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IMLA NEWS
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FEATURED CASE:

SPEECH: NO FIRST AMENDMENT CLAIM FOR PARENT BANNED FROM SCHOOL GROUNDS AND REPORTED TO CHILD PROTECTIVE SERVICES

Davison v. Rose, no. 20-cv-1683 (4th Cir. Dec. 3, 2021)

Affirming the district court, the Fourth Circuit holds that a father who made threats of violence against school officials and school board members, and who required his elementary school age children to distribute anti-school board flyers during class time, had no claim for censorship, retaliation, or denial of due process.

In September 2015, Brian Davison (Davison) appeared at a back-to-school night and PTA meeting in Loudon County, Virginia (County), vigorously attacking the County School Board (LCSB). His bellicose behavior prompted the school's principal, Tracy Stephens (Stephens), to serve Davison with no-trespass letters. They prevented Davison, for the remainder of the school year, from (1) attending any public events in the school, including PTA meetings; (2) using any outdoor public facilities such as the track or playgrounds; and (3) dropping off or picking up his children at the school without first getting permission. (He was permitted to keep attending LCSB meetings and participate in public comment).

Davison then involved his elementary school-age children in his efforts. At his direction, on school property and during classroom hours they distributed flyers which included Stephens's picture and Davison's criticisms of school policies and alleged violations of federal law. Based on the children's discomfort at playing this role and believing that

they were being coerced, as well as peripheral information about Davison's erratic behavior, Stephens contacted Child Protective Services (CPS), which conducted an inquiry but did not conclude that action needed to be taken.

In a letter to Davison referencing the school's no-trespass posture, Stephens wrote:

> [Y]ou have stated publicly that you are a Navy veteran, publicly made allusions to American Sniper, used the term "SHOTGUN" in reference to a public meeting, referred to "BE PREPARED" regarding a public meeting, referred to a public school as a "target rich environment," used a quote that referred to a "hand grenade," made references to public officials' children, and made a reference to public officials meeting their creator [, which] have all contributed to intense fear among staff, caused disruption and time off tasks, causing great alarm and concern for the safety of Seldens Landing Elementary School. Your tone has been both aggressive and intimidating. Staff has [re]viewed your demeanor and are very concerned about your behaviors.

That letter gave Davison the opportunity to appeal, and made further accommodations for Davison as a parent, including telephone conferences regarding his children's progress in school. Davison appealed the letters to Stephens, and then to the LCSB, both of whom denied the appeal.

In December 2015, Davison filed a Petition for Review of the no-trespass letters in the Circuit Court of Loudoun County, claiming that they violated his First and Fourteenth Amendment rights, and seeking injunctive relief. He then filed a Section 1983 action in federal court in May 2016 while his state court petition was still pending, suing Stephens, the LCSB, and various other individuals associated with the school and LCSB. That proceeding was stayed pending the outcome of the state petition; once the state court dismissed the petition, the federal court also did so, holding that res judicata or qualified immunity barred each of the claims.

Davison appealed, resulting in several years of intervening litigation. The district court ultimately denied in full Davison's motion for partial summary judgment, dismissing his First Amendment free speech and assembly claims against the LCSB and various LCSB officials in their individual capacities and denying his claims for injunctive relief and money damages. The district court also dismissed Davison's claims that the no-trespass letters and involvement of the CPS were in retaliation for his lawful and protected speech. And it dismissed his Fourteenth Amendment procedural due process claim because his behavior made prior notice and a hearing impracticable.

The Fourth Circuit affirmed in full.

Res Judicata: The district court had dismissed some claims against LCSB based on res judicata. Under Virginia law, a valid res judicata defense requires: (1) a final judgment issued on the merits of a prior suit; (2) identity of parties—or those in privity with the parties—between the prior and present suits; and (3) that the prior proceeding

arose out of the same conduct, transaction, or occurrence. The Fourth Circuit found each of these requirements to be satisfied. “Because Davison brings the same claims against the same party—LCSB—res judicata bars these claims.”

