Cases



by Sophia M. Stadnyk, Senior Associate Counsel

Adult Business Regulation

Ordinance Upheld

Metro Pony was an adult nightclub that offered "live artistic dance performances" (on stage, at tableside, and in a monitored VIP room) featuring nude dancers, and sold DVDs of a sexual nature for patrons to purchase for viewing in their homes. It opened in the City of Metropolis in late 2010. It did not serve alcohol, but allowed patrons to bring in their own alcohol beverages to consume onsite.

In response to public petitions opposing the opening of Metro Pony, the City Council considered regulating sexually oriented businesses. Before passing Ordinance 2011-2, the council took into account judicial opinions, crime reports, news articles, expert reports and affidavits, and it held a public hearing that included a presentation about the negative secondary effects associated with sexually oriented businesses.

The ordinance, among other things, imposed an annual licensing of sexually oriented businesses and their employees; prohibited nudity, sex, and the touching of patrons; imposed a minimum six-foot buffer area between dancers and patrons, a stage 18 inches high and a room of at least 600 square feet; imposed a ban on the hours of operation from midnight to 6 a.m.; prohibited the possession, use and consumption of alcohol on the premises; imposed an inspection requirement (by staff) of the premises every 90 minutes or monitoring by video cameras; imposed a minimum interior lighting requirement; and prohibited barriers (walls, fencing) that hid the parking areas from public view.

Metro Pony – the only sexually oriented business that came within the scope of the ordinance– challenged the ordinance pursuant to 42 U.S.C. § 1983, alleging that the City violated its First Amendment rights. Pending a ruling, two investigators witnessed instances of illicit sexual behavior, including conduct that could be construed as prostitution, within Metro Pony's establishment, although they did not observe nor investigate any increased crime in the vicinity of Metro Pony. There was no record of an increase in crime or urban blight in the vicinity of Metro Pony since it began its operations.

In addition, Metro Pony pointed to a provision in the ordinance stating that the City's interest in preventing the secondary effects associated with sexually oriented businesses "exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses." Metro Pony claimed this provision belied a predominant motive to combat secondary effects because it essentially "admitted" that the City was committed to regulating sexually oriented businesses regardless of whether the secondary effects they caused were greater or lesser than those caused by other businesses. It was, Metro Pony argued, an acknowledgment that the ordinance was "wildly underinclusive when judged against its asserted justification," and showed that the City was not truly motivated by combating negative secondary effects. Metro Pony's expert, Dr. Daniel Linz, prepared a 48-page report stating that much of the evidentiary material relied on by the City was shoddy because the studies were unsound or flawed in their design and data collection methods, so as to fail to provide scientifically reliable conclusions. Other studies, Linz claimed, reached conclusions contrary to those for which they were relied on by the City. Metro Pony also pointed to studies Linz and others had done to show sexually oriented businesses did not create negative secondary effects.

The court held that Ordinance 2011-2 did not violate Metro Pony's First Amendment rights and that the City was entitled to summary judgment on that claim. It was clear that the City's "predominant motive" in enacting the ordinance was to combat negative secondary effects by restricting the circumstances of speech. "This is so notwithstanding the provision of Ordinance 2011-2 highlighted by Metro Pony purportedly disavowing reliance on the relative frequency of secondary effects at sexually oriented businesses ... the fact remains that the record is replete with evidence the City considered showing an association between sexually oriented businesses and negative secondary effects, and the City has avowed its intention to reduce those effects by the restrictions it enacted."

There was, also, no genuine issue of material fact about whether the City relied on evidence reasonably believed to be relevant to demonstrate a connection between the restrictions in the ordinance and negative secondary effects, and Metro Pony had not cast doubt on the City's rationale such that the burden shifted to the City to supplement the record with further evidence. "[I]n the absence of any glaring red flags in the reports and other evidence it considered, the City was not required to scour the nation to find reports that contradict the evidence before it. The evidence it considered was reasonably reliable and supported Ordinance 2011-2. Even had the City considered Dr. Linz's reports, that would not have rendered its reliance on other reports unreasonable."

Addressing Metro Pony's argument that the lack of an increase in crime around its establishment in the first ten months it was open showed the City's rationale was unreasonable, the court responded that, in light of the unchallenged evidence the City had considered in passing the ordinance, and the affidavits attesting to prostitution activity in Metro Pony after the ordinance was passed, the lack of an increase in crime was "not enough to call into question the City's reasonable reliance on a connection between the restrictions in [the ordinance] and negative secondary effects." Lastly, the ordinance was narrowly tailored. It did not prohibit erotic dancing, which was

still available — just not at all hours and under any conditions — but instead, targeted non-expressive aspects of sexually oriented businesses. *Metro Pony, LLC v. City of Metropolis*, No. 11-cv-144-JPG, 2012 U.S. Dist. LEXIS 55491 (S.D. Ill. April 20, 2012).

