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Employment: County Prison Employees Not Entitled to Pay for Uncompensated Portion of Lunch Break Where They Received "Predominant Benefit" of the Break

Babcock v. Butler County, No. 14-1467 (3d Cir. Nov. 24, 2015).

SUMMARY: The Third Circuit has declined to require that prison employees receive compensation for an unpaid 15-minute portion of their one-hour lunch break where, despite being required to remain in close proximity in the event of an emergency, they received the "predominant benefit" of a break during such period.

FACTS: Butler County, Pennsylvania (County) and its County prison employees have a Collective Bargaining Agreement (CBA), under which the employees work for a total of eight and one-quarter hours per day, which includes a one-hour mealtime. The mealtime is unpaid for fifteen minutes and paid for forty-five minutes. However, for the entire meal period, including the unpaid fifteen minute segment, no employee may leave without permission, must remain in uniform, be in close proximity to emergency response equipment, and be on-call to respond to an emergency. As a result, prison employees complained that they could not smoke a cigarette, run errands, sleep, or go outside for fresh air.

Some employees filed suit against the County, arguing that under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-209, *et seq*., they should be compensated for the entire mealtime. The County moved to dismiss the complaint, arguing the employees should not be compensated because they get the "predominant benefit" of the mealtime break. The district court agreed with the County and dismissed the case.

The employees appealed, arguing not about the standard, but that they had in fact posited a plausible claim for relief and that summary judgment was inappropriate.

HELD: The Third Circuit agreed with the district court that the predominant benefit test applies and affirmed the lower court's factual analysis.

DISCUSSION: FLSA does not directly address whether a portion of an employees' mealtime should be compensated and thus two competing tests have been developed in the circuit courts. The first, and less popular, examines whether the employee is relieved of all duties during mealtime, and the second looks at whether the employee receives the "predominant benefit" of the mealtime. The Third Circuit had yet to confront this question, and ultimately sided with the majority of its sister circuits.

The crux of the predominant benefit test is "whether the officer is primarily engaged in work-related duties during meal periods." Given that neither party disputed its application, that most circuit courts have adopted it, and that where the other test was discussed it was not applied, the court found it easy to adopt this as the circuit rule. The court thus looked to the totality of the circumstances to determine whether the officers in question were, on balance, the party benefited by the mealtime. The court looked to other law enforcement cases and compared the facts. Whereas where compensation was required officers needed permission for their lunch break and were prohibited from reading "nondepartmental publications," the Butler County correctional officers could request to leave for the entire mealtime, could eat away from their desks, and were allowed to fill the time as they chose and only had to be ready to respond to an emergency. The court also found the CBA helpful because, though not determinative, it did provide that the officers were paid for forty-five minutes of the mealtime and were required to be paid overtime if they were required to work the final fifteen minutes. Given that the CBA assumes the officers are not working during that time, the majority found the predominant benefit was going to the workers. The majority thus affirmed the lower court.

DISSENT: The dissent would have reversed the lower court as to the application of the test, but also agreed the predominant benefit test was the appropriate standard. As for the facts, the dissent disfavored the majority's consideration of the CBA, the fact that the employees are paid for forty-five minutes, paid if called upon to work, and can request permission to leave. Instead, the issue for the dissent was that the essence of the employees' complaint was that they had to be prepared to work at a moment's notice for the whole hour, thus depriving them of any real "mealtime" during which they were not working. The dissent focused on cases that highlight the Supreme Court's definition of "work," which it has concluded under FLSA means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Under the totality of the circumstances – being restricted to the premises, restricted to wearing a uniform, not sleeping, being near emergency equipment, and working immediately if called upon – the employees should have been compensated for the fifteen minutes. In the dissent's mind the plaintiffs set forth enough facts to, at minimum,

raise the issue of compensability for the fifteen minutes, thus the majority erred in dismissing the case and limiting further discovery.

LINK (last accessed Dec. 2, 2015).

