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Due Process: Law Is Not Clearly Established As To What Appeal Rights Must Be Specified on Eviction Notices

Gardner v. Evans, No. 1:12-cv-1338 (6th Cir. Feb. 4, 2016)

Lansing, Michigan code inspectors found violations of rental housing units and issued eviction notices (red tags). The red tags provided information about how to correct the violation, the time frame and who to contact with questions but did not include reference to the city's code providing for an appeal of the eviction and notification that if not appealed timely the right to appeal was deemed waived. Those evicted did not exercise appeal rights (claiming they did not know of them) and sued instead, under Section 1983. The District Court denied qualified immunity to the inspectors.

The Sixth Circuit reversed, concluding that the law is not clear as to what specific appeal rights must be included in eviction notices to satisfy due process under these circumstances.

LINK

NOTE: Congratulations to Janene McIntyre and her colleagues at IMLA Member Lansing, Michigan City Attorney's office, who successfully defended this case.

Employment: County Water Employees' Firings Were Not Due To Retaliatory Animus; Wrong Standard of Review Was Harmless Error

Dekalb County v. U.S. Department of Labor, No. 14-15435 (11th Cir. Feb. 8, 2016)

Two employees of the Dekalb County, Georgia Department of Public Works (DPW) claimed they were fired after questioning the DPW's allegedly lax enforcement of federal clean water standards, which require restaurants to use traps to prevent grease and other waste from entering waterways. They sued, claiming retaliation for their whistleblowing activities.

The Administrative Law Judge (ALJ) found that, although they had engaged in protected activity, they would have been fired anyway, because of their generally disruptive behavior and their lack of fit into the DPW. They appealed to the Department of Labor Administrative Law Board (Board), which incorrectly applied *de novo* review to the ALJ's decision rather than the correct "substantial evidence" standard. The Board reversed, finding that the DPW could not separate its retaliatory animus from its legitimate disciplinary motivations. It remanded, and the ALJ awarded reinstatement and back pay. The DPW appealed.

The Circuit Court held that Board applied the wrong standard of review--*de novo* review only applies to issues of law. Here, the Board had reviewed the factual record, which can only lead to reversal if the decision is not supported by substantial evidence. But the Board had also reviewed the ALJ's requirement that the employees show that retaliation was *the* motivation for their firing, not merely *a* motivation. The Circuit found that the Board's decision was supported by the facts and relevant legal standards, and rejected the DPW's appeal.

LINK

Immunity: Zoning Inspector Does Not Have Immunity—But His Denial of Church's Zoning Application Did Not Violate RLUIPA

Mesquite Grove Chapel v. Debonis, No. 13-16633 (9th Cir. Dec. 18, 2015)

The Pima County, Arizona Zoning Inspector (Debonis) denied the Mesquite Grove Chapel (Chapel) zoning application on the grounds that it was not a "church." The Chapel brought an action against Debonis and the Pima Board of Zoning Appeals under RLUIPA, asserting that they were imposing a substantial burden on their religious activity. The district court granted summary judgment to defendants, finding that Debonis had absolute immunity and that no substantial burden had been demonstrated.

The Ninth Circuit affirmed as to the RLUIPA claim, but reversed on the immunity issue. In order to assert immunity, Debonis had to demonstrate that the Zoning Inspector role was analogous to that of a judge. He could not: "The Inspector is not functionally comparable to a judge. Although the Inspector's decisions are reviewable on administrative and judicial appeal and land use decisions can be "contentious," proceedings before the Inspector are not adversarial and they lack procedural protections."

LINK

Police: No Immunity For Pointing Loaded Weapon, With Finger on Trigger and Safety Off, At a Compliant Detainee

Stamps v. City of Framingham, No. 15-1141 (1st Cir. Feb. 5, 2016)

A Framingham, Massachusetts SWAT team executed an early morning raid on a residence in search of suspected drug dealers. An elderly man in the residence was ordered to lie on his stomach with his hands over his head as the SWAT team searched. He complied without offering any resistance. One officer kept watch over the man, pointing a rifle at his head; the weapon's safety was off and his finger was on the trigger. He accidentally shot the man at close range, killing him.

