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Sierra v. City of Hallandale Beach, No. 10740 (11th Cir. Sept. 27, 2018).

The Third Circuit holds that a district court incorrectly dismissed for lack of subject matter jurisdiction in a case brought under the ADA by a deaf resident who objected to a city's lack of closed-captioning on its websites; exhaustion of FCC administrative remedies was not required under the primary jurisdiction doctrine.

Eddie Sierra (Sierra) is deaf. He sued the City of Hallandale Beach, Florida (City) alleging violations of § 505 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) based on his observation that four of the City's webpages do not provide closed captioning, which both the Rehabilitation Act and ADA require. The City responded by moving to dismiss the case, arguing the district court lacked subject-matter jurisdiction because the Twenty-First Century Communications and Video Accessibility Act (CVAA) presents a jurisdictional hurdle - i.e. Sierra had to file in the FCC *first* and then, after exhausting the administrative

process, could file under the ADA and Rehabilitation Act in federal district court. The lower court agreed and dismissed the case, prompting Sierra to seek the Eleventh Circuit's review.

The Circuit identified two issues: whether the CVAA posed a jurisdictional bar to Sierra's claims and whether abstention under the primary jurisdiction doctrine was otherwise warranted. The Court agreed with the City that the CVAA grants the FCC exclusive jurisdiction over closed captioning complaints but found that factor immaterial because Sierra did *not* file such a case; he filed an ADA and Rehabilitation Act case and the lower court had jurisdiction to hear that case under the federal question provisions of 28 U.S.C. § 1331. The Circuit identified the flaw in the City's argument as interpreting the CVAA too broadly: where Congress granted the FCC "exclusive jurisdiction with respect to any complaint *under this section*," the City described that grant in its arguments as the FCC having "exclusive jurisdiction *over issues* concerning closed captioning of videos streamed on the internet."

As for the City's alternative argument, the Circuit explained that the primary jurisdiction doctrine applies when a court has jurisdiction over a matter but nonetheless abstains from deciding the case for prudential reasons. This doctrine provides a separate, independent basis for a court to avoid adjudicating a case and the Circuit's test looks at two issues: "expertise of the agency deferred to" and the "need for a uniform interpretation of a statute or regulation." Under the first factor, the court found the doctrine did not apply because the FCC itself has stated the CVAA operates *parallel* to other federal statutes (such as the ADA and Rehabilitation Act) and therefore the Circuit found it inadvisable to provide deference to an agency which itself says none is needed. As for the second possibility, the court reviewed the previous case recognizing a need for uniformity where tariffs and rates were at issue. It described the facts as presenting a "zero-sum game" because a lack of uniformity in rates meant one carrier benefited at another's expense by gaining an edge in the marketplace. With the present case though, no such need for uniformity arose because even if courts across the country differ on whether a claim like Sierra's is cognizable under the Rehabilitation Act and ADA, there is no harm to another plaintiff from a favorable interpretation being applied to Sierra. The Circuit reversed and remanded the case.

LINK

Due Process: Probable Cause that Resident Engaged in Drug Distribution is Insufficient Grounds for Denial of Section 8 Housing Voucher

Yarbrough v. Decatur Housing Authority, No. 17-11500 (11th Cir. Oct. 3, 2018).

A grand jury finding of probable cause supporting an indictment for illegal drug distribution is not adequate grounds for denying a Section 8 housing voucher, which denial must be based on finding of actual criminal activity.

The Decatur Alabama Housing Authority (Housing Authority) terminated Sheena Yarbrough's (Yarborough) Section 8 housing voucher after it learned she had been arrested and indicted on two counts of unlawful distribution of a controlled substance. The hearing officer deemed that evidence she had been arrested and copies of indictments on the charges met the preponderance-of-the-evidence standard. Yarbrough filed suit, alleging that terminating her voucher without more than that evidence violated her Due Process rights. The lower court granted the Housing Authority summary judgment, deeming that evidence sufficient to support the finding that she engaged in drug-related criminal activity.

