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Due Process: No Section 1983 Liability Where Defendants' Actions Do Not Shock the Conscience and Plaintiff Fails to Establish Pattern of Constitutional Violation

Daniel v. Hancock County School District, No. 14-12429 (11th Cir. Sept. 11, 2015).

SUMMARY: Where police did not effectively intervene in a fight among high school football players, a football coach injured in the melee could not overcome summary judgment in his case against the school district for injuries, because he failed to show that the officers intended to cause him harm or that their behavior (including allegedly pepper-spraying only one team's players) shocked the conscience.

FACTS: David Daniel was a teacher at Warren County (Georgia) High School and served as the school's football coach. On October 14, 2011 the Warren team was scheduled to play Hancock Central High School. Various incidents increased the risk of violence at the game, including the fact that Daniel's predecessor had become a coach at Hancock and the players had engaged in pre-game taunting.

As a result, Warren directly notified the school district that it had concerns about safety. It was assured that twelve officers would be at the game, but only four off-duty officers showed up. Warren won the contest, and as the teams were leaving the field, players from Hancock instigated a fight. The police officers, standing between the teams, pepper-sprayed the Warren players only. In the melee a Hancock player hit a Warren player, knocking him to the ground. Coach Daniel saw the interaction and stood in front

of aggressor to protect the downed player. He was intentionally struck in the head by the opposing player, suffering serious and permanent injuries.

Daniel thereafter filed a § 1983 suit against the school district and the officers, alleging they violated his Fourteenth Amendment right to bodily integrity. Defendants moved for summary judgment, which the district court granted.

HELD: The Eleventh Circuit affirmed the district court, finding Daniel failed to show the actions of Defendants shocked the conscience.

DISCUSSION: The Court's initial issue with Daniel's allegations was that he premised his argument on the officers' use of pepper spray against the Warren players – which Daniel posited the officers did, not for a legitimate law enforcement reason, but to give the Hancock players an advantage in the fight. Daniel argued this was a proximate cause of his constitutional deprivation.

The Court found two fatal flaws with this allegation. First, Daniel failed to allege the officers intended to harm him – a necessary prerequisite for a substantive due process claim – and second that, even if such an allegation had been made, it would still not shock the conscience as required. As the Court put it, "from the allegation that the Officers pepper sprayed Warren's players—not Daniel—to allow Hancock's players to have an advantage in fighting Warren's players—not Daniel, we would have to conclude that the Officers also intended for a then-unidentified Hancock player to later catastrophically injure Daniel . . . ." The Court simply could not make this leap to hold the officers liable, and instead noted redress for Daniel rested in standard state tort claims against the assailant, claims it noted were currently pending in state court.

As for Daniel's claims against the school district – that the school district failed to provide proper security and to train those providing the security – the Court found another fatal flaw in Daniel's case. For municipal liability to attach under § 1983 Daniel had to supply a causal link between the school and his constitutional deprivation by identifying either an official policy or an unofficial custom or practice. Daniel did neither. There was no specific unconstitutional policy alleged, so Daniel provided two theories of unofficial practice. The first, that there was insufficient security, was rejected by the Court because the Due Process Clause "confers no affirmative right to government aid," and the facts Daniel did allege about the limited security did not "shock the conscience" as required for such a claim. His second theory, that the government failed to train and supervise the officers, also failed since there are "only limited circumstances in which an allegation of a failure to train or supervise can be the basis for liability under § 1983" and those are "only where the failure to train amounts to deliberate indifference to the rights of persons with the police come into contact."

Meeting the standard usually demands showing a pattern of constitutional violations by untrained employees, but Daniel failed to do so and instead argued the school district was on notice of the need for training and supervision because there was a rivalry between the schools, it was a homecoming game, and law enforcement had itself

inquired about security at the game. The Court held these facts were insufficient to put the school district on notice that security patterns it had used in the past would be inadequate. It affirmed the lower court.

LINK (last accessed Sept. 22, 2015).

Employment: Female Candidate Denied Promotion Due to Supervisor's Discriminatory Animus, Court May Be Liable Under "Cat's Paw" Theory

DeNoma v. Hamilton County Court of Common Pleas, No. 14-4058 (6th Cir. Sept. 14, 2015).

