International Municipal Lawyers Association



e-News: Issue 17 October 3, 2019

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Employment: Termination of Political Rivals who Alleged Campaign Violations Cannot Succeed on Summary Judgment

Briggs v. Potter County, No. 18-3559 (3d Cir. Sept. 12, 2019).

Reversing the district court, the Circuit finds that a Sheriff, who after having been elected fired two subordinates that challenged him in a primary, was not entitled to summary judgment on the issue of retaliatory termination and whistleblower violations.

In the Republican primary for Potter County (Pennsylvania) Sheriff, Roy Hunt ("Hunt") and Ralph Briggs ("Briggs") ran against Glenn Drake ("Drake"), who at the time was the Chief Deputy Sheriff. Drake, who had retired from the Pennsylvania State Police Department, was brought into the Chief Deputy job by the previous Sheriff, with the understanding that he would run for Sheriff at the next election. According to Briggs, the last three Sheriffs had attained the office via this route- retiring from the Pennsylvania State Police, followed by appointment to the Chief Deputy position, and then election to Sheriff. Briggs and Hunt questioned the wisdom of this practice during the campaign, and were critical of Drake. Hunt believed that Drake was conducting campaign activities "on County property, in his official uniform, and during time that he was to have been at

work for the County." He believed that these actions violated federal, state, and county law, and reported Drake to the District Attorney, the Pennsylvania Attorney General, and the Potter County Commissioners at a public Commissioners' meeting.

Drake was ultimately victorious in the primary and went on to win the general election.
After the primary, but before Drake took office, Briggs received an Employee Warning with four separate allegations of improper performance. And eight days after Drake assumed the office of Sheriff, Briggs was fired.

Four days after Briggs was fired, Hunt, acting in capacity as Union Steward, "grieved the termination of Briggs under the CBA and notified the Defendants of his role in investigating and prosecuting the grievance for the Union." While investigating Briggs's termination, Hunt discovered that Briggs had been accused of sleeping on the job. Hunt later observed two other officers sleeping on the job-when he reported the incident up the chain of command, no action came of it. When Hunt requested a copy of the relevant surveillance footage of the sleeping officers, he too was fired.

Hunt and Briggs filed suit, alleging that they were fired in retaliation for exercising their First Amendment Rights to speech, political association, and (in Hunt's case only) union association. They also brought claims under the Pennsylvania Whistleblower Act. The district court granted summary judgment for the defendants, holding that neither Briggs nor Hunt could establish a causal connection between their protected activity and their terminations, given that approximately eight months elapsed between the primary and the terminations. The court also held that Hunt's union activity was not protected, as it was not related to matters of public concern.

The Third Circuit reversed in significant part. It found that Briggs's and Hunt's speech was constitutionally protected: they were speaking as citizens about matters of public concern, including possible corruption in the Sheriff's Office. Hunt's and Briggs's campaigns against Drake were also protected associational activities. "The quintessential political association case involves the termination of an employee based on membership in a different political party. But such claims can also be made on the basis of membership in different factions within the same party." Because Hunt and Briggs were clearly in a different faction of the party than Drake, their campaign against him in the Republican primary was protected associational activity. In addition, Hunt's actions as Union Steward constituted protected activity.

The Circuit also viewed the issue of causation differently than the district court, which had found that the temporal proximity between Briggs's and Hunt's protected activities during the campaign and their terminations (approximately 8 months) was not "unusually suggestive." As the Circuit saw it, that interpretation ignored the fact that Briggs was fired a mere eight days after Drake took office and gained the power to fire him, and Hunt was fired approximately a month later, while he was pursuing a grievance on behalf of Briggs.
The Circuit held that the district court erred in finding, as a matter of law, that there was no causal link between Hunt's and Briggs's protected activities and their terminations as it relates to the individual defendant-appellees. It also held that the lower court had wrongly denied the plaintiffs' whistleblower claims on summary judgment.

But the Circuit did affirm as to one item--the lower court's summary judgment order regarding Potter County-given that the plaintiffs had provided no evidence of a policy or custom that caused the deprivation of their constitutional rights.

LINK

Opioids: Controlled Substances Act Does Not Bar Safe Injection Sites

United States v. Safehouse, No. 19-0519 (E.D. Pa. Oct. 2, 2019).