The Eleventh Circuit identified the standard for terminating Section 8 housing vouchers as the

public housing authority bearing the burden of persuasion and initially presenting sufficient evidence to establish a *prima facie* case that the recipient committed an act that warrants termination. The summary of Yarbrough's argument was that since an indictment or valid arrest is based only on a finding of probable cause, such evidence is insufficient to support a factual finding that she actually engaged in drug related criminal activity and thus falls short of this burden. The Court agreed that proof of a crime under a preponderance standard requires more than a finding of probable cause. It found the Housing Authority's noted fact that the grand jury made three probable cause determinations in her case unpersuasive, saying "three probable-cause determinations do not add up to a finding that a person more likely than not committed a drug-related crime." While the Circuit recognized that indictments that only require a finding of probable cause finding could, theoretically, meet the preponderance standard, that would require facts showing something over and above probable cause which was not the case here. The Circuit reversed and remanded.

Judge Pryor wrote a concurrence, noting agreement with the ultimate decision since Circuit precedent controlled and required reversal, explaining that the precedent was inconsistent with Supreme Court case law, and setting forth why the Circuit's precedent should be reversed by an *en banc* review. No word yet on whether the case will be heard *en banc*.

LINK

Labor: NLRA Narrow Grant of Powers to States Does Not Extend to Municipalities; Local Law Regulating Unions is Preempted

International Union of Operating Engineers Local 399 v. Village of Lincolnshire, No. 17-1300 & 1325 (7th Cir. Sept. 28, 2018).

Although one clause of the NLRA defers to "State and Territorial" laws which prohibit membership in unions as a condition of employment, that narrow exception to the NLRA's preemptive reach cannot be interpreted to give localities the right to enact such laws.

Lincolnshire, Illinois (Lincolnshire) passed an ordinance regulating unions in three ways: (1) forbidding the inclusion of union-security or hiring-hall provisions in collective bargaining agreements, (2) forbidding the mandatory use of hiring halls, and (3) forbidding dues checkoff arrangements. It claimed the right to do so under Section 14(b) of the National Labor Relations Act (NLRA) because it is a political subdivision of a state - and thus empowered to share in the NLRA's provision of such powers to "states." There is a split among the two courts that have confronted the issue of whether a local law - rather than state law - can regulate in the manner that Lincolnshire's ordinance did under its construction of Section 14(b) of the NLRA: The Sixth Circuit holds it is possible *only* for union-security clauses and Kentucky's Supreme Court holds it is impermissible altogether. On this issue of first impression the Seventh Circuit, the court found that the subjects of hiring halls or dues checkoffs are preempted by the federal law (as the Sixth Circuit had held) and that union security clauses are also prohibited, as the Kentucky court had held.

The issue reached the Circuit when a collection of unions sued Lincolnshire, arguing these ordinance provisions are preempted by the NLRA and, thus, violate the Supremacy Clause and §1983. With the other two provisions subject to fairly well-settled doctrine, the Court only substantially took up the union-security clause.

Beginning with the basics, the Circuit laid out the first issue as field preemption and noted the Supreme Court confirms that section 8 of the NLRA occupies the field for any activities that it

"may fairly be assumed" fall within the ambit of the NLRA. The exclusive way a state law can coexist with the NLRA is if it falls within the narrow scope of Section 14(b) - i.e. where Congress sanctioned the conflict between federal and state law - and where Lincolnshire argued its union-security clause did indeed fall. The heart of the case came down to statutory interpretation: Did Congress mean to include local laws when it referred to "State or Territorial law" in 14(b)'s command that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territoryin which such execution or application is prohibited *by State or Territorial law*"?

