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Due Process: Challenge to Onerous Hearing Process Resulting from Settlement Agreement is Barred by Res Judicata

Kilburn-Winnie v. Town of Fortville, No. 17-2498 (7th Cir. May 30, 2018).

Where class action litigants in a water-shutoff fight had previously signed all-encompassing settlement agreements with robust waivers, they could not later challenge the agreed-to hearing process, however complex, as a violation of due process.

In July of 2014 Michelle Allen-Gregory (Allen-Gregory) filed a class action lawsuit against Fortville, Indiana (Town) alleging the Town violated the class's Fourteenth Amendment procedural due process rights by disconnecting its water service. The class was defined as "[a]ll customers of the Town of Fortville, Fortville Utilities and/or Fortville Water Department from July 9, 2012 through October 31, 2014 who had their water service terminated and who paid a reconnection fee to reestablish their water service," and it included Bobbi Kilburn-Winnie (Kilburn-Winnie). A settlement was reached under which both Allen-Gregory and Kilburn-Winnie - the appellants herein - received proceeds from it and agreed that "[t]he claims released by Named Plaintiffs and

the Class will include all claims that were or could have been raised in [*Fortville 1*]." Nonetheless in March and April of 2015 Kilburn-Winnie failed to pay her water bill and her water service was disconnected and, in November 2015, she filed suit. She claimed the hearing procedures instituted as a result of the previous lawsuit, "were so complicated and burdensome that they violated Appellants' Fourteenth Amendment procedural due process rights." The district court ultimately held the claim resolved under the settlement agreement and thus barred the suit under the doctrine of *res judicata*.

On appeal the Seventh Circuit addressed the three elements of *res judicata:* (1) an identity of the causes of action; (2) an identity of the parties; and (3) a final judgment on the merits. The primary issue on appeal, however, was the final element, with Kilburn-Winnie arguing that since the preliminary injunction sought in *Fortville 1* was dismissed as moot by the court *after it approved* the settlement offer, there was no final judgment on the merits. She supported the argument with reference to a 1999 Seventh Circuit opinion holding there is "no reason to conclude that a decision based upon the conclusion that a claim is moot creates a barrier for future litigation." The Circuit was unpersuaded by this singular statement, rather it noted the *Fortville 1* settlement agreement language was clear that it "fully, finally, and forever resolves any and all Fourteenth Amendment due process claims based on any pre-litigation, litigation, and post-litigation activities that were or could have been raised." It viewed the subsequent court order dismissing the still-pending injunction motions as moot because the claims were moot in the sense that the settlement agreement resolved the case. It affirmed the district court.

LINK

Elections: Illinois "Rule of Three" which Limits Number of Referenda on Ballot is Rationally Related to Legitimate Objective

Jones v. Markiewicz-Qualkinbush, No. 17-1227 (7th Cir. June 14, 2018).

The Seventh Circuit has upheld Illinois' "Rule of Three" which prohibits more than three referenda on a single ballot, finding that the limit promotes voter focus and comprehension-given that the right to enact legislation via referendum is not Constitutionally-guaranteed (it is created by the state), the Rule merely needed to be rationally-related to a legitimate government objective.

Thaddeus Jones (Jones) was an alderman in Calumet City, Illinois (City). Michelle Markiewicz-Qualkinbush (Qualkinbush) is the City's mayor. Jones, seeking to be mayor, concocted a plan with friends to prevent Qualkinbush from running again: getting a referendum on the ballot that set a three-term limit on the mayor. The plan failed because the City itself put three referenda on the ballot and Illinois has a "Rule of Three" that prohibits more than three referenda from being on any one election ballot - though, if requested, a proposal can be rolled over to the next election. Jones *et al* did not make such a request, so their referendum died. In a twist, one of the City's referenda was a term-limit that prevented the election as mayor of any person who has served *four or more consecutive terms as either mayor or alderman*. This did not prohibit Qualkinbush from running again in the disputed election for mayor, but it did prevent Jones since he was a fifth-term alderman. Jones was removed from the ballot.

Jones countered with two lawsuits - a federal and state case. The Seventh Circuit in the federal case reviewed the final decision of the district court rejecting Jones' request for an "injunction against the application of the Rule of Three and an order removing the City's term-limits referendum from the ballot or nullifying the voters' approval of that referendum." The Circuit identified some issues as moot, but found that the request to prohibit the Rule of Three in the future was live and thus took it on.

The core of Jones' argument was that the Illinois Rule of Three violates the First Amendment because it effectively makes it it impossible to get a referendum on a ballot. This is so because it takes a citizen months to collect enough signatures to get a referendum on a ballot, while any city can get fill all three ballot slots in 48 hours, meaning a city can prevent citizen referendum from ever getting on a ballot upon seeing an unwelcome referendum gathering steam. The problem with this argument is that the Constitution does not guarantee the right to enact legislation via a referendum; rather it is a state-created right. As the Court succinctly put it, "[n]othing in the Constitution guarantees direct democracy," but rather it creates an indirect democracy, thus the ballot is not a public forum to which there is a right of the public to place a referendum. The Supreme Court addressed a tangential argument in 1988 in *Meyer v. Grant*, where it held that once a state opens the ballot to referenda it cannot put unconstitutional limits on it, and thus the Circuit quickly pivoted to asking whether Illinois, having opened the ballot to referenda, made an unconstitutional limitation with the Rule of Three.

