International Municipal Lawyers Association
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IMLA NEWS
Issue 7 – April 9, 2015

Employment: Denial of Request to Postpone Post-Termination Hearing Due to Unavailability of Counsel Was Not Deprivation of Due Process

Draper v. City of Festus, No. 14-1127 (8th Cir. Apr. 6, 2015).

The refusal by a City Council to postpone a hearing because counsel for the terminated City Administrator could not attend was not a deprivation of procedural or substantive due process, according to the Eighth Circuit. The plaintiff could have attended the hearing without counsel to answer charges about his alleged improprieties; given that the allegations of his misfeasance were uncontradicted, termination of his employment was not arbitrary or capricious.

The Festus, Missouri (Festus) City Council (City Council), terminated Terry Draper from his position as City Administrator roughly six months into a three-year employment contract. Draper requested a public hearing before the City Council, which was scheduled for June 27, 2011. On June 2, 2011, six days after receiving notice of the hearing, Draper's attorney notified the City that he had a conflict and asked that the hearing be postponed. The City refused to reschedule the hearing. On June 13, 2011, Draper's attorney again requested a continuance, which the City denied. The hearing took place as originally scheduled. Neither Draper nor his attorney was present. Draper explained in his deposition that he did not appear at the hearing "[b]ecause [he] felt that it was very important for [him] to be represented by legal counsel."

During the hearing, several witnesses testified regarding decisions Draper had made during his tenure as City Administrator. Specifically, evidence was presented regarding Draper's role in the hiring of a less-qualified engineering firm to complete a road project

and act as City Engineer; his authorization of more than $50,000 in repairs to a heating system and more than $2000 for the purchase of new windows without seeking bids; his memorandum purporting to end an employee bonus program for unused sick leave where the City Council had not yet decided to end the program; and his request for a reimbursement check for a hotel stay where he had used a Festus credit card.

Draper brought suit against Festus, the City Council, individual members of the City Council, and the mayor (collectively, the City), alleging violation of his Fourteenth Amendment procedural- and substantive due process rights under 42 U.S.C. § 1983, a § 1983 conspiracy claim, breach of contract, and other claims. He also sought judicial review of the City Council's decision to terminate him under the Missouri Administrative Procedure Act (MAPA). The district court granted summary judgment to the City and upheld the City Council's decision.

HOLDING: On appeal, the Eighth Circuit affirmed.

DISCUSSION: Draper argued that the City's refusal to reschedule the post-termination hearing deprived him of both his procedural due process rights. The Circuit Court disagreed: "A public employee with a protected property interest in continued employment receives sufficient due process if he receives notice, an opportunity to respond to the charges before his termination, and post-termination administrative review." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). "[A]n employee waives a procedural due process claim by refusing to participate in post-termination administrative or grievance procedures made available by the state." *Krentz v. Robertson Fire Prot. Dist*., 228 F.3d 897, 904 (8th Cir. 2000).

Nor did the Circuit Court find a deprivation of substantive due process, which would require a determination that the City's conduct was so outrageous that it shocks the conscience. "The City's denial of counsel's request to reschedule does not rise to that level."

Draper's breach of contract claim was similarly ineffective. Under Missouri law, "[a] breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010). The undisputed facts established that Draper's actions constituted, at the very least, misfeasance. He admitted to sending a memorandum to Festus employees stating that the City Council had abolished the sick-leave-bonus program, even though the City Council had not yet made such a decision. He was required to obtain three bids and City Council approval before authorizing a purchase for more than $500 but authorized the purchase of windows for more than $2000 without obtaining bids or approval.

Finally, Draper's contention that the City violated the MAPA also failed. He argued that the district court erred when it reviewed the City Council's decision as a contested case

under MAPA—and even if the facts did constitute a contested case, the City Council's decision was arbitrary and capricious.

"The key to the classification of a case as contested or noncontested is the requirement of a hearing." (citation omitted). Draper did not dispute that he received notice of the hearing, that a hearing was held, that witnesses testified under oath, that exhibits were admitted, that a record was made, and that a written decision was rendered. Thus, this was a contested case. Furthermore, the evidence before the City Council supported its decision to terminate Draper and the decision was not arbitrary, capricious, or unreasonable.

