International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 15 – August 11, 2016

Employment: Failure to Compensate City Park Rangers for Donning and Doffing Time May Violate FLSA

Perez v. City of New York, No. 15-315 (2d Cir. Aug. 2, 2016)

Reversing and remanding a lower court decision (by the now-infamous Judge Shira Scheindlin of New York City "stop and frisk" litigation) which had granted partial summary judgment to the City, the Second Circuit has found that the City's Department of Parks & Recreation may have violated the Fair Labor Standards Act by refusing to compensate City park rangers for time spent putting on and taking off ("donning and doffing") required uniforms. The case was remanded to determine how integral the time taken to dress in Park uniforms was to job performance.

During their shifts, Assistant Urban Park Rangers (PRs) are required to wear uniforms and carry equipment including a bulletproof vest and a utility belt holding handcuffs, gloves, a radio, a flashlight, a baton, a can of mace, a summons book, and a tape recorder. PRs estimate it takes from 5 to 30 minutes each day to don and doff those uniforms.

The Fair Labor Standards Act (FLSA) mandates compensation for activities which an employee is employed to perform, including tasks — even those completed outside a regularly scheduled shift — that are an integral and indispensable part of the principal activities. But the FLSA does not require payment for time spent on activities which are preliminary to or following an employee's principal activities.

Courts have found a broad range of pre-and post-shift activity to be integral and indispensable, including a slaughterhouse employee's knife sharpening and donning “metal-mesh gear”; a radiological technician's powering up and testing of an x-ray machine; a K-9 officer's feeding, walking, and training of his dog; and battery plant employees’ time spent showering and changing clothes at the workplace after a shift.

With those precedents in mind, the Circuit Court found that a reasonable fact finder could conclude that the PRs’ donning and doffing of uniforms were integral and indispensable to their principal activities. Several considerations pointed to that result:

First, the donning and doffing of a PR uniform were "undertaken for the employer's benefit, with no choice on the employee's behalf.” The Parks Department prescribed the components of the uniform in painstaking detail, and required that they be donned and doffed at the workplace. More fundamentally, the uniforms were vital to "the primary goal[s] of [the plaintiffs'] work" during a shift. Their utility belts held items used to perform law-enforcement duties. A summons book was necessary for the issuance of summonses. A baton, mace, and handcuffs could be critical in effecting an arrest. And a radio and flashlight might prove crucial in tracking suspects and coordinating with other municipal employees.

> We are inclined to classify these items as tools of an AUPR's trade, arguably analogous to a butcher's knife, a radiological technician's x-ray machine, or a K-9 officer's dog. . . . therefore, we think that a reasonable factfinder could conclude that the donning and doffing of a [Park Ranger’s] utility belt are integral and indispensable tasks.

The district court's decision was vacated and remanded. The Second Circuit could not conclude as a matter of law that the PRs’ donning and doffing of uniforms were not integral and indispensable to their principal activities.

LINK

Employment: Professor’s Sexual Orientation-Based Employment Discrimination Claim is Not Cognizable under Title VII

Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. July 28, 2016)

Explaining that it is powerless under current precedent to move further, the Seventh Circuit has resisted the EEOC’s continuing push for including “sexual orientation” as a form of gender-based employment discrimination under Title VII, affirming a lower court determination that a lesbian Indiana professor’s employment discrimination claim based on her sexual orientation does not fall within the ambit of Title VII--and that such an expansion of Title VII requires action by Congress or a definitive Supreme Court decision.

Kimberly Hively began teaching as a part-time professor at Indiana's Ivy Tech Community College in 2000. In 2013, she filed a bare bones pro se charge with the EEEOC claiming that she had been blocked from full time employment due to her sexual orientation in violation of Title VII. After exhausting the EEOC's procedural requirements, she filed a complaint in district court alleging that although she had the necessary qualifications for full-time employment and had never received a negative evaluation, the college refused even to interview her for any of the six full time positions for which she applied between 2009 and 2014, and her part-time employment contract was not renewed in July 2014. In short, she alleged that she had been "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII. The college defended on the grounds that Title VII does not apply to claims of sexual orientation discrimination in the workplace. The district court agreed and granted Ivy Tech's motion to dismiss.

