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In This Issue: 5 Cases

Public Records: Newspapers May Not be Refused Access to DEA's ARCOS Opioid Data

Seizure: No Seizure where Pedestrians are Ordered to Get onto the Sidewalk and Blocked by Police Car

Sovereign Immunity: State's Waiver of Immunity must be Unambiguous and Cannot be Construed from Cursory Statute

Title IX: In Sexual Discrimination Claim, 8(a) Standards, not McDonnell Douglas, Govern Pleadings

Trials: District Court's Extension of Time to File Appeal was not Based on Good Cause; Without Timely Appeal, Circuit had no Jurisdiction

Quick Links

IMLA Website
Webinar Calendar
Municipal Jobs Board
Become a Member
Join The IMLA Community
IMLA Podcasts

Public Records: Newspapers May Not be Refused Access to DEA's ARCOS Opioid Data

HD Media LLC v. United States Department of Justice, No.18-3839/3860 (6th Cir. June 20, 2019).

Vacating the district court's Protective Order, the Sixth Circuit holds that the blanket denial of the request by intervenors HD Media and Washington Post for access to opioid plaintiffs' DEA ARCOS data is not supported by good cause and must be revised within more reasonable parameters.

Since December 2017, opioid cases filed by more than 1600 municipalities have been transferred to *In re National Opiate Litigation* in the Northern District of Ohio (17 MDL 2804). Among the more important evidentiary data sought by plaintiffs is the Drug Enforcement Administration's ARCOS ("automated comprehensive drug reporting system") database, which compiles required filings from drug manufacturers and distributors and includes supplier name, registration number, address and business activity; buyer name, registration number and address; as well as drug code, transaction date, total dosage units, and total grams. The ARCOS

data provides an extremely detailed picture of which manufacturers' opioids were delivered by which distributors to which dispensing entities.

Over the objections of the DEA, which claimed that release of the data would compromise ongoing enforcement actions, and the objections of the opioid defendants, who argued that the data would reveal sensitive competitive information, the MDL allowed plaintiffs access to the ARCOS data:

> Plaintiffs' request for [production of] the ARCOS data, which will allow Plaintiffs to discover how and where the virus grew, is a reasonable step toward defeating the disease. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("Sunlight is said to be the best of disinfectants.") (quoting Justice Brandeis, Other People's Money 62 (1933)).

Access to the data was not unlimited. The plaintiffs were subject to strict Protective Order provisions: "disclosure of the ARCOS data shall remain confidential and shall be used only for litigation purposes or in connection with state and local law enforcement efforts." Data was only produced for the period 2006 to 2014, thereby addressing any enforcement or competitive concerns.

HD Media then filed a West Virginia Freedom of Information Act request with Cabell County, West Virginia seeking the ARCOS data that the county received as a plaintiff in the MDL, and the Washington Post filed similar public records requests with plaintiffs Summit and Cuyahoga counties in Ohio. They were met with objections by the plaintiffs, the opioid defendants and the DEA. The district court denied the media requests and the media organizations appealed.

The Sixth Circuit (two members of the panel) saw things differently. It found the district court's original analysis of plaintiffs' ARCOS data demand to be probative:

> In the same order concerning disclosure to Plaintiffs, the district court rejected Defendants' and the DEA's arguments that there was "good cause" for nondisclosure. The court specifically rejected the DEA's arguments that disclosing the data would interfere with law enforcement interests. . . . ("[S]imply saying that disclosure of ARCOS records dating back to 2006 would detrimentally affect law enforcement does not make it so.").) The court likewise rejected the argument that producing the data would cause Defendants competitive harm, explaining that "the assertion was conclusory and . . . market data over three years old carried no risk of competitive harm."

