ment, arguing the Facebook posts were not protected speech as they were too vague, did not touch on a matter of public concern (and had a private motive), and were "immediately disruptive" to him in his position as the prospective Circuit Clerk. Milligan also claimed entitlement to qualified immunity because no reasonable official could have known that the posts touched on a matter of public concern.

The court granted the motion, in part. There was no evidence that Milligan discharged Mattingly in retaliation for associating with supporters of Kidd and campaigning on his behalf, and Milligan's motion for summary judgment was granted with respect to Mattingly's free association and right to campaign claim. On the other claim, viewing the evidence in Mattingly's favor, her Facebook posts touched on a matter of public concern: County residents were sufficiently concerned about the terminations to contact Milligan with individual complaints, and news media reported on the terminations. In light of the context, content, and format of the Facebook posts, Mattingly's speech related to a matter of public concern. "Even if, as Milligan contends, Mattingly's Facebook posts were made primarily to further her private interest in receiving emotional support and affirmation, the fact remains that she did not make them as an employee but as a citizen." Although Mattingly's first post was vague, in the context and given the additional comment, it was clear it was a reference to the decision not to retain certain employees in the Circuit Clerk's office. Milligan himself—and, according to him, a number of his constituents—clearly understood the posts to refer to his termination decisions.

Milligan failed to point to any evidence that Mattingly's posts adversely affected the efficiency of the Circuit Clerk's office or caused any disruption at all. Bare allegations that the speech caused disruptions supported by minimal or no evidence was insufficient to invoke the *Pickering* balancing test. Milligan was not entitled to qualified immunity because, at the time Mattingly's termination occurred, it was clearly established that a public employer could not fire an employee for speech relating to a matter of public concern when that speech caused no disruption to the workplace. *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 U.S. Dist. LEXIS 126665 (E.D. Ark. Nov. 01, 2011).

Ex-Employee Must Provide Passwords, Login Information

In 2008, a related group of online marketing companies ("Ardis") hired Ashleigh Nankivell as a video and social media producer. All of the Ardis companies were wholly owned and collaboratively operated by its founder, Jordan Finger. Nankivell signed an agreement that stated that all work created or developed by her was the property of the employer, that she would return all confidential information to the employer upon request, and that "actual or threatened breach of [the agreement]" would cause the employer "irreparable injury and damage." Nankivell performed work for a number of entities in Finger's enterprises, including producing videos and maintaining websites, blogs, and social media pages in connection with the online marketing of the companies' products. She maintained passwords and other login information for websites, email accounts, and social media accounts, as well as for third-party servers where content was stored. Because her personal laptop crashed purportedly due to over-use from work-related tasks, the employer provided Nankivell with a used laptop as a replacement. She used this to store much of the work she did.

By 2011, Nankivell was looking for new employment, and was fired in June 2011, allegedly because the employer discovered she was looking for work. Finger requested the return of the laptop, as well as the access information and passwords. Nankivell, however, declined to return the computer and information, and the employer was unable to access a number of online accounts and websites to update them as needed for its marketing purposes. The employer also alleged that the laptop contained proprietary information that was otherwise unavailable to it. (Nankivell maintained that the laptop was synced with the desktop she used at work, so all of the work files on the laptop were within the company's control). The employer moved for a preliminary injunction against Nankivell, to require her to return the employer's login information for various websites, and return the laptop and its content.

The court ordered the return of the employer's access information. It was uncontested that the employer owned the rights to that information, and the employee's unauthorized retention of the information could, therefore, form the basis of a claim of conversion. However, the return of the laptop was not ordered. The employer had not demonstrated irreparable harm if the laptop was not returned, and "made no arguments whatsoever with respect to the computer itself; as a mass-produced object, its loss [was] clearly monetarily compensable." *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. Oct. 19, 2011).

Planning and Land Use

RLUIPA & Secular Uses

Calvary Christian Center ("the church") applied to the City of Fredericksburg for a special use permit to lease its church space to the operator of a private day-school for disabled children called Fairwinds, operated on a for-profit basis. The church believed that the Bible mandated that it have a "social ministry" and assist families in the area. It had previously obtained a special use permit to allow it to operate a before and after school day-care called Precious Moments Day Care. Fairwinds would have six full-time staff at the church, and would operate between 8:30 a.m. and 3:00 p.m., utilizing two classrooms and office rooms on the second floor of the church building. The council members rejected the application, referring to the number of group homes and group facilities already functioning in the area; the propriety of providing services to special-needs students from outside the area; the nature of the disabilities of the Fairwinds students; and the safety of the day-care students in the same building. The church sued, claiming that the City's decision violated the Americans with Disabilities

Act (ADA) and the Rehabilitation Act (RA), the Religious Land Use and Institutionalized Persons Act (RLUIPA) (i.e., that the City treated the church on less than equal terms with other, secular assemblies or institutions, and discriminated against it on the basis of religion), and the Free Exercise and Free Speech Clauses of the First Amendment (that the City discriminatorily targeted religion and religious worship). The City moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.

