Cases



by Sophia M. Stadnyk, Senior Associate Counsel

Civil Rights

Councillor's "Retaliation"

Virgil Novotny was a member of the Tripp County Commission, and his neighbor and political ally, Roger Turnquist, was a member of the County's Weed Board. Virgil's nephew, Stephen Novotny, was "openly critical" of the County Commission and had a "long history of hostility" with both of these public officials. As part of this, Stephen wrote letters to the local newspaper and spoke at County Commission meetings. His uncle allegedly approached the local newspaper and ordered it to stop publishing Novotny's letters, telling the editor that if the newspaper continued to publish these letters, the County would use another newspaper for the publication of its legal notices. Novotny also claimed retaliatory enforcement: that members of the County Commission and County Weed Board had heavier weed infestations than Novotny, but weed abatement procedures were only instituted against Novotny. He sued the County, the County commissioners, members of the County's Weed Board, and the County sheriff in a Section 1983 suit, complaining of a deprivation of his First Amendment rights, deprivation of his Fourteenth Amendment rights, and civil conspiracy under 42 U.S.C. § 1985. The district court granted summary judgment in favor of the defendants, dismissing his claims on the basis, among other things, that (1) there was no evidence that the uncle was acting on behalf of the County in threatening to withdraw business from the newspaper, and (2) even if he was, any potential damages claim would belong to the newspaper.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. To state a claim under Section 1983, a plaintiff was required to allege that the defendant acted under color of state law, and that the alleged conduct deprived the plaintiff of a constitutionally-protected federal right. An individual did not possess a constitutional right to require that a privately owned newspaper publish his letters to the editor, and the publisher had the discretion to determine what content ran on the editorial page. "Accordingly, any potential First Amendment claim arising from Virgil's threats to the newspaper belong[ed] to the newspaper and not to Novotny." Turning to the Fourteenth Amendment claim, Novotny failed to present sufficient evidence to support a prima facie substantive due process claim. Although he asserted "a property right in his chosen profession and business and a right not to have same wrongfully interrupted or interfered with by the actions of Tripp County," he failed to show how his profession was unlawfully interfered with by County officials or how any interference rose to the necessary "shocks the conscience" level. Moreover, he had not presented sufficient evidence to support an equal protection claim: there was no first-hand knowledge as to whether weed ordinances were being unequally enforced. In any event, the enforcement of county weed ordinances was based on "a number of subjective factors within the purview of the county officials' discretionary authority," and was not the result of arbitrary government action. *Novotny v. Tripp County*, 664 F.3d 1173 (8th Cir. 2011).

Prosecutorial Immunity

Howell, a high-school teacher, approached the principal to deny rumors that she had a sexual relationship with a minor student, JS. The principal spoke with JS, who initially agreed with Howell, but later changed his story to say he had sex with Howell several times at her apartment. The school called the police. JS gave police a description of the apartment and its location, and a tattoo and skin graft on Howell's body. Howell continued to deny a sexual relationship or that JS was ever in her apartment, but allowed police to photograph the interior of her apartment, and her tattoos. After confirming the photos matched the descriptions provided by JS, the detective determined to seek an arrest warrant. Howell offered to take a polygraph to clear herself, but this did not occur for reasons that were unclear (Howell claimed that the polygraph exam was called off by Sanders, the Commonwealth's Attorney whose office brought the charges; the record suggested that the exam may have been cancelled by the polygrapher himself). JS significantly changed his testimony at trial, and the jury acquitted Howell. Howell filed a lawsuit against Sanders, claiming violations of 42 U.S.C. § 1983 for false arrest, malicious prosecution, and violations of due process.

The district court held that Sanders's actions were taken in the course of his prosecutorial duties, entitling him to absolute immunity, and, in any event, his actions were not in violation of clear constitutional rights, thereby entitling him to qualified immunity. It reviewed the record and determined that Sanders took action only after the issuance of the arrest warrant, specifically, the decision to execute the arrest warrant without giving Howell the opportunity to take a polygraph. Howell raised three arguments on appeal with respect to the grant of absolute immunity: the arrest warrant was not supported by probable cause; even if there was probable cause, Sanders's acts of commanding Howell's arrest and denying Howell's request to take a polygraph were not related to advocacy and were investigatory; and last, none of Sanders's actions could be considered advocacy because he was not the attorney who prosecuted her case.

