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ADA: City's Offer of Future Dispatcher Job to Injured Police Trainee is Sufficient Participation in "Interactive Process" for ADA Purposes

Shreve v. City of Romulus, No. 17-1778 (6th Cir. July 16, 2018).

Where a police officer candidate was injured during training and could not continue working despite a 16-month recuperation process, the city's offer to provide him with a future dispatcher position-which he declined in favor of a potential police officer career-was sufficient to satisfy the good faith mandates of the ADA.

Stacey Shreve (Shreve) began working for the Romulus Michigan (City) Police Department in July 2012 and graduated from the police academy in December. Just two weeks into his mandatory Field Training Officer (FTO) Program he was severely injured on the job when the police car he was in was struck by another vehicle. He was on leave from work for sixteen months, after which he returned to work with no restrictions. However, when he started training again - which he had to do since he had yet to complete the FTO program - he had pain and was given work restrictions that included no bending, kneeling, lifting, or squatting. He asked for light-duty work, but none was available that could meet his restrictions and he returned to medical

leave. The Police Chief thereafter discussed him being transferred to a dispatcher within the department, but he said he wanted to be a police officer and did not apply for, nor get offered a dispatcher position. He was ultimately terminated and then filed suit alleging an ADA claim. Finding that there were no genuine disputes of material fact, the district court granted the City's motion for summary judgment and dismissed the case.

On appeal, the Sixth Circuit identified the narrow issue as whether Shreve was "otherwise qualified for the position despite his . . . disability . . . with a proposed reasonable accommodation," because there was no dispute that he was disabled and terminated. The accommodations at issue were either light-duty work or the dispatcher job. The light-duty issue came down to the fact that Shreve never completed his FTO Program and that, therefore, Shreve simply was not "otherwise qualified" for light-duty work since it consisted of tasks that only trained police officers could do. In short, the work was not physical, but one still had to be a trained police officer to do it.

As for the dispatcher role, Shreve's argument was that the City did not offer him a position when one came available - but only talked about it before one was available - and that in having failed to offer it to him, it failed to participate in the "interactive process" to find a reasonable accommodation in good faith as required by the ADA. The Court rejected that the City acted in bad faith, pointing out that when it met with Shreve he expressed interest in continuing to become a police officer and that the City's discussion of the dispatcher position theoretically in the future when a position became available was not followed up on by Shreve - he never inquired about it, applied for it, or expressed interest in it. These facts did not show "bad faith" from the City - rather it showed it participated in the interactive process as required. The judgment was affirmed.

LINK

Employment: Resignation to Protect Future Career Prospects Deemed Insufficient to Show Involuntariness to Save Appeal of Adverse Employment Decision

Conney-Manning v. Thomas County Board of County Commissioners, No. 17-13546 (11th Cir. July 12, 2018).

The fact that former employee resigned while her appeal of an adverse employment decision was pending invalidates employment discrimination suit regardless of former employee's intentions or thought process in choosing to resign.

Beverly Conney-Manning (Conney-Manning) worked for Thomas County, Georgia (County) in the Sheriff's Office. After an initial investigation by the County, she appealed an adverse employment decision and, instead of awaiting the conclusion of the appeal, she resigned. She then filed an employment discrimination suit against the County and Sheriff, in his individual capacity. The district court dismissed the case on summary judgment, finding she resigned voluntarily.

On appeal Conney-Manning argued that her "thought process" based on her previous interactions with the County was that she was fired and thus she resigned so there would be a "lesser consequence" on her future career options. The Circuit affirmed the lower court, noting that whether resignation is voluntary depends on the objective facts, not the "employee's subjective view of the options available to her." The Circuit recognized that the options available to Conney-Manning may well have been unpleasant alternatives, but that even in such cases the resignation is voluntary because the employee could have chosen to "stand pat and fight." Since the facts showed Conney-Manning offered her resignation rather than continuing her appeal until, if ever, she was terminated there was no genuine issue of material fact as to the voluntariness of

the act.

