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In This Issue: 6 Cases & This Just In

Due Process: Where Government has Discretion to Remove Names from List of Potential Hires, No Protectible Property Interest is Created

ERISA: Plan Fiduciaries Do Not Satisfy "Prudent Man" Standard Merely by Offering a Wide Range of Investment Alternatives

Excessive Force: Jailer Not Entitled to Qualified Immunity Where Motionless, Non-resistant Detainee Tasered Second Time in Eight Seconds

Firearms: Under LEOSA, Corrections Officers Qualify to Carry Concealed Weapons

First Amendment: Ordinance Limiting Number of Freestanding Signs and Defining "Flag" is Unconstitutional

Title VII: Plaintiffs' Allegations of Anti-Italian Employment Actions are Sufficient to Survive Dismissal

THIS JUST IN-IMLA Canada Member Neil Robertson Appointed to Queen's Bench of Saskatchewan

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Quick Links

IMLA Website

Webinar Calendar

Municipal Jobs Board

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IMLA Podcasts

Due Process: Where Government has Discretion to Remove Names from List of Potential Hires, No Protectible Property Interest is Created

Tundo v. County of Passaic, No. 18-1460 (3d Cir. May 2, 2019).

Despite the reasonable understanding by two former New Jersey corrections officers that the appearance of their names on a list of potential re-hires created a property interest, the government had not explicitly agreed to any such commitment, meaning that the plaintiffs had no protectible property right or Fourteenth Amendment due process claim.

The New Jersey Administrative Code ("Code") sets the rules and procedures for rehiring former employees. N.J. Admin. Code § 4A:4-4.8 (2019). The Code empowers the state's Civil Service Commission ("Commission") to set up different categories of rehire lists of former employees. While some employees can be placed on a "special" rehire list to be considered for employment ahead of others, the Commission also has discretion to remove employees from all types of lists-special or not-for many reasons. These include the obvious circumstances, like having a criminal record, refusing to accept reappointment, or not following the instructions for staying on the lists.

Also included are the lack of job requirements," being "physically or psychologically unfit" for the job, having bad employment history, or any "[o]ther sufficient reasons."

Against this backdrop, the Passaic County ("County") Sheriff's Office hired Claudio Tundo ("Tundo") and Ruben Gilgorri ("Gilgorri") as corrections officers on a trial basis. But they were often absent from work, were reprimanded repeatedly for insubordination and incompetence, and were fired as part of a mass layoff even before completing their twelve-month trial period.

However, less than six months later, the County needed more employees. It asked the Commission to create lists of former officers whom it might rehire--and the Commission included Tundo and Gilgorri on the lists.

The parties dispute what type of list they were on: Tundo and Gilgorri claim that the Commission put them on "special" rehire lists, which the County disputed. Regardless, the County and the Commission were soon at odds. The County tried to remove Tundo and Gilgorri based on their work and disciplinary history. But the Commission blocked this attempt and restored them to the eligible list, and ordered the County to place them in "a new 12-month working test period." The County then offered to rehire the two and asked them to complete a re-employment application, which included a provision asking them to agree not to sue the County. The two refused to complete the application, and the Commission then removed them from the list.

Tundo and Gilgorri sued, bringing a range of actions including an unsuccessful Section 1983 procedural due process claim. On appeal, they challenged the district court's grant of summary judgment against them, contesting the court's holding that they did not have a protected property interest in staying on the rehire list. One issue remained for the Third Circuit: do former civil-service employees in New Jersey have a property interest protected by the Fourteenth Amendment in staying on rehire lists?

The Fourteenth Amendment and its extensive precedential progeny provided the relevant backdrop. It forbids deprivations of an individual's property without due process of law. A protected property interest can spring from state statutes, regulations, policies, or other sources that establish a mutually explicit understanding between a government employer and an employee that the employee is entitled to the property. It can arise where the government can only withhold the property interest "for cause." It can also arise from the circumstances of service. But the employee's unilateral expectation, even if reasonable under the circumstances, is not enough. There is no protected interest if the government has ample discretion to deny that benefit. The discretion need not be absolute; it merely has to be enough that there is no mutually explicit understanding that the benefit will continue.

