International Municipal Lawyers Association



e-News: Issue 20 November 9, 2018

Click Here To Print This Issue

Quick Links

IMLA Website
Webinar Calendar
Municipal Jobs Board
Become a Member
Join The IMLA Community
IMLA Podcasts

In This Issue: 7 Cases & This Just In

Employment: Termination due to Side-Effects Caused by Treatment for Migraines is Disability-Related and Violates State Law

Jails: Class Action by Jailees Alleging that Judges, Mayor, and Police Chief Operated "Debtors' Prison"is Dismissed

Searches: County's Bodily Search of Children in Abuse Case without Obtaining Parental Consent Violates Fourth and Fourteenth Amendments

Searches: Detective Obtaining Entry to Plaintiff's Home on Fictitious Grounds to Investigate Disability Claim Violates Fourth Amendment-but Violation Had Not Been Clearly Established

Speech: Judge Blocks Cincinnati Billboard Tax

Speech: Television Station's Limitation of Debate to Candidates Who Garner at Least Ten Percent of Likely Voters is Reasonable and not Viewpoint-Based

State-Created Danger: Private School Bus Company was not State Actor; County Not Liable for Failing to Terminate Dangerous Driver

THIS JUST IN-FORD ENTERS THE SCOOTER WARS

Employment: Termination due to Side-Effects Caused by Treatment for Migraines is Disability-Related and Violates State Law

Stewart v. Snohomish County Public Utility District No. 1, No. 17-35579 (9th Cir. Oct. 30, 2018).

The Ninth Circuit holds that terminating an employee due to temporary impairments in work performance caused by a migraine treatment is a violation of state employment laws; the employer did not demonstrate that she could not perform her job.

Cynthia Stewart (Stewart) was terminated from her job at Snohomish County Public Utility District No. 1 (PUD) and filed suit alleging she was fired in violation of the Washington Law Against Discrimination (WLAD). The case went to trial and PUD lost, with the trial court holding Stewart was fired in contravention of the WLAD.

The primary noteworthy issue in the appeal was that the Circuit affirmed the lower court ruling that the protections of WLAD can extend to side effects of a prescription drug. It was key in this case because, as a matter of fact, the trial court had found that Stewart's migraine *treatment* caused

her to exhibit signs of impairment while at work, and that this impairment was disability-related conduct protected by the WLAD. As for PUD, it provided three affirmative defenses, but all were rejected on appeal. The Circuit first held there is no "good faith" affirmative defense outside of the *McDonnell Douglas* framework for discrimination claims. Second, it held that, though PUD advanced a "bona fide occupational qualification" (BFOQ), the trial court's holding on the issue was not clearly erroneous since Stewart's condition was "temporary" as a result of medical treatment and did not render her incapable of performing her employment. And finally, the Circuit rejected PUD's business necessity affirmative defense, holding it failed to show Stewart's perceived impairment prevented her from properly performing her job.

LINK

Jails: Class Action by Jailees Alleging that Judges, Mayor, and Police Chief Operated "Debtors' Prison" is Dismissed

McCullough v. Finley, No. 17-11554 (11th Cir. Oct. 29, 2018).

In a case challenging a City's policy of requiring indigent jailees to work off unpaid fines by earning $50 per day for labor, judges were found to have judicial immunity and pleadings were inadequate as to other municipal defendants.

Angela McCullough and numerous others consolidated as a class of indigent jailees in Montgomery, Alabama (City). The class filed a complaint alleging municipal judges, the mayor and the police chief operated, effectively, a "modern day debtors' prison" because jailees that could not afford to pay fines were forced to sit-out the fines in jail by earning a credit of $50.00 a day for labor. They alleged the scheme was hatched at the top echelon of the local government and that the aim was to increase municipal revenues. The defendants - which included the City itself and the individuals - asserted several immunity defenses. The district court denied the motions in part and, ultimately what survived for appeal included the jailees' allegation that the judges, mayor, and police chief violated federal anti-peonage statutes, 18 U.S.C. §§ 1589, 1595, which prohibit forced labor by coercive means.

The application of this claim to the judges was the simplest for the Circuit to handle: judges enjoy absolute immunity for judicial acts, leaving the Eleventh Circuit with the narrow question of whether the judges were acting in such a capacity. Determining whether the acts were judicial came down to a consideration of four factors: "(1) the precise act complained of is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity." All of these tipped in favor of finding the acts at issue, which included probation procedure, indigency hearings, provision of counsel, sentencing, and work program, were judicial.

