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Education: Student Has No Constitutional Right to Be Protected from Bullying by Other Students

Bridges v. Scranton School District, No. 14-4565 (3d Cir. Mar. 14, 2016)

The Third Circuit has declined to find in favor of a child who was bullied in school, citing *DeShaney* and other precedent for the proposition that the state is not liable to individuals for violence inflicted by other private citizens.

Parents of the only African-American student in a first grade class brought Title VI discrimination and Fourteenth Amendment substantive due process claims under § 1983 based on allegations that their child had been subjected to bullying by other students and discriminatory treatment by the teacher.

Affirming the district court's grant of summary judgment to the defendant school district, the Third Circuit cited *Morrow v. Bulaski*, a Third Circuit school bullying decision which had relied on the Supreme Court's *DeShaney* opinion that state actors are not liable under the Due Process Clause for failing to protect an individual against private violence. Although *DeShaney* had referenced a "special relationship" exception and *Morrow* defined a "state-created danger" exception, neither of these was present. Compulsory school attendance laws and the "concomitant *in loco parentis* authority and discretion that schools necessarily exercise over students" did not create a special relationship-based duty to protect students from other students. The state-created danger theory required a showing that the school district took action which "shocks the conscience" and affirmatively subjected the plaintiff to greater danger than if no action had been taken. This was not the case; if anything, the state had failed to act.

The teacher's own alleged acts of bullying did not shock the conscience and did not support a *Monell*- based failure to train claim. Finally, the teacher's describing the student as a "gabber" did not evidence a hostile and discriminatory environment for Title VI purposes—contrary to the parents' assertion that "gabber" was a code word for the more racist term "uppity," the word merely meant "talkative."

LINK

Equal Protection: Use of Race in Denying Medical Treatment Violated Equal Protection, But Right Was Not Clearly Established

Mitchell v. State of Washington, No. 13-36217 (9th Cir. Mar. 14, 2016)

A prison's denial of an inmate's request for a particular Hepatitis C treatment--based on data suggesting that the remedy was largely unsuccessful in African-Americans--required strict scrutiny due to the potential for invidious discrimination, according to the Ninth Circuit. However, although the use of race in such a context was a constitutional violation, it had not yet been clearly established, and the defendant was entitled to qualified immunity.

George Mitchell, an African-American male, was civilly committed in 2003 as a sexually violent predator. He was diagnosed with Hepatitis C prior to his commitment. One treatment option for this condition is "interferon and ribavirin," however, when he requested such treatment, the supervising doctor for the civil commitment program refused to prescribe it because studies showed it was largely unsuccessful for African-American males and because Mitchell's disease had not progressed such that the severe side effects of the treatment were justified. Mitchell filed suit, alleging his equal protection rights were violated because the doctor inappropriately considered race in his treatment decision. The district court rejected Mitchell's claim because it held the doctor did not act with discriminatory intent.

On appeal, the Ninth Circuit noted that neither it nor the Supreme Court had ever determined whether strict scrutiny applies when a state actor uses race in a medical treatment decision, but that such a standard should apply given the potential for invidious and illegitimate use of race-based motivations in the medical treatment arena. It then held that despite the fact Mitchell set forth facts sufficient to show that race was used by the doctor explicitly in his medical treatment decision and the state's concession of that fact, qualified immunity was justified given that such a constitutional violation was not clearly established. The Circuit Court determined the right at issue was "using race-related success-of-treatment data as a factor in making a medical treatment

decision" and that a reasonable official would not have been on notice that doing so would be unconstitutional.

LINK

Guns: Right to Possess Firearms for Personal Protection Includes Stun Guns

Caetano v. Massachusetts, No. 14-10078 (U.S. Mar. 21, 2016)

Expanding on *Heller,* the Supreme Court has unanimously reversed a Massachusetts Supreme Court decision that upheld a state law prohibiting the private possession of stun guns. The case involved a woman who had brandished a stun gun to fend off threats of bodily harm by her ex-boyfriend.