SUMMARY: Where a county court selected a male candidate as probation director after a female candidate's supervisor made discriminatory comments which prejudiced her chances for promotion, the plaintiff's § 1983 action survived a motion to dismiss and could proceed against the court, which employed the discriminatory supervisor, on a "cat's paw" theory of liability.

FACTS: Cassandra DeNoma worked for the Hamilton County, Ohio Adult Probation Department from 1992 to 2012. She moved up the ladder while there, receiving a promotion from a probation officer to a supervisor and then to the project director. In 2009 a probation officer DeNoma indirectly supervised through another employee was investigated and ultimately fired for misconduct and incompetence. In addition in 2009 an inappropriate sexual relationship developed between a supervisor and a subordinate, and DeNoma provided the subordinate EEOC and human resources information. Thereafter, the subordinate accused DeNoma of pressuring her to file a claim and sue the supervisor.

In 2010 the director position for the entire adult probation position came available. Eight candidates applied, seven males and DeNoma. The judges of the Court of Common Pleas hired the director, a process in which the head judge of the probation department selected three of the candidates for interviews and an interview committee provided a final recommendation to the entire hiring committee. The process was also guided by Michael Walton, the highest non-judicial authority in the probation department. DeNoma, the sole female candidate, did not make it past the first round of interviews. The committee instead hired a lower-ranked supervisor with only three years of supervisory experience, substantially less than DeNoma's sixteen years.

DeNoma filed a gender discrimination suit against Walton, as well as the court itself, under the Equal Protection Clause, pursuant to §1983. The Defendants moved for summary judgment and the district court granted the motion in whole. DeNoma appealed.

HELD: The Sixth Circuit reversed the lower court, holding DeNoma had put issues of material fact at play, making summary judgment inappropriate.

DISCUSSION: The Court began by setting forth the Title VII standard for gender discrimination, under which the "[t]he burden is first on the plaintiff to demonstrate a prima facie case of [gender] discrimination; . . . then shifts to the employer to offer a legitimate, non-discriminatory explanation for its actions; [and] finally, . . . shifts back to the plaintiff to show pretext." The Court found DeNoma easily made the prima facie showing since she was a female qualified for the job and her candidacy was rejected in favor of a lower-qualified male. From there though the Court noted the complexity of the case, specifically DeNoma's attempt to establish liability not only against the judges who made the ultimate hiring decision, but also against the non-judicial authority figure – Walton – who managed the hiring process.

As a result, the case was analyzed under the "cat's paw" theory of liability, under which "if a supervisor performs an act motivated by [prohibited] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under the cat's paw theory." With this standard in mind, the Court held that a reasonable jury could find Walton acted with the intent to not promote DeNoma and that his actions were a proximate cause of the ultimate non-promotion. The facts the Court found noteworthy included Walton telling the personnel director that he was dissatisfied with DeNoma's supervisory work and naming two specific people he preferred for the job, that female employees deposed stated that Walton generally afforded male employees more authority than females, that Walton gave male employees preferential treatment, and that the atmosphere in the department was one of an "old boys' network." From these facts, the Court found a reasonable jury could conclude Walton's actions were taken with the intent that DeNoma not be recommended for the job.

Defendants countered that the deposition testimony was not credible generally, not weighty since it did not include specific examples of discrimination, that those deposed did not have intimate knowledge of the probation department, and lastly that several women have been promoted in the past. While the Court found these appropriate and relevant for the jury's consideration, it held they were not determinative at the summary judgment stage. They only showed that material issues were at play and thus summary judgment was inappropriately granted.

Defendants also offered legitimate explanations for the hiring decision, including that the male hired was most qualified given the quality of his interview, that he had letters of support from the community, that he had been successful as a supervisor, and that he was employee of the year. On a related note, Defendants argued DeNoma was less qualified because she interviewed poorly, had issues with employees under her supervision, and during her tenure there was a poor government assessment of the Hamilton County probation department in comparison to other counties. Given this

divergence in the parties' allegations, the Court found that there were issues of material fact and reversed the lower court.

LINK (last accessed Sept. 23, 2015).

Speech: Ordinance Banning All Activity in Median Strips is Not Narrowly Tailored, Cannot Survive First Amendment Challenge

Cutting v. City of Portland, No. 14-1421 (1st Cir. Sept. 11. 2015).

