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Education: Parental Acceptance Does Not Waive Rehabilitation Act Claims; Parents Lack Expertise to Assess Adequacy of Accommodations

A.G. v. Paradise Valley Unified School Dist., Nos. 13-16239/16707 (9th Cir. March 3, 2016)

The Ninth Circuit has reversed and remanded an Arizona district court's decision in favor of a school district, finding that the lower court improperly conflated standards under the IDEA, the Rehabilitation Act and the ADA, each of which can apply to disabled students in the educational setting.

A.G. went to public school and was placed in the unique and gifted program, but she had behavioral problems, including harming herself, refusing to go to class and, eventually, physically striking the school resource officer. She was transferred to another school, but had a slew of problems there, ultimately being charged twice with assault and aggravated assault. She was then transferred again to a private psychiatric school. Her parents went through the administrative process and ultimately filed a variety of claims, including one alleging a failure to provide a "reasonable accommodation" under Section 504 of the Rehabilitation Act. The lower court dismissed the claim, holding that since A.G.'s parents consented to placing A.G. in the subsequent schools, they were barred from alleging she was denied meaningful access to educational benefits.

The Ninth Circuit reversed, holding that, given A.G.'s behavioral challenges, whether placement in the subsequent schools was appropriate required specialized expertise,

something her parents did not possess, and their consent could thus not be used to bar their claim.

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Employment: §1981 Discrimination Claim Alleging Denial of Major Promotion is Governed by Three-Year Statute of Limitations

Wright v. City of Ithaca, No. 15-1293-cv (2d Cir. Mar. 7, 2016)

The Second Circuit has affirmed a lower court grant of summary judgment in a §1981 employment discrimination action brought by a white police sergeant who claimed that less-qualified nonwhite officers were promoted in his stead. The action was commenced more than three years--but less than four--after the plaintiff became aware that he had not been promoted.

Generally, §1981 claims are governed by a three-year statute of limitations. However, that period is extended to four years "if the plaintiff's claim against the defendant was made possible" by an Act of Congress enacted after December 1, 1990. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). The Civil Rights Act of 1991 had amended §1981; the question was whether that post-1990 amendment created the basis for plaintiff's claim and extended the limitation period to four years.

It did not. While the Civil Rights Act of 1991 extended rights to employees who were denied awards "given routinely upon satisfactory job performance" or "not involving a substantial increase in status or responsibility" the original scope of § 1981, passed in 1866, had always covered situations where "the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." (citations omitted). The Second Circuit had "no trouble concluding that promotion from police sergeant to police lieutenant entails the kind of 'substantial increase in status or responsibility' necessary to assert a claim under § 1981 before its amendment. Therefore, the three-year limitation period applied.

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Employment: Older Staff Attorneys Replaced with Much Younger Lawyers by District Attorney Wanting to Create "Modern" Prosecutor's Office; Insufficient Evidence of Discriminatory Intent

Gallen v. County of Chester, No. 15-1557 (3d Cir. Feb. 19, 2016)

Statistical evidence that District Attorney fired legal staff aged in their 50's and 60's and replaced them with much younger lawyers does not, without more, create the inference that the firings have a discriminatory motive, according to the Third Circuit.

Two former attorneys at the Chester County, Pennsylvania District Attorney's Office, aged 57 and 65, sued the County alleging age discrimination. The two stumbled on the third prong of the *McDonnel-Douglas* burden shifting framework in both the lower court and subsequently in the Third Circuit. They presented three primary factors evidencing discriminatory animus, including that the new director who fired them had asked for termination paperwork before he even took office; that he publically announced that he wanted a "modern" prosecutor's office; and that he fired attorneys in their 50s and 60s and replaced them with attorneys aged between 27 and 42.

The Court found that these statistical factors, without more tangible evidence of discriminatory intent, fell short of being enough evidence for a reasonable jury to believe the firing decision was pretext. The new District Attorney had worked with them before he rose to the DA position and had previously expressed dissatisfaction with their work product.

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False Claims Act: Prior Disclosure of Fraud in Audit Constitutes Bar to False Claims Action

Cause of Action v. Chicago Transit Authority, No. 15-1143 (7th Cir. Feb. 29, 2016)

The Seventh Circuit has affirmed a lower court finding that no action existed under the False Claims Act against the Chicago Transit Authority where the wrongdoing complained of had already been disclosed in a publically-accessible audit.