On appeal, the Seventh Circuit affirmed. In a lengthy analysis it determined that Title VII as written by Congress and interpreted by the Supreme Court does not provide for employment discrimination claims based on sexual orientation, only those for gender-based discrimination. While claims of discrimination based on sexual orientation are covered by Title VII (and Title IX), they are not a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination must arise as gender stereotype or sex discrimination claims. The Circuit readily acknowledged the discontinuity under current law:

> As things stand now, however, our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing makeup—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman. We are left with a body of law that values the wearing of pants and earrings over marriage. It seems likely that neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects "flamboyant" gay men and "butch" lesbians but not the lesbian or gay employee who act and appear straight. This type of gerrymandering to exclude some forms of gender-norm discrimination but not others leads to unsatisfying results.

In theory, current precedent would create a paradox in which a person "can be married on Saturday and then fired on Monday for just that act." The irony is that, although federal law now guarantees the right to marry another person of the same gender, Title VII -- to the extent it does not reach sexual orientation discrimination "also allows employers to fire that employee for doing so."

> Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, 'You are a hard-working employee and have added much value to my company, but I am firing

> you because you are gay.' And the employee would have no recourse whatsoever— unless she happens to live in a state or locality with an anti-discrimination statute that includes sexual orientation.

Despite advances in civil rights for the LGBT community, more than half the states do not have sexual orientation protections: Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming.

The Circuit called on Congress (which has repeatedly declined to act) or the Supreme Court to clarify that under Title VII, sexual orientation is also entitled to protection in the workplace under Title VII. Although the Court could conceivably have done so through *Windsor* or *Obergefell*, it declined.

LINK

Preemption: Supremacy Clause Does Not Preempt Local Government's Expression of Viewpoint on a Matter Related to Foreign Affairs

Gingery v. City of Glendale, No. 14-56440 (9th Cir. Aug. 4, 2016)

The Ninth Circuit has affirmed a district court's dismissal of an action brought by Japanese Americans challenging Glendale's decision to erect statute commemorating South Korean "Comfort Women."

Plaintiffs brought suit challenging the City of Glendale's 2013 installation of a statue commemorating South Korean "Comfort Women." South Korea asserts that during WWII, an unknown number of women were forced to serve as sexual partners to members of the Japanese Imperial Army and has urged Japan to redress grievances related to this issue. South Korea's assertion has been heavily disputed by Japan, who denies involvement and counters that any all WWII claims, including those related to "Comfort Women," have been resolved through post-war treaties. Throughout this heated and politically sensitive debate, it has been the official policy of the U.S. to remain neutral and encourage "further government-to-government negotiations."

Plaintiffs argued that the City's installation violated the Supremacy Clause and that by taking a position on the politically-sensitive international debate, the City had "disrupted the federal government's policy of nonintervention and encouragement of peaceful resolution of the. . . dispute." Plaintiffs requested that the statue be uninstalled and cited examples of various Japanese officials who had expressed disapproval of the monument.

The court first dispensed with the issue of standing, likening the plaintiffs to those in Establishment Clause and environmental cases. It agreed that to satisfy the "injury-in-fact" requirement, it was enough for plaintiffs to assert that their use and enjoyment of the public park had been impaired. Similarly, the court agreed that the plaintiffs' claim is traceable to the challenged action because the City approved the installation and Plaintiffs' grievances could be easily redressed by ordering the City to take down the statue.

The court then reached the issue of preemption. It first noted that the Supremacy Clause clearly prevents local governments from enacting statutes affecting the legal rights and powers of foreign governments, since these are decisions that the Constitution clearly delegates to the federal government. The court held that the issue of regulatory statutes affecting foreign governments should be distinguished from the separate issue of expressive displays. Expressive displays of viewpoints related to foreign policy, according to the court, are well within the traditional responsibilities of state and local governments, even if they are overtly intended to "put the city. . . on the international map."

The court went even further, indicating that in order to intrude on the federal government's foreign affairs powers, a local government's actions must have more than some incidental or indirect effect on foreign affairs. Because the plaintiffs did not demonstrate this assertion with specific instances in which the monument had directly impacted U.S. foreign policy beyond the disapproval of several Japanese officials, the plaintiffs had failed to state a claim.

In a concurring opinion, Justice Korman notes that Section 1983 cannot support the plaintiffs' claim because neither the Supremacy Clause nor the foreign affairs provisions of the Constitution confer individual rights that would be redressable under Section 1983.

