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Attorney's Fees: Where Plaintiff Obtains Substantially All Relief Sought, It Is "Prevailing Party" Entitled to Attorney's Fees

Rodolfo Sanchez v. City of Austin, No. 13-50916 (5th Cir. Dec. 18, 2014).

The Fifth Circuit has reversed a lower court's denial of attorney's fees, holding that success in obtaining injunctive relief constitutes grounds for such an award. In 2011 Occupy Wall Street protests broke out in Austin, Texas. Authorities issued criminal-trespass notices to those on City Hall property. Rodolfo Sanchez and Kristopher Sleeman received oral criminal-trespass notices banning them from City Hall property for one year. Austin later formalized its criminal-trespass notice policy, adding provisions that individuals should be warned before receiving a notice and that review of each criminal-trespass notice would be available after receiving it.

Rodolfo and Sleeman sued under 42 U.S.C. § 1983 challenging the policy, both as applied and facially, as a violation of the First Amendment and the Due Process Clause. They sought declaratory and injunctive relief, attorney's fees, expenses, costs, a TRO, and damages. The District Court expedited the case. After a bench trial, and before that court rendered its decision, Austin began to enforce two new policies that effectively quashed the protests. The District Court ultimately held the city's criminal-trespass-notice policy to be unconstitutional on its face and enjoined their issuance. It ordered a permanent injunction and awarded costs to plaintiffs, but denied other relief sought, including attorney's fees under 42 U.S.C. § 1988, despite holding that plaintiffs were the prevailing party. Rodolfo and Sanchez appealed.

HELD: The Fifth Circuit reversed, holding that attorney's fees should have been awarded to the plaintiffs.

DISCUSSION: The court confirmed that Rodolfo and Sanchez were the prevailing party because the "actual relief on the merits of [the plaintiff's] claim materially alter[ed] the legal

relationship between the parties by modifying the defendant's behavior in a way that directly benefit[ed] the plaintiff." In short, the plaintiffs obtained declaratory and injunctive relief, and thus prevailed.

The Court of Appeals found that the District Court erred in holding that "special circumstances" rendered fees unjust in this case. The lower court held the limited nature and scope of the injunctive relief and the limited injury to the plaintiff's rights constituted "special circumstances." The Circuit Court disagreed. The "special circumstances" exception to the general rule that prevailing parties receive attorney's fees is a very narrow one.

The court held that the two justifications for denying attorney's fees identified by the lower court were relevant to the *reasonableness* of an award, not to *whether the fees were awarded* at all. The city argued that though the plaintiffs obtained two of the remedies they sought – injunctive and declaratory relief – these were *de minimis* and thus, under *Farrar v. Hobby*, 506 U.S. 103 (1992), justified a denial of fees. The Circuit Court rejected this argument, finding that *Farrar* did not control. *Farrar* involved plaintiffs who had sought compensatory damages but had not succeeded, obtaining only nominal damages. In contrast, Rodolfo and Sanchez sought declaratory and injunctive relief and only nominal damages and received all but the latter.

The appellate court also took issue with the underlying factual holdings of the lower court. The District Court found that the policy at issue in the case was no longer in effect at the time the court ruled. The Circuit Court agreed that Austin may have stopped issuing new criminal-trespass notices, but that the record was devoid of any evidence showing that the criminal-trespass notice *policy was no longer in effect*. Critically, the city attorney refused to concede at oral argument that the criminal-trespass-notice policy was repealed or amended as a result of the two new policies. Thus the District Court's ruling was clearly erroneous; the Fifth Circuit remanded with instructions to allow attorneys' fees, including funds used to successfully prosecute the appeal.

http://www.ca5.uscourts.gov/opinions/pub/13/13-50916-CV0.pdf (last accessed Jan. 15, 2015).

Due Process: No Procedural Due Process Violation for Applicant's "Self-Inflicted Delays" in Obtaining Business License

B&M Auto Salvage and Towing, LLC v. Township of Fairfield, No. 13-4266 (3d Cir. Dec. 18, 2014).

The Third Circuit has upheld a lower court ruling rejecting a procedural due process claim where the plaintiff's own inaction caused the defendant Township to delay issuing a business license, resulting in plaintiff's subsequent breach of an agreement to sell the business.

