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Employment: No Property Interest in Employment Under OPMA, no Liberty Interest Deprivation via Comment about For Cause Termination

Earles v. Cleveland, no. 19-6157 (10th Cir. Aug. 28, 2020).

Affirming the District Court, the Tenth Circuit denies a public employee's claims of a property interest in her employment, finds no actionable liberty interest claim where county commissioners publicly commented that she had been terminated for cause, and declines to allow her to file a fifth amended complaint.

Andrea Earles (Earles) was hired by the Cleveland County Fair Board (Fair Board) in 2010 as an administrative assistant. In late 2013, she applied for the executive director position but alleges that she was "summarily rejected for the position as she was a younger female and presumably less qualified than any male applicant . . ."

Stephan Koranda, who was appointed as the Fair Board executive director, allegedly treated male employees as friends but verbally and emotionally abused younger female employees, including Earles. He also used Earles as a scapegoat for his own mistakes, such as when a Fair Board meeting was cancelled because he forgot to timely post the meeting agenda. He further harassed Earles because she would call out Koranda when he impermissibly used Fair Board funds for personal reasons, when she refused Koranda's requests to falsify portions of Fair Board meeting minutes, and when she complained that "open meetings violations occurred with the hiring of Koranda" because Cleveland County Commissioner Stacy (Stacy), a friend of Koranda's, had demanded that the Fair Board hire him.

In May 2014, Earles was fired, at the direction of Koranda and/or Stacy or Commissioner Cleveland (Cleveland) or two named Fair Board members. The Fair Board (other than the named members) was not aware that Earles would be terminated, and no Fair Board meeting to discuss Earles' termination took place beforehand.

After the termination, some Fair Board members investigated. Eventually, Koranda was asked to resign due to concerns about Earles' termination. But Stacy and Cleveland discussed Earles' personnel file and employment with members of the public and Fair Board members and intentionally maligned her.

Based on these accusations, Earles alleged gender discrimination in violation of Title VII and denial of "both procedural and substantive due process prior to being deprived of her employment and liberty interests in her good name and employment history." She also asserted several state-law claims. She subsequently amended her complaint, adding Fair Board members to Stacy, Cleveland and Koranda as defendants. After removing the case to federal court, defendants successfully argued, among other things, that Title VII did not permit Earles to sue the individuals because it applies only to employers, not individual employees.

Earles' fourth amended complaint ultimately asserted causes of action for:

- deprivation of procedural and substantive due process, in violation of the "First, Fifth, and Fourteenth Amendments," because defendants did not follow the Oklahoma Open Meetings Act, acted with deliberate indifference toward gender discrimination and retaliation for whistleblowing, and placed false accounts of wrongdoing in her personnel file; and

- sexual discrimination and sex-based hostile work environment in violation of Title VII.

The district court granted defendants' motion to dismiss. As for her original First Amendment theory—denial of the right to associate with the Fair Board—the district court held that Earles had no such First Amendment right under the circumstances. It dismissed Earles' due process claim because the Fifth Amendment applies only to the federal government. As for her Fourteenth Amendment due process theories, the district court found Earles had not plausibly pleaded a property interest in her job; the court specifically rejected as untimely Earles' attempt to invoke the County policy manual as a basis for that property interest. And the court found that Earles had not pleaded any real stigma arising from the defendants' alleged publicizing of the reasons they terminated her, so she also failed to state a deprivation of a liberty interest in her reputation.

Regarding Title VII, the district court agreed with defendants that the statute does not apply to non-employer individuals. As for Earles' new argument that her Title VII claim was instead (or also) an Equal Protection claim, the district court deemed the argument untimely and refused to consider it. Turning to Earles' remaining state-law claims, the district court declined to exercise supplemental jurisdiction over them, remanding to

state court. Finally, the district court announced it was dismissing Earles' federal claims and her emotional distress claim with prejudice because this was her "fourth attempt to bring her claims. Although liberality in amendment is important to assure a party a fair opportunity to present her claims, equal attention should be given to the idea that there must be an end to a litigation."

