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In This Issue: 8 Cases & This Just In

Courts: Recognition of Violation or Vindication of Plaintiffs' Rights Does not Equal a Concession of Liability by Defendants

Employment: Circuit Again Remands in Boston's Hair-Analysis Drug Testing Case to Assess City's Evaluation of Alternative Tests

Employment: Divisive Social Media Undermines Police Department Camaraderie and Community Trust, but Government Must Show Actual Disruption to Justify Policy Prohibiting Negative Speech about Employer

Employment: USERRA Claimants Do Not Need to Demonstrate Objective Qualification for the Position Sought, Only that Military Service was a Substantial Factor in Failure to Promote

FOIA: "Pre-decisional" Drone Strike Documents are Exempt from Disclosure under FOIA

Immunity: Not Clearly Established that Officer Arriving Late to Ongoing Law Enforcement Activity Must Warn Before Firing

Land Use: Enactment of Indefinite Moratorium Without Post-Deprivation Remedies Violates Due Process

Preemption: NLRA Exemption for State Legislation Does Not Apply to Municipal Ordinances; Illinois District Court Disagrees with Sixth Circuit

THIS JUST IN - Denver Launches Its Short-Term Rental Ordinance . . . and Early Compliance is Slow

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Webinar Calendar

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Courts: Recognition of Violation or Vindication of Plaintiffs' Rights Does not Equal a Concession of Liability by Defendants

Diaz-Colon v. Solivan, No. 16-1192 (1st Cir. Dec. 23, 2016)

First Circuit holds attorney did not violate confidentiality order by making a statement to the press addressing the rights of the plaintiffs but remaining silent on the matter of liability.

In 1999 it was discovered that several people in Puerto Rico were wrongly convicted based primarily on false witness testimony. Consolidated cases that involved the prosecutors and police officers (the defendants in the appeal) worked their way through courts, but ultimately the parties arrived at a settlement. The magistrate judge produced a "Fourth Settlement Conference Report" including various terms, three of which became relevant on appeal: "(1) The settlement agreement shall not signify acceptance of liability regarding the facts alleged in the complaint"; (2) "The parties shall maintain in strict confidentiality all the terms and conditions of the settlement

agreement"; and (3) "The court shall retain jurisdiction to enforce all the terms and conditions of the settlement agreement."

Just days after the Report, Erasmo Rodríguez-Vázquez, an attorney for some of the criminal defendants that became plaintiffs in the cases against the government, was quoted in a newspaper saying "[i]t was inconvenient for them (the government) to fight it because of the [First] Circuit's decision and because of the implications made by both the federal and Circuit courts . . . . This case is a vindication of the plaintiffs' rights. It is never payment for the damages suffered, because that will not cover the loss of the lives of Manuel Ortiz and Leopoldo Sanabria; that has no price. Or the death of Hector Merced; that has no price, and the damage will never be compensated, but at least there is that implicit recognition of the violation of the plaintiffs' civil rights." The defendants claimed Rodriguez violated the Report because his statement revealed a term or condition of the settlement agreement, an argument with which the district court agreed, prompting Rodriguez to appeal.

Rodriguez argued simply that his statements did not violate the court order. The Court first noted that a finding of contempt for violating a court order should issue only "when there is clear and convincing proof of a violation of a court decree." It, moreover, characterized the lower court's order as a prior restraint, lending a further favorable level of review to Rodriguez. Whereas the lower court held that Rodriguez violated the order because he said the settlement showed liability on the part of the Puerto Rican government, the Circuit held only that Rodriguez *addressed the rights of the plaintiffs.* The Court faulted the district court for assuming "a recognition of the violation or vindication of plaintiffs' rights clearly equals a concession of liability by the defendants." The Circuit said his statement is ambiguous, and noted that the "ambiguity becomes inescapable in a civil rights suit like the one settled in this instance, where a violation of rights does not establish liability." Additionally, the Court pointed out that even construing his statement as saying the defendants were liable, showed it still not *reveal terms or conditions* of the agreement: the agreement was that there was no liability, meaning such a statement would have been "a false description, rather than a disclosure . . . ." It thus reversed the lower court.