The court granted the application. "None of the plaintiff's claims can succeed, and the Court will grant the motion to dismiss. The plaintiff lacks standing to assert either the ADA or RA claims. The plaintiff has not alleged that operating the school amounts to religious activity, and so the church's RLUIPA and Free Exercise claims fail. Finally, the Free Speech claim fails for several reasons: operating the school is not expressive conduct, the City's zoning ordinance is content neutral, and the zoning regulations are neither vague nor overbroad."

The church lacked standing to pursue an associational discrimination claim under the ADA or RA because it had not claimed any unlawful discriminatory effect that the church itself suffered as a result of its association with the Fairwinds students, and failed to demonstrate a hindrance to the students' ability to bringing suit on their own behalf to protect their own interests, as required to establish third-party standing under the ADA or RA. The court further held that the church had "not pled any facts demonstrating that the operation of the day school by a third party [was] a religious exercise. Talismanic assertions lacking factual support are insufficient to satisfy the pleading standard set" by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

On the First Amendment claims, the church argued that its "speech" was its ministry to disabled children. This, however, was insufficient to implicate the First Amendment: "[e]ven if Calvary intended to communicate a message through allowing a school to operate on its premises, the message is not 'particularized' as required," and allowing the school to operate on its premises was not speech. The zoning ordinance was content neutral because it did not regulate speech; it simply regulated *how* speech occurred, and not its content. The City's zoning laws clearly served a number of important governmental interests, and imposed, "at worst, an incidental inconvenience" on the church. According, the free speech claims failed. *Calvary Christian Center v. City of Fredericksburg*, No. 3:11-CV-342-JAG, 2011 U.S. Dist. LEXIS 134290 (E.D. Va. Nov. 21, 2011).

Search and Seizure

Arrest & The Right to Refuse to Answer Questions

Does a person have a First Amendment right to refuse to answer a law enforcement officer's questions during an investigatory visit? A federal appellate court recently considered this issue in *Koch v. City of Del City*, No. 10-6105, 2011 U.S. App. LEXIS 22095 (10th Cir. Nov. 02, 2011).

Vicki Koch and her parents were in some kind of relationship with an elderly woman, Gladys Lance. In 2004, Lance signed an affidavit purportedly revoking power of attorney from her niece, Patricia Loar, and appointing Koch and her parents: she later appointed them her guardians and the "conservators or guardians" of her property. She agreed to pay Koch $1,500 month for her care-giving services. Koch's father sold Lance's home, and several days later he placed her in a nursing home without notifying Loar or the Oklahoma Department of Human Services (DHS). When Loar and DHS could not locate Lance, Loar filed a court petition seeking to be appointed as "special guardian" to Lance and her property. The petition was granted, and the court authorized Loar to contact law enforcement to find the whereabouts of Lance, and ordered Koch and her family to disclose Lance's whereabouts. Both Koch and her attorney were notified of this order, but Koch apparently did nothing for several days.

As a result, police officer Beech was told during his shift that a "pick-up order" was in place for Lance, and that he should periodically check Koch's residence to see if anyone was there. Beech went to Koch's residence and found Koch standing outside. When he asked about Lance, Koch told him that he should not be on her property and that he should talk to her attorney. Beech replied that he had an emergency pickup order, and that if Koch did not tell him the whereabouts of Lance, he would arrest Koch for obstruction. She allegedly responded with "an expletive-laced excoriation" and punched him in the chest before he arrested her. She claimed that she didn't resist; that Beech used excessive force and threatened to get Lance's location, even if he had to "beat it out of her." Koch was charged with assault and battery upon a police officer and with obstruction, but the charges were dropped. She sued the City and Beech in a Section 1983 action, claiming a violation of her Fourth Amendment rights. The district court granted the defendants' motions to dismiss, concluding that Beech was entitled to qualified immunity on Koch's claims, and that her claims against Del City failed as a matter of law. Koch appealed, arguing that Beech could not have had probable cause to believe that she committed obstruction by failing to disclose where Lance was located.

On appeal, the U.S. Circuit Court of Appeals for the Tenth Circuit affirmed. An arrest without probable cause that a crime had been committed violated the Fourth Amendment. The encounter between Beech and Koch was an investigative detention under *Terry v. Ohio*, and Beech could reasonably believe that Koch had information concerning Lance's whereabouts. Reviewing the totality of the circumstances in assessing whether an officer had probable cause to arrest, the court concluded that neither of the statements Koch made (to get off her property and to speak to her attorney) could establish probable cause to arrest for obstruction in this case. However, in the qualified immunity/summary judgment context, a plaintiff was required to show both that the defendant violated a constitutional right and that the right was clearly established. At the time of Koch's arrest, it was not clearly established that, under the circumstances, she had a right to re-

continued on page 38