While the Circuit recognized a "plain language" approach makes the issue look straightforward since the phrase 14(b) says nothing about local government, it found that was not determinative because it was illogical to enable the states to re-delegate power in the NLRA context. This is because labor law is a field entirely preempted by federal law, except that one sentence - 14(b) - cedes some power back to states and it thus made "no sense" to the Circuit that the state can then re-delegate that power since "no one would be able to figure out what is legal and what is not." It analogized the situation to Medicaid where "states have the power to choose whether to opt into Medicaid, but that power must be exercised by the state as a whole and cannot be redelegated." An example distilled the Court's point: if an employer physically located in Lincolnshire had employees that predominantly worked *outside* Lincolnshire in a place *without* a comparable law to Lincolnshire's it could risk violating the law - committing an unfair labor practice with significant associated penalties - and if the employer *refused* to bargain over certain contract provisions that employer would also face penalties if it misjudged the "predominant" physical location of its workers. The Circuit also foresaw administrative nightmares with the power to redelegate - noting there are over 100,000 local government bodies, but just 50 states. Overall the Circuit predicted that allowing redelegation would result in a "crazy quilt of regulations" creating an administrative burden and an incentive to abandon union security agreements and, "do violence to the broad structure of labor law-a law that places great weight on uniformity." Lincolnshire's bid was unsuccessful and the lower court's ruling rejecting all three ordinance provisions at issue was affirmed.

LINK

Probable Cause: Officer Charging Unconscious Driver with DUI/Drugged Driving Need not be Drug Expert in Order to Find Probable Cause

People v. Gocmen, No. 122388 (Ill. Sept. 20, 2018).

Reversing in part its own precedent, the Illinois Supreme Court has clarified that although an officer lacks specific training in assessing drug usage and intoxication, he may still find probable cause to charge a driver with drug-influenced driving based on reasonable inferences.

In September 2015, a passerby called police about an unconscious driver behind the wheel of a truck on the side of the road. Adam Beaty, a two-year officer with DUI/alcohol training but no specific drug training responded and found paramedics already on the scene, the man behind the wheel, the vehicle running, the driver incorrectly stating his location (both direction and what road he was on), a can torn in half with burnt residue that tested positive for opiates, a used syringe, and a baggie with a brown granular substance in it (no test was done on the substance). The officer charged the driver with driving under the influence and his license was suspended. The driver, Ahmet Gocmen (Gocmen), appealed the license suspension, saying the officer did not have probable cause to believe he was under the influence (Gocmen said he was actually a

diabetic) and a trial and appellate court agreed with him. His luck ran out at the Illinois Supreme Court, however.

The state's highest court first took issue with the standard of review, namely that the trial court said it would "review the evidence in the light most favorable to the defendant at the *prima facie* stage." The Supreme Court pointed out that state law mandates that the *defendant has the burden* at that stage (it flips to the state once the defendant successfully shows his/her license should not be suspended). Having clarified that, it graduated to the two issues, as it saw them, in the case: "First, must an officer be qualified as an expert to testify regarding his inference from the totality of circumstances that a motorist was driving under the influence of drugs? And, if not, did the totality of the circumstances in the present case provide reasonable grounds for the arrest of defendant for DUI/drugs?"

As to the first issue, the Illinois Supreme Court recognized its precedent was the basis for the trial court's ruling (affirmed by the appellate court): "that expert testimony was necessary to present to the jury the officer's assessment that the defendant was under the influence" where the defendant's intoxication was allegedly due to drugs. It disagreed with the precedent though, and held that to the extent that case required "an officer's finding of probable cause [be] based on his or her inference from the totality of circumstances that the defendant was under the influence of drugs, it is hereby overruled."

Turning to the application of the facts to the law and the appropriate standard, the Illinois court framed the question as "whether defendant made a *prima facie* case that the officer lacked probable cause to arrest him for DUI/drugs." Under *de novo* review the court found the defendant's physical condition (semiconscious and disoriented), his physical symptoms (obtained from EMS personnel and the officer's personal observation at the hospital), the officer's test of the can showing the presence of opiates, the discovery of the brown granular substance suggesting illicit drugs, and the fresh track marks on the defendant's arm, gave a reasonably cautious officer probable cause to believe the unconscious defendant behind the wheel was driving under the influence. The appropriate standard at this point in the inquiry was not "reasonable doubt"-"probability" of drug use was adequate. It reversed the lower courts and upheld the state's license suspension.

LINK

Public Records: Denial of Access to Real Estate Development Study is Upheld under Vermont's Trade Secret Exemption

Long v. City of Burlington No. 2017-434 (Vt. Sept. 21, 2018).