Censorship: The Circuit next considered Davison’s claims against individual LCSB members for their alleged censorship of his speech at LCSB meetings. This analysis required the court to assess (1) whether the “speech [was] protected by the First Amendment....;” (2) “the nature of the forum” in which Davison spoke; and (3) “whether the justifications for exclusion from the relevant forum satisf[ied] the requisite standard.”

All parties agreed that the school board meetings were limited public fora. Government entities may create a limited public forum in a specified location for a limited use, so long as they do not impose those limits in a manner that discriminates based on the speaker's viewpoint. Here, the LCSB was “justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions ... to further the forum's purpose of conducting public business.” The LCSB’s policy regulating the public's participation at school board meetings limited the content of public comments to matters related to the public schools and did not allow comments “that are harassing or amount to a personal attack against any identifiable individual,” including school board members. The policy stated that it limited public comment in order “to maximize citizen participation and to allow the Board to transact public business in an orderly, effective, efficient and dignified manner.” Personal attacks were prohibited because they had “the potential for causing unnecessary delay or disruption.”

The Circuit upheld the policy, finding it to be “viewpoint neutral, and the restriction is reasonable in light of the purpose of the LCSB. The policy prohibits all personal attacks, regardless of viewpoint, because they cause ‘unnecessary delay or disruption to a meeting.’”

Retaliation: Davison asserted that the defendants engaged in First Amendment retaliation via the no-trespass letters and by contacting CPS about the welfare of his children. The Fourth Circuit, like the court below, found an insufficient causal nexus between Davison’s protected speech and the defendant’s actions. While his generalized criticisms of staff were clearly protected speech, his allusions to “American Sniper,” calling the school a “target rich environment,” and referring to public officials “meeting their creator” were evidence that the letters had been issued in response to non-protected speech.

CPS: Davison's contention that Stephens retaliated against him by contacting CPS was a closer issue, given the possibility of serious consequences for parents who are reported due to the mistaken suspicion of child abuse. However, Virginia has designed its child abuse mandatory reporting system “in a way that prioritizes the protection of children over the potential costs of a mistaken report.” Under Virginia law, Stephens was a “mandatory reporter” of child abuse: teachers who “have reason to suspect that a child is an abused or neglected child, *shall* report the matter immediately to the local

department of the county or city wherein the child resides . . . " and mandatory reporters who fail to notify the authorities are subject to fines. The law errs on the side of immunity for those reporting: they "shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent." Stated otherwise:

> So long as the reporter was acting in the interest of protecting a child rather than out of self-interest or with an intent, for example, to settle some score with the child's parent, the plain intent of the legislature was to allow immunity to attach to the reporter.

The burden was therefore on Davison to overcome the presumption that immunity should attach. He could not do so. Mere assertions that "Stephens frivolously referred Davison to CPS," or "conspired with senior LCPS officials to refer Davison to CPS for child abuse," were insufficient, without more. Buttressing Stephen's position was the fact that several teachers had reported to her that Davison's children were crying as they handed out their father's fliers, that his daughter had come to school without lunch and not appropriately dressed for inclement weather, and so on.

In affirming, the Circuit recognized the challenges created by Virginia's policy:

> Hard choices surround the issue of suspected child abuse. Virginia's reporting statute and its social services apparatus are both based on the assumption that false positives—mistaken reports of child abuse followed by DSS investigations—are less harmful than false negatives—serious harm to a child that could have been prevented but was not.... There is no conceivable child abuse prevention policy that both gives government the ability to respond to threats in order to prevent harms before they occur yet prevents government from investigating before being certain that a perceived threat is real. Policymakers must choose which of these harms is the greater evil.
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> This case makes concrete the consequences of a false positive ... But because the Commonwealth of Virginia in designing its child abuse reporting scheme and its social services apparatus decided the costs of an occasional mistaken report were far less than the costs of lasting harm to the lives and safety of young children, the judgment must be affirmed.

