

Cases

Incendiary Emails and Unwarranted Parole Revocation

By IMLA Editorial Staff

Section 1983: Email Sent by Municipal Officer, but in Capacity as Private Citizen, Does not Constitute Action "Under Color of State Law"

Conner v. Castro, No. 17-50462 (5th Cir. **Feb. 23, 2018).**

Affirming the lower court, the Fifth Circuit found that a disrespectful email sent by a municipal officer was not grounds for a claim of retaliation against the municipality, because the communication was not made in an official capacity and was not "under color of state law."

Madeleine Connor (Connor) is a resident of Lost Creek, Texas which was recently annexed into Austin. The Lost Creek Municipal Utility District was set up after annexation – a municipal entity – to construct sidewalks in the area. Connor played a couple roles: she was the president of the Lost Creek Neighborhood Association and was hired by a neighbor, in her capacity as an attorney, to file suit to enjoin construction of the sidewalks. After contentious meetings between the Municipal Utility District, the Neighborhood Association and Connor in her capacity as an attorney, she amended the filing to add herself as a plaintiff and sought damages under § 1983, alleging she was retaliated against for exercising her First Amendment rights. The case was initially brought in state court but, with the addition of the retaliation claim, was removed to federal court. After various procedural events, the sole issue that survived appeal to the Fifth Circuit was whether the actions Connor alleged were retaliatory could be attributed to the Municipal Utility District – i.e. were done "under color of state law." The district court held they were private actions and Connor challenged that holding.

The Fifth Circuit opinion recounted the unpleasant history of wrangling over the sidewalks, including Connor being "jeered, shouted down, booed, cat called, and laughed at [] for more than two hours during a neighborhood association meeting," and ultimately being recalled as the Neighborhood Association president. As to the issue of whether these acts of "retaliation" could be attributed to the Municipal Utility District as a government entity, the Circuit found Connor's claim fell short. At issue was an email sent from the director of the Municipal Utility District to Connor's employer, Colonel Paladino, the executive director of the Texas Veterans Commission where Connor was the Interim General Counsel and being considered for appointment to General Counsel. The email stated that "Connors has made it her mission to drain the budget of the Lost Creek Limited District, a governmental entity engaged in facilitating the transition of Lost Creek recently annexed by the City of Austin," and characterized Connors as "a devious attorney with no morals, no credibility, and no integrity, who's [sic] goal to further cripple veterans and other disabled citizens as a manifestation of her Borderline Personality Disorder with histrionic features, and a vendetta against men as her former husband learned the hard way."

The Circuit made quick work of its deliberation, disagreeing with Connor's argument that because the email involved government issues it could be characterized as "under color of state law" for a §1983 case. Instead, the Circuit focused on the facts that 1) it was sent from a personal email, 2) signed by the author with his affiliation listed as the Austin Institute LLC (not the Municipal Utility District), and 3) that the author self identifies as simply "Chuck" and a "retired FBI executive" (not a director of a government entity). As such nothing in the email "supported any allegation that McCormick, [the director of the Municipal Utility District], acted under color of state law, rather than as a private individual, when he sent it to Connor's employer." The lower court was affirmed.

http://www.ca5.uscourts.gov/opinions/unpub/17/17-50462.0.pdf

Immunity: Acts of "Advocacy" Qualify for Prosecutorial Immunity; But Recommending Denial of Parole is Not Advocacy

Patterson v. Van Arsdel, **No. 15-35838 (9th Cir. Feb. 23, 2018)**

An Oregon Release Officer cannot claim the protections of prosecutorial immunity where his action did not involve an act of advocacy.

James Van Arsdel (Van Arsdel) was employed as the Yamhill County, Oregon Circuit Court Release Assistance Officer. His duties included investigating and initiating revocation of pretrial release for criminal defendants who appeared to have violated the terms of their release agreements.

In 2012, Sarah Patterson (Patterson) was arrested on charges of theft and possession of a controlled substance. She entered into a pretrial release agreement that required her to comply with all laws while on release. In March 2012, while on pretrial release, she was arrested on domestic violence charges. At Patterson's arraignment on the domestic violence charges, Van Arsdel moved in open court for a revocation of her pretrial release and for her arrest.

Judge Stone, the criminal-calendar duty judge, orally denied Van Arsdel's motion and subsequently wrote "Denied" on both the revocation form and the arrest warrant. Van Arsdel was visibly displeased. That day, he provided

to Judge Tichenor, another judge on the Circuit Court, an unsigned warrant for Patterson's arrest. He did not attach a revocation form, and did not disclose that Judge Stone had orally denied the revocation motion and arrest warrant earlier in the day.

Judge Tichenor was not then assigned to the criminal duty roster, and only judges on that roster were responsible for handling revocation matters. However, Van Arsdel regularly socialized with Judge Tichenor outside of work, including "Saturday golf games and weekly Tuesday morning [B]ible study sessions." Van Arsdel's wife was Tichenor's judicial assistant, and her initials appeared on Van Arsdel's unsigned warrant. Judge Tichenor signed the warrant that day.

