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THIS JUST IN:


## ADA: "Individual" as Used in the ADA Does Not Apply to Corporations

### *Michigan Flyer LLC, v. Wayne County Airport Authority*, Nos. 16-1205 & 1255 (6th Cir. June 22, 2017).

**Where disabled airport patrons sued a Michigan county airport for moving a curbside pickup location farther away, a transportation company could not similarly sue the airport because the term "individual" as used in the ADA only applies to humans, not corporate entities.**

Michigan Flyer LLC and Indian Trails, its parent company (collectively, Flyer), provide transportation services at Michigan's Wayne County Airport (Airport). When the Airport planned to relocate the public transportation bus stop from the terminal curbside to a more distant location, two disabled individuals, with support from Flyer, sued to prevent the change. After the discrimination case settled, Flyer filed suit under Title V of the Americans with Disabilities Act (ADA) alleging the Airport retaliated against them for supporting the disabled parties. The district court dismissed the case, holding "individual" as used in Title V of the ADA does not include corporate entities, thus preventing Flyer from recovering for retaliation.

Flyer argued the term "individual" should be interpreted broadly to protect plaintiffs from retaliatory actions because the ADA's remedial scheme is broad and because Supreme Court precedent supports the finding that "individual" includes corporations. As for precedent the Circuit found that it did not support "individual" being equated with a corporate entity, but only a natural person. First, it noted that in common parlance the term "individual" only includes natural persons and the Supreme Court recently held as much in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

Second, the Court addressed Flyer's argument, based on the Supreme Court's *Clinton* case, that "Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person,'" by looking to the specific text of the ADA at issue: "[n]o *person* shall discriminate against any *individual* because such *individual* has opposed any act or practice made unlawful by this chapter or because such *individual* made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." The Court held the *Clinton* quote did not apply to the ADA since Title V uses both *person* and *individual,* indicating they are not synonymous in this statute. Moving on to the comprehensive scheme of the statute, the Court found "the language and design of the ADA would not make sense if individual was to mean corporate entities," since the term precedes things like communicable diseases, hearing impairment, and uncorrected vision, all of which are manifestly inapplicable to corporate entities.

Rebutting what the court called the "unambiguous text," Flyer argued the remedial scheme of the ADA required "individual" to be interpreted as broadly as possible, and denying corporate entities definition under "individual" would result in unfair treatment of corporations. The court was unpersuaded, holding the "fact that a statute has a broad remedial structure does not allow us to interpret its text in a way that conflicts with its plain language." The appeal failed.

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## Due Process: Expulsion of Students Based on Video Evidence, Without Cross-Examination of Complainant, is Upheld

### *Plummer v. University of Houston*, No. 15-20350 (5th Cir. June 23, 2017).

**Two university students expelled after one made videos of the other as he groped an unconscious coed were not denied due process and did not have a Title IX selective enforcement claim, according to the Fifth Circuit, despite challenging the school's use of a preponderance of the evidence standard and the absence of an opportunity to cross-examine the complainant.**

Ryan McConnell (McConnell) met a fellow University of Houston student (UH Female) at a bar in November 2011. Both became intoxicated and walked to McConnell's dorm room, where they engaged in sexual relations. They were discovered, naked and unconscious, by McConnell's girlfriend, Natalie Plummer (Plummer). She proceeded to make two videos at the scene. In one, McConnell fondles the unresponsive UH Female and the camera then focuses on her private

parts while Plummer makes lewd comments. In the second, UH Female is shown staggering naked in the hallway towards Plummer, who guides her to an elevator and sends it to the lobby. Plummer later shared the videos electronically.

UH Female submitted a complaint to UH alleging that she was a victim of sexual assault. Based on the videos, and without requiring UH Female to present testimony, UH found that McConnell violated school sexual assault policies and that Plummer "facilitated/encouraged" the assault and shared video of the activity without consent. After various appeals within the UH process, the two were expelled.

They brought a due process suit against UH and its officials, complaining that UH's procedures failed to give them adequate notice of the adverse evidence and denied them the right to confront the UH Female. The district court found the UH process to be constitutionally sufficient and granted qualified immunity to UH officials.

The Fifth Circuit affirmed. It cited Supreme Court guidance as to the factors to be considered in determining due process in university disciplinary proceedings: (a) the student's interests; (b) the risk of erroneous deprivation of such interests through the procedures used and the value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the additional burden that would it would incur from supplemental procedures. (*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The first and third *Mathews* factors were easily assessed: McConnell and Plummer had a liberty interest in their higher education and UH had a strong interest in the educational process, including maintaining a safe learning environment for all its students. The second *Mathews* factor-the risk of erroneously depriving McConnell and Plummer's interests, and the potential value of other procedural safeguards-was answered by the unique evidence in the case:

> McConnell and Plummer received multiple, meaningful opportunities to challenge the University's allegations, evidence, and findings. In light of the graphic conduct depicted in the videos and photo-which the panels viewed for themselves before affirming the University's findings-further procedural safeguards would not have lessened the risk of an erroneous deprivation of McConnell and Plummer's interests or otherwise altered the outcome.

