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Due Process: Attorney Has No Constitutionally-Protected Property Right to Practice Law; No Grounds for Section 1983 Action Against Bar Association

Deters v. Kentucky Bar Association, No. 15-6055 (6th Cir. Apr. 28, 2016)

Rebuffing the latest in a long series of cases brought by a Kentucky lawyer, the Sixth Circuit has upheld the rules of the Kentucky Supreme Court and the Kentucky Bar Association (KBA) which allow Bar Counsel to defer reinstatement of suspended law licenses where the attorney in question has failed to demonstrate a return to ethical practice. The Circuit also upheld KBA rules granting absolute immunity to Bar Counsel in the performance its duties.

Eric Deters, a lawyer admitted in Kentucky, Florida and Ohio, was temporarily suspended numerous times from practice in Kentucky for dishonest behavior before the court. On various of these instances, KBA Bar Counsel moved to prevent automatic reinstatement following the term of the suspension to allow time for further investigation into Deters' actions, as permitted by the KBA rules. Deters' license remained suspended until he appeared before the KBA Character and Fitness Committee. His suspension in Kentucky also caused him to be suspended from law practice in Florida and Ohio.

In 2014, Deters moved to retire his Kentucky law license. However, KBA Bar Counsel intervened, requiring that Deters' pending disciplinary matters be resolved before he be allowed to retire his license.

In several federal court proceedings, he challenged the legitimacy of the KBA rules under Section 1983 and state law, seeking a declaratory judgment that the KBA rules violated his due process rights by failing give him automatic reinstatement to the bar following suspension. He also challenged the automatic immunity afforded Bar Counsel under the KBA rules as unconstitutional. Each of these cases was decided against Deters, ultimately resulting in Rule 11 sanctions of nearly $40,000 from state and federal court proceedings. He appealed to the Sixth Circuit (and even filed for certiorari before the United States Supreme Court, which was not granted).

The Circuit upheld the lower court. In order to support his Section 1983 claim for denial of procedural due process, Deters first had to show that he had a cognizable property right which merited Fourteenth Amendment protections. This he could not do:

> [I]t has long been the case that a license to practice law is not an absolute right but a privilege only. (*citation omitted*). Deters' license to practice law in Kentucky was, and continues to be, conditioned on his adherence to the unambiguous standards of conduct prescribed by the Kentucky Supreme Court, along with other requirements for maintaining his membership.

Without a constitutionally-protected property right, Deters' due process claim could not proceed. And the provisions of the KBA which provided absolute immunity to Bar Counsel for damages caused in the course of a disciplinary investigation were therefore not susceptible to a Section 1983 challenge.

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Employment: Denial of Light Duty Accommodation for Pregnant Corrections Officer Creates Inference of Intentional Discrimination

Legg v. Ulster County, No. 14-3636 (2d Cir. April 26, 2016)

Based on the Supreme Court's holding in *Young*, the Second Circuit has found that a pregnant corrections officer who was not offered light duty could proceed with a claim alleging intentional discrimination under Title VII.

Ann Marie Legg worked as a corrections officer in Ulster County Jail in New York. She sought an accommodation to her working conditions when she was pregnant, and was denied such an accommodation by the sheriff. Legg filed suit alleging pregnancy discrimination under Title VII of the Civil Rights Act. The district court granted the defendant's motion for summary judgment and Legg appealed.

While the appeal was pending the Supreme Court decided *Young v. United Parcel Service, Inc*., 135 S. Ct. 1338 (2015), in which the Court held that a facially-neutral

accommodation policy can give rise to an inference of pregnancy discrimination if it imposes significant burdens on pregnant employees that are not justified with respect to the non-discriminatory policy explanation. The Circuit thus applied the Supreme Court's modified *McDonnell Douglas* burden shifting scheme for these cases to Legg's appeal by determining whether: (1) Legg established a prima facie case; (2) the employer then identified a non-discriminatory reason for the policy; and (3) Legg then showed that the non-discriminatory reason was pretext—which she could do under *Young* by presenting "sufficient evidence that the employer's policies impose[d] a significant burden on pregnant workers, and that the employer's legitimate, nondiscriminatory reasons [we]re not sufficiently strong to justify the burden, but rather – when considered alongside the burden imposed – give rise to an inference of intentional discrimination." 135 S. Ct. at 1354.

