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ADA: Miniature Horse Qualifies as Service Animal Under ADA Despite Not Meeting All ADA "Assessment Factors"

Anderson v. City of Blue Ash, No. 14-3754 (6th Cir. Aug. 14, 2015).

A miniature horse which demonstrably assisted a disabled girl to exercise qualifies as a service animal under the ADA and cannot be removed pending further inquiry, according to the Sixth Circuit, despite the fact that the horse had not been professionally trained and did not meet other ADA "assessment factors."

FACTS: In 2010 Ingrid Anderson's disabled daughter C.A. began working with a miniature horse service animal. Like dogs, miniature horses are covered under the Americans With Disabilities Act (ADA) and are specifically referred to in the ADA C.A. used the horse to recreate outside – by holding on to its mane she was able to move around and exercise. The horse eventually came to live with the Anderson family so C.A. would not have to travel to and from the therapy facility.

In 2010 the city of Blue Ash, Ohio (City) began receiving complaints from neighbors about the animal in the residential neighborhood. These complaints centered on the waste from the animal and Anderson's failure to keep the property clean. At least one complaint alleged the horse was not being used for therapeutic purposes. As a result Anderson was ordered to remove the animal from her property as a health and safety concern. She responded by providing documentation that the animal was an ADA service animal and the city council decided not to enforce the order.

In 2012 another round of complaints were received by the City centering on the unsanitary conditions of Anderson's property, which at that point housed two miniature

horses, pigs, goats, dogs, and chickens. She was again ordered to remove one horse and this time, despite an appeal, the council upheld the order. In response Anderson removed both horses and obtained a single new one, Ellie, to serve as the therapeutic horse. She trained Ellie herself.

In 2013 the city passed Ordinance No. 2013-1, amending the City's municipal code "to prohibit keeping of farm animals at residences within the city." It specifically applied to horses, but excepted those "otherwise specifically permitted elsewhere in the Municipal Code or permitted by Hamilton County, Ohio State, or Federal law." Anderson was subsequently cited by the City for having the horse on the property once the ordinance took effect. She took both citations she received to trial and argued that the ADA permitted her under the ordinance to have the horse. The municipal court found against Anderson.

In 2014 Anderson filed suit against the City in district court, arguing its refusal to permit her to keep a horse violated her rights under the ADA. The district court granted summary judgment to the City. Anderson appealed.

HELD: The Sixth Circuit reversed, holding that miniature horses can be service animals and that material issues of fact were in dispute, precluding summary judgment.

DISCUSSION: Anderson argued that the ADA required the City to make reasonable accommodations to its policies and procedures and allow the horse on her property as a service animal. The district court found that the horse did not meet ADA requirements and did not satisfy the "assessment factors." The City supported this holding on appeal, arguing the horse did not meet ADA regulations since "it does not help C.A. with her daily life activities (such as going to school), C.A. can walk without the horse, and the horse does not help C.A. inside the house." The Sixth Circuit was not persuaded by this position, finding that, viewing the evidence most favorably for Anderson, the horse helped C.A. walk outside and recreate and that the horse did not need to help C.A. with all daily activities to qualify under the ADA.

The City also argued that the animal could not meet ADA regulations since it was only trained by Anderson, who holds no certifications to train service animals. The Court also found this entirely unpersuasive, noting the ADA has no rules about who can train a service animal or whether a service animal can only qualify as such if it is trained by a certified trainer. It thus overturned the lower court' first holding.

The district court had held that the "assessment factors" in the ADA were not met in Anderson's case and, therefore, ruled the horse was not a service animal. The Circuit Court began by recounting that the ADA provides that certain factors be considered when determining "whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility." These include "(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features; (ii) Whether the handler has sufficient control of the miniature horse; (iii) Whether the miniature horse is housebroken; and (iv) Whether the

miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation."

As to the first factor, the City argued the Anderson property was too small to accommodate Ellie. Anderson countered that Ellie was uniquely chosen because she has deformed legs, making walking more difficult for her, thus necessitating less room than a standard miniature horse. Anderson also testified that the horse's shed is the size built for three miniature horses, giving Ellie plenty of room. The Circuit reversed the lower court, finding factual issues remained outstanding as to this first factor.

The City next argued the second factor weighed against Anderson since it provided a sworn statement describing an incident where Ellie did not help C.A. when she fell (the horse continued walking and did not help C.A. get up). Anderson testified that she had *sufficient* control of the animal and that she had trained it to help C.A., leading the Court to hold that there was an issue of material fact as to the second factor.

