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to provide adequate medical treatment required a showing that the defendants acted with deliberate indifference to the serious medical needs of the detainee. In this case, both the EMTs and the jail nurse, "who presumably had a greater facility than the average layperson to recognize" an individual's medical needs, had concluded that McCargo did not need hospitalization. As McCargo's condition was not obvious to these medically-trained employees, it certainly would not have been obvious to a layperson or to Officer Ruth. As a result, the plaintiffs failed to establish the obvious existence of a sufficiently serious medical need. The plaintiffs were also required to show that the defendant officer was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]," had drawn that inference, and disregarded the risk. Officer Ruth's actions did not rise to this level: while he may have failed to mention that McCargo had used cocaine, he was also entitled to rely on the EMTs' and nurse's medical assessments. Even had a constitutional violation occurred, the court found the plaintiffs failed to show that the policy prohibiting officers from transporting individuals to the hospital in a police vehicle for medical services caused McCargo's injuries. "At most, the evidence shows that Officer Ruth was reluctant to transport McCargo to the hospital. However, this reluctance could have sprung from any number of motivations, including the possibility that Officer Ruth, relying on the EMTs' assessment, did not believe that McCargo needed to go to the hospital for treatment." *Spears v. Ruth*, 589 F. 3d 249 (6th Cir. 2009).

First Amendment

School's Distribution Policy

The Plano, Texas Independent School District enacted a policy in 2005 that restricted the distribution of written materials, including those religious in nature, by its students. Students could only distribute such materials 30 minutes before and after school; during three annual parties; at recess; and "passively" at designated tables during school hours. All other distribution was prohibited. The preamble to the policy stated, in part, that the policy was "intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others." The plaintiffs, four students and their families, brought suit, claiming that the policy was facially invalid under the First Amendment. The district court disagreed, finding that the policy was facially valid under *United States v. O'Brien*, 391 U.S. 367 (1968), being content- and viewpoint-neutral, narrowly tailored to achieve the significant governmental interest of improving the educational process, and leaving open ample alternative channels of communication. The plaintiffs appealed, arguing that the *O'Brien* standard only applied to expressive conduct and not to "pure speech," like distributing written materials, and that the "substantial disruption" test in *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969), applied to "pure speech."

The U.S. Court of Appeals for the Fifth Circuit affirmed with respect to the 2005 policy (but remanded claims regarding an earlier policy). "We have made plain that 'time, place, and manner' is the proper standard for evaluating content and viewpoint regulations of student speech." Pursuant to *U.S. v. O'Brien*, in order to have a valid time, place, and manner restriction, a regulation had to be content-and viewpoint-neutral, and be "narrowly tailored to serve a significant government interest, and … leave open ample alternative channels for communication of the information." The "regulation of speech during and immediately before the classroom instructional period [was] intended to facilitate the beginning of class without a wait for the distribution of [classroom] materials." The court found that there were ample alternative channels of communication: students could distribute religious materials before and after school, during recess, and even during school hours at designated tables. *Morgan v. Plano Indep. Sch. Dist.*, 589 F. 3d 740 (5th Cir. 2009).

Personnel and Employment

Age and Political Affiliation

Smith was the Superintendent of the City of Allentown Recreation Bureau. He had been appointed to that post in 2000 by the then mayor, a Republican. In 2001, a Democrat was elected as the new mayor. Smith continued to serve in his position, although some performance issues were raised by Pawlowski, his manager at the time. In 2004, a new manager was appointed and developed a performance plan for Smith. In early 2005, Pawlowski, a Democrat, announced his candidacy for mayor. Smith, a registered member of the Republican party, supported the Republican candidate (who was also the former mayor who had appointed him initially) and placed his election sign in his yard. Smith claimed that a campaign worker for Pawlowski told him that Pawlowski "viewed [Smith] as a political enemy[ ] of sorts" and believed that Smith had improperly attempted to influence two members of the City's recreation commission to support the Republican candidate's bid for mayor. The campaign worker recalled the conversation differently. In any event, Pawlowski was elected and appointed a new manager. That manager reviewed Smith's file, concluded that Smith had failed to achieve any of the goals set forth in the 2004 performance plan, and recommended that he be fired. The City Solicitor and the HR director both recommended against this (the City had a progressive discipline policy). Smith, who was 55 years old at the time, was told he lacked the skills necessary to perform his duties effectively, and that he was being given the option of resigning or retiring. Smith resigned. His replacement was 36 years old. Smith sued, claiming the City discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, and on the basis of his political affiliation, in violation of his First Amendment rights.

On the age discrimination claim, the district court held that Smith failed to adduce evidence from which a reasonable jury could conclude that the defendants' proffered rationale for terminating him was a pretext for

age discrimination. On the political affiliation claim, the court found that Smith's testimony regarding the "political enemy" comment constituted inadmissible hearsay that could not be considered on summary judgment, and because Smith could not identify an alternate source of Pawlowski's alleged political enmity toward him, Smith lacked admissible evidence that Pawlowski considered Smith a political adversary. Smith appealed.