SUMMARY: Portland Maine's effort to prevent panhandling by banning virtually any presence in median strips has been stricken down, not because it is a content-based measure which violates *Reed* and requires strict scrutiny, but because it is not narrowly tailored to promote the City's asserted interest in promoting safety.

FACTS: Responding to concerns about safety issues arising due to panhandlers in its median strips, the Portland, Maine city council passed an ordinance in 2012 providing that "No person shall stand, sit, stay, park or drive" on the City's median strips, except that pedestrians may use medians "only in the course of crossing from one side of the street to the other." Median strips are simply defined as "a paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel." The ordinance does not differentiate among medians of differing sizes and does not prohibit presence in the streets themselves.

Five people were cited under the ordinance, all for panhandling. They challenged the law as a facial violation of the First Amendment and sought injunctive relief.

The district court found that medians were traditional public fora, similar to parks. It further discerned an unwritten policy by the City to allow political signage to be placed there, while other expression was prohibited. This content-based discrimination implicated *Reed*, which required strict scrutiny analysis: Was the ordinance, including its uneven application, the least restrictive means needed to accomplish the City's goals? The district court answered that question in the negative, found the ordinance to violate the First Amendment and permanently enjoined the City from enforcing it. Portland appealed.

HELD: The First Circuit upheld the finding of a constitutional violation and affirmed the grant of injunction—but on different grounds.

DISCUSSION: The Circuit Court first examined the question of whether median strips are traditional public fora, like sidewalks and parks. Portland's medians had traditionally been used for first amendment expression, including political campaigns, protests,

charitable solicitation and the like, making them public fora—a position held in the Fourth and Sixth Circuits.

The Court then reviewed the issue of uneven enforcement of the ordinance to answer whether it was content –based. Here, the Circuit diverged from the lower court: even though there were apparent instances where the ordinance had been unevenly applied, the doctrine of constitutional avoidance required focus on the law as written. On that score, the ordinance was content-neutral because it banned virtually any activity whatsoever on the City's medians. Therefore, it did not need to be the least restrictive solution; the relevant question was whether it was narrowly tailored to accomplish a legitimate governmental interest.

On reflection, the First Circuit found that the ordinance could not survive such inquiry. The asserted governmental interest—safety—did not require a complete shut-down of the City's medians, particularly when some of those medians were 50 feet across. There were other limitations that might better promote safety, such as prohibitions on activities in medians after dark, and prohibitions during snow and inclement weather. Similarly, there were many activities in medians that did not create any safety problems. Even panhandling activities had generated very few safety issues.

The Circuit Court found that the content-neural ordinance violated the First Amendment because it was not narrowly tailored to accomplish a legitimate governmental interest. (The decision therefore cannot be said to be a progeny of *Reed*.)

LINK (last accessed Sept. 22, 2015).

Speech: School's Demand For Students' Facebook Passwords to Investigate Bullying Did Not Violate "Clearly Established" Constitutional Rights in 2007

Jackson v. Ladner, No. 13-60631 (5th Cir. Sept. 15, 2015).

SUMMARY: The Fifth Circuit has upheld claims of qualified immunity where a school teacher demanded that cheerleaders provide their Facebook passwords so she could investigate alleged on-line bullying and threats, finding that (1) such a search of students' communications did not violate clearly established Fourth Amendment rights in 2007 and (2) although such communication was clearly protected by the First Amendment, it would not have been apparent to defendants based on legal precedent at the time that a search of Facebook postings violated those rights.

FACTS: In 2007 the Pearl High School cheer squad travelled to a local Jackson, Mississippi television station to promote a charity event. M.J. was a freshman on the squad at the time and K.E. was the captain of the team. During a segment of filming, a

cameraman asked the girls to be quiet and M.J. failed to do so, prompting the captain to remonstrate her. On the bus ride back the two girls exchanged terse words and, the next day, the unpleasantries continued on Facebook. The cheer squad sponsor, Tommie Hill, also a teacher at the school, learned about the social media exchange and spoke to the entire squad, ultimately requesting the girls provide their Facebook information and login data.

She then checked the Facebook accounts and found M.J. and K.E. had exchanged words, and determined that M.J. had used threats against K.E. Thereafter Hill suspended M.J. from the squad for two weeks. M.J. argued it was more than two weeks, that in fact she did not participate in a majority of cheer practice and events, that she was forced to carry equipment for other cheerleaders when she did go, she could not participate in competition, and that Hill publically said she should not get a "spirit stick" despite being nominated by teammates for one. M.J.'s parents complained up the chain of authority from the principal to the superintendent, but nonetheless M.J.'s punishment was not reversed. Ultimately, M.J. was not invited to join the cheer squad the following year.