LINK (last accessed Apr. 8, 2015)

Qualified Immunity: No Immunity Where Police Apply Taser For 26 Seconds To Non-Resistant Arrestee

Goodwin v. City of Painesville, No. 14-3120 (6th Cir. Mar. 19, 2015).

The Sixth Circuit has upheld the denial by the District Court for the Northern District of Ohio of qualified immunity where police responded to a noise complaint and eventually tasered the host of a party in two segments totaling 26 seconds while they handcuffed him. The Circuit refused to find that the host, who became agitated at the police presence and refused to leave his apartment as the officers had requested, was resisting arrest.

David and Rebecca Nall held a small party in their second story apartment in June 2010. Two guests went outside and began arguing with a neighbor, generating a disturbance call to the Painesville, Ohio police. When police approached, they heard yelling inside the apartment and notified the Nalls that the noise would need to be remedied. Ms. Nall told police she would have guests quiet down. Police left the apartment but remained nearby, to confirm that quiet continued.

The noise level soon rose again. As police headed for the apartment, a woman emerged, saying that Mr. Nall was “crazy” and was threatening to kill everyone at the party. Police met Nall at the doorway of his residence and requested that he step outside. He refused, saying he did not need to, and retreated into the apartment. The officers then entered and attempted to restrain Nall. In the process, they discharged a Taser twice, first for 21 seconds, then for an additional five seconds.

Mr. Nall began foaming at the mouth and convulsing. He was taken to the hospital, where he remained for two weeks, and left with permanent brain damage due to oxygen deprivation--he cannot recall life events or remember to care for himself or work and

requires 24-hour supervision. Police initially charged both Nalls with disorderly conduct, but the charges were dropped

The Nalls filed suit against the police, alleging constitutional violations under §1983. The city and the individual officers sought summary judgment based on qualified immunity, which the district court denied. Defendants appealed.

HELD: The Sixth Circuit affirmed.

DISCUSSION: At the summary judgment stage, a qualified immunity case must go to the jury "if the court finds that first, there are genuine issues of material fact as to whether [the Officers] violated [the plaintiff's] Fourth Amendment rights in an objectively unreasonable way and, second, those rights were clearly established at the time of [the plaintiff's] arrest such that a reasonable officer would have known that his conduct violated them."

Whether an officer's force was excessive requires the court to determine whether an officer's actions were "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. Three factors from *Graham v. Connor*, 490 U.S. 386, 397 (1989), frame the analysis: "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight." The first factor weighed in favor of the Nalls, as the issue was a disturbance of the peace due to noise from a party.

For the second factor, the city argued that the witness's statements about Mr. Nall being crazy and threatening to kill everyone at the party showed he was an immediate threat. However, the Nalls countered, arguing that there were numerous pieces of circumstantial evidence from which a reasonable jury could challenge the tasering officer's credibility. Specifically, they pointed out that the witness' affidavit was signed a year after the incident and, "significantly" according to the court, this occurred just one day after the witness was arrested for a DUI--and then just two days after she signed the affidavit the DUI charges were dropped. Moreover, the officers testified that after they spoke with the witness they planned to arrest Mr. Nall for disorderly conduct, a low-level misdemeanor, prompting the plaintiffs to argue that if the police were really worried about the witness report they would have sought more substantial charges.

In addition, the tasering officer failed to start his body camera for his interaction with Mr. Nall, which was a violation of department policy and procedure that this officer had been in trouble for violating before. The Court thus found that the Nalls "do not rely on the abstract possibility that a jury might discredit the testimony of [the witness] and the Officers regarding Mr. Nall's dangerousness. Rather, they present a series of specific facts that could plausibly place the witnesses' credibility at issue in the mind of a reasonable juror." The Nalls prevailed on this factor.

The third and final factor - whether Mr. Nall was actively resisting arrest or evading arrest by flight – was also deemed as weighing in the Nall's favor. The police argued that Mr. Nall's refusal to step out of his apartment when asked was active resistance, verbal hostility, and a deliberate act of defiance. The court found the facts did not bear this out and that case law supported characterizing his refusal to step outside after a single request to do so as only passive resistance, not sufficient to support the use of a Taser.