LINK

Employment: Circuit Again Remands in Boston's Hair-Analysis Drug Testing Case to Assess City's Evaluation of Alternative Tests

Jones v. City of Boston, No. 15-2015 (1st Cir. Dec. 28, 2016)

In the latest chapter of a long-running controversy brought by black officers about Boston's hair-analysis drug testing program, the Third Circuit has remanded to allow inquiry into Boston's evaluation of potential alternatives.

Between 1999 and 2006 Boston administered a hair drug test to thousands of officers, cadets, and job applicants. Eight police officers, a police cadet, and a provisionally-hired 911 operator all had positive results that ultimately lead to their losing their offers, being fired, or being required to undergo rehabilitation to keep their jobs. They sued. The case went up to the First Circuit and in that previous appeal it held that the officers - all of whom identify as black - had established under the first prong of the disparate impact inquiry that the hair drug test caused a cognizable disparate impact. The Circuit then remanded the case to the district court to consider the next two prongs of their disparate impact case, requiring it to determine "(1) whether the Department's drug testing program was job related and consistent with business necessity; and, if so, (2) whether the Department refused to adopt an available alternative that would have met the Department's legitimate needs while having less of a disparate impact." On remand, the district court again granted summary judgment to Boston, holding the evidence presented could not

support a jury verdict under either prong. The First Circuit vacated again, this time only in part.

The Circuit looked first at a pivotal question-- given that drug testing police officers was clearly job-related, was the test used - hair drug testing - so unreliable as to not meaningfully further the city's legitimate need for a drug-free police force? The Court found it was reliable enough to further Boston's goal, despite the fact that a few of the thousands tested suffered an inaccurate positive result.

Moving to the next prong of the disparate impact analysis, the Court asked "whether the evidence could support a jury finding that the Department nevertheless refuse[d] to adopt an available alternative employment practice that ha[d] less disparate impact and serve[d] the employer's legitimate needs." The Court agreed with the plaintiff-officers that other drug tests exist, and specifically that a jury could find that the plaintiffs' alternate suggested test met the city's legitimate needs. This led the Circuit to evaluate whether the alternative test actually had less of a disparate impact *and* that Boston refused to adopt it. Boston defended by arguing it could not show the alternative test would have less of a disparate impact without a full-blown analysis. The Court rejected this argument out of hand, noting that it has previously held that proffered alternatives may be "self-evidently incapable" of causing a disparate impact.

As an example, the Court cited an employer that chose applicants by height, thus creating a disparate impact on female applicants, and the alternative of a coin-flip, where it said it is "self-evident" that selecting applicants by the alternative coin-flip method would reduce the disparate impact. The Court found that there was evidence in the record - an affidavit - that the plaintiffs' expert told Boston about the alternative test as long ago as 2003. However, because the precise date of when this information was provided to Boston was unclear, the Court identified it as a material dispute, leaving it an open question as to when the city "refused" the alternative test, and leading the Court to remand. It thus affirmed the lower court with regard to the business necessity of the testing, but vacated its grant of summary judgment based on Boston's refusal to adopt a test with a less disparate impact, and remanded the case again.

LINK

Employment: Divisive Social Media Undermines Police Department Camaraderie and Community Trust, but Government Must Show Actual Disruption to Justify Policy Prohibiting Negative Speech about Employer

Liverman v. City of Petersburg, No. 15-2207 (4th Cir. Dec. 15, 2016)

The Fourth Circuit has found that a police department's social networking policy prohibiting negative comments that impact public perception of the department is overly broad and because no actual harm or material disruption to the department was proven, the police chief was not awarded immunity.

In 2013 the chief of the Petersburg, Virginia Police Department updated the social networking policy for officers. Two clauses in particular became an issue. Coined the "Negative Comments" provision by the Court, the first states "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law." The second, termed the "Public Concern" provision by the Court, states "Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer. The

instances must be judged on a case-by-case basis."