The First Circuit affirmed the district court's holding that the officer's pointing a loaded weapon at a compliant, non-threatening detainee, with the safety off and his finger on the trigger, constituted a violation of the decedent's Fourth Amendment rights. Although the actual shooting may have been unintentional, the officer intentionally created the elements leading to the accident. Supreme Court precedent and analogous decisions in virtually all Circuits clearly established that the decedent had the right to be free of such intimidation, and the officer should have known that such an action violated the Constitution.

LINK

Police: No Immunity For Wrongful Detention Where Minimal Research Would Have Confirmed Mistaken Identity

Garcia v. City of Riverside, No. 13-16857 (9th Cir. Feb. 3, 2016)

Riverside, California police arrested Garcia on DUI charges. When they ran his name through the statewide Wanted Persons System, they found a "hit" for a man wanted by Los Angeles authorities. Despite Garcia's protests that the database was incorrect and he had previously been wrongly arrested based on the same flawed data, they turned him over to LA police, who detained him. The LA authorities had information which indicated that the "Garcia" they were seeking was 8 inches shorter and 40 pounds

lighter than the man which Riverside had sent them. They had not communicated that data to Riverside, had not entered the full biometric data into the statewide database and did not reconfirm their own records after Garcia complained to them that they had the wrong person.

The district court denied defendants' claims of immunity in the face of Garcia's Due Process-based §1983 action. The Ninth Circuit affirmed: failure to investigate claims of mistaken identity could form the basis of a Fourth and Fourteenth Amendment claim, and relevant case law illustrated that Garcia's constitutional rights were clearly established at the time.

LINK

Police: Plaintiff's Uncontradicted Claim of Being Beaten While Handcuffed Precludes Summary Judgment in Excessive Force Action

Curry v. Cotton, No. 15-3562 (6th Cir. Jan. 26, 2016)

A woman arrestee was handcuffed in a Hamilton County, Ohio nightclub parking lot after violently resisting. She claims she was beaten while handcuffed and sustained lacerations to her face. She brought a Section 1983 action for excessive force. The district court denied the officer's qualified immunity-based motion for summary judgment.

The Sixth Circuit affirmed. It is clearly established in the circuit that the gratuitous use of force on a suspect who has already been subdued and placed in handcuffs is unconstitutional. Material issues of fact existed, based on the conflicting accounts of what transpired. Dashcam video from later-arriving police vehicles shows the plaintiff cuffed and seated on the ground, bleeding, but does not indicate how the injuries occurred.

LINK

Preemption: Houston's "SafeClear" Towing Program Is (Once Again) Not Preempted by Federal Law, Does Not Violate First Amendment

Houston Professional Towing Association v. City of Houston, No. 15-20117 (5th Cir. Feb. 3, 2016)

Houston has implemented its "SafeClear" program to remove stalled vehicles from roadways expeditiously. (When police report a stalled vehicle, it is towed for a set price of $50, a much lower price than collision-related tows). The Houston Professional Towing Association (HPTA) challenged SafeClear as being preempted by a federal statute governing intrastate transportation (49 U.S.C. §14501). It also claimed that a provision of SafeClear which prohibits towing companies from negotiating towing details

with car owners at accident scenes until police have departed violates their First Amendment speech rights.

The Fifth Circuit affirmed the district court finding that a series of related prior decisions had already found sufficient safety-related elements of SafeClear to circumvent the federal law and were *res judicata.* It also held that the time needed to allow police to finish their investigatory work without tow operators intruding on the scene was not an actionable infringement of HPTA's speech rights.

