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Attorney's Fees: Court's Failure to Specify Number of Hours Allowed in Fee Award Requires Remand

Kerner v. City and County of Denver, No. 17-1222 (10th Cir. May 7, 2018).

A lower court's omission of the number of hours allowed for a class action attorney's fee award - and simply allowing a dollar figure admitted as reasonable by the defendant city - is an abuse of discretion, requiring remand.

Marian Kerner and Ramona Lopez won a class action suit alleging that Denver's use of a specific type of pre-employment screening test had a disparate impact on minority applicants. They won $1,674,807 in damages and sought $1,550,195 in attorney's fees and $162,121 in expenses. Denver objected to the costs and fees, providing the court an alternative calculation of $894,443 in fees and $140,358 in expenses. The district court awarded Denver's proposed $894,443 in attorney's fees and only $97,495 in expenses. The plaintiff appealed.

The Tenth Circuit reviewed the district court's lodestar analysis - the accepted method for determining reasonable attorney's fees - beginning with the hourly rate. The Court noted the lower court found the rates reasonable, but that its conclusory statement with respect to the *number of hours* the attorneys claimed to have worked on the litigation was ambiguous. The lower court said "[w]ithout fixing a specific figure of the number of hours reasonably expended in this case, the Court exercises its discretion to defer to those admitted as reasonable by Denver - $894,443." The problem with this sentence, according to the Tenth Circuit, was that it lent itself to at least two interpretations. Without a "specific figure" for the *reasonable number hours worked* and only a statement about the *reasonable hourly rate* left the parties to argue about, and the Circuit to decipher, how the ultimate number was calculated. This one sentence left the Circuit no option but to hold that "the district court abused its discretion by failing to conduct a full lodestar analysis. Once the district court determined that the [hourly] rates were reasonable, it needed to continue the analysis by making a determination about the reasonable number of hours and then calculate the final lodestar figure." The Circuit refused to adopt either parties' interpretation on appeal, and instead remanded the case so the lower court could "clarify its decision and redo its lodestar analysis."

LINK

Contracts: Trash Hauler Could Not Rely on Implied Right to Use Alternative Transfer Stations, Absent Express Language

Dirty Boyz Sanitation Service, Inc. v. City of Rawlins, No. 16-8123 (10th Cir. May 14, 2018).

Neither the Contract Clause nor the FAAAA were violated when a Wyoming city passed an ordinance requiring a trash hauler to use a city-owned transfer station, in the absence of an express contractual provision giving the hauler the latitude to use alternate sites.

The state required Rawlins, Wyoming (City) to close its landfill, at which point the City opened a transfer station and passed a flow-control ordinance requiring locally licensed garbage haulers to take garbage to the transfer station for transport to a landfill elsewhere. Notably, the first flow-control ordinance the City sought to pass failed and, during the time it took for the City landfill closure and transfer station opening, Dirty Boyz Sanitation Service, Inc. (Dirty Boyz) sought to construct its own transfer station for what it collected (including from its contract with the City itself) and then transfer that garbage to neighboring counties. Overall, this was cheaper than paying a fee to use the City's own transfer station. Ultimately, Dirty Boyz got a state and a county permit for its transfer station and the City passed its flow-control ordinance, the latter of which led the City to amend its contract with Dirty Boyz to require it to bring garbage to the City's own transfer station. Dirty Boyz immediately filed suit arguing the ordinance violated the Contract Clause of the United States Constitution and is preempted by the Federal Aviation Administration and Authorization Act (FAAAA). The district court granted summary judgment in favor of the City and Dirty Boyz appealed.

Dirty Boyz made two primary arguments on appeal: 1) the flow-control ordinance violated the Contract Clause by impairing the agreement between the City and Dirty Boyz and 2) the FAAAA preempts the ordinance. Taking the arguments in turn, the court first sought to determine whether the ordinance violated the Contract Clause, by "ask[ing] whether the change in [] law [] operated as a substantial impairment of a contractual relationship." Dirty Boyz posited their contract was impaired because it required it to take garbage to the City transfer station, not their own, which ultimately prevented it from taking the garbage itself to the landfill of its choice (again, where it

could save money). The hitch for Dirty Boyz was the absence of any clause in the contract between the City and Dirty Boyz giving Dirty Boyz the right to choose the disposal site of garbage it collected from the City. The Circuit rejected its *implied right* to do so because, at the time of contracting, the City landfill was open. Dirty Boyz had not contracted for such a right.

