International Municipal Lawyers Association



e-News: Issue 14 July 12, 2018

In This Issue: 7 Cases

Immunity: No Appellate Jurisdiction to Hear Qualified Immunity Appeal Where Defendant Challenges Factual Inferences Drawn by District Court

Immunity: Sheriff and County Granted Immunity for Child Protective Services' Removal of Children from Home without Notice

Prisons: Hormone Treatments Provided to Inmate with Gender Dysphoria are Sufficient to Avoid Eighth Amendment Violation

Procedure: Property Owner not Entitled to Claim Vested Interest in Prior Zoning Classification where it was Operating in Violation Thereof

Search: Although Partly Motivated to Assist Police, Private Citizen was not Acting as Government Agent in Searching Suspect's Car

Statutory Interpretation: State Law is Not "Inconsistent" with Federal Law Merely Because It Extinguishes § 1983 Claim

Click Here To Print This Issue

Quick Links

IMLA Website

Webinar Calendar

Municipal Jobs Board

Become a Member

Join The IMLA Community

IMLA Podcasts

Employment: Police are Not Entitled to Pay for Donning and Doffing Uniforms and Driving Patrol Cars to Work

Llorca v. Collier County, No. 17-11377 (11th Cir. June 27, 2018).

Citing the "integral and indispensable" test under the FLSA, the Eleventh Circuit has denied compensation to police officers for time spent putting on their uniforms; other specific Department of Labor regulations specifically foreclose payment for time spent commuting in police vehicles.

Four former Collier County, Florida (County) deputies sued the County alleging they were improperly underpaid under the Fair Labor Standards Act (FLSA). Specifically, they claimed that the County violated the statute's overtime provisions by failing to compensate them for time spent 1) donning and doffing police gear and 2) driving to and from work in marked patrol cars.

The Circuit began by setting out the history of FLSA, noting it was amended in 1947 by Congress (the Portal-to-Portal Act) to clarify just this sort of question. The result is the integral and indispensable test courts use to determine whether pay is required for certain employee

activities. The test holds that "[a]n activity is integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." The Court thus agreed donning and doffing protective gear may well be "indispensable" but countered it was not "integral" because it was not *principal* to, but rather *adjunct* to, the deputies duties. In short, "donning and doffing is an entirely separate activity from the deputies' principal law enforcement duties," and thus "a preliminary and postliminary activity" under FLSA for which the County did not have to compensate the officers. It followed up by noting that "[d]onning and doffing uniforms and protective gear at home has never been considered work time" and that holding otherwise would "disregard . . . long-established customs."

As for driving to work in marked patrol cars, the Court made quick work of the issue, noting the statute itself addresses this directly, stating that commuting time is generally not compensable. It then clarified further that the statute even includes language about using an employer's vehicle, stating that "activities performed by an employee which are incidental to the use of [an employer's] vehicle for commuting shall not be considered part of the employee's principal activities." Moreover, the Court noted the Department of Labor specifically addresses this issue - supporting its conclusion - in a regulation that states "[a] police officer . . . who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls." The Circuit affirmed the lower court.

LINK

Immunity: No Appellate Jurisdiction to Hear Qualified Immunity Appeal Where Defendant Challenges Factual Inferences Drawn by District Court

Barry v. O'Grady, 17-3485 (6th Cir. July 11, 2018).

The Sixth Circuit has denied jurisdiction to hear a request for qualified immunity, because-in its view- the defendant challenged the weight, the plausibility, and credibility of the evidence presented by plaintiff rather than addressing plaintiff's claims as a matter of law.

Teresa Barry (Barry), a judicial administrative assistant, alleged that Franklin County Municipal Judge James O'Grady (O'Grady) created a hostile work environment with vulgar comments about women, either coming from O'Grady directly, encouraged by him, or tolerated by him. After overhearing the judge and bailiffs discussing the sex life of a female lawyer- the bailiff saying that the lawyer "licked [a male lawyer] like a lap dog" and O'Grady responding that the female lawyer must be "good at her job"- Barry angrily posted about the conversation on Facebook and informed the lawyer of O'Grady's comments. When O'Grady learned that Barry had reported the conversation to the female lawyer, he retaliated-though the Sixth Circuit does not go into specific here. In response, Barry brought O'Grady's behavior to the attention of the court administration. She was moved out of O'Grady's chambers and accepted her only option for transfer- to a less-desirable position. Her work life continued to devolve; she suffered from mental-health issues.

