Employment: One Incident Does Not Establish *Monnell* Policy of Indifference; Promise of Non-Existent Job Does Not Create Employment Relationship

Wilson v. Cook County, No. 13-1464 (7th Cir. Feb. 10, 2014).

A female job-seeker who provided sexual favors as part of a phony job interview could not bring a Section 1983 action against the County which employed the perpetrator, because there was no evidence of a "policy of indifference" to his behavior. Furthermore, the promise of a non-existent job did not give rise to an employer-employee relationship for purposes of Title VII.

Felice Vanaria was employed by the State of Illinois in the Cook County Adult Probation Department between 1984 and 1998. He was fired in 1998 after probationers complained that he offered to give them favorable treatment in exchange for sexual favors. In 2004, based on Vanaria's loyalty and fundraising the Cook County Commissioner set him up with a political patronage job at Oak Forest Hospital. Because the hospital had not hired Vanaria through its normal channels, it did not conduct a background check and was unaware of his checkered background. At the hospital, he attempted to condition a drug company representative's participation in staff training on her giving him a massage. The hospital did not fire Vanaria, but counseled him about the behavior.

In 2007, Vanaria set up a seemingly official hospital employment interview with a massage therapist. He offered her a $52,000-a-year position, provided her with legitimate application forms, insurance paperwork, and had her fill out a fingerprint consent form. In reality, there was no position. Vanaria had no authority to hire or interview any potential employees and had fabricated the entire ruse. During the interview sequence, Vanaria got the applicant to take off her clothes in his office. He subsequently visited her massage studio, where he encouraged and received further sexual favors. He then managed to enlist a friend to call the applicant, posing as an HR employee for the hospital and saying that the position had been upgraded and would pay another $10,000, but that Vanaria would require another massage. At this point the applicant called the hospital's actual HR department, discovered there was no job, and contacted police.

After Vanaria plead guilty to official misconduct and bribery, the plaintiff sued Cook County under Title VII, Equal Protection and Due Process, alleging the County was liable for Vanaria's actions. The district court, though initially ruling for the plaintiff on a variety of issues, ultimately granted the County summary judgment. She appealed.

HELD: The Seventh Circuit affirmed the district court, finding the County not liable for its employee's actions.

DISCUSSION: The Circuit Court first dealt with the Equal Protection Clause claim, noting a municipality may be liable for the acts of its employees under *Monell* if the "plaintiff show[s] the existence of an official policy or other governmental custom that not only causes but is the moving force behind the deprivation of constitutional rights." The plaintiff argued that the County had a policy of not responding to sexual harassment complaints, which caused her constitutional deprivation. The court found that since Vanaria had been a state employee from 1984-1998, his sexual harassment history there did not apply to County policy. The plaintiff was left to argue that Vanaria's behavior at the hospital showed that the County improperly handled sexual harassment. But the court held that one incident in 2005 with the drug company representative was not sufficient to show that the hospital had a policy of turning a blind eye to sexual harassment.

The Due Process claim was uncommon in sexual harassment cases brought under Section 1983, but was applicable here because the plaintiff claimed a state actor violated her bodily integrity. Plaintiff argued that the County had a practice of failing to screen political employees which caused the Due Process violation. The County countered that her bodily integrity was not compromised by action of the County, but by her own willingness to participate in the scheme – for example, she never called the police until what she was promised, a $52,000 dollar job, was not delivered. The court said it "is an interesting question whether sexual contact extorted by a current supervisor is fundamentally different than sexual activity attained by promises of providing a job," but that the issue would have to await an answer because the County had never made the argument in the lower court.

Even assuming that she did suffer injury to her bodily integrity, the court found that plaintiff failed to show the 'deliberate indifference' required when a claimant alleges a municipality caused an employee to injure her (rather than alleging the municipality caused the injury directly). It simply could not find that Vanaria's history of sexual misconduct was so egregious and pervasive that what happened was an "obvious result" of hiring him: his worst behavior was when he worked for the state, seven years prior; he had no incidents of sexual misconduct for seven full years across two other jobs; and the incidents were very different. On the last issue the Court noted no one could foresee the extreme lengths Vanaria would go to in impersonating someone and entirely making up a job when his past history involved abusing a position of power. Thus the Court said "we take the Supreme Court seriously when it instructs us to be wary of imposing municipal liability in circumstances like this."

Finally, plaintiff argued that the County violated Title VII when it allowed Vanaria to condition employment on sexual favors. The court rejected the County's argument that there can be no liability when the plaintiff is only a prospective employee – for Title VII clearly states otherwise. But it also rejected plaintiff's argument because there was no job at all. In order for an applicant to be protected against discrimination in hiring there must be some employee - employer relationship. The court closed by saying "Cook County's method of filling positions through patronage is [not] a model worthy of the

civics books. Yet neither can we find that Vanaria's conduct is attributable to his employer, the county. "

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-10/C:13-1464:J:Griesbach:aut:T:fnOp:N:1287965:S:0 (last accessed Feb. 19, 2014).

Guns: Ninth Circuit Strikes San Diego's "Good Cause" Requirement for Concealed Carry Permits, Widens Split Among Appeals Courts

Peruta v. County of San Diego, No. 10-56971 (9th Cir. Feb. 13, 2014).

In a case which implicitly challenges California's public carry gun policies overall, the Ninth Circuit has invalidated a San Diego law requiring that concealed carry permit applicants show "good cause." In doing so, it directly confronts Second, Third and Fourth Circuit holdings.

California generally prohibits the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations. Nonetheless, one may apply for a license to carry a concealed weapon in the city or county in which he or she works or resides. The applicant must demonstrate "good moral character" and establish "good cause." California delegates to each city and county the power to issue a written policy setting forth procedures for obtaining a concealed-carry license.

San Diego County's "good cause" requirement calls for "[A] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." Good cause is "evaluated on an individual basis" and may arise in "situations related to personal protection as well as those related to individual businesses or occupations." But mere concern for "one's personal safety alone is not considered good cause."

Plaintiffs Edward Peruta and others were denied concealed-carry licenses because they could not establish "good cause." In October 2009, they sued the County of San Diego and its sheriff under 42 U.S.C. § 1983, requesting injunctive and declaratory relief. Peruta's lead argument was that, by denying him the ability to carry a loaded handgun for self-defense, the County infringed his Second Amendment right to bear arms.

The district court granted the County's motion for summary judgment. Conceding that the Second Amendment "encompasses Plaintiffs' asserted right to carry a loaded handgun in public," the district court nevertheless upheld the County policy under intermediate scrutiny. The court reasoned that California's "important and substantial interest in public safety"—particularly in "reduc[ing] the risks to other members of the public" posed by concealed handguns' "disproportionate involvement in life-threatening