LINK

Privacy: Right to Privacy Articulated in *Lawrence* Does Not Extend to the Buying, Selling, and Using of Sex Devices

Flanigans's Enterprises, Inc. v. City of Sandy Springs, No. 14-15499 (11th Cir. Aug 4, 2016)

Affirming the judgment of the district court, the Eleventh Circuit has held Sandy Springs' municipal ordinance prohibiting the commercial distribution of sexual devices within the City did not violate Due Process or the First Amendment.

In 2009, the City of Sandy Springs, Georgia enacted several provisions prohibiting commercial distribution of sexual devices within the City. In response, multiple businesses and individuals brought suit. In this severed portion of the ensuing litigation,

adult entertainment stores Flannigan's Enterprises, Inc. and Fantastic Visuals, LLC as well as intervenors Melissa Davenport and Marshall Henry alleged violations of Due Process. Ms. Davenport, who suffered from multiple sclerosis, used sex devices to facilitate intimacy with her husband and sought to sell devices to others with similar conditions. Mr. Henry, an artist, used sexual devices in artwork to sell to patrons as well as for his own private activities.

Plaintiffs and intervenors complained the ordinance burdened their fundamental right to sexual privacy under *Lawrence v. Texas*—a right that they indicated should extend to the buying, selling, and using of sexual devices. They also urged the court to overturn *Williams IV*, a 2004 Alabama case upholding a statewide ban of sexual devices in light of the more recent Supreme Court decisions of *Windsor* and *Obergefell*. *Windsor*, in particular, plaintiffs and intervenors argued, provided clarity to the privacy interests articulated in *Lawrence* by indicating that such a right could be infringed upon by laws seeking to control moral or sexual choices, which logically extended to ordinances banning the selling and using of sexual devices.

Davenport and Henry's motion to intervene was granted in 2014 and their complaint was filed shortly thereafter. The City filed an answer and a motion for judgment pursuant to Rule 12(c), which the district granted. Plaintiffs and intervenors appealed.

The Eleventh Circuit reviewed the district court's judgment de novo, upholding the lower court's decision and declining to overrule *Williams IV* because there is, as of yet, no case explicitly holding that the right to buy, sell and use sexual devices falls within the right to engage in acts of private, consensual activity. In dicta, however, the court indicated that it was sympathetic to the Due Process claim, despite being constrained by prior decisions. It encouraged the appellants to petition the court to reconsider the decision en banc.

LINK

Religion: Requiring Atheist Officer to Stand Next to Police Formation for Prayer Violates Freedom of Religion

Marrero-Méndez v. Calixto-Rodríguez, No. 14-2030 (1st Cir. July 19, 2016)

The First Circuit has confirmed that ordering an avowed atheist police officer to stand near a group of fellow officers as they prayed amounted to forcing the officer to observe a religious practice against his will, and his subsequent reassignment of duties amounted to punishment on religious grounds. Despite not finding a case precisely on point, the Circuit Court cited numerous analogous precedents which would clearly establish a Constitutional violation.

In March 2012 Officer Calixto-Rodríguez (Calixto), a regional commander of the Puerto Rico Police Department (PD) summoned 40 PD officers to an outdoor meeting which concluded with a prayer. Officer Marrero (Marrero) -- an "open atheist" -- told Calixto that "he object[ed] to such official prayers because they promote[d] religious beliefs to which he [did] not subscribe." Calixto ordered Marrero to "abandon the formation." As Marrero was walking away, Calixto required that he stop and stand still until the prayer was finished, shouting that Marrero “doesn't believe in what we believe in." Marrero stood with his back to the formation until the prayer ended.

Marrero reported the incident to his immediate supervisor, becoming extremely emotional. His police weapon was then taken away and he was ultimately given two transfer options-- clerical tasks or vehicle maintenance. Both were effectively demotions. Marrero filed this action in 2013, alleging Establishment Clause violations. Defendants moved to dismiss under FRCP 12(b)(6) and invoked qualified immunity.

The district court denied the motion to dismiss, finding that the allegations plausibly showed that Calixto forced Marrero to observe the prayer against his will and that Marrero was punished for his refusal to participate. The district court rejected appellants' claim of qualified immunity, finding a constitutional violation which had been clearly established: a reasonable officer at that time would have understood that "ordering a subordinate to observe a religious prayer given during an official meeting -- without giving the subordinate the ability to opt out -- would violate the Constitution."

The First Circuit affirmed. "It is beyond dispute that, at a minimum, . . . government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1982). Appellants' conduct violated that principle. Here, the prayer was unmistakably a state action. Marrero objected, and was ordered to stand nearby. After filing an administrative complaint, he was deprived of his usual law enforcement responsibilities and his firearm was taken away.

