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## ADA: Disability Discrimination Claim Fails Where Plaintiff Does Not Establish Link Between Disability and School's Conduct

## *Waltherr-Willard v. Mariemont City Schools*, No. 14-3168 (6th Cir. Feb. 11, 2015).

Where a teacher alleges discrimination due to a disability, her claim cannot succeed where she fails to demonstrate that the conduct complained of was in response to her disability, according to the Sixth Circuit.

Maria Waltherr-Willard taught at Mariemont High School for twenty years. In 1997, however, she was asked to teach elementary school. She refused, saying she had pedophobia – a debilitating fear of children. She provided a letter from a psychologist. The school sent her to an independent specialist who confirmed the diagnosis. She thus remained at the high school for twelve more years teaching French and some Spanish.

The school then moved its French classes online, eliminating the need for a French teacher in the high school. The superintendent thereafter met with the principal to see what could be done with Waltherr-Willard. Seeing that her fear was of small, young children they moved her to a middle school. However, at this time the superintendent heard rumors that Waltherr-Willard was telling parents that the high school was going to cease offering French altogether. He asked her to meet and, according to her, yelled at her and "lunged" across the table at her.

Ultimately, Waltherr-Willard began the middle school job in September of 2010, but asked to be transferred back to the high school six months later because her "talents were underutilized" and staying would "further detrimental[ly] impact on her health." There were no openings at the high school however, and Waltherr-Willard retired.

In June 2012 she sued the school, alleging disability-discrimination under the Americans with Disabilities Act ("ADA"), as well as age discrimination and breach of contract. The District Court granted summary judgment to the school. Waltherr-Willard appealed.

**HELD**: The Sixth Circuit affirmed the lower court, holding that she failed to evidence that the improper treatment she had received was because of a disability.

**DISCUSSION**: Waltherr-Willard argued that the lower court erred in failing to find a genuine issue of material fact regarding the school's failure to accommodate her pedophobia. The Circuit Court cited the long-standing precedent that employers need not provide *un*reasonable accommodations. For example, they are not required to create a new job or displace existing employees to accommodate an employee's disability. Here, Waltherr-Willard asked to be moved back to the high school, but there was not a job there. Thus, the Circuit Court affirmed the lower court, finding the school did not violate the ADA when it did not accommodate her complaint about pedophobia at the middle school.

Plaintiff's claim of age discrimination also failed. After she retired, she was replaced by a teacher only two years younger. Although that teacher left within one year and was replaced by a substantially younger person, the second hiring was not relevant for purposes of Waltherr-Willard's age claim.

Waltherr-Willard also alleged that a reasonable jury could find she endured a hostile work environment – one "permeated with discriminatory intimidation, ridicule, and insult." As evidence Waltherr-Willard pointed to 1) emails wherein Mariemont employees made fun of her and 2) her testimony about the meeting with the superintendent wherein he yelled and lunged at her. Under the ADA theory she pressed, Waltherr-Willard had to show that these incidents occurred *because* of her disability, but the court was unable to make such a finding. As for the emails, the court pointed out that Waltherr-Willard was unaware of the emails until after she retired, thus they could not have created a hostile work environment. Nor did the emails mention her pedophobia; thus were not based on her disability. As for the unpleasant meeting, although Waltherr-Willard did show the superintendent was hostile to her, she admitted he never mentioned her disability.

http://www.ca6.uscourts.gov/opinions.pdf/15a0125n-06.pdf (last accessed Feb. 26, 2015).

## APA: HUD's Rejection of County Fair Housing Plans Is Not Solely Matter of Agency Discretion and is Subject to Judicial Review

## *County of Westchester v. United States Department of Housing and Urban Development*, No. 13-3087 (2d Cir. Feb. 18, 2015).

Reversing the lower court, the Second Circuit has rejected HUD's contention that its rejection of Westchester County's fair housing plans is solely within the agency's discretion, finding ample statutory grounds for judicial review.

In 2006, Westchester County filed documents to obtain grants from the United States Department of Housing and Urban Development ("HUD"), certifying that it would "affirmatively further fair housing." The Anti-Discrimination Center of Metro New York filed a *qui tam* action alleging that the filings were false. The suit dragged on for years, culminating in a settlement wherein the County had to repay $30 million of previously awarded grant money back to the United States. It was also required to conduct new analyses of its fair housing issues and identify further actions it would take to remedy them and, critically, this strategy had to "deemed acceptable by HUD." From 2010 to 2013 the County submitted numerous strategies, but HUD found them all insufficient and ultimately reallocated the majority of another $7.4 million previously set aside for the County.