The Circuit held it did not: the Rule of Three is wholly viewpoint- and content-neutral and "there [wa]s little doubt it [wa]s rationally related to a legitimate state objective" given the manifest reasoning that "the more complex the ballot the less attention each candidate and proposal receives," giving states a "strong interest in simplifying the ballot." The holding was affirmed.

LINK

Employment: Insufficient Evidence that Protected Speech was "But-For" Cause of Termination

Milliman v. County of McHenry, No. 17-2687 (7th Cir. June 19, 2018).

Despite evidence that an employee's negative deposition testimony may have played a role in his firing, there was ample evidence that he was unfit for duty, providing a non-retaliatory basis for termination.

Scott A. Milliman (Milliman) served as a McHenry County Sheriff's Deputy in Illinois. He suffered a brain tumor in 2001, received treatment and was able to return to work in 2003 after being examined and deemed fit for duty. In 2010 Milliman gave deposition testimony in a case unrelated and irrelevant to this one against the McHenry County Sheriff's Department, during which he accused the sheriff of corruption, bribery, securing fraudulent loans, trafficking illegal aliens, and soliciting the murder of two individuals. When the testimony reached the McHenry County Sheriff's Department an investigation was started, in light of the "bizarre" allegation, because suspicions arose that "Milliman might have been suffering from psychological difficulties." Ultimately, a fitness for duty exam concluded Milliman was not so, and the McHenry County Sheriff's Department urged Milliman to retire with disability benefits. He refused. The paperwork deadline passed and he was ultimately terminated for "(1) making false allegations against [the sheriff] in the deposition; (2) violating multiple [McHenry County Sheriff's Department] General Orders; and (3) being unfit to perform his duties as a deputy." Milliman filed suit alleging he was retaliated against for his 2010 deposition testimony in violation of the First Amendment. The lower court found in favor of the County and Milliman appealed.

To prevail on his First Amendment claim Milliman had show that "(1) he engaged in constitutionally protected speech; (2) he suffered a deprivation because of h[is] employer's action; and (3) h[is] protected speech was a but-for cause of the employer's action." The third element, which was at issue here, requires also that an employee show that a violation of his First Amendment rights was a motivating factor in the termination. Milliman stumbled here because, even though his deposition testimony *was* a basis for his firing, the County presented sufficient

evidence that the fitness for duty report, specifically the finding that Milliman was unfit for duty, provided an independent, non-retaliatory reason for his termination. Without an issue of material fact, the Circuit affirmed the lower court.

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Employment: Questions about Degree of Control and Contract Terms Preclude Finding that Worker was Independent Contractor

Simpkins v. DuPage Housing Authority, No. 17-2685 (7th Cir. June 20, 2018).

Reversing the lower court, the Seventh Circuit has refused to find that a worker was not an employee for FLSA purposes; despite the parties' signing an "Independent Contractor Agreement," other issues such as the degree of control over the worker, payment for equipment used by the worker and inconsistent contract language required remand.

Anthony Simpkins (Simpkins) worked for the DuPage Housing Authority (Authority) from 2009 to May 2015, at which point he was injured in a work-related accident and filed suit alleging violations of the Fair Labor Standards Act (FLSA)--namely that he was wrongly and repeatedly not paid overtime and owed certain disability benefits. When Simpkins started he worked under an agreement titled "Independent Contractor Agreement" that expired June of 2011. But he continued working exclusively for the Authority. The parties then entered another "Independent Contractor Agreement" with an original termination date of July 2012, but that date was crossed out and replaced with the hand-written phrase "to be determined." Simpkins continued to work full-time and exclusively for the Authority until 2015, received 1099 tax forms, sought to be converted to a regular employee, but was denied, and was never provided pension, insurance, or other similar fringe benefits. The district court granted the Authority's motion for summary judgment in response to the lawsuit, ruling Simpkins was not an employee of the Authority under the FLSA, but the Seventh Circuit reversed, finding issues of material fact precluded judgment.

The Circuit began by noting that - despite the above facts - determining whether an individual qualifies as an employee under FLSA necessitates examining "the totality of the circumstances, with the ultimate goal of determining the economic reality of the working relationship." While the Seventh Circuit has set out "a list of factors" in its precedential *Lauritzen* case, it does not mandate an exclusive, determinative multifactor test. It found this case "abounds with factual disputes" that are material and - though disclaiming determinativeness - listed four "exhaustive" issues that required further consideration by the lower court.