The Fifth Circuit disagreed with plaintiffs' arguments that they had been retroactively subjected to UH's updated 2013 sexual harassment/misconduct policy-their conduct violated the policy which had been in effect in 2011. It also discounted their objections that they had been denied the opportunity to cross-examine the UH Female. Again, the court found that the unique facts of the case eliminated the need to consider the requirement for cross-examination-the videos were the dispositive evidence; furthermore, UH Female (like McConnell) did not recall any of the salient facts.

McConnell and Plummer's final argument was that UH had violated Title IX, by selective enforcement-it sided with the female litigant, when McConnell and UH Female were *in pari delicto*, in that both had been intoxicated when engaged in sexual conduct. The court found no gender bias: UH's discipline was predicated on purely on what each individual student had done, and during the discipline process they-a male and a female-were treated equally.

**DISSENT:** Circuit Judge Edith Jones dissented. She saw the court's action as overly reliant on the videos: "The panel's conclusion seems driven by the 'unique facts' of graphic evidence to discount all of McConnell's and Plummer's serious arguments. Put bluntly, the panel implies that because they were guilty, they got enough due process."

She pointed out that UH's sexual misconduct policy was largely based on a United States Department of Education Office of Civil Rights circular that "was not adopted according to notice-and-comment rulemaking procedures; its' extremely broad definition of "sexual harassment" has

no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt." Here, UH Female had no recollection of the night's events, she denied anyone had touched or hit her, and no criminal charges were filed due to lack of evidence.
UH officials, with "no significant expertise in this area" relied solely on the videos, and "in essence, assumed the roles of prosecutor, jury and judge, whose decision the hearing panels were required to approve only by a preponderance of the evidence." Furthermore, the school was essentially acting as an advocate for UH Female while purporting to be a finder of fact and arbiter.

"Even though these students deserved punishment, they also deserved more protective procedures given the seriousness of the charges." She called for reversal and remand for further proceedings.

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## Due Process: Septic System Installer's License is Protectable Property Interest; Summary Revocation Violates Fourteenth Amendment

## *Simpson v. Brown County,* no. 16-2234 (7th Cir. June 26, 2017).

**Where, without any pre-deprivation hearing, an Indiana County summarily revoked a septic system installer's license because he failed to repair a system as directed, the County deprived the installer of a protected property interest and additional due process was required.**

John Simpson (Simpson) installed and repaired septic systems in Brown County, Indiana (County) until June 2013 when the County public health division revoked his license. Simpson had been sent notice in late-May 2013 that if he did not repair a septic system he installed on a property, the County Health Officer would recommend rescinding his license and, two weeks later the County acted on that threat, sending Simpson a letter saying his license was indeed revoked. The letter did not indicate what law he had violated that led to losing his license nor any administrative process he could pursue to obtain judicial review. Simpson brought an action under §1983 alleging that rescinding his license deprived him of a property interest and thus the summary action deprived him of due process guaranteed under the Fourteenth Amendment. The district court held that post-deprivation remedies under state law, such as common-law judicial review, satisfied the Fourteenth Amendment's due process requirement and dismissed the case under FRCP 12(b)(6).

The Seventh Circuit reversed. It began by noting that Simpson's government-issued license to perform septic installation and repair is an entitlement - government-created property - and thus a protected property interest subject to the Fourteenth Amendment. Thus it quickly moved on to determining what level of protection was due for such an interest under the *Matthews v. Eldridge* test, by evaluating "the private interest at stake; the risk of erroneous deprivation and the value, if any, of additional procedural safeguards; and the government's countervailing interests." Balancing these factors, the Circuit held the private interest was strong because Simpson's ability to earn a livelihood hinged on the license; that the risk of erroneous deprivation was relatively high as the public health officer was vested with broad discretion to revoke a license if the license-holder had an "inability or unwillingness to comply" with county "rules and requirements;" and finally that the government's interest was serious indeed - as septic systems are paramount to general public health - but not "so serious and so urgent as to justify summary action by the County."

As a result, the court held Simpson had a right to some pre-deprivation process before the revocation of his license and, having gotten absolutely none, the district court erroneously granted dismissal. As for the idea that a common law remedy under state law was available as the lower court held, the Circuit noted it was "aware of no Indiana case (and the County has cited none) where a litigant obtained damages through such an action" and Simpson would not be made whole without such. The reinstatement of his license would not redress his injury of years of lost wages he had suffered since losing the license. The Circuit thus reversed the lower court and remanded the case so Simpson could pursue his §1983 case for deprivation of his property without due process of law, to include seeking damages.