The Circuit reviewed the proceedings below for abuse of discretion. As to procedural due process, Earles had to show that (1) she had a protected interest to which due process protection was applicable; and (2) had not been afforded the appropriate level of process. She alleged a property interest in her Fair Board job and a liberty interest in her good name and reputation. **The standard for the existence of a property right in public employment is whether the plaintiff has a legitimate expectation of continued employment. This usually requires tenure, an employment contract for a definite term, a clearly implied promise of continued employment, or a statute, regulation, or state-law-endorsed collective bargaining agreement that requires cause for termination.** Earles asserted that Oklahoma's Open Meetings Act, Okla. Stat. tit. 25, §§ 301-14, created a legitimate expectation of continued employment. The Circuit disagreed:

> In Trant v. Oklahoma, we rejected a claim that the Open Meetings Act creates an implied contract with public employees, enforceable through a state-law breach of contract action. 754 F.3d 1158, 1174 (10th Cir. 2014). We reasoned that the Open Meetings Act "does not guarantee an employee any procedural rights by virtue of his employment. [It] was enacted for the public's benefit and not to provide a private right of action in employment matters." . . . The Open Meetings Act is meant "to encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems." Okla. Stat. tit. 25, § 302. It contains no hint that it was meant to provide public employees with an expectation of continued employment.

Although defendants did not deprive Earles of a constitutionally protected property interest, the "liberty" component of the Due Process Clause might still provide relief: "[a] public employee has a liberty interest in his good name and reputation as they relate to his continued employment."

To state a claim for deprivation of one's liberty interest in good name and reputation, the plaintiff must plausibly allege the following:

1. a state actor made a statement that impugned the plaintiff's good name, reputation, honor, or integrity;

2. the statement was false;

3. the statement was made during the course of termination and forecloses other employment opportunities; and

4. the statement was "published" (disclosed to the public).

The remedy for a deprivation of the liberty interest in good name and reputation is "an adequate name-clearing hearing.

The district court had concluded that Earles did not plausibly plead the first element, because the allegedly false statements were not sufficiently stigmatizing and had not been shown to preclude her from other employment opportunities. Here, Earles' only clear assertion of an allegedly false, published statement was that Commissioner had openly discussed Earle's personnel file and employment with Koranda as well as other members of the public and other Fair Board members, and had intentionally maligned her reputation and good name by intentionally leading the public to believe that she was being disciplined for good cause .

The Circuit found that, even assuming defendants publicized statements such as these, they did not create the sort of stigma required for a liberty interest deprivation. Similar statements have been countenanced by the Circuit: (Sullivan v. Stark, 808 F.2d 737, 739 (10th Cir. 1987) ("The [plaintiff's termination] letter . . . consisted of a variety of complaints against [him], each of which asserted that he was negligent or derelict in performing the duties of [his government job]. These complaints do not implicate concerns of constitutional stature."); Stritzl v. U.S. Postal Serv., 602 F.2d 249, 252 (10th Cir. 1979) ("the characterization of Stritzl by [his former employer] as one possessed of 'poor work habits and low productivity' . . . [does not] amount to a type of 'stigma' [*17] [sufficient for a liberty interest deprivation]"). On the other hand, implications of serious dereliction or violation of law will give rise to a liberty interest claim: (Palmer v. City of Monticello, 31 F.3d 1499, 1503 (10th Cir. 1994) ("We are satisfied that an accusation that a police officer falsified a speeding ticket qualifies as a stigmatizing charge which amply supports that element of a liberty interest violation."); McGhee v. Draper, 564 F.2d 902, 910 (10th Cir. 1977) (district court should not have directed verdict against plaintiff on liberty interest claim where plaintiff, a school teacher, had been accused of "[distributing] allegedly pornographic materials," "improper changing of grades," "misconduct with male students," and "drunkenness").

Earles argued that the district court should have granted her leave to amend so she could plead a First Amendment retaliation claim—in what would effectively be a fourth amended complaint and fifth overall. While "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2), courts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 "to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, to present theories seriatim in an effort to avoid dismissal, or to knowingly delay raising an issue until the eve of trial."

The Circuit declined to allow further amendment. Earles had represented to the district court that her First Amendment claim was really part of her intentional infliction of emotional distress claim. "Now, in her opening brief, she argues that she can satisfy the elements of a standalone First Amendment retaliation claim. And, in her reply brief, she

asserts for the first time a new "class of one" Equal Protection theory." The district court did not abuse its discretion in concluding that a fifth chance to state viable claims was unwarranted.