Barry sued under §1983, claiming retaliation in violation of the Free Speech Clause of the First Amendment and gender discrimination in violation of the Equal Protection Clause. O'Grady argued qualified immunity. The district court denied O'Grady, finding disputed issues of material fact and concluding that a reasonable jury could find in Barry's favor. The Sixth Circuit dismissed an appeal because O'Grady's argument relied on disagreements with the district court's weighing of facts and factual inferences, not questions of law.

LINK

Immunity: Sheriff and County Granted Immunity for Child Protective Services' Removal of Children from Home without Notice

N.E.L v. Douglas County, No. 17-1120 (10th Cir. July 3, 2018).

A Colorado County and its Sheriff's Office were immune from liability for removing ten children from a home based on un-recorded *ex parte* orders originating in Kansas; no precedent "clearly established" a constitutional right by the parents.

Mr. and Mrs. Doe (Does) have ten children with whom they lived in Johnson County, Kansas. Starting in 2008 and continuing through March of 2009 three Doe children made revelations that an uncle sexually abused each of them. After investigating, the Kansas Department of Children and Families (KDCF) determined the allegations were baseless. After months of back and forth between parties with the agency finding the claims baseless and the Does' repeated reports and complaints, KDCF filed ten *ex parte* protective custody orders to obtain custody of the children. A Kansas court deemed it necessary to remove the children from the home. However, at the time Mrs. Doe had taken the children to Douglas County, Colorado to visit friends, resulting in KDCF working with the Colorado Department of Social Services, the Douglas County Department of Human Services, and the Douglas County Sheriff's Office to execute the ex parte order. Contrary to the Colorado Uniform Child-Custody Jurisdiction and Enforcement Act (CUCCJEA), Douglas County Sheriff's Office did not register the Kansas Order before executing it and removing the children from Mrs. Doe's care. Mrs. Doe filed a § 1983 suit claiming the Douglas County Sheriff's Office actions violated the Fourth Amendment and, under *Monell,* that Douglas County was liable. The district court granted Douglas County's motion to dismiss, finding both prongs of the qualified immunity assessment applied and, thus, no *Monell* claim was viable.

The Tenth Circuit began with the Fourth Amendment allegation that the children (two of which brought the case when they reached 18) were illegally seized without a warrant since the *ex parte* order was never registered. The children's reference to two cases involving child protective services agents seizing children did not meet the clearly established prong according to the Circuit, however. One case involved entering a home *without* an ex parte order at all, in contrast to this case were an order was issued, and the second involved child services agents acting *contrary to an ex parte order*, in contrast to this case where Douglas County acted in accordance with one they only failed to register. The Fourth Amendment claim failed.

As for the Fourteenth Amendment, the Circuit recognized that under it "[a] child has a constitutionally protected liberty interest in a relationship with her parent," but found the children did not point it to a single case with facts similar to theirs. Thus, it held they failed to meet the "clearly established" prong on this issue either.

As for *Monell,* the Circuit identified a single fact that indicated a practice, policy or custom that could have caused the children's alleged injury -- specifically that a deputy stated that Douglas County does "this all the time" -- but it held a single statement is insufficient to show a continuing, persistent, and widespread custom. It affirmed the lower court.

LINK

Prisons: Hormone Treatments Provided to Inmate with Gender

Dysphoria are Sufficient to Avoid Eighth Amendment Violation

Lamb v. Norwood, No. 17-3171 (10th Cir. July 9, 2018).

Although it recognized a male inmate's gender dysphoria as a serious medical need, the Eighth Circuit has found that a prison's provision of hormones and testosterone-blockers--while declining to provide sex reassignment surgery--was sufficient to avoid "deliberate indifference."

Michelle Renee Lamb (Lamb) was born male but has expressed feminine characteristics and identified as female since youth. In prison she experienced gender dysphoria and is getting treatment for that condition. She filed suit in the District of Kansas alleging her treatment was inadequate under the Eighth Amendment. The court granted summary judgment to state prison officials, holding the officials were not deliberately indifferent to her medical needs. She appealed.