As for the third factor, the City argued that Ellie was not housetrained. There was no dispute as to this issue. However, the court was quick to point out that "this does not automatically relieve the City from its obligation to make a reasonable modification because the assessment factors are not *prerequisites* for a reasonable modification, but are independent *factors* that shall be considered when evaluating whether a particular modification is reasonable for a particular animal. The City provides no reason why Ellie's lack of control over producing waste indoors is relevant here, where the horse is never indoors . . . ."

Finally, the City pointed to the numerous citizen complaints about the unsanitary nature of the Anderson property as a basis to find against Anderson. Anderson conceded there were had previously been issues with sanitation, but testified that currently the property was cleaned, that she had no complaints from her current neighbors--and she provided letters of support from those neighbors to counter the City's charges. The Circuit Court thus found a factual dispute as to whether one miniature horse would threaten the City's "legitimate safety requirements." The court thus reversed and remanded.

LINK (last accessed Aug. 26, 2015).

Driver's Privacy Protection Act: Repeated Accesses by Municipalities to Certain Drivers' Information Requires Analysis Under DPPA

McDonough v. Anoka County, No. 14-1754 (8th Cir. Aug. 20, 2015).

The Eighth Circuit has reversed lower courts' dismissal of DPPA-based claims brought by three Minnesota drivers whose driver's license data was accessed hundreds of times by counties, cities and towns, seemingly without a justifiable governmental purpose.

FACTS: In 1994 Congress passed the Driver's Privacy Protection Act (DPPA) in order to ensure that the sensitive information collected by state motor vehicle agencies is only disclosed for permissible purposes. These purposes include "use by any government agency, including any court or law enforcement agency, in carrying out its functions, or … use by a private person acting on behalf of a government agency in carrying out its functions." Anyone who knowingly obtains, discloses or uses personal information from a motor vehicle record is liable to the individual, and courts can award actual damages, attorney's fees, as well as punitive damages. In Minnesota, law enforcement officers logging in to the website portal giving them access to the driver information database are provided with a general reminder of these rules by the statement that "[a]ccess to this service is for authorized personnel only conducting official business."

Brooke Nicole Bass, Johanna Beth McDonough, Dawn Mitchell, and Brian Potocnik, all Minnesota residents, suspected that law enforcement officers were unlawfully accessing their driver license information without a proper purpose under the DPPA and requested audits from the state Department of Public Safety. The audits revealed that each driver's information had been accessed hundreds of times by the law enforcement offices of local municipalities and counties, prompting the four drivers to file suit in various district courts, alleging that the repeated accesses were unlawful under the DPPA because the officers – John Doe's – and the municipalities and counties for which they worked did not have permissible purposes for doing so.

The district courts dismissed the cases for failing to state a claim upon which relief could be granted. The courts dismissed all the claims against the municipalities and counties because each held the allegations were either too conclusory or too speculative to show that as to each John Doe defendant or each individual access of the personal information that the John Does' purposes for obtaining the driver's information was impermissible. The four drivers appealed to the Eighth Circuit.

HELD: The Eighth Circuit reversed the district courts' holdings as to Bass, McDonough, and Mitchell, finding the pleadings were sufficient to meet FRCP 8 and the requirements of *Iqbal* and *Twombly.* The Circuit affirmed the district court holding as to Potocnik, deeming his pleadings insufficient to overcome the plausibility hurdle.

DISCUSSION: The municipalities and counties first argued that the law enforcement officers in the cases never "obtained" the personal information of the drivers within the

meaning of the DPPA. The argued that accessing driver information does not meet "obtainment" under the DPPA since obtain means to "hold onto or possess." The Circuit Court quickly rejected this, noting that while etymologically the local government might be correct, the modern usage of the word "obtain" refers to gaining or attaining something – information for example.

Moving to the meat of the case, the local governments argued, and the district courts agreed, that the plaintiffs did not meet the federal pleading standard and the *Iqbal/Twombly* criteria. "To establish a DPPA violation, Drivers must prove that the Defendants 1) knowingly 2) obtained, disclosed, or used personal information, 3) from a motor vehicle record, 4) for a purpose not permitted." The appeal hinged on whether the impermissible-purpose prong was met. The court noted that *Twombly* directs that determining the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Further, *Iqbal* demands courts "consider whether there are lawful, 'obvious alternative explanation[s]' for the alleged conduct, because '[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" With these standards in mind, the court determined whether each plaintiff's allegations met this standard for each defendant against whom it was alleged – e.g. each local municipality and county from which a potentially unlawful access occurred.

