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## ADA: To State Discrimination Claim, Prisoner Must Show That County's Decision to Segregate Him From General Prison Population Was Due *Solely* to His HIV Status

## ***Doe v. Board of County Commissioners*, No. 14-6197 (10th Cir. June 4, 2015).**

Upholding a jury verdict from the District Court for the Western District of Oklahoma, the Tenth Circuit has held that, in order to state an ADA discrimination claim, a prisoner must show that he was placed in segregated jail housing *solely* because of his HIV status; merely establishing that it was *a motivating factor* is insufficient.

In 2012 John Doe was arrested for obstruction of justice and assault with a deadly weapon against a police officer in Payne County, Oklahoma. He was originally sent to the municipal jail, but was quickly moved to the Payne County Detention Center where he was put in general housing. Having been so classified, Doe had unrestricted access to the shower, television, and telephone, and he could freely attend group religious services.

During the evening hours of Doe's first day at Payne County Detention Center a sergeant saw his booking paperwork wherein it noted that Doe was HIV positive. He was immediately moved to a segregation pod where he stayed until his release some weeks later. Under this classification he was limited to just one hour a day outside his cell, during which was the only time he could use the telephone, television, or shower. Moreover, he could not mingle with other inmates and could not attend group religious services even during that one hour. The sergeant specified that the reason for the transfer was "due to [Doe's] HIV statutes [sic]."

Doe took the case to trial, arguing he was discriminated against based on his HIV status, a disability as that term is defined under Title II of the Americans with Disabilities Act. The central issue at trial was whether Doe was segregated solely because of his HIV status. The jury ruled against Doe and he appealed.

**HELD**: The Tenth Circuit affirmed the trial court rulings, holding that it properly excluding expert testimony under *Daubert* and that the jury instructions were appropriate.

**DISCUSSION**: Doe argued on appeal that the trial court erred by "(1) excluding his proposed expert witness testimony, and (2) instructing the jury that the decision to move him from general to segregated housing had to be motivated "solely by the fact that he is HIV positive." The appellate court reviewed the first issue *de novo*, establishing a two part evaluation; 1) the trial court's performance as a "gatekeeper" under *Daubert* and then 2) its application of the Federal Rule of Evidence standard of whether to admit the expert. The second element of this analysis was in dispute by the parties, thus requiring the court to determine whether the expert's testimony would have "help[ed] the trier of fact to understand the evidence or to determine a fact in issue . . ." as Federal Rule of Evidence 702(a) mandates. The central issue was whether Doe's HIV status was the *sole* reason for his transfer to segregation—and given that the proposed expert's sixteen opinions all related to the inadequacy of the Payne county Detention Center's policies classifying prisoners with HIV and its failure to follow "best practices" in this area, the opinions did not address Doe's HIV status as the basis for the alleged discrimination he suffered. Therefore, the trial court had properly excluded the expert opinions.

As to the jury instructions, the Circuit Court first set forth that proving a claim under Title II of the ADA requires the plaintiff prove "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability."

Doe argued that the jury should have been instructed that his HIV status was a *motivating factor* in his transfer, not the *sole factor* as the trial court had instructed. Doe argued the trial court incorrectly relied on *Fitzgerald v. Corrections Corporation of America*, 403 F.3d 1134 (10th Cir. 2005), which required that his disability be the sole factor driving the discrimination he suffered, when it should have relied on the earlier Tenth Circuit case *Bones v. Honeywell International, Inc.*, 366 F.3d 869 (10th Cir. 2004), which would have allowed the jury to rule in his favor if the disability was a motivating factor in the discrimination he suffered. He further argued that *Fitzgerald* should not have been relied on because it is incompatible with the Supreme Court's holding in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), which Doe characterized as "strongly suggest[ing]" that the motivating factor analysis should be applied in Title II ADA discrimination cases. The court rejected Doe's arguments regarding the Tenth Circuit precedent on two fronts. It pointed out that its

earlier *Bones* case concerned Title I, not Title II, of the ADA, making it an inappropriate guide in his case. Second, the court highlighted that *Bones* was decided at the summary judgment stage, which also made it an inappropriate guide for a trial court considering overturning a jury verdict. As for the Supreme Court's *Nassar* case, the Tenth Circuit flatly opposed Doe's interpretation of the Supreme Court's statements in the case. It noted it already had the chance to apply *Nassar* in the Title II context and already determined it required the disability to be the sole factor driving the discrimination a plaintiff suffers, not a motivating factor. Doe thus lost on appeal.

