International Municipal Lawyers Association
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IMLA NEWS
Issue 2 – January 28, 2016

DUE PROCESS: Where Prisoner's Felony Convictions Were Vacated and State Appealed, Detention in Solitary Confinement Pending Appeal Did Not Violate Fourteenth Amendment

Ballinger v. Cedar County, No. 14-3576 (8th Cir. Jan. 14, 2016).

SUMMARY: Where a Missouri prisoner's felony convictions were overturned and the state appealed, holding the prisoner in solitary confinement pending appeal did not violate due process under the Fourteenth Amendment, according to the Eighth Circuit. The court did not agree that vacating the convictions restored him to "pretrial detainee" status; because he remained a prisoner, he could not demonstrate "atypical and significant hardship" needed to benefit from Fourteenth Amendment protections.

FACTS: In 2009 Brent Ballinger was convicted of three felonies and, in 2010, he used a Missouri Supreme Court Rule to get the convictions vacated and set aside because of ineffective assistance of counsel. Granting the motion, the state court ordered he be "remanded to the custody of the Cedar County Sheriff's Department for further proceedings in his underlying case." The State then appealed the court's order to vacate his sentence.

The Sheriff's Department, in response to the order, put Ballinger in "administrative segregation," also known as solitary confinement. Ballinger, who remained there for a year, filed §§ 1983 and 1988 claims against the county, arguing that his rights were violated. He maintained that the county policy was deliberately indifferent to his Fourteenth Amendment rights by not taking him to the county jail after his sentence was vacated and leaving him, instead, in solitary confinement. The county answered that he

was not a pretrial detainee at that point – rather, he was a prisoner – and therefore did not suffer an atypical hardship as required under the Fourteenth Amendment. The district court granted the county's motion.

HELD: The Eighth Circuit affirmed, holding that Ballinger was a prisoner and not a pretrial detainee.

DISCUSSION: The Court began noting that while pretrial detainees are presumed innocent and cannot be punished under the Fourteenth Amendment, prisoners have already been deemed culpable and thus must show an "atypical and significant hardship" to establish claim under that amendment. Ballinger's position was that, since his conviction was vacated, he was a pretrial detainee and that the county illegitimately punished him by keeping him in solitary confinement. He argued the language of the rule his sentence was vacated under was analogous to a successful habeas petition – e.g. that he is entitled to the same status as a person that has a murder conviction overturned. The district court agreed with the county's position that he was still a prisoner and thus his solitary confinement did not reach the level of a Fourteenth Amendment violation. To do so, the lower court relied on the Missouri Supreme Court Rule under which Ballinger's sentence was vacated, which states that if the state appeals (which it did in Ballinger's case) then the defendant shall remain in custody during the pendency of the appeal. This is an exception to the complementary state rule under which a defendant's sentence can be vacated.

The Circuit Court saw the strength of Ballinger's argument but was not persuaded given the Missouri Supreme Court Rules exception. The rule under which Ballinger benefited authorizes an appeal by the state if a sentence is vacated and, if so, *requires the order be stayed*, while habeas petitions and the other state rule Ballinger's sentence could have been vacated under, do not allow appeals and do not include the stay. As a result, the Circuit Court held the lower court correctly identified Ballinger as a prisoner while the state's appeal was pending and that he never regained the status of a pretrial detainee. It affirmed the lower court.

LINK (last accessed Jan. 28, 2016).

EMPLOYMENT: No Property Interest Where City Job Is At-Will; Employee Manual Does Not Create Just-Cause Employment

Crawford v. Benzie-Leelanau District Health Department Board of Health, No. 14-2520 (6th Cir. Jan. 15, 2016).

SUMMARY: A city health department director who was demoted for inappropriate behavior towards women could not bring a due process claim for loss of a property interest where his position was at-will. An employee manual describing

subordinate employees' appeal rights did not apply to the director and did not create any "legitimate expectation" of continued employment.

FACTS: William Crawford worked at the Benzie-Leelanau Health Department from 1976, when he started as a "sanitarian 1," until 2012, by which time he had been promoted to the director of the department. His termination process began when an employee complained that Crawford was inappropriate toward a female employee. The complaints focused on his behavior with one female employee, but soon included general comments about inappropriate behavior toward women. An investigation soon began and ultimately culminated in his demotion from the director to the sanitarian 1.