The Massachusetts court had offered a three-way rationale for its holding that the Second Amendment does not extend to stun guns. First, it explained that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." Second, it asked whether stun guns are "dangerous per se at common law and unusual," referencing the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." The Supreme Court found that both of these arguments failed in light of *Heller's* analysis that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."

Finally, the Massachusetts court used "a contemporary lens" and found "nothing in the record to suggest that [stun guns] are readily adaptable to use in the military." But *Heller* had rejected the proposition "that only those weapons useful in warfare are protected."

LINK

Police: Aggressive Action to Subdue Noncompliant Traffic Law Arrestee is Justified As Split-Second Decision making

Brown v. Makofka, No. 15-1537 (3d Cir. Mar. 17, 2016)

The Third Circuit has upheld a lower court decision that police were justified in lifting a man from his motorcycle, throwing him to the ground and twisting his

arms behind his back to effect a traffic arrest, despite the plaintiff's assertions that he was complying.

The case arose after officers saw the plaintiff apparently riding his motorcycle on the sidewalk, although the plaintiff alleged that he was merely sitting on the cycle and pushing himself along. The motorcyclist was unhelpful in providing his license and registration and then tried to avoid being handcuffed, eliciting the rough police response. Noting that evaluation of excessive force involves asking whether "from the perspective of the officer at the time of the incident and not with the benefit of hindsight," the Court found that such force was objectively reasonable: "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Here, the officers were forced to make a split-second judgment about the amount of force needed to arrest the plaintiff, who was physically resisting arrest by crossing his arms and gripping his protective vest so that the officers could not handcuff him, as supported by video evidence.

The Third Circuit agreed with the lower court that the plaintiff's federal false arrest claim failed, because police clearly had probable cause to arrest, having seen him driving on the sidewalk. However, it reversed and remanded on the New Jersey false arrest claim, because the New Jersey Supreme Court has been less adamant about the right to arrest for traffic infractions: "[t]he exercise of the statutory power to make warrantless arrests for traffic offenses cannot arbitrarily and unreasonably infringe on 'the fundamental constitutional rights guaranteed to all citizens.'"

LINK

Religion: Planning Commission's Denial of Use Permit Is Not Least Restrictive Means of Promoting Public Health and Safety Where City Staff Has Recommended Conditional Approval

Harbor Missionary Church Corp. v. City of San Buenaventura, No. 14-56137 (9th Cir. Mar. 14, 2016)

Reversing a district court, the Ninth Circuit has found that the absolute denial by Ventura, California of a church's request for a conditional use permit constituted a substantial burden on religious exercise.

In 2008 Harbor Missionary Church began an outreach program to serve the homeless in Ventura. The program consisted of providing spiritual guidance, religious teaching, prayer, clothing, counseling, and other support to the homeless. The Church states its belief that homeless ministry is part of its religious dictates and constitutes part of its believers' sacred duties. In 2013 Ventura informed the Church that it needed a

conditional use permit to operate the program and, after staff met with the Church and developed a report recommending conditional permit approval, the Planning Commission denied the permit. The Church filed suit under the RLUIPA, alleging that Ventura infringed on its First Amendment rights and seeking a preliminary injunction. The district court rejected the Church's claim, holding it failed to show the permit denial constituted a substantial burden on its religious beliefs and that, even if it did, ending the program was the least restrictive means of advancing Ventura's compelling interest in public health and safety.

On appeal the Ninth Circuit reversed, holding the permit denial prevented the Church from conducting its ministry – an integral part of its religious exercise – which the Court found substantially burdened its religious exercise. Moreover, the Court rejected the district court's conclusion that shuttering the program was the least restrictive means to address Ventura's interest in public health and safety since the staff's recommendation that the permit be approved with conditions evidenced the availability of a less restrictive option.

