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## First Amendment: Court Declares Injunction Compelling Transit Authority to Display Controversial Political Ad Moot After Subsequent Implementation of New Policy Banning All Political Ads

## *American Freedom Defense Initiative v. Metro Transportation Authority*, No. 14 CIV 7928 (S.D.N.Y. June 19, 2015).

**FACTS:** This case arises from a decision by the New York Metro Transit Authority (MTA) to exclude controversial political ads from its buses submitted by the American Freedom Defense Initiative (AFDI). The ads, which referred to the killing of Jews by Islamic militants, were excluded based on a regulation prohibiting ads that could foreseeably incite imminent violence or breach the peace. AFDI moved to enjoin the MTA from restricting the ad, claiming that the regulation as applied, violated the organization's first amendment speech rights. The court granted the injunction, finding that the MTA had not proffered any objective evidence to support its contention that the ad was likely to incite imminent violence. Moreover, the court found that MTA ad space on public buses was a public forum requiring MTA ad regulations to overcome a strict scrutiny standard when challenged on constitutional grounds.

In failing to justify the prohibition of the AFDI ad, MTA also failed to meet its burden of showing that the rejection of the ad was narrowly tailored to achieve a compelling government interest. The court delayed the effective date of the injunction by 30 days, in an effort to give the MTA time to appeal. However, rather than appeal, the MTA adopted a new policy prohibiting all political ads. The new policy took effect immediately, and the MTA subsequently moved to dismiss the preliminary order,

arguing that the new regulation rendered the preliminary injunction moot by creating a blanket provision excluding all political ads.

**HELD:** Agreeing with the defendants, the court held that the preliminary injunction was rendered moot by the MTA's change in policy banning all political ads and granted the defendant's motion to dissolve the injunction.

**DISCUSSION:** As a general rule, the voluntary cessation of allegedly illegal conduct will usually render a claim moot if the defendants can demonstrate that there is no reasonable expectation that the alleged violation will recur. The court noted that the preliminary injunction was granted primarily because the court found that the advertising space on MTA buses was a "designated public forum." According to the court, allowing political speech evidenced a "general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy."

By changing its policy, MTA effectively transformed the nature of the ad space from a public form to a "limited public" or "nonpublic" forum. Limited forums warrant a less stringent level of scrutiny, thereby granting the MTA more discretion to choose the ads displayed on public buses. As such, the court found that the change in policy "sufficiently altered the circumstances underlying the case" so as to convince the court that the violation will not recur, thereby making the preliminary injunction moot.

AFDI argued that the new policy was unconstitutional because (1) the amendments were motivated by a desire to suppress their viewpoint, (2) the new policy deprived AFDI of "vested rights," and (3) the new policy was facially invalid. The court rejected AFDI's assertion that the new policy was enacted specifically to suppress AFDI speech. The defendants asserted that the change in policy had been debated prior to the initiation of the suit and referenced several instances in which the MTA had rejected controversial political ads by other groups. As such, the court held that AFDI failed to meet their burden of showing that the blanket prohibition on political ads was motivated by actual viewpoint discrimination.

The court also summarily dismissed AFDI's vested rights claim, noting that the only case the plaintiff cited in support of its position was inapplicable. Absent an additional showing that AFDI had accrued some property interest or expectation to the MTA ad space, the court rejected the vested rights claim.

Finally, the court held that the plaintiffs could not properly raise a facial challenge to the new policy before the court, because these arguments were not made in AFDI's initial complaint. In other words, the court held that AFDI would have to submit an amended complaint raising these claims in order for the court to consider the merits.

For these reasons, the court held that AFDI's claims were now moot due to the change in MTA policy and lifted the injunction.

LINK (last accessed Aug. 12, 2015).

## Jails: Detainee Assaulted in "Sobering Cell" Succeeds in §1983 Claim Against Officers, But Not Against County

## *Castro v. County of Los Angeles*, no. 12-56829 (9th Cir. Aug. 11, 2015).

**SUMMARY:** In a post-*Kingsley* action brought by a public intoxication detainee who was attacked by another arrestee and suffered serious harm, alleging that the County and Sheriff were deliberately indifferent to the substantial risk of harm created by housing the two arrestees in the same sobering cell and by failing to supervise the cell adequately, the district court's judgment entered following a jury trial was: 1) affirmed as to damage award and judgment against individual defendants, where they were not entitled to qualified immunity; and 2) reversed as to judgment against the entity defendants where plaintiff's claim under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), was legally viable but insufficiently proven.