The evaluation of immunity for the police chief and the mayor would have turned on the familiar qualified immunity test: whether the discretionary actions violated clearly established statutory or constitutional rights of which a reasonable person would know. However, the Circuit never reached the point of reviewing the district court's denial of immunity under this test because it instead found the claim failed to meet Fed. R. Civ. P. 8. Performing the two-part *Iqbal* evaluation, the Court first stripped away any statements in the Complaint it found to be conclusory allegations and then, second, assumed that any remaining factual allegations were true. The Circuit ultimately determined that the class failed to state a plausible claim. It reversed the lower court's immunity rulings and remanded the case.

LINK

Searches: County's Bodily Search of Children in Abuse Case without Obtaining Parental Consent Violates Fourth and Fourteenth Amendments

Mann v. County of San Diego, Nos. 16-56657 & 56740 (9th Cir. Oct. 31, 2018).

Going beyond a district court's finding that county protective services were required to notify parents before conducting invasive bodily searches of their children-but not obtain consent-the Ninth Circuit holds that both notice and consent are required.

Mark and Melissa Mann (Manns) have four kids - including a set of triplets - and in April 2006 when Mark told a preschool teacher he had hit his child with a wooden spoon, she reported it to authorities. This led to the San Diego County Health and Human Services Agency (HHSA) investigating and, despite a different bruise on another child deemed "likely accidental" after a medical examination and even though in the Ninth Circuit's words the application "rel[ied] on flawed evidence," the children were removed from the home based on a protective custody warrant. Once the children were at a San Diego County (County) facility a doctor performed a medical evaluation of each, including invasive gynecological and rectal exams, a practice the County engaged in since 2003.

The Manns were never notified of this exam, even over months of litigation through which the entire case was dismissed. When one of their children mentioned the exam later, they filed suit against the County in April 2011, contending that the County violated their Fourteenth Amendment rights and the children's Fourth Amendment rights by: "(1) performing the medical examinations in the absence of exigency, valid parental consent, or court order specific to the child examined, and (2) failing to notify the parents of the examinations so that they may be present." The district court concluded that the Fourteenth Amendment required the County to notify parents of medical examinations and to include them during the examinations, but that the County was not constitutionally obligated to obtain the parents' consent. The parties cross-appealed: the County contending it need not provide advance notice to parents, and the Mann's contending the Fourteenth Amendment required not only advance notice, but also consent or a court order.

The issue on appeal was whether the "County violates the Fourth and Fourteenth Amendments when, absent exigent circumstances or a reasonable concern that material physical evidence might dissipate, it subjects children to medical examinations without first notifying parents and obtaining parental consent or judicial authorization for the examinations." The Circuit ruled in the Mann's favor, holding both *notice and consent or a court order* are required. The Court did not find this decision particularly hard to make, noting that it held in its 2000 *Wallis* case that " [b]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate medical attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." The County tried to distinguish *Wallis* by noting it was about "investigatory" exams, while the exam at issue was a "mental health" evaluation. The Court disagreed, as did the district court, holding that the exam *is investigatory* since the doctor is looking for signs of abuse and, covering its bases, ultimately held that even if the exam at issue was some sort of "dual-purpose" exam, the *Wallis* rule applied.

LINK

Searches: Detective Obtaining Entry to Plaintiff's Home on Fictitious Grounds to Investigate Disability Claim Violates Fourth Amendment-but Violation Had Not Been Clearly Established

Whalen v. McMullen, No. 17-35267 (9th Cir. Oct. 30, 2018).

Although a detective's use of a concocted reason (seeking help in a fictitious criminal investigation) to gain entry to a disability claimant's home violated her constitutional rights, that violation had not yet been clearly established, allowing for qualified immunity.

In 2011, Kathleen Whalen (Whalen) applied for Social Security Disability and Supplemental Security Income benefits for cervical dystonia, a neurological disorder that causes tremors. The Disability Determination Services division (DDS) of the Washington Department of Social and Health Services referred the case to its investigative unit where John McMullen (McMullen), a detective with the Washington State Patrol, was then posted. McMullen gained both Whalen's cooperation and entrance into her home by requesting her assistance in a *fictitious* criminal investigation in order to complete his DDS investigation. During his investigation, McMullen secretly videotaped Whalen both outside and inside her home and then used this information and surveillance footage at her social security hearing. Whalen filed suit, contending the officer's actions violated her Fourth Amendment rights. The district court granted McMullen's motion for summary judgment, holding that McMullen was entitled to qualified immunity because as a matter of law it was not clearly established prior to this incident that McMullen's conduct amounted to a Fourth Amendment violation.

The Ninth Circuit first pointed out two different types of police intrusion into homes - the "undercover" and the "ruse." It noted the "former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home," while the later ruse tactic occurs "when the suspect is informed that the person seeking entry is a government agent but is *misinformed* as to the purpose for which the agent seeks entry [and] cannot be justified by consent." Thus, in the Circuit's opinion, McMullen violated Whalen's Fourth Amendment rights since Whalen's consent - upon which it hinged - was vitiated. However, it affirmed lower court's grant of qualified immunity since this was not clearly established law *in the context of a civil or administrative investigation* relating to a determination of benefits.

