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ADA: County's Denial of Wheelchair to Inmate Can Constitute Failure to Provide Reasonable Accommodation

Cadena v. El Paso County, No. 18-50765 (5th Cir. Jan. 3, 2020).

Reversing the district court's grant of summary judgment for the municipality, the Fifth Circuit finds that a county detention facility's failure to provide a wheelchair to a woman who had recently undergone leg surgery and could not use crutches required jury consideration under the ADA.

On June 23, 2014 police arrested Cadena on an outstanding warrant. At the time of her arrest, Cadena was in a wheelchair recovering from surgical repair on her right leg. She was discharged from the hospital 24 hours before her arrest with instructions not to put any weight on her right leg as she was not a candidate for crutches.

During her intake at the El Paso County Detention Facility, a licensed vocational nurse (LVN) conducted a medical intake procedure. Cadena told the LVN se could not walk, but the LVN indicated on the intake form that Cadena had knee surgery and that she could stand independently. The County's physician gave orders that Cadena be given pain medication, crutches, assignment of a lower bunk, wound care to her right leg, and a follow up two weeks later with an orthopedic physician.

Cadena visited the clinic to request a wheelchair but was told by clinic staff that there was no room for a wheelchair. On the way to the clinic, Cadena stumbled while trying to use the crutches and an officer had to catch her before she hit the floor. That officer obtained a wheelchair and wheeled Cadena the rest of the way to the clinic. Cadena was left in her cell without a wheelchair. Two days later, June 25, 2014, Cadena was

granted a request for a wheelchair, but officers denied Cadena access to the wheelchair and forced her to use crutches. After several other falls based on the forced use of the crutches, Cadena testified that her right leg was twisted with her foot facing the middle of her body and reported her pain as seven out of ten. The County made a follow-up appointment for Cadena to see an orthopedic surgeon on July 14, 2014 and transferred her to a housing unit adjacent to the medical clinic.

On July 18, 2014, Cadena was discharged from custody into a substance abuse treatment facility. The orthopedic surgeon reported that Cadena was in "extreme varus" and "extreme pain" before the corrective surgery. Cadena alleges she has continuing nerve damage in her right leg and cannot engage in recreational activities or move normally.

Cadena filed suit against the County, the County's physician, and Corizon Health, Inc. under Title II of the ADA and Section 504 of the Rehabilitation Act for failing to provide her with reasonable accommodations. Cadena also alleged that the County was deliberately indifferent to her serious medical needs in violation of the Fourteenth Amendment and that these constitutional violations were the result of the County's unlawful policies, procedures, and customs.

The Fifth Circuit reversed the district court's summary judgment dismissal of the ADA claim because a reasonable jury could find that the County intentionally denied Cadena reasonable accommodations. Although the County provided Cadena with crutches, it failed to provide her accommodations such as a wheelchair, modified food delivery procedure, and various forms of medical care. Additionally, here a jury could find that crutches did not provide Cadena with meaningful access to the County's services because she could not safely move within the facility while on crutches.

The Fifth Circuit affirmed summary judgment dismissal of Cadena's Section 1983 claim because Cadena cannot show that she was subject to an unconstitutional condition of confinement or that the medical treatment she received was deficient such that it amounted to deliberate indifference to a serious medical need.

LINK

Excessive Force: Verbal Warning Before Fatal Shooting of Drive-By Suspect was Sufficient

Ybarra v. City of Chicago, No. 19-1435 (7th Cir. Jan. 3, 2020).

Officers in pursuit of a vehicle that had been involved in a drive-by shooting reasonably used deadly force to avoid possible injury to the public, and verbal warnings by one officer gave reasonable notice for the shooting by the other officer.

Early morning on August 29, 2015, Commander Valadez and Officer Reyes ("the officers") were in an unmarked police car patrolling an area where a gang-related shooting had recently occurred. At 1:30 AM, officers saw a rear passenger in Rafael Cruz's car fire five gunshots at the occupants of another car, then immediately sped away. Cruz drover the car at roughly 40 to 70 miles per hour in a 30 mile per hour zone. The officers followed Cruz's car, which had dark tinted windows, for one mile but did not activate emergency lights or sirens on the undercover car.