The next point of possible resistance was Mr. Nall's refusal to comply with directions during and after the two taserings. The city argued Mr. Nall resisted by failing to produce his arms for handcuffing as requested. The court noted the first tasering was 21 seconds long. This, the city conceded, was an atypically long period. It also highlighted that the officer doing it was trained on the Taser and knew or should have known that a typical tasering is five seconds, that a tasering of 15 seconds or longer is considered "prolonged," that tasering directly to the chest increases to the subject, and that involuntary muscle contraction is a result of tasering. Thus, the court found that Mr. Nall's failure to immediately comply with any order during and immediately after tasering was not resistance.

The court framed the general issue before it as "whether an intoxicated misdemeanant, who had not been placed under arrest and who had neither fled nor resisted, had a right not to be tasered twice in his own home for a total of 26 seconds . . ."

The two time frames – the intitial 21-second tasering and the subsequent five-second tasering – presented two distinct constitutional questions. As for the first tasering, the court found that if a simple refusal to exit one's own home—and surrender the heightened Fourth Amendment protections it provides—constituted active resistance of an officer's command sufficient to justify a tasering, it "would undermine a central purpose of the Fourth Amendment."

As for the second tasering, the city argued that "there is no clearly established law stating that a suspect has a right to be free of more than one Taser application when the suspect objectively, reasonably appears to resist arrest." The court refused to give characterize Nall's behavior as resistance, noting that after the initial tasering, Nall was "obviously convulsing and powerless to respond to the officers' commands."

The court denied qualified immunity.

LINK (last accessed Apr. 8, 2015)

Editor's Note: The Oxford English Dictionary permits two forms of the verb referring to use of a Taser (Thomas A. Swift's Electronic Riffle): "Tasering" and "tasering".

Search and Seizure: Texas Regulatory Scheme Allowing Searches for Illegal Wildlife is Adequate Substitute for Warrant

Anderton v. Texas Parks and Wildlife Dep't, No. 14-10297 (5th Cir. Mar. 26, 2015).

Where a state's regulatory scheme provides for notice of a search and includes limitations on the scope of the search, it constitutes a sufficient substitute for a warrant and fulfills Fourth Amendment requirements, according to a Texas case in which Wildlife Department officers entered a private property to seize and destroy breeder deer being held without a permit.

James and Jimmie Anderton had a permit to breed deer in Quinlan, Texas from 2000 to 2010. The permit was not renewed because they unlawfully imported deer from another state, a crime for which they pled guilty under the Lacey Act. The Andertons applied to renew their permit after the convictions, but were denied by the Texas Parks & Wildlife Department (Department). They thus possessed breeder deer but did not possess the required permit for those deer in mid-2010.

In December of 2010 and May of 2011, Department officials entered the Anderton's property and killed all the breeder deer, in front of Anderton's family. The Andertons filed suit, charging the Department with a violation of the Racketeering Influenced and Corrupt Organizations Act (RICO) and alleging deprivation of their Fourth and Fourteenth Amendment rights. The district court dismissed the RICO and constitutional claims under FRCP 12(b)(6) and the Andertons appealed.

HELD: The Fifth Circuit affirmed.

DISCUSSION: Under § 1983 a plaintiff must "(1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." Here the Andertons alleged their rights emanated from state regulations permitting deer-breeding operations. They claimed first that the Department unconstitutionally searched their property and, second, seized their deer without a warrant.

The court, however, found support for the warrantless entry and seizure from *Burger's* administrative search rules for closely regulated business. Like junkyards in *Burger,* the Fifth Circuit found the comprehensive rules regulating deer breeding in Texas were extensive enough. It found (1) "a substantial government interest that informs the regulatory scheme" pursuant to which the inspection was made; and (2) that the inspection was necessary to further the regulatory scheme. It also held that "the statutory or regulatory scheme provides a constitutionally adequate substitute for a warrant," because the scheme put the Andertons on notice of the search and limited the discretion of the officers carrying it out: though searches and seizures could be conducted anytime under the regulations, they were limited to inspecting only pens, or

enclosures holding breeder deer or records relating to such enclosures; and the deer could only be seized after 30 days has passed since the termination, revocation, or suspension of the deer breeder's permit.

The Andertons argued their Fourteenth Amendment substantive due process rights were violated by killing the deer since such an act "shocks the conscience" and was arbitrary and capricious to a degree beyond a mere bad-faith violation of law. The court disagreed. It noted the officers and the Department were not violating state law, but following it. It agreed with the lower court's point that while the allegations "may raise questions related to the most humane ways to kill deer, [they] do not plausibly establish that the officials' conduct was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Moreover, the court pointed out that the Andertons did not have an interest in the deer sufficient for due process protections, because the right to conduct deer breeding is granted or denied by government officials in their discretion.