Here, the Circuit had little trouble affirming the decision below. Tundo and Gilgorri argued that they had a protected property interest in staying on the rehire lists, which the court acknowledged may have been a reasonable understanding on their part. But it was not founded on any explicit mutual agreement, and the government and the employee must both clearly expect that the employee has some entitlement to the benefit: "Here, the Commission had significant discretion to take former employees off its rehire lists, and it never suggested that it would constrain itself. So it did not create a protected property interest."

The Circuit observed that there was some potential ambiguity in the Code. Catchall provisions requiring that the reasons be "sufficient" or "valid" might suggest that the Commission's discretion was not absolute, but that did not change the ultimate determination:

> [I]n effect, the government can take former employees off rehire lists if it does not want to hire them. And the Code lets the Commission set the standards for removing them. . . .At the very least, the scope of this discretion is too ambiguous to create a constitutionally protected interest. Tundo and Gilgorri bore the burden of resolving any ambiguity and convincing us that they and the Commission both understood that they would stay on the lists. They failed to meet this burden.

Given the absence of a protectible property interest, Tundo and Gilgorri's complaints about due process-the Commission's failure to provide them notice of removal or the opportunity to be heard-was irrelevant. "A plaintiff first has to show a protected interest before he can dispute the government's power to deny it."

LINK

ERISA: Plan Fiduciaries Do Not Satisfy "Prudent Man" Standard Merely by Offering a Wide Range of Investment Alternatives

Sweda v. University of Pennsylvania, No. 17-3244 (3d Cir. May 2, 2019).

Reversing the district court, the Third Circuit holds that a complaint alleging specific instances of non-feasance by retirement plan administrators satisfied the pleading standards needed to avoid dismissal.

Plaintiffs Jennifer Sweda and others represent a class of 20,000 former employees ("Plaintiffs") who participated, since 2010, in the University of Pennsylvania's 403(b) defined contribution, individual account, employee pension benefit plan ("Plan") overseen by the University of Pennsylvania and its appointed fiduciaries ("Penn"). The Plan offers mutual funds and annuities through TIAA-CREF and Vanguard Group, Inc. Since 2010, the Plan has offered as many as 118 investment options.

In October 2012, Penn organized its investment fund lineup into four tiers. Tier 1 consisted of lifecycle or target-date funds for the "Do-it-for-me" investor; Tier 2 was designed for the "Help-me-do-it" investor looking for moderate curating by the fund providers; Tier 3 offered an "expanded menu of funds" for "the more advanced 'mix-my-own' investor," and under Tier 4, the Plan offered the option of a brokerage account window for the "self-directed" investor looking for additional options, subject to additional fees. At the end of 2014, the Plan had $3.8 billion in assets: $2.5 billion invested in TIAA-CREF fund options, and $1.3 billion invested in Vanguard fund options.

TIAA-CREF and Vanguard charged investment and administrative fees, using a "revenue sharing" model, in which part of a fund's expense ratio is diverted to administrative service providers.

Plaintiffs sued Penn for breach of fiduciary duty, prohibited transactions, and failure to monitor fiduciaries under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. They alleged that Penn failed to use prudent and loyal decision-making processes regarding investments and administration, overpaid certain fees by up to 600%, and failed to remove underperforming options from the retirement plan's offerings. The district court dismissed the complaint in its entirety, determining that Plaintiffs failed to state a claim for fiduciary breach under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007) because their factual allegations could also indicate rational conduct. The court further held that the funds' service agreements with third parties could not constitute prohibited transactions without an allegation that Penn had the subjective intent to benefit a party in interest.

The Third Circuit found otherwise. It held that the lower court had misapplied *Twombly*, by observing at various points in its memorandum that "[a]s in *Twombly*, the actions are at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." However, the Circuit advised, *Twombly's* discussion of alleged misconduct that is "just as much in line with a wide swath of rational and competitive business

strategy" is "specific to antitrust cases." There, "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.".

The Circuit noted that a sister forum, the Eighth Circuit, has declined to extend *Twombly's* antitrust pleading rule to breach of fiduciary duty claims under ERISA because "[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party." Therefore, to the extent that the lower court required Plaintiffs to rule out lawful explanations for Penn's conduct, it erred.

The court then evaluated the elements in the complaint to determine whether they plausibly gave rise to entitlement for relief. ERISA's purpose informed the court's assessment of the pleadings--the statute plainly states that ERISA is a response to "the lack of employee information and adequate safeguards concerning [employee benefit plans'] operation," and reflects Congress's desire "that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans."