LINK

Qualified Immunity: Insufficient Precedent that Social Worker's Sexual Harassment Violates Clearly Established Right; Judges Criticize Supreme Court's QI Ambiguity

Sampson v. City of Los Angeles, no. 18-55450 (9th Cir. Sept. 9, 2020).

Reversing the lower court in part, the Ninth Circuit finds that actions by county social services employees constituted retaliation for complaints of sexual harassment by a client in violation of the First Amendment, but that such behavior did not violate clearly established Fourteenth Amendment Equal Protection precedent; both the majority and two dissents criticized the Supreme Court's inconsistent opinions on qualified immunity.

In the summer of 2014, Natia Sampson (Sampson) became the caregiver for her niece H.S., whose parents had been incarcerated. In November 2014, the Los Angeles County Department of Children and Family Services (DCFS) assigned social worker Ahmed Obakhume (Obakhume), to H.S.'s case. He immediately began a campaign of sexual harassment, commenting on Sampson's appearance and inappropriately touching her. Sampson complained about Obakhume's conduct but DCFS did nothing. In October 2015, Sampson allowed her brother Ronald (H.S.'s father), to visit H.S. unsupervised--based on Obakhume's representation that Ronald had unmonitored visitation rights. Ronald absconded with H.S., who was found the following day unclothed.

When Sampson alerted DCFS superiors, Obakhume threatened her, saying that DCFS operatives covered for one another and "No one is going to lose their job behind you and your mess." He filed unsupported allegations that Sampson was abusing H.S., prompting a county investigator to visit Sampson's home in November 2015. DCFS then obtained a warrant authorizing removal of H.S. from Sampson's care; however, the warrant was never executed. DCFS next sought an order to remove H.S. from Sampson's care, again alleging that Sampson was abusing and neglecting H.S. Although Sampson successfully opposed DCFS's removal effort at a juvenile court hearing, in December 2015 DCFS petitioned for an extraordinary writ with the California Court of Appeal and removed H.S. pending briefing. Finally, in January 2016, the California Court of Appeal vacated its stay order and returned H.S. to Sampson's care, realizing that DCFS's allegations of abuse and neglect were unfounded.

Sampson sued DCFS and four employees under Section 1983, alleging sexual harassment in violation of the Equal Protection Clause, retaliation under the First Amendment, and violation of her substantive and procedural Due Process rights; she also brought a Monell claim against Los Angeles County. The district court granted qualified immunity to Defendants on the Fourteenth Amendment sexual harassment and First Amendment retaliation claims and dismissed all other counts.

The Ninth Circuit vacated the grant of qualified immunity to Defendants on Sampson's First Amendment retaliation claim because it was clearly established at the time of Defendants' conduct that the First Amendment prohibits public officials from threatening to remove a child from an individual's custody to chill protected speech out of retaliatory animus.

To state her retaliation claim, Sampson had to plausibly allege that (1) she engaged in a constitutionally protected activity; (2) Defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) the protected activity was a substantial or motivating factor in Defendants' conduct. And to prevail, she had to establish that Defendants' "retaliatory animus" was the "but for" cause of her injury, "meaning that the adverse action against [her] would not have been taken absent the retaliatory motive." While the district court found no case law clearly establishing that public officials outside of the law enforcement, prison, employment, or school contexts could be liable for retaliation under the First Amendment, the Circuit disagreed, citing Capp v. County of San Diego, 940 F.3d 1046 (9th Cir. 2019): "In Capp, we denied qualified immunity to a social worker because '[a] reasonable official would have known that taking the serious step of threatening to terminate a parent's custody of his children, when the official would not have taken this step absent her retaliatory intent, violates the First Amendment.'"

But the Circuit was unable to reverse the district court's grant of qualified immunity on Sampson's Equal Protection claim because the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time.