Qualified Immunity: Qualified immunity shields government officials performing discretionary functions from personal-capacity liability for civil damages under Section 1983 unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Here, in responding to Davison's threatening behavior, "[n]o person in Defendants' position would have reasonably thought that he or she was engaged in conduct that violated the law, clearly established or otherwise." The court cited a comparable case involving a father who harassed his son's basketball coach and various school officials: in *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999) the Fourth Circuit held that "[t]he right to communicate is not limitless,"

particularly where the plaintiff has engaged in a "continuing pattern of verbal abuse and threatening behavior towards school officials."

Due Process: Davison asserted that Defendants "violated [his] Fourteenth Amendment Rights to procedural due process when they deprived him of constitutionally protected fundamental liberty interests without providing notice or a meaningful opportunity to be heard prior to the deprivation." These purported liberty interests included the right to direct his children's education, the right to enter school property, and the right of free speech on school property without fear of retaliation. He also contended that he was deprived of procedural due process when his right to post messages on the school and LCSB Facebook pages was suspended.

Here, because of Davison's alarming behavior and allusions to violence on school grounds, the sending of an immediate no-trespass notice with subsequent opportunity to appeal, constituted an adequate post-deprivation remedy. And because his access to social media had been restored, there was no need for a prospective injunction.

LINK

SHORT SUMMARIES:

1st CIRCUIT – CLIMATE CHANGE – NATURAL GAS – BEST AVAILABLE CONTROL TECHNOLOGY

Also on Friday, the 1st Circuit concluded that the MADEP was not wrong in deciding that a company could use natural gas to operate a turbine at its natural gas compressor station and was not in violation of the MDEP regulations that required it to use "best available control technology.". The cities had sought to require the company to use electric motors to reduce the nitric oxide emissions. Essentially, the Court upheld a decision that found the BACT analysis eliminated the electric motor alternative as not being cost effective as a solution.

LINK

1st CIRCUIT – CONTRACTS WITH GOVERNMENTAL ENTITIES – STAFFORD ACT – PREEMPTION

Something I told my students over the years and told friends who frequently didn't believe it – when you deal with the government you do so at your own risk of its authority. On Friday, the 1st Circuit affirmed a lower court decision that dismissed a contractual dispute in which a contractor that responded to an emergency affecting Puerto Rico and expended significant time, energy and effort on behalf of a municipality in Puerto Rico sought to recover its perceived contractually agreed upon sum. Why, Puerto Rico law at the time required that a contract with a Puerto Rico municipality be in

writing and be submitted to the Comptroller within a specified time. In the facts of this case, the latter did not happen and the court concluded that neither had the former. While the Mayor had signed a Letter of Authorization, it was not countersigned by the Plaintiff nor did it incorporate the major terms of the proposal and scope of work (I may be editing these facts down quite a bit, so read the case for more detail).

Sometimes when a court goes into detail about arguments not preserved for appeal, you wonder if the court is miffed with counsel for the offending party, as those statements seem to suggest some lack on the part of counsel that might lead to a malpractice action. OUCH. Could be wrong but correct me if I'm wrong. One of those arguments involved a claim that the Stafford Act preempted Puerto Rico law and would have afforded the Plaintiff recovery. I'm not sure of the extent to which the Stafford Act might preempt local procurement laws but as you address an emergency, you need to make that assessment as FEMA may not cover your costs.

LINK

1ST CIRCUIT – EMPLOYMENT LAW

Of all the Circuits, I find the 1st often the easiest to read and the one least likely to prolix opinions. Take the case of Felix vs Town of Kingston as an example. There a person appointed to a term of office sought to sue the town for various violations of federal acronyms including FMLA and ADA. As something of a lesson to us all, she claimed that after her FMLA leave expired and she showed up for work, she was denied because according to the Town Attorney her leave had expired, and she was "terminated". The Court recognized that the word "terminated" was a euphemism employed by the attorney as the actual facts showed clearly that her term of office had expired. The expiration of her term of office doomed her claim that she lost her job due to retaliation as well, since it was a statutory term of office and a local governing body is under no obligation to reappoint an official to a new term of office.

