Cases



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Civil Rights

Ban on Firing Ranges

Four days after the U.S. Supreme Court's ruling in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (invalidating handgun ban ordinances as violative of the Second Amendment), the Chicago City Council adopted the Responsible Gun Owners Ordinance. This repealed the firearm ban and imposed a permitting regime that, among other things, required four hours of classroom instruction and one hour of firing-range training as a prerequisite to obtaining a permit for lawful gun ownership. However, at the same time, a provision in the City Code prohibited all firing ranges in the City, and also prohibited the "discharge [of] any firearm within the city." The firing-range ban did not apply to governmental agencies or private security companies. The City's position was that firing ranges posed a threat to health and safety, since using firearms meant a risk of injury from unintentional discharges, and there was also the issue of criminals seeking to steal firearms from range users and cars parked at the range.

Three Chicago residents, including Rhonda Ezell (the victim of three attempted burglaries), and several organizations challenged the ordinance on the basis that the Second Amendment protected the right to maintain proficiency in firearm use (including the right to practice at a range), and the City's total ban on firing ranges was unconstitutional; further, the ordinance severely burdened the core Second Amendment right to possess firearms for self-defense because it conditioned possession on range training but simultaneously prohibited range training throughout the City. They also argued that range training was protected expression under the First Amendment. The plaintiffs sought a preliminary injunction and declaratory relief invalidating the ban, which the district court denied, but which was granted on appeal.

In a ruling of first impression, the U.S. Court of Appeals for the Seventh Circuit found that (1) firing-range training was not categorically unprotected by the Second Amendment, and (2) to justify its ban, the City had to satisfy a heightened standard of judicial review. It failed to do so.

The appellate court noted that the district court's decision contained "several critical legal errors," and was "a bit hard to follow; standing and merits inquiries [were] mixed in with the court's evaluation of irreparable harm." Most of these errors were based in the district court's finding that there were ranges outside the City that the plaintiffs could use.

On standing, the Seventh Circuit found the court below erred in finding that the Second Amendment protected an individual right, not an organizational one. Further, the availability of range training outside the City neither defeated the organizational plaintiffs' standing nor had "anything to do with merits of the claim. The question is not whether or how easily Chicago residents can comply with the range-training requirement by traveling outside the city; the plaintiffs are not seeking an injunction against the range-training requirement. The pertinent question is whether the Second Amendment prevents the City Council from banning firing ranges everywhere in the city." This led to the error in mis-characterizing the plaintiffs' injury (having to travel outside the City to receive training) as not implicating the Second Amendment at all, or at most, only minimally. "This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption." Moreover, in a facial constitutional challenge, as was the case here (where the violation inhered in the terms of the statute, not its application), individual application facts did not matter. Once standing was established, the plaintiffs' personal situations became irrelevant.

On whether the training and target practice came within the scope of the Second Amendment, both of the Supreme Court's rulings (*D.C. v. Heller* and *McDonald*) suggested that broadly prohibitory laws restricting the core Second Amendment right were categorically unconstitutional. The City's evidence in this case fell far short of establishing that target practice was "wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States." Addressing the appropriate standard of review to be used, the court held that reliance on First Amendment jurisprudence was most apt, and selected a more rigorous showing than intermediate scrutiny, if not quite strict scrutiny. The City had the burden of establishing a strong public-interest justification for its ban, one that showed "a close fit between the range ban and the actual public interests it serve[d], and also that the public's interests [were] strong enough to justify so substantial an encumbrance on individual Second Amendment rights." Because the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and thefts, the firing-range ban was "wholly out of proportion to the public interests the City claim[ed] it serve[d]." *Ezell v. City of Chicago*, No. 10–35252011 WL 2623511 (7th Cir. July 06, 2011).

Public Official's Privacy Rights – Internal Report

Karen Malleus was a school board member for the Warwick School District.

In 2006, a student at the school told her teacher and her parents that she had seen another teacher hugging a minor student. Malleus was a relative of the reporting student and was informed as well. During the ensuing investigation, Malleus shared her concerns about the reporting student's credibility, and volunteered advice to various administrators that they should have more evidence before disciplining the suspect teacher. The teacher was ultimately warned but not fired.

