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Commerce Clause: Minimum Wage Law Requiring Higher Wages by Employers Associated With Large Franchisors Does Not Discriminate Against Out of State Commerce

International Franchise Association v. City of Seattle, No. 15-35209 (9th Cir. Sept. 25, 2015).

SUMMARY: A Seattle minimum wage law that imposes higher wage requirements on Seattle employers having 500 or more employees—and on any Seattle employer associated with a franchisor having 500 or more employees—has been upheld against claims that it violated the dormant Commerce Clause. The Ninth Circuit upheld the lower court's finding that the ordinance did not discriminate against out of state businesses and had not been enacted with that intent.

FACTS: Seattle, Washington enacted a minimum wage law that set a two-tiered schedule for businesses in the city to come into compliance with the higher minimum wage. The ordinance had one schedule for businesses with 500 employees or more and one for businesses with fewer than 500 employees. Any franchisee associated with a franchise or franchise network with more than 500 employees nationwide were grouped with those businesses with 500 or more employees, no matter how many employees the franchisee employed in Seattle. The International Franchise Association ("IFA") sought a preliminary injunction in district court after the law was enacted, claiming the franchise classification system violated the Commerce Clause, the Equal Protection Clause, the First Amendment and was preempted by the Lanham Act. The district court rejected the IFA's claims. IFA appealed.

HELD: The Ninth Circuit affirmed, denying IFA's request for a preliminary injunction.

DISCUSSION: Though IFA brought a variety of challenges, the only substantial issue on appeal was whether Seattle's ordinance violated the dormant Commerce Clause. The Circuit Court stated the well-established rule that "[i]f a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means."

The Court was quickly able to eliminate facial discrimination, given that the ordinance does not classify employers by location of the business headquarters or employees, or whether the business participates in interstate commerce. This classification system – based on the number of employees and the business model – does not discriminate facially.

IFA argued there was evidence of a discriminatory purpose for the ordinance based on the statements of some city officials, including emails and comments to the effect that franchises are "not good [the] local economy" and one statement from a mayoral staff person that "if we lose franchises in Seattle I won't be sad." The court noted that these and other errant comments showed that city officials questioned the merits of franchises as a business model and their value in Seattle, but held the statements did not show an intent to discriminate against out-of-state business. Instead, the Court found the ordinance's stated purposes of improving health and welfare and reducing economic inequality in the city to be legitimate, non-discriminatory purposes.

In sum, the statements were too indirect, both since the speakers were not decision-makers and since the content was not about out-of-state business, and too limited "to overcome the evidence of the provision's permissible purpose."

As for whether the ordinance has discriminatory effects, IFA argued the district court applied two improper legal standards: 1) the evidentiary burden and 2) the standard to determine discriminatory effect. The Court held that a higher evidentiary burden applies when the law at issue, as here, is neither facially discriminatory nor motivated by an impermissible purpose. While the Court saw IFA's second point as "somewhat stronger," that argument ultimately failed as well. While one of the standards used by the lower court to determine whether the ordinance had a discriminatory effect was insufficient, the lower court had evaluated the possible effects of the ordinance on interstate commerce using six different standards, and did not err.

LINK (last accessed October 12, 2015).

Employment: Demotion by Sheriff Due to Political Opposition is Upheld; Evidence of Problematic Job Performance Overcomes Gender Discrimination Claim

Ezell v. Wynn, No. 13-15851 (11th Cir. Sept. 23, 2015).

FACTS: Terri Ezell began working for the Columbus Consolidated Government in Georgia in 1983 and had a long, trailblazing career. She started as a corrections officer, was promoted to deputy sheriff just two years later, then became the first woman to be a major, and moved on to a commander, wherein she was third-in-command in the entire sheriff's office and managed the jail and 250 employees. In the run-up to the 2008 election Ezell showed support for the incumbent sheriff under whom she'd been working. Ultimately, however, he lost and a new sheriff was elected – John Darr. Darr began his term by reorganizing the department and he was clear that one of his primary objectives was to improve management of the jail. Darr, recognizing Ezell was charged with running the jail, considered Ezell responsible for the short-comings there and demoted her. Over his first month in office, Darr ultimately replaced the entire top management team he inherited from the previous administration. Though within a year or so the male officers he transferred were returned as command staff, Ezell was transferred repeatedly, moving four ranks below a commander, and ultimately into the city manager's office where she was ordered to discontinue wearing her uniform. All told, Darr promoted thirteen officers to a rank of sergeant or higher, all of whom were male. By the time the case made it to the Circuit Court, Darr had promoted 28 men and six women, but no woman achieved a rank higher than a lieutenant.