In a decision likely to have major implications for some municipalities seeking solutions to drug addiction, the Eastern District of Pennsylvania had determined that merely providing facilities where drugs are used under monitored, sterile conditions-but no controlled substances are provided-does not violate the Controlled Substances Act.

Safehouse, a nonprofit organized to combat drug addiction and overdose, announced plans to open an "Overdose Prevention Site" in Philadelphia which will offer a variety of services aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment. Drug users will receive a variety of services, including provision of sterile syringes, fentanyl test strips, reversal agents to prevent fatal overdose, and observation. Certified peer counselors, as well as recovery specialists, social workers, and case managers will be available to offer services and encourage treatment.

In April 2019, the Department of Justice advised Safehouse that such activities violated the Controlled Substances Act, 21 U.S.C. § 856(a)(2) ("CSA"), and brought suit seeking declaratory judgment to prohibit Safehouse's operation. Yesterday, the Eastern District announced its conclusion that Safehouse's operations do not violate the CSA:

> Having examined the text and employed a number of tools of statutory construction, I conclude that the provision on which the Government relies is reasonably capable of more than one interpretation. This supports a further conclusion that consideration of the legislative evidence surrounding passage of this provision is appropriate. As discussed below, courts must exercise extreme care in discerning the objective sought by Congress in enacting a statute. That said, having reviewed materials I consider appropriate in discerning what Congress sought to address in enacting § 856(a)(2), there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. **Although the language, taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse.** Particularly in the area of criminal law, it is the province of Congress to determine what is worthy of sanction. A line of authority dating back to Chief Justice John Marshall cautions courts against claiming power that properly rests with the legislative branch. A responsible use of judicial power under those circumstances is to decline to expand the scope of criminal liability under the statute and allow Congress to address the issue.

LINK

Signs: Ordinance's Size and Location Limitations are Legitimate Aesthetic Parameters

Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove, No. 16-3055 (7th Cir. Sept. 25, 2019).

Although a locality's sign ordinance likely included impermissible content based provisions, those provisions were not at issue in this case, which only implicated the ordinance's aesthetically-justified size and placement limitations.

Downers Grove, Illinois ("Village") has codified a sign ordinance ("Ordinance") which includes various restrictions on the placement and size of signs. The Ordinance prohibits "any sign painted directly on a wall" and for buildings closer than 300 feet to a street allows a maximum of 1.5 square feet per linear foot of frontage. Although businesses are generally allowed only one sign, those that face both a street and a railroad are permitted an extra sign on the railroad side. Various types of signs are exempt from the Ordinance's restrictions, including holiday decorations, temporary signs for personal events such as birthdays, "[n]oncommercial flags,"political and noncommercial signs not exceeding 2 square feet, "[m]emorial signs and tablets" and other about a dozen more.

Leibundguth Storage & Van Service, Inc. (Leibundguth) occupies a building which adjoins a railroad. Its railroad-facing signage, seen by passing commuters and responsible for upwards of 20% of its business, according Leibundguth, is 10 feet high by 40 feet in length-far larger than the 159 square feet permitted to Leibundguth under the Ordinance. When the Village attempted to enforce the Ordinance, Leibundguth sued, arguing that the Ordinance's numerous content-based exceptions ran afoul of *Reed*. But because the principal topic of the Ordinance is commercial speech, the district court concluded that *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than *Reed* supplied the relevant rule, and it found the Ordinance valid.

The Seventh Circuit came to the same result, but did not agree with the lower court's analysis. Strongly implying that the Ordinance's content-based differentiation might not survive scrutiny in an appropriate case, it declined to perform such analysis here. The Ordinance, as applied to Liebundguth, satisfied constitutional parameters:

> A limit on the size and presentation of signs is a standard time, place, and manner rule, a form of aesthetic zoning. The Supreme Court has told us that aesthetic limits on signs are compatible with the First Amendment.
>
> * * *
>
> The Village's ordinance contains content discrimination, but as we have explained that discrimination does not aggrieve Leibundguth. And the parties agree that enforcement of the sign ordinance leaves open plenty of ways to communicate. Advertising does not depend on applying paint to brick- and although 159 square feet of signage on Leibundguth's building is less than it prefers to use, 159 square feet is still a large sign. Leibundguth also is free to advertise in print or over the Internet. The parties dispute how the Village's ordinance applies to the signs on two other faces of Leibundguth's building, but none of the possibilities poses a constitutional issue distinct from the ones we have already addressed. What we have said is enough to show that the ordinance, as applied to Leibundguth, does not violate the First Amendment.