As for the FAAAA, it prohibits states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Thus, the question became whether garbage was "property" under the law, a term undefined in the statute. Looking back at legislative history, the Circuit found a House Report stating "[t]he conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors," and quickly concluded that state and local regulation of garbage collection did not fall within the preemptive scope of the FAAAA. But the Court went further, noting that even if garbage was within the scope of FAAAA, the City ordinance's effect on prices, routes, and services would be too insignificant to warrant preemption. It affirmed the lower Court on both rationales.

LINK

Due Process: Mere Notice of City Council Hearing to Discuss Blight, Without Subsequent Notice of Actual Condemnation Decision, Does Not Afford Due Process

M.A.K. Investment Group, LLC v. City of Glendale, No. 16-1492 (10th Cir. May 14, 2018).

Reversing the lower court, the Tenth Circuit has found that Glendale, Colorado's reliance on the state's Urban Renewal law in not alerting a landowner of a resolution deeming its property blighted deprived the plaintiff of a constitutionally-protected property interest and did not meet constitutionally-mandated due process standards.

M.A.K. Investment Group, LLC (M.A.K.) owns various parcels of property in Glendale, Colorado ("City"), several of which were declared "blighted" by the City, which followed the state statute in making the determination. The City never notified M.A.K. about its resolution deeming its property blighted, which had legal consequences, including the 30-day window M.A.K. had to seek judicial review of the resolution and a seven-year window for the City to begin condemnation proceedings. M.A.K. challenged Colorado's Urban Renewal statute facially and as applied to it as violative of Due Process because it fails to require municipalities to notify property owners about an adverse blight determination or the 30 days owners have to seek review. The district court dismissed M.A.K.'s §1983 case, on the City's motion, holding that M.A.K. did not have a due process right because the blight determination was legislative.

The Circuit began with the familiar two-step due process inquiry, asking "[f]irst, . . . whether the City's actions deprived plaintiffs of a constitutionally protected property interest" and second whether plaintiff was "afforded the appropriate level of process." The Circuit quickly agreed with M.A.K. that it had a protected property interest *in the statutory right to seek judicial review*, i.e. in the cause of action itself. Glendale countered that there could not be a property right in the judicial review hearing itself because "process is not an end in itself but is meant to protect a substantive interest to which the individual has a legitimate claim of entitlement." The Circuit disagreed, pointing out the right to challenge the determination was nota right to just a *hearing* but rather a *right to overturn* a determination that was an abuse of discretion under the state law.

Having settled that, the Court moved on to whether Glendale provided M.A.K. sufficient notice that its property interest was in jeopardy, thus requiring the Circuit to first determine what type of

notice due process required. The state statute requires cities to notify property owners whenever a city council will hold a hearing with respect to an urban renewal plan as well as whenever it commissions a study regarding blight. However, the statute *does not* require any notice to property owners *after a city council determines property is blighted*. M.A.K. received notice that Glendale was considering a Riverwalk Urban Renewal Plan, that it was commencing a study, that some of M.A.K.'s property was in this area and that a hearing was occurring on May 7, 2013 to approve said Plan. But M.A.K. took issue with not having been notified that indeed its property had been deemed blighted at that hearing - which was the trigger for the timeclock for it to seek judicial review.

