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Aviation: County Not Responsible for Airport Development Delay Costs Caused by FAA

***SilverWing at Sandpoint, LLC v. Bonner County*, Nos. 15-35589, 16-35296, 17-35051 (9th Cir. Nov. 1, 2017).**

An Idaho developer whose construction project at a county airport was delayed when the FAA found the airport to be noncompliant has been unsuccessful in appealing a denial of its claim for taking/equal protection violations and breach of the covenant of good faith and fair dealing.

SilverWing at Sandpoint, LLC purchased 18 acres adjacent to the Bonner County, Idaho Airport. The LLC sought to construct a 45-unit development that comprised airplane hangars and residences. Thereafter, the FAA deemed the airport in noncompliance status, a move that significantly delayed SilverWing's plans. SilverWing then filed suit against Bonner County, alleging breach of covenant of good faith and fair dealing, an unconstitutional taking, and a violation of equal protection. The district court ruled in favor of the County and ordered costs and fees be paid by SilverWing. SilverWing appealed the holdings and the costs and fees being assigned to it.

The Ninth Circuit first tackled the covenant of good faith and fair dealing claim, noting off the bat

that the state law is preempted by federal law in the fields of aviation safety and aircraft operations. The FAA had deemed the County's airport in noncompliance due to specific safety and operations concerns with SilverWing's development, thus it was the FAA, not the County, that frustrated and foiled SilverWing's plans. As for the constitutional violations, under *Monell* SilverWing had to show a County custom or policy was at issue, but it could not. The Court conceded the County did take official action when it voted to submit a new Airport Layout Plan to the FAA, but noted it did so in order to comply with the FAA's mandatory requirement. The action was therefore *not* pursuant to a custom or policy of the County. Finally, on costs and fees the Circuit found the County was the prevailing party, as it obtained judgment on all the claims except one remanded to state court. Since the only exception to the award of costs and fees would be SilverWing's showing that such awards were inappropriate or inequitable, which it could not, the fees and costs were affirmed as well.

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Employment: Amended Order Issued by Court at Request of Plaintiff was Solely for Pension Reporting; Did Not Increase Actual Damages. *Nance v. City of Newark*, No. 16-4450 (3d Cir. Oct. 27, 2017).

No abuse of discretion was found where the court denied a show cause order and motion for judgment for a terminated public employee seeking an award not contemplated by the jury.

Darren M. Nance (Nance) was terminated from his employment as a Newark, New Jersey police officer in 1996 and ultimately won a wrongful termination suit in 2010. A jury returned a verdict in his favor and awarded him $350,000 in compensatory damages (including lost wages) and $250,000 in punitive damages, according to the Jury Verdict Sheet. In 2015 Nance received a letter from the New Jersey Department of Treasury that sought clarification on the "period involved, the amount, and the total value of mitigated damages in order to collect his pension and receive years-of-service credit for the period between his termination and the jury award," which he communicated to the district court. The district court submitted the above information to the state. Nance then followed up with another letter from the state noting the correct amount of mitigated wages was $980,942.97. The district court followed up with an Amended Order confirming New Jersey's number for total mitigated wages of $980,942.97. Nance then sought an Order to Show Cause from the district court requiring Newark to pay him the total $980,942.97 (in contrast to the jury award amount). The district court denied that request, saying the Amended Order did *not* increase his award and that Newark had complied with the jury award and ruling in the wrongful termination case. Nance appealed.

The Third Circuit rejected Nance's arguments, upholding the district court. Nance argued that Newark made statements at the oral argument that the district court erroneously interpreted as meaning all or a portion of the jury verdict was wages. But the Circuit rejected this because, as it bluntly stated, "the jury award include[ing] lost wages is plainly based on the Jury Verdict Sheet, which specifically instructed the jury to calculate compensatory damages and include lost wages." The Court clarified that the $980,942.97 in mitigated wages was specifically required for the purpose of pension reporting and calculation, and was not applicable to increase the damages awarded by the jury. The Circuit affirmed the lower court order in favor of Newark.

LINK

Procedure: Justiciability Requires Plaintiff to Demonstrate that Probability of Detrimental Future Event is Real and Substantial.
Pieczenik v. Comm'r New Jersey Dep't of Envtl. Prot., No. 16-3579 (3d Cir. Nov. 2, 2017).

A lessee who is not a party to an administrative consent order between the state agency and the land owner lacks standing to bring suit against the state agency.

George Pieczenik (Pieczenik) leases property that includes areas classified as freshwater wetlands or wetlands transition areas in New Jersey. As a result, he is subject to a mowing and maintenance restriction on those areas. The property owner and the New Jersey Department of Environmental Protection (NJDEP) created the restrictions under an administrative consent order (ACO). Pieczenik filed suit against NJDEP (among others) complaining that meeting the ACO meant hiring "a lawn service that can use GPS to identify the spatial coordinates corresponding to protected wetlands areas," and thus he sought a declaration that it was void on its face. NJDEP moved to dismiss the case, arguing Pieczenik lacked standing since he was not a party to the ACO and thus would not suffer under any potential enforcement action for a violation of the ACO.