The fiduciary breach claim required a showing that: (1) a plan fiduciary (2) breached an ERISA-imposed duty (3) causing a loss to the plan." The parties did not dispute that Penn was a fiduciary or whether loss was adequately alleged; therefore the focus was on the adequacy of allegations of breach of fiduciary duty. A fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan." The "prudent man" standard applied, which requires fiduciaries to exercise "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

These duties applied to the fiduciary's selection of investment alternatives and the negotiation of fee structures, among other things. Courts assess a fiduciary's performance by looking at process rather than results. "A fiduciary's process must bear the marks of loyalty, skill, and diligence expected of an expert in the field. It is not enough to avoid misconduct, kickback schemes, and bad-faith dealings." Although the Circuit had affirmed dismissal in *Renfro v. Unisys Corp.*, a prior ERISA case based partly on the fiduciary's provision of a wide range of alternatives, "We did not hold, however, that a meaningful mix and range of investment options insulates plan fiduciaries from liability for breach of fiduciary duty. Such a standard would allow a fiduciary to avoid liability by stocking a plan with hundreds of options, even if the majority were overpriced or underperforming."

Here, Plaintiffs had provided much more than conclusory allegations. They alleged wrongdoing with specificity: the Plan paid between $4.5 and $5.5 million in annual recordkeeping fees at a time when similar plans paid $700,000 to $750,000 for the same services; the percentage-based fees went up as assets grew, despite there being no corresponding increase in recordkeeping services; no cap or renegotiation of fees was sought; and no competitive bids were solicited. Plaintiffs pointed to similarly situated fiduciaries who acted prudently, such as fiduciaries at Loyola Marymount who hired an independent consultant to request recordkeeping proposals and consolidated services with a single provider and to similar moves at Pepperdine, Purdue, and CalTech-which negotiated for $15 million in revenue sharing rebates.

There were more damaging allegations: Penn paid unreasonable investment fees, included high-cost investment options with historically poor performance, and retained multiple options in the same asset class and investment style, driving up costs and confusing participants. Furthermore, 60% of Plan options underperformed appropriate benchmarks, and Penn failed to remove underperformers.

This detailed compendium placed Plaintiffs' complaint far beyond "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." The allegations plausibly alleged that Penn failed to

"defray[] reasonable expenses of administering the plan" and otherwise failed to "discharge [its] duties" according to the prudent man standard of care.

Penn argued that allowing Plaintiffs to proceed would undermine the fiduciary discretion central to plan management. The Circuit was unconvinced: "[W]hile fiduciaries have discretion in plan management, that discretion is bounded by the prudent man standard . . . .[A] fiduciary's conduct at all times 'must be reasonably supported in concept and must be implemented with proper care, skill, and caution.'"

Amici for the mutual fund industry had joined Penn in arguing that allowing the complaint to survive 12(b)(6) dismissal would "overexpose plan sponsors and fiduciaries to costly litigation and will discourage them from offering benefit plans at all." They predicted that reversal would give class action lawyers "a free ticket to discovery and the opportunity to demand extortionate settlements."

Citing the Supreme Court's handling of a nearly identical ESOP concern in *Fifth Third Bancorp v. Didenhoeffer,* the Circuit rejected these dire predictions. "Despite our appreciation of Penn and amici's fear of frivolous litigation, if we were to interpret *Renfro* to bar a complaint as detailed and specific as the complaint here, we would insulate from liability every fiduciary who, although imprudent, initially selected a 'mix and range' of investment options. Neither the statute nor our precedent justifies such a rule. "

Reversed and remanded.

DISSENT: Judge Roth dissented. He argued that this case presented a question virtually identical to the one addressed by the Circuit in 2012 in *Renfro,* which found that the provision of a broad mix of alternatives substantially satisfied the "prudent man" standard, and which the district court had properly followed:

> In *Renfro v. Unisys Corp*., we evaluated a similar complaint at the same stage in litigation, and determined that the mix and range of investment options in the retirement plan provided by Unisys was sufficient to demonstrate that the defendants' fiduciary duty had been met. Despite a greater mix and range of options in the instant case, the majority believes that the standards that foreclosed the plaintiffs' arguments in *Renfro* do not do so here. However, a close look at the facts indicates that plaintiffs' arguments under both Counts III and V are the same as, if not in fact weaker than, in *Renfro*.