LINK (last accessed June 16, 2015).

## Due Process: Court Finds No Due Process Violation When City Fails to Renew Lease Agreement Amidst Bribery Scandal

## *Systematic Recycling LLC. v. City of Detroit*, No. 13-1334 (6th Cir. June 10, 2015).

In 2006 Systematic Recycling LLC ("Systematic") sought to establish a composting facility in Detroit in an industrial zone of the city. The property in question was owned by James Rosendall, who agreed to lease the property to Systematic for use as a compost facility. The city of Detroit ultimately agreed to the project but placed, subject to several restrictions, including a condition that Systematic enter a Host Community Agreement ("HCA") with the city. The HCA was intended to enable the city to monitor the composting activities. In March of 2007 the Detroit City Council agreed to enter the HCA, for a period of two years, after which the Council could reject an extension if it so chose.

In January of 2009, just before the HCA was to expire, Rosendall pled guilty in federal court to bribing various public officials. In doing so, he admitted that his felonious conduct included the Council's approval of Systematic's HCA. He specifically stated in his plea that he "caused Systematic Recycling to pay [a public official] over $20,000, in part, to help [Rosendall] obtain approval for the Community Host Agreement with the Detroit City Council." After learning of this fraud the city sent a letter to Systematic stating it would not renew the HCA and that therefore the composting facility had to close.

Systematic filed suit in state court alleging Detroit violated its federal due process and equal protection rights. As the case was winding its way through the appeals process, Rosendall's company from which Systematic had been leasing, filed for bankruptcy. In doing so, the receiver moved to evict Systematic. The property was ultimately sold and Systematic was evicted. As a result, Detroit argued the state case was moot – as Systematic had no operational facility and no property interest in the land in which the conditional zoning grant was issued. The state court agreed. Systematic responded by

filing an amended complaint alleging § 1983 claims against the city, specifically violations of procedural and substantive due process, equal protection, and its First Amendment right to petition the government. It also alleged an unjust enrichment claim, theorizing that Detroit profited from the HCA even though it was void *ab initio*. The district court rejected these arguments and entered summary judgment in favor of Detroit onall counts. Systematic appealed.

**HELD**: The Sixth Circuit affirmed the district court on each count, relying exclusively on the underlying fraud as a rationalization for Detroit's actions.

**DISCUSSION**: The common thread in all of the court's holdings in this case was the fraud underlying the HCA. The Court grounded all of its decisions on this issue. Systematic made three claims. First, Systematic posited that Detroit violated its substantive due process rights, which, according to the court, hinged on whether Detroit's refusal to renew the HCA was constitutionally suspect – e.g. whether the failure to renew the agreement was arbitrary or irrational. Second, Systematic made a "class-of-one" claim under the equal protection clause, requiring it to show that it was intentionally treated differently from others similarly situated and that there was no rational basis for the disparate treatment. Third, Systematic made a substantive due process claim, arguing that it was deprived of property without due process of law. For this claim it was required to "show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning that there is no rational basis for the administrative decision."

As set forth above, all of these claims required Systematic to show that Detroit acted arbitrarily, irrationally, or without reason. As the court put it, given the "fraud-riddled history" of the HCA it could, not find in favor of Systematic, easily finding a rational basis for Detroit's treatment of the company. The Court approvingly quoted the district court for its rationale, noting simply that "[t]he city officials had a rational basis to allow the [HCA] to expire at the end of the term of two years in order to uphold the integrity of the system that was compromised by the payment of a bribe."

LINK (last accessed June 18, 2015).

## ERISA: Living Wage Law Allowing Lower Wage Rates If Employer Offers Health Benefits Does Not "Have a Connection With Or Reference To" Benefits Plan

## *Calop Business Systems, Inc. v. City of Los Angeles*, No. 13-56992 (9th Cir. June 2, 2015).

The Ninth Circuit has upheld dismissal of a claim that Los Angeles' living wage laws were preempted by ERISA because they allow employers to pay lower wages if they offer health benefits.