The Third Circuit agreed with the lower court. Specifically, it noted that Pieczenik's complaint was based solely on the ACO and NJDEP agreed it could not, had not, and will not take any action against him based on the ACO. It refused to disavow a letter it sent to Pieczenik, however, stating that NJDEP *could take action* against him based on his independent violations of New Jersey's Freshwater Wetlands Protection Act as a *tenant*. The Court clarified the rule of justiciability, specifically that "[i]n order to present a justiciable controversy in an action seeking a declaratory judgment to protect against a feared future event, the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Examining the incongruity between the basis of the complaint and the enforcement action noted in the letter, this standard was not met. Pieczenik's argument that he *could* be affected by a *potential* NJDEP enforcement action against his landlord was not sufficiently concrete to confer justiciability, meaning a court would be in the position of rendering an impermissibly advisory ruling. The Circuit affirmed the district court's refusal to issue such a ruling.

LINK

Qualified Immunity: No Arguable Probable Cause to Arrest Driver with .000 BAC
Barnett v. MacArthur, No. 16-17179 (11th Cir. Oct. 30, 2017).

A Florida police officer could not demonstrate arguable probable cause when arresting a driver who passed a breathalyzer test and a urinalysis drug test, particularly when the driver did not smell of alcohol, have any difficulty communicating or exhibit other signs of intoxication.

Shana Barnett (Barnett) went out for dinner in Orlando with friends in March of 2014. She drove her friend's car home, as he was too intoxicated to drive. She came to a complete stop at a green light before travelling through an intersection, after which officer Sara MacArthur (MacArthur) followed her for two blocks before pulling her over despite no other transgressions. Barnett stated she drank one glass of wine at dinner nine hours earlier and willingly performed field sobriety tests. The parties disagreed over her performance and how well the officer explained, administered and interpreted the tests. Barnett was arrested and took a breath test at

the jail that registered a BAC of .000. Not content with this, and despite admitting she had no evidence to suspect Barnett was under the influence of drugs, MacArthur sought a urinalysis test. Barnett spent the night in jail. The drug test came back negative as well. Barnett sued alleging, among other things, that MacArthur's actions amounted to false arrest and unlawful detention, and was thus unconstitutional under §1983. The district court denied MacArthur's qualified immunity, prompting the officer to appeal.

The Circuit Court began by noting that an officer is entitled to qualified immunity in the Fourth Amendment context as long as the arrest was supported by *arguable* probable cause. It specified this exists when "reasonable officers in the same circumstances and possessing the same knowledge as the Defendant could have believed that probable cause existed to arrest." As for the claim of unlawful arrest, the Circuit agreed with the lower court that there was no arguable probable cause for the arrest because MacArthur did not smell or see alcohol, did not observe any indication that Barnett was under the influence of drugs, and admitted Barnett communicated well, meaning a reasonable officer in this circumstance would not have found probable cause.

As a result of this initial finding that the arrest was without probable cause, it was easy for the Court to find that MacArthur violated Barnett's rights with regard to detention by detaining her beyond the initial arrest. This was evidenced by the .000 BAC result at the jail (a test Barnett undertook twice) and then ordering a urinalysis for drugs when there was no evidence that Barnett was impaired by drugs at all. The Court affirmed the district judge.

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Religion: State Healthcare Workers May Include Religion in Discussions with Parents about Merits / Risks of Vaccinations for Children
Nikolao v. Lyon, 17-1367 (6th Cir. Nov. 7, 2017).

The Sixth Circuit has dismissed a challenge to Michigan's procedures for granting religious exemptions from mandatory vaccination requirements.
Under Michigan state law, all school-age children be vaccinated prior to entering the public school system; however certain exemptions may be granted for medical and non-medical reasons. To receive an exemption, a parent must first visit a local health department and explain the basis of their objection.

Tara Nikolao (Nikolao), a devout Catholic, applied for an exemption for her two children at her county's health department. After some back and forth conversation with the county nurses, Nikolao was given an ultimatum by one of the nurses to declare which religion she practiced and further explain her religious beliefs. Nikolao was then told by one of the nurses that no religion in the world explicitly objected to vaccinations and was handed a Religious Waiver Note that incorrectly attributed a quote supporting the use of vaccines to Pope Benedict XVI. On the form itself, the nurse eventually wrote that Nikolao objected to the vaccine because she wanted her children to have natural immunity, leaving off any reference to Catholicism. Nikolao took great issue with the way the nurse had filled out the form and left off her specific religious objection.

Thereafter, she brought a Section 1983 suit against the county nurses, the county's health department director, and the Michigan State Department of Health and Human Services Director, challenging the treatment she received during the waiver process. She alleged the waiver process violated her religious beliefs under both Establishment and Free Exercise clauses and sought injunctive relief to remove the waiver certification process along with nominal damages. District court granted the defendants' 12(b)(6) motion to dismiss. The Sixth Circuit affirmed in part and remanded in part.