LINK

Speech: Limiting Protestors to Specified Areas of Arena Concourse is Constitutional; Prohibiting Profanity and Amplification is Not

Pomicter v. Luzerne County Convention Center Authority, no. 18-2380 (3d Cir. Sept. 23, 2019).

A municipal arena used for commercial activities is a nonpublic forum, allowing for reasonable restrictions on otherwise protected speech; while the restrictions may include limiting protestors to specific areas so as to allow passage by patrons, restrictions on protestors' use of profanity or devices to amplify their message cannot stand.

Luzerne County Convention Center Authority ("Authority") owns the Mohegan Sun Arena ("Arena"), a large event space in Wilkes-Barre, Pennsylvania. The Arena holds up to 10,000 people and hosts athletic and other commercial entertainment events. Patrons attending events at the Arena drive from the public road onto an access road, park in one of the lots, and then walk to the Arena's entrances via a large concrete concourse.

Under the Arena's protest policy, "[a]ll persons are welcome to express their views" at the Arena. The Arena's policy imposes several limits on protest activity. First, protesters must stand within "designated area[s]" on the concourse and "[h]andouts can only be distributed from within" those areas (the "location condition"). Second, the policy bans protesters from using profanity and "promotional verbiage suggesting vulgarity or profanity" (the "profanity ban"). Finally, the protest policy prohibits any artificial voice amplification (the "amplification ban").

In 2016, Silvie Pomicter ("Pomicter") and Last Chance for Animals ("LCA"), sought to protest the use of animals in circuses at the Arena. They sued the Authority, contending the Arena's protest policy is a facial violation of their free speech rights under the First Amendment and Article I of the Pennsylvania Constitution. They alleged that confinement to the designated areas limited their ability to communicate with patrons, and sought declaratory and injunctive relief prohibiting the Authority from enforcing the location condition, the profanity ban, and the amplification ban.

The district court, after holding an evidentiary hearing on the location condition, granted plaintiffs' motion for injunction, finding it "unreasonable 'in light of the characteristic nature and function' of the Arena." It crafted a less restrictive policy in its injunction, allowing up to 20 protesters to distribute literature and talk to patrons within a circumscribed section of the concourse -- but protesters could not approach anyone in line or otherwise "block the ingress or egress of patrons."

Plaintiffs protested under the terms of the preliminary injunction at circus performances at the Arena in 2016 and in 2017. The district court later held a bench trial where plaintiffs showed video footage of nonconfrontational interactions between patrons and protesters, with no abnormal congestion created on the concourse. The Arena argued that, while plaintiffs' interactions were peaceful, the Arena's policies were designed to deal with other, potentially more unruly protest groups.

The district court ruled in favor of plaintiffs and found all three restrictions violated the First Amendment. As to the location condition and amplification ban, the court discounted the Arena's proffered explanations for the policies, finding them speculative and unreasonable. As to the profanity ban, the court held it "unreasonably singles out First Amendment activity by imposing" the ban "on protesters alone. "It entered judgment for plaintiffs and enjoined defendants from enforcing the three restrictions, though it noted more carefully crafted restrictions may be permissible.

The Third Circuit affirmed in part. Its opinion began by affirming that plaintiffs' message was assuredly protected speech-but that the forum in which the speech takes place governs what regulation is permissible; in a nonpublic forum like the Arena concourse, protected speech is subject to reasonable regulations.

In a public forum, property that "has been traditionally open to the public for expressive activity, such as public streets and parks, "time, place, and manner restrictions must be content neutral and narrowly tailored, while content-based restrictions must meet the even higher bar of being the least restrictive means of achieving a compelling government interest.

In nonpublic forums-government property that is not dedicated to First Amendment activity-the government has more flexibility to limit speech. "Nothing in the Constitution requires the government to grant open access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that

might be caused by the speaker's activities. Rather, the government may reserve a nonpublic forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Here, the concourse was used for ingress and egress to the Arena-there was no evidence that it was routinely used for public assembly and advocacy. There was no claim that the Arena's protest policy discriminated based on viewpoint or that it was enforced in a discriminatory way. Accordingly, the inquiry was "reasonable in light of the purpose served by the forum." The record confirmed that the concourse was dedicated to a single purpose: providing for the passage of patrons into and out of the Arena. Customers required access through the concourse from the parking areas, and it was important that areas immediately abutting the parking lots remained clear to prevent "backing people up into the traffic area." Given this usage, the Arena's location condition, which required protesters to stand within designated areas on the concourse next to the Arena's two entrance gates, was reasonably related to the goal of minimizing congestion. Plaintiffs' arguments for other less restrictive strategies were unavailing in the context of a nonpublic forum-even though the location condition clearly burdened plaintiffs' speech, narrow tailoring was not required here.