Cruz's car caused significant damage to four cars parked on the street. The officers thought the car had stalled and Valadez proceeded to exit the vehicle announcing he was a police officer. As the officer exited the vehicle, Cruz reversed his car backing directly into the door Valadez was attempting to exit from and fled the scene. Officers then pursued Cruz on foot to a parking lot where the exit and entrance to the parking lot was one and the same. Officers claim they announced that they were police while in the parking lot, but that fact is disputed. As Cruz attempted to exit the parking lot, the officers fired shots at the car. Cruz died as a result of a gunshot wound. Surveillance footage shows that pedestrians, cyclists, and other vehicles were in the area within 20 minutes of the incident.

Ybarra, Cruz's mother and administrator of his estate, filed suit bringing claims against the individual officers and the City for use of excessive force under Section 1983 and for wrongful death under Illinois law. The district court entered summary judgment for the defendants holding that the officers acted reasonably in self-defense and acted reasonably in using deadly force against Cruz to protect those in the immediate vicinity. Ybarra appealed.

The Seventh Circuit affirmed the district court's judgment agreeing that under the circumstances of the case, the officers had probable cause to believe Cruz posed a threat of serious physical harm to others in the immediate vicinity based on his involvement in a drive by shooting and his reckless driving. There is a dispute as to whether Valadez gave a warning before opening fire, however, Reyes did give a warning before Valadez opened fire and that is enough to satisfy the legal requirement that a warning be given before deadly force is used to prevent escape. Every officer is not required to give a warning. When Cruz failed to stop after Reyes gave the warning, the officers had probable cause, based on Cruz's involvement in the drive by shooting and based on his reckless driving, to believe that Cruz posed a threat of serious physical harm to others in the immediate vicinity if not apprehended. The use of deadly force continued to be reasonable as Cruz drove past the officers. Therefore, it was not unreasonable for the officers to prevent Cruz's escape by using deadly force.

LINK

Firearms: No Injunction Against Ohio Amendment Expanding Rights to Sue Municipalities

City of Akron v. State, no. cv-2019-11-4501 (Ct. Comm. Pleas, Summit Co., Dec. 19, 2019).

Ohio cities are unsuccessful in obtaining injunctive relief pending a merits analysis of an Ohio statutory amendment which expands citizens' rights to sue municipalities for ordinances deemed to inhibit firearm rights.

Ohio is a "shall-issue" open carry state and applies the "Castle Doctrine" affording significant presumptions in favor of those who use firearms in the protection of their home or real property; it is not a full "stand you ground" jurisdiction. In 2018, the Ohio General Assembly passed an amendment to R.C. 9.68, the Firearms-Uniformity Act, which originally became law in 2006. Akron, as well as Columbus and Cincinnati in their respective county courts, challenged the amendment as infringing upon Home Rule. The State argued that, given that the original statute has previously been upheld by the Ohio Supreme Court as one of General Law, the amendment was simply a clarification of that General law.

The statute, as amended, reads as follows (amended language in italics):

(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, other transfer, *manufacture, taxation, keeping and reporting of loss or theft*, of firearms, their components, and their ammunition. *The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and other from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others.* Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, *including by any ordinance, rule, regulation, resolution, practice or other action or any threat of citation, prosecution, or other legal process*, may own, possess, purchase, *acquire* , transport, store, *carry, sell, transfer, manufacture,* or keep any firearm, part of a firearm, its components, and its ammunition.

Any such further license, permission, restriction, delay or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities and the state by this

section preempts supersedes and declares null and void any such further license, permission, restriction, delay or process.

The amendment further provides recourse to anyone "adversely affected" by any ordinance deemed to restrict the lawful possession and/or use of firearms, and allows for damages and attorney's fees:

(B) *A person, group, or entity adversely affected by any manner of ordinance, rule, regulation, resolution, practice or other action enacted or enforced by a political subdivision in conflict with division (A) of this section may bring a civil action against the political subdivision seeking damages from the political subdivision, declaratory relief, injunctive relief, or a combination of those remedies. Any damages awarded shall be awarded against, and paid by, the political subdivision.* In addition to *any actual damages awarded against the political subdivision and* other relief provided *with respect to such an action*, the court shall award reasonable expenses to any person, group, or entity that brings the action, to be paid by the political subdivision, if either of the following applies:

a. *The person group or entity* prevails in a challenge to the ordinance, rule, regulation*, resolution, practice, or action* as being in conflict with division (A) of this section.

b. *The ordinance, rule, regulation, resolution, practice or action or the manner of its enforcement is repealed or rescinded after the civil action was filed but prior to a final court determination of the action.*

The Ohio law specifically exempts from these proscriptions zoning ordinances that regulate or prohibits the commercial sale of firearms in residential or agricultural zones or impose temporal or geographic limits on the operation of retail firearm establishments in commercial zones.