In 2009 M.J. and her parents filed suit, alleging the staff and school (1) violated M.J.'s constitutional right to privacy by accessing her private Facebook messages; and (2) violated M.J.'s right to free speech by punishing her for the content of her private Facebook messages. Defendants filed a motion for summary judgment on the basis of qualified immunity, which the district court denied. The court held "first, that plaintiffs' complaint stated a claim for the violation of M.J.'s "clearly established" constitutional rights to free speech under the First Amendment and to be free from unreasonable searches and seizures under the Fourth Amendment; and second, that genuine issues of fact remained for trial." They appealed.

HELD: The Fifth Circuit reversed the district court, granting qualified immunity to Defendants, but reserving any judgment on whether M.J.'s Fourth Amendment rights had in fact been violated.

DISCUSSION: The Court recited the well-settled rule that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff shows (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct." The Court began its analysis of these rules by taking "as given" that M.J. did not consent to the search of her Facebook messages or the dissemination of the content to other school officials. As for the reasonableness of the search, the Circuit set out the Supreme Court's two-part approach: first, the search must be justified at its inception with reasonable grounds that it will turn up evidence that the student violated the school rules or a law, and second, it must be permissible in its scope and not excessively intrusive.

In light of the facts, the Court found qualified immunity was warranted. First, in 2007 there was no precedent holding that the Fourth Amendment proscribed Hill's actions in obtaining Facebook login information. Second, Hill had reliable information that the

Facebook messages pertained to school activities and included threats and offensive language directed at another student about school activities, and although written outside of school, the Facebook messages related to a quarrel that began at a school event. The Court closed noting that it was expressing no opinion as to whether Hill's actions violated M.J.'s Fourth amendment rights, and only held that qualified immunity was warranted because the right was not "clearly established" in 2007 when the facts arose.

Similarly, the although the Court found that "it can hardly be disputed that Internet speech was protected by the First Amendment at the time the events in this case occurred," it was not clear that a reasonable school administrator would have known that taking remedial action by investigating such speech constituted a First Amendment violation. Therefore, whether premised on Fourth or First Amendment challenges, an attempt to overcome the school's qualified immunity could not succeed.

(It seems likely that application of current standards, when applied to online postings made outside of school, would have resulted in a different analysis).

LINK (last accessed Sept. 23, 2015).

Trials: Miami Has Standing to Sue Bank for Costs and Lost Tax Revenues Due to Predatory Lending Practices

City of Miami v. Bank of America Corp., No. 14-14543 (11th Cir. Sept. 1, 2015).

SUMMARY: The Eleventh Circuit has cleared the way for Miami to sue Bank of America for costs and lost revenues ensuing from the mortgage meltdown, reversing a lower court's finding that the City did not establish proximate causation between the bank's practices and the City's losses.

FACTS: Following the mortgage crisis, Miami instituted litigation against Bank of America (BOA). It filed two claims under the Fair Housing Act, §§3604(b) and 3605(a), alleging that by engaging in a variety of predatory lending schemes BOA disproportionately caused foreclosures in African American and Latino neighborhoods. This, in turn, the City posited, caused financial harm to the City in the form of increased municipal costs for trash removal, police, firefighters, etc. and reduced tax revenues, and thus it was harmed by BOA's actions.

The district court granted BOA's motion to dismiss, holding that Miami lacked statutory standing to sue, that the City failed to sufficiently allege proximate cause as required for an FHA claim, and that Miami failed to show BOA caused the City's harm. Miami appealed.

HELD: The Eleventh Circuit reversed the lower court, holding Miami had standing to sue under the FHA, that it had met the pleading standard to show that BOA caused the harm to the City, and that proximate cause was substantiated.

