firmed, finding none of her arguments had merit. State prosecutors were absolutely immune from civil liability when acting within the scope of their prosecutorial duties. The courts were to use a "functional approach" to determine when a prosecutor was acting within the scope of his duties as a prosecutor, and when he was merely giving legal advice or investigating. The existence or nonexistence of probable cause was "not determinative of whether absolute immunity applie[d]" because the inquiry remained one of function, not probable cause. The decision to stop a polygraph (if in fact that was what happened) seemed "integrally related to the initiation of the criminal proceedings against Howell in the same way ordering her arrest was. At most, the facts suggest that Sanders stopped a polygraph in order to initiate Howell's prosecution, which was well within his role as an advocate." The court likewise rejected the last argument, that a prosecutor who did not try the case was not entitled to absolute immunity for his actions on the case. *Howell v. Sanders*, No. 10-5797, 2012 U.S. App. LEXIS 1903 (6th Cir. Feb. 02, 2012).

Land Use & Planning

Beach Access Policies

In 1968, the Incline Village General Improvement District ("District") acquired property that included four beaches. The land within the District's 1968 boundaries was purchased and improved with proceeds derived from the sale of public bonds, and all payments due on the bonds were made exclusively by owners of the 1968 property. The deed conveying the 1968 property to the District included a restrictive covenant that stated the property would be held by the District "only for the purposes of recreation by, and for the benefit of, property owners and their tenants ... within [the District] as now constituted." It permitted the individual owners of real estate within the 1968 property to enforce the restrictive covenant. Ordinance 7 limited access to the beaches, as required by the restrictive covenant, and by policy, the District designated the beaches as a nonpublic forum, and generally allowed only people who owned or rented real property within the District's 1968 boundaries to access these beaches.

Frank Wright, who was excluded from beach access because he did not live within the 1968 boundaries, argued that this policy was unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, facially and as applied. He alleged that the District routinely ignored the restrictive covenant and opened the beaches to general public access (for example, on the Fourth of July for firework displays). The district court granted the District's summary judgment motion and denied Wright's summary judgment motion, concluding that both Ordinance 7 and the policy were constitutional.

The U.S. Court of Appeals for the Ninth Circuit ruled that the beaches were not a "traditional public forum," and that the restrictions were constitutional. This was not a case where the government attempted to destroy or convert a public-forum park into a nonpublic forum, and the First Amendment did not guarantee access to property simply because it was owned or controlled by the government. Only a limited set of property owners could access the beaches for limited, non-expressive purposes, and the actual use and purposes of the beaches were, and had been, consistently restricted by the covenant, Ordinance 7, and the actual practice of the District. Kiosks and gates surrounded the beaches, proscribing access to anyone not entitled to access.

Because Ordinance 7 and the policy were reasonable in light of the beaches' purpose and were viewpoint neutral, they did not violate the First Amendment. "Moreover, were we to hold that [the District] could not exclude persons from the beaches as required by the restrictive covenant, we would be removing 'one of the essential sticks in the bundle of property rights' belonging to the prior owner of the 1968 property; namely, the right to exclude others." Because the two groups of residents were not alike in all relevant respects (namely, only owners of portions of the 1968 property paid for the purchase and improvement of the beaches), Wright's claim of disparate treatment did not support an equal protection claim. The ordinance and policy survived rational basis review because they were justified by legitimate government interests: complying with the restrictive covenant, and excluding persons who did not pay for the purchase and improvement of the beaches. *Wright v. Incline Vill. Gen. Improvement Dist.*, No. 10-16043, 2011 U.S. App. LEXIS 26086 (9th Cir. Dec. 27, 2011).

Personnel & Employment

"Policymaking" Employee

Larry Davis was appointed as the Senior Humane Officer (SHO) for the City of Anderson in 1988, following his work on the successful campaign of a Democratic mayoral candidate, Lawler. Despite having no relevant prior experience in animal control, Davis accepted. In 2004, Smith, a Republican, took office as mayor, but did not remove Davis. However, during the 2007 Democratic primary election for mayor, Rensil ran against Ockomon, and Davis actively supported Rensil's campaign. Ockomon won. Davis was terminated as soon as Ockomon took office on January 1, 2008. Davis brought a 42 U.S.C. § 1983 suit against Ockomon and other City officials, claiming that he had been terminated from his position in violation of the First and Fourteenth Amendments.

The district court granted the City officials' motion for summary judgment. An individual could be terminated on the basis of political affiliation when the nature of the public official's job made political loyalty a valid qualification for the effective performance of his position. The court first determined that the official job description controlled the analysis of whether Davis could be replaced for political reasons because the job description was reliable. The SHO's duties, as provided for in the job description, could be characterized as "policymaking" and, thus, properly subject to removal on the basis of political affiliation. Due to the broad discretion exercised by the SHO, the court found that Davis was a policymaker, and that his termination was proper.