Robert and Michelle Hoffman purchased E-Z Joe's Used Auto Parts in December 2007. The couple acquired the necessary business license in March 2008, but the renewal in 2009 was delayed by Fairfield Township, in part because they paid only $150 of a $200 application fee. The Township employee responsible for transmitting the Hoffman's application to the proper state and local authorities did not notify them of problems with the paperwork and eventually took a hostile stance with them after being confronted about continuing delays. The Hoffmans asserted that, as a result of the delay, they were unable to perform under a contract to sell their business for $950,000.

The Hoffmans filed suit, claiming they were deprived of substantive and procedural due process, that Fairfield's Administrator was liable under state law for negligent retention and supervision of an employee, and that Fairfield and the Administrator tortiously interfered with the sale contract. The District Court for the District of New Jersey ruled in favor of the defendants, prompting the Hoffmans to appeal.

HELD: The Third Circuit affirmed the District Court's ruling in favor of the municipality on all counts.

DISCUSSION: Procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. The application process for a business license in Fairfield requires the submission of an application and a fee. The Hoffmans, the record showed, provided a check for $150, $50 short of the $200 required to process the application. According to the Court, once the balance of the fee was provided, the application was approved quickly and the Hoffmans were issued a license. According to the Court, this self-inflicted delay by the Hoffmans was not a procedural due process violation by Fairfield.

As for the negligent supervision claim, the court noted that an employer is only liable for "torts of its employees beyond the scope of the employment where the employer knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee, and could reasonably have foreseen that such qualities created a risk of harm to other persons." The Hoffmans argued that the lower court failed to take into consideration evidence they submitted that showed Fairfield should have known about the employee's "dangerous attributes." The court agreed with its lower counterpart that Fairfield did not have the requisite knowledge and as such, could not be held liable. As for tortious interference claim, the court noted such a claim required the Hoffmans to show that the interference alleged "caus[ed a] third person not to perform the contract." Reviewing the record, however, the Court found that it was the Hoffmans, and not the would-be purchasers, that cancelled the contract for sale before it expired. As a

result, Fairfield could not be held liable for tortious interference with the Hoffmans' contract for sale.

http://law.justia.com/cases/federal/appellate-courts/ca3/13-4266/13-4266-2014-12-18.html (last accessed Jan. 14, 2015).

Employment: Legitimate Grounds for Disciplinary Action Do Not Overcome Causal Connection Between Protected Speech and Retaliatory Action

Smith v. County of Suffolk, no. 13-1230 cv (2d Cir. Jan. 14, 2015)

The presence of various independent factors which would justify disciplinary employment action are insufficient to overcome a finding that protected speech bears a causal connection to such action, according to a recent Second Circuit decision.

Raymond Smith served as an officer on the Suffolk County, New York Police Department from 1981 through his retirement in 2008. In 1997, 2000 and again in 2006, he was reprimanded for using his office computer for personal purposes. In 2007, after he claimed that he was late for a hearing because he needed to find certain files on his computer, the Department searched the computer.

It found e-mails indicating that Smith had repeatedly communicated with newsmedia (including Jeffrey Toobin of CNN) about a celebrated murder conviction that had recently been overturned. In a "tip" emailed to Toobin, Smith contended that the Department's homicide detective may have helped plan the murder and orchestrated a cover-up, that the district attorney appeared to have an ethical conflict and was protecting the actual murderers, and that there was a history of documented abuses committed by the Suffolk County Police Homicide Squad.

The Department assigned Smith to a lesser-paid position and cited him for various infractions, including expressing his personal opinion in a manner tending to discredit the Department, sending e-mails discrediting the Department, using Departmental email to conduct non-Departmental business, accessing non-work related websites, using profanity in his emails, and failing to refer media inquiries to the Department's Public Information Section. Rather than fight the disciplinary proceeding, Smith retired.

Two years later he brought a Section 1983 claim against Suffolk County and its police commissioner, alleging that they retaliated against him for expressing his First Amendment rights.