The Circuit found that Legg provided sufficient evidence under *Young* to proceed to trial since, like the plaintiff in *Young*, she showed Ulster County categorically denied light duty accommodations to pregnant women. The Court thus vacated the lower court and remanded the case with instructions to conduct a new trial.

LINK

Employment: Title VII Allows Back Pay in Addition to $300,000 Compensatory Damages Cap, But Plaintiff Must Demonstrate Offer of Higher Pay

Szeinbach v. The Ohio State University, No. 15-3016 (6th Cir. Apr. 20, 2016)

In addition to seeking $300,000 in compensatory damages, a university professor alleging employment discrimination could seek back pay in based on what other universities would have paid for a similar position, according to the Sixth Circuit—but only if she demonstrated that another university was actually prepared to employ her.

Dr. Sheryl L. Szeinbach worked as a professor at Ohio State University and, after a decade-long career at the school, alleged the school discriminated and retaliated against her in violation of Title VII. After a jury trial she was awarded a little over $500,000 - $300,000 in compensatory damages for emotional suffering and $213,000 for back pay. The University moved for remittitur on the ground that the award was excessive in light of the evidence presented.

Szeinbach opposed the remittitur, arguing the back pay amount was an equitable award, allowable in addition to Title VII's $300,000 statutory cap on compensatory awards, but the district court rejected her argument both because it held her expert did

not use a reliable methodology to calculate the back pay and because she inaccurately based her back pay amount on comparisons to what other universities would have paid her, not the discriminator (Ohio State). Szeinbach appealed.

The Sixth Circuit, looking at precedent, sister circuit holdings, and the goals of the back pay provisions of Title VII, rejected the lower court's reasoning that Szeinbach's back pay could not be based on what a third-party would have paid her. Despite winning this battle, it did not save her appeal. The Circuit ultimately agreed with the lower court that Szeinbach *failed to prove* she was entitled to back pay. It held that Szeinbach's attempt to prove back pay with her own testimony about what other universities would have paid her and an expert's testimony about salaries fell short of reasonable certainty given the expert's methodological shortcomings and Szeinbach's failure to actually get offered a job at another university.

LINK

Employment: Unlike Title VII Substantive Discrimination Claims, Retaliation Claims Only Require Showing of "Materially Adverse" Action

Williams v. Prince William County, No. 15-1711 (4th Cir. Apr. 14, 2016)

The Fourth Circuit has reversed and remanded a lower court Title VII decision which incorrectly applied the more onerous substantive discrimination standard to a retaliation claim.

Carol Williams worked for Prince William County, Virginia when she alleged she was sexually harassed, and subsequently discriminated and retaliated against. She thus filed suit against the county under Title VII for both substantive discrimination and retaliation. The district court dismissed both claims, analyzing both under the *same* standard and holding that she failed to state a claim for either. Williams appealed.

The Fourth Circuit held that the lower court applied too stringent a standard for the retaliation claim. It held that, whereas for substantive discrimination claims plaintiffs must show employer action that *affected terms and conditions of employment*, for retaliation claims plaintiffs need only show a "*materially adverse*" action by the employer. It held the lower court thus erroneously dismissed both claims under the same standard when it should have considered the retaliation claim under a less burdensome standard for the plaintiff.

The Circuit therefore remanded the case to apply the less-stringent standard to Williams's complaint.

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Fracking: Local Ordinances Prohibiting Fracking are Preempted by State Oil and Gas Statute

City of Longmont v. Colorado Oil & Gas Association, 2016 CO 29, 2016 Colo. LEXIS 442 (Colo. May 2, 2016)

City of Fort Collins v. Colorado Oil & Gas Association, 2016 CO 28, 2016 Colo. LEXIS 443 (Colo. May 2, 2016)

The Colorado Supreme Court has found that two local ordinances which inhibit fracking within municipal boundaries are preempted by a statewide oil and gas statute. Although the language of the statewide law does not expressly or impliedly preempt the ordinances, the ordinances impermissibly frustrate the operation of the statewide law. The "inalienable rights" provision of the Colorado Constitution, which protects Coloradans' lives, liberties, safety, property and happiness, does not legitimize the ordinances. (The Longmont fracking ban is discussed below; the court also found that Fort Collins' five-year moratorium on fracking and storage of fracking wastewater was similarly preempted).

