> Panhandling and solicitation of immediate donations convey messages of need, and waving placards at traffic islands may often be political expression. But if the mere association of certain behavior with certain subjects were to amount, in itself, to a content basis for First Amendment scrutiny, the point behind content discrimination would be lost. That point is to bar the government from suppressing speech because it disapproves the message, see *Playboy Entm't Group*, 529 U.S. at 812.

Given that these were content-neutral time, place, or manner regulations, intermediate scrutiny required only that they be narrowly tailored to serve a significant governmental purpose while leaving open adequate alternative channels of communication, and not burden substantially more speech than necessary.

The Circuit Court found that appellants had incorrectly assumed that merely by raising a facial overbreath challenge, the burden shifted to the City to demonstrate its bona fides. This was incorrect: "In a facial overbreadth challenge, the claimant has the initial burden to make at least a prima facie showing of such "substantial" overbreadth before any burden of justification, be it strict or intermediate, passes to the government. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003).... We do not think the appellants have made such a showing."

The First Circuit found that appellants had failed to provide support for even the most vulnerable of the ordinances' provisions—the requirement to stay at least 20 feet away from someone standing or waiting, such as at a bus stop or ATM machine. "Even the most intuitively appealing of all the appellants' claims, going to the ban on requests by using a sign within 20 feet of the listed lines and locations, does not prompt adequate support to meet their burden. Twenty feet is not very far, being within the range of audible conversation, and a sign request that close would reasonably give rise to discomfort to someone stuck at a bus stop, and could definitely produce apprehensiveness in someone obviously possessing fresh cash."

Appellants had also raised Equal Protection claims, arguing that the ordinances were facially invalid because they were motivated by the City's distaste for its poor and homeless. The court found nothing in the record to support this allegation, particularly under the applicable rational basis standard ("because neither wealth nor homelessness is a suspect class under the Equal Protection Clause, see *United States v. Myers*, 294 F.3d 203, 209 (1st Cir. 2002)).

Finally, the First Circuit denied appellants' Due Process vagueness claim, citing their "failure to identify any specific instance of uncertainty on their part about the status of a traffic island, or the lawfulness of continuing to hold a solicitation sign, or the likelihood of police action, or any other detriment that might be attributable to a failure of textual concreteness. A vagueness claim must be specific and as applied to a given plaintiff, not facial."

In sum, the Circuit Court affirmed the denial of a preliminary injunction as to all provisions of the challenged ordinances except for the Aggressive Panhandling Ordinance's proscription on nighttime solicitation, (see Worcester Revised Ordinances, ch. 9, § 16(e)(11)), and remanded to the District Court.

***Thayer v. City of Worcester*, No. 13–2355 (1st Cir. June 19, 2014).**

Filing of EEOC Intake Questionnaire Can Constitute Age Discrimination Charge

In a case of first impression in the jurisdiction, the Third Circuit has held that the filing of a fully-completed EEOC intake questionnaire constitutes formal commencement of an age discrimination action under the ADEA, also holding that exhaustion of administrative remedies may be pled generally rather than requiring specificity.

Anthony Hildebrand served as a detective for the Allegheny County District Attorney's office for five years before being terminated in 2011. He filed an internal grievance, but the termination was upheld. He then went to the EEOC and completed an intake questionnaire, wherein he stated he was the victim of age discrimination and wherein he checked a box stating he "want[ed] to file a charge of discrimination." He was issued a right-to-sue letter and did so, claiming the County and the DA's office violated the ADEA, Title VII (by retaliating against him), and the Equal Protection Clause (due to age-based discrimination he filed under Section 1983). The District Court granted defendants' motions to dismiss, finding that Hildebrand had not pled exhaustion of administrative remedies and that an EEOC questionnaire did not constitute a charge of discrimination. Hildebrand appealed.

HELD: The Third Circuit held that (1) Hildebrand could not maintain a Section 1983 claim for age discrimination because Congress had set forth a specific grievance procedure under the ADEA; (2) Hildebrand was not required to plead exhaustion of administrative remedies with specificity, but instead could do so generally; and (3) an EEOC intake questionnaire, if properly completed, does constitute a charge of discrimination.

DISCUSSION: This case presented three issues on which the Third Circuit had never published an opinion. First, the Circuit Court addressed "whether an employee terminated from a local government position may maintain an action for age discrimination under 42 U.S.C. § 1983." The Third Circuit affirmed the lower court's holding that the ADEA is the exclusive remedy for individuals asserting discrimination based on age. To determine whether a statute precludes enforcement of an individual's rights under Section 1983, courts look to whether the statute provides a sufficiently comprehensive remedy. The Circuit Court found the ADEA does have a comprehensive scheme under which individuals may enforce their rights. It provides a private right of action, requires plaintiffs to exhaust administrative remedies by filing with the EEOC, and, unless the EEOC files, allows the employee to file suit.

(This ruling is in line with precedent from the First, Fourth, Fifth, Tenth, and DC Circuits, and differs only from the Seventh Circuit. The Seventh Circuit holds that, in addition to a comprehensive remedial scheme, "some additional indication of congressional intent" to deny plaintiffs the use of Section 1983 is necessary before the Court will deny plaintiffs such a action. *Levin v. Madigan*, 692 F.3d 607, 619 (7th Cir. 2012)).