Affirming the lower court, Vermont's Supreme Court has found that Burlington's refusal to provide a public interest group with an evaluation of a proposed shopping mall is justified under the trade secrets exemption to Vermont's public records act.

The Burlington Vermont Town Center Mall was targeted by the Burlington City Council (Council) for redevelopment and, in December 2014, the first steps took place with the Council approving a public-private partnership with a group of investors (collectively BTC). As part of the process, the City of Burlington (City) contracted with an economic consulting firm - ECONorthwest - that was to analyze the project, from costs to income projections to the expected economic activity generated, and produce a Market Feasibility Assessment (Assessment). BTC had concerns about providing what it saw as confidential or proprietary information to the City that, if public, could put it at a competitive disadvantage. As a result, the City agreed to receiving only a redacted version of the Assessment and, meanwhile, ECONorthwest entered a nondisclosure

agreement with BTC that the City recognized with a signature, but to which it was not a party. After finalization, the Coalition for a Livable City (CLC) requested a copy of the Assessment and the City Attorney denied the records request, saying the City did not have an unredacted version to provide and, if it did, it would be exempt from disclosure under the Public Records Act because of the trade-secrets exemption and, also, the document was subject to a nondisclosure agreement. CLC filed suit, the trial court granted summary judgement to the City. CLC followed up with an appeal.

CLC made a variety of arguments, but the Vermont Supreme Court found one conclusive and thus did not address them all. It affirmed the lower court's holding that the Assessment fell under the trade-secrets exemption of state's Public Records Act. In Vermont a "trade secret" is "confidential business records or information, including any . . . plan, . . . production data, or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it . . . ." The Assessment fell under this category because the compiled information in the Assessment would give the possessor the ability to obtain a business advantage over competitors that did not have it since it included anticipated project costs and revenues, financial projections, and confidential lease terms with a major prospective tenant, all of which are the Court found were "highly sensitive in the real estate development industry." It found BTC took reasonable steps to protect the information as well by requiring the nondisclosure agreement and by requesting the City acknowledge that agreement and only provided it a redacted report. The City Attorney's denial of access was thus upheld.

LINK

Sexual Assault: County not Liable for Acts of Parks and Recreation Worker under Indiana Law or under *Monell*

Doe v. Vigo County, No. 17-3155 (7th Cir. Oct. 3, 2018).

The Seventh Circuit has upheld a lower court finding that, where a County Parks and Recreation worker assaulted a woman volunteer, the County could not be held liable, whether under Indiana law (which only provides for such liability where the employment inherently requires close contact with vulnerable members of the public) or under Monell (due to a lack of policy or custom tolerating such aberrant behavior).

David Gray was an employee of Vigo County, Indiana (County) and working in his capacity as a maintenance specialist for the Parks and Recreation Department (Department) when he sexually assaulted a woman volunteering for the Department. She filed suit against the County, alleging various state-law theories that she argued made the County liable under §1983. The lower court granted the County's motion for summary judgment and the victim appealed.

The court took on three issues. First, under §1983 the government - here the County - cannot be held vicariously liable, thus the Circuit quickly dispensed with that issue. Second, it looked to underlying Indiana law to see if the County could be vicariously liable *under state law* - which in Indiana can occur when its employee "has inflicted harm while acting within the scope of employment." In the sexual misconduct arena, Indiana Supreme Court precedent requires the job include intimate physical contact for the employer to be liable - examples include a baseball team's equipment manager in the locker room and outfitting players, and an employee required to dress, bath and reside with disabled youth. The fact pattern here - a park maintenance employee assaulting a volunteer while directing her volunteerism - did not line up with this precedent and the Circuit affirmed the lower court's ruling that 1983 liability could not be attached

to the County under this state law.