Given this posture, the district court's rejection of the media's ARCOS requests seemed unsupportable: "Between the time it ordered the DEA to produce the ARCOS data to Plaintiffs and the time it denied Intervenors' requests for the data, the district court seems to a complete about-face concerning the relevant interests at stake." The Circuit opined that if the ARCOS data benefited the plaintiffs, it served the public even more, citing HD Media's previous use of ARCOS data received from the West Virginia Attorney General in a prior unrelated litigation. That data included "hundreds of printed pages of ARCOS data spreadsheets that revealed the number of hydrocodone and oxycodone dosage units sold to every retail pharmacy in West Virginia from 2007 to 2012," and was used in the HD Media Charleston Gazette-Mail's extensive reporting on the opioid crisis, which was awarded a Pulitzer Prize for exposing the causes, context, and scope of the epidemic. That reporting also prompted a committee of the U.S. House of Representatives to investigate and issue a report on the opioid epidemic.

The Circuit therefore held that the district court abused its discretion in finding "good cause" not to permit disclosure of the ARCOS data pursuant to the media public records requests. It vacated the district court's Protective Order and remanded to permit the district court "to consider entering a new protective order consistent with the proper legal standards as set forth in this opinion." In that process, the lower court may entertain arguments by the DEA as to why particular portions of ARCOS data that relate to specific ongoing investigations should not be disclosed; however, "the district court shall not enter a blanket, wholesale ban on disclosure pursuant to

state public records requests." And if the district court permits a pleading to be filed under seal or with redactions, it must explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary."

DISSENT: Judge Guy disagreed. In his view, the DEA *had* provided credible good cause arguments during the original ARCOS request by the plaintiffs, because the so-called stipulated protective order had only been entered into after significant arguments between the parties. As he put it:

> When properly viewed, I do not believe, as the majority does, that the court's subsequent decision to prevent the press from obtaining the ARCOS data was "bizarre." (Maj. Op. at 16.) The district court balanced different interests, under different circumstances, and at different times. . . . The court ordered the DEA to turn over the data because Rule 26 entitled plaintiffs to acquire it, even if it carried a risk of harm to the DEA or defendants. The newspapers are not parties and thus are not entitled to the material. The bar for keeping discovery materials out of their hands is thus considerably lower. In my view, the court did not abuse its discretion in striking those balances.

LINK

Seizure: No Seizure where Pedestrians are Ordered to Get onto the Sidewalk and Blocked by Police Car

Johnson v. City of Ferguson, No. 16-1697 (8th Cir. June 17, 2019).

Reversing the district court's finding that a police officer was not entitled to qualified immunity where he ordered two men to "Get the f*ck on the sidewalk" and blocked their futher passage down the street with his vehicle, the Eighth Circuit majority holds that the facts do not depict either the necessary show of authority or submission to authority to constitute a legally cognizable seizure. A four-judge dissent follows.

Dorian Johnson ("Johnson") alleges that he and Michael Brown, Jr. ("Brown") were "peacefully and lawfully" walking down Canfield Drive in Ferguson, Missouri ("City"), at approximately 12:00 p.m. on August 9, 2014, when they were approached by Officer Darren Wilson ("Wilson") in his marked police vehicle. As he approached the pair, Wilson slowed his vehicle and ordered them to "Get the f*ck on the sidewalk." Wilson continued to drive his vehicle several more yards, then abruptly put the vehicle in reverse and parked it at an angle so as to block the pair's path. After stopping his vehicle just inches from Brown, Wilson forcefully opened his door, striking Brown. Wilson reached through his window, grabbed Brown, and threatened to shoot his weapon. As Brown struggled to break free, Wilson discharged his weapon twice, striking Brown in the arm. Both Brown and Johnson ran away from Wilson, who at no time ordered either of them to "stop" or "freeze," but rather fired his weapon at the two men, with several of the shots striking and killing Brown.

At issue was whether Wilson's actions amounted to an unconstitutional seizure. As the Circuit put it, "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield."

The district court had found that an unconstitutional seizure had occurred and denied the officer's qualified immunity defense.

