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Education: No "Deliberate Indifference" to "Known Act of Discrimination" where University Imposes No-Contact Policy

Pearson v. Logan University, no. 18-2674 (8th Cir. Sept. 4, 2019).

Where a university, after receiving complaints about an alleged stalker, confronted the stalker and imposed a no-contact policy between the complainant and the alleged stalker, it did not exhibit "deliberate indifference;" furthermore, under Missouri law, the university did not have an inherent obligation to keep all students safe from one another.

In December 2015, Morgan Pearson (Pearson) met with the Dean of Students and Title IX Coordinator (Dean) of Logan University (Logan) to complain of stalking by a male fellow student (FS). She described his constant staring at her and expressed that she was "terrified of being raped." The Dean requested a written statement, which Pearson did not promptly provide, and FS enrolled in Pearson's same "complete schedule" for the next trimester. The Dean wanted to

question various students that Pearson identified as witnesses to FS's actions, but Pearson requested to remain anonymous, making the inquiry difficult.

The Dean met with FS in January 2016, telling him that a complaint had been filed, but Pearson continued to experience the unwanted attention. After Pearson decided to drop her request for anonymity, the Dean spoke with Kirsten Kirkpatrick (Kirkpatrick), another Logan undergraduate, who recounted unwanted texting from FS. The Dean ultimately wrote a report of interviews with 14 students, 12 of whom did not describe any untoward behavior by FS. Pearson did not appreciate the apparent lack of animus reported by the Dean, and complained to other Logan officials. Logan subsequently issued a directive to both Pearson and FS, advising that they were not to come in contact with one another.

By March 2016, both Pearson and Kirkpatrick had transferred away from Logan. They each sued, claiming that Logan was deliberately indifferent to their complaints. The district court granted summary judgment to Logan.

Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." To succeed on a Title IX claim based on harassment by another student, a plaintiff must show that the educational institution was "(1) deliberately indifferent (2) to known acts of discrimination (3) which occur[red] under its control."

The Circuit found that the lower court had properly dismissed Kirkpatrick's Title IX claim because there was no evidence that Logan had actual knowledge that she was being harassed. She merely responded after Logan initiated an interview, and had said that, although she previously thought FS was creepy, she "was fine now." Viewing the evidence in the light most favorable to Kirkpatrick, she provided after-the-fact notice that she found limited interactions with FS at the beginning of the school year distressing. But such after-the-fact notice of limited interaction was insufficient to satisfy Title IX's actual knowledge requirement.

Pearson's Title IX claim argued that Logan had been deliberately indifferent to her complaints. "A school is deliberately indifferent when its 'response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Here, Logan did investigate Pearson's allegations of stalking and even though it ultimately determined that there was insufficient evidence to find FS responsible, it instructed Pearson and FS to have no contact with each other.

In a similar case, a university's investigative report had revealed that the Title IX plaintiff had been sexually assaulted, but the university declined to move the alleged perpetrator before the investigation and hearing process had concluded. However, the Circuit determined that instituting a no-contact order and giving the Title IX plaintiff housing alternatives so that she would not have to live in proximity to her assailant-which she declined-did not constitute deliberate indifference. In Pearson's case , Logan's investigation did not conclude that FS engaged in stalking or harassment, but Logan still instituted a no-contact order and gave Pearson the option of taking a work-study position at a location other than the library.

Pearson contends that the Dean unreasonably delayed the investigation by not reaching out to other witnesses until Pearson dropped her anonymity in early February-- but limiting the scope of an investigation out of respect for a Title IX complainant's desire for confidentiality does not by itself constitute deliberate indifference.

Finally, the court assessed the Missouri premises liability and general negligence claims. Under Missouri law, Pearson and Kirkpatrick had to show that Logan University had a duty to protect them, breached that duty, and that breach proximately caused an injury. As a general rule, under Missouri law, a college does not owe a duty to protect its students.

There are two "special circumstances" that create exceptions to this principal: First, Missouri law

recognizes that a "duty may arise when a person, known to be violent, is present on the premises or an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury." Second, Missouri law recognizes a duty where "specific incidents of violent crimes on the premises are sufficiently numerous and recent to put a defendant on notice, either actual or constructive, that there is a likelihood third persons will endanger the safety of defendant's invitees." None of FS's actions rose to this level of imminent and serious danger, so Logan had no special duty of protection.