LINK (decided 12/23/2021)

6th CIRCUIT – ADA – VICARIOUS LIABILITY

In a 2-1 decision the 6th Circuit reviewed a case in which the plaintiff sued asserting that the city of Detroit was liable vicariously when the plaintiff, who uses a wheelchair, was arrested and transported without the wheelchair being secured causing him injury. The majority reviewed the Act and the many decisions that conclude that the Act does not impose vicarious liability on a city (or for that matter anyone). As seems to be the case more frequently, the court noted that the plaintiff was given an opportunity to assert direct liability before the lower court and chose not to do so. Judge Karen Moore dissented and as she is wont to do sought to find a source of city liability in the remedial

purpose of the Act rather than follow the course other courts have taken. Why she doesn't run for Congress is beyond my ken.

Congratulations to Cheryl L. Ronk, CITY OF DETROIT and its legal team for a great win.

LINK (decided 12/21/2021)

8TH CIRCUIT – EPA REGULATIONS – NATIONWIDE INJUNCTIONS

In what I consider to be an astounding victory for the Iowa League of Cities represented by John Hall that John C. Hall, Esq. of Hall & Associates a Washington DC firm passed along, the 10th Circuit issued a mandate to prevent the EPA from enforcing its blending rule within the 8th Circuit but refused to grant a nationwide injunction. The court noted: In 2013, we held that the Environmental Protection Agency's (the "EPA") "blending rule" was substantively defective because it "applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe." Iowa League of Cities v. EPA, 711 F.3d 844, 877 (8th Cir. 2013)." The Iowa League on behalf of its members has fought tirelessly to stop the EPA from enforcing what the 8th Circuit concluded was its illegal rulemaking, while the EPA ignored the court's decision. The result was this message from the court: "The EPA's direct violation of our prior mandate warrants mandamus relief." The Court denied the League's request for a nationwide injunction, so for those in other circuits who find the EPA blending rule to be difficult and expensive, you may want to reach out to the Iowa League for information about its success. As an aside, I've tried to attach the Order and think that in this day of the ease with which courts issue nationwide injunctions it's too bad the 8th didn't issue one especially once it concluded the EPA was effectively ignoring its prior opinion.

10th CIRCUIT – ADA – REASONABLE ACCOMMODATION – LEAVE AS ACCOMMODATION -FMLA

Today, the 10th Circuit decided an ADA case involving an employee who has PSTD associated with being the victim of domestic violence. The employee worked in the courts as an in court clerk and found that domestic violence cases in the courts triggered her PTSD. Her medical providers agreed and she asked for accommodations. There was a fair amount of interactivity over the course of several months. The gist of the decision in this case seems to be that when the employee asked to have leave extended beyond the FMLA requirement as an ADA accommodation, the employer had the duty to do so or to show why it was unreasonable to do so. The case also discusses the back and forth between employee and employer in considering accommodations for her PTSD and the court sided with the employee in concluding the employee had done enough to raise the need for accommodation in seeking another working environment. Bear in mind this is pleading stage where the lower court granted summary judgment to the city employer.

Clearly, this case as others raise some difficult issues for employers. How long must you leave open a position to grant leave to an employee under the ADA or do you need to leave the position open, fill it and then offer the employee some other position for which they qualify on return form leave if such a position is available? This might make for a good discussion as part of a program on Employment law that IMLA is planning for later in 2022. For managers, these issues can be quite difficult and finding the correct approach to addressing requests for accommodation while not incurring liability makes for a very difficult minefield to traverse.