Finally, as to *Monell* liability, the victim argued the County adopted a custom or practice of failing to prevent or respond to employees' sexual misconduct, and that the custom or practice it adopted was the cause of the violation of her civil rights. She supported this claim with a handful of employee misconduct incidents in the County over the prior 20 years, but the Court found they did not occur or continue with impunity. Instead, the record showed that three employees were each either fired or allowed to resign (rather than face disciplinary action). The Circuit did not see these amounting to custom or practice and did not see indifference on the part of County officials either. The lower court's summary judgment on the *Monell* claim was thus likewise affirmed.

LINK

Speech: Requiring Anti-Gay Protestors to Move Out of Area Permitted for LGBTQ Festival Violates First Amendment

McGlone v. Metropolitan Government of Nashville and Davidson County, no. 17-6291 (6th Cir. Sept. 19, 2018).

Reversing the district court, the Sixth Circuit has found that Nashville's requirement that anti-gay protestors vacate a sidewalk which was included within an area permitted for a LGBTQ festival and continue their messaging from across the street was a violation of their free speech rights-and because that requirement was issued by a ranking Nashville police officer with authority over such permitting, the act constituted a "policy" of Nashville for *Monell* purposes.

The Nashville Pride Festival (Festival) was held in June 2015, at Public Square Park in downtown Nashville. Its stated purpose was "to celebrate the culture and community of the LGBTQ people in Nashville in a safe space." The Festival received a special events permit and submitted a security action plan, approved by the Metropolitan Nashville Police Department (MNPD). The Festival's ticketed areas were marked off with fencing and barricades that controlled access, but the permitted area extended beyond the fence lines and included the area central to this dispute-the sidewalk plaza near the fountains in front of Public Square Park.

John McGlone (McGlone) and Jeremy Peters (Peters) believe homosexuality is sinful, and they regularly preach at public events using bullhorns and amplification equipment. Prior to the 2015 Festival, Peters emailed the MNPD, informing it of the preachers' intent to spread their message outside of the Pride Festival on Public Square Park's sidewalks. An MNPD officer emailed back: "The organizers secured a sidewalk lane and road closure surrounding the event site, and it would appear that you need to conduct your activities on the other side of the road." The Festival's security officers were on notice that the preachers were to remain on the opposite side of the street.

On the second day of the 2015 Festival, McGlone, Peters, and some supporters went to the sidewalks of Public Square Park to preach. The sidewalk area was open to the public; no one had to pay to be there. A few minutes thereafter, an off-duty police officer employed as security for the Festival, told McGlone and Peters that they were not allowed to be in the sidewalk area and that they would be arrested if they remained. Their presence did not block people from queuing in line for the Pride Festival or force people to step into traffic. Only the preachers and those affiliated with them were told to leave. Together with their retinue, McGlone and Peters retreated to the sidewalk across the street from Public Square Park, and from that area preached for the next four to five hours. They claim that their message, communicated from across the street, was interfered with by "deflection" and the noise of passing traffic.

McGlone and Peters filed this action in federal court in April 2016, alleging that the Metropolitan Government of Nashville and Davidson County, Tennessee (Nashville), violated their First Amendment rights to freedom of speech and the free exercise of religion by barring them from the Public Square Park. After discovery, McGlone and Peters filed for summary judgment, as did Nashville. The district court ruled in favor of Nashville. The preachers appealed.

The preachers appealed, which raised two issues: First, whether McGlone and Peters' right to free speech was violated by their exclusion from Public Square Park, and second, whether Nashville was properly subject to municipal liability.

Three inquiries guide courts in ascertaining whether First Amendment free speech rights have been violated: (1) whether the allegedly excluded speech is protected under the First Amendment; (2) the nature of the forum in which the speech was to take place; and (3) whether the government's exclusion is justified under the requisite standard. The parties agreed that the First Amendment protects McGlone and Peters' speech and that the sidewalk area in question was a traditional public forum. The question was whether Nashville's exclusion of the preachers from Public Square Park could be justified under the applicable level of constitutional scrutiny.

Content based restrictions require strict scrutiny, and the restriction survives only if it is "narrowly tailored to be the least-restrictive means available to serve a compelling government interest." If instead the restriction is a content-neutral regulation of the time, place, and manner of speech, then intermediate scrutiny applies, asking whether the restriction is "narrowly tailored to serve a significant government interest, and leave[s] open ample channels of communication."

