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IMLA NEWS
December 16, 2021

Featured Case:

False Claims: Confidentiality Requirement Does Not Violate First Amendment; Potential *Qui Tam* Recovery is Too Speculative for Local Agency Law Claim

Dankanich v. Pratt, no. 21-1008 (3d Cir. Dec. 9, 2021)

Andrew Dankanich and Nicholas Marrandino (Appellants) worked for the Philadelphia Parking Authority (PPA) until being terminated in 2017. During their tenure, they became aware of a "conspiracy" among high-ranking PPA officials to fraudulently secure contracts worth roughly $100 million for Conduent State and Local Services, Inc. (Conduent) to service the PPA's Red Light Camera program. Conduent failed to remit millions of dollars in penalties, they alleged.

The Appellants brought a *qui tam* complaint under Philadelphia's False Claims Ordinance, Phila., Pa., Code §§ 19-3601 to -3606, which allows "[a]ny person" to submit to the City Solicitor a proposed complaint seeking to recover, on the City's behalf, any fraudulently acquired City property or money. *Id.* §§ 19-3602, -3603(2).

Under that ordinance, the City Solicitor may take one of four actions: bring a civil lawsuit on behalf of the City; designate the person who brought the complaint to sue in the name of the City (in which case the City Solicitor may still dismiss the action at any point and still retains "sole authority" over settlement); take no action at all; or "[p]roceed in any other manner the City Solicitor deems appropriate." *Id.* § 19-3603(2), (6)(b).

As is the incentive for all *qui tam* actions, the Appellants stood to receive a share (typically between ten and thirty percent) of the amount recovered. And, similar to other

qui tam laws, the Philadelphia statute required that all information provided by the Appellants or gathered by the City Solicitor be kept confidential.

The Appellants submitted their proposed complaint in October 2018. The then-City Solicitor, Marcel Pratt (also an IMLA Board member at the time) declined to either designate the Appellants to file the complaint or to bring suit on behalf of the City, concluding that "the False Claims [Ordinance] did not apply;" because the Commonwealth of Pennsylvania rather than the City ran the PPA's Red Light Camera program, the City could not claim that it was defrauded even if the allegations were true. The Appellants were also advised to keep their allegations and pleadings confidential.

Unsatisfied, the Appellants sued the City and Solicitor Pratt in his official capacity. They alleged that the City's refusal to authorize them to file the proposed complaint or to itself bring suit violated their procedural and substantive due process rights, breached a contract, and caused unjust enrichment. They also asserted that the requirement in the False Claims Ordinance that "any information shared with the City Solicitor" be kept confidential constituted a violation of their First Amendment free speech rights, both facially and as applied. Finally, they asserted violations of the City's Local Agency Law (LAL).

The City moved to dismiss for failure to state a claim, which district court granted in December 2020. On appeal, the Appellants contested only the dismissal of their First Amendment and LAL claims.

First Amendment: The City argued that the Appellants lacked standing for their First Amendment claim. However, the Circuit was satisfied that they had alleged a "specific present objective harm or a threat of specific future harm" sufficient to establish standing. The City had directed Appellants to keep certain information confidential, and that failure to obey was "at [their] own risk" -- a "stern warning" made real by the possibility of $300-a-day fines. "For several weeks until the complaint was unsealed, the Appellants stayed silent out of a fear of punishment from the City, and they thus suffered a First Amendment injury."

But Appellants' facial challenge failed on the merits, because it could not meet the high bar of alleging that "no set of circumstances exist under which the [False Claims Ordinance] would be valid[,]" or, at least, that the ordinance is "overbroad because a substantial number of its applications are unconstitutional[.]" And their as-applied challenge failed to establish municipal liability under *Monell* because they had not alleged any unconstitutional policy or custom. Although they pointed to emails from the City's attorneys demanding that they keep information confidential and stating that "the City has made clear ... its position," that did not constitute an "official interpretation" of the False Claims Ordinance:

> An interpretation in one instance does not amount to a policy or custom. Those emails reflect the City's position on confidentiality in this specific case, not an official position on the interpretation of the ordinance generally. "A mere legal

position, without anything more, is insufficient to constitute an official policy," *Teesdale v. City of Chicago*, 690 F.3d 829, 837 (7th Cir. 2012). , and the Appellants do not point to any unconstitutional City conduct beyond the decision leading to this case.8 *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (holding that "a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*" absent evidence that the incident was caused by an existing policy).