As to Bass, McDonough, and Mitchell the court reversed the lower courts' dismissals. In each case the Circuit looked to see whether there were unusual patterns of access of the driver's information to determine whether it was plausible to posit that the personal information was accessed for illegitimate purposes. For Bass, the pleadings stated that between 2005 and 2011 her information was accessed via name (not license plate) over 750 times by 340 different Minnesota government officers. Within those 750 times it identified four unusual patters of access by local government officers: 1) late night access between 11pm and 6am; "2) accesses on the same day as or within a few hours of accesses by other, unrelated entities during the limitations period; 3) multiple late-night accesses . . . . ; or 3) a history of frequent suspicious accesses fitting the above criteria . . . ." Bass had no criminal record at all according to her pleading.

As for McDonough--a television crime reporter and investigator--the pleadings stated that her information was accessed 500 times by 70 local government agencies between 2006 and 2013. The court identified the same suspicious patterns of access as for Bass and found that during one six-day period her information was accessed 178 times by 46 different Minnesota agencies. While McDonough, unlike Bass, did have two DUI arrests – one of which occurred during that six-day period – the court still found it unlikely that for one DUI arrest 46 local governments needed to view her information 178 times. Local governments argued that since McDonough covered the Republican National Convention during this time that accounted for so many accesses, but the court could not see why a reporter's identity would need to be verified by dozens of agencies for such an event and pointed out that many of the accesses were *after* the Convention.

As for Mitchell, a reporter and sportscaster on television, her information was accessed 219 times by 50 local government agencies between 2005 and 2013. The Circuit also found suspicious patterns in her pleadings and, while it seemed more willing to accept the local government explanation for this plaintiff that there are multiple Dawn Mitchells in Minnesota, it held that at the motion to dismiss stage, she had crossed the hurdle of plausibility.

The local governments from which officers accessed these women's information offered a variety of explanations for the excessive information access, including officers verifying information before meeting with a driver (Bass served as the police union's legal representative for a period), approval of gun permits, computer forensics investigations, verification of a witness or victim in a case, a license-plate check, that officers investigate crime during their overnight shift, and that officers could have used a driver's information to use her photo for a photo lineup. The court ultimately found though, taking the pleadings and audits attached in a light most favorable for the plaintiffs, that the allegations raised the specter that the information was accessed for impermissible purposes and reversed the district courts' holdings as to these three plaintiffs.

Mr. Potocnik alleged his information was accessed 420 times by 40 different departments and 200 officers since 2003. The court did not identify the suspicious patterns it found with the three other plaintiffs and refused to find just based on the "sheer volume of accesses" that they were for an impermissible purpose. The court held that his "allegations of underlying facts lack[ed] the specificity necessary to give rise to a reasonable inference that the defendants obtained his personal information for an impermissible purpose" and thus dismissed his complaint, affirming the lower court in his case.

LINK (last accessed Aug. 26, 2015).

Excessive Force: Sixth Circuit Reverses Dismissal of Excessive Force Claim, Finding Officer Was Not Entitled to Qualified Immunity for Fatally Shooting Fleeing Suspect

Godawa v. Byrd, No. 14-5963 (6th Cir. Aug. 19, 2015).

The Sixth Circuit has reversed a district court's grant of summary judgment to a police officer in an excessive force claim, finding that the officer's firing through the rear passenger window of a slowly-moving vehicle after a field sobriety test was not a reasonable use of deadly force because the driver did not pose any imminent threat of danger to officers or the public.

FACTS: On the night of the shooting, the defendant police officer was serving on bicycle patrol near a parking lot where the suspect was parked. The defendant approached the suspect's vehicle, and after observing an open beer bottle, suspected that the driver had been drinking. As the officer requested backup for the performance of a field sobriety test, the decedent started to back his vehicle out of the parking spot. The officer had his gun drawn as he ran to the front of the suspect's car. In the moments that followed, video surveillance shows that the suspect's car hit the defendant. Soon afterwards, the suspect attempted to flee the scene in the vehicle, and as the officer ran after the suspect, he fired his weapon through the rear passenger window, ultimately killing him.