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## Personnel: Contract Employee Has Right to Share Moneysaving Ideas with Mayor

### *Klosowski v. City of Bay City*, 16-1996 (6th Cir. June 21, 2017).

**A bridge tender has successfully brought a claim for retaliation against a Michigan city after claiming to have been fired for sharing advice with the Mayor on how to save the city money.**

Contract bridge tender Ron Klosowski (Klosowski) told the Mayor of Bay City, Michigan (City) that the government could save a considerable sum if it closed two bridges in December, when the Saginaw River freezes over. While the Mayor and other public officials liked Klosowski's idea, other bridge tenders who wanted to work through December disagreed. Ultimately, Klosowski's boss Joe Ledesma (Ledesma) asked that Klosowski not return the following season and, unhappy with this decision, Klosowski sued Ledesma and the City, claiming that they tortiously interfered with a business expectancy and a contractual relationship. In addition, Klosowski claimed a First Amendment violation under Section 1983, alleging the City retaliated against his free expression (i.e. citizen advising the Mayor that the government could save money by closing bridges in December).

The Fifth Circuit agreed with the district court in granting immunity to the City for the tortious interference claim, but reversed as to the district court's judgment on Section 1983, instead granting Klosowski's claim. As to the claim against Ledesma, because criticizing unnecessary government spending did not fall within the scope of Klosowski's duties since his duties were limited to tending bridges, the court determined that Klosowski was speaking to the Mayor as a concerned citizen and not as a bridge tender. Further, Klosowski had a constitutional right to continued employment despite being a contract employee. As to the claim against the City, the court found that Ledesma, as a bridge foreman, was the final decision-making authority on behalf of the City based both on Ledesma's job description and scheduling authority.

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## Personnel: Regular Office Attendance is an "Essential Function" of a Litigation Attorney's Job

### *Credeur v. Louisiana*, No. 16-30658 (5th Cir. June 23, 2017).

**The Fifth Circuit has found no ADA violation where the Department of Justice denied a civil litigator's request to continue working from home after she had already received temporary accommodations to telework for several months with the goal of returning to the office.**

Renee Credeur (Credeur) was a Department of Justice (DOJ) litigation attorney in the Attorney General's Office in Louisiana and developed health problems due to complications from a kidney transplant. As a result, the DOJ granted her temporary accommodations to work at home with the goal of eventually returning to the office. After several months of teleworking, Credeur requested additional leave to work from home, which the DOJ denied, instead providing alternative accommodation with certain conditions-that she work part-time from the office and not work from home. Credeur refused the DOJ's alternative accommodation and instead brought suit in state court. DOJ removed the case to federal court where they won a motion for summary judgment. Credeur appealed.

To be considered "qualified" for Americans with Disabilities Acts accommodation, Credeur must be able to perform the essential functions of an attorney in the DOJ civil litigation division with or without reasonable accommodation. Because Credeur's position as a litigator with the DOJ's Civil Division necessarily involved a large degree of personal interaction and teamwork, office attendance was considered an essential function of the position. The court relied on the EEOC's informal guidance on teleworking to reach this conclusion, also observing that "[a]s an initial matter, there is a general consensus among courts, including [the Fifth Circuit] that regular, on-site attendance is an essential function of most jobs."

The court also points to the EEOC's emphasis on the employer's judgment of what constitutes an "essential function." The court observes that not only is this explicitly mentioned in the applicable EEOC statute but also touches on an important procedural and logistical issue. If equal weight were given to the employee's judgment, "every failure to accommodate claim involving essential functions case would go to trial because all employees who request their employer exempt an essential function *think* they can work without that essential function." However, the court also noted that the employer's words should be evaluated alongside its policies and practices and not be given blind deference.

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## Preemption: San Francisco Ordinance Prohibiting Misleading Pregnancy Services Advertising is Not Preempted and Does Not Violate Free Speech or Equal Protection Rights

### *First Resort, Inc. v. Herrera*, no. 15-15434 (9th Cir. June 27, 2017).

**The Ninth Circuit has upheld San Francisco's ordinance prohibiting misleading advertisements by anti-abortion healthcare providers, finding the limitation on commercial speech does not burden a fundamental right or violate equal protection, and is not in conflict with California's false advertising law-and is thereby not preempted.**

First Resort, a limited services pregnancy center (LSPC) operating in San Francisco (City), provides free pregnancy related services. First Resort's goal is "to build an abortion free world" and it therefore does not provide abortions or emergency contraception or refer patients to other facilities for such services. However, neither its website nor marketing materials mentioned its anti-abortion stance; rather, it advertised itself online as a neutral organization that provided "abortion information, resources, and compassionate support for women" with "unintended pregnancies" who are "considering abortion." First Resort utilized paid-for online advertising services such as a Google to reach its audience--searches for key words such as "abortion" and "emergency contraception" resulted in users being

directed to First Resorts' website.