There was ample Circuit caselaw in analogous scenarios. Although the Supreme Court has never explicitly considered whether sexual harassment violates the Equal Protection Clause, the Ninth Circuit has held that allegations of "persistent and unwelcome physical and verbal abuse" in the workplace "state a claim of sexual harassment, which can be impermissible sex discrimination in violation of the Equal Protection Clause." Bator v. Hawaii, 39 F.3d 1021, 1027, 1028 (9th Cir. 1994). ("Sexual harassment violates the Equal Protection Clause because, by definition, it is 'motivated by gender.'") **However, the Circuit reluctantly found its precedents factually distinguishable: "we have never held that the Equal Protection Clause protects private individuals who suffer sexual harassment at the hands of public officials providing them with social services."**

Therefore, it was not clear that that the question raised by Sampson's claim was "beyond debate" when the conduct at issue occurred. Although the court found that "Sampson has plainly alleged a constitutional violation here, for purposes of analyzing qualified immunity, we must heed the Supreme Court's repeated admonitions 'not to define clearly established law at a high level of generality.'" And although Cal. Civ. Code § 51.9 prohibits sexual harassment at the hands of social workers in California, a violation of state law generally does not lead to liability under § 1983.

> **Unfortunately, the Supreme Court's exceedingly narrow interpretation of what constitutes a "clearly established" right precludes us from holding what is otherwise obvious to us—that the right of private individuals to be free from sexual harassment at the hands of public officials outside of the workplace and school contexts was clearly established under the Equal Protection Clause at the time of Defendants' conduct. Although we are prevented from denying qualified immunity in the instant case, we want to make it abundantly clear moving forward—if it was not already—that State public officials violate our Constitution's promise of equal protection when they sexually harass the people they serve.**

DISSENT: Judge Hurwitz concurred with the denial of qualified immunity on the Equal Protection claim, but would have also denied on the First Amendment retaliation count:

> I agree with my colleagues that Natia Sampson has plausibly alleged violations of both her First and Fourteenth Amendment rights. In a world in which the plain language of the statute controlled, that would end our analysis. But, of course, it does not. We must also parse the judgemade doctrine of qualified immunity, which is found nowhere in the text of § 1983. See Baxter v. Bracey, 140 S. Ct. 1862, 1862–63 (2020) (Thomas, J., dissenting from denial of certiorari). And that doctrine requires—in this case and many others—the dismissal of facially plausible claims of constitutional violations because the right at stake was not "clearly established" at the time of the violation. Until the Supreme Court revisits its qualified immunity jurisprudence, as a constitutionally "inferior" court, U.S. Const. art. III, § 1, we must continue to struggle to apply it.

Judge Hurwitz cited the ambiguity of Supreme Court parameters: The Court has stated that a prior "case directly on point" is not required (Mullenix, 136 S. Ct. at 308). **"But much like Lucy of 'Charlie Brown' fame, the Court repeatedly yanks away the football when lower courts attempt to apply this language."** Although stating that qualified immunity does not protect the "plainly incompetent or those who knowingly violate the law," (Kisela, 138 S. Ct. at 1152), the Court has protected wrongdoers unless the violated constitutional right was "particularized," (Pauly, 137 S. Ct. at 552).

That standard made Capp inapposite. While it has long been clear "that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out," Hartman v. Moore, 547 U.S. 250, 256 (2006), Hurwitz noted that "'general' is not good enough for the Supreme Court." The 2019

opinion in Capp came down four years after the conduct at issue in this case occurred in November 2015. "As a matter of pure logic, because Capp found the asserted constitutional right clearly established at the time of the official's actions in that case, August 2015, it ought to mean that the same right was clearly established several months later, when the allegedly retaliatory conduct in this case occurred. However, I do not read the Supreme Court's caselaw as allowing us to draw that logical conclusion—indeed, a panel of this Court has already been reversed for attempting something similar." (citing Kisela, 138 S. Ct. at 1154–55) . . . . **The "clearly established" inquiry focuses on the judicial opinions extant at the time of the conduct at issue, not on how subsequent cases characterize pre-existing law. Decided years after the relevant conduct here, Capp is of no use.**

Judge Zouhary concurred in part and dissented in part, finding that qualified immunity should have been denied on both constitutional claims. Obakhume's alleged actions had violated Sampson's constitutional right to be free of sexual harassment, and that right had been clearly established. This was not a case of "high generality"--Obakhume undertook a persistent course of inappropriate conduct over several weeks. "Context matters. The Supreme Court has noted that 'even though the very action in question has not previously been held unlawful . . . officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" Hope v. Pelzer, 536 U.S. 730, 741 (2002). The Circuit's repeated holdings that the right to be free of sexual harassment by public officials was clearly established in a variety of contexts--including prison, educational settings, and the workplace—were sufficient to provide the relevant context. These existing cases placed the unreasonableness of Obakhume's conduct "beyond debate," Mullenix, 136 S. Ct. 305, 309 (2015) (citation omitted), he had "fair notice" that his conduct was unlawful.

