Cases



Civil Rights

Biblical References – Government Contractors

Andrew and Glenda Grosjean were "advocates" under a State unemployment agency program that provided no-cost information, consultation, and representation to unemployed workers involved in unemployment benefits appeals. Advocates were independent contractors, not state employees, and had to be selected by a worker. The unemployment agency published a list of biographies of the available advocates to help workers in making their selections. Those wishing to be advocates signed a "Personal Service Contract" in which they agreed to submit biographical information ("Advocate Profile Information," or API). The contract limited the information to be included to relevant personal information, like educational background, experience, and any special qualifications. The contract specifically stated that APIs could be edited by program staff, although prior to 2006, the APIs went largely unedited. The advocates included short narrative statements about themselves and other messages (e.g., "Screwed over By Your Employer? Don't Settle for an Ambulance Chaser"). The Grosjeans' APIs included short Biblical passages, and they were hired by clients because of these references. Starting in 2005, agency staff removed these references because they were not biographical, and adopted a new format. The Grosjeans' newly revised APIs retained a reference to their "Biblical perspective" and a Bible verse reference, without including the actual text. When the agency staff deleted these references, the Grosjeans brought a Section 1983 suit, claiming the agency and its staff violated their First Amendment rights to free speech and free exercise, their right to equal protection, and the First Amendment's Establishment Clause. The district court granted summary judgment in favor of the defendants, ruling that the list amounted to a nonpublic forum and, as such, the agency could engage in content-based discrimination of the advocates' speech as long as the restrictions were reasonable, taking into account the purposes and objectives of the program. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed.

The advocates did not have a First Amendment right to have religious messages included as part of their biographies with the state agency. The list of APIs was government speech, and not the private speech of the individual advocates. More specifically, under the new template, the "overarching message" of the list was "clearly focused on presenting the professional, objective biographical information of advocates relevant to unemployment insurance." While it was a "closer question" with the APIs under the old template, the court held that, under existing First Amendment principles, the agency could impose reasonable, content-based regulations on this speech in a nonpublic forum. The agency's prior practice of not enforcing the "relevant speech" restriction did not indicate a governmental intent to create at least a limited public forum, as access to the list was consistently selective, not general, and the purpose of the list was to carry information one way, rather than to create "a multi-avenue 'free and open dialogue.'" The relevancy restriction was reasonable in light of the list's informational purpose, and the restriction was not qualified by the viewpoint of the speaker. The agency did not violate the Grosjeans' free speech and free exercise rights by excising their Biblical references. For similar reasons, the agency did not violate the Grosjeans' right to equal protection. *Grosjean v. Bommarito*, 302 Fed. Appx. 430 (6th Cir. 2008).

RLUIPA and Tarot Cards

The Arkansas Department of Corrections (ADC) had a policy which required all inmates to check out tarot cards from a chaplain, and prohibited the inmates from keeping such cards in their cells. Singson, an inmate, used tarot cards as part of his religion and sued, alleging violations of his First Amendment and Religious Land Use and Institutionalized Persons Act (RLUIPA) rights, and claiming that ADC's policy prohibited him from the spontaneous practice of his religion. At trial, ADC's expert witness testified that the card policy was necessary for many reasons: to prevent gambling, trafficking, psychological control (some inmates believed that tarot cards held special powers), and to prevent inmates from imprinting gang symbols on cards. The district court ruled in favor of ADC, noting that prison officials never rejected Singson's requests to check-out cards, and that Singson was allowed to keep other religious items in his cell. The court found that even if Singson's religious beliefs had been burdened, ADC had instituted the least restrictive policy while promoting prison safety.

The U.S. Court of Appeals for the Eighth Circuit agreed and affirmed. RLUIPA prohibited governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution ... unless the government demonstrates that imposition of the burden ... is in furtherance of a compelling governmental interest ... and is the least restrictive means of furthering that compelling governmental interest." The court found that prison safety and security were compelling governmental interests. Quoting *Carter v. Wilkinson*, 544 U.S. 709, 722 (2005), the Eighth Circuit stated that "[w]hen enacting RLUIPA, Congress was 'mindful of the urgency of discipline, order, safety, and security in penal institutions.'" In addition, Congress "anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources. *Singson v. Norris*, 553 F. 3d 660 (8th Cir. 2009).

Due Process – School Sports Practice

The plaintiffs sued a public school district, the State of Georgia, and several high

school football coaches on behalf of the estate of their son. The son had attended a voluntary outdoor workout session for his high school football team, and died the next day due to the intensity of the condition drills and the heat. The parents alleged that their son's substantive due process rights were violated because he was deprived of water after exhibiting signs of overheating, and there was a delay in his receiving medical attention after he collapsed, and these decisions resulted in the deprivation of his life, liberty, health and safety. The district court dismissed all the charges except the charges against the coaches. The court allowed the charges against the coaches to stand on the basis that the claims, if proven, would be enough to support a finding that the coaches acted willfully or maliciously with an intent to injure the son.