A majority of the Circuit found no seizure. "Whatever one might say about Wilson's expletive-expressed directive that Brown and Johnson move from the street to the sidewalk, Johnson's

complaint concedes that neither he nor Brown was ordered to stop and to remain in place. Johnson's decision to remain by Brown's side during Brown's altercation with Wilson rather than complying with Wilson's lawful command to return to the sidewalk was that of his own choosing. That he was able to leave the scene following the discharge of Wilson's weapon gives the lie to his argument that the placement of Wilson's vehicle prevented him from doing so."

As the majority saw it, without submission, there could be no seizure: "Accordingly, in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied, as occurred in both *Brower v. County of Inyo*, 489 U.S. 593, 596-99 (1989), and in *Tennessee v. Garner*, 471 U.S. 1, 4, 7 (1985), we conclude that no seizure occurred in this case."

That determination necessarily led to a denial of plaintiffs' claim of supervisory liability against the Police Chief or the City. Consistent with other jurisdictions, the Eighth Circuit has "consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." Furthermore, to maintain an action for training or supervisory liability, a plaintiff must show the failure to train or supervise caused the injury.

The Circuit majority directed that the district court's order be reversed and the case be remanded with directions to dismiss the federal claims.

DISSENT: Judge Melloy dissented, joined by Chief Judge Smith and Judges Kelly and Erickson.

He found that there had been a seizure: "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007). In claiming a seizure through a show of authority (rather than through physical force), the claimant must demonstrate both (1) a show of authority and (2) actual submission to that show of authority.

Show of Authority.

To determine whether there was a show of authority, courts apply an objective test: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." The dissent viewed Wilson's actions with his vehicle and commands as communicating that Johnson was not at liberty to ignore the police presence and go about his business:

> By crudely ordering Johnson to move and then abruptly reversing his vehicle and stopping it inches away and directly in Johnson's path, Officer Wilson communicated an intent to use a roadblock to stop Johnson's movement. Despite Defendants' (and amicus curiae's) argument that the roadblock did not foreclose all of Johnson's avenues of travel, a reasonable person would understand the roadblock's purpose was to serve as a "physical obstacle" conveying an order to stop-not an order to go around the vehicle and continue on one's way.

Amicus curiae The National Police Association argued that Wilson's order was nothing more than an order "simply for two pedestrians to get off the street and use the sidewalk" - a type of order is commonly referred to as a "move on" order and is meant to convey the message that a person is free to go anywhere else but cannot remain where he is. The parties had not cited, nor was the dissent aware of, any Eighth Circuit precedent addressing whether move-on orders qualify as seizures under the Fourth Amendment. Other circuits have split on the issue, with the analysis frequently (but not always) turning on whether there was physical contact.

The dissent faulted the majority and the amicus curiae for oversimplifying the factual account. After Wilson's initial "move on" directive, he escalated the encounter by abruptly putting his vehicle into reverse and parking his car at an angle blocking Johnson's path and within inches of

Brown and Johnson. Officer Wilson then fought with Brown and threatened to fire his firearm. "These events, viewed in a light most favorable to Johnson, would communicate to the reasonable person that Johnson 'was not at liberty to ignore the police presence and go about his business.'" It was, in the mind of the dissent, a legally cognizable show of authority.

Submission to Authority.

While temporary stopping is not always sufficient to constitute a submission to authority (see *United States v. Baldwin*, 496 F.3d 215, 219 (2d Cir. 2007) (holding that, after a police vehicle with activated lights and sirens followed the defendant's vehicle, the defendant's "momentary stop did not constitute submission to police authority"), the dissent construed Johnson's behavior to be such a submission. "Johnson's stop was not a temporary, reactionary pause caused by the roadblock placed in his path. Johnson did not recommence walking and go around the vehicle." Instead, Johnson had remained throughout the time that Wilson reached through his window and grabbed Brown, threatened to shoot his weapon, wrestled with Brown who struggled to break free, and then twice fired his weapon.

