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IMLA NEWS
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FEATURED CASE:

SPEECH: Municipal Advisory Board Volunteer May be Dismissed by Appointing Councilperson due to Apparent Antifa Support.

Lathus v. City of Huntington Beach, no. 21-56197 (9th Cir. Jan. 5, 2023).

While a volunteer member of a municipal advisory board has a constitutional right to express her views, the City Council member who appointed the volunteer may terminate her service because the volunteer is the "public face" of the appointer.

FACTS: Kim Carr (Carr), a Huntington Beach (City) Councilperson, appointed Shayna Lathus (Lathus) to the City's Citizen Participation Advisory Board (CPAB). Each councilperson appoints one member to the seven-person CPAB and may remove that member without cause. The CPAB's mandate is to "provide citizen participation and coordination in the City's planning processes" related to a federal Department of Housing and Urban Development block grant program, focusing on issues facing "low and moderate income households." The CPAB holds regular open meetings to "assess the needs of the community," "evaluate and prioritize projects," "obtain citizen input," and "provide specific recommendations" to the City Council. After joining the CPAB, Lathus was photographed at an immigrants' rights rally, standing near individuals whom Carr believed to be "Antifa." Carr then instructed Lathus to write a "public statement on social media denouncing Antifa." Lathus did so, believing that continuing in her position on the CPAB depended on it. Carr found the statement inadequate and removed Lathus from the CPAB, stating that "[t]hose that do not immediately denounce hateful, violent groups do not share my values and will not be a part of my team."

Lathus sued the City, claiming retaliation for exercising her First Amendment rights to free speech, association, and assembly. She alleged that Carr's demand for a public statement amounted to unconstitutionally compelled speech, and sought various remedies, including reinstatement to the CPAB.

The district court dismissed the complaint, holding that under *Blair v. Bethel School District*, 608 F.3d 540, 543 (9th Cir. 2010), "Carr was not politically powerless to disassociate herself from Plaintiff's public actions through a process that authorized appointment and removal in Carr's sole discretion." The court held that "Carr was permitted to consider the political ramifications not only when she decided to appoint Plaintiff but also when she later elected to remove her. . ."

APPEAL: The Ninth Circuit affirmed, holding that, while Lathus unequivocally had a First Amendment right to attend a rally, Carr also had the right to terminate her membership on the CPAB based on such activity. The Circuit found that *Blair* was not controlling: in that case, the plaintiff had been elected as vice president of a school board by its members. Blair criticized the district superintendent to a reporter, whereupon the other board members removed him from the position. The Circuit found no First Amendment violation in the removal of an elected official "from a titular position . . . by the very people who elected him to the position in the first place." In contrast to Blair, Lathus had neither gained nor lost her appointment due to a vote by her fellow CPAB members, nor was her dismissal simply the result of an "internal political leadership election."

But even if not controlling, *Blair* made clear that the First Amendment rights of government officials are not absolute. The Supreme Court has so recognized in *Elrod v. Burns*, 427 U.S. 347 (1976), which holds that employees in "policymaking positions" may be dismissed for engaging in activities protected by the First Amendment so that "policies which the electorate has sanctioned are effectively implemented." And in *Branti v. Finkel*, 445 U.S. 507, 518 (1980) the Court further clarified that "the ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

The Circuit therefore analyzed whether "commonality of political purpose" with Carr was an appropriate requirement for Lathus's service on the CPAB. It was: because each member of the CPAB, an entity that advises on matters of policy and solicits public feedback, is appointed and removable by a particular councilperson, board members speak to "the public and to other policymakers on behalf of the official" who appointed them. The public could readily infer that a CPAB member's actions and statements in that role reflect the current views and goals of the appointing councilperson. Lathus was Carr's "public face" on the CPAB, and the public was entitled to assume that she spoke on Carr's behalf.

The mission of the CPAB—to enhance the provision of housing to low and middle income city residents—was also significant. The CPAB acts as a conduit between the community and City Council. Its directive is to "assess the needs of the community," "evaluate and prioritize projects," "obtain citizen input," and "provide specific recommendations" to the Council; it conducts regular meetings open to the public to obtain such input. The CPAB member is thus "an adviser [who] formulates plans for the implementation of broad goals," *Elrod*, 427 U.S. at 368, further entitling councilperson to an appointee who represents her political outlook and priorities.

These facts differentiated Lathus' posture from certain situations where the Circuit has held that retaliation against officeholders for their exercise of First Amendment rights is forbidden. For instance, the court has found that First Amendment protections extend to those who "did not have authority to speak to the media without prior approval of higher-ranking officials," or did not "formulate or substantially influence plans to implement the broad goals" of the appointing authority.