Cause of Action, a nonprofit watchdog organization, sued the Chicago Transit Authority (CTA) under the False Claims Act, alleging the CTA fraudulently misreported transit data in order to secure more, and inappropriate, federal grant funding. The district court accepted CTA's motion to dismiss the action since the wrongdoing had been publically disclosed previously and thus the False Claims Act public disclosure bar applied.

Cause of Action argued that there was no public disclosure because government awareness is not the same thing as disclosure, but the Circuit Court held the publically accessible audit report was a public disclosure, as that term is defined in the False Claims Act. Moreover, the Court held that the audit exposed the fraudulence and that the lawsuit was based on the public disclosures in the audit, thus affirming the lower court.

LINK

Police: Generalized Allegation of "Unjustified Excessive Police Force" Does Not Specify a Clearly Established Constitutional Right

Cass v. City of Abilene, No. 14-11134 (5th Cir. Feb. 24, 2016)

Freedom from "unjustified, excessive police force," without greater specificity, is not a clearly established constitutional right for §1983 purposes, according to the Fifth Circuit.

Abilene Texas police officers executed a warrant at the Abilene Gold Exchange, where Marcus Cass worked, and shot him in the process. The district court ruled for the City at the summary judgment stage, holding there was no excessive force used and qualified immunity was warranted. The Fifth Circuit affirmed the ruling with regard to the individual officer involved because, even though it was objectively unreasonable to execute the warrant via a raid rather than knocking on the door and presenting the warrant, the officer named had not made the decision to raid the business and thus was not liable. As to the police department, the Circuit found a reasonable jury could find the facts viewed in light most favorable to the plaintiff objectively unreasonable, but that no clearly established constitutional right was violated because the plaintiff failed to plead the law specifically enough. She alleged only that it was "clearly established in the law that citizens are protected against unjustified, excessive police force."
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Police: Plaintiff in Police Shooting Fails to Demonstrate Inadequate Training or Hiring Procedures, Ratification of Officers' Actions, or Policy of Failure to Discipline

Lopez v. City of Cleveland, No. 1:13 cv 1930 (N.D. Ohio Mar. 1, 2016)

On remand from the Sixth Circuit, the Northern District of Ohio has granted the Cleveland Police Department summary judgment in a case where an incoherent man, swinging a machete in his front yard in the presence of his family members, was surrounded by five officers and shot after repeated Taser attempts failed. The family members claimed that the man was not making life-threatening gestures when shot and that there were issues of fact precluding summary judgment as to whether the City 1) provided inadequate training to its officers, 2) ratified the alleged unconstitutional actions of its officers, 3) had inadequate hiring procedures, and 4) had a policy, practice, or custom of failing to discipline officers who used excessive force.

Plaintiff failed on all four issues. First, plaintiff had not introduced credible evidence of substandard training practices. Second, plaintiff had clearly identified the allegedly unconstitutional acts ratified by the City and had not named a ratifying official with "final decision making authority"—an element required under Sixth Circuit precedent. Third,

plaintiff had not shown that the City's decision to hire one of the officers—who had previously been reprimanded for excessive force—rose to the level of "deliberate indifference." Fourth, plaintiff did not demonstrate that the City's "policy, custom or practice" of inadequate disciplinary action was the moving force behind the shooting.

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Real Estate: In Landmarks Preservation Hardship Claim, City Has Discretion to Apply its Own Estimates in Calculating Potential Return to Owner

Stahl York Ave. Co., LLC v. City of N.Y. Landmarks Preservation Comm'n, No. 15-2000 cv (2d Cir. Mar. 7, 2016)

Concluding four years of litigation, the Second Circuit has upheld a Southern District holding that a landlord was not denied substantive due process where the City's Landmark's Commission refused to accept the plaintiff's future returns calculations *per se*. The landlord had claimed that the Commission's discretion was narrowly circumscribed and that it had to find a hardship based on the landlord's projections.