In 2011, Ezell filed suit alleging the sheriff and the Columbus Consolidated Government demoted her based on her gender and violated her First Amendment right by retaliating against her for her political support of the incumbent. As to her gender claim, Ezell challenged both the demotions and that the sheriff denied her compensatory time off, while men of comparable rank got such a benefit. The district court denied the defendant's motion for summary judgment with regard to Ezell's compensatory time, but granted it for the gender discrimination and First Amendment claims. Ezell appealed.

HELD: The Eleventh Circuit affirmed the lower court.

DISCUSSION: The Court began with the First Amendment claim, noting that adverse employment actions based on political affiliation or patronage can violate the First Amendment only when political loyalty is an inappropriate requirement for a given job. It noted it, as many other circuits do, that in the ranks of law enforcement political loyalty is considered critical to the job. Ezell tried to get around this clear rule with a caveat of Georgia law: she argued "patronage cannot be necessary to the effectiveness of the [Columbus Consolidated Government] sheriff's deputies because [it]'s civil service system, which binds the sheriff's office with the force of state and local law, prohibits employment decisions based on political patronage." The Court rejected the argument, noting that the critical fact remains that political patronage is critical to the *actual job duties* of a deputy sheriff and that Ezell had failed to show how being a part of the civil service system altered those *duties.* Simply put participation in the civil service system did not alter the legal relationship between the sheriff and his/her deputies under Georgia law, and therefore the Court found political patronage remained an appropriate requirement for the job.

As for the gender discrimination claim, the Court first highlighted that Ezell was proceeding with circumstantial evidence and thus was bound by the *McDonnell-Douglas* burden-shifting framework. It found, as did the lower court, that Ezell set forth a prima facie case and that the sheriff and Columbus Consolidated Government set forth a legitimate, non-discriminatory basis for the employment decision. Plainly stated, Darr said he was unsatisfied with Ezell's work, that she was ineffective at communication and did a poor job of managing the jail, causing him to seek a different manager in that role. With the burden back on Ezell to show this proffered reason was pretextual, the Circuit agreed with the lower court that Ezell failed to meet this challenge. Her circumstantial support was not enough for a reasonable jury to find the sheriff's reason pretextual. In closing the Court did note that the "general disparities in promotion and rank of men and women in the [Columbus Consolidated Government] sheriff's office under Sheriff Darr g[a]ve [it] pause in reaching [its] decision." Though it ultimately concluded "that those disparities alone cannot give rise to a reasonable inference that gender discrimination was at work in Ms. Ezell's transfer . . . the number and modesty of Sheriff Darr's promotions of women allow for the theoretical possibility that discrimination was at work in his employment decisions . . . ." The Court thus upheld the lower court rejection of Ezell's claim.

LINK (last accessed Oct. 12, 2015).

Religion: NYPD's Post-9/11 Program to Track Muslims Violates First and Fourteenth Amendments

Hassan v. City of New York, no. 14-1688 (3d Cir. Oct. 13, 2015).

SUMMARY: A group of New Jersey Muslims who challenged an allegedly discriminatory New York Police Department (NYPD) practice of targeting and investigating them as violating their First and Fourteenth Amendment rights have succeeded overturning a lower court's dismissal of their case for lack of standing and failure to state a claim. The case was closely watched by a broad group of amicus participants asserting racial, ethnic and religious rights.

FACTS: Following 9/11, plaintiffs allege, the NYPD began a concerted program to infiltrate and investigate the Muslim community in a broad area around New York City (City), sending undercover representatives to mosques, Muslim businesses and schools and similar venues and generally observing and questioning Muslims in their New Jersey neighborhoods. Investigators allegedly compiled a massive database of names, addresses, license plate numbers and the like about the Muslim community surrounding the City. Plaintiffs allege that there was no correlation between people targeted and any potential for violence or terrorism.

Word of the undercover operations eventually leaked out. Both then-Mayor Bloomberg and then-NYPD Chief Kelly defended the policy, saying it was an appropriate effort to protect the City.

As a result of the NYPD activities, plaintiffs allege, attendance at Mosques and other Muslim venues decreased. The reputations of various influential Muslims in the community were damaged and local Muslim-owned businesses suffered financial losses.
They brought suit in 2012 under § 1983 and *Monell*, citing violations of the Free Exercise, Establishment and Equal Protection clauses and requesting an injunction against the policy, destruction of the database and damages. The district court granted the City's 12(b)1 and 12(b)6 motions, finding that plaintiffs failed to identify any cognizable "injury-in-fact" and that "[t]he more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies" than a desire to discriminate. *Hassan v. City of New York,* No. 12-cv-3401, 2014 WL 654604, at *7 (D.N.J. Feb. 20, 2014).

HELD: On appeal, the Third Circuit reversed.