In 2011 the San Francisco Board of Supervisors (Board) passed the Pregnancy Information and Disclosure Ordinance (Ordinance) intended to prevent false and misleading advertising by LPSCs purporting to provide a full range of pregnancy counseling and services but in reality acted to prevent abortion. The Board's findings underlying the Ordinance included the fact that the deception and delay by LPSC's of those seeking abortion, particularly the indigent, had a detrimental effect, sometimes impairing patients' health, foreclosing their options and causing the City to incur additional healthcare costs.

The Board's findings also affirmed LPSC's right to provide anti-abortion counseling and stated that the Board had no intention of interfering in such advocacy.

The Ordinance, codified as an amendment to the San Francisco Administrative Code, made it unlawful for any LPSC to make any untrue or misleading statements, whether express or by omission, about the services which it offered. It gave the City Attorney enforcement authority, to be effected by providing written notice of the violation to the LSPC; if not cured within ten days, the City Attorney had authority to move for injunction and to recover civil penalties of between $50 and $500 per violation.

First Resort brought suit against the City in the Northern District of California, alleging freedom of expression, equal protection, void for vagueness, and state law preemption claims. The district court granted in part the City's motion to dismiss, denied First Resort's motion for summary judgment, and granted the City's cross-motion for summary judgment.

A panel of the Ninth Circuit affirmed. The panel held that the Ordinance was facially valid because it regulates only unprotected false or misleading commercial speech, a category afforded no constitutional protection. First Resorts argued that, because no financial transaction was involved, this speech could not be "commercial." The Ninth Circuit found a North Dakota Supreme Court decision persuasive. Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D.), cert. denied, 106 S. Ct. 1957 (1986) involved very similar facts. "As in this case, the pro-life clinic argued that its communications constituted non-commercial speech 'because no financial charges [were] assessed against persons receiving services.' However, the court did not find that the lack of payment for services was dispositive to the commercial speech inquiry. . . . The court thus concluded that, '[i]n effect, the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech.' "

First Resorts' equal protection argument failed. Lacking any unconstitutional burden on the fundamental right to free speech, the Ordinance was subject only to rational basis review, and the panel found that it was rationally related to a legitimate government interest in protecting the welfare of women seeking the full range of pregnancy services.

Finally, the panel held that the Ordinance was not preempted by California's false advertising law. Whether a California state law preempts a local law is governed by Article XI, section 7 of the California Constitution, which states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." As California courts have held, "[A]bsent a clear indication of preemptive intent from the Legislature," California courts presume that a local law in an area of traditional local concern "is not preempted by state statute." (citation omitted).

Here, the Ordinance did not conflict with existing law, and did not impose duplicative criminal sanctions, avoiding double jeopardy concerns.

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## RLUIPA: Requirement that Inmate Formally "Accept Responsibility" for Sex Offense Violated Sincerely-Held Religious Belief

### *Robinson v. Superintendent Houtzdale SCI*, No. 16-3893 (3d Cir. June 19, 2017).

**Reversing the district court, the Third Circuit has held in favor of a Pennsylvania inmate who refused to comply with a sex offender therapeutic program's mandate that participants formally accept responsibility for their acts, accepting the inmate's position that, based on his religious beliefs, he could only make such an admission to God.**

Curry Robinson (Robinson), a prisoner in the State Correctional Institution in Houtzdale, Pennsylvania (SCI), complained that the facility violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). Specifically, he argued his religious rights were substantially burdened because the Sex Offenders Therapeutic Community program mandated that he "confess" to a therapist or counselor and he, a Christian who is limited to confessing his sins only to God, could not therefore participate. Not being able to participate meant Robinson could not benefit from the program, including things like obtaining a transfer to be closer to his family and obtain "privileged blocks/status."

The defendants moved to dismiss the case, arguing Robinson's allegations a) were not "precise" enough with regard to the elements of the sex offender program that burdens his religious practice; b) were not specific enough about the particular aspects of his beliefs that were substantially burdened; and c) that Robinson was not required to "confess" or "to make a confession" in the religious sense, but only to accept responsibility for his sex offenses in order to complete and succeed in the program. The magistrate agreed with the prison officials that Robinson has not been asked to "confess" in the religious sense of the term, but only to describe the offense he committed and assume responsibility for it, and dismissed the case. The lower court adopted the recommendation in full, prompting Robinson to appeal.