According to the court, Nikolao gave no indication that the information coerced her into doing or not doing anything, especially since the end result was that she received the waiver. Further, the court pointed out that Nikolao has no right to an exemption in the first place-that right was given statutorily by the state of Michigan. *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (holding that compulsory vaccination laws with only medical exemptions do not violate any federal constitutional right).

While Michigan's statute gives her the right to object to vaccinations on religious grounds, the provision makes no mention of where or how (if at all) a parent's objection should be noted. In fact, she lacked the standing to bring an establishment clause claim because the state had not actually compelled her to do something forbidden by her religion since the end result of the procedure was that she received her waiver; therefore, she had not suffered injury. The burden of missing work to drive to the county health department to apply for a waiver is the same for *everyone* applying for a waiver-regardless of the reason for the waiver.

While Nicolao could demonstrate injury for her Establishment Clause claim, the court did not buy her substantive arguments. Because Michigan's decidedly secular goal is to dissuade parents from opting out of vaccinations, it does not amount to excessive entanglement. Government employees must discuss religion with parents to the extent that the parents are informed about the benefits of vaccinations and the dangers of declining to do so. The court characterizes this as the state voicing its own opinion on religious objections generally in an effort to prevent the outbreak of a communicable disease.

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Taxation: Chicago's Real Estate Transfer Tax Cannot Be Avoided by Buyers in Fannie or Freddie Transactions

Federal National Mortgage Association v. City of Chicago, No. 16-4140 (7th Cir. Oct. 30, 2017).

Although Freddie Mac and Fannie Mae are exempt from paying the seller's portion of Chicago's real estate transfer tax, the buyers in such transactions cannot also claim the benefit of such Congressionally-mandated exemption, and must also pay the seller's portion of such tax.

Chicago has a real estate transfer tax that is bifurcated: the "City portion" is paid by the purchaser and the "CTA portion" is to be paid by the seller. If the seller is exempt from tax for some reason, the CTA portion also falls to the purchaser. The Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") are federally-chartered entities and are exempt from all taxation. Thus, when private individuals purchased properties from Fannie Mae and Freddie Mac in 2013 and 2014 in Chicago, they did not pay the transfer tax, prompting Chicago to pursue them. The case wound its way through the administrative system concluding in an administrative law judge holding the buyers had to pay the tax and, in turn, prompting the buyers, Fannie Mae, and Freddie Mac to all file suit in federal district court to overturn the administrative decision. The district court held that the tax was preempted by the federal exemption statutes and issued an injunction barring the City from collecting the taxes.

The Seventh Circuit began by noting it had previously determined that Fannie Mae and Freddie Mac are themselves exempt from taxes (which every circuit to have decided the issue also holds) but that the crux of this case was "whether the scope of the exemptions expands so far as to

exempt individuals who purchase property from the federal entities." Noting that "[t]axation authority is recognized as central to state sovereignty" the Circuit said it "will interpret a statute to pre-empt the traditional state powers only if that result is the clear and manifest purpose of Congress." Looking to the plain language of the organic acts for the entities, the Court found that "[e]ach provision is specific to the federal entity and its various assets . . . [and that n]othing in the language of these provisions addresses parties that transact with the exempt entities." Foreseeing this problem, the buyers, Fannie Mae, and Freddie Mac argued the conclusion was contrary to the congressional intent since taxation affects both parties in a transaction and applying it to the buyers would result in Fannie Mae and Freddie Mac having to lower prices, thus harming their ability to carry out their core missions of stabilizing the housing market. The Court agreed the tax likely had *some effect* on the federal entities, but it could not find it "clear that the burden falls on something Congress intended to shield." Even more, the Court said just because a tax "has an effect on an entity does not make it a tax on that entity." The plain language of the law does not shield those that *transact with* Fannie Mae and Freddie Mac from state and local taxation and the high bar needed in the arena of states' sovereign right to tax could not be overcome. The Circuit reversed the lower court and dissolved the injunction.

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THIS JUST IN: Wisconsin Legislature Acts to Redress *Murr* Decision

The Wisconsin senate has come to the rescue of landowners who were prevented by a local ordinance from selling an empty plot next to their cabin, passing a law which waives such restrictions. Members will recall that in June 2017 the issue was resolved at the Supreme Court, which upheld, in *Murr v. Wisconsin*, the St. Croix County ordinance, and the Wisconsin courts' decisions enforcing the ordinance, against claims of unconstitutional taking, among other things.

As the *River Falls Journal* describes it:

A land-use bill that would reroute state law around a U.S. Supreme Court decision cleared a major hurdle Tuesday.

On a voice vote, the Wisconsin Senate passed the measure, which waives land-use restrictions that prevented a family from selling a small parcel of their St. Croix River-side land. Lawmakers stepped in after the U.S. Supreme Court rejected the Murr family's claim that St. Croix County's laws governing the sale of the land were unconstitutional.

The article can be accessed here: LINK

IMLA

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