In 2012, the residents of Longmont, a home-rule municipality, voted to add Article XVI (Ordinance) to Longmont's home-rule charter. Article XVI provides:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont. In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.

The Colorado Oil and Gas Association (Association) sued, contending that the Longmont Ordinance was preempted by the state's Oil and Gas Conservation Act (Act). The Colorado Municipal League, the City and County of Boulder and various environmental groups filed amicus briefs in support of Longmont; the Colorado Oil and Gas Conservation Commission, the Denver Chamber of Commerce, and oil industry representatives supported the Association.

Longmont's Ordinance was premised on the reach of the Colorado Constitution's home-rule provisions:

> The people of each city or town of this state . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Colo. Const. art. XX, § 6.

The Association disagreed, arguing that the language of the Act must take precedence:

> It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom.

§ 34-60-102(1)(b), C.R.S. (2015).

The Colorado Supreme Court found that the wording of the Act did not explicitly or impliedly preempt a local fracking ordinance. The relevant inquiry, however, was whether the Ordinance had an impact beyond the locality. For example, municipal ordinances imposing local sales and use taxes, qualifications of local deputy sheriffs, or local residency requirements for city employees had only local impact and would not be preempted by a conflicting state statute. However, where the ordinance (even a zoning ordinance) implicated statewide or mixed state and local issues, it would be preempted by the state law.

Here, the Ordinance had an extra-territorial scope, impacting oil and gas operations outside Longmont:

> [M]any operators have determined that fracking is necessary to ensure the productive recovery of oil and gas. For these operators, banning fracking would result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, such a ban could adversely impact the correlative rights of the owners of oil and gas interests in a common source or pool by exaggerating production in areas in which fracking is permitted while depressing production within Longmont's city limits. And Longmont's fracking ban could result in uneven and potentially wasteful production of oil and gas from pools that underlie Longmont but that extend beyond its city limits.

Given that the Ordinance was not merely “local” in effect, the inquiry was whether it ran afoul of a third type of preemption—“operational conflict” preemption:

> The Oil and Gas Conservation Act and the Commission's pervasive rules and regulations, which evince state control over numerous aspects of fracking, from

> the chemicals used to the location of waste pits, convince us that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking. Article XVI, however, prevents operators from using the fracking process even if they abide by the Commission's rules and regulations, rendering those rules and regulations superfluous.

Longmont had also argued that the Colorado Constitution's "inalienable rights" clause protected its residents: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." However, they could not provide authority supporting application of that provision to the facts at hand.

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Police: Officer Must Secure Treatment for Arrestee Exhibiting Objectively Serious Medical Need, Irrespective of Officer's Own Belief About Cause of Medical Need

Barton v. Taber, No. 14-3280 (8th Cir. Apr. 27, 2016)

The Eighth Circuit held that an officer's failure to secure medical treatment for a post-vehicular arrestee with an undiagnosed heart condition is a violation of the arrestee's constitutional rights, precluding the officer from qualified immunity.

Alan Barton was involved in a car accident in September 2011. When police arrived, they had Barton blow into a portable breathalyzer which determined his blood alcohol content at .11%. Barton swayed, fell over repeatedly, and had trouble standing without help at the scene. He got worse as time passed at the police station, slurring his speech and suffering a complete inability to walk without assistance. He was left in a holding room where he was found dead, ultimately of a heart condition. Barton's family filed suit, to which the officer responded he was entitled to qualified immunity. The lower court dismissed the complaint against the officer in his official capacity, but denied qualified immunity otherwise.

