rights Act. The district court granted summary judgment to the school, holding there were no material facts in dispute, and the plaintiffs appealed.

HELD: The Fifth Circuit affirmed the district court, holding though there were material facts in dispute about the discrimination the girls faced, the school took appropriate actions in response to it.

DISCUSSION: Section 601, Title VI, of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Supreme Court holds that this law prevents only intentional discrimination, thus requiring plaintiffs to prove discriminatory intent to succeed. Moreover, in *Davis ex rel. Lashonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), the Court also held that recipients of federal funding can be liable for student-on-student *sex-based harassment under Title XI* if the recipient was deliberately indifferent. Courts of appeal have uniformly applied this same standard to student-on-student *race-based harassment* under Title VI. Though the Fifth Circuit had not previously dealt with such a case it followed its sister circuits and applied this high standard for the plaintiff here. Thus the school district would be liable for the student-on-student harassment if "(1) the harassment was so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school (a racially hostile environment), and the district (2) had actual knowledge, (3) had control over the harasser and the environment in which the harassment occurs, and (4) was deliberately indifferent."

The Court had no trouble finding "that repeatedly being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, [and] being shamed and humiliated on the basis of one's race" is harassment, that it deprived the plaintiffs of access to educational opportunities, and that the school had knowledge and control. However, the plaintiff's case faltered on the final element, given the Supreme Court's direction in *Davis* that to be deliberately indifferent to acts of student-on-student harassment the school's "response to the harassment or lack thereof [has to be] clearly unreasonable in light of the known circumstances." Here the Fifth Circuit found the school took some action, included providing the girls' with accommodations including parking in the teacher's lot, working in a counselor's office, having an aide walk with one of the girls to school, cooperating with police and FBI investigations into the noose incidents, suspending students (sometimes) for their misconduct toward the girls, providing training for staff on discrimination and harassment, and requiring students to attend special assemblies on bullying and discrimination. Even though ultimately these actions did not stop the harassment, the Court found they showed the school was not deliberately indifferent to the discrimination. It thus affirmed the district court.

LINK (last accessed Nov. 5, 2015).

Education: Where Parents Move Child to Different School District, New District is Not Required to Continue Providing Private School for Individualized Education Program During Appeal.

J.F. v. Byram Township School District, No. 14-4466 (3d Cir. Oct. 29, 2015).

The Third Circuit has clarified the rule that, where parents unilaterally move a child from one school district to the other and appeal the new school district's determination that an IEP can be effectively provided in-district without the need for a private school, the child is not entitled to remain in the private school during such appeal—that right would only arise if the school district had moved the child.

In May 2014 Westwood (New Jersey) Regional School District created an individualized education program (IEP) for J.F., a fourteen-year old boy with learning disabilities. Before the program went into effect in the 2015 school year J.F.'s family moved to the Byram Township School District. In the Westwood school district, the IEP could not be implemented in-district and required J.F. to attend a private school, for which the district was required to pay under the Individuals with Disabilities Education Act (IDEA). However, the Byram school district, after reviewing the IEP created by Westwood, determined it could implement it in-district, thus obviating the need for the private placement. J.F.'s parents appealed the district's decision and argued that during the pendency of the appeal, J.F. should be allowed to stay in the private school. The administrative law judge disagreed, as did the district court, which held Byram school district met its obligations under IDEA. J.F.'s parents appealed.

HELD: The Third Circuit affirmed the lower court, holding the Byram school district met its obligations under IDEA.

DISCUSSION: The thrust of J.F.'s parents' claim was that the stay-put provision of IDEA, 20 U.S.C. 1415(j), requires that during the pendency of an appeal to an IEP "the child shall remain in the then-current educational placement . . . ." Therefore, they argued while the challenge to Byram's decision to execute the Westwood program in-district, rather than at the private placement, was pending, J.F. should have been permitted to stay at the private school. The appeals court, however, disagreed. It held that the stay-put provision comes into play when the *school district* unilaterally acts to change the child's school placement. In this case, J.F.'s parents unilaterally and voluntarily moved from one school district to another, and therefore the stay-put provision was inoperative.

The Court then tackled the issue of whether, as a general matter, Byram school district met its obligations under IDEA. The Court agreed with both the administrative law judge and the district court that Byram met its obligations by implementing the IEP created the previous spring by Westwood upon J.F.'s entry into the Byram district. While J.F.'s parents argued the school district did not, the only thing the district did differently than

Westwood was provide the program in-district, rather than in a private school. This did not "affect in some significant way the child's learning experience" and therefore complied with IDEA.

LINK (last accessed Nov. 5, 2015).

THIS JUST IN: SHARED LODGING CONTINUES TO SURGE.

The "shared lodging" tsunami continues to add momentum across the country, gaining power and resources that will continue to challenge state and municipal efforts at regulation.

Airbnb defeats San Francisco regulations: On Tuesday, San Francisco voters decisively defeated a proposal aimed primarily at Airbnb that would have reduced to 75 the number of days per year that city dwellers can rent out their properties. The *San Francisco Chronicle* article is HERE.

Expedia acquires Homeaway: This morning, travel behemoth Expedia (Nasdaq-"EXPE") announced that it is acquiring Austin, Texas-based Homeaway (Nasdaq-"AWAY") for $3.9 Billion. The *New York Times* article is HERE.

Given that Homeaway's business model does not put the company in the middle of the rental transaction, it has been more successful than Airbnb at resisting the collection and payment of lodging taxes. It remains to be seen whether Expedia, already a seasoned litigant in resisting the payment of Online Travel Company lodging charges to states and municipalities, will modify the Homeaway model.