Ordinances: Elimination of Ten-Minute Limit and Onerous Licensing for Mobile Food Vendors Moots Complaint

The Dog Pound LLC v. City of Monroe, No 12-2692 (6th Cir. Mar. 10, 2014).

Where a Michigan city revised its mobile food vendor ordinance to strike potentially troublesome provisions and the vendor failed to comply with the new licensing requirements, it could not sustain Due Process, Equal Protection or Commerce Clause actions.

Monroe, Michigan had an ordinance in 2009 that required street vendors operating within a designated restricted area to obtain, in addition to a standard business license, permission from the City Council. Notably, this designated area essentially covered nearly all of downtown Monroe. This additional requirement included extraneous licensing requirements and limited a vendor to no more than 10 minutes in any one place.

In 2009, the Dog Pound LLC sought to run a mobile hotdog stand in downtown Monroe and submitted its application to do so under the transient merchant ordinance described above. The town council denied the application and the Dog Pound sued. While the case was proceeding, the City amended the ordinance and eliminated the restricted area. Thereafter the district court denied the Dog Pound's motion for a preliminary injunction because the amendment made the arguments "essentially moot." The Dog Pound amended its complaint and added two charges: 1) a violation of the Due Process Clause of the United States and Michigan constitutions and 2) a violation of the dormant Commerce Clause. The district court granted the City's motion for summary judgment and the Dog Pound appealed.

HELD: The Sixth Circuit affirmed the district court.

DISCUSSION: The Dog Pound first alleged that the ordinance violated the Equal Protection Clause by unconstitutionally classifying transient merchants differently than static, brick-and-mortar businesses. The core matter at issue in an equal protection claim is that similarly-situated parties suffer disparate treatment, which the Sixth Circuit held the Dog Pound failed to meet. The Court noted the Dog Pound applied for a license under the old ordinance, but since the litigation, had yet to properly apply for a license under the revised ordinance and thus could not prove there was disparate treatment. Even though the Dog Pound had applied under the new ordinance, that application was "rife" with errors, so many that the City simply noted that it was incomplete, specified the errors to correct, and welcomed a revised application. But the Dog Pound failed to revise and resubmit that application and thus the Circuit Court essentially held the application was never completed, leaving no issue of material fact in dispute.

Second, the Dog Pound claimed the ordinance – including the amendments –violated the dormant Commerce Clause. The court easily rejected this proposition, however, because it focused on the wrong dispute. The dormant Commerce Clause focuses on differences in treatment between in-state and out-of-state business, but the Dog Pound focused on different treatment between static and transient business. Simply put, there were no facts to support a dormant Commerce Clause claim put in issue.

Finally, the Dog Pound alleged a due process violation, stating that the City's denial of the 2009 application was done "with the specific purpose of preventing" the Dog Pound from competing with local businesses. The court did not address this argument, however, holding that the claim was waived since it was not taken up in the Dog Pound's briefs supporting the amended complaint.

http://www.ca6.uscourts.gov/opinions.pdf/14a0189n-06.pdf (last accessed Mar. 20, 2014).

Procedure: Failure to Allege Prima Facie Elements in Title VII Action Does Not Justify Dismissal of Claim

Miller v. Carolinas Healthcare System, No. 13-1856 (4th Cir., Mar. 13, 2014).

The Fourth Circuit has reversed in part a lower court decision which dismissed a pro se plaintiff's Title VII action, finding that even cursory pleadings of retaliation, failure to promote, and race discrimination were sufficient to survive a Rule 12 (b) (6) motion.

Gregory Miller was terminated by Carolinas HealthCare System (CHS) and filed suit, pro se, alleging that CHS had discriminated and retaliated against him in violation of Title VII of the Civil Rights Act (Title VII). Specifically, he asserted a litany of violations: (1) discrimination based on sex, age, race and color; (2) blacklisting, invasion of privacy, and violation of the North Carolina Recording Law; (3) failure to promote based on race; (4) hostile work environment; and (5) retaliation. CHS moved to dismiss under Rule 12 (b) (6) for failure to state a claim upon which relief could be granted, which was granted by the district court. Miller appealed.

HELD: On appeal, the Fourth Circuit affirmed much of the lower court decision, but reversed as to its dismissal of Miller's claims for race discrimination, failure to promote, and retaliation.

DISCUSSION: The Fourth Circuit recited the relevant legal parameters: To survive a motion to dismiss under Rule 12 (b) (6), plaintiff's factual allegations must be enough to "raise a right to relief above the speculative level" and statements of bare legal conclusion "are not entitled to the assumption of truth." However, "what Rule (12) (b) (6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations," and "a pro se complaint 'is to be liberally construed . . . and must be held to less stringent standards than formal pleadings drafted by lawyers." (citations omitted).

The Circuit Court also pointed out that the Supreme Court has recognized that specific facts are not necessary in a pleading, and a plaintiff need only give the defendant fair notice of what the claim is and the grounds upon which it rests. In the case of Title VII actions, the Supreme Court has cautioned that a plaintiff is not required to plead facts that constitute a prima facie case (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Under this analysis, the district court had improperly granted CHS's motion to dismiss Miller's discrimination and retaliation claims. "In analyzing Miller's discrimination and retaliation claims under the burden-shifting framework adopted by the Supreme Court in *McDonnell Douglas*