LINK

Search and Seizure: Unnecessary Search of Female Inmate by Male Guard Violates Prisoner's Limited Right of Bodily Privacy

Harris v. Fischer, No. 14-2957 (2d Cir. Mar. 15, 2016)

Reversing in part a district court grant of qualified immunity to prison officers, the Second Circuit has held that prisoners have limited rights of bodily privacy, particularly involving searches of females by male guards and vice versa.

The case arose where a female inmate at New York's Bedford Hills Correctional Facility had blocked her window with cotton from her mattress. Three female officers entered her cell to remove the blockage, demanded to know if she had any more cotton, and ultimately threw her to the ground, lifted her smock, and forced her to allow a male officer to visually inspect her for mattress cotton. The Second Circuit found that her Fourth Amendment claim regarding the visual body cavity search survived: the inmate retained a limited right to bodily privacy, there were disputes of fact concerning whether the search occurred and the officers' justification, and there was no evidence that she was in such imminent danger of harming herself that the search had to be conducted immediately by the male officer at the scene.

The inmate's Eighth Amendment excessive force claim also survived because, inter alia, the appellate court could not discern whether the district court adequately

considered the possibility that the alleged search offended contemporary standards of decency:

> While all forced observations or inspections of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex. The desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. For this reason, courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances. . . . A prisoner has a constitutional right to bodily privacy.

LINK

Speech: Judgment Notwithstanding Verdict Required Where City Held Liable for Retaliation Even Though Mayor Did Not Have Authority to Take Retaliatory Action

Advanced Technology Building Solutions, LLC v. City of Jackson No. 15-60069 (5th Cir. Mar. 14, 2016)

The Fifth Circuit has upheld a lower court's reversal of a jury award in favor of a developer which alleged that it was denied public funding assistance because of comments about the mayor's cronyism, agreeing with the lower court that the mayor lacked the authority to cause such denial of funding.

Advanced Technology Building Solutions (ATBS) sought to redevelop a bank building in Jackson, Mississippi and sought financial support from the Joint Redevelopment Authority (JRA) – a distinct public entity – in the city to do it. The JRA supported the project, even issuing a letter to that effect, but ultimately the financing was not forthcoming after ATBS failed to provide certain financial documents and the city's already-existing debt became a concern, according to the city. According to ATBS and its owner, the financing fell through only after ATBS's owner made derogatory statements about the mayor and allegations about cronyism in regard to another local project. ATBS sued under § 1983, alleging it was retaliated against based on the owner's comments. A jury found for ATBS, awarding $600,000, but the judge held in a judgment as a matter of law that the mayor lacked policymaking authority and thus could not be liable, thereby reversing the jury.

On appeal the Fifth Circuit held, despite a lack of absolute clarity in Mississippi law, that the mayor does not have the power of the purse and thus could not be liable, but rather the city council would have had to approve of the funding, meaning as a matter of law

the lower court correctly overruled the jury. ATBS then argued "in practice" the mayor controlled the JRA, but the Circuit noted though the mayor appoints its members, they can only be removed for cause and have an independent executive director, thus it rejected the theory of *de facto* authority and affirmed the lower court.

LINK

Takings: Requirement That Private Employer Indemnify County for Damages Caused by Moonlighting Officers Is Not Taking of Property Without Due Process

Blue Martini Kendall, LLC. V. Miami Dade County, No. 14-13722 (11th Cir. Mar. 17, 2016)

Where a private entity which employed off-duty Miami Dade County police officers was required to reimburse the County after the officers caused damage or injury for which the County was found responsible, such indemnity was not a taking in violation the Fourteenth or Fifth Amendment.