As Zouhary saw it, giving the Supreme Court's mandate a narrow reading would lead to a "bizarre" conclusion: Obakhume would have known that he could not sexually harass others in his workplace if they were employed by the County; but he would have been unaware (or confused or unsure) about whether he could sexually harass a client. Furthermore, the existence of a California statute that specifically prohibited social workers from making unwanted sexual advances towards members of the public could be considered in determining whether a reasonable official would have known the conduct at issue was unlawful.

LINK

Telecommunications: Ninth Circuit Upholds Most of FCC's Small Cell Order

City of Portland v. Federal Communications Commission, no. 18-72689 (9th Cir. Aug. 12, 2020).

The Ninth Circuit rejects challenges by dozens of municipalities and various utilities to the FCC's Small Cell Order, issued to accelerate 5G deployment.

Section 253(a) of the Telecommunications Act of 1996 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). That provision has become ground zero for litigation as carriers push to expand their services across the nation. Under that rubric, on September 27, 2018, the FCC issued its small cell ruling and order (https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf) (Small Cell Order), which significantly limited local prerogatives in addressing the placement, pricing, review process and other elements of small cell installations needed for 5G deployment. The Small Cell Order was challenged by more than 50 municipalities as well as utilities and other entities that own land or infrastructure where small cells are to be sited.

On August 12, 2020, a three-judge panel of the Ninth Circuit substantially rejected petitioners' arguments, agreeing only on one issue—that provisions of the Small Cell Order regarding 5G aesthetics were arbitrary and capricious.

"Material Inhibition": Petitioners argued that Section 253(a) does not preempt state or local fees or requirements unless they result in an "actual prohibition" of service. The panel deferred to the FCC, applying the agency's less stringent "material inhibition" standard.

Aesthetics: Petitioners were more successful on the issue of aesthetics, in that two of the FCC's three criteria were stricken. The Small Cell Order had preempted local aesthetic regulations unless "(1) reasonable; (2) no more burdensome than those applied to other infrastructure deployments, and (3) objective and published in advance." The Circuit held that the "no more burdensome" standard impermissibly conflicted with Section 332, which "explicitly contemplates" some differentiation based on differing technologies. The "objective" standard was rejected because the restriction on "intangible public harm of unsightly or out-of-character deployments" is inherently subjective.

Fees: Petitioners challenged the Small Cell Order limits on state and local fees for accessing the public ROW and the safe harbor thresholds for Small Wireless Facilities ($500 application fee for up to five Small Wireless Facilities / $1,000 application fee for a new pole / $270 yearly per Small Wireless Facility per year for all recurring fees). The panel upheld the limits, finding that the FCC's fee structure did not violate Section

253(c) given that "calculation of actual, direct costs is a well-accepted method of determining reasonable compensation."

Shot Clocks: The FCC had significantly shortened shot clocks (90 days reduced to 60 days for approval/ denial of Small Wireless Facilities collocation applications and 150 days to 90 days for other collocation applications). Petitioners argued that most states and municipalities could not meet the new thresholds, but the panel upheld the shorter timeframes, finding that the FCC had properly relied on a survey of local laws.

Government-Owned Property: Under the Small Cell Order, the FCC's rules applied not only to government-owned public ROW but also to government-owned property such as light poles and traffic lights within that ROW. Public pole owners contended that the Small Cell Order did not apply to them, citing Section 224, which governs attaching various telecommunications infrastructure to private utility poles and contains an "express exclusion for government-owned utilities." The panel disagreed; Section 253 imposes independent authority to limit amounts local governments may charge for pole attachments. Petitioners also argued that Section 253(a) preemption does not apply to them when acting "like private property owners in controlling access to, and construction of facilities in the rights-of-way." The panel rejected this argument and agreed with the FCC's assertion that "cities act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulator objectives, such as maintaining aesthetic standards."