The Circuit Court noted “If these actions do not establish religious coercion, we would be hard-pressed to find what would.”

The First Circuit framed the "clearly established" inquiry as follows: “[A]ppellants are entitled to qualified immunity if a reasonable officer in March 2012 would not have known that appellants' conduct was coercive in the situation they encountered.” It found the coerciveness of appellants' conduct to be “so patently evident that no particular case -- and certainly not one ‘directly on point,’ need to have existed to put a reasonable officer on notice of its unconstitutionality.” Nonetheless, precedent supported the same inescapable conclusion. Cases involving mandatory attendance at services by military academies; requiring parole applicants to conform to religious beliefs as a condition of parole; pressuring government employees to conduct themselves in conformity with religious standards, have all struck down the practice as violating the Establishment Clause.

Appellants' attempt to analogize this case to Establishment Clause and legislative prayer cases such as *Town of Greece* was rejected by the Circuit Court: "None of these cases remotely resemble what we have here -- an objecting individual who was forced to observe a prayer and humiliated and punished for his non-conformance."

LINK

Speech: Tampa's Anti-Solicitation Ordinance Violates the First Amendment Under *Reed*--But *Reed* Should be Revisited

Homeless Helping Homeless v. City of Tampa, No. 8:15-cv-1219 (M.D. Fla. Aug. 5, 2016)

Based on *Reed*, the Middle District of Florida has stricken Tampa's ordinance banning the solicitation of donations in certain public areas—but the opinion includes a scathing critique of what it views as *Reed's* overbreadth and inequitable consequences.

In 2015, Tampa enacted an amended Ordinance 2013-95 (Ordinance), in which Section 14-46 makes it "unlawful" for any person to "solicit donations or payment" -- through implied threat of injury or damage; by continued contact after the solicited person declines; or by impeding the free passage of the solicited person. Section 14-46 also specifies areas of Tampa where solicitation is prohibited per se – including at a bus or trolley stop; at a sidewalk café; within 15 feet of a bank entrance or ATM; and in Tampa's downtown "Prohibited Zone." Merely holding a sign asking for solicitations is not proscribed.

Homeless Helping Homeless, Inc., a nonprofit that provides beds and basic toiletries to the homeless, was foreclosed by Section 14-46 from using many of the locations where it had previously solicited money, drastically reducing its working capital and undermining its effectiveness. It sued Tampa, seeking an injunction and a declaration that the Ordinance violates the First Amendment and the Florida Constitution.

Tampa argued that the Ordinance was not content-based, to no avail. As the court clearly articulated, the Ordinance facially distinguished between various messages—for example, there was no similar prohibition against political statements. Under *Reed*, imposing a content-based regulation of speech in a public forum required surviving strict scrutiny—Tampa had to demonstrate that the Ordinance constituted the least restrictive means of advancing a compelling governmental interest. However, "the City admits that no compelling governmental interest supports Section 14-46(b). . . And — with admirable candor — the City forbears the assertion that Section 14-46(b) is the least restrictive means of advancing any governmental interest."

The Middle District declared that the Ordinance violated the US and Florida Constitutions and permanently enjoined its enforcement.

But in an unusual move, Chief Judge Steven Merryday added that *Reed* "governs for the moment despite prominently featuring the badges of a transient reign." He was unapologetically hostile to the Supreme Court's approach in that decision:

> *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by.
>
> This action illustrates (as *Reed* illustrates) the frailties of governing discrete local issues, which are otherwise decided by local officials subject to periodic election, by force of intermittently issued decrees, which are conveyed as constitutional directives; which are issued by a majority (or, sometimes, only a plurality) of nine lawyers serving during "good behavior"; and which are uttered in the course of resolving a different dispute in another locality. Nonetheless, this order dutifully applies *Reed* and resolves the present dispute against the City and in favor of Homeless Helping Homeless. Without *Reed*, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in *Norton v. City of Springfield*, 768 F. 3d 713 (7th Cir. 2014), and similar decisions, and I would uphold the City's ordinance, which results from a constructive and demonstrably benign legislative attempt to manage fairly and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community.

LINK

Telecommunications: Section 706 of Telecommunications Act Does Not Preempt State Authority to Restrict Broadband Services and Infrastructure

Tennessee v. FCC; North Carolina v. FCC, Nos. 15-3291, 15-3555 (6th Cir. Aug. 10, 2016)

The Sixth Circuit has reversed an FCC order which had allowed cities in North Carolina and Tennessee to offer broadband service despite being preempted by their states.