LINK (last accessed Apr. 8, 2015)

Sovereign Immunity: States Are Immune From Suit Based On Personal-Care Claims Under the FMLA

Bryant v. Texas Dep't of Aging and Disability Services, No. 14-20278 (5th Cir. Mar. 25, 2015).

Tammy Bryant was hired by the Texas Department of Aging and Disability Services (Department) in 2008 as an assistant residence director for the Brenham State Supported Living Center (Living Center). A couple years later she was promoted to a residence director. Just a month after her promotion Bryant took six weeks of leave under the Family and Medical Leave Act (FMLA) to care for her husband after a surgery. During this period Bryant's boss called her between three and ten times to discuss work matters according to Bryant. Returning to work after having taken the FMLA leave, Bryant began receiving negative performance reviews, which had never happened before. She was then reassigned to serve as a residence director for a different unit within the Living Center.

Shortly thereafter Bryant told her supervisor she had high blood pressure and had suffered a mini-stroke and she needed some time off. Then Bryant reported that she had panic attacks and severe depression. Her doctor required her to take two months off work. The note from the doctor for her official FMLA paperwork however, mistakenly said she would take one month off, so Bryant altered the date to reflect what the doctor had actually said. The Living Center supervisors discovered this and reported it to the state Department of Health and Human Services for a fraud investigation. This action

further exacerbated Bryant's stress and anxiety and caused her to extend her leave. Bryant then received a "Notice of Possible Disciplinary Action" because of her "continued failure to obey the work rules of the agency, perform [her] job duties and meet HHS standards for job performance, and follow job-related instructions from HHS supervisors." She was subsequently terminated.

Bryant filed suit against the Department, raising two kinds of FMLA claims – interference and retaliation. She alleged the Department (and her supervisor individually) interfered with her leave by reassigning her when she returned from leave, calling her at home with work related issues, and sending an investigator to her home to threaten criminal prosecution regarding the FMLA paperwork, while she was on protected FMLA leave. She further claimed that the defendants retaliated against her for using her leave and in doing so she "suffered adverse employment actions, including but not limited to, being reassigned to a different unit, receiving various disciplinary actions after taking protected leave, harassment while on protected leave, and the termination of her employment because she exercised her rights under FMLA."

Bryant sought reinstatement as relief. The district court denied the defendant's motion for summary judgment in full holding 1) there were issues of material fact in dispute, 2) the individual supervisor was not entitled to qualified immunity, and 3) the Department was not protected by sovereign immunity. The defendants sought and were granted an interlocutory appeal.

HELD: The Fifth Circuit reversed and remanded, overturning the lower court's denial of sovereign immunity to the Department and reversing the lower court's denial of immunity to Bryant's individual supervisor.

DISCUSSION: The court first dealt with the issue of sovereign immunity for the Department. Generally, states are immune from suit unless they have waived immunity or unless Congress has expressly eliminated immunity by statute. Although Congress did in fact abrogate the states' immunity defense for family-care claims under the FMLA, it did not do so for self-care claims. Bryant argued that by seeking reinstatement as relief she was pleading an appropriate form of prospective relief not barred by the Eleventh Amendment. The court rejected Bryant's argument, holding that the *Ex Parte Young* exception to the Eleventh Amendment she relied on did not apply to state agencies. The Circuit Court thus held that neither it nor the district court had jurisdiction over Bryant's suit against the Department.

As to Bryant's claim against her supervisor, the court first outlined the FMLA's prohibition against "interference" and "retaliation." First, the FMLA states that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under th[e] subchapter," and second, the FMLA makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."

Under the qualified immunity framework the court must first decide whether the plaintiff's allegation, if true, establishes a violation of a clearly established right and then decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident."

The court found that Bryant's supervisor did not interfere, restrain, or deny her FMLA rights. Bryant had taken all of the leave she was entitled to and thus was not denied it. The fact that a criminal investigator appeared at Bryant's house with regard to her questionable paperwork could not be attributed to her supervisor, who had no control over the independent investigation once in motion. Finally, there was no interference with her leave as a result of the few and brief phone calls from her work during her time off because, as the court put it, "a limited number of phone calls cannot reasonably be considered as interfering with an employee's FMLA leave."

