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Negligence: No Liability for Principal Whose Policies Were Discretionary; One Day Delay in Filing Dooms Administrative Remedy

L.B. v. Jefferson City School District, no. 19-2502 (8th Cir. Jan. 11, 2021).

Affirming the district court, the Eighth Circuit finds that a school principal cannot be sued for negligence where his policies on early dismissal of students were discretionary; filing with Human Rights Commission one day after expiration of 180-day mandatory period means that administrative remedies had not been exhausted before seeking adjudication in court.

Under the policies of Missouri's Jefferson City School District (District), school principals are responsible for creating procedures to ensure that students will only be dismissed early "for proper reasons" and "to authorized persons." At one school, that responsibility rested with Principal Robert James (James), who had instituted a policy that, for early dismissal requests over the telephone, school employees were supposed to ask for verifying information—such as the caller's name, home address, and phone number—to ensure that a "parent or guardian" was the one making the request. Doubts about a caller's identity were to be resolved through follow-up questions.

The problem was that school officials did not always follow James' procedures. L.B., a girl at the school, was released to her 31-year-old cousin on four different occasions. No one verified his identity, and he used the opportunity each time to abuse her at his home.

L.B.'s father sued James for negligence, and he sued the District, the school employee who answered the calls, and James for a violation of the Missouri Human Rights Act. The district court dismissed these actions on summary judgment.

The Tenth Circuit affirmed. L.B.'s negligence claim failed because James was entitled to official immunity, which "protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." (cite omitted).

Like the district court, the Circuit concluded that James had to use discretion in creating and administering the school's early-dismissal policy. The school district left it to "building principal[s to] establish procedures to validate requests for early dismissal," and noted that the "procedures may vary depending on the age of the student." As the court explained, "[t]his type of language, including the use of the word 'may,' connotes classic discretion, because it requires an official to exercise 'reason and judgment.' " And as the Missouri Supreme Court has explained, official immunity is not lost simply because an act is mandatory if there is still "authority to decide when and how [it] is to be done."

L.B.'s second claim fell for a more basic reason, however harsh. Before bringing a claim in court for deprivation of her "full and equal use and enjoyment of the public school and its services," L.B. had to file a written complaint with the Missouri Commission on Human Rights (Commission)" within one hundred eighty days of the alleged act of discrimination." She missed that deadline by one day, filing on the 181st day after the alleged act—meaning that she had failed to exhaust her administrative remedies. It made no difference that the Commission later sent her a right-to-sue letter; as the statute makes clear "regardless of" any such act, "[t]he failure to timely file a complaint . . . may be raised as a complete defense . . . at any time . . . in subsequent litigation." The Human Rights Act claim was dismissed without prejudice.

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Qualified Immunity: Detainee's Inadequate Care Claim is Governed by Objective Reasonableness Standard, not Subjective Standard

Sandoval v. County of San Diego, no. 118-55289 (9th Cir. Jan. 13, 2021).

Reversing a lower court decision that had granted qualified immunity to three nurses and denied *Monell* liability to San Diego County in a case where a detainee was left alone for eight hours despite exhibiting signs of medical distress, the Ninth Circuit applies an objective reasonableness standard derived from the

Supreme Court's *Kingsley* decision which distinguished the standards for Eighth Amendment excessive force claims from those for Fourteenth Amendment inadequate care claims.

In February 2014, deputies from the San Diego Sheriff's Department arrested Ronnie Sandoval (Sandoval) after finding methamphetamine during a probation compliance check. Unbeknownst to them, Sandoval had swallowed an additional amount of methamphetamine—later estimated to be several hundred times the typical recreational dose—in an effort to prevent its discovery.

At the San Diego Central Jail, Sandoval was sweating, appearing disoriented and lethargic, but suggested that he might be diabetic. He was ultimately left unmonitored by medical staff for eight hours, despite signs that he was under the influence of drugs. When Sandoval was ultimately discovered unresponsive and having a seizure, the staff failed to promptly summon paramedics. He died shortly thereafter.