The Third Circuit disagreed, holding that the "threshold question in any . . . RLUIPA case is whether the prison's challenged policy or practice has substantially burdened the practice of the inmate-plaintiff's religion" and that the magistrate, in delving into whether Robinson was confessing in accordance with his religion, inappropriately questioned the "truth" of his assertion about his sincerely held religious beliefs. The magistrate, and ultimately the lower court in adopting the recommendation, thus "went too far" at the pleadings stage. In short, "Robinson asserted that he believes any requirement that he acknowledge his past behavior is a forced 'confession,' and that his sincerely held religious belief therefore precludes him from verbally accepting responsibility for his past offenses, even for purposes of rehabilitation" and the lower court impermissibly evaluated the truth of this belief when it dismissed the case. The Third Circuit thus reversed, giving Robinson the chance to pursue his case at least beyond the pleadings stage.

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## Speech: Officers' Support for Twelve-Hour Shift was Based on "Special Knowledge" Acquired on the Job and Was Not Private Speech

### *Killion v. Coffey*, No. 16-3909 (3d Cir. June 19, 2017).

**Affirming the lower court, the Third Circuit has affirmed dismissal of an action alleging violation of speech and free association rights brought by a group of New Jersey police**

**officers who vocally supported implementation of twelve-hour shifts, finding that the subject matter of their speech involved particular knowledge of the department's operations and was not protected "private" speech.**

Five police officers in the Pennsauken Police Department (PPD) voiced support for implementing a twelve-hour shift schedule in the department. Each suffered some adverse--or what was perceived as adverse--action and all decided to file a §1983 suit against the PPD, alleging they were retaliated against for exercising their free speech and free association rights. The district court disagreed and dismissed the case, which the officers appealed.

The Third Circuit began by repeating the *Garcetti* test, holding a public employee's speech is constitutionally protected "when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee different from any other member of the general public' as a result of the statement he made." The Circuit noted that it has not determined whether the public concern requirement of *Garcetti* applies to First Amendment freedom of association retaliation claims, but that its sister circuits mostly do apply it in such cases.

Despite this observation, the court did not have the opportunity to reach that issue, instead noting it has "applied both the public concern and the private citizen requirements in instances where the associational claim is linked closely enough with [a plaintiff's] free-speech claim." That was the case here since the officers' freedom of association claim and freedom of speech claim both alleged they were retaliated against for supporting the twelve-hour shift model. The Court never delved deeply into the elements, finding the officers' argument fell short of showing they spoke as private citizens. The complaint only posited that they spoke in their "capacities as citizens for First Amendment purposes and that they had an obligation as citizen[s] . . . to speak out on behalf of public and of [the Fraternal Order of Police]."

The Court found this "cursory" statement showed that the speech embodied "special knowledge" acquired through their job - one of the foremost examples of a public employee's speech *not being* private speech. And with that the Court affirmed the district court's dismissal.

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## Trials: Interlocutory Appeal of Denial of Prosecutorial Immunity is Limited to Issues of Law; Inadequate Factual Record Requires Dismissal

## *Filler v. Kellett*, no. 16-1186 (1st Cir. June 15, 2017).

In a malicious prosecution case, the First Circuit has dismissed a 12(b)(6) motion to dismiss sought on interlocutory appeal by a Maine prosecutor, finding that it was unclear whether the basis for such appeal was based on questions of law or fact; it did not have access to a sufficient factual record to establish absolute immunity.

After separating from his wife, Vladek Filler (Filler) planned to relocate from Maine to another state, taking his children. In response, his wife made a series of abuse allegations against him. He was arrested in April 2007, without a warrant, and charged with gross sexual assault of his wife.

Filler was ultimately indicted in August 2007 for five counts gross sexual assault, but was convicted of only one such count of gross and two misdemeanor charges. The trial court subsequently overturned the guilty verdict and ordered a new trial based upon a finding of prosecutorial misconduct.

The prosecutor, Hancock County Assistant District Attorney Mary Kellett (Kellett) told a local newspaper that she intended to "retry [Filler] on the three remaining charges." At a second trial in May 2011 conducted by a separate prosecutor, the jury acquitted Filler except on one count of Class D assault. Thereafter the Maine Supreme Judicial Court disciplined Kellett for violations of the Maine Rules of Professional Conduct, "the first disciplinary proceeding ever filed with the Maine Supreme Judicial Court by the Overseers of the Bar against a member of Maine's prosecutorial bar based on the prosecutor's representation of the State."

In 2015, Filler filed a civil suit against 18 defendants including Kellett, including a § 1983 claim for malicious prosecution. He alleged that Kellett (1) suppressed and tampered with evidence, and (2) directed law enforcement officers not to comply with subpoenas from Filler's attorney.

Kellett moved to dismiss for failure to state a claim on various grounds, including that, insofar as Filler's claim was premised on the violation of his Fourth Amendment rights, Kellett was entitled to absolute prosecutorial immunity. The district court concluded that Kellett was entitled to absolute immunity for her "consideration of the evidence, her decision whether to charge the case, what charges to present to the grand jury, and how to prosecutor the charges," because these were all "intimately associated with the judicial phase of the criminal process." However, it denied the rest of her motion to dismiss. Kellett brought an interlocutory appeal.