Employment: Temporary Worker Can Sue Third Party Employer for Employment Discrimination Under Title VII

Faush v. Tuesday Morning, Inc., No. 14-1452 (3d Cir. Nov. 18, 2015).

SUMMARY: The fact that a company was using a temporary worker did not insulate it from being sued for employment discrimination under Title VII.

FACTS: Matthew Faush is an African-American who was employed by Labor Ready, a temporary employment agency. Labor Ready sent him to work at Tuesday Morning, Inc., where he was subjected to racial slurs and racially-motivated accusations that he was a thief. Faush sued Tuesday Morning under Title VII, claiming he suffered employment discrimination. The district court rejected the claim, granting summary judgment to Tuesday Morning after holding it was not Faush's employer and thus could not be liable for employment discrimination. Faush appealed.

HELD: The Third Circuit reversed the lower court, holding a reasonable jury could find Faush was Tuesday Morning's employee for Title VII purposes, making summary judgment inappropriate.

DISCUSSION: The court began by noting the standard rule that to prevail Faush had to show an "employment relationship" with Tuesday Morning. The Circuit held that the appropriate test for this is the Supreme Court's *Darden* test under which the Court interpreted "employee" in ERISA, which, like Title VII, is circular, and held that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

Applying this test, the court looked to the hiring party's control over the "manner and means by which the product is accomplished," and noted that the Third Circuit has generally focused on who pays the employees, who hires and fires them, and who controls the daily activities. The court then disagreed with the lower court. It found, first, that though Labor Ready set the employee's pay rate, paid the wages out, and maintained worker's comp, Tuesday Morning was obligated to pay Labor Ready the minimum wage for each employee and had the "primary responsibility" to comply with the minimum wage law. It found the payments from Tuesday Morning to Labor Ready were functionally equivalent to direct employee pay – it paid a set, agreed-to salary to workers via Labor Ready, was obligated to pay overtime, and, if Labor Ready suffered increased tax or insurance costs, it had to pay those increases as well. Second, while

Labor Ready initially hired Faush, Tuesday Morning had ultimate control over whether Faush was permitted to work at the store. Third, Tuesday Morning directly controlled Faush's daily activities – the store's personnel directly supervised him, provided training on-site, furnished equipment and materials necessary for his work, and tracked the number hours he worked per day.

Moreover, Tuesday Morning agreed with Labor Ready that it would "provide a workplace free from discrimination and unfair labor practices and to comply with all applicable federal, state and local laws and regulations concerning employment, including but not limited to: wage and hour, breaks and meal period regulations, the hiring and discharge of employees, Title VII and the FLSA." Lastly, the Court noted its position aligns with the EEOC – the agency charged with interpreting Title VII – because the agency's guidance provides that "[a] client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment [for purposes of Title VII] . . . . because the client usually exercises significant supervisory control over the worker."

Thus, the Court found Faush made a plausible argument, certainly one strong enough to survive summary judgment, that Tuesday Morning and not Labor Ready, was his employer for Title VII purposes and ultimately held that a reasonable jury could so find.

LINK (last accessed Dec. 2, 2015).

Police: Officer Could Not Assert Qualified Immunity in Section 1983 Action Brought By Arrestee Who Was Tased While on the Ground and Offering No Resistance

Claridy v. Golub, No. 14-15319 (11th Cir. Nov. 30, 2015).

SUMMARY: A Florida police officer could not avail himself of qualified immunity under federal or state law where he tased a compliant, non-threatening arrestee a second time and submitted an offense report containing unsubstantiated allegations about the arrestee's behavior.

FACTS: In May 2009, Jason Golub and a fellow officer from the Lake City, Florida Police Department assisted animal control authorities in capturing three pit bulls that were running loose outside the Claridy residence and allegedly terrorizing a neighbor, Ronald King. The officers helped to impound the dogs and left the scene.

Johnny Claridy was not at home when the impounding occurred, but soon returned. An argument ensued between Claridy and King, and King called police. Officer Golub received a call that there was a disturbance at the Claridy residence, that Claridy was threatening his neighbor, and that there might be a gun in Claridy's car.