Two years later, the same teacher was arrested after having intercourse with the minor student, and the school district re-opened the investigation of the 2006 incident. Malleus agreed to cooperate because the attorney in charge of the investigation told her that the report would remain confidential, which was the position taken by the school board. Malleus repeated her opinion that the reporting student had a vivid imagination and a history of exaggerating her conclusions about others. The final report also included the details of Malleus's initial interjection into the 2006 investigation. Malleus though this was unfair, but did nothing in the belief that the report was confidential. When the report was later provided to the press, however, Malleus sued, claiming the school officials violated her constitutionally protected expectation of privacy under the Fourteenth Amendment, because she had revealed her opinion about her relative for a limited purpose and with the expectation that it would be kept secret. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6), finding it failed to state a claim because the Fourteenth Amendment did not protect that type of communication.

The U.S. Court of Appeals for the Third Circuit affirmed. In order to recover in her 42 U.S.C. § 1983 claim, Malleus had to establish that government actors deprived her of a right secured by the U.S. Constitution, which in this case, amounted to the right to share one's opinion about other individuals privately. However, the Fourteenth Amendment's constitutional privacy protection was limited to information about oneself; further, it traditionally applied only to two kinds of personal information: the interest in avoiding disclosure of one's own intimate information (confidentiality of sexuality, medical records, or financial information), and the interest in "independence in making certain kinds of important decisions" (autonomy).

The information for which Malleus was claiming a privacy right fell under neither: her information was voluntarily shared, non-intimate, an opinion rather than fact, and about someone else; nor was it a matter of independent personal decision-making. "We have not previously recognized a third category of Fourteenth Amendment privacy, and we decline to do so now." *Malleus v. George*, 641 F.3d 560 (3d Cir. 2011).

First Amendment

Employee Speech

Maria Díaz–Bigio was a medical social worker at the health department of the city of San Juan, Puerto Rico. While so employed, she made statements in 2004, in both print and radio media, accusing the department's executive director, E., of having serious conflicts of interest, in that he allegedly had economic interests in companies and a medical group that had been given health department contracts. This, she explained, was the reason for differences in the quality of the conditions in different areas of the hospital to the benefit of E., in that areas that generated money for E. were kept in good condition. The City immediately launched an audit and investigation, and obtained statements under oath from E. and others, denying the allegations. The City twice issued a summons for Díaz–Bigio to testify about her allegations, but, despite being expressly directed to go by her supervisor, she refused. The investigation concluded that the charges were false and groundless. The City notified Díaz–Bigio that she would be terminated and had the right to an administrative hearing on the issue. Díaz–Bigio again refused to testify at that hearing and was fired. The letter of termination gave, as reasons, her failure to comply with laws and regulations governing her obligations as a public employee (her false and groundless allegations and her failure to comply with the summons of the investigating body). Díaz–Bigio did not dispute these facts, but sued the City and its officials under 42 U.S.C. § 1983, alleging that she was fired in retaliation for statements she made on matters of public concern in violation of the First Amendment. The district court denied summary judgment to the individual defendants in their personal capacities on grounds of qualified immunity, and the defendants brought an interlocutory appeal.

Generally, the speech of an employee speaking as a citizen on a matter of public concern was protected, provided the employee's interests in the speech outweighed the government's interests as an employer in avoiding disruption in the workplace. The pivotal issue on appeal was whether a reasonable public official could have concluded that terminating Díaz–Bigio's employment in the circumstances would not violate her First Amendment rights. A claim of qualified immunity demanded "deference to the objectively reasonable beliefs and actions of the defendants as to the constitutionality of their actions, even if the beliefs [were] mistaken."

The U.S. Court of Appeals for the First Circuit held that the defendants were entitled to summary judgment because the outcome of the "fact-intensive" balancing of interests was not so clear as to put all reasonable officials on notice that firing Díaz–Bigio would violate the law: "Reasonable officials could well have concluded there was no First Amendment violation on these facts." Although the allegation that a senior public official had a conflict of interest that potentially violated the law was speech on a clear matter of public concern, the speech was one that could also be highly disruptive to the workplace. Further, Díaz–Bigio's allegations and conduct (failing to cooperate with the investigation in defiance of a direct order) "could have been reasonably seen as part of a broader disciplinary problem." Here, the City terminated her only after establishing that there was no basis for her accusations, and the truth or falsity of an employee's speech was itself a factor that was relevant in balancing the interests of the parties. On the facts, "a reasonable public official even could have concluded that Díaz–Bigio made the allegations with reckless indifference

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