the most elusive element of *Penn Central* was also met because the character of the government's action was to single out Sherman's development in an unfair, unreasonable, and bad faith manner.

http://www.ca2.uscourts.gov/decisions/isysquery/61eb6196-4b31-42f2-b280-654a5c6c89eb/1/doc/13-1503_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/61eb6196-4b31-42f2-b280-654a5c6c89eb/1/hilite/ (Last accessed June 19, 2014).

Trials: Judicial Immunity Protects Judge Who Removed Combative Public Defender from All Cases Before Him

Bright v. Gallia County, Nos. 13-3451/3907 (6th Cir. June 2, 2014).

An Ohio judge was found to be protected under judicial immunity where he removed a public defender from some 70 cases before him. The judge was found to have sufficient subject matter jurisdictional nexus to the underlying cases to provide him with authority to make such a removal decision.

The Gallia County, Ohio board of county commissioners contracted with a non-profit organization to hire public defenders to represent indigent criminal defendants. One such defender was Robert Bright. Bright represented a criminal defendant in the course of his job, and he negotiated a plea deal for the defendant, but the defendant hesitated to accept it during colloquy. "Mere seconds" after refusing to accept to the deal, he accepted it but the judge, Judge Evans, refused to accept it, saying "we're not going to play games." The judge continued to refuse to accept the plea in a pretrial meeting in chambers. Bright then made a motion in court to accept the plea and stated the judge was being arbitrary and unreasonable in refusing to even hold a hearing to determine whether the defendant's plea was willingly, knowingly, and voluntarily entered. He went on to criticize the judge's policies on "drop dead dates" for plea agreements, his refusal to conduct a full colloquy regarding the defendant's plea, and his refusal to accept no contest pleas. Despite emphatic arguments throughout the motion, he cited case law and made proper legal arguments.

Bright alleged that, after this motion Judge Evans contacted the Ohio disciplinary counsel. Evans also filed a public journal entry stating that Bright created a conflict with the court, and ultimately ordered Bright removed from the case. The Judge went further and filed public journal entries for every felony case Bright defended before him and removed him from each one, which totaled approximately seventy cases. Thereafter the non-profit for whom Bright worked terminated his employment because he could not practice before Judge Evans.

Bright filed suit against Judge Evans, the nonprofit, and the county alleging they violated his First and Fourteenth Amendment rights to free speech, free association, substantive and procedural due process, and to equal protection; that Judge Evans tortiously interfered with his contractual rights with the nonprofit; that the nonprofit breached his contract by terminating him without good cause; and that Judge Evans invaded his privacy by publicly announcing that he had filed grievances with the disciplinary board. Evans defended with the doctrine of judicial immunity. The District Court found the Judge's decisions to remove Bright from each and every

felony case before him were judicial actions and denied his claim of immunity. The District Court also found that Bright failed to prove the county (through the board of county commissioners) retaliated against him or that *Monell* liability should attach. The District Court also dismissed all of Bright's claims against the nonprofit under FRCP 12(b)(6).

HELD: On appeal, the Sixth Circuit reversed the District Court's denial of Evans' judicial immunity and affirmed the District Court's dismissals of Bright's federal claims against the county and nonprofit.

DISCUSSION: The Sixth Circuit noted that judicial immunity exists so judges can carry out their duties and render decisions without fear of retribution or consequences, ensuring fair results. It also noted the appellate process is the mechanism by which litigants can protect themselves from judicial errors. As a result, there are only two narrow circumstances when a judge is not immune from suit: 1) when the judge is carrying out nonjudicial actions and 2) when a judge acts in a judicial manner but completely without jurisdiction. Bright argued, and the District Court agreed, that Judge Evans had no jurisdiction to remove Bright from all the felony cases.

The Sixth Circuit held the District Court erred, because jurisdiction is to be "broadly construed to effectuate the purposes of judicial immunity." It found that broad jurisdiction based on the fact that Judge Evans had underlying subject-matter jurisdiction in each of the cases from which he removed Bright. Bright's primary arguments in favor denying immunity were 1) that Judge Evans lacked jurisdiction because only the Ohio Supreme Court can punish or discipline attorney, but here Judge Evans took that upon himself, and 2) that the Court of Common Pleas (Evans' court) lacks the authority to disqualify attorneys from every case before it. The Sixth Circuit appreciated these arguments but found enough jurisdictional nexus to grant judicial immunity. Despite reversing the District Court, the Sixth Circuit called Evans' actions "petty, unethical, and unworthy of his office It agreed with the Ohio Supreme Court's decision to sanction the judge.