LINK (last accessed Apr. 8, 2015)

Trials: Failure to Give "Cats Paw" Instruction Was Harmless Error Where Town Would Not Have Hired Military Candidate Due to Other Factors

Murphy v. Radnor Township, No. 14-2946 (3rd Cir. Mar. 20, 2015).

The Third Circuit has upheld the lower court's refusal to find that the failure to give a "cat's paw" jury instruction (which holds an employer liable for failing to hire a candidate due to his or her military service obligations if a supervisor unduly influenced other decision-makers not to hire) where the failure to hire was due to other factors beyond military service.

In 2009 John Murphy, an Air Force major, applied to serve as the Township Manager for Radnor, Pennsylvania. He and seven other applicants were invited for first-round interviews. Murphy contended that in his interview one of the commissioners spent ten minutes asking about Murphy's military obligation – how much time he spent doing it and how many days he would miss per year based on his obligations. This line of questioning continued until the interim town manager became concerned about the legality of the questions and ushered the commission on to other topics. Murphy did not get a second interview despite that the interim town manager told Murphy he was also one of the commissioners' top four choices. Moreover, the interim town manager said the commissioners had "serious reservations" about his ongoing military obligations.

Murphy sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The district court granted summary judgment for Radnor, holding that, while Murphy met his initial burden of proving that his military obligations were a motivating factor in the town's decision not to hire him, Radnor "adduced sufficient

evidence from which no reasonable jury could find that its reasons for not hiring Murphy were invalid," and therefore overcame Murphy's claim. Murphy appealed and the Third Circuit reversed the lower court. The case then went to trial and the jury found, though Murphy proved his military service was a motivating factor in the decision not to hire him, the town would not have hired him even if it had not taken his military service into consideration. Murphy sought new trial under Federal Rule Civil Procedure 59(a), which the district court denied. He appealed again to the Circuit Court.

HELD: The Third Circuit affirmed the lower court, holding that, even if the district court did err in failing to include the specific instruction Murphy requested, it was a harmless error and thus not a basis for reversal.

DISSCUSSION: Murphy's case against Radnor was brought under both USSERA and Pennsylvania Military Affairs Act, both of which prohibit discriminating against employees based on membership in or an obligation to the military. In 2011 the Supreme Court recognized the "cat's paw" theory of liability under USERRA, under which an employer will be liable "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2011). Murphy argued the district court erred in failing to give an instruction to the jury under this theory.

Radnor opposed a cat's paw instruction in the district court because, it argued, it only applies when a supervisor influences the decision-making of others subordinate to him or her, which was not the case since there was no evidence submitted that anyone was influenced by the commissioner who had grilled Murphy on his military service. Murphy countered that that commissioner was the one leading the interview, and in effect directing it, and that as such he should be treated as a supervisor for the purposes of cat's paw theory.

The Third Circuit held that, no matter which of these arguments were correct, the failure to give the instruction was harmless and not reversible. Even if the failure to give the cat's paw instruction had been erroneous, the court found that it was "highly probable" that the error did not contribute to the judgment at all. The Circuit Court, agreeing with the lower court's analysis in denying the request for a new trial, noted that the cat's paw theory was only relevant to the first issue on the verdict sheet – whether Murphy's military obligation was a motivating factor in denying his employment – and that the jury had found for Murphy on that issue. It was the second issue on which he lost the case, and the cat's paw theory had no bearing on that issue; therefore Murphy was not prejudiced by the lack of a cat's paw instruction, and there was no reversible error in the case. The lower court was affirmed.

LINK (last accessed Apr. 8, 2015)

THIS JUST IN: City Ordinance Banning Outdoor Solicitation Bins Is Enjoined on First Amendment Grounds

We thank IMLA member Abigail Elias for posting the following to yesterday's ListServ:

In a decision dated April 6 in *Planet Aid v. City of St. Johns, MI*, Case No. 14-1680, the Court of Appeals for the 6th Circuit affirmed the District Court's preliminary injunction against the City's ordinance banning outdoor solicitation bins. The decision is based on 1st Amendment grounds, focusing on the "charitable solicitation" aspect of the boxes and cases that have held charitable solicitation to be protected under the 1st Amendment. The court found the ordinance was not content neutral.

You should be able to pull up the opinion HERE.