The County's suit alleged claims under the Administrative Procedures Act ("APA") and 42 U.S.C. § 12711, which prohibits HUD from interfering in lawful local housing policies, and sought to have the $7.4 million reallocated back to it, as well as have the court order HUD to approve its 2011 grant strategy. The District Court granted HUD's motion to dismiss, holding that rejection or approval of the County's housing strategy was "committed to agency discretion by law" and thus not subject to judicial review. The County appealed.

**HELD**: The Second Circuit vacated the District Court, holding that there are judicially cognizable standards for review in the relevant statutes regulating the HUD grants; thus the case should not have been dismissed under the APA.

**DISCUSSION**: Westchester argued that there was a statutory basis on which a court could review the agency's actions. The Circuit Court reviewed the relevant statutes. 42 U.S.C. 12705 states that HUD shall approve a tendered housing strategy unless "(A) the housing strategy is inconsistent with the purposes of this Act, or (B) the information described in subsection (b) of this section has not been provided in a substantially complete manner."

Moreover, §12708, regulates the ongoing compliance of grant-funded jurisdictions and provides that review of the housing strategy by courts "shall be limited to determining whether the process of development and content of the strategy are in substantial compliance with the requirements of this Act." Finally, §12711 prohibits the agency from

establishing "any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is (1) adopted, continued, or discontinued in accordance with the jurisdiction's duly established authority, and (2) not in violation of any Federal law."

Surveying these provision the Second Circuit held that "this is not a case in which the statute is drawn in such broad terms that . . . there is no law to apply."

HUD responded that its own internal agency regulations contain language requiring that housing strategies meet its "satisfaction" before being approved, thus shielding its decision in the matter from review. The court disagreed, holding that the "statutory provisions described above contain meaningful standards constraining HUD's discretion and providing for judicial review . . .The agency's adoption of regulations that might appear to give the agency unfettered discretion do not act to nullify the meaningful standards which exist in the governing statute."

HUD also posited that the consent decree language, which mandated the County submit a strategy "acceptable to HUD," prevented judicial review. The court rejected this argument as well, stating that consent decree language does not bear on whether the County's APA claims themselves are reviewable. The Circuit thus vacated the lower court's holding.

http://www.ca2.uscourts.gov/decisions/isysquery/a0e97daf-9473-448e-aa92-552065e12531/14/doc/13-3087_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/a0e97daf-9473-448e-aa92-552065e12531/14/hilite/ (last accessed Feb. 26, 2015).

## Home Rule: Local Zoning Laws Regulating Drilling Are Preempted by State Legislation

## *State ex rel. Morrison v. Beck Energy Corp.,* Slip Opinion No. 2015-Ohio-485 (Ohio, Feb. 17, 2015).

In a familiar battle between state and local governments over fracking, the Ohio Supreme Court has held that a city's zoning ordinances which specifically govern drilling activities are preempted by a state statute which reserves to the state the power to regulate gas and oil drilling, rebuffing the city's argument that the Home Rule amendment to the Ohio Constitution gives it such authority.

Ohio has a statewide regulatory scheme for oil and gas drilling. Defendant Beck Energy Corporation obtained a state permit to drill in the City of Munroe Falls. Soon after Beck

began drilling, the city issued a stop-work order and filed a complaint seeking injunctive relief, alleging that Beck had not complied with five city zoning ordinances. These prohibit drilling without obtaining a local zoning certificate, which in turn require city council approval and a public hearing. The trial court granted the injunction, and the defendant appealed, arguing that the city ordinances conflicted with state laws. The court of appeals reversed, holding that the state statute prohibited the city from enforcing its drilling ordinances.

**HELD**: On appeal, the Ohio Supreme Court affirmed. The Home Rule amendment to the Ohio Constitution does not allow Munroe Falls to enforce its own ordinances in the face of preemptive state legislation.

**DISCUSSION**: In 2004, the Ohio General Assembly amended the state's Revised Code section 1509 to provide "uniform statewide regulation" of oil and gas production within Ohio and to repeal "all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state." 150 Ohio Laws, Part III, 4157. That law entrusted the Ohio Department of Natural Resources (ODNR) with "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" within Ohio.