LINK

Excessive Force: Jailer Not Entitled to Qualified Immunity Where Motionless, Non-resistant Detainee Tasered Second Time in Eight Seconds

Piazza v. Jefferson City, no. 18-10487 (11th Cir. May 9, 2019).

Reversing in part, the Eleventh Circuit finds that a deputy who tasered an incapacitated, motionless detainee on his neck despite the fact he had already tasered the man eight seconds before, cannot benefit from qualified immunity.

Ricky Hinkle ("Hinkle") was arrested for public intoxication and transferred to the city jail in Birmingham, Alabama ("City"). After he expressed that he "wanted to die," jail personnel decided to move him to a padded cell-but while being transferred, Hinkle ran to the restroom, grabbed a shower curtain and would not relinquish it. After officers attempted three times to pull Hinkle into

his new cell, a deputy fired his taser, hitting Hinkle on the left side of his chest just above his heart. As a result of that taser shock-which lasted five seconds-Hinkle fell to the floor on his right side and urinated on himself. The deputy then ordered Hinkle to roll over to be handcuffed, but Hinkle remained unresponsive. Eight seconds after the end of the first shock, and while Hinkle still lay motionless on the ground, the deputy again tased him, this time on the front left side of his neck. Shortly thereafter, Hinkle went into cardiac arrest. He was taken to the emergency room, where he was pronounced dead.

Hinkle's son brought suit under 42 U.S.C. § 1983 alleging excessive force against the tasing deputy and asserting supervisory-liability and deliberate indifference claims for excessive force and deliberate indifference to Hinkle's serious medical needs against the deputy's superiors. The officers moved to dismiss on qualified immunity grounds, which the district court denied.

On appeal, the Eleventh Circuit agreed in part and disagreed in part. It found that the deputy violated Hinkle's clearly established constitutional right to be free from excessive force-he "crossed the constitutional line, and clearly so" in his tasing activities. But it reversed the lower court's decision to deny qualified immunity to the supervisors.

The Circuit first asked "What constitutional provision governs the use of force in this case, and what doctrinal standard guides our analysis?" While *Graham* provides that the Fourth Amendment prevents the use of excessive force during arrests, and the Eighth Amendment serves as the primary source of protection against excessive force after conviction, "it is the Fourteenth Amendment that protects those who exist in the in-between-pretrial detainees."

In 2015, the Supreme Court held, in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) that, unlike a prisoner bringing an Eighth Amendment excessive-force claim, a pretrial detainee raising a Fourteenth Amendment claim needn't prove an officer's subjective intent to harm but instead need show only that "the force purposely or knowingly used against him was objectively unreasonable."

The Circuit advised that "legitimate interests"-including the need to "preserve internal order and discipline" and "maintain institutional security"-may at times require jail officers to use force. That situation must be evaluated through the lens of "a reasonable officer on the scene."

Analyzing a the continuum of factors which might justify force, the Eighth Circuit concluded: "In other words, because force in the pretrial detainee context may be defensive or preventative-but never punitive-the continuing use of force is impermissible when a detainee is complying, has been forced to comply, or is clearly unable to comply."

Here, the parties did not dispute that the first shock was a permissible use of force, given Hinkle's resistance and the officers' need to preserve order. But the court did not accept the deputy's assertion that the second shock did not constitute excessive force in light of (1) Hinkle's failure to roll over to be handcuffed "after being ordered-and being given an opportunity-to do so," and (2) the "split-second decisions" that jail officers must make:

> Wrong. It seems to us totally unreasonable to expect that a man who is lying on the floor immobilized-and incontinent-following a taser shock should pep up, roll over, and submit to handcuffing within eight seconds. . . . Come on. The only reasonable inference is that Hinkle, who was lying motionless on the floor after a five-second taser shock-unable to hold his own urine-"did not" immediately roll over because he "could not." (Really, is there any surer indication of a grown man's inability to control his bodily functions than his wetting himself?)

The Circuit was adamant in its skepticism:

> Although we don't for a minute discount the difficult decisions that jail officers must make in the heat of a tussle, simply counting to eight aloud reveals the problem with [the deputy's]

> argument. In eight seconds, you can tie a shoe, sing the chorus of "Row, Row, Row Your Boat," or complete a qualified rodeo bull ride. And in eight seconds, we believe, any reasonable officer would have concluded that a detainee who lay inert on the floor, having soiled himself, was no longer putting up a fight.