Nashville argued that its speech restrictions were not content based because Nashville's reasons for excluding McGlone and Peters from the public sidewalk area were unrelated to the content of their speech. Nashville offers three purportedly non-content-based reasons for excluding the preachers. First, the preachers' message of "intolerance of homosexuality interfered with the message of the Festival." Second, the location of the speech "created an obstruction to ingress and egress." Third, the fact that McGlone and Peters' message drew crowds created a danger to public safety.

Despite the troubling language in the first of these justifications, the district court found that Nashville's exclusion of McGlone and Peters was a content-neutral regulation of the time, place, and manner of their speech. The MNPD officer has simply stated that plaintiffs would need to preach from across the street because 'the organizers secured a sidewalk lane and road closure.' He did not say that plaintiffs needed to be across the street because they had a different viewpoint from the event organizers.

However, the Circuit saw otherwise. There was no evidence that plaintiffs' mere physical presence on the near sidewalk would interfere with the Festival; the only plausible reason for their being moved away was because their message conflicted with the theme of the Festival. Strict scrutiny applied.

"No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available . . . to serve a compelling government interest." (*citing Reed*). Nashville could not offer a compelling reason for requiring that plaintiffs move; the restriction of McGlone and Peters' speech violated the First Amendment.

The Circuit also found Nashville liable under *Monell*. The Festival security plan was approved by Nashville and the email informing Plaintiffs that they had to preach from across the street was issued by MNPD and distributed among its officers. The officer in question had "final authority" with respect to the decision to bar the preachers from Public Square Park. Even though Nashville had no formal municipal policy of excluding speakers, and there was no pattern of unconstitutional conduct sufficient to infer such a policy or custom, the Sixth Circuit had found municipal liability in *Bible Believers* without finding a formally promulgated policy or a persistent

pattern of unconstitutional conduct.

The district court's judgment granting Nashville summary judgment was reversed and remanded.

DISSENT: Circuit Judge Karen Nelson Moore dissented. She disagreed that *Bible Believers*-was an appropriate comparator: there, local police had enforced a "heckler's veto" against speakers who had sought to express an anti-Islamic message at the Arab International Festival in Dearborn, Michigan; after failing to curtail crowd violence against the speakers, police escorted the speakers out of the festival-"permanently cutting off [their] speech." "Indeed, what the police did in this case in Nashville sounds a lot like what our en banc court suggested should have been done in *Bible Believers* . . . police could have 'cordon[ed] off the speakers,' among other possibilities."

She found that Nashville's actions could be defended simply as an action "ensuring that a permit-holder can use the permit for the purpose for which it was obtained. This interest necessarily includes the right of police officers to prevent counter-protestors from disrupting or interfering with the message of the permit-holder."

And while the permit did not divest the plaza sidewalk of its status as a public forum, it did change the nature of that public forum "in the specific context of the time-limited event covered by the permit." It was not, for that brief window of time, "a continually open, often uncongested . . . place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment," but part of "a temporary event attracting great numbers of visitors who c[a]me to the event for a short period" to align themselves with a particular message. "In that context, there was an interest in ensuring that the temporary event was able to proceed as planned that would not apply on a normal street corner."

Additionally, the MNPD's requirement that plaintiffs merely move across the street-where they could continue the use of their bullhorns and continue disseminating their message-qualified as "narrow tailoring." And the alternative location across the street unequivocally constituted an adequate "alternate channel of communication."

> The First Amendment requires individuals and groups to tolerate the expression of many views with which they disagree, but it does not require anarchy. In this case, a municipality sought to regulate the position of a group of continuously disruptive speakers with bullhorns in order to prevent that group from interfering significantly with another group, which had secured a permit enabling it to use public land for its own expressive purpose. The municipality regulated the first group's position in a way that did not silence them or seriously curtail their communication; it simply required them to cross the street. Though I share the majority's solicitude for the First Amendment, I do not understand the First Amendment to prohibit such a reasonable regulation of time, place, and manner. I respectfully dissent.

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IMLA

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