The Circuit held that the United States Supreme Court's "intuitive rule" from *Mullane* has controlled "for decades" and requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Applying it the Circuit said Glendale was required to provide M.A.K. with direct notice of the adverse blight determination via mail, email, or personal service. Even though the Circuit agreed M.A.K. could have attended the hearing on May 7 and could - maybe even should - have kept apprised of the legislative pronouncement about its properties it was made aware was potentially coming, it held "a party's *ability* to take steps to safeguard its interests *does not relieve the State of its constitutional obligation*." Glendale made several counterarguments, all of which were rejected by the Court, and the most noteworthy of which was its position that under Colorado law M.A.K could challenge the original blight determination if and when condemnation proceedings occurred, meaning the City did not need to provide notice of the determination itself. While this seemed promising, the Circuit rejected it as well on a couple grounds. First, the Circuit said the City may never have brought a condemnation proceeding, a problem the Circuit succinctly summed up as an "opportunity for review that may never come cannot replace a statutory right to review." Second, the Circuit found that "a cause of action to have the *blight determination reversed* is not the same thing as being able to argue the property is not blighted in a future condemnation action." In short, they were simply not equal and therefore the latter condemnation challenge could not replace the earlier blight determination challenge.

The Circuit reversed the lower court, holding Glendale violated M.A.K.'s due process right and remanding the case.

LINK

Employment: Entity Controlling Employee's Day-to-Day Performance is Employer, Even if Different Entity Pays Employee

Harris v. Allen County Board of Commissioners, No. 17-2577 (7th Cir. May 18, 2018).

The fact that a County provided a worker's job description, was listed as the worker's "department," and paid the worker's salary, did not make the County his "employer"-the Superior Court which controlled his day-to-day performance was his legal employer.

Indiana law allows the juvenile courts to establish detention and shelter facilities. The judge appoints staff, sets the budget, and hires personnel it sees fit. The county pays the employees from its general fund. When Carleton Harris (Harris) was hired for the Allen County (County) Juvenile Center in 1995 his offer of employment included the seal of the court and he signed a Superior Court Employee Handbook. However, his job description and his medical authorization came from the County Board of Commissioners, and his performance evaluation couched him within the Allen County Juvenile Center as his "department" for his "Allen County Employee

Performance Appraisal."

In 2003, by then promoted to a Youth Care Specialist, Harris was injured by a youth on the job and used the County worker's compensation. After some time Harris's doctor determined he reached "maximum medical improvement" and he was told by a *County employee* that this "diagnosis terminated his workers' compensation benefits and that his permanent work restrictions prevented him from perform[ing] the essential functions of his position at the Juvenile Center, with or without a reasonable accommodation." After not qualifying for any available jobs, Harris filed a discrimination case - with an Equal Employment Opportunity Commission right-to-sue letter in hand - against the Allen Superior Court and the Allen County Board of Commissioners for violating his rights under the ADA. The Board of Commissioners moved to dismiss the case and the district court agreed, holding the County Board was *n o t* Harris' employer. Harris then voluntarily dismissed the Allen Superior Court from the case, leaving the district to dismiss the entire case and leaving Harris to appeal the issue of whether the County Board of Commissioners was his employer.

On appeal to the Seventh Circuit Harris admitted that the Allen Superior Court was his *direct employer*, but argued the County Board of Commissioners *should be considered his indirect, or de facto, employer*. The ADA allows employees to being cases against those not their direct employer, but only under limited circumstances - Harris said he fit the bill. To establish he was eligible under this minimal category, the Seventh Circuit analyzed one primary factor: the degree of control the Board of Commissioners exercised over Harris, which it reduced to whether it controlled the direct work and his hiring/firing. Harris was mostly on the defensive end of the case, arguing a trier of fact *could find* the Board of Commissioners hired/fired him, while the County argued it did not have such power, but rather that the state statutes seated that power within the Allen Superior Court. The Circuit agreed with the County, noting the control of Harris's hiring, firing, day-to-day duties, and salary was statutorily delegated to the Allen Superior Court, even though facts indicated he was actually paid from the County general fund, his employment documents were from the County, and a county employee handled his disability matter and termination.

Harris' strongest evidence - the County employee's involvement and signature on his termination letter and disability paperwork - did not persuade the Circuit. It said these facts did not prove the *decision* that he could not return to the Allen Superior Court for work and that he could not be placed in another Court-system job *came form that employee or the County.* The lower court's dismissal was affirmed.