**FACTS:** Jonathan Castro was found staggering and speaking unintelligibly on the evening of October 2, 2009 and "for his safety," officers arrested him for public drunkenness. He was transported to the West Hollywood Station and placed in a "sobering cell." That same night, Jonathan Gonzalez was arrested after punching out a window at a nightclub, and was placed in the same cell as Castro. Gonzalez's intake forms indicated that he was "combative."

Shortly thereafter, Castro began pounding on the cell door. No one responded. A community volunteer came by 20 minutes later and noted that Castro appeared to be asleep and that Gonzalez was "inappropriately" touching Castro's thigh. The volunteer did not intercede, but reported the contact to the supervising officer. The supervisor took no action until he later heard loud sounds from the cell. On investigation, he saw Gonzalez stomping on Castro's head. Castro was by then lying unconscious in a pool of blood.

When paramedics arrived, Castro was still unconscious, in respiratory distress, and turning blue. He was hospitalized for almost a month, then spent four years in a long-term care facility. He still suffers from severe memory loss and permanent cognitive impairments and remains incapable of performing simple life functions such as maintaining hygiene.

Castro sued various individual officers and Los Angeles County under 42 U.S.C. § 1983 on the theory they were deliberately indifferent to the substantial risk of harm created by housing him in the same sobering cell as Gonzalez and by failing to maintain appropriate supervision of the cell. The individual defendants moved to dismiss on the ground of qualified immunity, but the district court rejected their arguments. It concluded that a jury could find that placing an actively belligerent inmate in an unmonitored cell with Castro constituted deliberate indifference to a substantial risk of harm, in violation of Castro's constitutional rights.

The case proceeded to trial. After Castro rested his case, all the defendants moved for judgment as a matter of law on three grounds: (1) insufficient evidence that the design of a jail cell constitutes a policy, practice, or custom by the County that resulted in a constitutional violation; (2) insufficient evidence that a reasonable officer would have known that housing Castro and Gonzalez together was a violation of Castro's constitutional rights; and (3) insufficient evidence for the jury to award punitive damages. The district court denied the motion in its entirety.

Five days later, the jury returned a verdict for Castro on all counts and awarded him $2.6 million in damages. The County and individual defendants appealed.

**HELD:** The Ninth Circuit affirmed as to the individual defendants, but reversed the finding of liability on the part of the County.

**DISCUSSION:** The doctrine of qualified immunity shields government officials from civil liability under 42 U.S.C. § 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

Therefore a court must evaluate two independent prongs: (1) whether the officer's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident.

The constitutional right at issue in this case is the right to be free from violence at the hands of other inmates. This right was first recognized by the Supreme Court in *Farmer v. Brennan,* 511 U.S. 825 (1994). In *Farmer,* a male-to-female transgender person was placed in male housing in the federal prison system, where she was beaten and raped by another inmate. The Supreme Court agreed with her contention that the corrections officers had acted with deliberate indifference to her safety, in violation of the Eighth Amendment. The Ninth Circuit has since clarified that the right to be free from violence at the hands of other inmates extends to inmates housed in state or local custody.

The individual defendants acknowledged that Castro's constitutional right to be free from inmate-on-inmate violence was established, but denied the sufficiency of the evidence supporting Castro's claim of deliberate indifference. Because Castro was a pretrial detainee, his right to be free from violence at the hands of other inmates arose from the Fourteenth Amendment rather than the Eighth Amendment.

Despite those different constitutional sources, the "deliberate indifference" test is the same for pretrial detainees and for convicted prisoners. *Clouthier v. County of Contra Costa,* 591 F 3d. 1232 (9th Cir. 2010) (explaining that "neither [the Ninth Circuit] nor the Supreme Court ha[s] departed from the standard set forth in *Bell* and *Farmer* for considering pretrial detainees' claims that government officials violated their Fourteenth Amendment rights by failing to prevent harm").