DISSENT: Judge Kelly concurred with most of the holding, but disagreed as to the last item, because, "In light of Pearson's complaints, Logan was on notice by December 2015 that FS was engaged in a continuing pattern of conduct that made at least one student feel that she was going to be physically assaulted." The fact that Pearson's complaints included only one instance of "actual touching" did not diminish the potential danger inherent in her allegations. "Viewing the record in the light most favorable to Pearson and Kirkpatrick and giving them the benefit of all reasonable inferences, as we must on summary judgment, I believe they established, if just barely, the existence of a duty of care to protect them against FS."

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Employment: Retaliation Claim Requires Showing of Particularized Message; General Course of Conduct is Insufficient

Welton v. Durham County, no. 18-2340 (4th Cir. Aug. 28, 2019).

Affirming the decision below, the Fourth Circuit holds that a County employee has no cognizable retaliation claim against a superior whom she challenged for a promotion but later withdrew, finding no specific message by the aggrieved employee that would warrant First Amendment protection.

In 2013, Marqueta Welton (Welton), then a Deputy County Manager, competed against Wendell Davis (Davis) for the open position of Durham, North Carolina County Manager. Welton later withdrew her application, however, clearing the way for Davis's selection. Welton claimed that, over the next two years, she suffered harassment, humiliation, and other unjust conduct while serving as Davis's deputy-in retaliation against her for challenging Davis's candidacy and seeking redress for subsequent work-related grievances.

The Fourth Circuit upheld the district court's finding of no actionable retaliatory conduct, because Welton could not show specific protected statements that would warrant protection: "Although free speech protections extend beyond the spoken or written word to include expressive conduct, see United States v. Hamilton, 699 F.3d 356, 369 (4th Cir. 2012), the First Amendment does not cover an employee's "general course of conduct" that lacks "an intent to convey a particularized message," *Dennison v. Cty. of Frederick*, 921 F.2d 50, 54 (4th Cir. 1990) (internal quotation marks omitted). Here, based on our review of the complaint's allegations, we agree with the district court's conclusion that Welton merely engaged in a general course of conduct unprotected by the First Amendment."

While Welton had correctly argued that "[d]iscussion of public issues and debate on the qualifications of candidates for public office" undoubtedly constitute matters of public concern," she failed to identify any protected conduct-such as "the expression of any idea or opinion" or "the intent to convey a particularized message," that precipitated the alleged retaliatory acts.:"[I]t is settled that a public employee's expression of grievances concerning [her] own employment is not a matter of public concern.".

Welton attempted to create a cause-and-effect relationship between her objections to a reorganization and her subsequent demotion and reduced salary. She had filed a grievance on April 1, 2016. On April 11, 2016 Davis informed her about an upcoming reorganization after which she wrote several letters objecting to her forthcoming demotion and reduced pay; when the plan took effect on April 25, 2016, she attributed the demotion to her earlier grievance. But the record clearly reflected, and Welton did not dispute, that Davis informally advised her of the demotion in February. Even though the change did not occur for a couple months, Davis already had made the decision. Therefore, Welton's grievance had no bearing on the subsequent demotion action.

LINK

Pleadings: 70-Page Pro Se Complaint Fails to Provide Basis for Relief

Cochran v. City of Wichita, no. 19-5309 (10th Cir. Aug. 16, 2019).

Confirming that, in legal pleadings as in many other endeavors, quality is more salient than quantity, the Tenth Circuit upholds dismissal of a First Amendment suit on FRCP 8(a)(2) grounds.

The Federal Rules of Civil Procedure require that a complaint "contain . . . a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). "It is sufficient, and indeed all that is permissible, if the complaint concisely states facts upon which relief can be granted upon any legally sustainable basis. Only a generalized statement of the facts from which the defendant may form a responsive pleading is necessary or permissible."