The U.S. Court of Appeals for the Third Circuit affirmed. After the district court had ruled in this matter, the U.S. Supreme Court decided *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009), which considered whether the burden-shifting framework established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was available to plaintiffs in age discrimination cases, noting that it had never definitively applied the *McDonnell Douglas* framework to ADEA claims. The Third Circuit interpreted the case thusly: "[W]e may not depart from our prior decisions applying *McDonnell Douglas* to age discrimination cases unless those decisions are irreconcilable with *Gross*.…While we recognize that *Gross* expressed significant doubt about any burden-shifting under the ADEA, we conclude that the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases." Evaluating Smith's age discrimination claim pursuant to *McDonnell Douglas* to see whether he produced sufficient evidence to establish that the employer's proffered rationale for terminating him was a pretext for age-based discrimination, the Third Circuit concluded he had failed to meet this burden. His performance was of concern for several years before the termination, and he clearly received notice of his deficient performance when the performance plan was established. "Under these circumstances, no reasonable jury could agree that appellees terminated Smith on the basis of age discrimination." Likewise, on the discrimination claim based on political affiliation, the court held that Smith failed to show that his political affiliation was a substantial or motivating factor in the termination. Smith could not show that Pawlowski knew of his yard sign or of his "reputation" as a supporter of his opponent (Pawlowski testified that he did not know where Smith lived). Because the campaign worker disavowed the "political enemy" statement, the district court properly refused to consider the comment for summary judgment purposes. *Smith v. City of Allentown*, 589 F. 3d 684 (3d Cir. 2009).

ADA Retaliation and Damages

Alvarado, a 65-year-old employee, had called an employee hotline to complain that his manager, M., had made inappropriate comments about his age. M. denied any inappropriate comments but three days later, Alvarado received his first "Performance Counseling Record," followed by several more. The assistant manager subsequently stated that Alvarado did not deserve the counseling records and she only wrote the counseling records because M. told her to do so. Alvarado called the hotline again, this time complaining of the retaliation and of pain in his hands. He was found to have arthritis, but was cleared for work. After Alvarado was terminated, he filed a lawsuit alleging, among other things, employment discrimination in violation of Title I of the ADA, 42 U.S.C. § 12112, and that his employer had retaliated against him for complaining that his manager had discriminated against him based on his disability. The employer filed a motion in limine to bar Alvarado from seeking punitive and compensatory damages for the ADA retaliation claim, and also asserted that, because only equitable relief was available, Alvarado did not have a right to a jury trial on his retaliation claim. The district court granted the employer's motion in limine, concluding that the plain language of 42 U.S.C. § 1981a(a)(2) precluded compensatory damages, punitive damages, and trial by jury. Alvarado appealed, arguing that, because compensatory and punitive damages were available under the Civil Rights Acts, compensatory and punitive damages were available for ADA retaliation claims.

The U.S. Court of Appeals for the Ninth Circuit affirmed. "Although we have not resolved whether compensatory and punitive damages are available for ADA retaliation claims, other courts have applied divergent approaches to interpret the ADA's remedial provisions," and referred to the Seventh Circuit's ruling in *Kramer v. Banc of Am. Sec.*, 355 F.3d 961 (7th Cir. 2004) (the 1991 Civil Rights Act did not expand the remedies available to a party bringing an ADA retaliation claim against an employer and, therefore, compensatory and punitive damages were not available). The retaliation provision of the ADA contained no remedy of its own, and it was "clear that the remedies and procedures available to aggrieved persons for violations of § 12203 [were] the same as the remedies and procedures available under Title I of the ADA." Further, 42 U.S.C. § 1981a limited its remedial reach to ADA discrimination claims, and did not incorporate ADA retaliation claims brought pursuant to 42 U.S.C. § 12203. "Being persuaded by the Seventh Circuit's reasoning, we hold, as did the Seventh Circuit in *Kramer*, that the plain and unambiguous provisions of 42 U.S.C. § 1981a limit the availability of compensatory and punitive damages to those specific ADA claims listed. ADA retaliation is not on the list. Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available." *Alvarado v. Cajun Operating Co.*, 588 F. 3d 1261 (9th Cir. 2009).

Search and Seizure

Warrantless Search of Cell Phone Data

In a ruling of apparent first impression for any Supreme Court in the United States, the Supreme Court of Ohio recently ruled that a warrantless search of data within a cell phone, seized incident to a lawful arrest, was prohibited by the Fourth Amendment when the search was unnecessary for the safety of law enforcement officers and there were no exigent circumstances. The facts of the case are as follows: after a woman was taken to hospital for a drug overdose, she spoke with police officers

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