Two officers, Herbert Liverman and Vance Richards, had the following Facebook conversation while off-duty, for which they were disciplined:

> Liverman: Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in todays world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing.
>
> Richards: Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. It's disgusting and makes me sick to my stomach DAILY. LEO Supervisors should be promoted by experience... And what comes with experience are "experiences" that "they" can pass around to the Rookies and younger less experienced Officers. Perfect example, and you know who I'm talking about..... How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit waiting to happen. And you know who will be responsible for that Law Suit? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll to begin with. Im with ya bro....[shaking my head]
>
> Liverman: There used to be a time when you had to earn a promotion or a spot in a specialty unit...but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been "devalued"...and when something has no value, well it is worthless.
>
> Richards: Your right..... The next 4yrs can't get here fast enough... From what I've been seeing I don't think I can last though. You know the old "but true" saying is.... Your Agency is only as good as it's Leader(s)... It's hard to "lead by example" when there isn't one.... [shaking my head]

When this exchange was discovered, the chief determined the comments violated the Negative Comments provision and gave each an oral reprimand and six months' probation. Because these officers were on probation, they were deemed ineligible for promotion and neither was considered for a sergeant position that came available. After becoming the subject of several complaints and investigations, Liverman was fired. Both officers filed suit under § 1983 alleging the social networking policy violated the First Amendment. The district court agreed at to Liverman but held the chief was entitled to qualified immunity. As for Richards, the district court held his speech was purely personal and thus not protected by the First Amendment. The officers appealed.

The Fourth Circuit held that the policies at issue were unconstitutionally broad and awarded relief to Richards, as well as upholding the lower court ruling for Liverman. It identified the policy as a generally applicable rule, as opposed to a post-hoc disciplinary decision, and thus looked to the Supreme Court's *NTEU* decision for guidance. In that case the Court had evaluated a regulation that prohibited federal employees from accepting compensation for a speech, whether or not the subject related to their official duties. The Court raised the burden for the government in this type of case, holding it had to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government" and that the "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Looking at the case before it, the Fourth Circuit had little trouble finding that the social networking policy was a blanket prohibition on speech critical of the government employer. It saw the policy as having an "astonishing breadth," easily finding the interest of present and future employees "manifestly significant," given that social networking sites are important places for discourse and debate. Moving on to whether the harms to operations cited by the city were real, the Court acknowledged that "divisive social media use undermines the Department's interests in maintaining camaraderie among patrol officers and building community trust" was legitimate, but concluded Petersburg did not meet its heavy burden of showing the actual disruption to its mission. This stated interest was only a "general divisiveness" from the online comments and the fact that some officers requested shift transfers, thus the Court found no *material disruption*. The Court thus held the policy was unconstitutionally overbroad and, based on this "patent unconstitutionality," reversed the lower court's grant of qualified immunity for the chief of police.

LINK

Employment: USERRA Claimants Do Not Need to Demonstrate Objective Qualification for the Position Sought, Only that Military Service was a Substantial Factor in Failure to Promote

Carroll v. Delaware River Port Authority, No. 16-2492 (3d Cir. Dec. 12, 2016)

Rejecting an argument by the Delaware River Port Authority, the Third circuit has found that a veteran who was denied a promotion did not have to establish that he was objectively qualified for the new position, and that under USERRA, his initial pleading burden was merely to show by a preponderance of the evidence that his military service was a substantial factor in the denial of his promotion.

Anthony Carroll worked for the Delaware River Port Authority from 1989 through 2009. Throughout his time there he was in the uniformed services in various capacities and was repeatedly deployed. In 2008 he was deployed to Iraq where he suffered an incident resulting in cervical spondylosis, degenerative disk disease, bilateral torn rotator cuffs, brain injury, and high-frequency hearing loss. While in recovery for these injuries in 2010 and again in 2012, Carroll applied for promotion and was denied. He filed suit, alleging the Port Authority violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA") by not promoting him in 2010 or 2012 due to unlawful discrimination on the basis of his military service. After the district court denied Carroll's motion for partial summary judgment and the Port Authority's motion for summary judgment, it certified a question to the Third Circuit, asking whether "in a failure-to-promote discrimination suit under [USERRA], a plaintiff [must] plead and prove that he or she was objectively qualified for the position sought?"