The FCC, citing a statutory mandate within Section 706 of the Telecommunications Act, issued a preemption order to both Tennessee and North Carolina in order to provide cities the opportunity to expand municipal telecommunication providers. Both states had enacted statutes which essentially foreclosed localities from expanding broadband

services, by requiring telecommunications providers to have territorially limited service areas as well as allowing for discretionary decisions regarding expansion, rate setting, and timeliness of service rollouts. The FCC argues that such state laws inhibit fair competition and serve as barriers to service.

Relying on *Nixon v. Missouri Municipal League*, a 2004 case in which the Supreme Court ruled against the FCC on a similar issue, the court applies the clear statement rule—appearing to reach step one of *Chevron*, but declining to move on the merits of the case. Without a clear directive from Congress, federal statutes may not preempt state authority. Because Section 706 contains no such clear statement, the FCC's order may not preempt the state laws.

Notably, the court clarifies that its holding is limited and does not address the public benefits that the FCC identifies in permitting municipalities to expand internet coverage. Further, the court does not preclude the possibility of Section 706 providing other avenues through which the FCC can seek preemption.

LINK

Title IX: *MacDonnell Douglas* Title VII Presumptions in Favor of Plaintiffs Also Apply to Sex Discrimination Claims Under Title IX

Doe v. Columbia University, Nos. 15-1536, 15-1561 (2d Cir. July 29, 2016)

The Second Circuit has vacated a decision which had dismissed Title IX claim of sex discrimination brought by a male Columbia University student who was suspended after being accused of non-consensual sex by a female classmate. The court found that the accused had provided sufficient facts alleging female-oriented bias by the university to overcome a 12(b)(6) motion and that Title VII presumptions and shifting of evidentiary burdens should apply in Title IX cases.

In May 2013, plaintiff Doe was a Columbia University freshman and soon-to-be varsity athlete. He alleges that he was approached by a female classmate (Jane) while studying for a final exam in his residence hall. After an hour-long walk together, they eventually began discussing the topic of "hooking up." Doe's complaint alleges that, in the interest of privacy for a sexual encounter, Jane suggested using the bathroom of her dormitory's suite, because her ex-boyfriend was Doe's roommate; that she went to her bedroom to retrieve a condom and the two had sex.

In September 2013, as the next school year began, Columbia's Assistant Director for Gender-Based and Sexual Misconduct informed Doe that a fellow student had made allegations of sexual assault against him, and advised him to come in for a meeting. At that meeting, Doe received formal written notice that he was charged with "Non-Consensual Sexual Intercourse" in violation of school policies. He was barred from

contacting Jane and his access to various residence halls was curtailed. He was advised of the school's psychological services but not of other support services as he faced the disciplinary process.

Doe was summoned to meet Columbia's Title IX investigator, who was charged with creating the narrative account that would be used by a disciplinary panel. He alleges that she was not gender neutral in this process. He told the investigator that the incident was consensual and provided names of witnesses at the residence hall who would be helpful—but she never contacted them. He alleges that her questioning of him was akin to cross-examination calculated to elicit a confession: she failed to tell him he could submit his own written statement to her or to the disciplinary panel, and failed also to advise him that he was entitled to seek the support of a student advocate. Nor did she advise him of resources available to him to aid him in the process.

Doe was scheduled for a hearing in February 2014.

At this same time period, students were criticizing Columbia for not taking seriously the complaints of female students about sexual assault. The controversy reached the press. On December 11, 2013, a *New York Post* article declared, "Columbia drops ball on jock 'rapist' probe: students." In January 2014, an independent, student-run newspaper criticized Columbia's handling of sexual assault complaints, specifically calling out the Title IX investigator as conducting "inadequate investigation[s]." In April 2014, 23 students would file complaints with the United States Department of Education for violations of Title IX, alleging that Columbia mishandled incidents of sexual assault.

Plaintiff's disciplinary hearing took place before three panelists. Doe, who had not been advised that he would be making a formal statement, brought his roommate. Jane brought a leading student advocate for women's rights—although she was not a friend of Jane's and had no prior relationship with Jane. Columbia's rules did not allow the accused student legal representation.

At the hearing, the panel considered the Title IX investigator's report, which did not reference witnesses who could have supported Doe's defense. Nor did the panel call witnesses who could have supported Doe. Doe submitted questions to the panelists to be put to Jane, but was told that most were "irrelevant."