DISCUSSION: The Court began with the threshold issue of standing, noting that BOA had argued Miami lacked standing because it failed to show a causal connection between its injury and BOA's conduct. BOA had countered Miami's charges saying that a number of factors caused foreclosure and blight in Miami, including the general state of the housing market and the actions of myriad third parties, thus attenuating the causal chain. The Circuit disagreed. It noted Miami employed in-depth statistical analysis in its pleading, including showing that in majority-minority neighborhoods (90% or more), BOA loans were 5.857 times more likely to enter foreclosure than in majority white neighborhoods; that African American borrowers were 1.581 times and Latinos 2.087 times more likely to receive a loan with predatory features than a white borrower (e.g. such as high-cost loans like those with an interest rate that was at least three percentage points above a federally established benchmark, subprime loans, interest-only loans, balloon loan payments, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates); that African American borrowers with FICO scores over 660 (indicating good credit) were 1.533 times more likely to receive a predatory loan than white borrowers, while a Latino borrower was 2.137 times more likely to receive such a loan; that 21.9% of BOA loans to African American and Latino borrowers were high-cost, compared to just 8.9% of those to white borrowers; and that Latino and African American borrowers were foreclosed on in less time than white borrowers. Based on these facts, the City alleged and the Court agreed, property values decreased, thus depriving the City of tax revenue and increasing its costs. This left the Court with "little difficulty finding" Article III standing. While it acknowledged BOA's argument that other factors could have caused the ultimate harms to the City, it found this set of circumstances "perfectly plausible."

The Court moved on to deal with BOA's argument, and the lower court's holding, that despite Article III standing, the city lacked "statutory standing" under the FHA to bring the suit. One on hand, BOA argued that statutory standing required the city to be within the "zone of interest" of the FHA statute, while the City countered the statutory standing of the FHA is equally as broad as Article III standing. The Circuit held the Supreme Court's older precedent clearly, plainly, and absolutely supported Miami, but acknowledged that more recent cases cast some doubt on those older precedents. It ran through the Supreme Court history, recognizing that the newer cases "gesture[] in the direction of rejecting the [older] holding[s], [but that] a gesture is not enough." Ultimately the Circuit held that the "rule governing [this] situation … is clear: if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court . . . the prerogative of overruling its own decisions." It did so and found Miami had statutory standing.

As for proximate cause, the initial sticking point was whether it was required at all – with BOA and the lower court arguing that, under the FHA Miami did need to show proximate cause between BOA's actions and the injuries, and Miami arguing it need not do so. The Court sided with BOA and the lower court on the initial matter, noting that though no Supreme Court case directly answered the whether a proximate cause showing is required, statements by the Court indicated it is necessary to recover damages. These include a comment in *Lexmark* that proximate cause is a "general . . . presum[ption]" in statutory interpretation and in *Meyer v. Holley*, 537 U.S. 280 (2003) that FHA claims are "in effect, … tort action[s]." However, the Court then went on to agree with Miami's alternate argument that it had shown proximate cause because it evidenced that the injury to the City was reasonably foreseeable given BOA had access to the same statistical tools and generalized published data Miami used to show that the lending practices caused premature foreclosure and, in turn, harm to the municipality. This "empirical data [was sufficient] to raise the pleadings above the speculative level," thus the Circuit overturned the lower court, providing the City with standing to bring its claims.

LINK (last accessed Sept. 22, 2015).

THIS JUST IN: FORBES MAGAZINE WRITER PREDICTS THAT *REED* DECISION WILL PREVENT ENFORCEMENT OF GMO FOOD LABELING LAWS

A writer in the Forbes Magazine blog is predicting that Reed will have far-reaching consequences, including rolling back state regulations which require labels on genetically-modified food.

As the blog puts it, "Well, the pro-labeling militia is about to get clobbered." It cites Reed as giving GMO proponents "increased confidence that process-specific food-labeling initiatives are likely to be deemed unconstitutional by the federal courts."

The article foresees that strict scrutiny will be applied to labeling laws, which are a form of "compelled commercial speech:"

> Information that is required on labels is considered to be "compelled commercial speech" and thus must follow the speech requirements of the First Amendment. The essence of the Reed case is the expansion of the range of regulations subject to "strict scrutiny," the most rigorous standard of review for constitutionality, to include special labeling laws.
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> As lawyer and New York Times Supreme Court correspondent Adam Liptak observed, Reed v. Town of Gilbert "marks an important shift toward treating countless laws that regulate speech with exceptional skepticism." He quotes First Amendment expert Floyd Abrams, who said, "When a

court applies strict scrutiny in determining whether a law is consistent with the First Amendment, only the rarest statute survives the examination."

LINK (last accessed Sept. 22, 2015).