Although R.C. 1509.02 preserved municipal corporations' "special power" to control public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts and the power to grant permits to operate certain heavy vehicles on highways within their jurisdiction, it expressly prohibited a local government from exercising those powers "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under [R.C. Chapter 1509]."

Under the Home Rule Amendment to the Ohio Constitution, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Article XVIII, Section 3. This amendment gives municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest." *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 212, 80 N.E.2d 769 (Ohio 1948).

The Ohio Home Rule Amendment does not, however, allow municipalities to exercise their police powers in a manner that "conflict[s] with general laws." Article XVIII, Section 3; (citation omitted).

Therefore, a municipal ordinance must yield to a state statute if (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the state statute is a general law, and (3) the ordinance is in conflict with the statute. *Mendenhall v. Akron*, 117 Ohio St.3d 33, 881 N.E.2d 255 (Ohio 2008).

Under this three-step analysis, the court concluded that the city's ordinances must yield to R.C. 1509.02. The court found that the Munroe Falls drilling ordinances were an exercise of police power, noting that Ohio jurisprudence has long recognized zoning as an exercise of police power. "[A]ny municipal ordinance, which prohibits the doing of something without a municipal license to do it, is a police regulation" within the meaning of the Home Rule Amendment. (Violation of the drilling ordinances could carry criminal penalties, making the police power element even more evident).

The court found that R.C. 1509.02 was a "general law," meaning one that (1) is part of a statewide and comprehensive legislative scheme; (2) applies to all parts of the state and operates uniformly throughout the state; (3) sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation; and (4) prescribes a rule of conduct upon citizens generally. The court rejected the city's argument that the law is not applied uniformly because only the eastern part of the state has viable quantities of gas and oil. "We have recognized that a general law can operate uniformly throughout the state "even if the result * * * is that the statute does not operate in all geographic areas within the state." (*citation omitted*).

The final question was whether the local ordinances conflicted with state law. The city argued that the Home Rule amendment was a broad grant of power allowing the city to impose reasonable conditions on oil and gas drilling within city limits-- the ordinances and the statute were not in conflict because the former addressed "traditional concerns of zoning" whereas the state statute regulated "technical safety" issues. The court found this distinction "fanciful," noting that the ordinances, which require applications for each drilling site and a one-year waiting period after city council approval, essentially prohibited drilling.

The court further found that the city's actions conflicted with the intent of the legislature, given the language of the statute which prohibits local governments from regulating in a way that discriminates or unfairly impedes the permitting, licensing, location and spacing of oil and gas wells.

Although it acknowledged the city's arguments that state and local governments should share regulatory responsibilities with respect to drilling, the court deferred to the legislature for such a resolution.
The Ohio Supreme Court affirmed, in a 4-3 decision.

**CONCURRENCE:** The concurring opinion emphasized that the scope of the opinion was limited to five ordinances which specifically regulated oil and gas drilling within the city.

> I write separately to emphasize the limited scope of our decision; "our holding is limited to the five municipal ordinances at issue in this case." Lead opinion at ¶ 33. This appeal does not present the question whether R.C. 1509.02 conflicts with local land use ordinances that address only the traditional concerns of zoning laws, such as ensuring compatibility with local neighborhoods, preserving property values, or effectuating a municipality's long term plan for development

> without imposing a separate permitting regime applicable only to oil and gas drilling plan for development, by limiting oil and gas wells to certain zoning districts.

Under this view, the terms "location" and "spacing" in the state statute related to the placement of wells on a tract. "Scientific expertise regarding the physical characteristics of oil and gas reserves is required to efficiently produce oil and gas, prevent waste, and protect the correlative rights of neighbors." In contrast, "that same scientific and regulatory expertise is not required to determine whether an oil and gas well is compatible with the character and aesthetics of a particular zoning district." According to the concurrence, "we generally presume that zoning authorities are far more familiar with local conditions and therefore are better able to make land use decisions." It suggested that the issue of whether the state statute would preempt a general zoning ordinance that addresses "traditional concerns of zoning laws," remains to be decided.

**DISSENT:** The dissent did not find the stark conflict between the state and local laws. The Ohio Constitution had vested the General Assembly with the power to pass laws providing for the "regulation of *methods of mining, weighing, measuring and marketing* coal, oil, gas and all other minerals." R.C. 1509.02 has broad language stating that "regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation" and that R.C. Chapter 1509 constitutes "a comprehensive plan with respect to all aspects" of the locating, drilling and operating of oil and gas wells in the state, including construction and restoration, permitting related to those activities, and the disposal of wastes.