The District Court determined that Smith's communications the media constituted speech made in his capacity as a citizen on a matter of public concern, and as such were protected under the First Amendment. The court also found that Smith suffered adverse employment actions including the initiation of disciplinary proceedings, his reassignment and reduction in pay. The court held, however, that Smith failed to demonstrate a sufficient connection between his speech and the adverse actions he suffered. He appealed.

HELD: The Second Circuit reversed, finding a sufficient nexus between Smith's constitutionally-protected speech and the Department's disciplinary actions.

DISCUSSION: To sustain a retaliatory employment action claim, the employee must establish that [1] he has engaged in protected First Amendment activity, [2] he suffered an adverse employment action, and [3] there was a causal connection between the protected activity and the adverse employment action. *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007). To

demonstrate a causal connection "a plaintiff must show that the protected speech was a substantial motivating factor in the adverse employment action." *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 167 (2d Cir. 2006) (internal quotation marks omitted). A plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action. *Cobb v. Pozzi,* 363 F.3d 89, 108 (2d Cir. 2004) (internal citation omitted). Since a direct showing requires plaintiff to provide "tangible proof" of retaliatory animus, "conclusory assertions of retaliatory motive" are insufficient. Once the employee has established a prima facie case, the employer may still be entitled to summary judgment by demonstrating "by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence of the protected conduct.'" *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

Because the Department had specifically referenced Smith's communications with the media, the Circuit Court found that "reasonable juror could conclude that the Department's actions were motivated, at least in part, by a retaliatory animus. Smith has presented direct evidence, which, if credited by a jury, could prove a causal connection between his protected speech and the adverse employment actions."

However this was not the end of the analysis. Under the so-called *Mt. Healthy* rule, the existence of a causal connection is not determinative if there are sufficient additional grounds to justify the disciplinary action. Here, defendants presented considerable evidence of extensive misconduct that was separate and distinct from the protected First Amendment speech. This included: using office computers to send emails to outsiders, disclosing an arrestee's charges; discussing a real estate deal; and accessing numerous non-work related internet websites while on duty for his own personal use and entertainment.

While acknowledging such alternate justifications for the County's taking disciplinary action, the Circuit Court was unpersuaded that they constituted sufficient independent grounds to overcome the retaliatory employment action charge. It reversed and remanded.

http://www.ca2.uscourts.gov/decisions/isysquery/e3c0dd4d-55f2-4a9e-9283-a2f23a5553d2/1/doc/13-1230_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e3c0dd4d-55f2-4a9e-9283-a2f23a5553d2/1/hilite/ (last accessed Jan. 15, 2015).

Police: Failure to Warn Before Reasonable Use of Deadly Force is Not an Automatic Bar to Qualified Immunity

Pedro Quiles v. City of Tampa, No. 14-12875 (11th Cir. Jan. 5, 2015).

The Eleventh Circuit reversed a lower court, holding that a police officer was entitled to qualified immunity despite failing to warn the suspect of the potential use of deadly force.

This case arises out of events during a routine traffic stop in 2011. As the suspect resisted the officer's attempt to take him into custody, he broke free and attempted to flee. A second officer, mistakenly believing that the suspect had taken off with the weapon of the first officer, fatally shot the suspect as he fled.

The decedent's estate subsequently filed suit, alleging that the shooting officer used excessive force in violation of the Fourth Amendment. The officer moved for summary judgment on the grounds of qualified immunity. The district court denied the motion, finding that the officer did not warn the suspect about the potential use of deadly force against him and that such warning was feasible under the circumstances. The police officer appealed the ruling.

HELD: The Eleventh Circuit reversed, holding *per curiam* that (1) the fatal shooting of the suspect by the police officer was objectively reasonable under the circumstances and as such, the use of deadly force was permitted under the Fourth Amendment; and (2) the failure of the police officer to warn the suspect of the potential use of deadly force against him does not preclude the officer's entitlement to qualified immunity.