As for Bright's retaliation claim against the nonprofit, the Court affirmed the District Court's dismissal. Bright had to prove "factual allegations sufficient to establish that (1) [he] engaged in constitutionally protected conduct; (2) an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by [his] protected conduct." (internal quotations removed). As to the first prong, the Sixth Circuit determined both the nonprofit's proffered reason for the termination – that Bright was unable to practice before Judge Evans – and Bright's argument – that the nonprofit knew of his speech and fired him almost immediately after it was discovered – were both plausible, meaning the District Court erred by finding for the nonprofit on this point. However, the claim still had to be dismissed. The problem for Bright was that in *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005) a prior Sixth Circuit panel held that an attorney cannot claim First Amendment protection for himself based on his speech in motions and courtroom statements. The panel reviewing Bright's case said if they "were writing on a clean slate, [they] would be inclined to hold that Bright ha[d] also carried [his] burden" on this prong, but with the prior published circuit authority they were compelled to rule against him.

Bright's claims against the nonprofit were dismissed quickly. His equal protection claim failed because he cited the nonprofit's proffered reason for his termination in his pleading, thereby failing to negate "any reasonably conceivable state of facts that could provide a rational basis" for his termination. As for his procedural due process claim, the Court held none of his three alleged Constitutional deprivations were entitled to protection – "(1) a property interest in his continued employment as a public defender; (2) a property interest in his right to practice law

before the Court of Common Pleas; and (3) a liberty interest in his good reputation" – meaning the Court had to dismiss the claim.

Last, Bright alleged that the county it should be liable under *Monell* because it failed to protect him from the unlawful actions of Judge Evans and the independent contractor. Under such a theory Bright had to allege "(1) that a violation of a federal right took place, (2) that the defendants acted under color of state law, and (3) that [the] municipality's policy or custom caused that violation to happen." Bright argued the county had a policy of deferring to Judge Evans the appointment of public defenders and that, since the judge removed him from all felony cases before him, the nonprofit, which Bright considered the county's policymaker, had fired Bright. Bright could not support this allegation and the Monnell claim was dismissed.

http://www.ca6.uscourts.gov/opinions.pdf/14a0116p-06.pdf (last accessed June 17, 2014).

Trials: Where Suit Involves Federal and State Claims, State Privilege Laws Do Not Protect E-Mails From Being Admitted in Federal Case

Wilcox v. Arpaio, No. 12-16418 (9th Cir. June 2, 2014).

State privilege laws are not effective to bar the admission of testimony in a parallel federal case, according to the Ninth Circuit.

Mary Rose Wilcox, a Maricopa County Arizona Supervisor, sued the County and various present and past officials after an ostensible corruption investigation of her by a former (and fired) county prosecutor and Sheriff Joe Arpaio. The investigation was ultimately deemed politically motivated and dismissed by a judge. Wilcox alleged that officials wrongfully investigated, harassed and prosecuted her and her husband. She brought federal claims under § 1983 as well as state law claims.

The County hired advisors to deal with the fallout, not only from the botched investigation of Wilcox, but from investigations of other similarly-situated county officials the sheriff and prosecutor had targeted. The advisors predicted a hundred or more people might pursue similar claims to Wilcox's and, concerned about the cost, pace, and propriety of the claims, the County directed the county manager to establish a dispute resolution program.

The resolution passed by the County "directed and authorized" the manager to "take all actions necessary to . . . adjudicate the claims" in the program, which included "entering into binding arbitration/mediation agreements" and "contracts." The manager appointed a former judge to head up the program and through him settled various claims before reaching Wilcox's claim.

The County and Wilcox's attorney began discussing her claim, conversations which led to various emails between Wilcox's attorney and the mediator. Wilcox alleged that ultimately the emails showed her claim had been settled and pointed to emails from the mediator to her attorney stating he was writing to confirm a $975,000 settlement. This email was identical to emails sent to two other claimants by the mediator, both of which were settled without incident. The only difference between the email to Wilcox and those to other litigants was that the email from the mediator to Wilcox's attorney stated "[t]his settlement is subject to any further approvals deemed necessary by the parties."