> But the broad language of a preemption clause is not sufficient to create a conflict. We have never held that a preemption statement alone is sufficient to divest municipalities of their constitutional right to home rule. To the contrary, a declaration by the General Assembly of its intent to preempt a field of legislation "does not trump the constitutional authority of municipalities to enact legislation that is not in conflict with general laws. . . While important in determining whether a statute is a general law, a preemption statement alone has no relevance to the existence or nonexistence of any conflict between local and state regulations.

For the dissent, the "vague declaration of intent to occupy the field" in the state statute was insufficient to show an actual conflict: "[N]othing in the statute expressly prohibits supplemental, non-conflicting local regulation. There is room for both state and local regulation for the drilling of oil and gas."

As the dissent noted, this posture has already been adopted by the highest courts in other jurisdictions considering fracking. Colorado, Pennsylvania and New York have each concluded that local zoning ordinances—where they are not designed specifically to conflict with state-issued oil and gas legislation—continue to have legitimacy and permit joint state and local authority over fracking. Such an outcome would be appropriate for Ohio:

> There is no need for the state to act as the thousand-pound gorilla, gobbling up exclusive authority over the oil and gas industry, leaving not even a banana peel of home rule for municipalities. I would reverse the judgment of the court of appeals and remand to that court for further proceedings.

http://www.sconet.state.oh.us/ROD/docs/pdf/0/2015/2015-Ohio-485.pdf (last accessed Feb. 26, 2015).

## Religion: Placement of Religious Symbols on Utility Poles Does Not Constitute Governmental Endorsement of Religion

### *Jewish People for the Betterment of Westhampton v. Village of Westhampton*, No. 14-1441 (2d Cir. Feb. 11, 2015).

The placement of religious symbols on poles by a utility for a paying third party has a secular purpose and is not governmental endorsement of religion under the *Lemon* test, according to the Second Circuit.

In 2010 East End Eruv Association, Inc. ("EEEA") entered into licensing agreements with Verizon and Long Island Lighting Company ("LIPA") to install plastic strips called "lechis" on the companies' poles in parts of Westhampton, New York. EEEA agreed to pay a fee for using the poles and for installing and maintaining the lechis. In putting up the lechis, EEEA sought to create an "eruv," or "delineated geographic area with significance to certain adherents of Judaism." The plaintiffs, having discovered the agreements, alleged that the purpose of creating the eruv was to "demarcat[e] a defined geographic area within which adherents subscribing to a certain interpretation of Jewish law believe they may perform certain activities that are otherwise prohibited on the Jewish Sabbath and Yom Kippur." This, the plaintiffs alleged, would be "a constant and ever-present symbol, message, and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity," in violation of the Establishment Clause.

After the District Court relieved Verizon from the suit on a 12(b)(6) motion and LIPA based on the pleadings, the plaintiffs appealed, arguing that the lower court improperly failed to find constitutional grounds for relief under § 1983.

**HELD**: The Second Circuit held the utility's placement of lechis on the poles in Westhampton did not violate the Establishment Clause.

**DISCUSSION**: The Circuit noted that Verizon and EEEA are not state actors, thus they could not face allegations of violating the Establishment Clause. On the other hand, the remaining party, LIPA, was a political subdivision of the state and thus could. It applied the *Lemon* Test, which despite decades of criticism, is still the standard for determining

violations of the Establishment Clause; under *Lemon*, government action is neutral with regard to religion so long as it "1) ha[s] a secular purpose, 2) ha[s] a principal or primary purpose that neither advances nor inhibits religion and 3) [does] not foster an excessive entanglement with religion."

The Court began by noting that while the eruv itself has a non-secular purpose – e.g. to demarcate an area for religious adherents - the plaintiffs failed to allege that *LIPA's actions were non-secular*. As the court put it, LIPA permitted access to its utility poles neutrally – a private group paid a fee to place an appurtenance to the company's power poles – and the Supreme Court holds that neutral accommodation of religion qualifies as secular. The first prong was thus satisfied.
As for the second *Lemon* prong, the Court reduced it to the issue of whether a reasonable observer would perceive the display in its context as a government endorsement of religion. It then simply held that no neutral observer that saw the lechis on the poles would draw the conclusion that LIPA is endorsing religion. It ventured to guess anyone that did notice the lechis would not be likely to even know what they were.