The Cities argued that the amendment would obligate them to repeal all existing local gun ordinances in order to avoid civil liability, and that the amendment's failure to include the word "manufacturing" in certain provisions implied that local zoning laws limiting firearm manufacture were also subject to invalidation.

The law was to take effect December 28, 2019, and the Cities sought a preliminary injunction pending a final ruling on the merits.

The court found that the Cities were unlikely to succeed on the merits. The Ohio Home Rule law gives municipalities the "authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Under Ohio jurisprudence, a statute is a "general law" if it satisfies a four part analysis:

> [A] statute must "(1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations, and (4) prescribe a rule of conduct upon citizens generally."

The court found it unlikely that the Cities could demonstrate that the amendment failed this test. The mere fact that the legislature had evidenced an intent to preempt local law did not automatically conflict with Home Rule. Even the fact that the word "manufacturing' had been left out of the amendment did not require injunctive relief:

> [T]he Cities argue that when combined with other portions of the amendment, all zoning laws regarding the manufacturing of firearms would be null and void. This, the Cities claim, could lead to persons or companies applying for permits to build manufacturing plants in residential areas and, if denied, could lead to litigation. . . While this Court does have concerns that the zoning portion of the amended statute was not likewise changed to include the manufacturing of firearms, the Court notes that all of the Cities involved in this litigation already have zoning laws in place prohibiting manufacturing, in general, in residential areas.

The injunction was denied. "In light of the extremely high threshold the Cities must reach in order for a court to determine that a statute is unconstitutional coupled with the extraordinary relief of a preliminary injunction, and with the limited evidence presented, this Court finds that the Cities have not demonstrated by clear and convincing evidence that they are likely to succeed on their claims that the amendment to the statute is unconstitutional and violates Home Rule."

This finding was sufficient to decide the case, but the court commented on the other prongs of injunctive relief analysis. It did not find that the Cities would suffer irreparable harm:

> While the Court empathizes with the Cities' concern that they may be forced to repeal their local ordinances as currently enacted, that has yet to be determined . . . While there is concern that they will suffer some harm, the Cities have not proven by clear and convincing evidence that they will suffer irreparable harm that can only be remedied by a preliminary injunction.

Further, the court did not find that, because the relief was being sought by a small number of cities, granting the injunction would avoid injury to third parties or serve the public interest.

The actual impact of the amendment has yet to be determined. In addition to the manufacturing question, issues such as local rights to regulate discharge of firearms are in the crosshairs.

LINK

First Amendment: *Central Hudson* and the State-Federal Cannabis Conflict

Plausible Products LLC d/b/a Hashtag Cannabis v. Washington State Liquor and Cannabis Board), no. 19-2-0329-6 (Sup. Ct. King. Co. Nov. 19. 2019).

Reversing Washington's Liquor and Cannabis Board which had found that a King County marijuana dispensary's placement of a string of lights spelling "POT" in the establishment's window violated signage laws, the Superior Court found that the legality of marijuana under Washington law—despite its illegality under federal law--allowed for *Central Hudson* analysis, which produced a finding that the law was unconstitutional.

The judge called it a "novel" issue: *the reach of the First Amendment to commercial speech promoting cannabis that is legal at the state level but illegal federally.*

In Washington State, a cannabis dispensary challenged the state's sign regulation on constitutional grounds Typically in commercial speech disputes, courts apply the multiple-prong *Central Hudson* test developed by the US Supreme Court in 1980. The *Central Hudson* standard determines whether First Amendment protection is warranted.

The first *Central Hudson* test: is the commercial speech lawful? ". . . While the (cannabis) speech does propose a transaction illegal under federal law, the fact that it is legal in the location where it is proposed at least merits the full *Central Hudson* analysis," ruled King County Superior Court Judge David S. Keenan.

The judge ruled in favor of the cannabis dispensary, citing the First Amendment and speech protections in the Washington State Constitution. Hashtag dispensary challenged government sign regulations after the store was cited for spelling out "POT" with a string of holiday lights in a window. Applying the other prongs of the *Central Hudson* test, Judge Keenan said:

- The State does have a substantial interest in preventing underage marijuana consumption. The State's asserted interest in maintaining an orderly marketplace to avoid federal intervention is too vague to qualify as a substantial interest under *Central Hudson*.