The First Circuit dismissed Kellett's appeal. While the "general rule that only final judgments and orders are immediately appealable in civil cases" permits an exception for interlocutory review of an order rejecting an immunity defense, the court had interlocutory jurisdiction over Kellett's challenge "only to the extent that such challenge turns on a question of law rather than fact."

The Circuit recited the elements giving rise to prosecutorial immunity: "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation." Therefore, such immunity attaches only for actions that are connected with the prosecutor's role in judicial proceedings--when functioning as an "advocate" for the state in "initiating a prosecution and in presenting the State's case." But no more than a qualified immunity is available with respect to acts of a prosecutor that are administrative or investigative in nature.

(Importantly, absolute immunity does not inherently apply to all actions that a prosecutor takes once the "judicial phase" begins. In *Buckley*, the Supreme Court held that the prosecutor did not have absolute immunity when making comments to the press about an ongoing prosecution; there was no common law immunity for such commenting, and it was not part of a prosecutor's role as an advocate).

These principles required that the court have access to additional facts. For example, it was unclear whether, in failing to disclose exculpatory evidence, Kellett was acting as a prosecutor or acting as legal counsel to individual law enforcement officers and "advised them not to comply with lawful subpoenas" as Filler alleged. As a result the court found itself in a situation where Filler's claims were "not clearly foreclosed and . . . [did] not clearly reveal the degree to which the conduct relied on could be considered part of the decision to prosecute or intimately associated with the judicial proceedings, rather than purely investigative or administrative."

There were also questions about timing, in that Filler's indictment followed his (warrantless) arrest. Prosecutors "do not enjoy absolute immunity for acts committed prior to a probable cause determination." Before probable cause is found, a prosecutor exercises no more discretion than a police officer and enjoys no more protection than qualified immunity. Filler alleged that Kellett had begun advising officers to withhold evidence even before he had been formally indicted.

In sum, by moving for dismissal via interlocutory appeal, Kellett deprived the court of the latitude necessary to confirm facts necessary to establish her immunity.

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## Trials: No Standing Where Plaintiffs Have Not "Confronted" Establishment Clause Violation or Suffered Demonstrable Injury

### *Barber v. Bryant*, No. 16-60477 (5th Cir. June 22, 2017).

**Plaintiffs who objected to a Mississippi law that prohibits the state from acting against those who follow conservative beliefs--such as "one-man, one-woman" marriage and biologically-determined gender--lacked standing because, unlike religious display precedents, they had not actually "confronted" the objectionable policy and had not (yet) been injured by the statute.**

Mississippi statute HB 1523 provides that "[t]he state government shall not take any discriminatory action" against persons who act in accordance with certain enumerated beliefs. These are:

> (a) Marriage is or should be recognized as the union of one man and one woman; (b) [s]exual relations are properly reserved to such a marriage; and (c) [m]ale (man) or female (woman) refer[s] to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

Under the statute, the State cannot impose any costs penalties on those who profess such beliefs, and cannot refuse to issue professional licenses to them.

A group of plaintiffs challenged the law under the Establishment Clause and the Equal Protection Clause and were granted a preliminary injunction by the district court. The plaintiffs comprised " (1) religious leaders who do not agree with the Section 2 beliefs, (2) gay and transgender persons who may be negatively affected by HB 1523, and (3) other persons associated with the Section 3 circumstances who do not share the Section 2 beliefs." When Mississippi appealed the preliminary injunction the Fifth Circuit reversed on the basis that the plaintiffs lacked standing.

The Circuit held the plaintiffs had no injury-in-fact and thus could not maintain the suit. As for the Establishment Clause the plaintiffs claimed they suffered a "stigmatic" injury from the statute endorsing certain moral and religious beliefs. Though the circuit agreed such a stigmatic injury is possible under the Establishment Clause, it held that the injuries claimed by these plaintiffs were not concrete and particularized. The plaintiffs argued their injuries were akin to those in the religious-display and religious-exercise cases, but the Court disagreed.

For religious-display cases, the court disagreed on the ground that there was no "personal confrontation" with the item or event as there was in relevant precedent. The court highlighted how this element met where previous religious-display case plaintiffs "encountered" the symbol on American currency or on a public utility bill they received; here, the plaintiffs "manufactured" the confrontation since "[t]he beliefs listed in that section [2] exist only in the statute itself." The Circuit identified the same "personal confrontation" problem in the religious-exercise cases, noting " [s]tanding to challenge invocations as violating the Establishment Clause cannot be based solely on injury arising from mere abstract knowledge that invocations were said. There must be proof in the record that [the plaintiffs] were exposed to, and may thus claim to have been injured by, invocations given at the relevant event."