On appeal, the U.S. Court of Appeals for the Sixth Circuit af-

firmed, finding none of her arguments had merit. State prosecutors were absolutely immune from civil liability when acting within the scope of their prosecutorial duties. The courts were to use a "functional approach" to determine when a prosecutor was acting within the scope of his duties as a prosecutor, and when he was merely giving legal advice or investigating. The existence or nonexistence of probable cause was "not determinative of whether absolute immunity applie[d]" because the inquiry remained one of function, not probable cause. The decision to stop a polygraph (if in fact that was what happened) seemed "integrally related to the initiation of the criminal proceedings against Howell in the same way ordering her arrest was. At most, the facts suggest that Sanders stopped a polygraph in order to initiate Howell's prosecution, which was well within his role as an advocate." The court likewise rejected the last argument, that a prosecutor who did not try the case was not entitled to absolute immunity for his actions on the case. *Howell v. Sanders*, No. 10-5797, 2012 U.S. App. LEXIS 1903 (6th Cir. Feb. 02, 2012).

Land Use & Planning

Beach Access Policies

In 1968, the Incline Village General Improvement District ("District") acquired property that included four beaches. The land within the District's 1968 boundaries was purchased and improved with proceeds derived from the sale of public bonds, and all payments due on the bonds were made exclusively by owners of the 1968 property. The deed conveying the 1968 property to the District included a restrictive covenant that stated the property would be held by the District "only for the purposes of recreation by, and for the benefit of, property owners and their tenants ... within [the District] as now constituted." It permitted the individual owners of real estate within the 1968 property to enforce the restrictive covenant. Ordinance 7 limited access to the beaches, as required by the restrictive covenant, and by policy, the District designated the beaches as a nonpublic forum, and generally allowed only people who owned or rented real property within the District's 1968 boundaries to access these beaches.

Frank Wright, who was excluded from beach access because he did not live within the 1968 boundaries, argued that this policy was unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, facially and as applied. He alleged that the District routinely ignored the restrictive covenant and opened the beaches to general public access (for example, on the Fourth of July for firework displays). The district court granted the District's summary judgment motion and denied Wright's summary judgment motion, concluding that both Ordinance 7 and the policy were constitutional.

The U.S. Court of Appeals for the Ninth Circuit ruled that the beaches were not a "traditional public forum," and that the restrictions were constitutional. This was not a case where the government attempted to destroy or convert a public-forum park into a nonpublic forum, and the First Amendment did not guarantee access to property simply because it was owned or controlled by the government. Only a limited set of property owners could access the beaches for limited, non-expressive purposes, and the actual use and purposes of the beaches were, and had been, consistently restricted by the covenant, Ordinance 7, and the actual practice of the District. Kiosks and gates surrounded the beaches, proscribing access to anyone not entitled to access.

Because Ordinance 7 and the policy were reasonable in light of the beaches' purpose and were viewpoint neutral, they did not violate the First Amendment. "Moreover, were we to hold that [the District] could not exclude persons from the beaches as required by the restrictive covenant, we would be removing 'one of the essential sticks in the bundle of property rights' belonging to the prior owner of the 1968 property; namely, the right to exclude others." Because the two groups of residents were not alike in all relevant respects (namely, only owners of portions of the 1968 property paid for the purchase and improvement of the beaches), Wright's claim of disparate treatment did not support an equal protection claim. The ordinance and policy survived rational basis review because they were justified by legitimate government interests: complying with the restrictive covenant, and excluding persons who did not pay for the purchase and improvement of the beaches. *Wright v. Incline Vill. Gen. Improvement Dist.*, No. 10-16043, 2011 U.S. App. LEXIS 26086 (9th Cir. Dec. 27, 2011).

Personnel & Employment

"Policymaking" Employee

Larry Davis was appointed as the Senior Humane Officer (SHO) for the City of Anderson in 1988, following his work on the successful campaign of a Democratic mayoral candidate, Lawler. Despite having no relevant prior experience in animal control, Davis accepted. In 2004, Smith, a Republican, took office as mayor, but did not remove Davis. However, during the 2007 Democratic primary election for mayor, Rensil ran against Ockomon, and Davis actively supported Rensil's campaign. Ockomon won. Davis was terminated as soon as Ockomon took office on January 1, 2008. Davis brought a 42 U.S.C. § 1983 suit against Ockomon and other City officials, claiming that he had been terminated from his position in violation of the First and Fourteenth Amendments.

The district court granted the City officials' motion for summary judgment. An individual could be terminated on the basis of political affiliation when the nature of the public official's job made political loyalty a valid qualification for the effective performance of his position. The court first determined that the official job description controlled the analysis of whether Davis could be replaced for political reasons because the job description was reliable. The SHO's duties, as provided for in the job description, could be characterized as "policymaking" and, thus, properly subject to removal on the basis of political affiliation. Due to the broad discretion exercised by the SHO, the court found that Davis was a policymaker, and that his termination was proper.