LINK

Equal Protection: Plaintiffs Survive Dismissal of Claim where Governor Preempts Local Minimum Wage Increase

Lewis v. Governor of Alabama, No. 17-11009 (11h Cir. July 25, 2018).

The Eleventh Circuit has reversed in part a lower court decision which had dismissed plaintiffs' claim that, in passing a law seemingly targeted directly at Birmingham, Alabama's effort to raise local wages, the state, its governor and its attorney general violated a spectrum of the Constitution's civil rights provisions.

For a single day in February 2016, Marnika Lewis and Antoin Adams secured a pay raise. The Mayor of Birmingham, Alabama, William Bell, had just affixed his signature to Ordinance No. 16-28, which guaranteed Lewis, Adams, and all other wage earners in the city $10.10 per hour. But the following afternoon, Alabama Governor Robert Bentley signed the Minimum Wage and Right-to-Work Act (Act) into law. The Act nullified Ordinance No. 16-28, preempted all local labor and employment regulation, and mandated a uniform minimum wage throughout Alabama-which, then and now, sits at $7.25 per hour.

So begins a case illustrating the continued racial turmoil in our nation. In 2015 the Birmingham City Council sought to take steps to improve the lives of people within their city-72% of whom are black, and 30% of whom live in poverty, the largest such concentration in the state. A white state representative from neighboring Mountain Brook (1.5% black residents, 3% in poverty) immediately introduced a bill which would quash Birmingham's efforts. The Act, codified at Alabama Code §§ 25-7-40 et seq., "establish[es] within the Legislature complete control over regulation and policy pertaining to collective bargaining . . . or the wages, leave, or other employment benefits provided by an employer to an employee . . . in order to ensure that such regulation and policy is applied uniformly throughout the state." *Id.* § 25-7-45(a). To that end, the Act "occupies and preempts the entire field of regulation" in these areas "to the complete exclusion of any policy, ordinance, rule, or other mandate promulgated or enforced by any . . . political subdivision of th[e] state." *Id.* § 25-7-45(b).

Plaintiffs sued the Governor and the Attorney General of Alabama, claiming racial discrimination under multiple theories. They later amended their complaint to include claims under the Thirteenth, Fourteenth, and Fifteenth Amendments and § 2 of the Voting Rights Act, adding the State of Alabama, the City of Birmingham, and Birmingham Mayor William Bell as defendants, while dropping the governor from the suit.

Defendants moved to dismiss for lack of standing and failure to state a claim. The district court agreed, dismissing the complaint. It concluded that the plaintiffs lacked Article III standing to sue any of the defendants; that the attorney general was an improper defendant under *Ex parte Young*, 209 U.S. 123 (1908); that § 2 of the Voting Rights Act did not abrogate Eleventh Amendment state sovereign immunity; and that, in any event, the plaintiffs had failed to assert any plausible claims.

Plaintiffs appealed the dismissal of their Fourteenth and Fifteenth Amendment claims against the attorney general and the City of Birmingham and their Voting Rights Act claim against the State of Alabama.

To show Article III standing, plaintiffs had to establish "(1) that they have suffered an injury in fact

that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there is a causal connection, so that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (citing the Supreme Court's enunciation in *Lujan*).

To satisfy these elements, Plaintiffs alleged (1) that the Act denies Birmingham's black citizens economic opportunities and abridges their right to vote on the basis of race; (2) that these harms are fairly traceable to the Act and to the defendants due to their enforcement roles; and (3) that their injuries can be redressed by enjoining the attorney general from enforcing the Act or by ordering the city to start enforcing Birmingham's minimum wageordinance.

The Circuit had "little trouble concluding that the plaintiffs have suffered concrete injuries" as a result of the Act.

The court addressed whether those injuries could be attributed to the named defendants, starting with the attorney general. The attorney general's broad authority to interpret and enforce the Act "illustrates his Article III connection to the defendants' harm, which is the direct consequence of the Act's continued enforcement." In fact, the power of the attorney to institute civil actions on behalf of the state had recently been demonstrated in Birmingham, where he sued the city and mayor to remove a plywood barrier erected around a Birmingham Confederate monument. "We have little doubt that an injunction declaring the Act unconstitutional and prohibiting the attorney general from enforcing it-thereby requiring him to announce its invalidity to the governor and the legislature-would go a long way toward redressing the plaintiffs' injuries. The plaintiffs have fulfilled the Article III standing requirements to sue the attorney general."