> The Court began by restating the framework for USERRA:
>
> [A]n employee making a USERRA claim of discrimination bear[s] the initial burden of showing by a preponderance of the evidence that the employee's military service was a substantial or motivating factor in the adverse employment action. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.

The Court characterized the Port Authority's argument that "USERRA plaintiffs *must sustain their initial burden* by demonstrating two facts by a preponderance of the evidence: (1) that they were

objectively qualified for the position sought, and (2) that their military service was a substantial or motivating factor in the adverse employment action" as "importing an additional requirement." It found Carroll's reading more persuasive. Specifically the Court found that objective qualifications for the job sought are indeed relevant, but they come into play as an affirmative defense of the employer, *not* an additional hurdle to be cleared by a plaintiff up-front in a case.

Thus, the Court held that "[o]nce a plaintiff has shown that his or her military service was a substantial or motivating factor in the adverse employment action . . . the employer may then advance non-discriminatory reasons-which may include a lack of qualifications-to show that the employer would have taken the adverse action anyway." It thus answered the certified question in the negative, meaning Carroll need not plead and prove that he was objectively qualified for the promotions he sought to sustain his USERRA allegation. It remanded the case.

LINK

FOIA: "Pre-decisional" Drone Strike Documents are Exempt from Disclosure under FOIA

American Civil Liberties Union v. United States Dep't of Justice, Nos. 15-2956(L), 15-3122(AXP) (2d Cir. Dec. 20, 2016)

Upholding in part and reversing in part the Southern District of New York, the Second Circuit has found that none of a group of 52 documents sought by the ACLU regarding drone strikes were subject to disclosure, resulting in non-disclosure of seven "pre-decisional" documents that the lower court had found discoverable.

In July 2015 the District Court for the Southern District of New York held that Office of Legal Counsel (OLC), Central Intelligence Agency (CIA), and Department of Defense (DOD) were entitled to withhold from disclosure a number of documents concerning drone strikes, that OLC had to disclose all or portions of four documents and that the CIA had to disclose all or portions of three documents concerning such strikes (seven disclosures total). The ACLU appealed, challenging the lower court's ruling to the extent it upheld nondisclosure of 52 documents, and the Government cross-appealed, challenging the ruling to the extent it ordered disclosure of seven documents. The Second Circuit affirmed the appeal - holding none of the 52 documents had to be released, and reversed the cross-appeal, holding the seven documents ordered released under FOIA by the lower court could be withheld.

The Second Circuit opened by noting it "appreciate[d] the difficulty" the ACLU faced in challenging the lower court ruling - for it could see neither the documents it sought nor the lower court's decision containing the reasons for withholding the documents. The Court, however, said it saw all of this information and, based on its closeted review, agreed that the lower court properly withheld the 52 documents because each was protected by an exemption under the FOIA statute and no waiver of secrecy had been granted.

The Circuit evaluated each of the seven documents ordered revealed by the lower court. All were deemed pre-decisional and thus fell under that FOIA exemption, leading the Court to reverse. The Court said the first document was a summary of a meeting where legal advice was offered and the author then asked participants to correct the attempted summary. The second document was said to be a draft of two paragraphs a DOJ staff member suggested be included in a final DOJ white paper. The third document was described as suggesting talking points as a legal basis for the drone strikes, meaning it too was pre-decisional. The fourth apparently comprised an outline of classified facts prepared in connection with drafting legal advice. The fifth was described as a draft of a proposed op-ed article created to explain the government's legal reasoning for the

drone strikes. And the sixth and seventh were said to be drafts leading to the formulation of a policy or an actual legal position on the drone strikes. The Court thus reversed the lower court's holdings on each and every one of these for the same reason - the pre-decisional FOIA exemption.