The district court granted the defendant's summary judgment motion, finding that the officer's use of deadly force was warranted under the circumstances.

HELD: On appeal, the Sixth Circuit reversed, holding that the evidence, when viewed in the light most favorable to the plaintiffs, could lead a reasonable jury to believe that the use of deadly force was not appropriate in this instance. In support of this ruling, the court cited Circuit precedent and Supreme Court case law rejecting qualified immunity as a bar to excessive force claims when deadly force is used against a fleeing suspect who does not pose an imminent threat to an officer or bystanders. Here, the court found that the facts in this case were consistent with prior rulings.

DISCUSSION: At issue on appeal is whether the officer's use of deadly force was justified, thereby entitling him to qualified immunity.

Video footage from the officer's body camera and a surveillance recording from a local bar show the impact between the suspect's car and the officer. However, each party contends that the video evidence supports two different accounts of what happened. The plaintiffs contend that the defendant was moving toward the car just prior to the impact "to block the exit," whereas the defendant claims that he was "targeted" by the suspect, who intended to hit him. The court found that the video footage was not dispositive, as it was difficult to discern whether the car was driving toward the defendant in an attempt to injure the officer, or whether the defendant was moving toward the car in an effort to prevent the suspect's escape. The defendant argued that the video blatantly contradicted the plaintiffs' account of the events, and therefore, sought to have summary judgment upheld. The court disagreed, recalling that when considering summary judgment motions, a court must consider the facts in the light most favorable to the plaintiffs. Here, the court found that the video evidence was not conclusory:

> Specifically, both videos can reasonably be interpreted as indicating that Defendant was not directly in front of the vehicle, but rather was located ahead of the vehicle to the right of the passenger side during the relevant timeframe, and that the car never "targeted" Defendant. Moreover, based on the surveillance footage and the nature of the movement depicted in the lapel video,

> it appears possible—and arguably likely—that Defendant was moving toward the car with his gun drawn in the moments before the apparent impact. A reasonable juror observing the video evidence could conclude that Defendant initiated the contact with [the suspect's] car in an apparent attempt to stop [him] from fleeing the parking lot.

Accordingly, the court assumed that the defendant was not actively struck by the suspect's car, but rather, that the officer initiated the impact with the vehicle in his efforts to keep the suspect from fleeing the scene.

With respect to the subsequent shooting, the court stated that the evidence could be "reasonably interpreted as indicating that Defendant was effectively chasing [the suspect's] car before he fired the shot that killed [him] and that he was not in harm's way at that critical moment."

These findings served as the basis for the court's discussion of the plaintiffs' excessive force claim. Citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the court asserted the general principle that 'if an officer 'has probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent [the suspect's] escape by using deadly force.'" In contrast, where a suspect poses no immediate threat to the officer or others, deadly force is not justified. Further, an officer may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety.

The court noted that an officer's prior interactions with a driver may suggest that the driver may continue to endanger bystanders. However, the court, relying on the plaintiffs' account of the events, found that the officer in this case, actively placed himself in the line of danger by using his body to block the exit, and that such actions did not warrant a finding that the suspect had "targeted" the police officer, or would otherwise pose a threat to innocent bystanders.

Moreover, the court noted that the suspect was initially suspected of the relatively minor offense of underage drinking and not a serious violent felony, and as such, the defendant posed no immediate threat to the officer or bystanders.

For these reasons, the court held that a genuine dispute of material fact exists regarding the circumstances of the officer's impact with the suspect's vehicle. Additionally, under the plaintiffs' version of the facts, a reasonable juror could conclude that the defendant's use of deadly force violated the suspect's clearly established constitutional rights under the Fourth Amendment. Consequently, the court held that the defendant was not entitled to summary judgment, and that the district court erred in granting qualified immunity to the defendant.

LINK (last accessed Aug. 26, 2015).

FOIA: Sixth Circuit Panel Upholds FOIA Request for Booking Photos of Police Officers, But Urges Reversal of Circuit Precedent

Detroit Free Press v. United States Department of Justice, No. 14-1670 (6th Cir. Aug. 12, 2015).

A panel of the Sixth Circuit has upheld a lower court requirement that US Marshals turn over booking photos of Detroit-area police officers under a FOIA request by the Detroit Free Press, but has urged reconsideration of the precedent requiring provision of the photos, citing contrary decisions by other Circuits.