In contrast, Lathus's role on the CPAB required her to speak to the public and plan low- and middle-income housing and development policy. She could plainly undermine Carr's credibility and goals, and therefore could be dismissed for lack of political compatibility.

COMPELLED SPEECH: The Circuit's analysis of Lathus's retaliation claim also dictated the outcome of her compelled speech claim. The central "constitutional issue" in compelled speech cases is whether the "State forced one speaker to host another speaker's speech." (citation omitted). Lathus's complaint had asserted that a "coerced" statement about her rally attendance was "a condition of . . . retaining her status." The Circuit found that "an elected official can compel the public speech of her representative because that speech will be perceived as the elected official's own." Therefore, "Just as Carr was entitled to political loyalty from her appointee to the CPAB, she was also entitled to compel that appointee to espouse her political philosophy."

21-56197.pdf (uscourts.gov)

SHORT SUMMARIES:

Florida Supreme Court – Preemption – Gun Regulation – Local Authority – Local Immunity

The Florida Legislature has a philosophy different from that of many of its more urban centers and has exercised its legislative sovereignty to preclude or preempt local governments from deviating from that philosophy. In one of the many areas of political polarization, the state legislature has preempted local governments from acting to regulate guns. That preemption included penalties, both civil and criminal, for any local official having the temerity to offer a proposal implicating the regulation of a gun. Several communities sued to seek declaratory relief from the oppressive preemption and won relief in the lower court, lost it in the intermediate appellate court and lost again at the Sate Supreme Court. While the whole concept of state preemption flies in the face of allowing local governments to act as laboratories of democracy and regardless of how you may feel about the underlying philosophy of the state, the result seemed foreordained by the doctrine that local governments are mere creatures of the State. Similarly, I believe most states, if not all, adhere to the rule that the common law can be changed through statute (some, to my mind surprisingly, believe the common law can be changed through court decisions). IMLA fights for local autonomy and we hope that if your government is not an IMLA member you join, and if already a member

you support our legal advocacy program so that we can protect the democratic principles foundational to our local governments.

Fried v. State

4th Circuit – Substantive Due Process – Monell Liability

The estate of a person who tragically died from carbon monoxide poisoning sued the Housing Authority that leased him an apartment. His estate sued asserting violations of substantive due process in the handling of maintenance of the property that allegedly caused the death. At the pleading stage, the lower court dismissed the case, but on appeal the 4th Circuit reversed finding that the Plaintiff alleged sufficient facts to overcome a deliberate indifference standard and sufficient facts to assert Monell Liability. The facts alleged paint a despairing picture of how the Housing Authority treated lower income families. Bear in mind that this is the pleading stage. Nevertheless, pivotal to the court's decision, the Authority adopted a policy recognizing the importance of carbon monoxide detectors to life and safety and required that the be installed and maintained in the "private" residences under the Authority's control, but not in the properties it rented to lower income families. The Authority apparently had one inspector for 2600 units and after the incident the code enforcement folks concluded that there were some 870 code violations throughout the units and that many did not have the state required carbon monoxide detectors and smoke detectors. The suit alleged that the Authority failed to perform preventative maintenance on its gas furnaces and the after the fact inspection found natural gas leaks in some units. Long story short, the complaint asserted sufficient facts for a trial according to the court. At trial the allegations may or may not prove true.

Washington vs. Housing Authority

(A law department having a housing authority for a client can use this unfortunate case to consider doing a legal audit of the authority's management of its units under the various applicable codes to ensure compliance with code and advise the client of the potential liability for not ensuring compliance).

11th Circuit – American Rescue Plan – Spending Clause Power

"Thirteen states sued the Treasury Secretary and related officials to challenge a tax offset provision in the American Rescue Plan Act, a coronavirus stimulus package passed by Congress in 2021. That off-set provision prohibits states from using Rescue Plan funds "to either directly or indirectly offset a reduction in [their] net tax revenue" that results from a change in law that "reduces any tax." 42 U.S.C. § 802(c)(2)(A). The States argued that this "tax mandate" exceeds Congress's authority under the

Constitution." The panel of the 11th Circuit affirmed a lower court decision to enjoin the offset provision of the American Rescue Plan as violating the concept of dual sovereignty inherent in the Constitution. As that provision of the ARP was severable only it was enjoined.

West Virginia v. US Dept. of the Treasury