Finally, the Circuit Court noted that a private party is financing the lechis and thus there is simply "no risk" of excessive government entanglement.

http://www.ca2.uscourts.gov/decisions/isysquery/a0e97daf-9473-448e-aa92-552065e12531/16/doc/14-1441_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/a0e97daf-9473-448e-aa92-552065e12531/16/hilite/ (last accessed Feb. 26, 2015).

## Trials: County's Failure to Provide Terminated Employee With Specific Supporting Evidence is Not Fatal Where Termination Process Provided All Relevant Facts

## *Skinner v. Loudoun County Department of Management and Financial Services*, No. 14-1798 (4th Cir. Feb. 9, 2015).

A county employee terminated for striking a fellow worker cannot assert due process violations where he did not receive the specific evidence supporting his firing, so long as was apprised of the relevant facts.

Douglas Skinner was employed as an emergency medical services training officer by Loudoun County, Virginia. He was fired for striking a trainee student in the head. Skinner sued under § 1983, alleging federal due process claims. The District Court granted summary judgment to Loudoun County, holding there were no issues of material fact and Skinner had been accorded the due process necessitated under the Constitution. Skinner appealed.

**HELD**: The Fourth Circuit affirmed, holding the procedural protections Skinner was afforded, coupled with the lack of prejudice resulting from any shortcomings, meant Skinner received constitutionally adequate due process.

**DISCUSSION**: After finding that, as a public employee, Skinner had a constitutionally protectable property interest in his continued employment, the Circuit Court reviewed each of Skinner's challenges--and rejected each. Skinner claimed that, beyond knowing the allegations against him, he had a right to know the substance of the *evidence* asserted against him by the County prior to termination. Specifically, he complained that he did not know 1) the identity of an eyewitness, 2) that the victim told another person Skinner had hit him, and 3) that the victim had sent an email about the incident.

The court found that due process does not require that "all evidence on a charge or even the documentary evidence" be provided to the employee; rather only a descriptive explanation allowing the employee to identify the conduct giving rise to the termination is required. The court found that Skinner had been provided the latter, as he was told the date of the incident, the nature of the conduct that caused the problem, and that there was a witness to the incident.

> The record makes clear that Skinner was informed that he was charged, on a specific date, with harassing, hitting, and kicking Nacy. He also was told that there was another witness to the altercation. Skinner understood the charges sufficiently to prepare a detailed response, and there is no evidence that Skinner misunderstood or expressed any confusion about the charges. Accordingly, we conclude that Skinner received a sufficient explanation of the evidence against him.

Skinner also alleged that he was deprived of the opportunity to confront the victim before or after the termination since he did not testify. The victim's hearsay statements were admitted, however, through an eyewitness. While Skinner recognized he had no Sixth Amendment right to confront the witness in a civil administrative hearing, he argued he did have such a right under the Fifth and Fourteenth Amendments.

The Circuit Court disagreed. It held the right to confront and cross-examine in a civil case is subject to a balancing test. The *Eldridge* test provides a balance between "(1) the private interest affected; (2) the risk of an erroneous deprivation and the probable value of additional procedural safeguards; and (3) the Government's interest." Weighing these factors the court found Skinner was not deprived of due process since he was informed of the charge, given the name of the accuser, told there was at minimum one eyewitness, and permitted at the hearing to put on evidence, call witnesses, and cross-examine the County's witnesses. As a result of this panoply of procedural protections, the court held Skinner could have undercut and/or contradicted the hearsay statements admitted by the hearing examiner, meaning he was provided due process.

Skinner next charged that he was not provided with all documents possessed by Loudoun County, was not able to prepare adequately and thus was deprived of due process. The Circuit did find that the County failed to follow its own policy regarding turning over every document involved in the case within ten days before the hearing (it provided some documents five days before the hearing). However, the Court did not find a due process violation here as it evaluated the "sufficiency of the procedures employed in any particular situation . . . in light of the parties, the subject matter, and the circumstances."

Here, Skinner received most of the documents in time to prepare for the hearing and, critically, the County permitted Skinner to review all their files on request, but Skinner never made such a request. He thus was not denied access to the documents even if copies were not provided in time, but rather he failed to exercise his right to access the files by requesting it of the County.

http://www.ca4.uscourts.gov/Opinions/Unpublished/141798.U.pdf (last accessed Feb. 26, 2015).