Crawford filed suit in 2013, alleging a variety of due process and contract claims, all of which hinged on his argument that he had a property interest in his job. The district court found Crawford was an at-will employee and thus not entitled to the due process he claimed.

HELD: The Sixth Circuit found Crawford was at-will and affirmed the district court.

DISCUSSION: In order to establish a procedural due process claim, Crawford had to show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior before depriving him of the property interest. The hiccup for Crawford was the first element, which hinged on Michigan state law – under which a presumption of at-will employment exists. Crawford argued he was not at-will under the "legitimate expectations theory" because his employer made promises that overcame the presumption. He argued, in particular, that the department's employee manual created this expectation.

The court rejected this argument, finding that the employee manual did not apply to Crawford in his role as the director. The manual is about employees' right to appeal adverse employment actions to the director – e.g. to Crawford – and the court found that no reasonable interpretation of the manual could thus be conceived as applying to the job vested with the power and authority to administer the personnel policy. Crawford argued the employee manual should apply to him given that the committee that terminated him consulted the manual in order to devise the internal process through which he was terminated. The court, however, held that this one-time consultation of the employee manual did not change the entire nature of his employment relationship.

Second, the court held the employee manual could not reasonably be interpreted as a promise of just-cause employment. For one, the manual had a "satisfactory" standard – e.g. it stated that the employee served at the will of the employer, so long as his services were satisfactory. The court found no matter the title of the policy, ultimately if an employee only works so long as he or she acts in a particular way – e.g. satisfactorily – it simply cannot be interpreted as a creating a just-cause relationship. Moreover, the court noted the manual has an express statement that it is not creating a

just-cause relationship and it found it difficult to read this statement out of the policy. The Circuit Court affirmed the lower court.

LINK (last accessed Jan. 27, 2016).

EMPLOYMENT: White Police Officer Wins Discrimination Claim Under Title VII

Bonenberger v. St. Louis Metropolitan Police Department, No. 14-3696 (8th Cir. Jan. 19, 2016).

SUMMARY: The Eighth Circuit has upheld a damage award to a white St. Louis police officer who was not hired for a Police Academy position due to his race, finding discriminatory intent and rebuffing the Police Department's argument that no adverse employment decision occurred because the position sought was not a promotion. The court found that denial of a transfer can constitute an adverse employment decision if the new positions offers materially different working conditions.

FACTS: Sergeant David Bonenberger had worked for the St. Louis Metropolitan Police Department for many years when a position as Assistant Director of the Police Academy opened up. He showed interest, asking whether, despite not having the minimum three years of supervisory experience and two years of teaching experience, he might be eligible anyway. The lieutenant said he should not bother applying because "the job was going to a black female." The lieutenant repeated this opinion to the outgoing assistant director, noting "there no way [sic] they were going to put a white male in that position." Bonenberger applied for the job despite these warnings, thinking the hand-picked person could fall through for some reason. That person – Sergeant Taylor – also did not have the minimum experience listed in the job description and had less supervisory experience, less teaching experience, and scored lower than Bonenberger on her performance evaluations. Neither candidate was interviewed. Sergeant Taylor got the job.

Bonenberger sued under §§1983 and 1981, alleging he was not hired because of his race. The case went to trial and the jury found in favor of Bonenberger, awarding both actual and punitive damages. The Police Department moved for judgment as a matter of law and, upon losing that motion before the trial judge, appealed to the Eighth Circuit.

HELD: The Eighth Circuit affirmed, holding judgment as a matter of law was properly denied in the case.

DISCUSSION: Bonenberger could make out a prima facie case of discrimination under Title VII of the Civil Rights Act by showing he suffered an adverse employment action brought on by his employer's discriminatory motive.

The crux of the defendant's appeal was that Sergeant Bonenberger did not suffer an adverse employment action because the job was not a promotion since it carried no increase in pay, benefits, or rank. The Eighth Circuit noted this might be true, but added that denial of a transfer can be an adverse employment action if it would have resulted in a change in material working conditions. The court noted it had not yet opined on this specific on this issue, but had evaluated when a compulsory, undesired transfer constituted an adverse employment action since it came with a significant change in working conditions.