Given that the deputy's behavior was unreasonable, the question was whether that standard had been "clearly established." There was no doubt: "It was more than ten years ago now that this Court held, in no uncertain terms, that "[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting-whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated-that use of force is excessive."

The court's inquiry turned to the supervisory officers. The complaint argued that they "fail[ed] to adopt and implement adequate policies" concerning the appropriate use of force, which resulted in a violation of Hinkle's constitutional rights. But the plaintiff cited only the single incident of unconstitutional activity, which was not, as a matter of law, sufficient to make out policy or failure that would support a supervisory liability claim. The same flaw undermined the claims of deliberate indifference: the single instance did not involve other staff, and the supervisory officers did not know of the incident. Because the complaint contained only conclusory assertions that jail officers were indifferent to Hinkle's needs pursuant to certain policies or customs-without alleging any facts concerning those policies or customs-he had not stated a claim for supervisory liability for deliberate indifference to serious medical needs.

LINK

Firearms: Under LEOSA, Corrections Officers Qualify to Carry Concealed Weapons

DuBerry v. District of Columbia, no. 18-7102 (D.C. Cir. May 21, 2019).

Reaffirming its position for the second time, the D.C. Circuit has held that former correctional officers have a justiciable Section 1983 action where the District of Columbia refused to provide documentation that would allow them to carry concealed weapons under the Law Enforcement Officers Safety Act.

Subject to certain conditions, the Law Enforcement Officers Safety Act ("LEOSA") authorizes "qualified retired law enforcement officer[s]" to carry concealed firearms. 18 U.S.C. § 926C(a). Ronald DuBerry, Maurice Curtis, and Robert Smith ("Appellees"), former correctional officers with the Washington, D.C. Department of Corrections sought to invoke LEOSA so that they would be able to carry concealed firearms as "qualified retired law enforcement officers."

The District of Columbia ("District") refused to issue the necessary certification forms for Appellees, claiming that, as former corrections officers, they never had statutory powers of arrest and thus could not claim rights under LEOSA. Appellees sued under 42 U.S.C. § 1983 seeking declaratory and injunctive relief to require the District to recognize them as "qualified retired law enforcement officers" for LEOSA purposes. Although the district court dismissed for failure to state a claim, the DC Circuit reversed and remanded, finding that "LEOSA's plain text, purpose, and context show that Congress intended to create a concrete, individual right to benefit individuals like [Appellees]."

On remand, the district court granted summary judgment for Appellees, holding that they had met three of LEOSA's statutory requirements necessary to be considered "qualified retired law enforcement officers"-each possessed "statutory powers of arrest," served as a "law enforcement officer" for an aggregate of at least 10 years, and separated from service in good

standing. But Appellees did not ask the district court to determine whether they had "identifications" sufficient to satisfy the requirements of LEOSA, and the court did not address that issue, simply noting that "whether or not [Appellees] have sufficient identification is irrelevant for purposes of determining whether they have met certain statutory preconditions to be considered 'qualified retired law enforcement officers.'"

The District appealed, making two arguments: First, LEOSA requires that "to carry a concealed weapon, an individual must be both a qualified retired law enforcement officer and hold an identification issued by his former government employer stating that he was a law enforcement officer," and the Appellees did not have such identification. Furthermore, Appellees lacked standing to pursue their action, because they failed to show a causal link between the District's actions and their injury: "but for the District's refusal to complete their employment certification forms, they would have been entitled to carry under LEOSA."

The Circuit disagreed on both counts. First, while possession of the photographic the ID might be needed to *exercise* the LEOSA right, it was not needed to qualify for that right. The Circuit rebuffed what it appeared to view as the District's intrusion into a Congressionally-mandated scheme, reiterating its prior admonition that Congress has "categorical[ly] preempt[ed]"state and local governments from "redefin[ing] either who are 'qualified law enforcement officers' or who is eligible for the LEOSA right. . . Accordingly, we once again state that LEOSA creates an individual right to carry that is remediable under Section 1983."

Second, the Circuit found the District's "causation" argument to be meritless. As the court framed it, the District was arguing that "the actions about which [Appellees] complain--the District's failure to issue them a form necessary to obtain the training certification required by Subsection 926C(d)(2)(B)-did not deprive them of any right under LEOSA." The Circuit found this to be "a perplexing claim, to say the least." It found that "the District is the cause of Appellees' inability to be considered qualified retired law enforcement officers."