FACTS: In 2012 the Detroit Free Press covered a local story about Detroit-area police officers indicted on federal charges. In so doing, the paper asked the United States Marshals Service for the booking photos of the officers. The paper relied on *Detroit Free Press v. United States Department of Justice*, 73 F.3d 93 (7th Cir. 1996), which held that the Freedom of Information Act (FOIA) requires government agencies to honor requests for the booking photos of criminal defendants who have appeared in court. The Marshals Service, despite honoring the 1996 holding for years, denied the paper's recent request. The paper responded by suing. The district court, bound by the 1996 opinion, granted summary judgment to the paper and mandated the Marshals Service turn over the photos. An appeal followed.

HELD: A panel of the Sixth Circuit affirmed the lower court because it too was bound by the Circuit's 1996 opinion, but strongly urged an en banc hearing for reconsideration and reversal of the Circuit's precedent.

DISCUSSION: FOIA requires government agencies – from the federal government to municipalities – turn over opinions, policy statements, and other records promptly in all but a few circumstances. Statutory exemption 7(C) permits agencies to deny access for "records or information compiled for law enforcement purposes" if public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In 1996, the Seventh Circuit determined that booking photos do not fall within this exemption and must be produced for a FOIA request because there is no privacy interest implicated since the defendant's name is already pubic and the defendant has already appeared in open court.

The panel in this case, recounting this history, affirmed the lower court, saying that it was "bound" by the 1996 case under Circuit rules, specifically 6th. R. 32.1(b). However, it concluded its opinion by urging an en banc rehearing of the issue. It underscored that the Sixth Circuit was the only jurisdiction to speak to the issue until 2012 when the Tenth and Eleventh Circuits disagreed with its holding and, notably, that the Eleventh Circuit case was denied cert. The panel challenged the view that no privacy interests are implicated by booking photographs, noting that they "convey the sort of potentially embarrassing or harmful information protected by exemption [7(C)]: they capture how an individual appeared at a particularly humiliating moment immediately after being

taken into federal custody," that they "convey the unmistakable badge of criminality, and that the photos "often remain publically available on the Internet long after the case ends." The panel concluded by saying that "in sum, several factors merit revisiting [the 1996 case]. But we remain bound by our precedent and therefore affirm."
LINK (last accessed Aug. 26, 2015).

Preemption: San Francisco Tow Truck Regulations Are Not Preempted by the FAAAA Due to "Safety Exception"

California Tow Truck Ass'n v. City and County of San Francisco, No. 13–15614 (9th Cir. Aug. 13, 2015).

The Ninth Circuit has upheld virtually all of a lower court's determination that San Francisco's tow truck permitting scheme is not preempted by the FAAAA, because the scheme is primarily a safety measure, and is thereby excepted from the FAAAA's broad preemptive scope.

FACTS: In 2009, the San Francisco Board of Supervisors announced a number of legislative findings related to the City's tow truck businesses, including:

- that there were frequent incidents of illegal towing from private property and significant risk to the safety of residents and visitors when illegal towing from private property occurred at night; and

- that illegal towing from private property affected people of limited economic means who had to pay hundreds of dollars to recover their vehicles--or were subjected to claims by collection agencies--even though their vehicles had been illegally towed;

The City enacted two ordinances within the San Francisco Police Code (the "Permit Scheme") to regulate the City's towing industry. Its provisions include:

Individual tow car applicants must submit identifying information to the Police Department, and disclose any criminal arrest history. Along with the application, applicants must submit fingerprints, passport-size photographs, a letter from an employer, and a filing fee. After receiving an application for a permit, "[t]he Chief of Police shall…make an investigation without unnecessary delay…and grant such application," unless the applicant was convicted of violating, or acted in violation of, certain enumerated criminal statutes, or falsified information on the application. Driving or operating a tow car within the City without a permit, or not maintaining possession of a permit while driving or operating a tow car, is a misdemeanor.

The requirements for tow car firms are similar. Applicants for such permits must provide not only identifying information about themselves and their business, but also additional

information, including: details of every tow truck that will be operated, "[a] description of the applicant's business plan, and proposed services to be provided, including…a system for handling complaints that is acceptable to the Chief of Police," the name and permit number of all tow car operators employed by the firm, evidence of a minimum level of insurance, and so on.

Tow car firms are also required to maintain records of each vehicle towed for three years and to make such records available for inspection by any peace officer. When a vehicle has been towed, tow car firms must "provide information to towed-vehicle owners by displaying and making available a brochure in a conspicuous place in the location where a vehicle owner must come to reclaim their towed vehicle."