LINK

Pleadings: Dismissal of Whistleblower Retaliation Claim Where Pro Se Litigant Cited Incorrect U.S.C. Provision is Vacated; Liberal Pleading Policy Applies

Torres v. Miami-Dade County, No. 17-14205 (11th Cir. May 15, 2018).

Although he incorrectly cited a US Code provision applicable only to Homeland Security employees, a pro se whistleblower retaliation litigant's reference to *Lane v. Franks* indicated an intent to frame a proper First Amendment cause of action, requiring that the lower court's dismissal be vacated.

Phillip Torres (Torres) started with Miami-Dade County (County) as an engineer in 1993. When the County faced tight financial times, it eliminated a variety of jobs and reclassified employees, including the elimination of Torres' supervisory role and his title as Senior Professional Engineer,

culminating in a salary reduction of $30,000 a year. Since then, the County reinstated many engineers, including to previous classifications, but not Torres, which led him to allege in a *pro se* suit that the County's refusal to reinstate him was the result of his complaints to the Miami-Dade Attorney and the Deputy Mayor in 2013 and that the County's actions were 'ongoing whistleblower retaliation" for his "protected activity" of "bringing to light acts of mismanagement, corruption, and wasteful spending." Torres' second amended complaint alleged two charges: 1) that the County violated Torres' right to be free of retaliation for "blowing the whistle" on the County's "official misconduct, corruption, and wrongdoing" under 5 U.S.C. § 9701, and 2) that the County violated the Florida Whistleblower's Act and the Miami-Dade County Code. The County moved to dismiss the case and Torres responded - still *pro se* - with citations, albeit incorrect ones, to *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014). The district court granted the County's motion to dismiss though because Torres said his protection as a whistleblower derived from 5 U.S.C. § 9701, but as the County pointed out this only protected Department of Homeland Security employees. Torres appealed.

The Eleventh Circuit vacated the lower court ruling, finding it inappropriately failed to give Torres the liberal construction he was due as a *pro se* litigant. In policy terms, the Circuit said "pleadings must be construed so as to do justice" and that for the *pro se* pleadings "however inartfully pleaded, must be held to less stringent standards" and that "in concrete terms" this means looking beyond labels to looking at their content and substance. It agreed Torres' pleadings seem to argue that he could proceed under 5 U.S.C. § 9701 because he is clearly not a Department of Homeland Security employee, but held that such "inaccurate labeling" should not have been fatal. Rather, liberally construing the pleadings, the Circuit determined Torres "attempt[ed] to raise" a First Amendment retaliation claim, evident by his citation to *Lane* and his allegations that he is a public employee who engaged in the protected activity of blowing the whistle and that he was retaliated against. The Circuit held the lower should have determined whether Torres' claim was cognizable as a First Amendment retaliation claim under §1983 and remanded the case to give it such an opportunity.

LINK

Religion: "In God We Trust" Motto Does not Violate RFRA or the Constitution

New Doe Child #1 v. Congress of the United States, No. 16-4345 (6th Cir. May 29, 2018).

Finding that, although a monotheistic motto placed on currency might conceivably conflict with a sincerely held religious belief, the Sixth Circuit has upheld a lower court's dismissal of a complaint that "In God We Trust" violates RFRA or the First Amendment; placement of the motto on currency, which is impersonal and routinely transferred, differs from a motto on a vehicle license plate and is not compelled speech.

A group of Atheist, Humanist and Jewish individuals, anonymous children and their parents, and various other groups alleged that the motto "In God We Trust" (Motto) on U.S. coins and bills violated their rights under the Religious Freedom Restoration Act (RFRA) and various constitutional provisions.

Specifically, plaintiffs asserted that the Motto substantially burdens their religious exercise by causing them to: (1) "personally bear a religious message that is the antithesis of what they consider to be religious truth"; (2) affirm as true a statement they believe to be false (both that God exists and that "we" as Americans trust in God) when "their religious ideologies mandate that they act with honesty"; and (3) "proselytize for a religious claim that is completely contrary to

their personal religious opinions." The Jewish plaintiff also alleged that it is sinful to print God's name on secular documents, particularly when those documents (currency) are later destroyed.