The City of Los Angeles enacted a living wage ordinance requiring airports in the city to pay employees $14.80 per hour or, if a contractor provides health benefits, $10.30 per hour. The city's compliance officer learned that over a 12-day period in 2010 Calop Business Systems, Inc. paid its employees only $11.55 per hour and did not provide any health benefits. Calop sued the city arguing that the phrase "health benefits" in the ordinance was unconstitutionally vague and that the measure was preempted by the Employee Retirement Income Security Act ("ERISA") and the Airline Deregulation Act. The district court granted summary judgment in favor of the city. Calop appealed.

**HELD**: The Ninth Circuit dismissed Calop's constitutional and ERISA claims for lack of jurisdiction, and affirmed the district court on all other matters.

**DISCUSSION**: The Ninth Circuit held that Calop lacked standing to challenge the constitutional validity of the phrase "health benefits." Since Calop did not offer any health benefits to its employees at all and paid them only $11.55 per hour, a clear violation of the law, the company lacked standing.

As for preemption by ERISA, the Circuit Court noted it preempts any state law that "has a connection with or a reference to" an employee benefits plan. But the ordinance in question could not be said to "reference" benefit plans simply because it called for variable hourly wages depending on the presence or absence of such a plan.

The court also held that the ordinance did not have a "connection with" a benefits plan since its mere mention of a health benefits plan did not impose any obligation on employers to provide a plan. Finally, the court held that the ordinance also does not create a "connection with" a benefits plan by creating an economic incentive to offer benefits to employees. Thus, the appeals court affirmed the district court holding.

As for the ordinance's preemption by the Airline Deregulation Act, the Ninth Circuit noted that to be preempted, the ordinance had to interfere "with the forces of competition" in the airline industry. The court was hard-pressed to see how a minimum wage ordinance would do so. It ultimately agreed with the lower court that the ordinance did not impact any airline "price, route, or service," and thus did not interfere with competition.

LINK (last accessed June 16, 2015).

## Excessive Force: Court Dismisses 1983 Claim, Refusing to Deviate from "Reasonableness" Standard for Medically Impaired Arrestees

## *Schoettle v. Jefferson County*, No. 14-1993 (8th Cir. June 11, 2015).

This case arises out of a traffic stop, during which the plaintiff-appellant claims the arresting officers used excessive force. On November 6, 2010 Edward Schoettle, an insulin-dependent diabetic, was driving his truck at night in Jefferson County, Missouri, when he began feeling lightheaded and experienced blurred vision. He pulled over to the side of the road, where he eventually lost consciousness. An officer came upon the truck and, seeing the driver slumped at the wheel, knocked on the window, attempting to wake up the driver. The officer believed Schoettle was intoxicated and called a DUI officer to investigate. . The officers eventually pulled him from the truck, at which point Schoettle broke free and attempted to get back to his truck. He then resisted being handcuffed until EMS arrived, at which point he continued his uncooperative. He was treated for a bloody nose and hypoglycemia. His blood alcohol came back as zero.

Schoettle filed a lawsuit against the County, alleging the officers used excessive force against him and that the municipality was also liable. The district court held the officers were entitled to qualified immunity and that, therefore, the county was not liable. Schoettle appealed.

**HELD**: The Eighth Circuit affirmed the district court ruling, holding that the officers did not use excessive force in subduing him and that there was no municipality liability given that it held there was no meritorious § 1983 claim.

**DISCUSSION**: The Circuit Court quickly disposed with the threshold matter of whether there was reasonable suspicion to stop Schoettle, noting that it was objectively reasonable to suspect he was intoxicated given that he was slumped at the wheel of his vehicle and his responses to questions were either "unintelligible" or "belligerent."