DISCUSSION: A plaintiff alleges injury-in-fact when it claims that it has, or is in imminent danger of having, suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "`actual or imminent, not conjectural and hypothetical." (citation omitted). The Circuit Court found a broad swathe of precedent holding that governmental practices based on religious or racial distinctions created a sufficient injury in fact, pointing to the evolution in judicial thinking from the time of *Plessy* to *Brown v. Board of Education*: even though the City had not expressly denigrated the Muslim faith, its actions created injury to Muslims, who felt threated and singled out. And this small group of plaintiffs could not be denied standing merely because a much larger group of Muslims had been injured: "Harm to all—even in the nuanced world of standing law— cannot be logically equated with harm to no one."

The City's reliance on *Laird v. Tatum*, 408, U.S. 1 (1972) was misplaced—that case had found that surveillance per se did not create an injury conferring standing, but it had not dealt with surveillance of entire class of persons.

Having found standing, the Court also found Constitutional violations sufficient to rebuff the City's motion to dismiss. The surveillance policy was clearly directed at Muslims, which justified a facial discrimination challenge. Unlike the facts in *Iqbal,* which the City cited, where plaintiff asserted generalized allegations "amount[ing] to nothing more than a `formulaic recitation of the elements' of a constitutional discrimination claim," the record in this case was replete with specific instances of targeting and shadowing only Muslims and their establishments. And the fact that "not a single lead" had been generated through the program undermined the City's argument that it was targeting terrorism rather than Muslims.

Interestingly, the Court did not have a clear legal standard with which to examine religion-based discrimination: "Perhaps surprisingly, neither our Court nor the Supreme

Court has considered whether classifications based on religious affiliation trigger heightened scrutiny under the Equal Protection Clause." However, Supreme Court dicta and express holdings in the Eighth and Tenth Circuits provided ample support for "heightened scrutiny."

The Circuit Court left for the district court to determine whether "intermediate scrutiny" or "strict scrutiny" would apply, but under either heightened standard, the burden of proof to justify the governmental policy now shifted to the City:
In sum, because Plaintiffs have plausibly alleged that the City engaged in intentional discrimination against a protected class, and because that classification creates a presumption of unconstitutionality that remains the City's obligation to rebut, Plaintiffs have stated a claim under the Equal Protection Clause of the Fourteenth Amendment.

The City attempted to defend plaintiffs' First Amendment challenge based on the fact that the policy was not motivated by any animus. This tack failed—discriminatory intent can exist even without discriminatory motive. The Circuit Court summed up the nation's difficult history of reconciling national security needs against Constitutional imperatives:
What occurs here in one guise is not new. We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind. We are left to wonder why we cannot see with foresight what we see so clearly with hindsight—that "[l]oyalty is a matter of the heart and mind[,] not race, creed, or color."

LINK (last accessed Oct. 15, 2015).

Takings: Failure to Exhaust Administrative Remedies Dooms Fifth Amendment Claim

Tripodi v. North Coventry Township, No. 13-3704 (3d Cir. Oct. 1, 2015).

SUMMARY: In a familiar ending to an attempt to end-run existing administrative remedies, a Pennsylvania plaintiff's takings claim has foundered where she neglected to pursue eminent domain statutory processes under state law before embarking on a constitutional challenge.

FACTS: In 2007 North Coventry Township, Pennsylvania (Township) inspected Josephine Tripodi's residential property and discovered multiple health and safety violations. She was asked to remediate them but did not do so, prompting the Township to file a civil action in the Court of Common Pleas. By April 2008 the parties agreed to a schedule for repairs, but Tripodi did not keep to it, prompting the court to find her in contempt. The court ultimately entered a final judgment against Tripodi and mandated the sale of her property.

In 2010 Tripodi filed suit against the Township in the district court claiming state and federal law violations. The Township met Tripodi's §1983 suit with a motion to dismiss for failure to state a claim, which the lower court granted. Tripodi appealed.

HELD: The Third Circuit affirmed the lower court, holding the plaintiff failed to state a *Monell* claim and failed to exhaust her state remedies before filing the Fifth Amendment Takings claim.

DISCUSSION: As for Tripodi's *Monell* claim, the Third Circuit first set forth the rule that in order to succeed on her claim Tripodi had to identify a Township custom, practice or policy that led to the violation of her rights. Tripodi argued that the Township's decision to pursue the taking of her property without recognizing that she did make some repairs was a policy. The Court rejected this theory, calling the statement "conclusory" and saying it failed to adequately describe how the Township's actions were policy.

As for the Takings claim, Tripodi argued that the Township took the property without just compensation and that it is was taken for a government project. The Court, somewhat confused about the government project alluded to, rejected the charge nonetheless since Tripodi failed to exhaust her state remedies before asserting her federal Takings claim. Until Tripodi pursued the claim through the Pennsylvania eminent domain statutory process, the Court deemed her claim not ripe for review. Tripodi thus lost the appeal.

LINK (last accessed Oct. 16, 2015).