Local Agency Law. Here, the City also had the better argument. The Appellants posited that their interest in the potential proceeds of the *qui tam* complaint was protected by the LAL, such that the City Solicitor's denial of their complaint was an "adjudication" from which they could seek relief. The City responded that that Pennsylvania courts "uniformly h[o]ld that, to be adjudicatory, a decision must impact a property interest protected by due process." The Circuit agreed: any contingent interest the Appellants may have had in the potential proceeds of a *qui tam* lawsuit was not covered by the LAL, which does not protect "amorphous interests[,]" "theoretical" possibilities, or "remote, future, indirect or speculative rights."

Despite Appellants' efforts to construe the City Solicitor's denial as reviewable because it left them with "no other forum [in which] to assert their 'rights, privileges, or immunities,' " that argument failed in light of the well-established principle that an agency decision is a reviewable adjudication only if it "impacts on a person's personal or property rights, privileges, immunities, duties, liabilities, or obligations."

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Short Summaries:

Antitrust: No Group Boycott, No Price-Fixing Scheme; Oakland Cannot Prevent Raiders' Migration to Vegas

City of Oakland v. Oakland Raiders, no. 20-16075 (9th Cir. Dec. 2, 2021)

Today, the Ninth Circuit upheld dismissal of Oakland's suit against the Raiders and the NFL concluding that while the city had standing it could not allege an anti-trust violation based upon the actions of the Raiders and the NFL. As someone who was an avid fan of Johnny Unitas, Lenny Moore and a host of Baltimore Colt greats and whose heart was broken when a Mayflower moving van took the team to Indianapolis (and who understands the similar feelings of those in Cleveland when their Browns became the Ravens), I question how the NFL is not a monopoly, but congratulations to the St. Louis team who recovered for that city's loss.

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Section 1983: Water Authority Employee's Preventing Filming of Arrest May Be "Under Color of Law"

Aguilar v. Moyer, no. 21-cv-595 (M.D. Pa. Dec. 7, 2021)

This is a magistrate's decision from Pennsylvania involving what should lead to some really important teaching points. I've tried to identify what I think are three below; if you see others, please pass them along.

The facts involve a family whose water was cut off. The husband called to ask to have it turned on, but according to him, the water authority said no one was available to respond. Shortly after, the husband meets a man from the water authority on the property who when asked if he's there to turn the water back on, asserts that he's there to make sure it stays off. As you might imagine, things deteriorate from there--and this is the Plaintiffs' suit so at trial the facts may play out differently, but from the Plaintiffs' perspective, the fellow from the water authority calls his son, who is a police officer. When the officer arrives, the wife begains filming at some point as the officer asks the husband for ID but is refused. The officer then pulls the husband from the car and begins the arrest process, while the father (water authority guy) knocks the phone from wife's hands to prevent her from recording the events.

So, the wife sues for First Amendment violations and battery. Defense claims water authority guy was not acting under color of law; i.e., just acting in his private capacity, therefor no 1983 liability, and even assuming he was acting under color of law, qualified immunity applies as no case has previously asserted that it's okay to film any government employee, only police. The magistrate concluded that on the pleadings it's not clear the water authority guy was either acting or not acting under color of law, so the case must go forward--and it's pretty clear in the Third Circuit that folks can film government employees under the First Amendment.

Teaching Points:

- Defense that action was not under color of law is something to consider always when 1983 is involved. It's difficult because the rules are somewhat conflicting, as a person acting in an official capacity will be seen to have acted under color of state law even if the basis for acting was purely personal *Barna v. City of Perth Amboy*, 42 F.3d 809, 815-16 (3d Cir. 1994), but a public employee who pursues purely private motives and whose actions are not connected with the employee's governmental position is not acting under color of state law. *Bonenberger v. Plymouth Twp*., 132 F.3d 20, 24 (3d Cir. 1997).
- Government employees should expect that they will be filmed, and policies should be developed to deal with when and where government can restrict filming; for example in sensitive areas, in private settings--but municipalities should also make sure that employees do not act rashly in the heat of the moment to restrict someone from filming them.