DISCUSSION: In ruling for the appellant, the court found that the officer's actions were "objectively reasonable" under the circumstances, and thus, not "excessive" in violation of the Fourth Amendment. The court noted that the assessment of reasonableness must account for the fact that police officers are often forced to make "split-second" judgments about the amount of force necessary in a particular situation, and stated that it was "loath to second-guess the decisions made by police officers in the field." The court found that the officer's reasonable but mistaken belief that the suspect was armed and posed a serious threat of physical injury to others, warranted the use of deadly force. Citing *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997); *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010), the court stressed that the law does not require officers to wait until the moment a suspect uses a weapon before acting with deadly force. Viewing the evidence in the light most favorable to the Plaintiff, the court held that the officer's fatal shooting of the suspect was a reasonable use of force under the circumstances, and accordingly, that the officer did not violate the suspect's Fourth Amendment rights.

More importantly, relying on *Penley v. Weippert*, 605 F.3d 843 (11th Cir. 2010) and *Carr v. Tantangelo*, 338 F.3d 1259, 1269 n. 19 (11th Cir. 2003), the court clarified that whether or not a police officer warned a suspect prior to the use of deadly force is only a single, non-dispositive factor in determining reasonableness: "[A]n officer's failure to issue a seemingly feasible warning – at least, to a person appearing to be armed – does not, in and of itself, render automatically unreasonable the use of deadly force." Moreover, the court reiterated that all of the facts and circumstances of a case are relevant when evaluating the use of force.

On these facts, the court concluded that failure to warn prior to the reasonable use deadly force did not bar the officer's entitlement to qualified immunity.

http://media.ca11.uscourts.gov/opinions/unpub/files/201412875.pdf (last accessed Jan. 7, 2015).

Taxation: Ninth Circuit Holds Fannie and Freddie Statutorily Exempt from Real Property Transfer Taxes

City of Spokane v. Federal National Mortgage Assoc., No. 13-35655 (9th Cir. Dec. 30, 2014).

The Ninth Circuit has joined the large preponderance of Circuit Courts finding that the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Feddie Mac") are exempt from real property transfer taxes. Spokane alleged, under various theories, that these two organizations are not statutorily exempt from paying real property transfer taxes. As has been the case in six circuits that considered this issue, the District Court held that the organizations are exempt from the taxes. Spokane appealed.

HELD: The Ninth Circuit affirmed the lower court, thus enforcing the legislative exemption of Fannie Mae and Freddie Mac from real property transfer taxes.

DISCUSSION: Spokane argued that Fannie Mae and Freddie Mac are not statutorily exempt from paying real property transfer taxes because these taxes fall under the statute's requirement that these organizations pay real property taxes. Specifically, the city pointed to 12 U.S.C. §§ 1452(a) and 1723a(c)(2) which state, respectively, that Fannie Mae and Freddie Mac "shall be exempt from all [state and local] taxation, . . . except that any real property of [Freddie or Fannie] shall be subject to State [and] local taxation to the same extent . . . as other real property is taxed." The Circuit rejected this argument by noting that there has long been a distinction between *excise* taxes, those levied against the *use or transfer* of a property, and a tax levied against the property itself. The court found it "clear" that the statute at issue permits state and local taxation of Fannie Mae and Freddie Mac for property taxes, not excise taxes. It did not help Washington that its own statutory tax scheme uses this precise dichotomy, a fact highlighted by the court.

Second, Spokane argued that the exemptions created by Congress exceeded that body's authority under the Commerce Clause. The court disagreed, noting that Congress may enact laws to regulate activities that substantially affect interstate commerce. The court also looked at the Necessary and Proper Clause to evaluate "whether the statute [at issue] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." Spokane tried to frame this issue by arguing that the regulated activity is state and local taxation and then differentiating taxation from commerce. The Court however took a larger view, pointing out that Spokane did not object to the premise that Congress has the power to regulate the secondary mortgage market. The Court, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 426 (1819), held that if Congress had the power to create Fannie Mae and Freddie Mac, it had the power to protect the statutory mission it gave them by exempting them from state and local taxes.