In 2010 two off-duty Miami Dade County officers were moonlighting for the Blue Martini bar when they got into an altercation with two patrons and arrested them. The County settled with the patrons, but Blue Martini appealed the district court's ruling that it was required to indemnify the County under Fla. Stat. § 30.2905. On appeal to the Eleventh Circuit the Blue Martini argued, for the first time, the law violated the Fourteenth Amendment by depriving it of its property without due process of law. Given that the issue posed a pure question of law, was likely to be repeated, and raised an issue of great public concern, the Circuit exercised its discretion to decide the claim.

The Court first held rational basis review was the appropriate standard given that the Florida statute did not discriminate against a protected class and did not implicate a fundamental right. Under that deferential standard, the Circuit disagreed with Blue Martini's argument that there was no legitimate governmental interest in shifting liability to the private employer when an off-duty officer moonlights. Instead, the Court found many legitimate reasons for the law--saying, for example, that legislators could have determined that the public should not bear the cost for police actions when the officers are privately contracted. Blue Martini could not overcome the heavy burden of the presumption of validity which rational basis provides and failed to refute every possible rational basis for the law. The appealed faltered.

LINK

Trials: Court's Conversion of Motion to Dismiss into Summary Judgment Did Not Prejudice Plaintiff Who was Fully Apprised and Had No Additional Evidence

Miller v. Means, No. 15-5557 (6th Cir. Mar. 14, 2016)

A district court properly converted a university's motion to dismiss into a summary judgment motion in a Due Process termination claim, the Sixth Circuit has found.

In 2009 Charles E. Miller was hired as the general manager of a public radio station at Northern Kentucky University, but by 2013 the station had poor finances and the school fired him. Miller sought reprieve through the administrative process and followed the grievance procedure, but his termination was affirmed at its conclusion. Miller then sought reprieve by filing a § 1983 suit alleging the school – a government actor – failed to provide adequate process and that he had a protected interest in his employment.

The district court granted the school's motion to dismiss, holding Miller failed to establish a constitutional violation since the employee policies on which Miller relied – specifically that "unless immediate discharge is warranted, appropriate discipline procedures will be followed before an employee is terminated" – did not create a protected property interest. Miller appealed solely on procedural grounds, arguing the district court erred converting the school's motion to dismiss into a summary judgment motion. The Sixth Circuit disagreed, finding the lower court properly converted the motion and that Miller could not have been surprised by the conversion, given the motion to dismiss was "functionally equivalent" to a summary judgment motion, and thus he was provided the reasonable opportunity to reply to the federal rules mandate. The Circuit Court further found that Miller could not have provided additional relevant evidence, because the university's written policies were dispositive of the issue in the case.

LINK

Trials: Wearing of Stun Belt In Front of Jury Does Not Impair Criminal Defendant's Right to Fair Trial

Adams v. Margaret, No. 07-3688 (6th Cir. Mar. 15, 2016)

Requiring a violent and dangerous criminal defendant to wear a stun belt under his clothing while in the courtroom before a jury did not violate the defendant's right to a fair trial, according to the Sixth Circuit.

A jury convicted Stanley T. Adams of burglary, kidnapping, two counts of rape, and three counts of aggravated murder, and ultimately sentenced him to death. He filed numerous post-conviction relief motions, one of which included an argument that being forced to wear a stun belt deprived him of a fair trial. After the state courts denied the petition, the federal district court followed suit, leaving the Sixth Circuit to review whether the stun belt prevented Adams from getting a fair trial.

The Court affirmed the lower courts, holding that the trial court did not make an unreasonable factual determination about the need for the belt. It noted the trial court conducted an evidentiary hearing, giving law enforcement the opportunity to speak about why the stun belt was advised; heard counsel's arguments on the issue; reviewed the mental health evaluations of two professionals that advised Adams had trouble controlling his behavior; recognized he previously threatened to physically harm his previous defense counsel; and took into account his violent history, including that he was convicted and sentenced for rape and murder in an unrelated case. Supreme Court precedent in *State v. Deck* finding prejudice where a defendant wore visible shackles before the jury was inapplicable here; the stun belt was hidden beneath the prisoner's clothing.

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