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Eighth Amendment: No Qualified Immunity for Prison Officials who Subjected Inmate to "Dry Cell" Scrutiny for Nine Days

Thomas v. Tice, no. 18-1811 (3d Cir. Jan. 15, 2020).

Where an inmate suspected of ingesting contraband was fed laxatives and placed in a "dry cell" for nine days, prison officials could avoid liability for the conditions of his incarceration but not for the extended duration.

Briaheen Thomas ("Thomas") was an inmate at SCI-Rockview, in the custody of the Pennsylvania Department of Corrections. In May 2015, Thomas received a friend in the prison's visiting room. The friend handed him a bag of peanut M&Ms, whereupon Thomas ate one and then quickly took a drink of soda. A guard believed that Thomas had ingested contraband and immediately handcuffed him and removed him from the visiting room. Thomas was then placed in a "dry cell" in which the water had been shut off and the sink and toilet capped to prevent Thomas from disposing of anything. All linens were removed from the cell, he was clothed in a white smock and one arm handcuffed to the bed to restrict movements which might facilitate hiding contraband.

To expedite his release, Thomas accepted laxatives, and nature took its course twelve times over the next four days, producing no evidence of any contraband. He was also x-rayed, which also did not reveal any contraband.

On day four, the prison's Program Review Committee ("PRC") interviewed Thomas in the dry cell and decided to continue his dry cell confinement for another five days.

Thomas filed an administrative grievance against prison officials, which was upheld in part and denied in part on administrative appeal. After exhausting his administrative remedies, he sued under 42 U.S.C. § 1983, alleging that the PRC had violated his Eighth Amendment right to be free from cruel and unusual punishment. Following discovery, the PRC moved for summary judgment. Although the Magistrate Judge found disputed issues of material fact and recommended denial, the district court granted summary judgment.

The Eighth Amendment "prohibits any punishment which violates civilized standards and concepts of humanity and decency." To prevail against prison officials on a claim that an inmate's conditions of confinement violated the Eighth Amendment, the inmate must meet two requirements: (1) the deprivation alleged must be, objectively, sufficiently serious," and (2) the "prison official must have a sufficiently culpable state of mind." The first element is satisfied when an inmate is deprived of "the minimal civilized measure of life's necessities," and the second is satisfied when an inmate shows that prison officials acted with deliberate indifference to his health or safety or that conditions of confinement that violated the inmate's constitutional rights.

Deliberate indifference requires subjective knowledge--a showing that prison officials actually knew of and disregarded constitutional violations.

Thomas had complained about the conditions of his confinement, and its duration. The Third Circuit majority found that the first of these complaints--Thomas' dry cell conditions—were not actionable, because he could not adduce evidence that the PRC defendants were personally aware of those conditions.

But, as the court put it "the duration of Thomas's confinement in the dry cell is a separate issue."

Here, the PRC members undeniably had personal knowledge of the additional dry cell incarceration they were imposing, and they knew or should have known, after four days and repeated searches of Thomas' excrement, as well as an x-ray of his abdominal cavity, that there was no rationale for continued dry cell incarceration. In their depositions, members of the PRC could not explain, or even recall, why they had continued Thomas's confinement.

The Circuit saw the penological justification question as constituting a disputed issue of material fact; summary judgment was therefore inappropriate as to duration issue.

The PRC members also argued that, even if Thomas's continued confinement without penological justification violated his rights, they would still be entitled to qualified immunity. The Circuit disagreed:

> Our precedent makes clear that, without some penological justification, an inmate may not be administratively confined in a dry cell.. . . [W]e have never determined the exact quantum or nature of penological interest that is needed to

> justify confinement in a dry cell. But we are satisfied that there must be at least some interest. Here, the PRC failed to present evidence of any continuing penological interest after its initial interview with Thomas. Without such a penological justification for Thomas's continued confinement in the dry cell, the PRC members are not entitled to qualified immunity.