The profanity condition did not survive, however. While the Authority justified the ban because "customers of the Arena should not be subjected to profane or vulgar language when attending a sports or entertainment event at the Arena," the court found that the ban was inconsistent with "the atmosphere" of the Arena-which imposed no such restriction on spectators, athletes or other attendees.

The voice amplification ban was likewise unjustifiable. The Authority argued that protestors' messages would drown out Arena announcements or commercial vendors' solicitations, and would annoy attendees, but the court was unconvinced: "Here, faced with a lack of record support demonstrating the justification for the ban or connection to the forum, we will not make inferences to fill the gaps and accordingly conclude the amplification ban is unreasonable."

LINK

Speech: Transit System Prohibition on Religious Ads is Viewpoint Discrimination

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, No. 18-2743 (3d Cir. Sept. 17, 2019).

In a decision which sets up a circuit split potentially requiring resolution by the Supreme Court, the Third Circuit holds that a transit system's refusal to allow the word "atheist" on its buses is a form of viewpoint discrimination-in contrast to a recent DC Circuit case which found that a similar policy permissibly prohibited religion as a subject matter.

In 2012, Northeastern Pennsylvania Freethought Society ("Freethought")--an association of atheists, agnostics, secularists, and skeptics--applied to place an ad displaying the word "Atheists" and the group's name and website on public buses operated by the County of Lackawanna Transit System ("COLTS"). COLTS leased advertising space on the inside and outside of its buses, but declined to run the Freethought ad, relying on a policy it had adopted in 2011 that banned ads for tobacco products, alcohol, firearms, and political candidates. The policy also banned ads that in COLTS's "sole discretion" were "derogatory" to racial, religious, and other specified groups, and even those that were "objectionable, controversial[,] or would generally be offensive to COLTS'[s] ridership."

COLTS rejected the Freethought ad via a letter stating:

> COLTS does not accept advertisements that promote the belief that "there is no God" or advertisements that promote the belief that "there is a God" . . . . The existence or nonexistence of a supreme deity is a public issue. COLTS believes that your proposed advertisement may offend or alienate a segment of its ridership and thus negatively affect its revenue. COLTS does not wish to become embroiled in a debate over your group's viewpoints.

The 2011 COLTS policy was updated in a 2013 policy which still remains in effect. The 2013 policy continued to ban "disparaging" ads and ads for firearms, alcohol, and tobacco, and added new prohibitions on religious and political messages. The religion provision barred ads: "that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [that] are otherwise religious in nature." The politics provision barred partisan and electioneering ads, and ads that "involv[e] an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity."

Freethought challenged COLTS's 2013 policy, seeking a declaratory judgment and a permanent injunction. The District Court ruled for COLTS, finding the 2013 policy to be viewpoint neutral, reasoning that the religious speech prohibition put the entire subject of religion out of bounds. It also deemed COLTS's ad space a limited public forum, grounding its conclusion in COLTS's statement of intent "not to become a public forum" and its "practice of permitting only limited access to the advertising spaces on its buses."

The district court found the 2013 restrictions to be reasonably related to the stated purpose of the ad space-to raise revenue by "maintaining or increasing COLTS'[s] ridership." The policy's restrictions were intended to "keep COLTS neutral on matters of public concern," and to preserve public safety: "Given the decrease in civil tolerance and the increase in social unrest and violence in today's society," controversial messages could "potentially lead to a dangerous situation for both passengers and drivers."

The Third Circuit reversed, looking to Supreme Court precedent: "Our task here is greatly simplified by a trilogy of Supreme Court decisions each addressing blanket bans on religious messages and each concluding that such bans constitute impermissible viewpoint discrimination. Those cases-*Rosenberger, Lamb's Chapel,* and *Good News Club*-govern this one."