Sandoval's wife and successor-in-interest brought suit under 42 U.S.C. § 1983 against the County of San Diego and three nurses, alleging that they violated Sandoval's Fourteenth Amendment right to adequate medical care in custody.

The district court granted summary judgment to the defendants, concluding that there were no triable issues of fact as to their liability and that the individual nurses were entitled to qualified immunity. After the district court issued its decision, the Ninth Circuit clarified that an **objective** standard applies to constitutional claims of inadequate medical care brought by pretrial detainees. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) was based on the the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). *Kingsley* involved claims that jail officials had used excessive force against a pretrial detainee. The question presented in *Kingsley* was whether the Eighth Amendment subjective good faith standard also applies to Fourteenth Amendment excessive force claims brought by pretrial detainees. The Court held that the Eighth Amendment and Fourteenth Amendment standards were not the same. ("The language of the two Clauses differs, and the nature of the claims often differs."). It concluded that for Fourteenth Amendment claims, the relevant question is not whether the defendant acted in good faith, but instead whether the force used was "objectively unreasonable."

Applying the *Gordon* framework and viewing the evidence in plaintiff's favor, the Ninth Circuit panel reversed, holding that a jury could conclude that Sandoval would not have died but for the defendants' unreasonable response to his obvious signs of medical distress. Specifically, a jury could conclude that a reasonable nurse who was told that Sandoval was shaking, tired, and disoriented—and who was specifically directed by a deputy to evaluate Sandoval more thoroughly—would have understood that Sandoval faced a substantial risk of suffering serious harm. The panel reached the same conclusion regarding the nurses' failure to promptly call paramedics – the delay was objectively unreasonable.

The panel further held that plaintiff had demonstrated that the available law was clearly established at the time as to the unreasonableness of the nurses' conduct, concluding that a reasonable nurse, knowing what the nurses on the scene knew, would have understood that failing to check on Sandoval for hours and failing to pass on information about his condition, or thereafter failing to call paramedics, presented such a substantial risk of harm to Sandoval that the failure to act was unconstitutional. Accordingly, the nurses were not entitled to qualified immunity.

The panel held that viewing the evidence in the light most favorable to plaintiff, there was a triable issue of fact as to the County's liability under *Monell*.—the County was aware that detainees were frequently placed in a holding cell near the nurse station without any clarity as to whether they were simply being detained or required additional medical observation and treatment.

DISSENT IN PART: Concurring in the judgment in part and dissenting in part, Judge Collins agreed with the majority's conclusion that two nurses were not entitled to summary judgment, but he would affirm the grant of summary judgment to one nurse and to the County, because in 2014, the then controlling deliberate-indifference liability standards included a *subjective* element, plaintiff had to make a showing of subjective deliberate indifference to defeat qualified immunity, and she had to do so even though that subjective element of the test for liability has since been overruled. Because plaintiff failed to present sufficient evidence to show that the third nurse was subjectively aware of Sandoval's serious medical needs, de Guzman was entitled to qualified immunity. He further stated that there was no evidence that the County had an unconstitutional policy, practice or custom.

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Signs: Placement of 7,200 Square Foot Vinyl Sign over 4,500 Square Foot Electronic Sign Does Not Impermissibly Expand Billboard

Lamar Advantage GP Company LLC v. City of Pittsburgh Board of Zoning Adjustment, no. 5 WAP 2020 (Pa. Jan. 20, 2021).

The Pennsylvania Supreme Court upholds two lower court decisions which overturned a Board of Zoning Adjustment finding that placement of a larger vinyl sign over an electronic billboard constituted an impermissible change; the precedent cited by the City was inapposite.