On the other hand, the City of Birmingham was not an appropriate defendant. The city's refusal to implement a nullified law did not make it the cause of the plaintiffs' injuries. The attorney general had the authority to enforce the Act against the City, "whether it wills to resist state supremacy or not." The Circuit affirmed dismissal of the city from the suit, but we reversed the district court's holding that plaintiffs lacked Article III standing versus the attorney general and the State of Alabama.

Besides dismissing the plaintiffs' claims for lack of Article III standing, the district court also found that they were barred on sovereign immunity grounds. Therefore, the Circuit evaluated whether Eleventh Amendment immunity bars the Voting Rights Act claim against the State of Alabama-that is, whether § 2 of the Voting Rights Act abrogated state sovereign immunity. While the Eleventh Amendment generally bars suits against a state by its own citizens, under the longstanding doctrine enunciated in *Ex parte Young*, "a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment." In *Ex parte Young*, the Supreme Court permitted a Fourteenth Amendment suit against the Minnesota Attorney General because "[h]is power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party." Here, the Alabama attorney general was sufficiently connected to the enforcement of the Act to satisfy *Ex parte Young*'s demands and eliminate any protection afforded by the Eleventh Amendment.

The court reached a similar conclusion with respect to plaintiffs' Voting Rights Act claim. It found unmistakable "textual, historical, and jurisprudential justifications for Congress' power to abrogate state sovereign immunity" through the Fourteenth and Fifteenth Amendments and voiced in the Voting Rights Act: "We join the Fifth and Sixth circuits in concluding that § 2 did abrogate state sovereign immunity, and thus find that we have jurisdiction to hear the plaintiffs' claim against Alabama."

Having settled the jurisdictional questions, the Circuit addressed whether plaintiffs' equal protection claims survived 12(b)(6) dismissal. Plaintiffs alleged (1) purposeful discrimination and (2) violation of the political-process doctrine by transferring control from the majority-black Birmingham City Council to the majority-white Alabama Legislature, in order to "uniquely burden

the ability of Plaintiffs to obtain employment-related ordinances that Birmingham's African-American community strongly favored."

In order to prevail on an equal protection challenge to a facially neutral law, plaintiffs must prove both discriminatory impact and discriminatory intent or purpose. It found such impact: "What we know from the pleadings is that the Act immediately denied a significant wage increase to roughly 40,000 Birmingham residents, the vast majority of whom were black. These facts are more than sufficient to support a plausible allegation that the Minimum Wage Act burdens black citizens more than white ones."

More intriguing was the question of purpose. It found similarities between these facts-legislation introduced by a white constituency, rushed through the legislative process in only 16 days with virtually no debate and without the support of a single black legislator-and the circumstances of many prior purposefully discriminatory laws passed in Alabama.

Most perturbing to the Circuit was the so-called "clearest proof" standard applied by the district court and defended on appeal. "Recklessly plucked from an unrelated line of precedent, this requirement runs contrary to decades of established equal protection jurisprudence. . . . Even a slight bit of context illustrates the danger of extracting this law from its intended setting." Here, a thorough examination of plaintiffs' detailed allegations led the Circuit to conclude that they plausibly alleged a discriminatory motivation behind the Act, despite the law's neutrality and rationale. Accordingly, it reversed the dismissal of their Fourteenth Amendment intentional discrimination claim against the attorney general.

The court was not as persuaded by plaintiffs' political-process claim. Historically, this equal protection principle has prohibited majorities from restructuring the political process to frustrate the ability of minorities to enact legislation explicitly addressing "racial issues." Noting the Supreme Court's recent narrowing of the principle in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), the Circuit did not find a viable political-process claim. "[W]hile we acknowledge the social and economic history behind the plaintiffs' assertion that the minimum wage is a racial issue, their claim still falls outside the Supreme Court's limited application of the political-process doctrine to laws explicitly addressing racial harms such as segregation."