As to the second issue, "whether the pleading of exhaustion of administrative remedies, a prerequisite to bringing a lawsuit under the ADEA, must satisfy the standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)," the Court

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Seccond Look *Cont'd from page 33*

a duty to report or fact findings from legally authorized investigations. The opinions do not have to be redacted (though a court could always order redaction if, for example, the judge decided that the opinions but not the facts in the document were untrustworthy[9] or decided that the opinions were irrelevant or unnecessarily cumulative, or that redaction would be prudent to avoid confusing or prejudicing the jury.[10] The courts explain allowing opinions to remain in the certified public records on the textual ground that Rule 803(8) provides a hearsay exception for the entire record if it sets out agency activities or qualifying observations or fact – the Rule does not restrict the hearsay exception to only portions of the document.[11] I am not sure that this view is entirely reconcilable with the courts' insistence on personal knowledge about observations and fact findings in public records, discussed above.

So the good news is that the document custodian does not have to distinguish facts and observations from opinions in deciding whether to certify a record under Rule 803(8). But ...

How is the custodian supposed to know whether there was "a *legal duty* to report" (Rule 803(8)(A)(ii)) the results of an observation that is contained in the record to be certified or that fact findings in such record were obtained in a "*legally authorized*" investigation (Rule 803(8)(A)(iii)?

While there is a risk of waiving attorney-client privilege, the only solution to this question that occurs to me is that when unsure of the legal issues the custodian should consult the government lawyer and testify if questioned about the decision to certify or not certify that he or she relied on the legal advice. If we represent the custodian we could object to this line of questioning as irrelevant since the judge can and will determine those questions without regard to the custodian's opinions. However, the question might be permitted where a particularly critical record or records are at issue as relevant carefully the custodian made the decision to certify and what standards the custodian used. That line of questioning probably should be permitted to a limited extent if the local government is a party to the litigation or closely allied with a party, but more strictly limited if the government is a disinterested nonparty.

Conclusion

We have a duty to protect our clients from negligently certifying records that should not be certified, and from hostile cross-examination about such conduct. Most important, we have a duty to ensure that records certifications under our clients' official seals are truthful and accurate, even if courts and counsel for other parties might get impatient with our concern.

Notes

1. *See* Second Look: There Is No "Convenience" Defense to Perjury: Risks & Opportunities Arising From Careless Business Records Certifications, *Municipal Lawyer*, (vol. 55, no. 3; May–June 2014), p. 20.
2. *See* Sobel v. Hertz Corp., 291 F.R.D. 525, 533 (D. Nev. 2013) (NAAG not a "public office" within meaning of Rule 803(8).
3. *See* United States v. Spano, 421 F.3d 599, 604 (7th Cir. 2005) (minutes of town board meeting excluded under Rule 803(8)(B) as untrustworthy due to strong evidence of tampering).
4. Smith v. Isuzu Motors, Ltd., 137 F.3d 859, 862 (5th Cir. 1998).
5. United States v. Harris, 942 F.2d 1125, 1129 n. 3 (7th Cir. 1991) (dictum).
6. *See* Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1273 (7th Cir. 1988).
7. *Id.*
8. The courts may relax this personal knowledge requirement if the official obtained the information from an outsider who had a legal duty to report. *See, e.g.,* United States v. Central Gulf Lines, Inc., 974 F.2d 621, 626–627 (5th Cir. 1992) (legally required surveyor reports). *But see United States v. Harris*, *supra n.5*, rejecting tax return information.
9. *See* Fed. R. Evid 803(8)(B).
10. *See* Fed. R. Evid. 403.
11. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988). ML

Cases *Cont'd from page 29*

held a plaintiff need not plead this with particularity, but rather may allege it in general terms. Under the ADEA a plaintiff must exhaust administrative remedies and file a charge with EEOC within 300 days after the last date of discrimination, both of which are considered conditions precedent to filing under the ADEA. The District Court had held Hildebrand did not plead with particularity that he had exhausted his administrative remedies and dismissed his charge against Allegheny County. The Circuit Court reversed, noting that *Twombly/Iqbal* interpreted only FRCP 8(a), while the pleading of a condition precedent is covered under FRCP 9(c). That latter rule states "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed."

On the third issue, "whether a complainant's submission of the Equal Employment Opportunity Commission's revised Intake Questionnaire constitutes the filing of a charge of discrimination," the Court held as long as the form is properly filled out it does constitute such a filing. Under *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), the Supreme Court held an EEOC filing may constitute a charge of discrimination. Hildebrand had checked a box on his EEOC form stating "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. . . ." The Third Circuit held Hildebrand unquestionably filed a charge of discrimination and reversed the District Court on that issue.

***Hildebrand v. Allegheny County*, No. 13-1231 (3d Cir. June 27, 2014).**

Prohibiting Use of Vehicle as "Living Quarters" is Unconstitutionally Vague

A longstanding Los Angeles ordinance prohibiting people from using their vehicles as "living quarters" while on public streets or parking lots has been struck down by the Ninth Circuit for vagueness in that it failed to provide adequate notice to potential arrestees and did not provide police with sufficiently clear standards for enforcement.