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-

continued on page 34

lenge the latter. Without the exemption provided by the State Statute, the City Council would not have been able to set the handgun licensing fee at the current $340 rate; instead, it would have been confined to the $10 maximum fee governing the rest of the State."

Regarding the arguments that the fee was constitutionally impermissible under the standards that governed the imposition of fees on the exercise of constitutionally protected activities, the court found the guiding principle was expressed by the U. S. Supreme Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941): that while the Government could not tax the exercise of constitutionally protected activities, it could impose a fee designed to defray the administrative costs of regulating the protected activity. In *Cox*, a statute requiring marchers to obtain licenses and prepay fees with a permissible range from a "nominal amount" to $300 a day to parade on public streets was permissible because the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and ... the maintenance of public order in the matter licensed." Similarly, the Supreme Court, in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), had rejected the notion that a fee had to be both nominal *and* designed to defray administrative expenses to be permissible. Here, there was no showing that the $340 handgun licensing fee qualified as a fee that was impermissible because it was so exorbitant as to deter the exercise of the protected activity. "There is no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights; indeed, all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced in doing so ... Moreover, there is no genuine dispute that the $340 fee is less than the administrative costs of the licensing scheme. The User Cost Analysis performed by the OMB in 2003 indicates that the average cost to the City at that time for each handgun license application was $343.49, more than the $340 fee at issue." The plaintiffs' motion for summary judgment with respect to this claim was denied.

The court also denied the plaintiffs' claim that the fee violated the Equal Protection Clause because it imposed an unequal burden on the Second Amendment rights of New York City residents as compared with other citizens of New York State. In that respect, the court found that the State Statute withstood rational basis scrutiny. The discretion the State Statute conferred upon the City to set its own licensing fees was cabined by New York law, which required that the amount of a license or permit fee not exceed "a sum reasonably necessary to cover the costs of issuance, inspection and enforcement" and not be "exacted for revenue purposes or to offset the cost of general governmental functions..." *Kwong v. Bloomberg*, No. 11 Civ. 2356 (JGK), 2012 U.S. Dist. LEXIS 41218 (S.D. N.Y. March 26, 2012).

First Amendment

Prevention of "Kosher Fraud"

New York's Kosher Law Protection Act of 2004 ("the Kosher Act," codified as N.Y. Agric. & Mkts. Law §§ 201-a through 201-d) imposed inspection and labeling requirements on food marketed as kosher. In enacting the law, the Legislature stated that "a significant number of consumers within the state [sought] to purchase food products that are kosher, and that many of those consumers [did] so for reasons unrelated to religious observance," and that it was "essential that consumers be provided [with] clear and accurate information about the food they [were] purchasing, and that this goal [be] furthered by requiring vendors of food and food products represented as kosher to make available to consumers the basis for that representation."

The plaintiffs — a delicatessen-butcher shop that specialized in kosher foods and its officers— challenged the constitutionality of the Kosher Act, alleging that the law discriminated against non-Orthodox Jews and impermissibly gave the State a supervisory role over what was properly "kosher." Specifically, the plaintiffs claimed that the labeling requirements of the Act violated the Establishment Clause of the First Amendment because there was no *halachic* (Jewish Law) requirement that, to be considered kosher, all food had to bear a label stating it was kosher, and that certain non-Orthodox Jews wished to market and purchase particular kosher foods without a kosher label or designation. The plaintiffs contended that, by adopting a labeling requirement, the challenged law discriminated against such non-Orthodox Jews and some kosher food purveyors; and that the inspection provision that granted the Department of Agriculture the authority to inspect all food establishments for compliance with the Act directly or indirectly involved an analysis of the acceptability or reliability of the "kosher nature" of the food that was sold. In addition, the plaintiffs claimed that the law violated the Free Exercise Clause because it constituted an impermissible regulation of a religious practice—whether a product was "kosher"—and was not the least restrictive means of preventing fraud. Finally, the plaintiffs argued that the language of the law was unconstitutionally vague.

The district court granted the defendants' motion to dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(6), finding that the Kosher Act did not violate the Free Exercise and Establishment Clauses of the First Amendment and was not void for vagueness. The State Legislature passed the Kosher Act for a valid secular purpose: the need to protect consumers from fraud in the kosher food market, and the law was "purely a labeling and disclosure law" that neither endorsed a particular religious viewpoint nor created an impermissible entanglement with religion. Under the law, the State did not have the authority to determine if a product was kosher under religious law, and the law imposed only an incidental burden on producers and retail vendors (that of labeling and disclosing information regarding the qualifications of their kosher certifier). As such, the State needed only to have a rational basis for its enforcement of the Kosher Act, a test the district court deemed the Kosher Act met. Last, the Kosher Act was not unconstitutionally vague.

On appeal, the U. S. Court of Appeals for the Second Circuit affirmed. "Jewish consumers reportedly now make up less than thirty percent of the consumers of kosher food." The legislative history of the law was clear —the labeling law had the "secular purpose of protecting against fraud by informing a consumer" that a particular seller believed a product was kosher, and the buyer had the option of examining the standard-form kosher certification form completed by that seller. (This