DISSENT: Judge Greenaway would have reversed entirely, not allowing the PRC members to escape scrutiny for the dry cell conditions. As he saw it, the conditions Thomas suffered while in the dry cell deprived him of "the minimal civilized measure of life's necessities." He cited the fact that Thomas only had a thin paper smock, which was not replaced during the entire period. He was denied a blanket, a sheet or a pillow. For nine days, a bright light on the wall shined on him continuously and his right hand was tightly handcuffed to the metal frame of the bed in a manner that prevented him from even standing and required him to sleep with his right arm outstretched above his head. And most egregiously for Judge Greenaway, Thomas was repeatedly denied any means of cleaning himself.

> Despite these inhumane conditions, the Majority entirely relieves Defendants of any possible liability by perfunctorily affirming the District Court's determination that they were not personally involved. But, at this summary judgment stage, that cannot be said as a matter of law. Further, qualified immunity should not be extended as a safe haven under these facts. . . I would vacate in full the District Court's grant of summary judgment and remand to the District Court for trial on both Thomas's duration and conditions claims. Given my divergence of viewpoint, I dissent from the Majority's disposition of Thomas's conditions.

LINK

Religion: Offering Firefighter a Code Enforcement Job with Similar Compensation Satisfies Reasonable Accommodation Standard

Horvath v. City of Leander, no. 18-51011 (5th Cir. Jan 9. 2020).

Where a firefighter refused on religious grounds to be inoculated for flu and other communicable diseases, or instead wear a protective respiratory mask at all times, and refused a code enforcement job providing the same salary and benefits as his firefighting position, he could not successfully assert Title VII discrimination or retaliation claims.

Brett Horvath ("Horvath"), an ordained Baptist minister, was hired as a firefighter by the City of Leander, Texas ("City") Fire Department ("FD") in 2012. In 2014, the FD directed its personnel to receive flu vaccinations. Horvath obtained an exemption on religious

grounds, provided he use increased isolation, cleaning, and personal protective equipment to prevent spreading the flu virus. He received a similar exemption in 2015.

In January 2016, the City mandated that all personnel receive a TDAP vaccine, which immunizes against tetanus, diphtheria, and pertussis. Horvath again sought an exemption. The City offered two accommodation options—he could be reassigned to the position of FD code enforcement officer, with the same pay and benefits and no vaccine requirement--and the City would cover the cost of training; or he could remain in his current FD position if he agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases, and keep a log of his temperature.

Horvath declined the code enforcement job and suggested an alternative accommodation: he would agree to all of the City's requirements except he would wear a respirator only when encountering patients who were coughing or had a history of communicable illness.

The FD chief declined, reiterating his original proposal. Horvath again rejected both options and urged his alternative—wearing the mask only at times he thought medically necessary. He stated that he could not find any medical authority that wearing the mask constantly is recommended procedure in lieu of a TDAP vaccine, but if the FD Chief had evidence to the contrary, he was willing to consider changing his position. As for the code enforcement position, Horvath believed it involved a much less favorable work schedule and less desirable job duties and was not a reasonable accommodation.

The FD determined that Horvath was deliberately refusing to obey a directive from a supervisor, which constituted insubordination in violation of the City's Code of Conduct, and his employment was terminated.

Horvath filed suit, alleging discrimination and retaliation under Title VII and a violation under 42 U.S.C. § 1983 of his First Amendment right to freely exercise his religion. The City and FD Chief were granted summary judgment.

On appeal, the Fifth Circuit began with Horvath's Title VII claim of religious discrimination, which makes it unlawful for an employer to discriminate against an employee on the basis of religion. While an employer has the statutory obligation to make reasonable accommodations for employees' religious observances, it is not required to incur undue hardship. It is not restricted to those means of accommodation preferred by the employee, and "[a]n employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end."

While the City conceded that Horvath established a prima facie case of religious discrimination, it argued that it offered Horvath two reasonable accommodations. The district court had found that the City provided a reasonable accommodation by offering to transfer Horvath to the code enforcement position, and the Circuit found similarly. It

cited an analogous case where a municipality satisfied a Title VII complaint raised by a counselor who sought to be excused from counseling on subjects that conflicted with her religious beliefs, by helping her seek another position within the organization. Here, the City's accommodation of Horvath was more generous—it had City actually offered him another job that would not require vaccinations and provided the same salary and benefits as Horvath's existing position.