Looking at those analogous precedents the court found that changes in supervisory duties, prestige, and promotion potential can produce materially different working conditions. Looking at the facts before it the Court found this was just the case for Sergeant Bonenberger. The evidence showed the Assistant Academy Director job came with more supervisory duties, a regular working schedule and hours, greater prestige, and significantly increased promotion potential once performed. Thus, the Circuit Court found the lower court properly denied the motion for judgment as a matter of law and affirmed its denial.

LINK (last accessed Jan. 27, 2016).

SPEECH: Police Officer Was Not Acting as Private Citizen Speaking About Matter of Public Concern When Complaining About Threatening Actions by Fellow Officer

Kubiak v. City of Chicago, No, 14-3074 (7th Cir. Jan. 11, 2016).

SUMMARY: A Chicago police officer who complained about a fellow officer's threatening actions towards her and was subsequently re-assigned was rebuffed in characterizing the action as retaliation in violation of her First Amendment rights. The Seventh Circuit agreed with the lower court that reporting about other officers' misdeeds is a normal incident of Police Department work, not an example of private citizens' speech.

FACTS: Laura Kubiak, a patrol officer with the Chicago Police Department, was detailed to the Office of News Affairs in 2000, where she worked as a liaison to the news media. The position was considered to be a prestigious "desk job" with high visbility. After a disagreement over a report for work in November 2012, Kubiak was verbally assaulted by another officer in the News Affairs Office. The officer – Veeja Zala – cursed, yelled, and raised his hand as if he was going to hit her. Kubiak reported the incident immediately to her supervisor. During the call to the supervisor Zala stood at her desk and berated her. Others witnessed the event and described fearing Zala might

shoot Kubiak, noting that Zala had a history of violence on the job both as a patrol officer and in the News Affairs Office.

Kubiak sought to discuss the incident further with her direct and higher up supervisors and each time was denied the opportunity, ultimately driving Kubiak to file a memo with her supervisor that triggered an internal affairs investigation. The complaint against Zala was ultimately sustained, but Kubiak was reassigned. She lost her position in the Office of News Affairs, was put back on patrol, and given the night shift.

Kubiak filed a complaint against the City and the supervisors who made the decision to reassign her, alleging she was retaliated against in violation of the First Amendment. The district court dismissed the complaint on the defendant's argument that she failed to state a claim since she was not speaking as a private citizen. Kubiak appealed.

HELD: The Seventh Circuit affirmed the lower court, agreeing that Kubiak's speech was made as a public official and not a private citizen.

DISCUSSION: To win a First Amendment case for retaliation the public employee must prove she was speaking as a private citizen on a matter of public concern – not pursuant to her official duties. Kubiak argued she was speaking as the former since her complaint identifies her job duties as a media liaison and that her job duties did not consist of reporting misconduct of her co-workers. The court found this too cramped an interpretation of "job duties," instead finding that all employees, as a general rule, would be expected to report inappropriate behavior of colleagues, despite that not being listed in a job description. The court found further support in its position since Kubiak's speech was so closely intertwined with her job – the complaint was about a colleague's inappropriate behavior based on a work-related report and her speech directed to her supervisors.

Additionally, Kubiak's speech had to be related to a matter of public concern, and the court found this element lacking as well. Kubiak argued she was motivated to make her complaint because of not only fear for herself, but the public at large. The court used three factors to evaluate this element – the content, form, and context of the speech. Despite Kubiak's entreaties that Officer Zala's behavior was a matter of public concern, given he was an officer, the Court focused on the content element by noting the complaint was about a work-related incident and all about her – her fear of Zala, the incident in November, and his previous outbursts towards her. The form further supported the idea that it was not a public matter since the objective was to alleviate a personal grievance – the complaint and her attempts to get it redressed were worked up the chain of command internally. Lastly, the context was a colleague interaction about a work report, at work. The court affirmed the lower court's holding that Kubiak nether acted as a private citizen nor spoke on a matter of public concern; thus she was not afforded the protections of the First Amendment.

LINK (last accessed Jan. 27. 2016).