The Eighth Circuit affirmed the lower court, holding the officer's failure to secure medical attention for Barton under these facts violated Barton's constitutional rights because the officer was deliberately indifferent to Barton's objectively serious medical need. The Court held that in September of 2011, a reasonable officer would have sought medical attention for a post-vehicular accident arrestee, even if a breathalyzer showed the presence of alcohol. The Court thus affirmed the lower court.

Judge Colloton dissented. The judge would have reversed the lower court with the alternate reasoning that denying qualified immunity under these facts exposed officers to an excessive amount of liability for a death that was ultimately caused by an arrestee's underlying heart condition. Judge Colloton did not agree that the majority's cited precedent put the officer on notice of clearly established law, reasoning that the majority's cited case involved denial of medical treatment to an arrestee that the officer knew consumed a cocktail of drugs, whereas the immediate case involved an arrestee who had only consumed alcohol.

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Religion: Los Angeles County Seal Depicting Cross on Building Violates First Amendment

Davies v. Los Angeles County Board of Supervisors, No. 2:14-cv-00907 (W.D. Ca. Apr. 6, 2016)

A federal court in California has granted a permanent injunction against the Los Angeles County Board of Supervisors' use of the County seal which includes a church with a cross on its roof.

In 1957, the Los Angeles County Board of Supervisors (Board) adopted a County seal containing a number of elements intended to represent various constituencies within the County. These included the Hollywood Bowl with two stars and an unadorned latin cross in the sky above it, an image of Pomona (the "goddess of gardens and fruit trees"), a Spanish galleon, a tuna, a cow, oil derricks, engineering instruments and more.

In 2004, the ACLU wrote to the Board requesting removal of the cross on Constitutional grounds. This precipitated a series of emotional public hearings on the County seal generally, resulting in a proposal by the Board that Pomona be replaced by a native American woman, the cross be removed from the sky and that San Gabriel Mission (Mission) be used in place of the oil derricks. At that time the Mission did not have a cross on its façade, having been removed since 1989 to retrofit the Mission after an earthquake.
The amended seal was approved by the Board, and was placed on County buildings and vehicles at a cost of more than $900,000.

In 2009, the cross was finally replaced atop the eastern façade of the actual Mission. This resulted in a motion by two Supervisors, in 2013, to restore the cross to the depiction of the Mission in the County seal, to make the seal "artistically, aesthetically, and architecturally correct." A proponent of the proposed new seal cited its historical

basis: “The purpose of the Municipal Seal [is to] accurately reflect the municipality’s history and culture. As you can see behind me, Ventura County, San Benito County, and San Luis Obispo City…have seals that also have a cross on top of the missions.” The Board voted 3-2 to adopt the new seal and preparations were made to begin using the new seal on County property.

The ACLU moved for a permanent injunction, arguing that the new seal was an impermissible establishment of religion under the California and United States Constitutions.

The Federal District Court for the Western District of California agreed. Finding that the plaintiffs had standing as taxpayers whose funds were about to be deployed in utilizing the new cross-bearing seals, the court held that plaintiffs had established all the elements needed to enjoin the Board: plaintiffs would suffer irreparable harm if the new seals were used; the balancing of the hardships favored the plaintiffs, and plaintiffs had established the likelihood of success on the merits.

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Section 1983: No Clearly Established Constitutional Right Where Wrongful Acts Were Committed by Third Party

Ramirez v. Escondido Union School District, No. 15-5439 (9th Cir. Apr. 18, 2016)

The Ninth Circuit has found an elementary school to be negligent but not liable under Section 1983 for student’s transfer of custody to a parent living in Mexico.

In December of 2010, staff members at Farr Elementary School released Enrique C. to Alejandro Rodriguez Ramos. School staff had received authorization for the release of the elementary school student from Enrique’s mother. At the time, school staff were on notice that Enrique’s mother had been deported to Mexico and that Enrique’s father had requested to be contacted about matters regarding Enrique. Upon the student’s release, Ramos took Enrique to Mexico to live with his mother.

Enrique’s father, Manuel Ramirez, sued the school for a violation of due process, negligence, and intentional infliction of emotional distress. The jury initially found in favor of Ramirez on all claims. The district court dismissed the plaintiffs’ intentional infliction of emotional distress and denied the defendant qualified immunity.