LINK

11TH CIRCUIT SEX – TRAFFICKING

Several victims of sex trafficking sued a number of people and entities under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595(a) TVPRA, and the lower court dismissed several major hotel chain franchisors. The 11th Circuit upheld the dismissal asserting that the complaint did not sufficiently allege complicity by the franchisors in sex trafficking at properties owned and operated by their franchisees. The concurrence made a point to remind all that the suit sufficiently asserted liability as to the franchisees.

We hold that Section 1595(a) should be applied according to its plain meaning: that is, to state a claim for beneficiary liability under the TVPRA, a plaintiff must plausibly allege that the defendant (1) knowingly benefited (2) from taking part in a common undertaking or enterprise involving risk and potential profit, (3) that the undertaking or enterprise violated the TVPRA as to the plaintiff, and (4) that the defendant had constructive or actual knowledge that the undertaking or enterprise violated the TVPRA as to the plaintiff.

LINK (decided 12/22/2021)

NOTE: While I have no idea as to the logistical or legal authority to implement this thought, after reading this case, I thought it might make sense for cities and counties to identify advocacy law firms who might be interested in bringing actions on behalf of victims under TVPRA and making referrals of victims to these firms when victims are identified. Perhaps, a public announcement of the effort would help deter owners of transient housing from allowing their properties to be used for sex trafficking.
I felt that the decision also suggested that there could be franchisor liability based on reframed allegations of facts reflecting their complicity in the activity, although, based on the narrow interpretation given the Act by the 11th, that may be a hurdle to high to overcome.

CITY ATTORNEY CONTRACTS – WHO REPRESENTS THE CITY – WA COURT OF APPEALS DIV 1

Not that this will help in situations like this but let me remind you that IMLA has a couple of Model City Attorney Contracts available for use on our website. They likely wouldn't have helped here because the battle involved a dispute between he mayor and council over who should or could represent the city. Rather than recite the facts, let me offer the holding:

"We hold that the mayor did not have the authority to appoint a city attorney under RCW 35A.12.090 because the city council had not passed an ordinance making the position an "appointive officer" as required by RCW 35A.12.020. The City obtained legal services by "reasonable contractual arrangement" authorized by RCW 35A.12.020, and the legislature has placed the power to enter into such contracts, under RCW 35A.11.010, with the city council, not the mayor. The city council had the authority to execute legal services contracts with these law firms and the mayor lacked veto power to reject the council's decision."

LINK (decided 12/27/2021)

FIRST AMENDMENT – YOU CAN PULL ON SUPERMAN'S CAPE – WASHINGTON COURT OF APPEALS DIV 1

So, a police officer on foot patrol at night peaceably looking to serve and protect when a person drive past without lights on and "yelled "f*ck the police" while pointing as if he had a gun". The City of Seattle charged Johnson with harassment and Johnson stipulated to the facts in the police officer's report. The municipal court found Johnson guilty, and on appeal, the superior court affirmed. The Court of Appeals Division 1 concluded however that the Defendant's actions were protected by the First Amendment. The Court concluded that the officer reasonably had fear of bodily injury based on the facts, but that "the evidence does not establish that Johnson made a true threat."

LINK (decided 12/27/2021)

NEBRASKA DISTRICT COURT – FIRST AMENDMENT – CITY ATTORNEY – QUALIFIED IMMUNITY

As most of us know, some of our residents take umbrage at our work. Some feel the need to overwhelm us with calls, letters, emails and public information act requests. One Nebraska city sought to shield itself from such a resident by filing an action to enjoin the resident from this behavior. The case was dismissed and the resident filed suit in federal court for damages against city, the city attorney and mayor which the city's insurer recently settled for $16,000. The court denied qualified immunity to the City Attorney and Mayor asserting that each should have known of the resident's right to petition the government under the First Amendment.

LINK

I'll admit that when I was a youngster I took the opportunity to write one such resident a letter suggesting that he refrain from boorish conduct in harassing some county employees through incessant calls and letters (this was before emails and texts). Gratefully, the harassment ended, but thankfully for me so too has the limitations period as my resident friend might well have used this Nebraska case against me.