The U.S. Court of Appeals for the Eleventh Circuit vacated the order below and remanded the case back to the district court. Starting its analysis with *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," the court further found that conduct by a government actor would only rise to the level of a substantive due process violation if the act could be characterized as arbitrary or conscience-shocking in a constitutional sense, pursuant to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There were some cases where a high school coach's conduct was found to have met this standard, such as *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000) (where a coach intentionally struck a student with a metal lock as a form of punishment). In the instant case, however, the defendant coaches did not engage in corporal punishment, and "the complaint's allegations of deliberate indifference, without more, [did] not rise to the conscience-shocking level required for a constitutional violation." Accordingly, the claim should "be confined to the realm of torts." *Davis v. Carter*, 555 F. 3d 979 (11th Cir. 2009).

Land Use

Takings – Standing – Optionee

In a case addressing whether Toll Bros., Inc., a real estate developer with an option to buy a parcel of land, had standing to challenge zoning restrictions that prevent its planned development from going forward, the Third Circuit held that it did. Toll described itself as "the nation's leading builder of luxury homes," and carefully chose "the most scenic areas" in which to build. This included a 160-acre tract of land in the Township of Readington, owned by Readington Properties, LLC. In 2001, Toll entered into an option contract with the landowner that gave it an exclusive option to buy the tract at a fixed price, and barred the owner from entering into any lease, agreement of sale, or any other agreement affecting the property during the life of the agreement. In exchange, Toll promised to make periodic payments to Readington Properties. At the time, the land was zoned "research-office" and "rural-residential." Toll developed plans and submitted the first one for approval to the Township in 2002. The Town denied approval and passed an ordinance rezoning the entire tract as "agricultural residential." The only residential use allowed under this zoning was "one residential dwelling per six acres," which effectively ended the developments Toll had in mind. Toll apparently viewed this move as part of a nefarious plot hatched by Township officials to "reduce the fair market value of properties held by disfavored landowners." Toll maintained its option by rendering periodic payments to Readington Properties. It sued the Township, its planning commission, and various officials, claiming under the Equal Protection Clause; the Due Process Clause; the Takings Clause; The Fair Housing Act of 1968, and others, seeking to set aside the rezoning ordinance, and damages. The defendants moved to dismiss the complaint for lack of standing, pointing to the fact that Toll did not have any present interest in the Readington Properties parcel. The district court granted the motion.

On appeal, the Third Circuit held that the owner of an unexercised option to develop had Article III standing. Referring to *Warth v. Seldin*, 422 U.S. 490 (1975), and *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252 (1977), the court found that Toll had satisfied the injury requirement. Toll had paid substantial sums in planning its proposed developments, and the rezoning thwarted its specific development, one for which a formal application had been submitted, on land for which it held the exclusive option to purchase. These economic harms amounted to a legally cognizable injury-in-fact, as the option was more than just a "phantom connection" to the affected parcel, being itself a "valuable property right." By driving down the value of the Readington Properties parcel, the Township had also driven down the value of the option. Dealing with the third element in standing, redressability, the court held it was sufficient for the plaintiff to establish a "substantial likelihood" that the requested relief would remedy the alleged injury in fact. Here, striking the ordinance would redress the injury by increasing the value of both the underlying real property and the option. Further, while all developments were subject to inherent uncertainties, the court did not require a guarantee of successful completion. Toll had stated its intent to exercise the option and move forward with construction if and when the Township approved its plans. This was sufficient to show that a favorable decision was substantially likely to result in construction of its planned developments. *Toll Bros., Inc v. Township of Readington*, 555 F. 3d 131 (3d Cir. 2009).

Personnel and Employment

Discrimination – "Secondhand" Motive

In a case of first impression in the circuit, the U.S. Court of Appeals for the Ninth Circuit considered the question of whether a final decision-maker's wholly independent, legitimate decision to terminate an employee could insulate, from liability, a lower-level supervisor involved in the process, who had a retaliatory motive to have the employee fired. Scott, the plaintiff, had been employed as an information systems specialist at Multnomah County's Department of Community Justice (DCJ). Her direct supervisor was Hogue, who reported to Gorton, who reported to Brown, who, in turn, reported to the DCJ director, Fuller. Scott complained to Hogue and Gorton about her coworkers' violations of County policies (including violations by Brown), and also accused Brown of favoring gay and lesbian employees in hiring and promotion decisions. Scott also filed a formal complaint with the Oregon Bureau of Labor and Industries ("BOLI complaint") about the

continued on page 34