Lamar Advantage GP Company, LLC (Lamar) owns a large flat-faced concrete billboard, erected in the 1920s, covering 7200 square feet (SF). Since 1933, the City of Pittsburgh Board of Zoning Adjustment (Board) has confirmed the billboard's legal

nonconforming use as an "electric advertising sign." For many years, a 4,500 SF electronic sign (displaying the logo of Bayer Corporation), was placed on the 7,200 SF billboard. In 2016, after its relationship with Bayer ended, Lamar installed a static vinyl advertisement over the entire 7,200 SF sign structure, without obtaining Board approval. After a hearing, the Board found Lamar in violation of Zoning Code Section 921.03.F.2 (barring the enlargement of, addition to, or replacement of a nonconforming sign without approval) and Section 919.01.J (requiring the removal of an advertising sign when a business has been terminated).

Lamar appealed to the Court of Common Pleas, which reversed. The court agreed with Lamar that it did not need a permit to change the billboard from an electronic sign to a vinyl sign under Section 921.03.F.2, finding no indication that Lamar enlarged, added to, or replaced the sign; rather, the vinyl sign only increased the size of the advertising content. The City of Pittsburgh (City) appealed to the Commonwealth Court, which affirmed the court below, again finding that the size of the advertising content increased but the size of the sign face or sign structure did not.

The City petitioned the Pennsylvania Supreme Court, seeking review as to whether the lower courts' holdings that a static vinyl advertising sign could replace an electronic advertising sign was inconsistent with the holding in *Lamar Advertising Co. v. Zoning Hearing Bd. of the Municipality of Monroeville*, 939 A.2d 994 (Pa. Commw. Ct. 2007).

In that case, Lamar was prevented from replacing 17 existing static vinyl signs with electronic LED signs. Relying upon *Lamar v. Monroeville*, the City argued that a static vinyl sign is so different from an electronic sign that the one cannot ever replace the other without prior approval under applicable zoning requirements.

The Pennsylvania Supreme Court saw material differences that made *Lamar v. Monroeville* unhelpful to the City. First, Lamar had never obtained certification that the original 17 vinyl signs were legally nonconforming. Second, the conversion from vinyl to electronic signage entailed significant structural alterations. Neither of those circumstances was present here. The lower courts' decisions were affirmed by a four Justice majority.

DISSENT: Chief Justice Saylor filed a dissenting opinion in which Justices Dougherty and Mundy joined. He argued that focus on a factually distinguishable case was improvident, and that Lamar's replacement of the sign violated the applicable statute:

> The majority disposition ultimately appears to turn on the view that the issue presented was framed improvidently by Appellants, given their premise that a factually distinguishable case is controlling. To me, however, the substantive question presented by the case – that is, whether Lamar's use of its billboard violated Section 921.03.F.2 . . . I find any suggestion that the electronic sign was not "replaced" because it remained in place behind the vinyl sign to be unmeritorious. Relative to signs, the Code is clearly directed, in large part, to the regulation of visual impacts. *See, e.g.*, PITTSBURGH ZONING CODE §919.01.A

(delineating, among the purposes of sign regulation, the recognition of effect on the City's community appearance, open and green spaces, and unique views and vistas). It therefore seems evident to me that "replacement" should be adjudged according to that which is put into view. In summary, I agree with Appellants and the Zoning Board of Adjustment that, when Appellee replaced its nonconforming electronic sign with a nonconforming static sign, it unlawfully substituted "another nonconforming sign." Accordingly, I would reverse and remand for consideration of Appellee's constitutional arguments as well as any others that are raised and preserved but have not yet been considered in the appeal proceedings.

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Speech: SWAT Officer's Comments did not Clearly Indicate Desire for Revenge Killing; *Pickering* Analysis Requires More Factfinding

Moser v. City of Las Vegas Metropolitan Police Department, no. B19-16511 (9th Cir. Jan. 20, 2021).

Reversing and remanding, the Ninth Circuit finds that the lower court improperly accepted the police department's interpretation of a SWAT officer's Facebook posting as indicating a desire for a revenge killing and justifying his demotion due to the negative impact of such a posting on departmental esprit de corps and operations; instead, the meaning of the message was a question of fact requiring further analysis.