The court then moved to the more important question of whether the officer's use of force was excessive. The use of force is not excessive if it was objectively reasonable in light of the facts and circumstances confronting the officers. Schoettle conceded he refused to comply with the officers' orders, repeatedly attempted to evaded arrest, and physically struggled against the officers. As his primary defense, Schoettle argued that he was not drunk, but rather having a medical problem, and should therefore have been treated differently. While the court recognized that an officers' knowledge of a medical condition could be relevant to the excessive force inquiry, in the case at hand the record indicated the force was reasonable regardless of when or whether they knew of his medical condition. In the words of the court, "even if the officers became aware at some point during their interaction with Schoettle that he was suffering a hypoglycemic episode, they were still confronted with a belligerent and impaired man who was refusing to comply with their orders to exit the vehicle and who was physically resisting their attempts to remove him from it. If the officers realized at some point that

Schoettle's impairment was not attributable to any fault of his own, that knowledge would not have made Schoettle any less dangerous to himself and others while he was impaired." Specifically, the court noted that Schoettle – a suspected drunk driver - was sitting in the driver's seat of vehicle, which he could have started and driven dangerously. The court noted this has previously been deemed a factor in the excessive force analysis, given the significant danger drunk drivers behind the wheel pose.

Having rejected Schoettle's excessive force argument and finding no merit in Schoettle's § 1983 claim, the court disposed of the municipal liability claim.

LINK (last accessed June 17, 2015).

## Speech: Ordinance Prohibiting Outdoor, Unattended Charitable Donation Bins Is Content-Based Regulation of Protected Speech

## *Planet Aid v. City of St. Johns*, no. 14-1680 (6th Cir. Apr 6, 2015).

The City of St. Johns, Michigan (City) was preliminarily enjoined from enforcing its Ordinance #618 which bans outdoor, unattended charitable donation bins. On appeal the Sixth Circuit affirmed, finding the ordinance to be a content-based regulation of protected speech because other outdoor collection containers including dumpsters were not prohibited.

Planet Aid is a nonprofit charitable organization which solicits donations of clothing and shoes through unattended, outdoor donation bins. In December 2012, the charity placed two donation bins on private property within the City. The City promptly sent a letter stating that the "clothing donation containers have been found to create a nuisance as people leave boxes and other refuse" around them, and directed their removal. The City then removed the bins and held them for collection by Planet Aid.

In January 2014 the City added a new Article 5.518 to the St. Johns Zoning Ordinance. It defines a "[d]onation box" as "[a]n outdoor, unattended receptacle designed with a door, slot, or other opening that is intended to accept donated goods or items." Section 5.518(1)(b) describes the purpose of the ordinance as follows:

> It is the intent of this section to prohibit donation boxes to protect the health, safety and welfare of the citizens of the city by preventing blight, protecting property values and neighborhood integrity, avoiding the creation and maintenance of nuisances and ensuring the safe and sanitary maintenance of properties. Unattended donation boxes in the city may become an attractive nuisance for minors and/or criminal activity. It is also the intent of this section to preserve the aesthetics and character of the community by prohibiting the placement of donation boxes.

The new ordinance contained a substantive prohibition: "No person, business or other entity shall place, use or allow the installation of a donation box within the City of St. Johns." (5.518(1)(c)) and a grandfather clause (which happened to protect a pre-existing Lions Club recycling center): "A donation box that exists on the effective date of this ordinance shall not be subject to the prohibition contained herein." (5.518(1)(d)).

Planet Aid filed a five-count complaint, alleging, among other things, that Ordinance #618 infringed on the charity's protected speech of charitable solicitation, and seeking a preliminary injunction—which the District Court granted.

**HELD:** The Sixth Circuit affirmed.

**DISCUSSION:** The City conceded a level of First Amendment protection regarding Planet Aid's speech, but argued that Planet Aid's bins were analogous to outdoor advertising signs, and that Ordinance #618 was therefore a content-neutral time, place, and manner restriction that passes constitutional muster.

The Supreme Court had addressed charitable solicitation in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). There, Court held that "charitable solicitations" were "clear[ly]" protected by the First Amendment, noting that its "cases long have protected speech even though it is in the form of . . . a solicitation." The *Schaumburg* Court applied strict scrutiny, holding that the ordinance could not be sustained unless it served a "sufficiently strong, subordinating" government interest.

Although the high court had not addressed unattended donation bins, the Fifth Circuit had, in *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011). It relied on *Schaumburg* to invalidate a Texas law requiring groups operating "public donations receptacles" to disclose on the receptacles whether donated items would be sold for profit.