To the dissent, the majority was wrongly focused only on Wilson's use of a weapon at Brown and incorrectly determined that while Brown may have been seized, Johnson was not. "I do not believe the complaint can be parsed that finely. . . . I do not believe that from the perspective of a reasonable person encountering Officer Wilson, it can be reasonably said Officer Wilson intended to seize Brown but not Johnson. If one of the two were seized, both were seized."

As the dissent saw it, Johnson's stop was not merely "passive acquiescence" to a show of authority-he had stopped walking away. This was more than the passive acquiescence found to constitute an element of seizure by the Supreme Court in *Brendlin* where the defendant, a passenger, merely remained in his seat as the driver pulled over the vehicle.

Given the dissent's finding that a seizure occurred, denial of the defendants' motion to dismiss followed--the defendants had not presented any argument that, assuming there was a seizure, the seizure and use of deadly force were nevertheless reasonable, and had therefore forfeited any argument on this issue.

LINK

Sovereign Immunity: State's Waiver of Immunity must be Unambiguous and Cannot be Construed from Cursory Statute

Pense v. Maryland Department of Public Safety, No. 18-1554 (4th Cir. June 11, 2019).

Reversing the district court which had denied a Maryland state instrumentality's claim of sovereign immunity in an employment action, the Fourth Circuit has reaffirmed that Supreme Court precedent requires clear and express language in any statute purported to waive a state's immunity.

Michael Pense ("Pense") was employed by the Maryland Department of Public Safety and Correctional Services ("Department") for 17 years. He alleges that, in April 2015, a female Department employee falsely accused him of sexual harassment. During an investigatory interview in June 2015, he disclosed to the Department that he is gay and HIV positive. Two hours later, the Department placed him on administrative leave, and within two weeks--despite having determined that the sexual harassment allegation could not be sustained--the Department fired Pense. He sued the Department under Maryland's Fair Employment Practices Acts

("FEPA").

The Department moved to dismiss the FEPA claims on Eleventh Amendment immunity grounds. The district court concluded that, through a statutory consent to suit provision, the Department had waived sovereign immunity as to FEPA claims in the state and federal courts.

The Department sought an interlocutory review of the lower court's immunity ruling, requesting a stay of Pense's related litigation seeking other relief arising out of the alleged FEPA violation. The Fourth Circuit granted the request and again evaluated the applicability of Eleventh Amendment immunity de novo

The Eleventh Amendment provides, in relevant part, that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." The Supreme Court has "construe[d] the Amendment to establish that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State," and the Court has also recognized that the States' Eleventh Amendment immunity may extend to "state agents and state instrumentalities." *See* *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

But as the Supreme Court has explained, the Eleventh Amendment bar to suit is not absolute, and a state remains free to waive its immunity from suit in a federal court, including through an express intent to subject itself to suit *(See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868 (1990). As the Court held in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142 (1985), a finding of waiver of immunity requires "a clear declaration that [the State] intends to submit itself to [federal court] jurisdiction." (That posture is also expressed by the Fourth Circuit in an upcoming case which will be heard by the Court in *Allen v. Cooper*, 895 F.3d 337, 347 (4th Cir. 2018) ("As the Supreme Court has made clear, a State must *expressly* consent to suit *in federal court* to waive its immunity under the Eleventh Amendment."), *cert. granted*, No. 18-877, 2019 U.S. LEXIS 3736 (U.S. June 3, 2019).

Here, the Maryland statutory consent to suit provision related to FEPA claims provides as follows:

> The State, its officers, and its units may not raise sovereign immunity as a defense against an award in an employment discrimination case under this title.

A separate venue provision states that a FEPA action "shall be filed in the circuit court for the county where the alleged unlawful employment practice occurred."