LINK

Speech: Judge Blocks Cincinnati Billboard Tax

Lamar Advantage GP Co., LLC, dba Lamar Advertising of Cincinnati, OH, and State of Ohio ex rel. Lamar Advantage GP Co., LLC v. City of Cincinnati; Norton Outdoor Advertising Inc. v. City of Cincinnati, No. A-18-01405 (Oh. Ct. Com. Pleas, Oct. 17, 2018).

Citing the First Amendment, an Ohio court has invalidated Cincinnati's hike in fees and taxes on billboards.

In June 2018, the City Council of Cincinnati (City) voted to increase billboard fees and to impose a billboard tax (seven percent of gross receipts or a calculation based on the billboard's proximity to street traffic, whichever is greater) as part of an emergency effort to balance the budget. In

July, Lamar Advertising Company and Norton Outdoor Advertising (collectively, Billboard Companies), which have 865 billboards in the City, sued the City on constitutional grounds, challenging the billboard tax and higher fees. The Ohio Court of Common Pleas issued a temporary restraining order blocking the new tax and higher fees.

The Billboard Companies then sought an injunction, arguing that billboards communicate a wide range of commercial and noncommercial speech, while competing with other media in a marketplace sensitive to price. The court issued a preliminary injunction, finding that the plaintiffs demonstrated substantial likelihood of success on the merits, on First Amendment grounds.

In September 2018 the court heard six days of testimony from City officials, advertisers, and the Billboard Companies. The City argued that billboards involve economic conduct, not protected expression, and that the billboard tax was aimed at a land use privilege. The court rejected that reasoning, and in October, it invalidated the City's excise tax on billboards as a burden on speech protected by the First Amendment: "Government may not single out and direct or target a tax solely at the exercise of First Amendment rights or at the means or instruments utilized in exercising First Amendment rights nor may the government impose a tax that targets a small narrow group to bear the burden of the tax. Yet, that is precisely what the City of Cincinnati has done . . ."

Quoting part of the 1981 U.S. Supreme Court case *Metromedia Inc. v. City of San Diego*, Judge Hartman agreed with plaintiffs that billboards are a well-established medium of communication that conveys a broad range of messages. He said the City's tax "directly and unequivocally isolated and targeted" billboards, which are utilized to exercise First Amendment rights.

On October 10, the City voted to repeal the fee hike. It plans to appeal the decision.

LINK

Speech: Television Station's Limitation of Debate to Candidates Who Garner at Least Ten Percent of Likely Voters is Reasonable and not Viewpoint-Based

Libertarian National Committee Inc. v. Holiday, **No. 17-6216 (6th Cir. Nov. 2, 2018).**

Upholding the court below, the Sixth Circuit finds that excluding a political candidate from a televised debate due to his limited appeal to voters is reasonable and does not constitute viewpoint discrimination.

Kentucky Educational Television (KET) is run by the Kentucky Authority for Educational Television, a state agency. It hosted a debate between the candidates for one of Kentucky's seats in the U.S. Senate, and determined it would limit the debate to candidates who met certain minimal criteria-including, among others, that at least 1 in 10 Kentuckians actually planned to vote for them. This left out David Patterson, the candidate for the Libertarian Party of Kentucky, who filed suit alleging his First Amendment rights were violated and that KET had excluded the Libertarian Party and Patterson because of his views. KET's process of determining which candidates could participate in debates was a multi-year refinement and was done, according to KET, to improve the quality of debate for viewers. The district court granted summary judgment to KET, and an appeal followed.

The issue in the case was whether KET officials should be protected by qualified immunity; all parties agreed the controlling case was *Arkansas Educational Television Commission v.*

Forbes, 523 U.S. 666 (1998), wherein the Supreme Court upheld the public television station's "duty to schedule programming that serves the 'public interest[.']" The case culminated in the holding that "the criteria that a public station uses to decide which candidates to invite to a debate must merely be reasonable and neutral as to the candidates' viewpoints" and that excluding candidates based on an "objective lack of support" met this test. The Sixth Circuit found nothing more than that at issue in this case. Reviewing the debate criteria, it found it was focused on whether a marginal number of voters supported the candidate through the polls and financial support. As the Court put it, KET was "not only permitted, but indeed required to put viewers' interests above a candidate's." Patterson argued the criteria was a "façade" for viewpoint discrimination and while the Court seemed willing to entertain such an idea, the hurdle was that Patterson never said what his "supposedly disfavored viewpoint was." His remaining contention that KET discriminated against all third-party candidates met the same fate, with the Court noting that is not a "theory of viewpoint discrimination, since not all third-party candidates have the same views."