Constitutional Challenges: The panel also rejected petitioners' constitutional claims: the Tenth Amendment was not violated because the FCC had not commandeered State or local officials, and there was no Fifth Amendment taking because the Small Cell Order allows for recovery of actual costs.

(Portions of this summary were excerpted from a posting on the Davis Wright Tremaine website).

LINK

Trials: No Implied Consent where Facial Claim Amended to As-Applied Claim

John Does #6 v. Miami-Dade County, no. 19-10254 (11th Cir. Sept. 9, 2020).

The Eleventh Circuit refuses to allow Does challenging a county sex offender ordinance to amend their pleadings to include an as-applied challenge where they had not provided notice of such amendment and the county would suffer prejudice.

In 2005, Miami-Dade County (County) enacted Ordinance No. 05-206 (Ordinance), which prohibits people convicted of certain sex offenses against a victim 15 years or younger from residing within 2,500 feet of a school. The Ordinance applies retroactively to offenders convicted before its enactment, but contains a "grandfather clause" that exempts offenders who established their residence before the Ordinance was enacted, or who established their residence before a school opened within 2,500 feet of their residence.

In 2014, various Does challenged the ordinance under the ex post facto clauses of the Florida and U.S. Constitutions. **Article I, § 10, of the federal Constitution prohibits States from enacting any ex post facto, or retroactive, increases in criminal punishment or changes in the definition of crimes. A civil law that applies retroactively, like the Ordinance, can violate the ex post facto clause in two ways. First, the law is unconstitutional if the legislature intended to impose punishment. Second, the law is unconstitutional if "the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil."**

At trial in 2014, the Does argued the Ordinance was unconstitutional in both ways, but the District Court held that the County had not enacted the Ordinance with punitive intent and that the punitive effect of the Ordinance was not so excessive as to transform it into a criminal penalty.

In October 2017, additional Does filed a second amended complaint alleging ex post facto clause violations, styling their suit as a facial challenge. It asked the District Court to "[i]ssue a permanent injunction prohibiting Defendants from enforcing the Ordinance against anyone whose qualifying offense occurred before the enactment of the Ordinance."

The County moved for summary judgment, which the District Court denied. A five-day bench trial took place in October 2018. On the next-to-last day of trial, the District Court remarked:

> Since this is a facial and not an as-applied challenge, we heard a lot from the Does about their individual circumstances. Some of them are pretty compelling.

> Maybe they would survive the as-applied challenge because it's so onerous for them to be able to comply with the statute and go about any kind of reasonable existence. But we don't have an as-applied case here. So think about that. I'm kind of addressing the plaintiffs' counsel in this case.

The next day, the Does moved to conform the pleadings to the evidence under F. R. Civ. P. 15(b), asking to "add an as-applied challenge to their second amended complaint." They argued that they had already established an as-applied ex post facto claim at trial by introducing evidence of the individual Does' circumstances, and that the County implicitly consented to allow the Does to try this theory of the case. The County objected, arguing that it had not received notice of an as-applied constitutional claim and would suffer prejudice.

The District Court declined to allow the amended pleading, and after a bench trial, ruled for the County based on its findings of fact and conclusions of law: the Ordinance was rationally related to the goal of protecting children in the community and was not excessive with respect to its purpose of public safety. While the plaintiffs "could have a potential 'as applied' challenge to the Ordinance" based on their "particular hardships . . . [including] mental or physical disabilities," but "no Doe has alleged an 'as applied' claim here."

On appeal, the Does disputed the denial of their Rule 15(b) motion.

Fed. R. Civ. P. 15(b)(2) reads:

> **When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.**

The Does argued that the County implicitly consented to an as-applied challenge, and the District Court should therefore have enjoined the Ordinance from being applied to them.