The district court had relied on a line of Maryland cases which held that, because other Maryland consent to suit provisions expressly limit the waiver of sovereign immunity, the lack of such an express limitation in the first above-cited statutory immunity language meant that there had been no waiver. As a Maryland district court decision had explained "[t]he Maryland legislature knows how to limit its waiver of sovereign immunity [to suit in state court]; it has simply chosen not to do so in the context of [FEPA] cases."

The Circuit noted that this line of cases has been foreclosed by *Atascadero* and other longstanding precedent of the Supreme Court, which requires "a clear declaration" that the State intends to submit itself to federal court jurisdiction. "The failure of section 20-903 to satisfy the Supreme Court's stringent test has become apparent even to the district court, which, after issuing its Immunity Decision, conceded in its Stay Order that the State "has a strong argument in support of not having waived immunity, given that [section 20-903] does not expressly waive immunity to suit *in federal court*." *See* Stay Order 4.

The Circuit reversed the district court's denial of Eleventh Amendment immunity and remanded for the dismissal without prejudice of Pense's FEPA claims.

LINK

Title IX: In Sexual Discrimination Claim, 8(a) Standards, not *McDonnell Douglas*, Govern Pleadings

Austin v. University of Oregon, No. 35559/35560 (9th Cir. June 4, 2019).

Affirming the lower court, a Ninth Circuit case of first impression holds that the appropriate pleading standard for a Title IX claim is FRCP 8(a)-not *McDonnell Douglas*-and that conclusory allegations purporting to link a University's disciplinary actions to the plaintiffs' sex do not suffice to avoid dismissal.

Brandon Austin, Dominic Artis, and Damyean Dotson ("Athletes") were basketball players on scholarship at the University of Oregon ("University"). In March 2014, a female student accused the men of forcing her to engage in nonconsensual sex at an off-campus apartment. She reported the alleged sexual assault to the Eugene, Oregon police department within a few days. When details of the alleged assault became public, in part because the local news published the police report in full, the campus erupted in protest. Although the Lane County District Attorney ultimately decided not to prosecute the student athletes, the University proceeded with a formal disciplinary process.

The University Student Conduct Code ("Code") defined "explicit consent" as "voluntary, non-coerced and clear communication indicating a willingness to engage in a particular act," including "an affirmative verbal response or voluntary acts unmistakable in their meaning."

The Athletes had the option to choose between two types of disciplinary hearings: a panel hearing or an administrative conference. They opted for the simpler, more streamlined administrative conference. According to the complaint and the University's Special Choice of Resolution Form, the administrative conference procedure included notice of the character of the accusations against each Athlete, a summary description of the types of processes available, and the range of possible penalties; access to the case file; the opportunity to review and respond to the investigative report including witness interviews; representation by an advisor, including counsel; and a neutral administrator as a hearing officer.

The University's Director of Student Conduct & Community Standards oversaw the hearing and found the Athletes responsible for sexual misconduct because they had violated the Code by "engaging in penetration without explicit consent." The University suspended the Athletes for "at least four years and until the female student is no longer enrolled at the University (but not longer than ten years)." It also declined to renew their scholarships.

The Athletes sued the University and various administrators, alleging several causes of action, including Title IX claims based on sex discrimination and due process violations. The district court dismissed their complaint with prejudice under FRCP 12(b)(6).

On appeal, the Ninth Circuit evaluated the pleadings standards applicable in a Title IX discrimination claim-a matter of first instance for the Circuit. It identified confusion among the Circuits regarding the applicability of *McDonnell Douglas* to the pleadings stage of litigation. In *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002), the Supreme Court had reiterated that "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." Under *McDonnell Douglas,* once a plaintiff pleads a prima facie case of discrimination, the burden of proof shifts to the non-moving party to show non-discriminatory intent. But the Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.

The Court stated that,"[c]onsequently, the ordinary rules for assessing the sufficiency of a complaint apply[:] . . . . The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."