In July 2010, CTTA, a nonprofit organization representing more than 1,000 towing companies doing business in California, filed a complaint against the City, alleging that its members had been "harassed and subject to citations, fines, and in some cases the impound of their tow truck . . . for failing to obtain a permit." Moreover, it alleged, "[t]he ability of CTTA members to conduct their business is adversely affected by the San Francisco ordinance, because it subjects them to great uncertainty as to whether they are able to conduct business in, around, and through the City."

CTTA sought, among other things, a declaration that the Permit Scheme is preempted by the Federal Aviation Administration Authorization Act (FAAAA or Act). The FAAAA's preemption clause provides: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

After initial remand, the district court upheld nearly all of the Permit Scheme, holding some provisions outside the ambit of the Act's express preemption clause and others covered by the Act's savings clauses. In particular, the district court determined that many of the provisions fell within the FAAAA's "safety exception," because they are "genuinely responsive to safety concerns." *City of Columbus v. Ours Garage & Wrecker Serv., Inc*., 536 U.S. 424, 442 (2002).

The district court granted the City's cross-motion for summary judgment, from which CTTA appealed.

HELD: The Ninth Circuit affirmed, finding that, except for the Permit Scheme's "business plan" requirement, the Scheme was not preempted by the FAAAA.

DISCUSSION: As the Circuit Court explained, the principal purpose of the FAAAA was 'to prevent States from undermining federal deregulation of interstate trucking' through a 'patchwork' of state regulations." (citation omitted).

Toward that end, the FAAAA contains an express preemption clause, which provides: "Except as provided in [the savings clauses in] paragraphs (2) and (3), a State [or] political subdivision of a State…may not enact or enforce a law, regulation, or other

provision having the force and effect of law related to a price, route, or service of any motor carrier…"

However, "[p]reemption analysis 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " And in this instance, those police powers were clearly preserved in the "safety" exception to the Act's preemptive ambit: It states that the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles."

The CTTA had argued that the FAAA "safety exception" covered only regulations related to the "motor vehicle safety" of the tow trucks themselves—for example, how they operate, how they are driven and so on. The Circuit Court disagreed:

> The very language of the safety exception demonstrates that CTTA's understanding of the FAAAA's safety concept is unduly narrow. Section 14501(c)(2) provides that the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphases added). The safety exception nowhere mentions "motor vehicle safety," the talismanic phrase to which CTTA repeatedly refers. (*emphasis added by IMLA*).

The court cited numerous precedents, including from other circuits, construing "safety" in the context of towing laws to cover a broad swathe of activities and persons peripheral to the actual towing operation.

The City conceded that its Permit Scheme "relate[s] to" the "price" and "service" of a towing company, and hence of a "motor carrier" -- but was not preempted by the FAAAA because it fell within the Act's "safety exception."

It pointed to testimony the Commanding Officer of the City's Police Department Permit Section, who explained that "corruption and criminal activity pervade the [towing] industry," leading to "[i]mproper conduct" such as "towing vehicles illegally; overcharging people whose vehicles are towed; outright stealing towed vehicles; operating tow trucks in an unsafe manner on the road; stealing merchandise from towed vehicles; and causing damages to towed vehicles." Further, he was "aware of instances in which tow operators or their employees have physically or sexually assaulted persons whose cars had been towed."

"[T]he towing business," he declared, "by its nature, presents certain dangers to the public," as "when a person discovers that her car has been towed, she is sometimes left stranded in a dangerous location."

The court found that the officer's declaration, and other evidence of legislative concern with public safety related to towing activities, fulfilled the safety exception. It also found

ample nexus between the permit provisions at issue and the safety concern. "That the permit requirements have a significant and logical relationship to safety is evident."

The Circuit examined a number of the specific permitting requirements to which CTTA had objected—background checks including arrest records, fingerprinting, record keeping, and so on—and concluded that all were legitimately related to the goal of maintaining safety. So too, did the fees payable for obtaining a permit, despite CTTA's objections:

> The filing and license fees reimburse the City for the costs of processing the application. The permit fees thus directly support the Permit Scheme's other requirements. The penalty provisions for driving or operating a tow truck in the City without requiring the requisite permit are likewise integral to the functioning of the Scheme's permit requirement. Absent some penalty for noncompliance, the permit requirement would be a dead letter.