In 2000, Charles Moser (Moser), a former Navy SEAL, joined the Las Vegas Metropolitan Police Department (Metro), and became a member of its SWAT team in 2006. In 2015, someone shot a Metro police officer on Las Vegas Boulevard. Metro police officers later arrested the suspect; Moser — while off-duty at home — saw the news and commented on a friend's Facebook post linking an article about the shooting. His comment said, "Thanks to a Former Action Guy (FAG) and his team we caught that asshole. . . It's a shame he didn't have a few holes in him. . ."

In a subsequent internal affairs interview with Metro investigators, Moser admitted his comment was "completely inappropriate" but explained that he intended to express his frustration that the suspect had "basically ambushed one of our officers" and that "the officer didn't have a chance to defend himself." He also said that he had removed that comment by the time of this interview.

Metro's Captain and Deputy Chief transferred Moser out of SWAT, finding that his Facebook comment showed he had become "a little callous to killing;" Moser's supervisors testified that snipers "are held to a higher standard" because they toil in difficult and stressful situations. Internal affairs also determined that Moser's comment violated the department's social media policy and found that his Facebook page had information identifying him as a Metro sniper. Moser filed a grievance report, requesting that he receive a verbal reprimand rather than a transfer with a pay decrease. The Labor Management Board denied Moser's grievance and upheld the transfer.

Moser sued Metro and the supervising officers for First Amendment retaliation, seeking damages under 42 U.S.C. § 1983 and injunctive relief, alleging that his disciplinary transfer was unconstitutional retaliation for his protected speech. Metro and Moser each moved for partial summary judgment. Metro did not dispute that Moser made that comment as a private citizen and that it addressed an issue of public concern, but it argued that Moser's comment eroded public trust and exposed Metro to legal liability.

The district court held that Metro's disciplinary action was justified under *Pickering*. While Moser's statement addressed a "public concern," the district court said it is "difficult to discern what message Moser was attempting to convey" and ultimately believed that Moser "wanted his fellow officers to shoot (and possibly kill) the suspect, regardless of whether the use of deadly force (or any force) was necessary." Moser's comment was "neither at the core nor the periphery of the First Amendment." Set against this "moderate First Amendment interest" was "Metro's prediction of likely future disruptions caused by Moser's continued SWAT service"--specifically, if more members of the public read Moser's post, they might question Moser's fitness as a SWAT member. Furthermore, "any future use of deadly force by Moser would have been more extensively scrutinized by the public and would more likely subject Metro to suit." The court granted summary judgment for Metro.

On appeal, the Ninth Circuit recounted the *Pickering* standards: the plaintiff has to establish that (1) he spoke on a matter of public concern; (2) as a private citizen rather than a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. If the plaintiff establishes this prima facie case, the burden then shifts to the government to show (4) that it had an adequate justification for treating the employee differently than other members of the public; or (5) it would have taken the employment action even absent the protected speech.
Applying these standards, the Circuit found first that that Moser's speech addressed a matter of public concern. Second, Moser made his Facebook comment as a private citizen. "Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." Third, there was no dispute that Metro demoted Moser because of his Facebook comment.

However, the Circuit disagreed with the lower court's balancing of Metro's interests. *Pickering* recognizes that a government employer has "broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be

directed at speech that has some potential to affect the entity's operations." Under *Pickering,* courts may consider the content of the speech to determine how much weight to give the government employee's First Amendment interests; courts have thus implicitly applied a sliding scale in which the "state's burden in justifying a particular discharge [or adverse employment action] varies depending upon the nature of the employee's expression." (citing *Connick*).

Here, the parties did not agree on the objective meaning of Moser's statement. Metro believed the comment advocated unlawful use of deadly force, and that Moser wished that the officers who captured the suspect would have shot him in retaliation for his earlier shooting of a police officer. The district court appeared to accept this interpretation of Moser's comment.

Moser offered a different take. At his interview with internal affairs, he said that he was implying that the police officer who had been ambushed by the suspect — not the police officer who ultimately arrested the suspect — should have fired defensive shots. "His statement then takes on a different meaning: He did not advocate unlawful violence, but rather expressed frustration — in an admittedly hyperbolic and inappropriate manner — at the perils of police officers being struck down in the line of duty."