First was the "nature and degree of control [DuPage Housing Authority] exercised over the manner in which [Simpkins] performed his work," specifically that it was disputed whether he was assigned a schedule while agreed upon that he was assigned the location of work, and disputed whether he could control the manner in which he completed tasks while agreed upon that he was assigned the tasks. Next, the factor of Simpkins' investment in equipment or materials required to complete his work was at issue - including that Simpkins said the Authority supplied all his tools and materials, while it pointed out this was contradicted by his tax returns. Third, whether Simpkins had specialized skills for the job and, if so, the extent to which that expertise was debated. Finally, the parties' contracts were difficult to nail down: the first required Simpkins to have his own worker's compensation and liability insurance coverage but he only did so until January 2012, and the second had no termination date. This left the court wondering whether the parties intended the agreement to be open-ended or if some unwritten completion date was agreed on. It vacated the lower court ruling and remanded the case.

LINK

Employment: Where Firing Allegedly Due to Political Preference, Employer Must Show Termination Would Have Occurred Anyway

Mahn v. Jefferson County, No. 16-1731 (8th Cir. June 7, 2018).

The Eighth Circuit has denied summary judgment to a municipal employer who allegedly fired a subordinate due to her vote for a candidate other than the one he supported; although her performance records indicated sufficient grounds for termination, the employer needed to show he actually *would* have fired her, in order to avoid the likelihood of pretext.

Jamie Mahn (Mahn) worked as a deputy clerk in Jefferson County, Missouri Circuit Court under Howard Wagner (Wagner) between 2012 and 2014. When Wagner did not run for reelection in 2014, Mahn alleges he "forcefully impressed upon [her] the need for her to vote for [Candidate] McKee and the Democratic ticket," a demand which she rejected by saying it was illegal and that she would vote for who she wanted. She was then terminated in September 2014 for "[p]oor work performance, [i]nab[ility] to complete tasks correctly and within given time lines, abuse of sick leave, [and] insubordination by lying to assigned [her] supervisor." She filed suit alleging she was fired for having voted Republican, which she alleged Wagner knew because he unlawfully obtained the information from his son - the County Clerk/election authority. The district court assumed Mahn had indeed provided sufficient evidence that political affiliation or loyalty was a motivating factor in her dismissal, but granted summary judgment to Wagner because he established that she would have been fired anyway for a non-pre-textual reason.

Mahn argued that the lower court erred in finding that she would have been terminated for something other than her political affiliation - i.e. her poor performance - and thus erred in granting summary judgment. The Circuit recounted that the lower court did indeed document that she had poor performance reviews and complaints from the public and her colleagues about her work in her work file, but agreed with Mahn. It held that Circuit precedent holds that "at the summary judgment stage, . . . [the employer is required] to show that the record would compel a reasonable jury to find that the adverse action *would have occurred anyway*, not merely that such action *would have been warranted anyway*." Without evidence from Wagner that Mahn would have been terminated for her performance issues without reference to her political affiliation, he failed to meet the standard, and thus were not entitled to summary judgment. The lower court was reversed on this issue and the case remanded.

LINK

Trials: Repeated Failure to Propose Licensed Counsel Leads to Finding that Defendant Waived Right

United States of America v. Stanley, No. 16-4241 (8th Cir. June 5, 2018).

Where a criminal defendant proposed various unlicensed attorneys to represent him, and subsequently ignored the court's admonition that he seek qualified counsel or accept court-appointed representation, he could not thereafter claim that he clearly

revoked his desire to proceed pro se.

Harold Stanley (Stanley) was charged with and ultimately convicted of tax evasion and corruptly endeavoring to impede enforcement of Internal Revenue laws. After the jury found him guilty he appealed to the Eighth Circuit arguing the lower court violated his right to counsel by allowing him to proceed pro se. The essential facts at issue include that Stanley was indicted on September 25, 2015 and from his initial appearance in court on September 2015 through to the week before the trial on May 31, 2016, the court encouraged Stanley to hire an attorney, but rejected two people Stanley moved to enter appearances for since neither were licensed attorneys. The week before trial Stanley rejected standby counsel, but then asked for a continuance in order to obtain counsel just days before trial, which the court rejected at that late stage. He eventually accepted standby counsel for administrative assistance at the trial.

On appeal Stanley claimed he was confused about the ability of his friend to assist at trial - despite the court's rejections of those entries of appearance he moved for - and claimed that when he requested counsel days before trial he "clearly revoked his desire to proceed pro se." The Circuit Court rejected this argument wholesale, and instead pointed out that Stanley was repeatedly advised about proceeding pro se, told multiple times over eight months that his friend could not act as his lawyer, offered solutions even to address his concerns and found it particularly telling that Stanley even admitted that "there was a fairly long discussion" about his proceeding pro se and he "was warned of the pitfalls of proceeding without legal counsel." The Court found this clearly met the standard that his waiver of counsel was "knowing and voluntary," leaving it satisfied that he made "his choice . . . with eyes open." It affirmed the lower court.

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