Patterson's final tack was to argue the criteria themselves were unconstitutional, but the Circuit was hesitant, noting first that this invited precisely what *Forbes* forbids - to "oversee" KET's "day-to-day" editorial decisions. Notwithstanding that, the Court determined the arguments lacked merit anyway. First, the Circuit noted Patterson tried to equate KET's criteria with what makes *ballot-access* unconstitutional, but the Court was quick to point out KET did not control ballot-access, but a *television debate* and different standards controlled that constitutional analysis. It concluded noting Patterson's further challenges to the criteria restate his First Amendment claims and failed for the same reasons. The lower court was affirmed.

LINK

State-Created Danger: Private School Bus Company was not State Actor; County Not Liable for Failing to Terminate Dangerous Driver

M.S. v. Hamilton County Department of Education, No. 17-6241 (6th Cir. Nov. 1, 2018).

Where a county contracted with a private bus company to transport students, it did not become liable on a state-created danger theory for deaths caused by the company's dangerous driver, even though it had received complaints and did not take action-the contract with the private company made it clear that the company was responsible for managing and disciplining its drivers.

Johnthony Walker (Walker) crashed a school bus in 2016 while transporting 37 children from an elementary school in Chattanooga, Tennessee. Six students died and many others were injured. At the time of the incident, he was working for Durham School Services, L.P. (Durham) and providing services for the Hamilton County Department of Education (District). Between Walker's start date in 2013 and the crash date in 2016, Durham and the District had both had received numerous complaints about Walker driving his bus dangerously. Nonetheless, neither did anything to prevent him from driving students and he faced no discipline. After the accident, parents filed suit against Durham and the District alleging a violation of 42 U.S.C. § 1983 for failure to protect M.S. (and other students as a class) from a state-created danger. The district court granted Defendants' motion to dismiss, holding that Plaintiffs had failed to allege facts sufficient to show that Durham was a state actor. The plaintiffs appealed.

Section 1983 creates liability for private entities only when they act "under color of any statute, ordinance, regulation, custom, or usage," of the state. The plaintiffs alleged the District was a state actor under two particular tests - the "symbiotic relationship or nexus test" and the

"entwinement test." Under the symbiotic relationship or nexus test "the action of a private party constitutes state action where there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." Under the entwinement test "the crucial inquiry . . . is whether the nominally private character of the private entity is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings [such that] there is no substantial reason to claim unfairness in applying constitutional standards to it." The court's primary focus inn applying these tests was whether the district "played a key role" in Walker's employment.

The court also highlighted what types of relationships have been held to be *not enough to confer state-actor status*, whichinclude "mere cooperation" between entities; regular partnership in public service activities; "extensive state regulation" of the private entity; and the existence of a contractual relationship, even when that contract subjects the private actor to an "extensive and detailed" set of requirements. In light of these legal standards and precedents, the Circuit agreed with the lower court that the contract between Durham and the District did not "play a key role" in the decision not to terminate or discipline Walker. Nor did it find that any *District employee* played a key role in that decision. It found the contract the Plaintiffs appended to the Complaint, in fact, fatal since it specifically stated that if the District had questions or concerns about the contractor's personnel (i.e. Durham's employee Walker) performance "*the contractor may take whatever action it deems necessary and appropriate to address the District concern*." Recognizing the contract undermined their argument, the Plaintiffs argued that despite the written agreement, the District personnel controlled, supervised and/or disciplined bus drivers because it had a "Transportation Policy" that stated the District's Transportation Supervisor will have disciplinary power over "bus drivers for the Hamilton County Board of Education." The court easily harmonized the two documents, finding the former contract applied to the contract employees from Durham (like Walker), while the latter Transportation Policy applied to the District's own bus drivers it employed. Thus, the court affirmed the lower court, though noted clearly that this said nothing of whether the parents could hold Durham liable in some fashion.

LINK

THIS JUST IN-FORD ENTERS THE SCOOTER WARS-

Ford Acquires Spin Scooters: We have previously noted the interest of large transportation technology companies in the shared bikes and scooters rapidly populating our cities. These entities clearly view the new modalities as part of a larger transportation ecosystem and not merely as a fad or hobby: Uber invested substantially in Lime, which provides dockless bikes and e-scooters, and Lyft purchased Motivate, the operator of major docked bike systems in New York, Washington and other cities.

Yesterday, Ford Motor Company announced that it has acquired Spin, a Silicon Valley based e-scooter company operating in Coral Gables, Washington, D.C., Charlotte and Durham, N.C., Lexington, Ky., Denver, Detroit, and Long Beach, as well as five college campuses. The price is estimated to be $100 million.

IMLA

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