As the Circuit saw it, Moser's statement — when viewed in the light most favorable to him under the summary judgment standard — could be objectively interpreted as a provocative political statement against police officers being shot in the line of duty. In short, a factual dispute existed over the objective meaning of Moser's statement. The district court, however, had not resolved this factual dispute over the objective meaning of Moser's statement and had simply adopted Metro's reading of it. "That was error."

The Circuit also found flaws in the lower court's analysis of potential disruption to Metro's operations. The Supreme Court has recognized several factors in evaluating the impact of an employee's speech on the government agency's operation: whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

And the government cannot rely on "mere speculation that an employee's speech will cause disruption." Here, Metro did not provide sufficient evidence:

> The record here does not support the government's contention that Moser's Facebook comment would have caused disruption. Typically, courts credit the government's claim where the challenged speech is widely known or reported by the press. Here, there was no media coverage of Moser's comment. In fact, the record shows no evidence that anyone other than the anonymous tipster even saw Moser's Facebook comment. Nor would most people have even known that Moser served as a SWAT sniper because nothing in his Facebook profile confirmed his employment. And importantly, the chance that the public would

have seen the Facebook comment remained low because Moser deleted that December 2015 comment by February 2016.

The Ninth Circuit admonished that "engaging in *Pickering* balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it." Material questions of fact remained as to whether Moser's comment would likely disrupt Metro's workforce or its reputation, meaning that the district court erred in granting summary judgment for Metro. Reversed and remanded.

DISSENT: Judge Marsha Berzon dissented. "Moser conceded to the district court, more than once, that there was no genuine issue of material fact about the meaning of his comment." And irrespective of the waiver, she faulted the majority for failing to explain how evidence of Moser's private, subjective meaning alone could make his public statement objectively ambiguous. "Because Moser waived any argument about the meaning of his Facebook comment and because Metro's interpretation of Moser's statement was by far more reasonable than Moser's proffered alternative, I would affirm the district court's judgment."

Judge Berzon saw peril in the majority's failure to give greater weight to Metro's need to maintain decorum and order among its uniformed officers:

> Stepping back, what the majority holds is that a police department may have to retain on its SWAT squad an officer who appears to support the unnecessary use of force in the capture of a suspect in a police shooting. I do not for a minute doubt that protecting the First Amendment right of public employees to contribute to the public dialogue on issues of public importance is of critical importance to our ongoing experiment in self-government. But we are living in a time when, driven by public concern, police departments nationwide are engaged in self-examination concerning how best to curb the use of excessive force by police officers as they carry out law enforcement's critical role. Tying the hands of those departments in making personnel decisions based on reasonable evaluations of those officers' ability to make measured judgments about the use of force—especially where, as here, the decision concerns an elite officer entrusted with high-caliber weapons and particularly dangerous assignments—can only stand in the way of these efforts.

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THIS JUST IN: DOJ Leaves Music Licensing Consent Decrees in Place

On January 15, 2021, the DOJ announced, after nearly two years of review and receipt of 800 comments (including by IMLA), that it was leaving in place the 80-year-old consent decrees which have governed the activities of BMI and ASCAP, requiring them to charge fair prices and offer equal terms to equally-situated licensees. While these two entities control more than 90 percent of all musical titles (over 20 million), two new Performing Rights Organizations—SESAC and GMR—are not so constrained, and are increasingly pressuring municipalities to sign music licenses at far higher rates.

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In Memoriam: Judge Steve Elliott

Steve Elliott, who served as Sparks, Nevada City Attorney for 17 years and thereafter as a Judge on Nevada's Second Judicial District for another 17 years, passed away on January 5, 2021 at the age of 72 after a short battle with cancer. He was a frequent attendee at IMLA conferences and well-known to many of our members. "Judge Elliott was a leader in the Northern Nevada legal community," Chief Judge Scott Freeman said. "He was a wonderful Sparks city attorney, judge, and man who had tremendous wisdom. He will be greatly missed."

Additional information about Judge Elliott is available at HERE.