In *Rosenberger*, the University of Virginia withheld subsidies from student groups whose activities "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." The Court held the University had restricted viewpoint, not subject matter. "Religion may be a vast area of inquiry," the Court reasoned, "but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." The policy was viewpoint based because it "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Student news groups could write on racism, or stress, or pregnancy-but not if their faith informed the message.

In *Lamb's Chapel*, the Court invalidated a ban on the use of public-school property for "religious purposes" that had stymied a group's efforts to screen religious lectures on family issues and child rearing. It did not matter "[t]hat all religions and all uses for religious purposes are treated alike" because the lectures-though avowedly religious-discussed topics the policy otherwise permitted.

And in *Good News Club,* the Court held it was viewpoint discrimination to bar the use for religious purposes of a space otherwise available for "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." The Good News Club, which wanted to offer after-school religious instruction, must have equal access to a forum that allowed others to speak on morals and character development. "If a forum is open to teaching morals through Aesop's Fables, it must be open to religious moral instruction too." In sum, "if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective."

Here, COLTS's policy allowed discussion of all topics not expressly prohibited--meaning that, while an issue of community concern could be addressed from a non-religious parameter, a religious entity could not comment on the same topic. Freethought could not post an ad that simply indicated to atheists "you are not alone, you have an organization," but secular entities would not be prohibited from sending the same message. In a similar vein, said the Circuit, a healthcare provider could tout its services on COLTS buses- so long as it didn't disclose that those services are (or once were) part of a religious tradition.

The Third Circuit explicitly rejected the recent decision of the D.C. Circuit in *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority* , 897 F.3d 314 (D.C. Cir. 2018), petition for cert. filed, No. 18-1455 (May 20, 2019). The court there had upheld WMATA's ban on "[a]dvertisements that promote or oppose any religion, religious practice or belief" despite the rule announced in *Rosenberger, Lamb's Chapel,* and *Good News Club*. The D.C. Circuit, emphasizing the narrowness of the WMATA forum, held WMATA's policy permissibly excluded "religion as a subject matter."

The COLTS court's disagreement with *WMATA* decision started with the D.C. Circuit's choice to conduct a forum analysis before determining whether the policy discriminated on the basis of viewpoint. "That put the cart before the horse because the type of forum sheds no light on whether a policy or decision discriminates against a certain viewpoint. And viewpoint discrimination is impermissible in any forum."

As the Third Circuit sees it, religion is itself a viewpoint:

> Religion is not only a subject. It's a worldview through which believers see countless issues. It was so for our Nation's founders, whose moral thesis changed the world and conceived a new birth of freedom in the United States: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Is there room for our revolutionary creed on a COLTS bus? Apparently not. As COLTS's counsel admitted at oral argument, the word "Creator" would be a problem.

The COLTS approach would require officials to distinguish messages that are "about" religion from those that address a permitted topic from a religious perspective. Even if such a distinction was possible, the Third Circuit found that COLTS had not shown that shown that "extirpating religion from its forum was reasonable." Accordingly, the 2013 policy's ban on speech relating to religion discriminated on the basis of viewpoint, which was not permissible, however the forum was characterized. The Circuit reversed, instructing the district court to grant declaratory relief and issue an injunction barring enforcement of the 2013 policy's religious speech ban.

DISSENT: Circuit Judge Cowen dissented. He stated that COLTS policy "clearly implicates a subject matter prohibition" and that COLTS had satisfied its burden of showing that the policy was reasonable. The majority had incorrectly determined that Freethought's "Atheists" advertisement, although it related to the subject matter of religion, communicated a viewpoint on other subject matters permitted in the forum. And the trilogy of cases cited by the majority had properly singled out religious viewpoints that otherwise fell within prospectively defined, permissible subject matter. "Stated otherwise, those decisions involved rules that permitted

private speakers to discuss categories A, B, and C, but when a speaker sought to discuss C from a pro-religious perspective, they were improperly prohibited from doing so."

But that was not the effect of WMATA's subject matter ban on advertisements that promote or oppose any religion, religious practice, or belief, and which prohibits any advertisement whatsoever on the subject of religious or antireligious advocacy, whether favoring or opposing religion in general, or any particular religion, belief, or practice. The same principles applied here:

> Applying the D.C. Circuit's approach, I see no meaningful difference between the advertisements and policies at issue in the WMATA proceeding and in this case. Accordingly, the District Court did not err by rejecting Freethought's claim of viewpoint discrimination.

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