The Ninth Circuit overturned the district court’s decision to deny qualified immunity. Farr Elementary, while found to be negligent in releasing a student to an individual who took the child to live with his mother in Mexico, is not liable under Section 1983 for the

wrongful actions of a third party. Defendant did not purposefully execute a transfer of custody, despite being on notice in regards to a parent's deportation status and a second parent's request to be contacted about matters concerning their child.

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Settlements: Rule 68 Offer of Judgment Must Explicitly State that Attorney's Fees and Expenses are Included in Lump Sum Amount

LaPierre v. City of Lawrence, No. 15-1641 (1st Cir. Apr. 26, 2016)

The First Circuit has confirmed that, in the absence of explicit language to the contrary, a lump-sum settlement offer under Fed. R. Civ. P. 68 does not cover fees and expenses—including attorney's fees—which may be recovered by the offeree over and above the settlement amount.

Coerdalene LaPierre alleged she was sexually assaulted by a City of Lawrence (City) police officer. The City prepared to defend the allegation, going so far as to file a motion for summary judgment. In addition, and with the summary judgment motion pending, the city made a Rule 68 Offer of Judgment for $300,000. The City failed to specify in the original offer whether the sum included the plaintiff's costs. The City thus amended the offer within the 14-day acceptance window, stating it included such costs. The plaintiff accepted, again within the 14-day window, but noted she would be moving separately for costs and fees, and filed the original *unamended* offer.

The City moved to strike, arguing the plaintiff's acceptance was invalid, and the District Court granted the motion, holding there was no meeting of the minds, and granted summary judgment to the City. The plaintiff appealed to the First Circuit, arguing she was within her rights to accept the first offer and treat it as complete. The First Circuit held for the plaintiff, noting Rule 68 precedent is clear that if an offer is silent on costs, it is exclusive of costs. Furthermore, it found precedent both from the Supreme Court and sister circuits dictated that courts cannot use extrinsic evidence (which the city tried to use) to consider a Rule 68 offer that is silent with regard to the inclusion of costs.

[A] review of the text of the Rule and the precedent interpreting the Rule convinces us that the City's offer, by virtue of its silence as to whether it was inclusive of costs, must be read to be exclusive of costs and thus to be neither "incomplete [n]or ambiguous" as to that issue. Rule 68 states that "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed.R.Civ.P. 68. *The Rule thus makes clear, through its trailing language, that a Rule 68 offer must be one that allows an offeree to recover costs.* (emphasis added).

The case was remanded, with instructions to assess costs and expenses, including legal fees, in addition to the $300,000 settlement offer. In addition, the costs of appeal were awarded to appellant.

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Speech: Protected Speech Must be Motivating Factor in Adverse Employment Action

Wilson v. Miller, No. 15-1415 (8th Cir. Apr. 25, 2016)

The Eighth Circuit has confirmed that negative performance evaluations are not an adverse employment action unless the negative review actually leads to the denial of a promotion and that a reasonable jury would be able to find a connection between the plaintiff's protected speech and the defendant's subsequent retaliatory actions.

Cynthia Wilson worked for the Minnesota Parks and Recreation Board. She made two public comments, which she alleged and the opposing party agreed, were protected under the First Amendment. Months after the comments, she subsequently received negative performance evaluations and, even later in time, was denied three promotions for which she applied. She filed suit against the Board and the superintendent of the department, alleging she was retaliated against for making those comments. The lower court granted summary judgment for the defendants, holding Wilson failed to show her protected speech was a motivating factor in the employment decisions.

The Circuit Court agreed with the defendant's appellate argument that a negative performance evaluation is not an adverse employment action unless the negative review actually led to the denial of a promotion. Wilson's allegations that the fact that the negative reviews were *available to managers* who ultimately did not promote her was thus not sufficient to clear that hurdle. Moreover, the Circuit noted Wilson failed to present any evidence that, absent the reviews, she would have been promoted, leading the Circuit Court to conclude a reasonable jury could not find an inference of a retaliatory motive either. The Eighth Circuit thus affirmed the lower court.

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