The Circuit easily rejected plaintiffs' Voting Rights Act claim: "The plaintiffs' voting claims fall short for the simple reason that their allegations have nothing to do with voting." Affirmed in part, reversed in part, and remanded.

LINK

Releases: County Jailer is not "Affiliate" of Medical Services Contractor and is not Covered by Release Agreement

Pope v. Carl, No. 17-6415 (6th Cir. July 17, 2018).

Reversing the district court, the Sixth Circuit has refused to grant summary judgment to a county jail deputy who barred an employee of an outside contractor from the jail and then claimed he was covered under the terms of a release agreement as an "affiliate" of the private contractor.

Russell Pope (Pope) worked as a nurse for Southern Health Partners, Inc. (Southern), a provider that contracted to provide medical services to Kenton County, Kentucky (County) Jail (Jail). When a co-worker was promoted to a supervisory role, Pope was upset, as he believed the co-worker was responsible for a sexually-explicit and harassing screensaver placed on the medical unit

computer and other inappropriate behavior. He emailed human resources and after an investigation determined that a Jail employee, not a co-worker, had implemented the screensaver. At this point, the Jail deputy, Terry Carl (Carl), had a "lockout order" issued that kept Pope from the premises, and Pope was subsequently terminated by Southern. Pope sued Southern, resulting in a settlement and a Release Agreement. Pope then sued Carl under § 1983 in his personal capacity for his retaliatory actions. The district court granted Carl's motion for summary judgment, holding that the Release Agreement signed by Pope for the settlement waived his federal claims against Carl.

The Sixth Circuit disagreed with the lower court. First, it noted the "Released Parties" were defined in the Agreement as "Defendants, including their . . . affiliated companies . . . , and any other person or entity charged or chargeable with [Southern Health Partners, Inc.'s] responsibility or liability," which did not include Carl in any respect. Carl's argument stemmed from paragraph 13, which stated the Agreement "*inure[s] to the benefit of the parties released herein* and their agents, servants, employees, representatives, insurers, sureties, past, present and future officers, directors, stockholders, attorneys, subsidiaries, affiliates, partners, insurers, predecessors and successors in interest, and assigns *and all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated*." Carl argued he was "affiliated" because as the County Jailer he was required to provide medical services to inmates and did so through his contract with Southern and, second, because Southern's staff was subject to the security controls of the Jail.

The court was frank, saying it was "unsure what it means for the Release Agreement to "inure to the benefit" of persons "affiliated" with the "Released Parties" and that it was "hard to understand why the drafters would limit the class of "Released Parties" in one provision and then expand it in another," but nonetheless determined it needed not resolve the ambiguity. Simply put, Carl was not an "affiliate" or an "affiliated party" in any way with Southern: first, because the company contracts with the County itself, not the County Jail; second, because the company is not subject to Carl's "control" as that term is used on the Release Agreement (rather than a statute); and third, because the company can only be joined as a defendant with Carl concerning the medical care of inmates, not in any other cases. The district court holding was reversed, and the case remanded to give it the opportunity to review the additional arguments of the parties.

LINK

Religion: Misclassification of Coptic Prisoner as Jewish is Grounds for First Amendment Claim

Riley v. Governor of Florida, No. 17-15093 (11th Cir. July 12, 2018).

Reversing a lower court which had dismissed the complaint as moot and/or lacking jurisdiction, the Eleventh Circuit has remanded a case involving a Ethiopian Zion Coptic prisoner who was classified as "Jewish" in the Florida Department of Corrections database.