Spokane also argued that the exemptions violated the Tenth Amendment, on two grounds. It first posited that the tax exemptions amounted to Congress commandeering state employees, since county clerks "would be required to record deeds from the Enterprises free of charge." The court disposed of this argument by highlighting that no municipalities are tasked with additional affirmative obligations under the law; they simply cannot enforce the tax law against these entities. Spokane next argued that the tax exemptions violated the general principles of federalism enshrined in the Tenth Amendment. This was unavailing: "nothing in the text or

structure of the Constitution categorically immunizes state taxation from federal preemption . . . [and m]ore to the point, the Supreme Court has long made clear that when Congress properly exercises its enumerated powers, it may lawfully abridge the states' ability to tax."

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/30/13-35655.pdf
(Last accessed Jan. 14, 2015).

Trials: *Younger* Abstention Applies Despite Plaintiff's Attempt to Invoke Constitutional Issues in State Animal Cruelty Prosecution

Sixth Angel Shepherd, Inc. v. James Schiliro, No. 13-3471 (3d Cir. Jan. 9, 2015).

Terry Sliva was the president of a company that owned two buildings in Marcus Hook, Pennsylvania. She operated her law firm out of one. She was also a former board member of Sixth Angel Shepherd, Inc., a non-profit allegedly dedicated to the care of German Shepherds. On February 22, 2013 Pennsylvania SPCA staff and James Schiliro, the mayor and health code officer of Marcus Hook, executed search warrants at both buildings. They discovered 28 dogs, in varying states of neglect and surrounded by filth. The dogs were removed. Silva, as well as the non-profit and its secretary, were charged with an array of animal cruelty and other local ordinance violations.

Silva and her fellow defendants claimed the state warrants and the subsequent prosecution were "malicious efforts" by the SPCA and the mayor to "pervert the mechanisms of government" to devastate her because of an unrelated case she was fighting against Marcus Hook. In 2010 Sixth Angel Shepherd, Inc. had successfully sued Marcus Hook and SPCA, and the fee petition in the case was still pending. The earlier case and the current animal cruelty charges were both handled by the same prosecutor. Silva and her compatriots alleged that these facts showed that Marcus Hook and SPCA unconstitutionally harassed and prosecuted them. They sought to have the federal District Court for the Eastern District of Pennsylvania intervene in the state case between themselves and Marcus Hook. The city moved to have the case dismissed under *Younger v. Harris*, 401 U.S. 37 (1971). The District Court dismissed the complaint in accordance with the *Younger* doctrine without prejudice, thus permitting Silva et al to ultimately amend the complaint at the conclusion of the state proceedings. They appealed that decision.

HELD: The Third Circuit held that under the standard articulated in *Younger* the District Court properly abstained from adjudicating the appellants' claims in federal court.

DISCUSSION: For reasons rooted in both comity and equity, federal courts do not interfere with pending state matters – especially criminal ones. Under *Younger,* abstention is appropriate when the ongoing state proceeding "(1) is judicial in nature, (2) implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges."

Appellants argued that this doctrine did not apply because the state district judge erroneously failed to consider their constitutional claims and that the state's remedy – a *de novo* trial before the Court of Common Pleas – was insufficient to protect them. The Circuit Court did not agree, stating it presumed the state was competent to hear constitutional claims and that to do otherwise would impugn the entire Pennsylvania state judicial system.

The court found Silva's claims to be inextricably linked with the pending prosecution. She charged that the search warrant improperly relied on a confidential informant, that it was predicated on false evidence, that she was denied a right to consent to the search before the warrant was issued, that the magistrate did not allow Silva to subpoena witnesses, and that, generally, procedural safeguards in Pennsylvania courts are inadequate to ensure constitutional

rights. The Circuit refused to "slash into such a thicket of federal claims interwoven into a pending criminal prosecution."

The court evaluated the exception to *Younger*, namely that "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction" or "in other extraordinary circumstances where irreparable injury can be shown," a federal court may interfere in a state case. The Court found that appellants had not exhausted state appeals, and even extreme claims are not subject to federal review until the state proceeding has run its course. Further, appellants failed to prove that the prosecution was devoid of a real chance for success since it succeeded in convicting Silva at trial.

Lastly, the court did not find an extraordinary circumstance with irreparable injury – a standard met in cases where the prosecution proceeds under a statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

http://www2.ca3.uscourts.gov/opinarch/112510np.pdf (last accessed Jan. 15, 2015).