LINK

RLUIPA: Denial of Church's Nonconforming Use Is Not Substantial Burden on Religion Unless Reasonable Expectation that Property Could be Used for Worship

Andon, LLC v. City of Newport News, No. 14-2358 (4th Cir. Feb. 9, 2016)

Reconciling People in Faith Together Ministries (Ministries) signed a lease for space from Andon in Newport News, Virginia. The property was zoned commercial but allowed for use by places of worship provided that they complied with 4 conditions, including a setback of at least 100 feet from adjoining residences. The plot did not afford a sufficient setback, so the property was not approved for church use by the Board of Zoning Appeals. Andon and Ministries sued under RLUIPA, alleging a substantial burden on Ministries' religious exercise, based partly on the fact that there were no other affordable sites available.

The district court dismissed, finding that, while RLUIPA protects a religious organization's "reasonable expectation" that it will be able to use a property, here there was no such reasonable expectation—it was known from the outset that the landlord would need a variance.

The Fourth Circuit affirmed, stating that if it allowed the case to go forward, it would effectively be granting an automatic exemption to religious organizations from generally applicable land use regulations. "Such a holding would usurp the role of local governments in zoning matters when a religious group is seeking a variance, and impermissibly would favor religious uses over secular uses."

LINK

Trials: In Lawsuit Between Adjoining Sewer Authorities, Absence of Actual or Imminent Injury Precludes Standing

Trumbull County Board of Commissioners v. Village of Lordstown, No. 14-3866 (6th Cir. Feb. 2, 2016)

Trumbull County, Michigan borrowed federal funds to improve its sewer system that served constituents including the General Motors plant, thereby falling within the terms of a federal statute protecting borrowers from competing sewer systems. Lordstown then extended its sewer line to the periphery of the General Motors plant, triggering a suit by the County. The district court granted summary judgment to Lordstown, finding that the mere expansion of sewer line, without more, did not constitute actionable competition.

The Circuit Court reversed, but on different grounds: the County lacked standing because it could not demonstrate an actual or imminent injury to its property interest.

LINK

Trials: Repeal of Bridge Toll By Rhode Island Legislature Moots Town's Request For Injunctive Relief

Town of Portsmouth v. Lewis, No. 15-1052 (1st Cir. Feb. 10, 2015)

In 1999, the Federal Highway Administration (FHWA) approved improvements to Rhode Island's Sakonnet River Bridge. Responding to public sentiment, the State and FHWA declared that they would not impose tolls on the bridge to pay for the work. After the renovated bridge opened in 2012, the State legislature voted to collect tolls and the FHWA revised its declaration to allow the tolls.

The Town of Portsmouth brought suit in 2013, seeking summary judgment under the Federal-Aid Highway Act, which generally prohibits tolls on federally-funded bridges. It also sought restitution of tolls already collected.

Before the district court heard the case, the Rhode Island legislature voted to cease tolls on the bridge.

The district court dismissed on the grounds that the legislature's action removed the actionable case or controversy and rendered the matter moot. On appeal, the First Circuit affirmed.

LINK

THIS JUST IN: Since 2015 SEC Has Cited 72 Underwriters For Violations Relating to Municipal Bond Issuances

IMLA member Robert Doty reports that the SEC has cited 72 firms for violations related to the issuance of municipal bonds under the Municipalities Continuing Disclosure Cooperation (MCDC) initiative. He cautions that actions against municipalities themselves will be forthcoming.

The SEC press release is attached ***here.***

In addition, as Robert Doty points out, the Governmental Finance Officers Association (GFOA) has just issued an advisory to municipalities themselves, urging them to prepare for settlement discussions with the SEC under the MCDC voluntary disclosure guidelines. The MCDC program is intended to induce voluntary compliance where municipalities have issued bonds and have failed to provide complete and accurate underlying financial information, whether in initial prospectuses or in required follow-on disclosures. The GFOA release, reprinted in the *Bond Buyer*, is accessible ***here***.