The Tenth Circuit began by recognizing that the seriousness of Lamb's medical need was not at issue; the only question was whether the treatment she was receiving was constitutionally adequate. It also recognized as undisputed that she is receiving hormone treatment, testosterone-blocking medication, and weekly counseling sessions. The Court reviewed its 1986 precedent, *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), where an inmate with gender dysphoria claimed a violation of the Eighth Amendment based on prison official's refusal to provide estrogen treatment. The Court determined the decision was still valid despite its age. Specifically, it noted that it typically does not overrule or reconsider medical assumptions underlying precedent and, second, that even if it did so in this case, the logical framework of the case was not obsolete. It then moved on to evaluating whether Lamb's treatment constituted deliberate indifference--and found it did not merely because it was different from the treatment Lamb wants. Specifically, she wants surgery and an increase in her dosage of hormones, but the Circuit found her current hormone dosage, counseling, and estrogen and testosterone-blocking medication, though a more conservative approach, were implemented by a licensed doctor and that a reasonable jury could not find the care met the deliberate indifference standard of Eighth Amendment. The Circuit affirmed the lower court ruling.

LINK

Procedure: Property Owner not Entitled to Claim Vested Interest in Prior Zoning Classification where it was Operating in Violation Thereof

Chicago Joe's Tea Room, LLC v. Village of Broadview, No. 16-1989 (7th Cir. June 29, 2018).

A strip club could not avail itself of a "vested right" theory because it sought to sell alcohol at its adult business, which was prohibited under the Village's presumptively valid ordinance in effect at the earlier time.

Broadview, Illinois (Village) and Chicago Joe's Tea Room, LLC (Chicago Joe's) have been in litigation for eleven years. This appeal to the Seventh Circuit is only an interlocutory appeal regarding a claim for an injunction - the case continues otherwise. The Seventh Circuit affirmed the lower court's ruling that the claim for an injunction was moot. In 2007 Chicago Joe's sought to operate a strip club in the Village and applied for a special use permit to do so, but was denied. It, along with the seller of the property it was simultaneously trying to buy, sued the Village alleging a First Amendment violation, asserting the Village ordinances were unconstitutional. The ruling at

issue in this interlocutory appeal was the denial of an injunction to prevent the Village from enforcing its ordinances. Chicago Joe's appealed.

The mootness problem for Chicago Joe's related to its lack of a vested property right and a change in state law. The general rule in Illinois is that property owners do *not* have a right to the continuation of an existing zoning classification, but that a party may acquire a vested right to continue using its property in accord with existing law and that, even, "a right may vest before actual use begins where there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance. . . ." The vested rights issue here was that Chicago Joe's sought to use its property *in violation of existing Village ordinances in its original 2007 application.* It sought to sell alcohol at its adult business, which the Village's presumptively valid ordinance in effect at the time prohibited. Since adult entertainment businesses cannot serve alcohol and that is precisely what Chicago Joe's sought to do, the court held it "cannot make the required showing that it probably would have won approval under the law as it stood when it applied for a special use permit." The Circuit thus held it had no vested right.

Relatedly, Illinois changed its state law to prohibit "locat[ing], construct[ing], or operat[ing] a new adult entertainment facility within one mile of the property boundaries of any school, day care center, cemetery, public park, forest preserve, public housing, or place of religious worship located in the area of Cook County outside of the City of Chicago" (where the Village is located). This one-mile rule is more restrictive than the previous 1000-foot rule that was in effect at the time of the special-use permit application. Importantly, the proposed location for Chicago Joe's is no longer viable because it is within one mile of a cemetery, two schools, three parks, and a church (though it was not within 1000 feet of these places). Chicago Joe's has never challenged the Illinois statute nor filed suit against any party that can be enjoined from enforcing the statute, meaning a court cannot grant it "any effectual relief." This, combined with the fact that Chicago Joe's property right was not vested *before this change in state law*, left the case moot. The Circuit affirmed the lower court ruling.

LINK

Search: Although Partly Motivated to Assist Police, Private Citizen was not Acting as Government Agent in Searching Suspect's Car

United States of America v. Highbull, No. 17-2728 (8th Cir. July 6, 2018).

Where a woman retrieved a cellphone from her boyfriend's vehicle after a suggestion by police, she was partly motivated by a desire to assist law enforcement-but her own motives in protecting her 13-year-old daughter relating to indecent photography on the phone provided sufficient alternative bases to avoid her being a "government agent" for Fourth Amendment purposes.