The Circuit acknowledged that Rule 15(b) while "at best, an imperfect vehicle for the Does' arguments" does open the possibility of amendment to as-applied challenge. The Supreme Court has explained that "the distinction between facial and as-applied challenges is not so well defined . . . that it must always control the pleadings and disposition in every case involving a constitutional challenge." Citizens United v. FEC, 558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010)--instead, the distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." The Eleventh Circuit itself had expressed some support for this argument when the switch in focus from facial to as-applied relief happens at the summary judgment stage: In American Federation of State, County and Municipal Employees Council 79 v. Scott, 717 F.3d 851 (11th Cir. 2013) (AFSCME), the union had asserted a

Fourth Amendment claim against a Florida executive order requiring drug testing of all state employees. The AFSCME complaint used "the terminology of a facial challenge," asking the District Court to enjoin "all employee drug-testing mandated by [the] Executive Order." At summary judgment, however, the Union began recasting its complaint, arguing that the statute was unconstitutional "as applied" to certain union members. The District Court ultimately agreed that the policy was unconstitutional as applied to those members and granted summary judgment.

On appeal, the Eleventh Circuit affirmed: "Ordinarily, it is true that, at the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with [Rule] 15(a)," which provides for amending a complaint before trial. But the union did not need to amend its complaint under Rule 15 because it was "not stating a new claim, only clarifying the scope of its desired remedy."

The Does argued that their case was just like AFSCME, and should result in receiving as-applied relief from the Ordinance. But unlike AFSCME, the Does did not seek to introduce an as-applied challenge at summary judgment, instead waiting to raise the issue at the end of trial. While the Circuit indicated that the Does might have succeeded by making arguments outside Rule 15(b), in this instance they had specifically framed their amendment efforts within the Rule.

> Thus, we return to the text of Rule 15(b). As we've said, Rule 15(b) permits amendment where unpled issues have been tried by the implied consent of the parties. "[I]mplied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some other way was denied a fair opportunity to defend."

The Does failed under this structure. As to notice, the County had not agreed to the admission of any evidence supporting an as-applied ex post facto challenge that was independent of the facial ex post facto challenge. "Of course, evidence introduced at trial about the individual Does' experiences with the Ordinance, the criminal justice system, housing, and homelessness could have supported an as-applied challenge. But the Does admit that the evidence about their personal experiences was also relevant to their facial challenge." And the County could point to as many as 20 instances since the filing of the initial complaint in October 2014 in which the Does arguably disclaimed an as-applied challenge. The notice requirement was clearly not satisfied.

The County would also face substantial prejudice. To survive a facial challenge, it merely needed to show that the Ordinance's overall effect on all covered sex offenders was not so punitive that it constituted a criminal penalty. But to refute an as-applied challenge, the County would have needed to defend the Ordinance's effect on the Does themselves. It would have litigated its case differently had it known the Does sought individualized relief: cross-examining the Does more extensively, introducing more

evidence to impeach them, asked them to to undergo physical or mental examinations, hiring experts to evaluate the Does' "individualized recidivism concerns," and so on.

> We are persuaded that the County would have made different choices at trial had it anticipated an as-applied challenge to the Ordinance, because would have needed to show the Ordinance's effects on the Does were proportional to the Does' risks of recidivism. For this reason, we cannot reverse the denial of the Does' Rule 15(b) motion.

LINK

THIS JUST IN: Class Action Lawyers Pursue Zoom

Although Zoom has facilitated communications across a wide spectrum of users in the time of Covid—including use by courts and by IMLA at our conferences, the company has attracted criticism for a lack of security protocols. Those issues have morphed into a class action in a California MDL, as a September 16, 2020 article by John O'Brien in Legalnewsline.com explains

Lawsuits alleged negligence and violation of laws like the California Consumer Privacy Act. They said Zoom shared the user's personal information, including the type of device and software the user has as well as their network carrier and location, with third parties such as Facebook.

The lawsuits also claim Zoom misrepresented its encryption protocols and failed to prevent unwanted users from crashing meetings (called "Zoombombing").

On Sept. 14, Zoom filed a motion to dismiss the consolidated amended complaint.
"In an effort to capitalize on Zoom's explosive growth during the COVID-19 pandemic, Plaintiffs seek to hold Zoom liable on behalf of a nationwide class under a scattershot array of loosely related factual and legal theories, largely drawn from sensationalist news reports," the motion says.

"Facing skyrocketing growth in use, Zoom has worked tirelessly since the pandemic's onset to keep its services operational and secure, while developing and deploying extensive privacy and security enhancements to address new challenges caused by the massive uptick in non-corporate usage."

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