This guidance has not been universally applied in the Title IX context: "Without citing *Swierkiewicz*, the Second Circuit reached the opposite result in *Doe v. Columbia University*, 831 F.3d 46, 55-56 (2d Cir. 2016), and applied the *McDonnell Douglas* presumption at the motion to dismiss stage in a Title IX case." In that instance, the Second Circuit had referenced a previous Title VII case in which it invoked the *McDonnell Douglas* presumption at the pleading stage. That court had concluded that "Reading *Swierkiewicz* on its face, it appears to have meant that a Title VII plaintiff is not required to plead facts supporting even a minimal inference of discriminatory intent. . . . This led the Second Circuit to reason that the *McDonnell Douglas* presumption informs the application of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), in Title VII cases."

The Ninth Circuit disagreed: "We read the Second Circuit's application of the *McDonnell Douglas* presumption at the pleading stage as contrary to Supreme Court precedent, and we decline to embrace that approach."

Having established that *Iqbal* and *Twombly* applied in this context, the Circuit applied FRCP 8(a) to discern "enough facts to state a claim to relief that is plausible on its face." But even applying the factual pleadings in a manner most beneficial to the Athletes, the court found that they could not fulfill the minimal requirements of 8(a). "What is missing for each theory of liability are sufficient, nonconclusory allegations plausibly linking the disciplinary action to discrimination on the basis of sex."

The Athletes had advanced three theories under Title IX: selective enforcement, erroneous outcome, and deliberate indifference. The essence of the selective enforcement theory was that the decision to discipline the student athletes was "grounded" in gender bias--but the Athletes failed to provide "any plausible link" connecting the University's disciplinary actions to the fact that the Athletes are male. "Just saying so is not enough. A recitation of facts without plausible connection to gender is not cured by labels and conclusory statements about sex discrimination."

The Athletes also alleged that the University disciplines male students for sexual misconduct but never female students; therefore it was biased against men. But this allegedly disparate impact, even if true, was not based on a claim that any female University students had been accused of comparable misconduct, and thus failed to allege that similarly-situated students-those accused of sexual misconduct-were disciplined unequally. The selective enforcement theory failed.

The erroneous outcome theory also failed. The Athletes did not articulate any basis to discern that the disciplinary proceedings were flawed due to the student athletes' sex.

The Athletes' "deliberate indifference" theory of Title IX failed-they had only made passing reference to it in one line of a footnote, meaning that the issue was waived. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) "Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief."

The Athletes' due process claims also failed. The University's disciplinary proceedings had comported with constitutional requirements. "We assume, without deciding, that the [Athletes] have property and liberty interests in their education, scholarships, and reputation as alleged in the complaint. Nonetheless, they received 'the hallmarks of procedural due process': notice and a meaningful opportunity to be heard." Importantly, they were represented by counsel and given a choice of a Special Administrative Conference or a Panel Hearing with a panel of students, faculty, and staff and the option to appeal. They signed a Special Choice of Resolution Form and chose the Special Administrative Conference.

In doing so, they removed the possibility of expulsion and negotiated away a potential "negative notation" on their academic record, replacing it with a "notation of finding of Code violation - unspecified." Because the Athletes were represented by counsel and negotiated the scope of sanctions, "they can hardly be heard to complain about the administrative hearing's procedural safeguards."

LINK

Trials: District Court's Extension of Time to File Appeal was not Based on Good Cause; Without Timely Appeal, Circuit had no Jurisdiction

Nestorovic v. Metropolitan Water Reclamation District of Greater Chicago, No. 18-2562 (7th Cir. June 11, 2019).

Finding that timeliness was a jurisdictional prerequisite for the Circuit to consider an appeal in a sex and disability discrimination case, the Seventh Circuit has dismissed on the grounds that the lower court had abused its discretion by granting the plaintiff an extension of her time to file the appeal based on cursory and non-meritorious excuses for delay.