Upon arrival, Golub informed Claridy that he was under arrest for disorderly conduct and ordered him to put his hands up. Claridy complied. Claridy's wife advised Golub that Claridy had just been released from the hospital following knee surgery.

With his hands up, Claridy moved backwards towards his car and leaned against it. Golub believed there was a gun in the car and that Claridy was trying to get to the weapon. He deployed his taser, causing Claridy to fall forward, striking his knees, stomach, and face on the sidewalk. Because he was momentarily "out" after the tasing, it took Claridy some time to respond to the officer's order to put his hands behind his back—but he eventually did so. Nevertheless, Golub tased Claridy a second time and handcuffed him. Because Claridy could not stand after re-injuring his knee, Golub dragged him down the sidewalk by his handcuffs.

Golub completed a report indicating that Claridy had committed battery of a law enforcement officer and disorderly conduct, charges that were reduced and subsequently dismissed.

Claridy filed a § 1983 excessive force claim and state malicious prosecution and loss of consortium claims against Officer Golub in his individual capacity. The district court granted qualified immunity as to the first tasing, but otherwise denied Golub's motion, finding that Golub was not entitled to qualified immunity as to the second tasing, and that he was not entitled to immunity under Florida law for the state-based claims. He appealed.

HELD: The Eleventh Circuit affirmed.

DISCUSSION: Qualified immunity "protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v*. *Pelzer*, 536 U.S. 730, 739 (2002)). The Circuit Court found that it was "undisputed" that Golub was engaged in a discretionary function when arresting Claridy. Therefore, Claridy had to show that the officer's conduct during the arrest (1) violated a constitutional right that (2) was clearly established at the time of the incident.

The court held that both prongs of the test were satisfied as to the second tasing, which constituted excessive force in violation of the Fourth Amendment. Under the "objective reasonableness" standard cited in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) the court viewed the circumstances "from the perspective of a reasonable officer on the scene."

The district court had concluded that Golub had arguable probable cause to arrest Claridy for disorderly conduct. But in making the arrest, Golub could only constitutionally use such force as "necessary in the situation at hand," which required the court to consider "the severity of the crime at issue, whether the suspect pose[d] an immediate

threat to the safety of the officer[] or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight."

Here, Claridy was lying face-down on the sidewalk, with his hands behind his back while submitting to arrest. The crime for which he was being arrested was not serious. He did not present a threat to Golub or anyone else when he was tased a second time. The Circuit agreed with the district court's determination that the use of the taser under such circumstances violated the Fourth Amendment.

In several decisions issued prior to May 2009, the Eleventh Circuit had held that the "gratuitous use of force when a criminal suspect is not resisting arrest" was unreasonable and violated the Fourth Amendment. These cases gave defendant Golub fair warning that the second tasing, which allegedly occurred while Claridy was lying face-down on the sidewalk, complying with Golub's instruction to put his hands behind his back, and submitting to arrest for, at most, a minor offense, was unconstitutional. Qualified immunity was denied on the federal claim for the second tasing.
The Florida statute cited by Golub protects an officer from personal liability for acts within the scope of his employment, unless the officer "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Here there was sufficient evidence to raise a question of fact as to whether Golub acted willfully or with malice. His offense report appeared to contain fabrications about Claridy's behavior, which the State Attorney relied on in deciding to prosecute Claridy. Thus, the Circuit also denied Golub's state law immunity request.
LINK (last accessed Dec. 2, 2015).

Speech: Ban of Protestor from Arizona Senate Building Due to Potential for Future Disruptive Behavior Violates First Amendment

Reza v. Pearce, No. 13-15154 (9th Cir. Nov. 19, 2015).

SUMMARY: Reversing the district court, the Ninth Circuit has found that a state senator's indefinite ban of a previously disruptive protestor from the Arizona Senate Building based on the possibility that the protestor might again be disruptive was a violation of the First Amendment.