- The advertising restrictions do not directly and materially advance the State's substantial interest in preventing underage consumption.

- The restrictions are not sufficiently tailored to advance the State's interest.

Compared to alcohol and tobacco, legal cannabis is new. Regulation of cannabis and its marketing is likely to generate disputes about the balance between protection of free speech and other societal interests.

The local judge's ruling in Washington State is an early data point. Interestingly, the judge cited First Amendment cases on alcohol and tobacco:

- *Rubin v Coors Brewing Co. (1995);* the Supreme Court invalidated a federal prohibition on displaying alcohol content on beer labels (as a First Amendment violation that failed to advance the government's interest in a direct, material way).

- *Lorillard Tobacco Co. v Reilly (2001);* the Supreme Court said Massachusetts' point-of-sale and outdoor advertising regulations on smokeless tobacco and cigars violated the First Amendment.

Note:-this summary was submitted by Ken Klein, Executive Vice President of the Out of Home Advertising Association of America (OAAA). We appreciate his flagging such an interesting issue.

Closer look: The foundation of the Superior Court's opinion is its determination that, as stated in the case summary preceding the full decision, the complaint "at least merits the full *Central Hudson* analysis." Applying *Central Hudson*, the court easily concludes that the signage statute cannot be applied to restrict plaintiff's on-site marijuana advertising, because the law does not coherently serve its asserted interest—to deter minors from marijuana use. (For one thing, a different provision of the sign law allows massive billboards promoting marijuana to be located near dispensaries).

The full opinion provides the basis for applying *Central Hudson*: the Superior Court looked to dicta from a 1982 First Circuit decision:

> In another drug paraphernalia case in 1982, the Court of Appeals for the First Circuit, in dicta, imagined something like the question presented here. *New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 4 (1st Cir. 1982). In discussing its conclusion that drug paraphernalia advertising was actually proposing illegal possession of drugs, the *New England Accessories* court reasoned that the advertisement in question "promotes activity which has been determined to be criminal in all jurisdictions." *Id.* at 3. Yet, the court envisioned a scenario close to that the presented here: **"If New York, or some other state, decided to legalize the sale and use of marijuana, New Hampshire would have greater difficulty . . . prohibiting an advertisement suggesting that the Big Apple was the place to get high on marijuana." *Id.* at 4. In the scenario imagined by the First Circuit, commercial speech advertising recreational marijuana for sale in Washington would at least be entitled to *Central Hudson* analysis if another state where recreational**

marijuana was illegal tried to restrict advertisements in that state for Washington recreational marijuana stores. It follows that, where one state could not avoid *Central Hudson* scrutiny for banning advertisement of Washington recreational marijuana, neither can the State here avoid *Central Hudson* scrutiny on the basis that recreational marijuana is still illegal under federal law.

The result in *Hashtag* is that commercial speech which could otherwise be prohibited as promoting products illegal under federal law can survive via a safe haven under conflicting state law. It enlarges the fundamental Supremacy Clause discussion which underlies state-legalized marijuana to begin with.

LINK

Search and Seizure: Removal of Dogs After 911 Call and Photographic Evidence Does Not Violate Fourteenth or Fourth Amendment

King v. Montgomery County, No. 19-5500 (6th Cir. Jan. 3, 2020).

Where county authorities were alerted to potential animal abuse by a 911 call and photographs, they were justified in entering a residence on exigent circumstances grounds and in removing numerous dogs.

Cincy King ("King") regularly kept fifteen dogs in her home, six of which were foster animals for a local rescue group. King asked a friend to watch five of the animals for her while she went on vacation. The friend agreed; however, upon seeing the conditions the animals were kept in, the friend called 911 believing the dogs in the residence required immediate care. The friend took photos of the conditions the dogs were subject to. Officer Matos arrived on the scene and listened to the friend's statements, viewed the photos, and then entered the home to investigate. Upon seeing the conditions the animals were kept in, Officer Matos contacted Montgomery County (Tennessee) Animal control (MCAC).