LINK

Immunity: Not Clearly Established that Officer Arriving Late to Ongoing Law Enforcement Activity Must Warn Before Firing

White v. Pauly, No. 16-67 (U.S. Jan. 9, 2016)

The Supreme Court has reversed a Tenth Circuit denial of qualified immunity in an excessive force case where an officer arrived at ongoing police activity scene where individuals were shooting at police officers, finding that there was no precedent which would have put the officer on notice that he had to warn the shooters before firing.

A Santa Fe, New Mexico motorist was threatened by a wildly-driven truck and called 911. Officers interviewed the caller, obtained the vehicle's license plate number, identified Daniel Pauly as the owner and, although they conceded they did not have probable cause for an arrest, went to visit him at home.

Officer White stayed at the interview scene while two officers drove to Pauly's address. They proceeded in a covert manner toward a house which appeared occupied and had lights on. Pauly and his brother were within the home and became aware of people outside, asking "Who are you?" and "What do you want?" The parties' subsequent exchange is disputed--according to the respondents, the officers yelled "Hey, [expletive], we got you surrounded. Come out or we're coming in." The officers claimed that they shouted "Open the door, State police." But Pauly's brother testified that they did not hear the officers identify themselves. The brothers then armed themselves and yelled to the police "we have guns."

Officer White happened to arrive at the house just as heard someone shout "we have guns." He drew his gun and took cover. Shortly thereafter, he heard shotgun blasts; then one of the brothers opened a window and started firing in White's direction. One of the other officers fired back, missing. White shot and killed Pauly.

The district court denied the officers' motion for summary judgment / qualified immunity. The Tenth Circuit affirmed, analyzing White's claims separately from the other two officers because he did not participate in the events leading up to the shooting. With regard to White, the Tenth Circuit found that a jury could have concluded his use of deadly force was not reasonable despite the fact that he arrived late at the scene and only heard the respondents state "We have guns" before taking cover. The Tenth Circuit denied Officer White qualified immunity on the grounds that a reasonable officer in White's position would have known he should have given a warning before shooting, despite the seriousness of the threat.

A dissenting Tenth Circuit judge suggested the Supreme Court should review this case noting he was "unaware of any clearly established law that suggests . . . that an officer . . . who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall."

The Supreme Court disagreed, cautioning that courts should not analyze whether a law is clearly established at a high level of generality. Specifically, the Court noted that the Tenth Circuit "failed to identify a case where an officer acting under similar circumstances as Officer White was held

to have violated the Fourth Amendment," but instead erroneously relied on *Graham* and *Garner*, which the Court noted, "lay out excessive-force principles at only a general level." The Court noted that *Garner* and *Graham*, "do not by themselves create clearly established law outside 'an obvious case.'"

This was not an obvious case, which the Tenth Circuit implicitly have recognized when it stated: "this case presents a unique set of facts and circumstances..." In the Court's view, "[t]his alone should have been an important indication" that Officer White did not violate a clearly established right.

The Court referenced the unique fact pattern:

> Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

The case was remanded as there were outstanding factual questions regarding when exactly Officer White arrived, as Justice Ginsburg noted in her concurrence. The Court expressed no opinion as to whether the other two officers were entitled to qualified immunity.

LINK

Land Use: Enactment of Indefinite Moratorium Without Post-Deprivation Remedies Violates Due Process

Clayland Farms Enterprises, Inc. v. Talbot County, No. 15-1755 (4th Cir. Dec. 2, 2016)

Ordinances indefinitely preventing subdivision and subjecting property to sewer tier system deemed regulatory taking and violation of due process.

Clayland Farms is a 106-acre property in Talbot County, Maryland zoned "Village Center," a designation allowing for single and multi-family residential development. Three ordinances burden the property, however, preventing its development for years. Two ordinances enacted in 2012 and 2014 are moratoriums that prohibit applying for subdivision and prohibit "Village Centers" from being subdivided at all into more than two lots. A third ordinance subjects the property to a tier system controlling the availability and, if available, type of sewer system it could have. Of Clayland Farms' 106 acres, all but six are designated for natural resource protection, and despite the state telling the County the sewer tier was *incorrect*, Talbot County refused the alter its classification.