In late February 2014, Doe was informed that he had "directed unreasonable pressure for sexual activity toward the Complainant over a period of weeks" and that "this pressure constituted coercion [so that] the sexual intercourse was without consent." Doe was suspended until Fall 2015; because Columbia refused to give Doe credit for his Spring 2014 classes, the suspension was functionally equivalent to one and one half years. In March, Columbia's Dean of Students denied Doe's appeal, four days before the Dean was to appear at a university-wide meeting on the issue of handling rape complaints.

Doe filed suit in June 2014, alleging that Columbia subjected him to sex discrimination in violation of Title IX and state law. The Complaint seeks both damages and expungement of his disciplinary record. It alleges that Columbia's supposedly neutral Title IX investigator was motivated by pro-female sex bias, driven by a desire to refute criticisms of herself and Columbia, which led her to produce a one-sided account of his interview, ignore his witnesses and fail to advise him of his rights. The Complaint alleges also that Columbia's decision-makers (the panel and the Dean), took a pro-female, sex-biased stance on Jane's allegations, leading them to decide against him, incorrectly and contrary to the weight of the evidence.

The district court granted Columbia's motion to dismiss for failure to state a claim.

The Second Circuit vacated and remanded. It found that the Complaint met the low standards for alleging facts giving rise to a plausible minimal inference of bias sufficient to survive a motion to dismiss.

Tttle IX's relevant language provides, "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or *be subjected to discrimination* under any education program or activity receiving Federal financial assistance." Because Title IX prohibits subjecting a person to discrimination on account of sex, it is understood to "bar the imposition of university discipline where gender is a motivating factor in the decision to discipline."

In a series of cases beginning with *McDonnell Douglas*, the Supreme Court has ruled that, in suits alleging employment discrimination in violation of Title VII, until the defendant furnishes a nondiscriminatory reason for the adverse action it took against the plaintiff, the plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail.

Furthermore, with respect to the sufficiency of federal complaints generally, the Court ruled in *Iqbal* that a complaint must plead facts sufficient to support a plausible inference that the defendant is liable for the misconduct alleged. In other words, at the 12(b)(6) stage of a Title VII suit, allegation of facts supporting a minimal plausible inference of discriminatory intent suffices; it entitles the plaintiff to the temporary presumption of *McDonnell Douglas* until the defendant furnishes its asserted reasons for its action against the plaintiff.

The question raised by the Second Circuit was "whether the burden-shifting framework established by the *McDonnell Douglas* line of cases for claims of discrimination on account of race, religion, or national origin under Title VII, and the associated pleading burden we articulated in *Littlejohn*, apply also to Title IX claims alleging discrimination on account of sex in education programs or activities that receive federal support."

It recited that rules the Supreme Court established for Title VII litigation "appear to apply also to such similar claims of sex discrimination under Title IX." Because Title VII cases provide the proper framework for analyzing Title IX discrimination claims, "We therefore

hold that the temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well."

Therefore, the Circuit held, a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination. Here, Doe had pled facts specific enough to avoid dismissal.

LINK

Voting: North Carolina Voter Registration Amendments Violate Voting Rights Act, Fourteenth and Fifteenth Amendments

NAACP v. McCrory, No. 16-1468, No. 16-1469, No. 16-1474, No. 16-1529 (4th Cir. July 29, 2016)

Reversing the district court, the Fourth Circuit has found various provisions of North Carolina's voting registration requirements to have a discriminatory purpose, in violation of the Voting Rights Act and the Constitution.

The Voting Rights Act (VRA) was passed to redress persistent voter suppression tactics primarily among Southern states, and required, in Section 5, that covered jurisdictions obtain prior federal approval before altering their voting laws. The VRA succeeded. For example, between 2000 and 2012, while North Carolina was covered by Section 5, African American voter registration grew by more than 50%. Not coincidentally, during this period North Carolina emerged as a swing state in national elections.

In 2013, the Supreme Court issued its opinion in *Shelby County*, invalidating the preclearance requirements under Section 5 of the VRA. States which had previously required prior authorization from the Justice Department were henceforth free to change their election laws without seeking federal approval. Within a day after *Shelby*, North Carolina's legislative majority began a purposive change in the state's voter registration requirements. Virtually all of these changes—allowing only a limited range of current photo IDs, reducing early voting (including one of the two "Souls to Polls" Sundays when churches transported their congregations to polling places), and reducing same-day registrations and preregistrations—disproportionately impacted African American voters. Documents and processes used more frequently by white voters were largely unaffected.