By forcing them to choose between not using cash and violating their religious beliefs, plaintiffs alleged, the Government substantially burdened their religious exercise without a compelling interest as required by RFRA. Their Free Exercise claim stated that the Motto impermissibly promotes a monotheistic Christian religious belief, and their Free Speech claim argued that they are being compelled to proselytize when they pass currency to others. Finally, they said, the Motto denies equal dignity to Plaintiffs' religious views, contributing to cultural stigma, alienation, and denigration in violation of the Equal Protection clause.

Plaintiffs sued Congress, the United States, the Secretary of the Treasury, the Principal Deputy Director of the Mint, and the Director of the Bureau of Engraving and Printing, seeking an injunction against producing currency inscribed with the Motto.

The district court dismissed all of Plaintiffs' claims for failure to state a claim.

The Sixth Circuit affirmed. It first found, over defendants' arguments to the contrary, that the plaintiffs had alleged injury-in-fact sufficient for Article III standing purposes (a question different from the adequacy of RFRA injury). It then assessed plaintiffs' RFRA arguments. To survive a motion to dismiss, a RFRA claim must demonstrate that: (1) the plaintiff seeks to engage in (or avoid engaging in) an exercise of religion; (2) the Government has placed a substantial burden on that exercise; and (3) the Government either has no compelling interest in imposing that burden or has another less restrictive means of achieving its compelling interest.

The Circuit found that plaintiffs were exercising "religion" for RFRA purposes. "Sincerity is distinct from reasonableness. *Hobby Lobby* teaches that once plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations." The court agreed with plaintiffs that carrying currency implicated more than mere exposure to distasteful ideas: "Currency is an item an individual owns, carries on his or her person, and uses to engage with the world in a way that is distinct from mere exposure to objectionable speech or ideas. For these reasons, we conclude that Plaintiffs have adequately alleged that they seek to engage in an "exercise of religion" protected by RFRA. The arguments of the Government and amici to the contrary are not persuasive."

While they succeeded on the religious exercise issue, Plaintiffs fared less well in demonstrating a burden on that exercise. Although use of cash might occasionally be necessary, it was hardly the only avenue open: "[P]laintiffs can often avoid cash by using checks or credit cards. Though access to credit or bank accounts is not universal, not one of the Plaintiffs alleges that his or her financial situation forecloses access to credit or checks. Plaintiffs therefore have not plausibly alleged that they lack a feasible alternative to cash for engaging in commerce." Their RFRA claim failed.

The Free Exercise claim required a showing that the Motto was intended to promote one religious view over others. That position had already been refuted at the Supreme Court: "The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose. *Cty. of Allegheny v. Am. Civil Liberties Union* , 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). Furthermore, the Motto "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." (*citations omitted*). There was no Free Exercise violation.

Plaintiffs' Free Speech argument was essentially that they were being compelled to promote a particular viewpoint. But they had not argued-and could not-that observers would attribute the Motto on currency to plaintiffs rather than to the Government. In that respect, it was far different from mottos placed on license plates. While the Supreme Court has held that the Free Speech Clause barred New Hampshire's requirement that drivers use a license plate containing the state

motto, "Live Free or Die," currency "differs in significant respects from an automobile, which is readily associated with its operator." Plaintiffs could not allege that the Motto was attributed to them; therefore, the district court properly dismissed their Free Speech claim.

Finally, although the court acknowledged that the plaintiffs might experience societal discrimination based on their beliefs, there was no indication that the Motto as placed on currency discriminated against plaintiffs or contributed to any such discrimination.

LINK

Takings: City's Provision of Improvements Near Plaintiffs' Beachfront Property Encouraged Trespass and Taking, but $1.5 M Award Resulted in Public Easement

Chmielewski v. City of St. Pete Beach, No. 16-16402 (11th Cir. May 16, 2018).

Although St. Pete Beach's development of improvements and parking areas encouraged the public to encroach on plaintiffs' private beachfront property, when St. Pete Beach paid the plaintiffs $1.5 million for the "taking," it was implicitly purchasing a permanent public easement across the plot.