In January 2018, Michael T. Cochran (Cochran) cfiled suit against the City of Wichita, Kansas (Wichita), current and former members of Wichita's City Council, and Wichita's Mayor, Vice Mayor, and Deputy Police Chief (the City Defendants). In his complaint, Cochran alleged that the City Defendants conspired to enact several panhandling-related ordinances and to deprive him of his First Amendment rights to free speech, free exercise of religion, and peaceable assembly.

In May, 2018, the district court concluded that Cochran had not established proper service on various defendants and in August 2018, upon the City Defendants' motion, the district court dismissed Cochran's complaint for lack of subject matter jurisdiction but allowed Cochran to file an amended complaint. He did so, whereupon the City Defendants moved to dismiss, both for failure to state a claim and for failure to comply with the pleading requirements set forth in Fed. R. Civ. P. 8. The case was dismissed in February 2019.
The Circuit affirmed, finding the amended complaint, although voluminous, failed to state a cognizable claim:

> After reviewing Cochran's 70-page amended complaint, we conclude that the district court did not abuse its discretion when it dismissed Cochran's amended complaint for failure to comply with Rule 8's pleading standards. The court correctly observed that the amended complaint is a "long-winded recitation of facts, conclusory allegations, and . . . legal quotations" that "fails to sufficiently and succinctly identify [Cochran's] claims and facts alleged against each [individual] Defendant." ROA at 421. We agree that, "by scattering and concealing in a morass of irrelevancies the few allegations that matter," Cochran has made his complaint "unintelligible."

LINK

Police: Failure to Adopt Policies for Dealing with Mentally Ill Subjects Gives Rise to Deliberate Indifference Claim under ADA

Haberle v. Borough of Nazareth, No. 18-3429 (3d Cir. Aug. 29, 2019).

Although a generalized history of misconduct may not be actionable, a clear instance of refusal by a police department to institute specific recommendations about how to interact with mentally ill subjects gives rise to an ADA deliberate indifference claim.

In May 2013, Timothy Nixon (Nixon), who suffered from a variety of mental health problems, had a mental health crisis. During that episode, Nixon told his partner Nicole Haberle (Haberle) that he was suicidal, broke into this friend's apartment and stole a handgun, then went to his cousin's apartment. Haberle called the Nazareth Pennsylvania (Nazareth) Police Department. Officer Daniel Troxell (Troxell) obtained a warrant for Nixon's arrest and went to the cousin's apartment accompanied by other officers from both the Nazareth Police Department and some of the other surrounding police departments. Upon arrival, the suggestion by other officers was to set up a perimeter and ask the Pennsylvania State Police to send crisis negotiators. The other suggestion was asking Haberle to help communicate with Nixon. Officer Troxell rebuffed those suggestions and went to the door of the cousin's apartment, and knocked and announced the police were there. Nixon then pointed the gun on himself and committed suicide.

Haberle filed suit alleging violation of the Americans with Disabilities Act (ADA) because Nazareth failed to implement procedures to accommodate disabled individuals, specifically that it could have but failed to adopt a policy for dealing with the "mentally disturbed" and had such a policy been adopted Nixon would have received professional and medical assistance he needed. Haberle also alleged a Fourth Amendment unconstitutional seizure violation and Fourteenth Amendment state-created danger. Both the Fourth and Fourteenth Amendment claims were dismissed. Haberle sued for money damages.

To successfully make a claim for money damages under the ADA, the plaintiff would have to show deliberate indifference by Nazareth. Deliberate indifference is met when the plaintiff has shown that "the official acted or failed to act despite his knowledge of a substantial risk of serious harm". General allegations of a history of misconduct and violating civil rights alone is insufficient to demonstrate a pattern of past occurrences of injuries like the plaintiff's.

However, that showing was made given the general allegations combined with allegations that law enforcement regularly encountered mentally ill residents and made arrests without accommodating their disabilities; in response to those events a Nazareth officer had drafted ADA guidelines for the Nazareth Police Department based on his training and in conjunction with mental health professionals. The Department refused to adopt those guideline despite the officer's identification of the serious risk to those with mental illnesses without adoption of such policy.