These changes were not coincidental. As the district court found, prior to enacting the modified voting laws, the North Carolina legislature requested and received specific data showing usage, by race, of the various voting documents and processes.

The revised registration laws were challenged by the Women's League of Voters, the NAACP and other groups as violating the VRA and the Constitution. On April 25, 2016, the district court entered judgment against the Plaintiffs on all of their claims as to all of the challenged provisions. It found no discriminatory intent and no undue burden on the right to vote.

The Fourth Circuit reversed:

> In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees. This failure of perspective led the court to ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina.

The Circuit Court found that the new registration provisions "target African Americans with almost surgical precision." Faced with such a record, "we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent," in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act.

Although the district court had recognized North Carolina's "shameful" history of "past discrimination," it found "little evidence of official discrimination since the 1980s." The Fourth Circuit found this to be clearly erroneous. "The record is replete with evidence of instances since the 1980s in which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans." This included more than 50 letters from the Justice Department between 1980 and 2013 objecting to proposed election law changes.

While the district court had recognized that the new laws produced a discriminatory result, it did not find that the laws were motivated by discriminatory intent. The Circuit Court would not allow the inconsistency: "The district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent." The district court had also relied on similar election provisions laws in other states which has survived legal scrutiny—but none of those included the breadth of provisions simultaneously implemented by North Carolina.

The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels as they had in the past. Not only was this burden misplaced, but the lower court gave "almost dispositive weight" to the fact that African American participation had risen by 1.8% from the 2010 midterm election to 2014. A single election could not be cited with any statistical validity, and trends would have suggested a far greater increase in African American participation absent the revised registration laws.

Reversed and remanded with instructions to enjoin the challenged provisions of the voter registration law.

LINK

Zoning: Failure of Town Zoning Officials to Litigate Did Not Deprive Plaintiff of His Own Right to Take Action or Deny His Property Rights

Miller v. Town of Wenham, No. 15-2337 (1st Cir. Aug. 10, 2016)

In the fall of 2013, Wenham, Massachusetts (Town) granted a request by 110, Inc. (110) to opening a substance abuse treatment facility, under Massachusetts' so-called Dover Amendment, which provides preferential zoning treatment to religious and educational land uses. Officials reached this decision without a public hearing.

Lawrence Miller, a Town homeowner, observed that 110 was operating a substance abuse facility next door. He filed a Request for Zoning Enforcement, stating that the treatment facility was a commercial operation that housed up to 14 people at a time, and was not compliant with the Town's zoning by-laws.

After a public hearing, the Town's Building Inspector granted Miller's request to enforce the zoning ordinance against 110, finding that the facility was not an "educational use" under the Dover Amendment or otherwise permitted by the Town's zoning by-laws.

110 responded by filing a complaint in the federal court alleging that the Town, in addition to violating the Dover Amendment, had illegally discriminated against the facility's residents under the Federal Fair Housing Act, the Americans with Disabilities Act, and other Massachusetts laws. Unbeknownst to Miller, the Town agreed with 110's demand for a "reasonable accommodation" under the ADA and FHA, with the only limitations being that 110 could not accommodate more than 14 clients. The Town also made a settlement payment to 110 of $125,000.

Miller subsequently sued under 42 U.S.C. §1983, alleging that in making zoning and settlement decisions under color of state law, the Town violated his Due Process rights. The Town conceded that those decisions constituted state action—but it challenged Miller's contention that those decisions violated his constitutional rights, because he had not been deprived of any protectable property interest.

The district court denied Miller's due process claim. On appeal, the First Circuit affirmed.
"Property interests . . . are not created by the Constitution[,] [but] rather . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." Looking at Massachusetts law to discern whether and to what extent "an entitlement grounded in state law exists" the court found

that the state and its localities had established zoning mechanisms to assure the orderly and transparent allocation of land rights, endowing various officials with requisite permitting and related authority to adjudicate and enforce zoning decisions, subject to the Constitution and relevant federal laws such as the FHA and ADA.

Having summarized the applicable law, the court asked "whether and to what extent that law creates an entitlement that qualifies as a constitutionally protected interest." Miller's briefs on appeal did not clearly identify a property interest of which he claims to have been deprived. He made passing reference to the "interest" of "abutters" and to "abutter property interests." He also cited to a federal district court case in which the property interest, under the applicable local and state law, was identified as "a property right in the protection of his own property against incompatible uses of adjacent property which devalue his property." These were insufficient to support a Constitutional claim of property deprivation.