The court saw otherwise, finding that, although the relevant law states that the Commission "shall" grant hardship relief if a landmarked property is not capable of earning a reasonable return, that law also affords the Commission considerable discretion to determine whether an applicant has made the requisite showing of return. Here, the Commission disagreed with the landlord's projected future rents and substituted higher figures—and replaced several other conservative financial assumptions used by the landlord.

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Search and Seizure: Requirement that Police Knock and Announce at Shack on Curtilage is Not Clearly Established for §1983 Purposes

Mendez v. County of Los Angeles, Nos. 13-56686/57072 (9th Cir. March 2, 2016)

After police announce and knock at a residence, it is not clearly established that they must also knock and announce at a shack located on the curtilage, according to the Ninth Circuit.

In 2010 Los Angeles County Police responded to an officer's request for assistance after he believed he saw a wanted a parolee. Various officers were dispatched,

including two that went to a house they were advised had people living in the backyard. The officers entered the curtilage of the house by opening a gate and then opened the door to a shack in the backyard and shot the two occupants who lived there. The Circuit Court affirmed the trial judgment that the officers were not entitled to qualified immunity because they searched the shack without a warrant and such search violated clearly established law, given they were within the curtilage of the property and caused the plaintiff's proximate injuries.

Simultaneously, the Court also held the officers violated the knock-and-announce rule with regard to the shack in the backyard. However, the Court held the law on this point was not clearly established since a reasonable officer that knocked-and-announced at the front door to a residence could not be expected know they had to do the same for the shack within the curtilage.

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Trials: Claimant Adequately Exhausted Administrative Remedies Under Ohio Prison Complaint Process

Troche v. Crabtree, No. 15-3258 (6th Cir. Feb. 25, 2016)

Where Ohio's prison complaint scheme did not clearly articulate how a claimant was to progress through the process, a prisoner's §1983 action before completing the Ohio process was not a failure to exhaust administrative remedies.

Shannon Earl Troche, a Southern Ohio Correctional Facility inmate, alleged he was beaten by a corrections officer. He ultimately brought a §1983 suit against the officer, which was dismissed by the district court for failure to exhaust his administrative remedies. He appealed and the Seventh Circuit reversed. The Circuit Court noted the Prison Litigation Reform Act requires administrative exhaustion and requires the inmate take advantage of each step the prison makes available to resolve the claim. In Ohio that is a three-step process that statutorily authorizes the inmate to proceed to step two if no response from step one is received within a reasonable time, but provides no such authorization from step two to step three if no response is received. In the case, the Court found Troche never received a response at all at step two and thus had nothing to appeal, so he sent a letter to the prison staff asking about his case. The Court found "it cannot be said that [he] did not exhaust his administrative remedies because he failed to do something not specified, outlined, or required by his prison's grievance procedure."

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Trials: Filing Fact-Based Appeal is Grounds for Sanctions

McDonald v. Flake, No. 14-6258/6370 (6th Cir. Feb. 29, 2016)

The Sixth Circuit has imposed sanctions against a police officer and the City of Memphis, finding that they filed appeals on spurious grounds in a police excessive force case.

As several couples walked down a street in Memphis, Tennessee's entertainment district, a group of off-duty police drinking in a parking lot made racial slurs, calling the passing women "snow bunnies." When the passers-by responded, they were beaten in the course of "resisting arrest" and had to be hospitalized. The Sixth Circuit upheld the lower court's finding on plaintiff's §1983 claim that being attacked by plainclothes, intoxicated police who were trying to arrest them after a verbal exchange precipitated by the officers violated clearly established constitutional rights. The Circuit also upheld liability against the City based on a policy of allowing off-duty police to congregate and drink in public.

Finally, the Circuit granted plaintiff's claims for sanctions against the individual officer and the City for attorney's fees for filing a frivolous appeal. An appeal is frivolous if it obviously lacks merit and is "prosecuted for delay, harassment, or other improper purposes." The Circuit Court found the officer's appeal was solely fact-based and ignored settled law and the direct admonition of the district court that the plaintiff's facts must be accepted. The Court also found the City's appeal hinged on pendant jurisdiction but its argument demonstrated clearly that there was no interdependence, and thus the appeal was "obviously without merit." Both the officer and the City were sanctioned by the Sixth Circuit.

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