In failing to adopt the policy posited by the officer, it is arguable that the Department was deliberately indifferent. Therefore, the Third Circuit reversed the lower court's grant of Nazareth's motion to dismiss and remanded for further proceedings.

LINK

Police: Warrantless Entry Justified by Exigent Circumstances; Close-

Range Shooting Objectively Reasonable

Baker v. City of Trenton, no. 18-2181 (6th Cir. Aug. 29, 2019).

Where officers reasonably believed that the decedent was threatening to kill or injure his mother, warrantless entry to the scene was justified; where the decedent struck an officer with a lawnmower blade and remained within range of the injured officer, using lethal force in self-defense was appropriate.

Shortly before his high school graduation, Kyle Baker (Kyle), a Michigan 18-year old, apparently experimented with LSD. The after-effects of the drug afflicted him for several days, resulting in his having to be removed from class because of behavioral issues. Kyle's friend checked in on him after school to see if everything was all right; it was not. The friend went to the police and told them that Kyle needed help and that he was armed and upset with his mother. The police dispatcher sent four officers to the house; lost in the communication, however, was that the mother was not actually home with Kyle. Without waiting for a warrant, the officers entered Kyle's home. He appeared at the foot of the basement stairs, wielding a lawnmower blade. When the officers attempted to subdue him with a taser, Kyle came up the basement stairs swinging. The lawnmower blade struck an officer, who fell back on the stairs or a landing in front of Kyle. The officer then shot and killed the young man.

Kyle's mother, Heather Baker (Baker), sued the individual officers and their employer, the City of Trenton (City), under 42 U.S.C. § 1983 for alleged violations of the Fourth Amendment guarantee against unreasonable searches and seizures. After discovery, the district court granted summary judgment to the defendants, holding that the officers had not committed any such Fourth Amendment violation (and finding in the alternative that the officers had qualified immunity) and that the City could not be liable in the absence of any such constitutional violation.

On appeal, the Sixth Circuit considered Baker's three Fourth Amendment claims: 1) that the officers violated Kyle's constitutional rights when they entered the home without a warrant, 2) that the officer violated Kyle's constitutional rights when he shot Kyle, and 3) that the City violated Kyle's constitutional rights by failing to properly train and discipline its police officers.

The Circuit found that the lower court had properly granted summary judgment as to each.

Warrantless entry: While "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," officers may enter under the exigent circumstances exception where there is a threat of violence to officers or others. An objective test is used to analyze the circumstances giving rise to a warrantless entry:, and an action is "reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. Here, the facts indicate that a reasonable person in the officers' position would indeed believe that entry was necessary to prevent physical harm-based on the information they received, Baker was inside with Kyle, and that he was armed in some fashion, with the knife.

Excessive force: In excessive-force claims, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). These facts were not in dispute: at the moment of the shooting 1) Kyle was holding a lawnmower blade, 2) he was advancing or had partially advanced up the stairs towards the officer, 3) the officer had fallen backwards and was in a seated or semi-seated position, and 4) Kyle actually struck the officer with the lawnmower blade.

The Circuit had little trouble finding that these facts justified the officer's actions. The scenario was strikingly similar to that in *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009) which involved a boy hiding in closet who emerged holding a knife, refused to drop it and moved

towards the officers. He ignored commands to stop and they fired, killing him. The Circuit reversed the district court's denial of qualified immunity on factors also present in Kyle's situation -the knife-wielding suspect was undisputedly moving toward the officers and had closed to within five to seven feet in a dark, cluttered, enclosed space. The officers were backed up against a wall in the small bedroom and there was no ready means of retreat or escape. In one regard, Kyle's scenario created greater justification for police use of lethal force-had had already cut the recumbent officer once with the lawnmower blade.

Given that the officer had probable cause to believe that Kyle would cause death or serious injury, his use of deadly force was not a violation of Kyle's rights under the Fourth Amendment.

Municipal liability: Under *Monell*, municipalities may be held liable under § 1983 for constitutional violations committed by their employees if the violations result from municipal practices or policies. However, where there has been no showing of individual constitutional violations on the part of employees. there can be no municipal liability.

The district court's grant of summary judgment to the defendants was affirmed.

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