The majority addressed a dissent which contended that the Supreme Court's recent decision in *Kingsley v. Hendrickson,* 135 S.Ct. 2466 (2015), required a different analysis. The majority saw a significant distinction between *Kingsley's* excessive force facts and the failure-to-protect facts before it:

> The standard for a failure-to-protect claim—deliberate indifference to a substantial risk of serious harm—is completely different from the standard for an excessive-force claim. For years, the Supreme Court has held that the focus of any excessive-force claim, whether brought under the Eighth Amendment or the Fourteenth Amendment, is on the reasonableness of an officer's actions rather than on whatever thoughts, knowledge, or motivation may have driven those actions.
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> Failure-to-protect claims, however, involve no affirmative act at all by the defendant. The Supreme Court thus requires lower courts to consider more than just the simple fact of inaction; we must also assess what was going on inside the defendant's mind that led to his failure to act. . . . We believe that this substantive difference is more significant than the common constitutional source.

Castro was required to show by a preponderance of the evidence that (1) he faced a substantial risk of serious harm, (2) the defendants were deliberately indifferent to that risk, and (3) the defendants' failure to act was a proximate cause of the harm that he suffered. The jury had specifically found that both individual defendants were deliberately indifferent to Castro's plight; this indifference could have arisen when they housed him with a "combative" inmate and when they failed to respond to his banging on the cell door. Moreover, the supervisor failed to respond fast enough to Gonzalez's inappropriate touching and delegated the safety checks to a volunteer.

The Circuit Court found no reason to countermand the jury's conclusion that the individual defendants were deliberately indifferent to Castro's plight and that such indifference was the proximate cause of his injuries.

It reached a different result for the County, which could not be found liable on a *respondeat superior* theory—Castro had to show either an informal County policy of disregard for inmate safety, with similar prior incidents, or a formal policy of such improper behavior.

The Circuit found that the design of the jail, including the layout of sobering cells, was a deliberate choice of the County.

> We cannot envision how a municipality can design a jail without making "a deliberate choice . . . from among various alternatives." . . . . [F]or any given construction project, including jails, the municipality's governing body—or a committee that it appoints to act in its stead—reviews bids, considers designs, and ultimately approves a plan for the facility and allocates funds for its construction. These choices are sufficient, in our opinion, to meet the definition of

> a formal municipal policy . . . In this case, the County does not contest that it was responsible for the design and operation of the West Hollywood Station. We therefore hold that the County instituted a formal policy under *Monell* with regard to the jail's sobering cell.

However, even though it might be implicit that sobering cells required additional security measures to protect inmates from one another, under Supreme Court doctrine, the County had to be on actual notice of such risk—constructive notice was insufficient:

> In *Farmer,* the Court held specifically that for liability to attach based on a defendant's failure to protect a plaintiff from harm, the defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837. In adopting this test for deliberate indifference claims, the Supreme Court specifically rejected an objective standard of knowledge (i.e., constructive knowledge) for these claims. *Id.* Even the dissent acknowledges that *Kingsley* did not overrule *Farmer* or otherwise question the existing test for deliberate-indifference claims against the individual defendants.

The only evidence proffered by Castro that the County knew of the risk to Castro's safety was the existence of a California regulation referencing the need for inmate safety in sobering cells. But that regulation merely established constructive knowledge on the part of the County—it was for Castro to present evidence of actual similar incidents in the past, which he did not do.

The Ninth Circuit affirmed the judgment of the district court against the individual defendants but reversed as to the County.

LINK (last accessed Aug. 12, 2015).

## Jails: Refusal to Classify ACLU Letters to Prisoners as "Legal Mail" and Refusal to Deliver Letters Violates First and Fourteenth Amendments

## *American Civil Liberties Fund of Michigan v. Livingston County*, No. 14-1617 (6th Cir. Aug. 11, 2015).

**SUMMARY:** Where a county jail did not categorize mail to inmates from the ACLU as "Legal Mail" because the correspondence did not involve an existing attorney-client relationship or privileged material, thereby purportedly justifying the jail's failure to deliver the letters or notify the inmates or ACLU, the jail's conduct violated First Amendment and due process principles.

**FACTS**: The Livingston County Jail's written mail policy requires that all mail except "bona-fide legal mail" must be on 4”x6” inch postcards. "Legal mail," on the other hand, may be sent in a sealed envelope and is generally not opened outside the inmate's presence.

The American Civil Liberties Union Fund of Michigan (ACLU) sent letters enclosed in sealed envelopes to 25 inmates at the Jail. Each letter was marked "Legal Mail," included the name and bar number of a Michigan attorney, and offered legal assistance regarding the Jail's mail policy.
The Jail did not deliver the ACLU's letters, nor did it inform the ACLU or the inmates of that fact. In response, the ACLU filed an action arguing that the Jail's policies violated the First and Fourteenth Amendments. The ACLU also moved for a preliminary injunction, which the district court granted and, in doing so, ordered the defendants to deliver the letters. The Jail appealed.