LINK

First Amendment: Ordinance Limiting Number of Freestanding Signs and Defining "Flag" is Unconstitutional

Willson v. City of Bel-Nor, No. 18-1753 (8th Cir. May 20, 2019).

A Missouri town's ordinance that defines "flag" with reference to "symbols of governments" has been found to be content-based and violative of the First Amendment.

Lawrence Willson ("Willson"), a resident of the City of Bel-Nor, Missouri ("City") has displayed three stake-mounted signs on his property, two since 2016 and a third since 2014. All of the signs contain political messaging. In 2017, he received a summons charging him with violation of the City's Ordinance No. 983 ("Ordinance").

The Ordinance permits "each improved parcel of private property to post one stake-mounted and self-supporting freestanding sign and not more than one (1) flag." A flag, as defined by the Ordinance, includes "any fabric or bunting containing distinctive colors, patterns or symbols used as a symbol of a government or institution". The Ordinance also includes several requirements regarding the size, placement, and features of permissible flags and signs.

In response, Willson sought preliminary injunctive relief alleging the Ordinance is content-based, vague, and overbroad in violation of the First Amendment. The district court denied Willson's

motion based on the standards for preliminary injunctive relief, and also held Willson was unlikely to succeed on the merits because the Ordinance is content-neutral and narrowly-tailored to address the City's interests in traffic safety and aesthetics. The district court also rejected Willson's overbreadth challenge.

The Eighth Circuit reversed the district court's denial of Willson's motion to preliminarily enjoin enforcement of the City's Ordinance restricting the number of signs displayed on private property. Citing *Reed*, the court held that the Ordinance is a content-based restriction that is not narrowly-tailored to achieve a compelling government interest related to government safety and aesthetics. It determined so based on the definitions of a flag or sign in the Ordinance, because those definitions turn on the content of the item. The Ordinance is content-based because whether a flag or sign is prohibited by the Ordinance depends on the topic discussed or idea/message expressed. The court further explained that even if there were no distinction between a sign or a flag, the Ordinance would still be unconstitutional. Moreover, even if the aesthetics and traffic safety were adequate justifications for this ordinance, it is still not narrowly-tailored because the City failed to cite evidence that the Ordinance furthers its stated interests, and testimony from the Mayor is not enough to provide such evidence.

The court also held that the ordinance is facially overbroad because based on the text it would prohibit items like "Welcome Home" banners, ADT security stickers, displaying Christmas lights, and displaying birthday balloons near the front door. These examples the court cited demonstrates that the Ordinance "creates a prohibition of alarming breadth" in accordance with the standards set by jurisprudence. The court also determined that Willson was likely to succeed on his First Amendment claim, and that the district court erred in denying the motion for preliminary injunction.

LINK

Title VII: Plaintiffs' Allegations of Anti-Italian Employment Actions are Sufficient to Survive Dismissal

Cicalese v. University of Texas Medical Branch, No. 18-40408 (5th Cir. May 16, 2019).

The Fifth Circuit has reversed a lower court dismissal of a Title VII claim brought by two Italian physicians employed at a Texas medical school, finding that they had adequately adduced circumstantial evidence of national-origin-based discrimination sufficient to satisfy *Twombly/Iqbal* standards.

Luca Cicalese, M.D. and Cristiana Rastellini, M.D. a married couple ("Appellants"), were born in Italy. They began working for University of Texas Medical Branch at Galveston ("UTMB") in 2007. Although all went well for several years, the couple began having problems after a new dean joined TMB in late 2012. Soon after being hired, he said to the couple, "What are you doing here? You should go back to Italy." The dean took other actions detrimental to the couple, altering job performance evaluation criteria to prevent positive evaluations, refusing to publicize an "Order of Merit" presented from the President of Italy, suspending UTMB's liver transplant program, and requiring investigations of Appellants' competence.

The couple's problems intensified in late 2014 when the dean hired a new chairman of surgery. The chairman, when speaking of the Italian Ph.D. students at UTMB, said he did not care about "these Italians" and referred to "stupidity" and failure to "understand[] a situation" as an "Italian thing." The Appellants were further demoted, their pay was cut, and they were required to work for less experienced doctors. Finally, the chairman instated a new policy rescinding all permanent

faculty licensure waivers, which, according to Appellants, was meant to target them because they were the only two physicians at UTMB who benefited from the permanent waiver.