As for the Equal Protection Clause, the Court also found the plaintiffs lacked standing. Though the standing elements are always the same no matter the claim, the "nature and source" of the claim affects the elements. In Equal Protection Clause cases "exposure to a discriminatory message,

without a corresponding denial of equal treatment, is insufficient to plead injury . . . ." Here, the plaintiffs may well have been exposed to a discriminatory message by the statute, but the Court found they fell short of being denied equal treatment. And even though future injuries can confer standing if they are *certainly impending,* when they are only a possibility standing will not be had. In this case, the Circuit found the affidavits "only claim offense at the clear message of disapproval that is being sent by the state" but did not allege certainly impending injuries based on the law.
The Fifth Circuit thus reversed the lower court, voided the injunction and dismissed the case for a lack of jurisdiction.

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## Trials: Plaintiff Was Not Required to Amend Original Complaint to Include Additional Claims Which Accrued After Filing; Second Action Was Not Barred by Res Judicata

## *Welsh v. Fort Bend Independent School District*, No. 16-20538 (5th Cir. June 22, 2017).

**The Fifth Circuit has reversed a lower court decision which had held that an employee suing a school district was required to amend her original complaint after filing as additional claims arose and was barred by res judicata, finding instead that Texas law allowed for claims that were not yet mature at the time of the initial complaint could be pursued in subsequent actions.**

Guadalupe Welsh (Welsh) had a dispute with her employer, Fort Bend (Texas) Independent School District (FBISD) and filed suit. The first suit in 2014 focused on claims for discrimination, hostile work environment, and retaliation under Chapter 21 of the Texas Labor Code, and was dismissed by the state district court for failing to meet the statute of limitations. She filed a second suit in 2015 focusing on discrimination under Title VII and the Age Discrimination in Employment Act (ADEA) during different dates than the previous suit. The School District answered the second suit by claiming it was barred by *res judicata* and could not proceed. The lower federal district court in which this second case was filed agreed and dismissed the case, prompting Welsh to appeal to the Fifth Circuit.

The Circuit focused on whether the claims in the second action were raised or could have been raised in the first action. The court's task was to determine whether claims that were not yet mature - they had not occurred yet at the time Welsh *filed* the first case - nevertheless were barred by that suit. Reviewing the applicable Texas law for the case, the Circuit noted the Texas Supreme Court holds that where a legal hurdle existed to a claim being litigated in a prior suit, *res judicata* does not apply. The court, addressing the FBISD's argument that Welsh had to amend her first petition *as the new claims accrued*, looked to century-old precedent to reject the theory, noting the Texas Supreme Court held, as far back as 1907, that a contract claim was not barred for a contract that had previously been litigated between the same parties when the issues in the second suit had not accrued until *after* the first case *was filed*.

The Fifth Circuit thus rejected the FBISD's theory that a plaintiff must amend its claim every time a new incident occurs once a suit is filed or lose the chance to litigate that incident in perpetuity. Rather, claims that are not mature *at the time the first suit is filed* may be brought in a subsequent suit between the parties. Welsh's second case was thus able to proceed.

LINK

## THIS JUST IN:

## A Win for Ann Arbor

## *Bailey v. City of Ann Arbor*, no. 16-2478 (6th Cir. June 20, 2017).

***Abigail Elias, IMLA member and Chief Assistant City Attorney of Ann Arbor, provided this note on a recent win by the City, which involved a video-taped robbery, a search of a residence where clothing worn by the perpetrator in the video was located, a subsequent arrest and a guilty plea-followed by a §1983 Fourth Amendment action. As indicated in Abigail's comment, the Sixth Circuit reversed the district court, finding qualified immunity.***

The Court of Appeals currently takes oral argument in only about 10% of their cases, so this was won on briefs. Tom Kent in this office gets credit for the City of Ann Arbor's success in the case.

Plaintiff Bailey brought this case alleging Fourth Amendment violations, malicious prosecution, and a *Monell* violation, based on alleged false or misleading statements in the affidavit submitted to obtain the search warrant. The District Court denied the City's motion to dismiss based on qualified immunity. The Court of Appeals overturned the District Court, describing and affirming in detail the veracity of the statements in the detective's warrant affidavit.

Significant in this decision (and we suspect the reason it will be published), is the Court of Appeals' admonishment that District Courts cannot rely on the pleading standard articulated in *Conley v. Gibson*, 355 U.S 41. (1957), but must follow the requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009),and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007):

One other house-cleaning item. Bailey maintains that, in reviewing a motion to dismiss a *Monell* claim, the plausibility standard of *Twombly* and *Iqbal* does not apply. He insists that the "no set of facts" pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), remains good law and applies to this claim. That is wrong. The Supreme Court overruled the *Conley* standard in *Twombly*. 550 U.S. 544, 561-62 (2007). That means district courts may not rely on contrary language in *Petty v. County of Franklin*, 478 F.3d 341, 345 (6th Cir. 2007), which is inconsistent with the Supreme Court's more recent and precedentially superior decisions in *Twombly* and *Iqbal*.