Matos relayed the information he received from the friend and what he witnessed himself to MCAC officer Cook, then allowed officer Cook in the home to perform a wellness check. Cook took pictures of the conditions in the home and texted them to her boss Farrell. Cook determined the conditions in the home threatened the dogs' health and took the dogs into MCAC custody. The friend and another caretaker of the dogs went to MCAC to surrender seven more animals. When King returned home, a third caretaker returned three of the dogs to King. Because those dogs were fosters, the organization charged with their care, CSN, sought MCAC's assistance in recovering the dogs. King surrendered those animals to MCAC.

Photographs of the conditions of King's property circulated around the community and were published in a local newspaper. As a result of the newspaper article, she lost her job. King was ultimately indicted on criminal charges of animal cruelty but escaped criminal punishment as a state court concluded the search of King's home violated the Fourth Amendment.

The County was granted a $10,000 security bond against King for the care of the animals while the criminal proceedings played out. King could not afford the bond, yet the County released five of the dogs back to King. The other dogs were returned to their rightful owners or adopted.

King filed a Section 1983 claim asserting her Fourth and Fourteenth Amendment rights were violated by Cook, Matos, and Farrell. She also brought a *Monell* claim against Montgomery County based on the actions of Cook and Farrell, and on the basis that the County maintained an animal-impoundment procedure that violated King's due process rights.

The district court dismissed King's *Monell* claim finding that none of the alleged constitutional violations occurred pursuant to policy, procedure, or custom of Montgomery County. King appealed. The Sixth Circuit affirmed the judgment of the district court.

There was no Fourth Amendment violation based on the warrantless entry into King's home or the seizure of the dogs inside the home under the theory of exigent circumstances. It was reasonable for Officer's Matos and Cook to believe that the dogs were in danger and in need of immediate medical care based on the descriptions from the caretaker and from what the officers witnessed upon entry.

The ten dogs that were voluntarily surrendered to MCAC or abandoned at MCAC were not seized within the meaning of the Fourth Amendment, therefore there was no Fourth Amendment violation.

In regard to the five dogs seized when the home was searched, the Sixth Circuit found that King did not have a property interest in the dogs that was protected by the Fourteenth Amendment's due process clause. Since the dogs were seized pursuant to a criminal proceeding, any property interest in the dogs was protected by the Fourth Amendment. Because Matos and Cook complied with the Fourth Amendment, King was not entitled to additional process before the dogs were initially seized. King failed to demonstrate why procedures underlying impoundment were insufficient under the Fourteenth Amendment. Because there is no constitutional violation perpetrated by the Montgomery County employees or the County's impoundment procedures, King's claim against the County failed.

As to the ten dogs surrendered to MCAC, there is no due process violation because King failed to demonstrate she was deprived of her property as a result of government

action. The dogs were voluntarily surrendered by trusted caretakers to MCAC. There could have been a due process violation if MCAC refused to return the dogs to King along with finding the dogs permanent homes elsewhere, however King was afforded adequate process.

LINK

THIS JUST IN: IMLA member Susan Trevarthen named Chair of 1000 Friends Board of Directors.

Susan Trevarthan, a long-time member and frequent speaker at IMLA conferences, was named Chair of the Board of Directors of 1000 Friends of Florida effective January 1, 2020. The 1000 Friends announcement states:

> Since 1986, 1000 Friends of Florida has focused on saving special places and building better communities in one of the fastest growing states in the nation. Over the course of close to 35 years, 1000 Friends has initiated and helped secure passage of vital statewide programs like Preservation 2000 and Florida Greenways. Its attorneys have successfully argued dozens of legal cases setting important statewide precedents. 1000 Friends maintains a strong presence in the halls of the Florida Legislature each year, advocating for sound public policy and halting damaging legislation.
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> 1000 Friends' commitment remains unwavering to educate citizens, professionals and elected officials on workable, Florida-specific strategies to enhance the quality of life. 1000 Friends spearheaded the landmark Florida 2070 project, showing the impacts of growth and development if current patterns of development remain the same, and more sustainable alternatives. Its free *Dr. John M. DeGrove Webinar Series*, launched in 2012, has reached more than 17,000 attendees on critical issues facing Florida.

Susan joined the Board of 1000 Friends in 2015, led the search for the organization's current President in 2018, and led its Legal Advocacy Committee in 2019.

An attorney with Weiss Serota Helfman Cole & Bierman, where she chairs the firm's Public Land Use and Zoning Group, Susan serves as a municipal attorney for two small coastal cities in Miami-Dade and Broward Counties.

We join in congratulating Susan on this announcement.