- We see a number of cases from small communities where someone calls a relative on the police department to take up their cause. I'm not sure if you can have policies in place to restrict police officers from responding to a relative's (or close friend's) call for support, but wouldn't it be nice if you could? Most of us would recognize a conflict if asked to opine on a matter singularly important to a relative, so maybe such a rule could apply to police departments, recognizing thar emergencies sometimes require a different application of policy.

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Speech: Police Action to Separate Journalist from LGBTQ Activists is not Clearly Established First Amendment Violation; Qualified Immunity Applies

Saved Magazine v. Spokane Police Dep't, no. 20-36073 (9th Cir. Dec. 9, 2021)

As an elderly person I hope you'll appreciate my distraction over the impact of the CPI on my pension income, so I apparently missed a great case yesterday from – wait for it – the Ninth Circuit.

The city's library hosted a book reading event--"Drag Queen Story Hour"--that inevitably created some protests and counterprotests. The Spokane Police Department separated the two groups to keep order. A person we'll call the Plaintiff, presented a tag labelled "Press" and asked to be able to cover the protests. The police assigned the "journalist" a police officer for security (according to the "journalist" because they felt it was a fake press pass). The police officer escorted the "journalist" through the crowd when one of the protesters (maybe a counter protestor but I hate trying to pick sides) stopped the "journalist" to engage in dialogue. The protester accused the "journalist" of promoting violence against gays and the police officer brought the conversation to a close telling the "journalist" that the purpose for being there was to cover the protest story, not to be the story itself (actually the officer was much more articulate).

Eventually, the officer escorted his charge through the protest and was thanked and they parted. Within a short time, a purported news organization (also called the Plaintiff) wrote the city and asked for its policies, etc. on these types of journalistic interactions. What I think was an exceptionally bright response by an assistant city attorney, the attorney asked for information about how the city interfered with the "journalists'" press rights. The suit followed and ultimately was dismissed for failing to state a cause of action and granting qualified immunity to the officer.

The gist of the qualified immunity discussion rested on the fact that the suit did not challenge the city's decision to separate the protestors and counter protesters, so the officer's decision to forestall the "journalists'" dialogue was not clearly a violation of the First Amendment, since someone would need to know what protestors were and what

counter protestors were each pushing – so, while content based, there was precedent to do so. Further, in enforcing the separation policy, the officer was not enforcing a clearly unconstitutional policy, so was entitled to the immunity.

One of the defenses that found its way into this case – the Plaintiffs sued the "police department." The court properly concluded that the police department is not an entity subject to suit. It nevertheless held that had the suit been against the city, that the claim failed to show a policy or custom, but if it showed anything it was a sporadic or one time event.

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- As a teaching point remember that in many jurisdictions a police department is not a separate entity from the city or county and just like other agencies of the government is not subject to suit as independent entities. In some instances that distinction may not make much of a difference in the long run, but certainly worth knowing. The response by the city attorney was also very thoughtful. As this case shows, we are faced more and more often with people who are doing whatever they can to trip up governments to then bring 1983 actions in the hopes of hitting the litigation lottery.

Apparently, my surprise Friday in reading the decision from Spokane led me to attribute too much critical analysis to the Ninth Circuit. One of our members pointed out that the Ninth Circuit did not actually hold that you cannot sue a police department as a "non-entity," it actually decided that because the Plaintiffs did not challenge the lower court's decision holding to that effect, the panel would not address it. I apologize for any confusion. I may be mistaken but my recollection is that like standing to sue, parties must be recognized entities to sue or be sued. Usually, for governmental entities that status will be conferred by statute and like private corporations, constituent subdepartments are not *sui generis* absent some statute making them so. Whether as a matter of practice it makes sense to raise the issue may depend on the specific facts of the case.

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Class Actions: District Court Inadequately Articulates Grounds for Granting Certification in Car Towing Case; Reversed

Santiago v. City of Chicago, no. 20-3522 (7th Cir. Dec. 13, 2021)

Yesterday, the Seventh Circuit concluded that a lower court had improperly certified a class action against the City of Chicago involving its towing programs and laws. I think it fair to say that the decision excoriated the lower court for lack of diligence, but may not eliminate the action on remand. The case involves a disabled woman whose van is occasionally used for transport. The vehicle sits for long periods of time on the street

parked in the vicinity of the woman's home. The woman's daughter drives her to various activities but not often. Someone complained about the van lingering and a city official tagged it with a sticker advising that the van was in violation of the Chicago ordinance and must be removed. The daughter saw the sticker and pitched it. She also moved the van. Nevertheless, the van was towed and ultimately disposed of. The city sent two notices to the woman about the van and its disposition, but she claimed not to have received them.