Lukely Riley (Riley) has been within the Florida Department of Corrections (FDOC) system since at least 1979. He is a member of the Ethiopian Zion Coptic faith, but he learned he has been incorrectly registered as Jewish since 1979. As it turns out, the FDOC chaplaincy service allows prisoners to designate their religious preference to meet their spiritual needs and, because Riley's faith is not included in the chaplaincy database at all, he was classed simply as "Jewish." Riley filed suit, alleging that the exclusion of his faith from the database imposed a substantial burden on his faith and that by being incorrectly registered as Jewish, the FDOC was pressuring him to abandon his faith. He said these were First Amendment violations - specifically the Free

Exercise and Establishment clauses. The district court dismissed the case as moot or because it lacked jurisdiction, in the alternative.

The Eleventh Circuit reversed the lower court on both issues. First, as to mootness, it held the lower court's position that Riley's transfer between prison facilities mooted his case was incorrect: liberally construing the *pro se* complaint showed that Riley's religious-preference designation was attached to him no matter where he was transferred within the FDOC system. Second, as to subject-matter jurisdiction, the Circuit found the court had jurisdiction because Riley's claim was under the First Amendment - which of course raises a claim under the federal constitution. Moreover, the Circuit noted, liberally construed, the complaint could be interpreted as raising a Religious Land Use and Institutionalized Persons Act claim as well. Whether or not the theories will sink or swim ultimately on the merits was not at issue; the lower court had jurisdiction and the case was not moot, thus the Circuit vacated and remanded the case.

LINK

Speech: Letter by Public Employee Urging Reduced Sentencing for Nephew is Matter of Public Concern, even if Motivated by Personal Interest

Bailey v. Independent School District No. 69 of Canadian County, No. 17-6110 (10th Cir. July 24, 2018).

Where a public employee wrote a letter on School District letterhead urging reduced sentencing for his nephew in a high-profile case of child pornography, his subsequent termination constituted improper retaliation for his speaking on a matter of public concern.

Chester Bailey Jr. (Bailey) worked as the Director of Athletics for the Independent School District No. 69 of Canadian County, Oklahoma (School District) for seven years and, by all accounts, received positive performance evaluations the entire time. His nephew Dustin Graham (Graham) was charged and convicted of child pornography charges in 2014. Bailey wrote a letter, using the School District logo and his official title, requesting reduced sentencing, and in 2015, wrote another letter, on similar letterhead, urging early release for Graham. The school received word of the letters and, after a meeting between the superintendent and Bailey, the superintendent recommended termination - which the school board approved. Bailey sued the School District and the superintendent under § 1983 alleging he was fired in violation of his First Amendment rights based on a theory that the termination was in retaliation for his protected speech in the letters. The district court granted summary judgment to the School District, holding Bailey's speech did not relate to a matter of public concern, and granted qualified immunity to the superintendent.

The issue for the Tenth Circuit was whether "a letter written by a public employee, seeking a reduced sentence for his relative, [was] speech on a matter of public concern for the purposes of a First Amendment *Garcetti/Pickering* inquiry"? The Circuit held that it held it does relate to a matter of public concern and reversed the lower court. As for the standard, it noted matters of public concern are issues "of interest to the community, whether for social, political, or other reasons." Having never answered the question, the Tenth Circuit referred to the Eighth Circuit - which has considered the issue - and agreed that sentencing convicted criminals is a public concern because it is funded by public dollars, takes place in public, implicates public safety, deterrence of crime and reintegration of criminals into society at large. As for content, looking to the letters, the Court noted Bailey's words concerned "Graham's behavior while incarcerated, his personal characteristics, and his level of community support." The Court recognized Bailey's

interest in the matter as a relative was personal -- but found that "[m]erely because speech concerns an issue of personal importance does not preclude its treatment as a public matter." Thus however "misguided or distasteful the School District may have found" Bailey's opinion regarding a person charged and convicted of child pornography, his speech was protected by the First Amendment.

Because it had not been clearly established in the Tenth Circuit that a public employee's request for reduced sentencing is a matter of public concern, the superintendent was nevertheless entitled to qualified immunity. Reversed in part, affirmed in part and remanded.

LINK

Speech: Subject-Matter Prohibition of Religious Advertisements on Public Buses Upheld

Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, No. 17-7171 (D.D.C. Jul 31, 2018).