Horvath challenged the proposed accommodations, arguing that the code position was the least desirable FD job, due to its duties and hours; furthermore, the code position's schedule would prevent his continuing secondary employment running a construction company, reducing his income by half.

The Circuit found these arguments unconvincing. "Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee." And Horvath's reduction in income due to loss of an outside job did not render the accommodation unreasonable—in the analogous case cited above, transferring would require the plaintiff "to take a significant reduction in salary." Transfer to a position with equivalent salary, which indirectly causes the loss of outside income, cannot be faulted. The Circuit the affirmed lower court on Title VII accommodation: "Though 'reasonableness' may often be a question for the jury, the facts here 'point so strongly and overwhelmingly in favor of [the City] that reasonable [jurors] could not arrive at a contrary verdict.'".

Horvath's retaliation claim (that he was fired not for his refusal to accept the accommodation but for his letter seeking further negotiation) fared no better. Applying *McDonnell Douglas*, once Horvath stated a prima facie case of retaliation, the City had to respond with a legitimate, non-discriminatory reason for the firing. The Circuit saw one: "The City has proffered a legitimate, non-discriminatory reason for Horvath's firing—his defiance of a direct order by failing to select an accommodation."

Finally, the court turned to Horvath's Free Exercise claim--that the City and the FD Chief violated his right to practice his religion through a policy requiring him to wear a respirator mask. The district court had found that the respirator requirement was not an official policy, but one of two accommodations offered to Horvath in light of his religious objection to the TDAP directive. Even if the respirator requirement was an official policy, Horvath's right to freely exercise his religious beliefs was not burdened by that requirement. The Circuit agreed. While Horvath had a constitutional right to exercise his religion by refusing the vaccine, he was able to exercise his religious beliefs while working for the City—either by remaining a firefighter and wearing a respirator, or working as a code enforcement officer. The respirator proposal did not violate Horvath's right to freely exercise his religion—instead, it would have enabled him to freely exercise his religion while maintaining his current job.

LINK

Religion: Vegan Food Items Offered to Passers-by Constitute Protected Expressive Communication by Religious Sect

Krishna Lunch of Southern California, Inc. v. Gordon, No. 18-55316 (9th Cir. Jan. 13, 2020).

Vacating two of three dismissals which had been granted by the district court, the Ninth Circuit holds that the offering of "prasada" vegan food items by a Krishna group cannot be summarily limited by UCLA's policy which restricts the offering of "food" by off-campus entities to four times per year, because the Krishna offering constitutes religious expression and protected associational activity.

Krishna Lunch ("Krishna") adheres to the teachings of Krishna consciousness, a religion within the broad theological umbrella of Bhakti Hinduism. A core practice of the religion is the consumption of sanctified, vegetarian and vegan food, known as prasada. Because the religion attaches significance to consuming prasada (e.g., those who partake in prasada are believed to be protected from the material world), the distribution and sharing of prasada is a "cornerstone of the religion."

Krishna sought to distribute lunchtime prasada on UCLA's campus "two or three times per week" but was informed that UCLA had a policy limiting food distribution to a maximum of four times per year, provided that the distributing entity paid a fee.

Krishna sued, alleging that UCLA's four-days-per-year limitation violated its First Amendment rights to free speech, free exercise of religion, and free assembly and association.

The district court denied Krishna's Free Exercise claim. It cited caselaw stating that, under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Krishna conceded that because UCLA's restriction limiting the number of events when off-campus organizations may serve prepared food was both facially neutral and generally applicable, and needed only to survive rational basis review. The lower court easily found that UCLA had a rationale for the limitation, given health concerns, the large number of entities (including fraternities and sororities) seeking campus access to distribute food, and so on. It granted UCLA's motion to dismiss the Free Exercise claim.

Krishna' Free Speech claim—that distributing prasada was expressive communication—also failed. Conduct intending to express an idea is constitutionally protected only if it is "sufficiently imbued with elements of communication," meaning "an intent to convey a particularized message is present, and the likelihood is great that the message will be understood by those who view it.". The district court found that Krishna failed to allege convincingly that their pro-animal/anti-meat message would easily be understood by those who were offered prasada.