The suit sought class certification for a number of causes of action including due process and other violations of the rights of Chicagoans (and presumably others who may also leave vehicles on the streets of Chicago). The pleadings were not clear as to which causes of action should be considered class actions and how the woman was a representative of the class and the lower court's decision granting class certification was equally unclear as to its analysis of each claim and the basis for granting class status. Thus, reversed and remanded.

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- The decision provides a copy of the notice sticker and explains how it is used. For those advising agencies that tow vehicles, the case provides an insight into some claims that apparently could be making the rounds asserting due process issues associated with tows and the disposition of impounded vehicles.

- It's probably fair to say that all of us should not only look at our policies regarding tows, impoundment and disposition but also get a good handle on what may be happening in real life to advise clients on protecting against due process claims (among others). Over the years, I found that many clients adopt policies that are great on paper but may not be adhered to or are misunderstood. It's a good idea to do a legal audit of high-risk practices on a regular basis, certainly annually. I think this is a high-risk area: towing, impoundment, and disposition of impounded vehicles.

Courts: Sixth Circuit Declines en banc Review of Massive National Challenge to Biden/OSHA Covid Mandates

In Re: MCP No. 165, Occupational Safety & Health Administration, Interim Final Rule: Covid-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, no. 21-7000/4027-4133 (6th Cir. Dec. 15, 2021)

Today, the *en banc* Sixth Circuit, having before it a multitude of cases seeking review of OSHA vaccine mandates, found insufficient numbers of the judges interested in taking on the cases *en banc* before a panel could ultimately decide the case. Of some interest are the dissenting opinions of Chief Judge Sutton (joined by several others) and Judge

Bush who telegraph their likely votes should the case get to them. As to the former, he questions whether OSHA was clearly given the authority to pass a vaccine mandate and Judge Bush questions whether Congress could even give it that authority. For those who enjoy history, there's a lot in there and Judge Bush discusses the history of vaccines and the federal response to the epidemics/pandemics that spawned them.

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THIS JUST IN: In Memoriam--Fred Morrison

Fred A. Morrison, former IMLA member, longtime city attorney for Leesburg, Florida and senior partner at McLin Burnsed, died on December 7, 2021. He was 67.

Additional details provided by journalist Frank Stansfield in the *Daily Commercial* follow: "It's sad. We're going to miss him," said Mayor John Christian. "He was very knowledgeable, one of the most knowledgeable attorneys I've ever known."

"He was a lawyer's lawyer," said Phillip Smith, senior partner and director of McLin Burnsed. "In the office, the other attorneys would come to him to ask how to get something done."

City Manager Al Minner on Monday called him "one of the most eloquent and dignified attorneys I've ever known."

Minner said Morrison has been the city attorney "off and on for about 30 years."

Morrison was a native of Leesburg, "who knew everybody in town," Smith said. He was a "double Gator." He graduated with an undergraduate degree from the University of Florida and earned his law degree there, too.

Survivors include his wife, Susan; daughter Isabella Morrison; and son, Nicholas.

The funeral will be held Saturday at 3 p.m. at Morrison United Methodist Church, with a reception at the Leesburg Boat Club at 4:30 p.m., according to Facebook posts. Beyers Funeral Home is handling the arrangements. Guests are asked to wear red at the funeral

Morrison was generally laid back at City Commission meetings, giving advice when asked but not thrusting himself unnecessarily into the limelight.

He was honest, frank and issued his opinions on facts and the law, Christian said. He stayed out of the politics.

"He kept us from doing something illegal or stupid," Christian said. "He could go from cuddly bear to grizzly bear if someone was being facetious or doing something detrimental to the city."

Morrison joined the Leesburg law firm when he graduated in 1979.

He was a member of Phi Theta Kappa, Phi Kappa Phi and Order of the Coif. Morrison was a member of the Florida Bar under the local government, real property, probate and trust law sections and served as secretary of the Lake County Bar Association for several years.

'A lawyer's lawyer:' Remembering longtime Leesburg City Attorney Fred Morrison (yahoo.com)