Paul and Katherine Chmielewski (Chmielewski's) own a beachfront parcel in St. Pete Beach, Florida (City) within a subdivision. Under Florida law the beach area between the water and the "mean high water line" is available for public use, regardless of ownership in a subdivision. In 2006 the Chmielewski's initiated a quiet title action against the City, a neighboring hotel and their subdivision property association. They won partial summary judgment, establishing their fee simple ownership of what came to be known as "Block M" and included the specific findings that other subdivision residents could use Block M for "beach and sunbathing purposes" and that the city's ownership of five parcels in the subdivision *did not* give the general public the right to use Block M.

However, back in 2003 to 2005 (leading up to the 2006 quiet title action), the City used federal grant monies to create a community center on one of its subdivision parcels. Thereafter - including after the title action - the City improved a parking lot, grassed and landscaped the area, and removed fencing and gates that previously prevented after-hours access and use. And, over the ensuing years, the City installed metered public parking across the street (within half a block) for Block M beach access parking and publicly announced that it had provided parking to allow the public to access the beach, and published a map showing public access to Block M and its beach. Moreover, the zoning map labeled the area as public park. And, perhaps as might be expected, the Chmielewski's experienced a lot of trespassing on their property - tourists that were not residents of the subdivision, weddings that took place and a City-sponsored wiffle-ball tournament. At one such event, a police officer told a Chmielewski family member that the event was private and made him leave his own property. Not surprisingly, the Chmielewski's went back to Court in 2009 and filed a §1983 suit alleging an unlawful taking and unreasonable seizure of their property.

A jury handed down a verdict for the Chmielewski's on both the federal § 1983 claim and a state inverse condemnation claim. After the court reviewed the jury award, the Chmielewski's were awarded over $1,489,000 for the loss of private use of their property. The City appealed, arguing the district court erroneously denied its motion for judgment as a matter of law under FRCP 50 and its motion for a new trial under FRCP 59.

The Circuit was unpersuaded by the City and affirmed the lower court. The standards at issue from the Federal Rules were as follows: FRCP 50 relief would be granted "only if the evidence [wa]s so overwhelmingly in favor of the [City] that a reasonable jury could not arrive at a contrary verdict," and FRCP 59 relief for a new trial would be granted only if the verdict was "against the clear weight of the evidence or w[ould] result in a miscarriage of justice." But the Circuit found the City's actions did encourage public occupation of the Chmielewski's beach property by "placing beach access signs, clearing vegetation, creating nearby parking spaces, hosting events at the property, and refusing to remove trespassers." The Chmielewski's successfully showed at trial that the continuous public trespassing on their property was a natural and indeed intended result of the City's actions, and neither a new trial nor a directed verdict was appropriate. However, although the Circuit did not agree that the City should be granted title to the parcel upon payment of the award, such payment would be consideration for a permanent easement across the Chmielewski's beach property for the benefit of the general public. The Circuit directed the district court to amend its judgment accordingly.

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eNews Brief

BAIL BOND - FORFEITURE

Bail bond company posted $50K in Wyoming for a defendant from Florida. Defendant failed to appear and bond was forfeited. Surety sought to set aside forfeiture on basis Defendant had not turned over his passport, but also testified that Surety usually required passport to be turned over if not already in court's possession and that Defendant was likely in Texas. Court refused to set aside bond forfeiture as Defendant did not need a passport to get into Texas.

SPEEDY BAIL BONDS V ALBANY COUNTY (SCT WY APRIL 13, 2018)

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eNews Brief

TAX ASSESSMENTS - AGRICULTURAL ASSESSMENT - RESTRICTIVE COVENANTS - INJUNCTION AGAINST AGRICULTURAL USE

A developer bought agriculturally assessed land and entered into a development agreement with a city which included a restrictive covenant against using the land for agriculture. The city sued to enforce the covenant and obtained an injunction enjoining that use. The city also sought to challenge the agricultural assessment since no agricultural use existed. The assessment was changed and the land owner appealed. The appeal was denied.

THOMA V VILLAGE OF SLINGER (WI SCT MAY 10, 2018)

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