The couple sued UTMB, alleging that "[d]irect and/or circumstantial evidence exists showing that [UTMB] intended to discriminate against [them] because of their national origin, in violation of Title VII." UTMB moved for dismissal under FRCP 12(b)(6), which the district court granted, concluding the couple had failed to state a plausible national origin discrimination claim or a hostile work environment claim.

On appeal, Appellants argued that the district court erred by holding them to a heightened pleading standard when dismissing their national origin disparate-treatment claims. They alleged that the district court confused the plausibility pleading standard of *Twombly/Iqbal* with the evidentiary standard of *McDonnell Douglas*. Under the *Twombly/Iqbal* pleading standard, a complaint must "state a claim to relief that is plausible on its face.'" This differs from the *McDonnell Douglas* standard, which "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases."

The Circuit's task was to identify the ultimate elements of a disparate treatment claim and then determine whether the district court erred by requiring Appellants to plead something beyond those elements to survive a motion to dismiss. There are two ultimate elements a plaintiff must plead to support a disparate treatment claim under Title VII: (1) an "adverse employment action," (2) taken against a plaintiff "*because of* her protected status." The Circuit cautioned that a court errs by requiring a plaintiff to plead something more than the "ultimate elements" of a claim, and "inappropriately heightens the pleading standard by subjecting a plaintiff's allegations to a rigorous factual or evidentiary analysis under the *McDonnell Douglas* framework in response to a motion to dismiss."

The district court had found Appellants did not allege facts plausibly showing any adverse actions taken *because of* their national origin-they did not allege with adequate specificity that any "similarly situated" non-Italian employee was treated differently, and it therefore concluded they failed to plausibly allege circumstantial evidence of discriminatory motive. The court also reasoned that the UTMB officials' derogatory statements about Italians were mere "stray remarks" and so could not plausibly constitute direct evidence of discriminatory motive. In arriving at that conclusion, the court faulted Appellants for failing to allege precisely when and how many times those remarks were made.

The Fifth Circuit disagreed. "While a close call, we conclude that [Appellants]--in claiming UTMB's various actions against them were motivated by anti-Italian bias-alleged sufficient facts to "nudge[ ] their claims across the line from conceivable to plausible." The lower court's analysis of the complaint's allegations-scrutinizing whether Appellants' fellow employees were really "similarly situated" and whether the derogatory statements about Italians amounted to "stray remarks"-was more suited to the summary judgment phase.

The Circuit vacated the district court's dismissal of Appellants' disparate treatment claims and remanded them for further proceedings.

LINK

THIS JUST IN-IMLA Canada Member Neil Robertson Appointed to Queen's Bench of Saskatchewan

IMLA congratulates the appointment of Neil Robertson to the Queen's Bench of Saskatchewan, as noted in this announcement on the National Judicial Website:

May 21, 2019 - Ottawa, Ontario - Department of Justice Canada

The Honourable David Lametti, Minister of Justice and Attorney General of Canada, today announced the following appointments under the new judicial application process introduced on October 20, 2016. The new process emphasizes transparency, merit, and diversity, and will continue to ensure the appointment of jurists who meet the highest standards of excellence and integrity.

Neil Robertson, a sole practitioner in Regina, is appointed a Judge of Her Majesty's Court of Queen's Bench for Saskatchewan. Mr. Justice Robertson would replace Mr. Justice B.A. Barrington-Foote (Regina), who was elevated to the Court of Appeal on November 1, 2018.

Biography: A graduate of the University of Regina and Osgoode Hall Law School, Justice Robertson articled with Leslie Shaw and was admitted to the Law Society of Saskatchewan in 1984.

At the time of his appointment, Justice Robertson had a private practice in municipal law and as an arbitrator. He also served as an Inquest Coroner and Chair of the Saskatchewan Police Commission. He previously practiced with Robb & Dowling and as counsel to the Regina Police Service and City of Regina, appearing before all levels of courts. He received the Queen's Counsel designation in 2003 and the Fellows designation from the International Municipal Law Association in 2005.

Justice Robertson has been active throughout his career with professional associations, including as a past president of the Saskatchewan Branch of the Canadian Bar Association, and with community groups. His community service was recognized by the award of the Saskatchewan Volunteer Medal in 2016.

Justice Robertson has been married for 32 years to Madeleine Robertson, Q.C. with whom he has a son and daughter.

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