The court was even more solicitous. "We could perhaps read Miller as raising a more nuanced claim: that Massachusetts law creates a property interest in securing enforcement of the zoning laws against currently unlawful uses of property that harm him, and that the Town's decision to allow such uses by 110, Inc. deprived him of that interest without prior notice or an opportunity to be heard."

But even if it did so construe Miller's claim, the First Circuit would still find no due process violation. Although the Town ultimately declined to take action against 110, Miller himself retained the ability to seek such enforcement on his own. He was not deprived of the right to have the zoning laws enforced against 110. And it was completely impractical to require that all of the Town's non-enforcement decisions should be preceded by notice and an opportunity to be heard.

Miller's property interest, assuming one existed, was in having the ordinance or by-law enforced, not in having the Town Building Inspector pursue enforcement. No one deprived Miller of that interest without notice and an opportunity to be heard:

> In sum, Miller has not been deprived of any constitutionally protected property interest without due process of law. He retained his right to initiate, receive notice of, and participate in a ZBA proceeding challenging 110, Inc.'s use of its property. While he lost the advantage of having the Building Inspector on his side, which may have shifted a greater burden of persuasion to him, we find that he had no property interest in having such an advantage. To rule otherwise would be to federalize all sorts of discretionary calls made by municipal officials even when applicable law does not render these calls binding or final.

LINK

THIS JUST IN: City Deletes Criticisms on Facebook and Pays a Price; Private Property Owners Not Amused by Pokemon Go

City Facebook Page Editors: Delete Residents' Criticisms at Your Peril

Beech Grove, Indiana recently settled with two residents for $7412 and changed its editorial policies governing postings on the City's Facebook page.

Kymberly Quick and Deborah Mays-Miller, residents of Beech Grove, alleged First Amendment violations after their comments were deleted from the Facebook pages of the Beech Grove Police Department (PD) and City government. Quick is a member of a local crime watch group and Mays-Miller is an active follower of the PD's page. Both women allege that their comments were deleted and accounts blocked because they had posted messages critical of the police department and city government.

According to the complaint, the police department deleted Quick's "comment" about a message from the city's mayor without any explanation for the removal. In another instance, Mays-Miller posted comments critical of the PD's responses to resident requests. The complaint also outlines several other instances where the City has deleted or blocked commentary from the plaintiffs.

Created approximately three years ago, the PD's Facebook page has provided announcements concerning reported crimes and police response, as well as crime statistics and other local news. At the beginning of 2016, the City created a separate Facebook page specifically for the City, where it could also post news, announcements, and other information. Both Facebook pages were publically accessible. Anyone with access to a Facebook account could "comment" on the City and PD's posts. The City also maintains a "terms of use" policy that is accessible from the PD's page, indicating that comments from other Facebook users may be subject to rejection or removal and that individual users may be blocked if the content of their post fell into one of several categories outlined within the terms of use.

Of particular interest to municipalities around the country is whether or not the deleting and blocking of users on Facebook will be considered to constitute viewpoint censorship. IMLA will continue to monitor this developing litigation.

LINK to complaint

LINK to Indianapolis Star

Thank you to IMLA Member, Rebecca McCuaig, La Porte City Attorney, for notifying us of this case.

Pikachu Trackers? Not In My Back Yard!

It was inevitable. A New Jersey homeowner, unamused by Pokemon Go participants seeking access onto his property in pursuit of invisible characters, has struck back. Jeffrey Marder, a resident of West Orange, New Jersey, was infuriated to find that a "Pokestop" or "Pokemon Gyms" had been placed somewhere in his back yard without his permission, causing repeated knocking at his door by Pokemon Go enthusiasts.

On July 29, he filed a class action on behalf of property owners across the country who have unknowingly become part of the Pokemon landscape. The complaint, filed in the Northern District of California against Niantic Inc. (the creator of Pokemon Go) as well as Nintendo Co. Ltd. and The Pokemon Company, alleges nuisance and unjust enrichment. He cites the fact that, as of July 23, 2016, Pokemon Go had already been downloaded 30 million times and earned $35 million.

Marder seeks unspecified damages—but asserts that the class action amount in controversy exceeds $5 million as per the Class Action Fairness Act of 2005.

LINK