FACTS: In February 2011 Salvador Reza, along with other members of Tonatierra, a community organization in Maricopa County, Arizona, attended a legislative hearing on the Omnibus Immigration Bill. The bill attracted a lot of attention, requiring the use of an overflow room in the Arizona Senate Building to accommodate the public. Reza was in the overflow room, which included both supporters and opponents of the bill. State Senator Pearce claimed that noise from the overflow room was interfering with the

legislative debate. He told an officer who, in turn, approached Reza and told him to silence the audience. Reza refused to do so.

At the end of the day-long hearing, the sergeant-in-arms asked the crowd in the overflow room to stop applauding because it violated the Senate rules of decorum. This was reported to Senator Pearce who, as President of the Senate, was responsible for such rules. The Senator claimed, later, that this event took place just after the shooting of Gabriel Giffords in Arizona, leaving everyone on "edge," and as a result of that nervousness he asked the sergeant-in-arms to "handle" the protestors. The sergeant responded that since the hearing was ending shortly it would be better to just limit the disturbances as much as possible, and not arrest any protestors. Senator Pearce followed this advice, but after the hearing asked for the names of the disruptive protestors and directed the officers to deny those people entry to the building. No time limit was placed on this ban. Reza was put on this list of banned individuals.

Two days after the hearing Reza returned to the Building for a meeting with a senator and was denied entry. When he tried to enter the building anyway, he was arrested for trespassing and placed in the Maricopa County jail. Reza filed suit after the arrest, alleging a violation of his First Amendment rights. The district court granted summary judgment to Senator Pearce and to the two arresting officers, holding that they were protected by qualified immunity. Reza appealed.

HELD: The Ninth Circuit reversed the lower court grant of summary judgment to Senator Pearce, holding that he had violated of Reza's First Amendment rights and that at the time the law was clearly established, thus stripping Senator Pearce of qualified immunity protection. The grant of immunity to the officers was upheld.

DISCUSSION: The Circuit Court began by determining that the Arizona Senate Building is a limited public forum since it is a place where the public has the opportunity to address local government officials. The court noted that Reza's role in the Building at the hearing – e.g. as an audience member as opposed to a testimonial witness – had no bearing on the classification and that speech of spectators is protected by the same constitutional rules as the speech of those addressing the chamber. Thus, the government can impose time, place, and manner restrictions and may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Reza argued Senator Pearce targeted him because of his support for pro-immigrant legislation and because of his Mexican ancestry. The court found no evidence in the record to support such a contention. It instead found Senator Pearce ordered the officers to identify any person who was loud in the overflow room – no matter why or what was being advocated for – and thus the regulation on speech was viewpoint neutral.

However, the Senator ran into trouble with the second prong of the analysis. For one, there were material issues at play as to whether Reza disrupted the hearing at all and whether Senator Pearce legitimately believed he would do so again if permitted back in the Building. In support of this, the court noted that the hearing continued to the end, that the officers told Senator Pearce that there was not a reason to arrest or remove people from the overflow room, and that there were conflicting affidavits about Reza's behavior. Moreover, the Court found it troubling that Senator Pearce's action foreclosed all avenues of communication for Reza because it banned him entirely from the Building indefinitely.

The court then moved on to determine whether Reza's right was clearly established in the Ninth Circuit at the time of the incident. The issue was presented by the Court as whether it was clearly established that an "individual could express disagreement in a limited public forum, but that the government could restrict the individual's speech to safeguard the purpose of the forum as long as the restrictions were reasonable and viewpoint neutral." It found that on February 22, 2011 the Ninth Circuit clearly held an individual could only be removed from a limited public forum by a government official if the person *actually* disrupted the proceedings. This was fatal for Senator Pearce because Reza was not disruptive when he was barred from entering the Building two days after the hearing – he had a scheduled meeting with a senator. The Circuit Court thus reversed as to Pearce.

The arresting officers' qualified immunity survived. They had arrested Reza for criminal trespass acting on an objectively valid order from Pearce as President of the Arizona Senate.

LINK (last accessed Dec. 2, 2015).