WAMATA Guidelines prohibiting broad subject-matters including religion in advertising on non-public forum public buses upheld as consistent with the First Amendment's Free Speech and Free Exercise Clauses, and RFRA.

The Catholic Archdiocese of Washington (Archdiocese) sought to place an advertisement on Washington Metropolitan Area Transit Authority (WAMATA) buses as part of their "Find the Perfect Gift" Christmas evangelization campaign. WAMATA rejected the advertisement pursuant to their *Guidelines Governing Commercial Advertising*. The *Guidelines* prohibited broad subject-matter advertisements. Guideline 12 specifically prohibited advertisements promoting or opposing religion, religious practice, or religious beliefs. The Archdiocese filed suit against WAMATA seeking a temporary restraining order and a preliminary injunction. The district court declined, finding in favor of WAMATA.

On appeal, the Archdiocese argued Guideline 12, barring religious subject-matter in bus advertisements, violates the First Amendment because it is viewpoint discrimination on a subject that WAMATA otherwise allows on its buses. The Archdiocese also argued WAMATA's Guideline violates the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA). The Circuit affirmed the lower court finding that the Archdiocese's articulation of viewpoint discrimination would effectively prevent any limitations on a non-public forum for commercial purposes and upend decades of precedent. The Circuit reiterated that it is well-established law that governments may run transit companies as non-public forums. The Archdiocese's position would require governments to accept all speech subjects and draws no line to distinguish when a government may reject a speech subject. Similarly, the Court found there was no RFRA or Free Exercise violation because there was no evidence of animus in Guideline 12. The Circuit found the Archdiocese's position not only untenable but that it would also upend Supreme Court precedent.

LINK

Telecommunications: Carriers' Challenge of City Fees Under Telecommunications Act Remanded for Further Fact Gathering

Qwest Corporation d/b/a CenturyLink QC v. City of Des Moines, No. 17-1257 (8th Cir. July 17, 2018).

No federal preemption of City imposed fees for access to the public right-of-way under the Telecommunications Act due to lack of evidence, and it is unclear whether fees are reasonable under relevant Iowa law.

In 1998, Des Moines, Iowa (Des Moines) enacted a fee for telecom companies to access its public right-of-way. The fee for each carrier was set at $0.0083 to $0.009 per foot of line. In 2015, the ordinance was updated, but the fee increase did not take effect until 2018, which raised the fee gradually but ultimately to $0.012 per foot of line. A variety of carriers banded together to file suit against Des Moines, alleging the ordinance violated both federal and Iowa state law. The district court entered judgment for Des Moines following a bench trial.

The Circuit first tackled the federal law issue and the carrier's primary argument that the city ordinance was preempted by the Telecommunications Act, which would occur if the City's ordinance "prohibit[ed] or ha[d] the effect of prohibiting the ability of any interstate or intrastate telecommunications service." The Court made quick work of it, with one sentence noting no evidence was provided by the carriers showing, "the fee increase formally or effectively prohibits entry into the Des Moines telecommunications market."

The state law issue was more involved, under which Des Moines' fees had to be limited to "those management costs *caused by the public utility's activity* in the public right-of-way." Furthermore, the Iowa State Code defines "management costs" as "the reasonable costs a local government actually incurs in managing public rights-of-ways." This state-law framework generated a three-part test from the Circuit: Des Moines could only collect fees to cover costs "(1) the City has actually incurred in managing the rights-of-way, (2) are reasonable, and (3) are caused by the public utility's activity in the rights-of-way." The heart of the appeal was therefore whether construction costs, which the parties agreed were the "increased costs that the City incurs to engineer and construct around the presence of utilities in the public rights-of-way," were management costs for which Des Moines could charge. The Court reviewed the most on-point, though not identical, Iowa Supreme Court cases on cities' authority to impose fees and determined that "with the proper legal standard in mind" more factual development was needed. It vacated and remanded the case because it held "those decisions must be made in the first instance by the trier of fact." Des Moines was thus left to establish more facts regarding the exact construction costs it was increasing the fee for and to do further expert battle with the carriers.

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IMLA

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