The district court also denied Krishna's associational activity claim. Krishna asserted that its food activity evinced a desire to associate with "like minded persons." But the court noted that Krishna could easily promote its associational interests via other religiously-oriented activities such as chanting, speaking and distributing literature, all of which were permitted by UCLA.

The Ninth Circuit saw otherwise regarding the lower court's determination of Krishna's free speech and free association claims, each of which were vacated and remanded:

> Krishna Lunch has plausibly pleaded that its distribution of sanctified vegan and vegetarian food ("prasada") is, in context, expressive conduct for purposes of First Amendment protection. While distributing prasada, the organization plans on chanting the names of God and other devotional hymns and songs, speaking with interested students and others of the University of California, Los Angeles ("UCLA") community, distributing religious literature, and displaying signs depicting reincarnation, animal protectionism, and other topics related to its followers' beliefs. Drawing all reasonable inferences in favor of Krishna Lunch, we can infer that in these circumstances an onlooker would understand the distribution of food "to be communicative."

Because the Circuit held that Krishna had plausibly pleaded that its lunch program was expressive conduct, it also vacated and remand the district court's dismissal of Krishna's free association claim.

The lower court's dismissal of Krishna's free expression claim was upheld. The Circuit found no evidence to suggest the policy was motivated by discriminatory intent. The four-times-per-year policy did not burden only religious conduct; it chiefly restricted the non religious, uncommunicative conduct of other off-campus and student organizations serving prepared food on campus. And Krishna had not sustained its requirement to negate justification for UCLA's limits: "Although UCLA has not yet stated its justification for the policy, Krishna Lunch must negate every rational basis supporting the policy, whether or not the basis has a foundation in the record."

LINK

Speech: Regulatory Scheme Restricting Alcohol Advertisements Does Not Further Stated Objectives

Missouri Broadcasters Assoc. v. Schmitt, No. 18-2611 (8th Cir. Jan. 8, 2020).

The Eighth Circuit upholds a lower court determination that Missouri's alcohol advertising regulatory scheme does not promote the State's objectives of encouraging responsible consumption and combating underage drinking.

Missouri regulations divide the categories of participants in the alcohol sale and distribution market into three distinct categories: producers (e.g. brewery or winery), distributors or wholesalers, and retailers (e.g. bars or liquor stores). Entities in these categories cannot engage in activities the others do (e.g. a winery cannot also be a wholesaler and vice versa). The stated purpose for this regulatory system is to, "promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals."

A Missouri statute at issue in this case prohibits producers and distributors from retail advertising because advertising is a "financial interest in the retail business" which is prohibited by the statute. An exception to the prohibition allows producers and distributors to list the names and address of unaffiliated retail businesses selling its product if it excludes the retail price of the product, lists multiple retail businesses that are not affiliated with one another, and makes the list of retailers inconspicuous.

In addition to the statute, Missouri enacted two regulations further restricting advertisements. The first is a discount regulation which prohibits retailers from advertising discounted prices for "intoxicating liquor" outside of their establishments (e.g. taking out an advertisement for "Margarita Mondays") ("Discount Regulation"). The second regulation prohibits retailers from advertising prices below the retailers' actual cost unless it is done so inside their retail establishments ("Below Cost Regulation").

Missouri Broadcasters filed suit arguing the state statute and regulations as applied violate the First Amendment and prohibitions on compelled speech. The district court determined that the Missouri statute and regulations violated the First Amendment.

The Eighth Circuit affirmed the district court's decision finding the Missouri statute and corresponding regulations covering retail advertising by alcohol producers and distributors violate the First Amendment's right to free speech. Although the statute on its face does not restrict speech, its practical operation restricts speech based on content and speaker identity, which implicates the First Amendment. Moreover, Missouri's authority under the Twenty-First Amendment cannot save the statute from these First Amendment implications.

The Court held that under the *Central Hudson* test, Missouri had not demonstrated that the harm of undue influence was legitimate or that the statute alleviated this harm to a material degree. Additionally, Missouri had failed to demonstrate that the statute's speech restriction as applied was not more burdensome than necessary to serve the state's interests. Moreover, the regulations failed to meet the *Central Hudson* test.