Clayland Farms filed suit against the County, alleging a variety of counts, most importantly one alleging the moratorium is a regulatory taking and facially unconstitutional, a second alleging the County deprived Clayland Farm of its procedural due process rights by enacting the moratoriums with no post-deprivation remedies, and a third alleging the County deprived Clayland Farm of its substantive due process rights by enacting the ordinances. The district court first granted Talbot County's motion to remove to federal court and then its motion to dismiss, holding the claims were not ripe. Clayland Farms appealed.

The Fourth Circuit majority was brief in its analysis, holding the claims were ripe. It noted Clayland Farms' exhibited concrete injuries, given the effects of the laws, directly traceable to the County

and redressable through the allegations made. It briefly noted the fact that the claims included a facial constitutional challenge that a taking took place, the contestation of "the enactment of an indefinite moratorium without any post-deprivation remedies" as violative of the Fourteenth Amendment's due process protection, and an allegation that its substantive due process rights were violated based on the arbitrary classification of the Clayland Farms into the natural resource tier for sewer development. These were all deemed clearly ripe by the majority.

The lone dissenter, Judge Floyd, concurred with the majority, except as to the taking and due process count (two of the total seven alleged). Judge Floyd interpreted the takings claim as contesting, on one hand, the validity of the ordinance and, on the other, seeking just compensation. Thus, looking to the Supreme Court's guidance in *Williamson County,* the judge noted "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." The judge thus would have followed the Third, D.C., and Sixth Circuit approach: since the facial taking challenge to the ordinance is ripe that should be handled in federal court, and since compensation sought is not, it should have been handled in state court, as there is no requirement to attach it to the contestation of the ordinance. The judge thus would have bifurcated these issues for the takings claim and treated the due process claim similarly.

LINK

Preemption: NLRA Exemption for State Legislation Does Not Apply to Municipal Ordinances; Illinois District Court Disagrees with Sixth Circuit

Int'l Union of Operating Eng'rs, Local 399 v. Village of Lincolnshire, No. 16-C-2395 (E.D. Ill. Jan. 7, 2017)

In a decision which departs from Sixth Circuit precedent, the Eastern District of Illinois has found that a local ordinance imposing restrictions on union membership and dues collection is preempted by the National Labor Relations Act. Although the Supreme Court and the Seventh Circuit had not opined on the specific issue, general principles of interpreting Congressional legislation would compel the conclusion that a very narrow reading of the NLRA was in order, and that an NLRA exemption for "state law" could not be extrapolated to municipal ordinances.

In December 2015, Lincolnshire, Illinois (Village) passed Ordinance No. 15-3389-116 (Ordinance) which imposed new restrictions on the relationships between labor unions, employers and employees.

One section of the Ordinance stated that private sector employees could no longer be required to join a labor organization, pay dues to such an organization or make payments to any third party in lieu of dues to a labor organization:

> SECTION 4: GUARANTEE OF EMPLOYEE RIGHTS
>
> No person covered by the NLRA shall be required as a condition of employment or continuation of employment with a private-sector employer:
>
> (A) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
> (B) to become or remain a member of a labor organization;
> (C) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor

organization;
(D) to pay any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of labor organization; or
(E) to be recommended, approved, referred, or cleared for employment by or through a labor organization.

Another section prohibited employers from making deductions from employees' compensation for labor union dues unless the employee had provided express written authorization:

> SECTION 5: VOLUNTARY DEDUCTIONS PROTECTED
> For employers located in the Village, it shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.

Four unions (Unions) representing workers in various building trades filed suit against the Village, its Chief of Police, Mayor and Clerk, in their official capacities, contending that the Ordinance was preempted by the National Labor Relations Act and the Labor-Management Relations Act. They contended that Section 4 of the Ordinance prohibits what are known as "union security agreements" and "hiring hall provisions" and are preempted by the NLRA, and that Section 5 restricts what are known as "check-off provisions" and is preempted by the NLRA and the LMRA. They sought declaratory and injunctive relief, as well as damages and attorneys' fees as authorized by 42 U.S.C. §1988.