**HELD:** On appeal, the Jail argued that the injunction was improper because “legal mail” does not include mail from an attorney if the mail neither contains privileged content nor implicates an attorney-client relationship. The Sixth Circuit disagreed, affirming the lower court’s preliminary injunction.

**DISCUSSION:** The Circuit Court categorically disagreed with the Jail’s contention that the protections accorded legal mail do not extend to mail from an attorney unless it contains privileged content or involves an attorney-client relationship:

> Contrary to the Defendants' position, this court has never suggested that "legal mail" requires an existing attorney-client relationship. In *Sallier,* we explained that "when the incoming mail is `legal mail,' . . . a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that *impacts upon or has import for* the prisoner's legal rights, the attorney-client privilege, *or* the right of access to the courts." . . . Likewise, in *Kensu,* we determined that "[t]he right of a prisoner to receive materials of a legal nature, which have impact upon or import with respect to that prisoner's legal rights and/or matters, is a basic right recognized and afforded protection by the courts." 87 F.3d at 174.
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> These principles apply equally here. The ACLU's letters are precisely the type of communication that an attorney and an inmate would want kept confidential—the letters were addressed to a specific inmate, clearly marked "legal mail," and included the name and bar number of a licensed Michigan attorney. *Kensu,* 87 F.3d at 174 ("defin[ing] `legal mail' to include delivery of legal materials to a prisoner, properly and clearly marked as legal materials."). Moreover, the substance of the letters indicated that the ACLU believed that the Jail's mail policy was unconstitutional, offered legal advice and assistance to the inmates, and noted the possibility of bringing a future legal action attacking the

> constitutionality of the Jail's mail policy. . . Attorneys from a "legal assistance organization" like the ACLU (or any other attorney for that matter) must be able to send confidential communication *prior to* initiating a legal action or formally creating an attorney-client relationship.
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> Together, the restrictive "legal mail" definition advocated by the Defendants and the postcard-only policy essentially prevent attorneys from writing confidential letters to inmates about the conditions at the Jail during the investigative stages of a legal matter. Precluding this pre-litigation correspondence and investigation, at the very least, chills important First Amendment rights.

The Circuit Court held that even if the ACLU letters were solicitations, it would not change the result. "But this is largely beside the point—again, an attorney must be able to communicate with an inmate in confidence before litigation and before establishment of a formal attorney-client privilege in order to offer legal advice or determine whether an actionable claim exists. This is precisely what the ACLU was attempting to do here."

Defendants also failed to articulate how their policy was reasonably related to legitimate penological interests. They claimed that attorneys could use the mail to correspond with inmates regarding non-legal issues or smuggle contraband; or imposters might bypass inspection of ordinary mail by using fictitious names or by surreptitiously masquerading as actual attorneys. And the volume of incoming legal mail would increase, which would increase the burdens on Jail personnel.

The court could not discern any valid connection between the mail policies and a legitimate interest. "Nothing in the record suggests that the parade of horribles advanced by the Defendants would occur if the Jail is required to deliver properly marked legal mail sent in an envelope from an attorney to a specific inmate—a policy entirely consistent with the Jail's written policies. . . . Indeed, rather than bear a rational connection to a legitimate interest, the policies at issue are arbitrary, untenable, and unnecessarily impinge on important First Amendment rights."

The Circuit Court was equally unimpressed with the Defendants' lack of due process in declining to deliver the letters without notice to the inmates or the ACLU. That practice was contrary to a number of precedents, including at the Supreme Court: "[T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards" because "[t]he interest of prisoners and their correspondents in uncensored communication by letter . . . is plainly a `liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." *Procunier v. Martinez,* 416 U.S. 396, 418 (1974). Thus it also accepted Plaintiffs' Fourteenth Amendment grounds for the preliminary injunction.

Finally, the court found Defendants' arguments relating to irreparable harm and the balancing of equities to be unpersuasive.

LINK (last accessed Aug. 12, 2015).