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Telecommunications: Requirement that Cell Tower be Moved 400 Feet is Not Supported by Substantial Evidence

Municipal Communications, LLC v. Cobb County, No. 18977 (11th Cir. Jan 10, 2020).

Affirming the court below, the Eleventh Circuit holds that a county's conditioning approval of a cell tower application on the applicant's moving the proposed tower 400 feet for aesthetic reasons was not supported by substantial evidence that such a move was necessary.

A Cobb County, Georgia ("County") zoning ordinance provides that before constructing a wireless tower over 35 feet in height, a special land use permit must be obtained. The County planning division and zoning division staff analyze the application and recommend either grant or denial. The County Planning Commission then holds a public hearing and makes a recommendation to the Board of Commissioners. Finally, the Board of Commissioners holds a public hearing and votes on whether to grant the application.

In 2015, Municipal Communications, LLC ("Municipal"), became the applicant for a special land use permit to build a cellular tower on a site leased from a church. Responding to recommendations from a County consultant, Municipal camouflaged the tower to resemble a pine tree and reduced its height from 190 feet to 165 feet. County planning and zoning division staff recommended approval, but proposed that the County condition approval on Municipal's moving the tower some 400 feet to the east, which would place it in a thick grove of trees in the center of the church property.

Municipal filed a supplement stating that the new proposed site was unavailable—the church would not lease that location for a cell tower because it would inhibit future development of the church property.

At a public meeting before the County Planning Commission, County representatives confirmed that the additional Municipal tower was necessary to fill a cellular service coverage gap in the area, and that Municipal had satisfied all of the zoning ordinance

requirements. Nevertheless, the Planning Commission unanimously conditioned approval of the application on relocating the tower. And at a subsequent public meeting attended by numerous constituents opposed to the tower, the County Board of Commissioners also voted unanimously to condition approval on relocation.

Municipal sued, alleging that the Board's decision was a constructive denial of its application and was unsupported by substantial evidence, in violation of the Telecommunications Act of 1996 (“Act”). The district court agreed, granting summary judgment in favor of Municipal and ordering the County to issue Municipal a special land use permit without the relocation condition.

On appeal, the Eleventh Circuit construed the Act. which preserves “the traditional authority of state and local governments to regulate the location, construction, and modification” of wireless communications facilities like cell phone towers, but imposes “specific limitations” on that authority. One such limitation is that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

The Act’s substantial evidence standard is the same as that used by courts to review agency decisions. It is defined as "more than a mere scintilla but less than a preponderance." As the party seeking to overturn the Board's decision, Municipal bore the burden of proving that the decision was not supported by substantial evidence.

The County raised two arguments on appeal: first, its decision to deny the application was justified because Municipal did not provide sufficient information to show that the alternate site was unavailable; and second, the Board's decision to deny Municipal's application was supported by substantial evidence as required by the Act.

The Circuit could not agree with the lower court that it was ”undisputed” that Municipal had "substantially complied" with the Act’s requirement for written documentation about the unavailability of the proposed new cell site. But the records showed that Municipal had repeatedly represented, throughout the application process, that the church would not lease the new location to it and it could not move the tower. No County representative had ever alleged that Municipal failed to meet its burden of providing sufficient information in compliance with the County's zoning ordinance. The court would not allow the County to raise this argument retrospectively and then “cherry-pick” evidence to support the proposition.

The County also challenged the district court’s determination that it had not acted on “substantial evidence”--when the record was considered as a whole, the need to move the tower was in fact supported, including via letters submitted from neighboring residents expressing aesthetic concerns, as well as concerns that the tower would decrease property values and impact the neighborhood's safety. But when the court evaluated the actual minutes of the Board meeting, it found no evidence that any

Commissioner had relied on those letters. Instead, they expressed generalized concerns about aesthetics—which was not enough to constitute "substantial evidence."

> While the County's local zoning laws permit it to consider aesthetic impact of the tower, we have held that blanket generalized aesthetic objections, standing alone—like those proffered here—are not enough to constitute substantial evidence under [the Act].

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