The court could not, however, find the nexus between safety and a requirement that towing firms produce a business plan in order to obtain a permit. Although the City argued that business plans could help reveal "whether a permitted towing firm would be able to make ends meet without resorting to illegal means," the Circuit Court found any that purported linkage to be ephemeral: "In sum, unlike the other challenged provision, the business plan requirement is just not genuinely responsive to safety concerns, and so is preempted."

This flaw did not doom the entire Permit Scheme, because it contained a severability clause that effectively insulated the balance of the Scheme from the invalid business plan requirement—which the court saw as "minor" and even "tangential" to the overall Scheme.

LINK (last accessed Aug. 26, 2015).

Speech: Panhandling Ordinance Previously Upheld By Seventh Circuit Is Struck Down Following *Reed v. Town of Gilbert*

Norton v. City of Springfield, No. 13-3581 (7th Cir. Aug. 7, 2015).

The Seventh Circuit has reversed itself following the Supreme Court's abolition in *Reed* of any salient distinction between content-based regulation and subject matter-based regulation, striking down a panhandling ordinance which it had previously upheld.

FACTS: The Springfield, Illinois Municipal Code prohibits panhandling in its downtown historic district. The ordinance defines panhandling as an oral request for an immediate donation of money. The ordinance does allow signs requesting money, as well as oral pleas to send money later. Don Norton and Karen Otterson challenged the ordinance,

arguing it discriminated based on content since it barred oral requests for money immediately, but allowed the requests if they were for future payment. The district court held that the ordinance did not discriminate based on content and the Seventh Circuit affirmed the ruling.

In 2014 the case reached the Seventh Circuit a second time on a request for rehearing. The Circuit deferred consideration this time until after the Supreme Court decided *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), which was then pending. After deciding *Reed* the Supreme Court remanded *Thayer v. Worcester*, 755 F.3d 60 (1st Cir. 2014), an opinion upon which the Seventh Circuit had relied in its first *Springfield* opinion. The parties, upon request, filed supplemental briefs on the relevant new law, finally enabling the Court to consider the merits of the rehearing.

HELD: The Court reversed the district court's holding in light of *Reed* and remanded for entry of an injunction against the ordinance's operation.

DISCUSSION: In its first *Springfield* opinion the Seventh Circuit held that the panhandling "ordinance d[id] not interfere with the marketplace for ideas, d[id] not practice viewpoint discrimination, and that the distinctions that plaintiffs call[ed] content discrimination [were] efforts to make the ordinance less restrictive, which [were] a mark in its favor." It thus upheld the ordinance for these reasons.

However, in the second case the Circuit found *Reed* undermined these foundations of its previous holding. Identifying the critical elements of *Reed,* it noted that the Supreme Court held "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," and that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." It thus determined the *Reed* majority had "effectively abolishe[d] any distinction between content regulation and subject-matter regulation." As a result it found that Springfield's attempts to narrow the ordinance – to apply it only to immediate requests for money and not those for future donations – was a critical flaw under *Reed*. For under *Reed* any law distinguishing speech by reference to its meaning requires a compelling justification to survive strict scrutiny. Ultimately, under *Reed* the Court found the ordinance's distinction between immediate and future requests for money was content discrimination, that no compelling justification was provided, and struck it down.

CONCURRENCE: Judge Manion wrote separately only to underscore the importance of *Reed.* The Judge noted that the content-neutrality standard espoused in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) was in tension with the Court's content-based speech doctrine and that *Reed* resolved that tension. The Judge said whereas *Ward* said "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," *Reed* holds that any "topical censorship is still censorship." Because the majority faithfully applied this new framework, the Judge concurred.

LINK (last accessed Aug. 26, 2015).

THIS JUST IN: MASSIVE INCREASE IN DRONES INTERFERING WITH COMMERCIAL AIRCRAFT

The current *Municipal Lawyer* reports on the rapid proliferation of consumer drone usage, and the coming challenges for municipal governments given the vacuum in FAA regulations for "recreational use." As evidenced in an article last week in the *Washington Post,* the pace of unregulated drone use--and the resulting interference with aviation—is accelerating. The *Post* notes that, in the first 2 weeks of August 2015, the FAA had already recorded 70 instances of drones being seen by commercial airlines in close proximity.

In some cases, these rogue drones were flying as high as *10,000 feet.*

LINK (last accessed August 26, 2015).