Civil Rights

Whistleblower Finalist's "Entitlement" to Position

McDonald worked for the City of St. Paul from 2002 to 2003 as its director of the Office of Affirmative Action and the Coordinator of Minority Business Development and Retention. In 2003, he was terminated and sued the City and city officials, alleging violations of the Minnesota Whistleblower Protection Act, the Civil Rights Act of 1866, and the Civil Rights Act of 1871. In 2004, the City and McDonald executed a settlement in which no party admitted liability.

In 2008, the City established a new department, the Department of Human Rights and Equal Economic Opportunity, and took steps to hire a director. A 13-member hiring committee was established to recommend a list of finalists, but the final decision was to be made by city council. Thirty-one people applied for the position, including McDonald, and eight of these were chosen for interviews. One of the selection committee members included a woman against whom McDonald had filed a workplace conduct complaint. She recused herself from his interview, but McDonald was asked about his 2003 whistleblower action. Three finalists — including McDonald— were selected. All were subjected to additional interviews. The position was offered to the first finalist, and then the next (who both rejected it, in turn), leaving McDonald as the sole remaining finalist. Instead of offering him the position, the council decided to reconvene the selection committee on the basis that they wanted to produce a slate of three to five candidates to choose from.

McDonald sued the City and the mayor, alleging violations of his rights to equal protection and procedural and substantive due process under 42 U.S.C. § 1983 and the Fourteenth Amendment, resulting from his engagement in protected activity; conspiracy to deny him an employment opportunity with a public institution because of engagement in protected activity, in violation of 42 U.S.C. § 1985; violations of Title VII of the Civil Rights Act of 1964, and various state law claims. In essence, he claimed that he was passed over because of his prior lawsuit against the City. The district court granted the defendants' motion for summary judgment on all claims.

On appeal, the U. S. Court of Appeals for the Eighth Circuit affirmed. Regarding the due process claim, the possession of a protected life, liberty or property interest was a condition precedent to the government's obligation to provide due process of law, and where no such interest existed, there could be no due process violation. McDonald had no protected property interest in the director position: nothing in the ordinances or the selection process, as outlined, precluded the selection committee from certifying additional finalists or prohibited the mayor from considering additional finalists. Even if the mayor was constrained to appoint from the initial list of three finalists, the fact that an appointment was subject to the approval of the city council prevented McDonald from possessing a legitimate claim of entitlement to the director position.

On the equal protection claim — that he was treated differently from similarly situated candidates and denied the position because of his participation in the earlier lawsuit— there was no evidence that the mayor's decision to appoint someone other than McDonald to the position was influenced by McDonald's lawsuit. Likewise, his conspiracy claim failed. To prove a conspiracy under 42 U.S.C. § 1985, a plaintiff had to show that the conspiracy was fueled by some "class-based, invidiously discriminatory animus." The court here decided, as had other circuits, that McDonald's status as a whistleblower did not qualify so as to entitle him to protection under 42 U.S.C. § 1985. *McDonald v. City of St. Paul*, No. 11-2264, 2012 U.S. App. LEXIS 9484 (8th Cir. May 10, 2012).

Handgun Restrictions and Fees

A group of residents of New York City, plus several gun-rights groups, brought a Section 1983 action challenging two statutes — New York City Administrative Code § 10-131(a)(2) (the City Statute) and New York Penal Law § 400.00(14) (the State Statute)— on the basis that these laws violated their rights under the Second Amendment, as incorporated against the States by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The State Statute made it illegal to possess a handgun, including within one's home, without a license. The fee to apply for a New York City "Premises Residence" handgun license, which allowed license holders to possess handguns within a specified dwelling, was set by the City at $340. All of the individual plaintiffs had paid the $340 fee.

The plaintiffs challenged two specific statutory provisions related to this licensing scheme: the State Statute authorizing the New York City Council to set the fees for the issuance and renewal of all handgun licenses issued in New York City (in New York State, the license fee was otherwise generally capped at a $10 maximum), and the City Statute prescribing the $340 fee, on the basis that it violated the Second Amendment because it imposed an impermissible fee that unconstitutionally burdened the right to keep and bear arms. The plaintiffs sought declaratory and injunctive relief, and moved for summary judgment. The fee, they alleged, was in excess of a "nominal" fee so as to deter the exercise of a protected activity, and exceeded the costs of administering New York's handgun licensing scheme. The Attorney General of the State of New York intervened in this action, and argued that the plaintiffs lacked standing to challenge the State Statute, on the basis that none of them had suffered any concrete or actual injury as a result of the operation of that law; any injury that occurred was traceable to the City's law alone.

The court dismissed the arguments challenging standing and found the fee was constitutional. "While the Intervenor is correct that it is the City Statute, rather than the State Statute, that imposes the $340 fee at issue, there exists a sufficient causal nexus between the City Council's actions and the State Statute to give rise to standing to chal-

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