In pleading guilty to sexual exploitation of a child, Terance Morice Highbull (Highbull) reserved his right to appeal the denial of his motion to suppress evidence in the case. The relevant facts of the underlying case are that a Sioux Falls Police Department officer responded to a domestic disturbance call whereupon he saw a man leaving the scene of a running vehicle and woman by it. The woman, Michelle Janis, complained that her boyfriend, Highbull, had taken nude photos of her 13-year old daughter and that it was his car still running. Janis began explaining how during an argument she saw his phone and the photos on it, at which point the officer interrupted asking if she had the phone, to which she stammered in response that she "didn't know . . . he had one," and just as the back-up officer arrived diverting the officer's attention, Janis went to the vehicle, obtained the phone and handed it to the officer. He took the phone and a forensic analysis

revealed the photos, leading to the arrest and conviction.

The district court found Highbull failed to show Janis was acting as a government agent, rather than as a private citizen, in retrieving the phone. In reviewing the case, the Eighth Circuit noted it evaluates three factors when determining whether a private citizen acted as a government agent: "[1] whether the government had knowledge of and acquiesced in the intrusive conduct; [2] whether the citizen intended to assist law enforcement or instead acted to further his own purposes; and [3] whether the citizen acted at the government's request." The first factor was essentially uncontested, with the government recognizing that the officer knew and acquiesced in the conduct. The third factor was most contested, with Highbull arguing that the officer's question of whether Janis had the phone necessarily encompassed a request that she search the car. The officer openly acknowledged asking the question in the hopes of securing the phone, but the Court held that did not equate to Highbull meeting his burden by a preponderance of the evidence that Janis was actually acting at the officer's request. That left the second element at issue, and on this the Circuit agreed with the lower court that Janis was not "motivated solely or even primarily by the intent to aid the officers" and that "the government did not request the challenged search." Without Janis' testimony, her motives were not perfectly clear to the court, but it agreed that the record showed her compelling personal interest in protecting her daughter. Highbull tried to, in the Court's words, "compress" her personal motive with the officer's, since getting justice for her daughter necessarily meant assisting the officer, but the Court refused this entreaty, stating it had previously held that the "fact [that] a private citizen is motivated in part by a desire to aid law enforcement does not in and of itself transform her into a government agent." The Circuit affirmed the lower court's denial of the motion to suppress.

LINK

Statutory Interpretation: State Law is Not "Inconsistent" with Federal Law Merely Because It Extinguishes § 1983 Claim

Wheeler v. City of Santa Clara, No. 16-17375 (9th Cir. July 3, 2018).

Even though an adopted child's federal § 1983 claims due to the death of her biological mother were prevented by a California law which states that adoption severs a parent-child relationship, the state law was not "inconsistent" with federal law and was properly considered.

Deborah Colbert (Colbert) was killed after a confrontation with police. Her biological son, Leland Wheeler (Wheeler), who was adopted as an infant by another family, filed suit against Santa Clara, California (City) alleging two claims on her behalf under § 1983: first, a Fourteenth Amendment substantive due process claim for deprivation of his right to a familial relationship with his biological mother and, second, a Fourth Amendment excessive force claim. The district court dismissed the case - granting the City's motion - holding Wheeler lacked a constitutionally-protected interest in his relationship with Colbert because their legal relationship had been severed.

On appeal Wheeler argued the district court erred because it should have used federal common law regarding survivorship in determining whether he had a viable §1983 suit. The Ninth Circuit summed up how a court is to determine which law (state or federal) to use as underlying statute in §1983 cases, saying it requires "courts to fill gaps in certain federal actions with state law when state law is not 'inconsistent' with federal law."

Two California laws were at issue in the case: on one hand, California law provides that a cause of action does *not* end with death, but that a successor in interest can pursue the claim, defining

such as the beneficiary of the estate; and, second adoption *does* sever the parent-child relationship. All parties agreed Wheeler did not fit the bill as a successor in interest, having been legally adopted, but Wheeler argued that allowing this state law to extinguish his case would undermine the goals of §1983. Santa Clara argued that it did not undermine §1983 but instead such a result was true to the statute. The Court sided with the City and the Supreme Court's *Robertson v. Wegmann*, 436 U.S. 584 (1978) precedent, holding that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Looking at the facts another way, if every time state law extinguished a §1983 case it was deemed "inconsistent" and the cause of action survived, then there would be no point at all in reviewing state law. The Circuit affirmed the lower court's dismissal.

LINK

IMLA

www.imla.org
51 Monroe Street
Suite 404
Rockville, MD 20850
202-466-5424