In 2015, the Metropolitan Water Reclamation District of Greater Chicago ("District") hired Slobodanka Nestorovic ("Nestorovic") as an assistant civil engineer. Nestorovic initially did well in the position, but later lost her job for allegedly poor performance. She filed a discrimination charge with the Equal Employment Opportunity Commission. She then received permission to sue and brought sex and disability discrimination claims under Title VII and the Americans with Disabilities Act. The district court dismissed her case on May 15, 2018 for failure to comply with Title VII's filing requirements. She then had 30 days to file a notice to appeal-until June 15, 2018. She missed this deadline.

On July 13, 2018, Nestorovic asked the district court to extend her time to appeal. 28 U.S.C. § 2107(c) allows such an extension in certain circumstances: "The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal2, extend the time for appeal upon a showing of excusable neglect or good cause." Nestorovic filed her motion to extend the time to appeal within the 30 days permitted by § 2107(c) (before July 15, 2018). Although timely, her motion offered little to explain what excusable neglect or good cause warranted the requested extension. She explained only that she was "actively searching for attorneys willing to take the case on contingency" and had been "advised very recently that [prospective] counsel could not file an appeal before reviewing filings to date, which would take several weeks." The district court granted the requested extension of time, saying only that the extension was warranted "in these circumstances."

The District moved that the complaint be dismissed because Nestorovic had not shown excusable neglect or good cause to justify the extension of time to appeal. The question on appeal was "whether the showing of excusable neglect or good cause required under § 2107(c) is jurisdictional, and whether Nestorovic made that showing in the district court."
In recent years the Supreme Court has clarified the meaning of the word "jurisdiction." In *Bowles v. Russell*, 551 U.S. 205 (2007), the Court held that an appellate court has no authority to consider an appeal filed after the period allowed by statute, explaining that "[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c)," the court of appeals lacked jurisdiction over the tardy appeal. And because courts lack authority to create equitable exceptions to jurisdictional requirements, they cannot excuse a party's noncompliance even when extraordinary circumstances present themselves.

After *Bowles*, the Circuit stated, "the controlling legal standard is clear: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category." The Circuit cited the Supreme Court's decision this term in *Fort Bend County v. Davis*, No. 18-525, 2019 WL 2331306 (U.S. June 3, 2019). There the Court sounded the reminder that not all statutory requirements are jurisdictional, as some requirements embodied in a statute speak not to the court's authority to entertain a case but instead to a party's procedural obligations.

The fact that the requirements of § 2107(c) are jurisdictional had clear consequences in this case. Most particularly, it did not matter that the District initially did not argue that Nestorovic had failed to show excusable neglect or good cause: Because Bowles' error was one of jurisdictional magnitude, he could not rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations.

Having confirmed that compliance with the statute in question was jurisdictional, the Circuit was left to determine whether the district court abused its discretion by concluding that an extension was warranted in these circumstances. Because the record contained no finding or evidence of excusable neglect or good cause for the missed deadline, the Circuit concluded that discretion had been abused. "Here, we do not know whether the district court applied the proper legal standard because it did not mention excusable neglect or good cause, cite the applicable statute, or look to the relevant factors-such as the length of the delay and its impact on judicial proceedings and whether the movant acted in good faith." The Circuit will sometimes remand a case for the district court to explain its rationale, but when "the absence of excuse is so total ... that it would be an abuse of discretion for the judge to extend the time for appeal," the proper course is to dismiss the appeal as untimely. That was the case here: Nestorovic's unsworn, unsupported statement that she was searching for an attorney-even if credible-did not demonstrate excusable neglect or good cause. She did not need an attorney to file a notice of appeal; indeed, the district court's treatment of her motion as an appeal demonstrated how little was required. Because the statute required a showing that Nestorovic did not make, her appeal is untimely. The Circuit lacked jurisdiction to review her appeal, and dismissed it.

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