Ten days thereafter, Patterson was arrested and jailed pursuant to the warrant signed by Tichenor. She was released two days later, after Van Arsdel confirmed to a deputy that the arrest warrant was defective.

Patterson filed under 42 U.S.C. § 1983, arguing that Van Arsdel violated her Fourth Amendment rights by instigating an unreasonable seizure. The district court held that Van Arsdel was entitled to absolute prosecutorial immunity, and Patterson appealed.

The sole question presented on appeal was whether Van Arsdel was protected by absolute prosecutorial immunity. Officials are absolutely immune against suits under § 1983 that arise from their performance of prosecutorial functions, even if the acts in question were committed in bad faith. Such immunity "is an extreme remedy, and it is justified only where 'any lesser degree of immunity could impair the judicial process itself.'" *Lacey v. Maricopa County*, 693 F.3d 896, 912 (9th Cir. 2012).

Acts of advocacy are entitled to absolute immunity, while administrative and "police-type" investigative acts are not. To qualify as advocacy, an act must be "intimately associated with the judicial phase of the criminal process." For such acts, absolute immunity furthers the doctrine's core goal of preventing retaliatory lawsuits that may impose "unique and intolerable" burdens upon prosecutors. Actions classified as "advocacy" include initiating a prosecution and presenting the state's case, appearing at a probable cause hearing to support an application for a search warrant, and preparing and filing a motion for an arrest warrant.

However, "When a prosecutor steps outside of the advocate's role," his or her conduct is protected only "to the extent that any other individual would be protected performing the same function." This means that prosecutors are protected by qualified, rather than absolute, immunity when they perform activities outside their core role as courtroom advocates.

The determinative question here was whether Van Arsdel was engaged in prosecutorial advocacy when he provided Judge Tichenor the bare unsigned warrant for Patterson's arrest. The Circuit Court found that he was not. It had not yet addressed this precise fact pattern but found an analogy in parole officer precedents: Parole board members have absolute immunity for adjudicative actions and for other discretionary decisions related to the processing of parole applications, but enjoy only qualified immunity for investigating potential parole violations and submitting recommendations regarding revocation. In undertaking those actions, the Circuit has found that a parole officer fulfills a function that is "more akin to a police officer seeking an arrest warrant, than to a prosecutor exercising quasi-judicial authority."

The Circuit looked to a Supreme Court decision which declined to accord a police officer prosecutorial immunity in a §1983 action for false arrest where the officer had presented a magistrate with felony complaints charging various individuals with violating controlled substance laws, with unsigned warrants, and with affidavits that did not establish probable cause. The officer argued that he was entitled to absolute immunity because his actions were equivalent to those of "a prosecutor who asks a grand jury to indict a suspect." The Court rejected that argument, holding that the officer's acts were "further removed from the judicial phase of criminal proceedings" and did not implicate the policy concerns that necessitate absolute immunity for prosecutorial functions.

The Ninth Circuit evaluated Van Arsdel's functions under the Oregon Revised Statutes, which provide that Release Assistance Officers "shall, except when impracticable, interview every person detained" and "verify release criteria information." They may submit formal recommendations to a judge, but may make release decisions only if "delegated release authority by the presiding circuit judge for the judicial district." Van Arsdel had not been delegated such authority; rather, he was only authorized only to make recommendations to a judge.

Van Arsdel unsuccessfully pointed to *Cruz v. Kauai County*, 279 F.3d 1064 (9th Cir. 2002). There, a prosecutor filed a motion to revoke a defendant's bail, attaching an affidavit in which he personally testified to facts supporting revocation. The Circuit held that the prosecutor was not entitled to absolute immunity because he "stepped outside of his prosecutorial role, and into the role of witness"—but in a footnote, the court had written that that the prosecutor would have been entitled to absolute immunity for the decision solely to file the revocation motion because such an action is "a traditional prosecutorial function." Van Arsdel argued that his actions were functionally indistinguishable from that of a prosecutor who files a motion to revoke bail.

The court was not persuaded. Van Arsdel had never submitted a motion to Tichenor. And if he had, the motion would necessarily have required his affidavit reciting facts supporting issuance of the warrant. This would have doomed his argument: "It is settled law that an official may not receive absolute prosecutorial immunity for reciting facts in support of an arrest warrant." Reversed and remanded.

DISSENT: Judge Fernandez disagreed, citing the fact that Patterson had not argued the proposition cited by the majority and had therefore waived that argument. "Although I fully understand the majority's desire to offer Patterson relief from the alleged unconscionable actions of Van Arsdel . . . I do not agree, however, that we should undermine existing law for the purpose of righting Patterson's wrong and punishing Van Arsdel's alleged malversation."

http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/23/15-35838.pdf ML