Trials: Corporate Owner of Sexually-Oriented Business Lacked Standing to Contest Public-Posting Ordinance on Behalf of Individual Owners, Employees and Entertainers

Keepers, Inc. v. City of Milford, No. 14-1581 (2d Cir. Nov. 20, 2015).

SUMMARY: Where a corporate owner of a sexually-oriented business brought a First Amendment challenge to an ordinance requiring the public posting of the names of its management, it could not act on behalf of the individual owners, employees and entertainers under the doctrine of "prudential standing" and lacked standing to bring the action.

FACTS: In 2003 Milford, Connecticut amended its sexually oriented business ordinance, adding more restrictions to the law. Keepers, Inc. filed suit shortly after the ordinance was amended, prompting Milford to not enforce the ordinance while the

litigation was pending. In 2007, the ordinance was replaced again, staying mostly the same but including some changes. In particular, the 2007 ordinance included a much more demanding public-posting rule, requiring the business license and the name of every individual who had any control or management position with the establishment to be posted. Keepers filed suit again, this time challenging the new ordinance for violating Keepers' owners', employees', and entertainers' First Amendment right to anonymity while engaging in constitutionally protected activities.

Milford answered that it had a substantial interest in regulating the business and that the posting requirement allowed law enforcement and city officials to identify those responsible for the business operations. The district court found most of the 2003 law valid, but found the posting requirement of the 2007 law "unconstitutionally broad." Both parties appealed the district court's order, but Keepers did not appeal the ruling on the 2007 ordinance. The Second Circuit, meanwhile, *nostra sponte* identified two issues not addressed by the lower court proceedings – whether Keepers had standing and if so whether the public-posting requirements violated the First Amendment – and had the parties brief the issues.

HELD: The Second Circuit remanded the case with an order to dismiss for lack of jurisdiction, holding Keepers lacked both prudential and constitutional standing.

DISCUSSION: The Second Circuit did not address whether the public-posting requirement violated the First Amendment; it instead focused on the prudential standing issues before it. The court pointed out that throughout its briefs Keepers referred to the right of its officers, shareholders, employees, owners, and entertainers to anonymity – but not its own right to anonymity. Keepers first tried to ward off the standing issue by noting that courts generally dispense with the rule that parties must assert their own legal rights when First Amendment rights are at stake. The court found, however, that such a general doctrine exists for overbreadth arguments – a characterization of its position Keepers only adopted in its supplemental brief to the court. In order to succeed in a third-party claim of that nature, moreover, Keepers would have had to show a close relationship to an injured party and a reason why the injured party could not assert its own rights. Keepers did neither and, perhaps critically for the court, Keepers' owner had already been publically identified and had suffered no harassment or reprisal, leading the court to see no reason why the case could not be brought by the owner.

Next the court held that, even if prudential standing was relaxed, Article III standing was also absent. Keepers argued the public posting requirements injured its constitutional and economic interests, but never alleged how the lack of anonymity harmed the owners' and/or shareholders' interests. The closest argument the court found was Keepers' statement that the public posting law might "chill" Keepers' expression, but the court found that purely conjectural.

Finally, Keepers argued, for the first time on appeal, that the public-posting requirement violated its right to be free from government-compelled speech. Thus, it posited, the Circuit could uphold the lower court even if it lacked standing to pursue its claim based

on the right to anonymity. Keepers ran into further trouble with this argument though under the mootness doctrine. The prohibition on mootness requires a "live" dispute at every stage of the proceeding. When Keepers began its litigation in 2003 the Milford municipal code required it to post names it did not want to. The 2007 ordinance, however, required only the names of those with "actual power" for operating the business be posted. The district court found for Keepers on the 2007 ordinance and thus it is not subject to the appeal. Looking at the record, the Court found that Keepers now has one, sole owner and that only that name would be posted and that must occur *no matter the outcome* of the appeal, and as a result, the entire argument of compelled speech was moot. The court remanded with instructions to dismiss the case.

LINK (last accessed Dec. 2, 2015).