The Village moved to dismiss on the grounds that the Unions lacked standing because few if any of their covered workers were actually predominantly employed within the Village-but the district court found sufficient evidence to contradict this position and granted standing.

The Village was more successful in its challenge to the Unions' §1983 claim, which was based on an argument that the Village was attempting to regulate an area otherwise reserved to the federal government through the NLRA. This argument did not follow the standards set by the Supreme Court in *Golden Gate Transit Corp. v. City of Los Angeles* , which would require a pleading that Lincolnshire had abridged a right or course of conduct that Congress intended to leave to the control of the free market. The §1983 claim was denied.

However, the Unions succeeded in their Supremacy Clause/preemption argument, contending that the NLRA generally preempts state and local regulation of labor relations and that an exemption to under the NLRA applies only to state, and not local, ordinances. The court stated the well-accepted principle "that in passing the NLRA Congress largely displaced state regulation of industrial relations. . . ." and states "may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." The NLRA does create a single exception--it states that it shall not be construed "as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or territorial law."

The court noted that "there is no question if the State of Illinois had adopted a statute enacting the same provisions at issue in count 1, the provisions would not be preempted by the NLRA." However, neither the Supreme Court nor the Seventh Circuit had expressly addressed whether the power given to states and territories in the NLRA to prohibit union security agreements extends to political subdivisions of the state. This required a review of the Court's analysis of other Congressional statutes: "In considering the same question regarding other statutes, however, the Supreme Court has indicated that whether an exception for state regulation also extends to local regulation depends on whether Congress, in enacting the statute, intended to occupy the entire field." As the district court saw it "extending the preemption exception to local

ordinances would create an impossibly disparate system that would undermine Congress's intent to create uniformity in the regulation of labor relations."

The Village had relied heavily on a recent decision by the Sixth Circuit in which the court held that the state exemption in the NLRA extends to local law and therefore that an ordinance similar to the Ordinance was not preempted (*United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016)). The Sixth Circuit analyzed the relevant NLRA section and concluded that the state exemption language also permits local subdivisions to regulate union security agreements.

The district court respectfully disagreed with the Sixth Circuit. "The dispositive question is not whether Congress intended to preempt state authority to delegate governmental power. Rather, the question is whether Congress intended to preempt legislation in general in the field of union security agreements." The district court found such an intent. Because laws of political subdivisions do not qualify as "State law" under the NLRA exemption provision, the court found that sections 4(A)-(D) of the Ordinance were preempted by the NLRA.

Section 4(E) of the Ordinances was also found to be preempted. The NLRA exemption language permits states to prohibit only "agreements requiring membership in a labor organization as a condition of employment"-in other words, only those provisions that amount to "compulsory unionism." The court found that the "hiring hall" provisions invalidated under the Ordinance, which required that all new hires by an employer be referred through a labor organization-do not amount to compulsory unionism.

> The result of a hiring hall provision is typically that non-union members looking to work for a particular employer are required to pay a small fee to the hiring hall for their referral service. The Fifth Circuit in *Simms* considered a similar provision and concluded that the state of Mississippi was not permitted to prohibit hiring hall arrangements. *Id.* In doing so, the court emphasized that charging referral fees relates to an employee's "pre-hire" conduct, which does not amount to compelled union membership.

The court granted summary judgment to the Unions on preemption grounds.

LINK

(We thank IMLA member Barbara Adams of Holland & Knight's Chicago office for bringing this case to our attention!)

THIS JUST IN - Denver Launches Its Short-Term Rental Ordinance . . . and Early Compliance is Slow

Like many other cities, Denver has wrestled with the issue of short-term rentals offered by AirBnb and others. It instituted a requirement that only primary residents could offer leases of less than 30 days, eliminating third-party investors, and required that lessors must be registered and indicate their license numbers on any advertising.

So far, compliance is underwhelming-not unlike the experience of other jurisdictions. But Denver has only begun the campaign, and will soon unveil a new compliance software program. Stay tuned.

LINK

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