LINK

## Federal Judge Upholds Validity of Riverside County's Possessory Interest Tax

## *Agua Caliente Band of Cahuilla Indians v. Riverside County*, No. ED CV 14-0007 DMG (C.D. Cal. June 15, 2017).

***We thank IMLA Member and Riverside County Counsel Greg Priamos for providing the following update on this tax decision of significance to local government:***

In a highly-anticipated ruling, a United States District Court has determined that Riverside County's possessory interest tax is valid against non-Tribal leaseholders of Indian trust land. Ruling on dispositive motions filed by both the Agua Caliente Band of Cahuilla Indians and the County of Riverside, the Honorable Judge Dolly Gee issued a thirty-four page ruling explaining

her decision to uphold the possessory interest tax.

The crux of the lawsuit stemmed from a series of leasing regulations issued by the Bureau of Indian Affairs seeking to exempt possessory interest taxes on leasehold interests paid by non-tribal members. The new set of regulations, which became effective on January 4, 2013, included Section 162.017 which sought to prohibit state and local governments from taxing leasehold or possessory interests, permanent improvements (regardless of the owner) and activities under a lease conducted on the leased premises. Viewed broadly, this provision arguably sought to establish a wholesale exemption from these taxes.

On January 2, 2014, the Agua Caliente Band of Cahuilla Indians filed a federal lawsuit seeking to invalidate the possessory interest tax imposed by Riverside County on lessees of Tribal land. A number of entities, including the federal government, tribal governments, tax organizations and lessees, submitted *amicus* briefs throughout the litigation offering various insight and thoughts on the tax.

After three and a half years of arduous litigation, the County of Riverside prevailed when Judge Gee found that the possessory interest tax was not preempted by federal law and it did not unlawfully interfere with the Tribe's sovereignty. First, the Court found that the Indian Reorganization Act, 25 U.S.C. § 465, does not apply to the Agua Caliente lands at issue because the Tribe did not acquire those lands pursuant to the Act, but rather by Executive Order. Second, the Court conducted the *Bracker* balancing test weighing the state, federal and tribal interests involved with the imposition of the tax. In finding that the federal interest must yield to the state's interest in taxation, the Court found summarized its *Bracker* analysis with the following:

> **Given the finite number of essential services that the Tribe provides on the Trust Lands, the fact that the non-Indian lessees pay the PIT, the lack of evidence that the PIT interferes with tribal governance or economic development, and the minimal effect the PIT has on the Tribe's leasehold marketability and revenue collection, the Court concludes that any adverse effect the PIT has on the Tribe is minimal and insufficient to tip the *Bracker* scale in favor of preemption.**

Finally, the Court ruled that the possessory interest tax did not infringe on tribal sovereignty because the tax did not significantly burden the Tribe, primarily because the tax is connected with services by the County of Riverside to non-Tribal lessees who benefit from government services such as fire protection, police protection, roadway maintenance, water services, trash, sewer, public transportation, court services, animal control, and other essential government services.

What This Ruling Means To County Government

If the Tribe were to have prevailed, the County of Riverside, along with local taxing jurisdictions such as cities, special districts and state-mandated education funds, would have lost approximately $40,000,000 annually in possessory interest tax revenue. It is interesting to note that only one of the taxing entities (Desert Water Agency) intervened in the action. All of the others simply sat on the sideline and watched. Approximately 12% of the possessory interest tax is used by the County to pay for various governmental services, including libraries, roads, fire protection, police protection/coroner services, correctional services, district attorney, health and mental services, public defender, probation, code enforcement and animal services.

By prevailing in this tax suit, the County was able to protect a key revenue source that funds government services in and around the Agua Caliente Trust lands.

What is Next?

It is important that local governments and other taxing agencies in counties with tribal lands continue to monitor the possessory interest tax cases. While the Tribe issued a formal media statement intending to file an appeal with the Ninth Circuit Court of Appeals, no appeal has been filed with the Court.

In addition to the anticipated appeal, the County is still defending two cases in state court where local taxpayers are seeking refunds of possessory interest taxes paid for the past ten years. Those lawsuits, *Heidi Herpel v. County of Riverside* and *Leonard Albrecht v. County of Riverside*, are currently being litigated in Riverside County Superior Court. If the taxpayers prevail, the County would be required to refund approximately $12,000,000 or more to these leaseholders of Tribal land.

Finally, in anticipation of the Tribe's appeal, the County will be seeking *amicus* support from various coalitions including IMLA, the National Association of Counties, California State Association of Counties and professional groups such as California Assessors' Association and the California Association of County Treasurers and Tax Collectors.

***I hope that this is helpful to you. We will continue to provide updates on the possessory interest taxes as they move through various parts of the litigation. Should you have any questions, please do not hesitate to contact me directly.***

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