> The Sixth Circuit found *Abbott* persuasive:
> A charitable donation bin can—and does—"speak," and not only in the ways described by the Fifth Circuit in *Abbott*. A passer-by who sees a donation bin may be motivated by it to research the charity to decide if he wants to donate—in so doing, the passer-by will gain new information about the social problem the charity seeks to remedy. . . For these reasons, we hold that speech regarding charitable giving and solicitation is entitled to strong constitutional protection..."

In order to determine whether strict scrutiny applied, the Circuit Court had to assess if Ordinance #618 was content-based. "Broadly speaking, content-based regulations on protected speech "can stand only if [they] satisf[y] strict scrutiny." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811 (2000). It found that the City's ordinance clearly regulated protected speech on the basis of its content:

> The ordinance does not ban or regulate all unattended, outdoor receptacles. It bans only those unattended, outdoor receptacles with an expressive message on a particular topic— charitable solicitation and giving. Thus, the ordinance is not 'unrelated to expression.' [It does not apply] with equal force to non-expressive outdoor receptacles such as dumpsters, receptacles at recycling centers, and public and private trash cans. Yet the ordinance permits the "place[ment], use [and] . . . installation" of these non-expressive receptacles. It bans only those outdoor receptacles that are "intended to accept donated goods or items.

The City asserted that, because the ordinance was viewpoint-neutral—it made no distinction based on the nature of the organization, person, or entity that sought to place a donation box within its bounds—it was therefore content-neutral. That analysis failed: "At oral argument, the City elaborated that the ordinance is content-neutral because it applies 'to donation bins regardless of whose they are.' However, as we explained above, a speech regulation can be viewpoint-neutral but content-based."

In a related argument, the City quoted the Supreme Court's pronouncement in *Ward* that "[t]he government's purpose is the controlling consideration" in determining content-status. The City cited ordinance's "purpose clause" listing a number of non-speech-based justifications (prevention of blight, aesthetics, etc.). The Sixth Circuit found that the "purpose clause" did not alter the fact that the ordinance was facially content-based. It applied only to one subclass of unattended, outdoor receptacles: those with a message about charitable solicitation and giving. "Thus, it is clear from the face of the ordinance that the City's purpose in enacting it was to regulate speech on the basis of its content".

Because the ordinance was a content-based restriction on speech, it would have to survive strict scrutiny. The City bore the burden of establishing that it was narrowly tailored to promote a compelling Government interest, without a less restrictive alternative. The court found that, even assuming the City's stated interests in preventing blight and aesthetics were compelling, the ordinance was not narrowly tailored to promote those interests.

> The ordinance preemptively and prophylactically prevents all charities from operating outdoor, unattended donation bins within the City in the interest of aesthetics and preventing blight. This implies, without any evidence, that charities would be negligent in failing to conduct timely pickups of donated goods, in maintaining the appearance of the bins, etc. Further, it assumes that lesser, content-neutral restrictions such as requiring weekly or bi-weekly pickups or inspections of all outdoor receptacles would be ineffective.

Given the plaintiff's likelihood of success on the merits, the Sixth Circuit affirmed, enjoining St. Johns' outdoor unattended charitable bin ordinance.

LINK (last accessed June 16, 2015).

## THIS JUST IN: Uber Drivers As Employees? Look to California

In a decision earlier this week that could have far-reaching consequences for Uber, Lyft and other transportation network companies, the California Labor Commission has upheld the claim by an Uber driver that she was acting as an employee while driving an Uber car, not as an independent contractor—which made her entitled to more than $4,000 in reimbursement of bridge tolls, parking fees and other costs incurred while providing Uber services to the public.

While Uber states that the decision is limited to one plaintiff and is appealing the decision, citing a contrary holding by the same body, the implications for the company and other TNC's are huge as they look to disclose their profitability and prospects to propel an IPO in the relatively near future.

Some sources believe the decision could also impact other parts of the "sharing economy" which involve ostensibly independent contractors who provide services to others—including chore service TaskRabbit, and cleaning service Homejoy.

LINK (last accessed June 18, 2015).