## RLUIPA: Eleventh Circuit Upholds Hair-Length Policy As Least Restrictive Means of Achieving Government Interest in Promoting Health and Safety in State Prisons

## *Knight v. Thompson*, No. 12-11926. (11th Cir. Aug. 5, 2015).

**FACTS:** The plaintiffs in this case are inmates in the Alabama Department of Corrections (ADOC). They brought suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) claiming that the ADOC policy requiring inmates to wear short hair styles violated their rights under the statute. Specifically, the plaintiffs are Native American prisoners, who would like a religious exemption permitting them to wear their hair long in accordance with their religious beliefs. The district court granted summary judgment for ADOC and the plaintiffs appealed.

**HELD:** The Eleventh Circuit affirmed, finding that while the policy imposed a substantial burden on the inmates' free exercise of religion, the burden did not outweigh the government's compelling interest in promoting safety and hygiene in the prison system.

**DISCUSSION:** The ADOC requires male inmates to wear short haircuts and does not grant exemptions, religious or otherwise to the policy. The plaintiffs seek a religion based exemption from the hair length policy. RLUIPA prohibits government from imposing a substantial burden on religious exercise unless such imposition (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. At trial, the plaintiffs offered undisputed expert witness testimony demonstrating the burden that the ADOC hair-length policy placed on their religious practices. Nevertheless, the defendants proffered ample witness testimony asserting that the policy was necessary to accomplish several compelling goals, including facilitation of inmate identification, maintenance of good hygiene and facilitation of prison discipline through uniformity. Specifically, the defendants' witnesses testified that hair length restrictions would reduce inmates ability to hide contraband, assist in inmate identification (both during the regular course of prison business and in the case of escape), aid in the detection and treatment of scalp infections, reduce the time and difficulty of conducting searches for contraband, and reduce the risk that inmates could grab each other by the hair during a fight or identify as a special group and form gangs.

The court summarily concluded that these objectives were compelling government interests, finding that the defendants had offered reasoned and fairly detailed explanations of how the ADOC's hair-length policy addresses genuine security and hygiene concerns. Therefore, the issue on appeal was the second prong of the RLUIPA

standard; whether the hair policy was the least restrictive means of furthering the government's interest.

The plaintiffs noted that a strong majority of U.S. jurisdictions permit inmates to wear long hair or allow a religious exemption for inmates. They argued that the widespread adoption of grooming policies allowing inmates to wear long hair demonstrates the viability of a less restrictive alternative to ADOC's hair-length policy. Specifically, the plaintiffs offered as an alternative that ADOC allow a religious exemption for Native American inmates, require exempted inmates to search their own hair and implement the use a computer program to manipulate inmate photographs to aid in identification. The court rejected the plaintiffs' alternative , reasoning that practices of other jurisdictions are not dispositive evidence of the feasibility of restrictive measures, citing Supreme Court case law cautioning lower courts to defer the to reasoned judgments of prison officials when applying RLUIPA. Moreover, the court noted that RLUIPA cannot be applied uniformly, as it requires courts to consider the unique facts and circumstances in the specific context of each case. Here, the court noted that Alabama prisons have become increasingly over-crowded, under-staffed and under-funded and that implementing the alternative would require additional expenses and increase the amount of time it takes for corrections officers to search inmates. Moreover, even if the court adopted the plaintiffs' suggested alternative, it would not address concerns about gang-formation, hair pulling during fights and the concealment of scalp infections.

The court was equally unpersuaded by the plaintiffs' argument that defendants failed to meet the "least restrictive means" standard because all of the witnesses admitted that ADOC did not consider less restrictive alternatives before adopting the policy. The court noted that other circuits have held that prison administrators must actually demonstrate that they considered and rejected the efficacy of less restrictive measures before adopting a practice. However, the Eleventh Circuit declined to follow the other circuits, noting that RLUIPA does not require such an inquiry. "The RLUIPA asks only whether less restrictive measures actually exists not whether the defendant considered alternatives to the policy."

Lastly, plaintiffs noted that ADOC permits female inmates to wear shoulder length hair and argued that this proved ADOC is able to accommodate a religious exemption for males. The court said that this argument ignores the factual findings of the trial court, which concluded that men pose greater safety risks than women in prison populations, and therefore ADOC is not required to enforce a "sex-blind" hair-length policy.
For these reasons, the court found that the defendants' hair policy was the least restrictive means of furthering the compelling government interests in promoting health and safety in Alabama prisons, and affirmed the trial court's grant of summary judgment for the defendants.

LINK (last accessed Aug. 8, 2015).