International Municipal Lawyers Association



e-News: Issue 23 November 30, 2017

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Animal Control: Ordinance Allowing Warrantless Entry into Premises to Seize Dogs Gives Rise to Unconstitutional "Policy" for *Monell* Purposes

Hardrick v. City of Detroit, nos. 16-2074, 17-2077 (6th Cir. Nov. 22, 2017).

A Detroit ordinance that gives animal control officers the right to enter yards to seize feral dogs was enjoined as a violation of the Fourth Amendment; the ordinance served as a "policy" by Detroit for *Monell* purposes-but the facts did not demonstrate an unconstitutional seizure for most of the plaintiffs.

One of the many consequences of Detroit's urban blight is a major feral dog population, rumored to number as high as 50,000 animals. This poses a significant threat; the United States Postal Service ranked Detroit sixth in its "Annual Dog Attack City Rankings" for 2016.

To address the problem, in 2004 the Detroit City Council enacted an ordinance entitled "Animal Control, Regulation, and Care," covering the "care, control, regulation, and disposition" of animals in Detroit. Animal control officers are empowered to capture and impound stray dogs and other animals owned in violation of the provisions and to euthanize them under some

circumstances. It defines strays to include "any animal running loose" and makes it unlawful for anyone to refuse to surrender an animal that has attacked or bitten a person or other animal. It imposes dog licensing and vaccination duties on owners. And it allows officers to enter "any . . . real property within the City for the purpose of capturing, collecting, or restraining any animal," whether they have a warrant or not.

Various owners' dogs were seized by the Detroit Animal Control, prompting the owners to file suit alleging the ordinance itself and seizures carried out under it violate the Fourth Amendment and that Detroit had a policy that deprived owners of due process under the Fourteenth Amendment. The district court issued an injunction against the city from warrantless search and seizures under the ordinance - a decision not appealed - but granted judgment as a matter of law against the dog owners on the remaining claims, holding there was no other constitutional violation. The owners appealed those decisions.

The Sixth Circuit began by noting that to succeed on their § 1983 *Monell* claims under the Fourth and Fourteenth Amendments, the plaintiffs had to show (1) that they suffered a constitutional violation and (2) that a municipal policy or custom directly caused the violation. As for a policy the Court identified - and gave credit to the city for conceding - that the ordinance itself permitting officers to enter "any . . . real property within the City" without a warrant to investigate unlicensed or menacing dogs is unconstitutional and thus is itself a "policy." That left connecting the alleged unconstitutional seizures to the policy, but the Court found only two of the owners could do so, while the other owners' dogs were seized for reasons unrelated to the "policy" identified - e.g. the dogs were seized from a public sidewalk, because of neglect, or because exigent circumstances provided an exception to the warrant requirement. With the direct-cause element of *Monell* met in these two cases, the Circuit found material facts in dispute and reversed the district court.

As for due process, the Circuit found the owners failed to show an underlying constitutional violation and that therefore the claims were properly denied by the lower court. For those that alleged they were deprived of property when the dogs were seized and brought to the city shelter - where some got sick and some even died - the court noted negligent conduct by state officials does not constitute a due process violation. And for those that alleged they were denied process because without a citation they could not contest that seizure or fine, the Court found that there was no due process violation as of yet since the owners failed to show the state or common law lacked a remedy.

LINK

Contempt: Where Settlement Agreement Did Not Require Escrow of Attorney's Fees, Defendants' Appropriation of Funds during Appeal did not Constitute Contempt

Gascho v. Global Fitness Holdings, LLC, Nos. 17-3577/ 3578/ 3579/ 3804/3805/ 3821/ 3822/ 3825/ 3826/ 3827 (6th Cir. Nov. 15, 2017).

Noting the extraordinary power of contempt, the Sixth Circuit has refused to cite corporate managers who paid themselves funds from a class action settlement account because the settlement agreement did not require those monies to be placed in escrow and payment to counsel was not due until the settlement terms were finally affirmed.

Global Fitness Holdings, LLC (Global Fitness) owned various gyms and was sued by a class of members over the terms of their membership. A settlement agreement was reached wherein Global Fitness agreed to pay (1) $1.3 million to the class members, (2) class counsel's fees as ordered by the court, and (3) the claims administrator's fees and costs. Various class members

objected to the settlement, resulting in additional protracted litigation. Eventually the settlement was affirmed and payment became due. While the payments Global Fitness owed to class members had been placed in escrow under the terms of the settlement agreement, not so for class counsel and the claims administrator, thus no money was left - some $10.4 million had been funneled out of Global Fitness during appeals and paid to Global Fitness management. The class counsel and administrator thus sought to hold the company and individuals in contempt. The district court agreed and the defendants appealed.

The Sixth Circuit disagreed. It noted that contempt is a "potent weapon" and "a weapon of last resort, not first resort." A party seeking contempt must demonstrate by clear and convincing evidence that the defendant knowingly violated a *definite and specific* court order. The problems meeting the standard in this case derive from the "definite" requirement--and the lack of that attribute in the settlement agreement. The agreement conditioned Global Fitness's obligation to pay when the agreement was "fully and finally affirmed by the highest court" from which any party sought review. The parties had appealed, first to the Sixth Circuit (a previous case) and then to the Supreme Court (cert was denied). Thus, the command from the district court was specific, but it was not definite because it depended on whether the parties appealed.

As the Court put it, "while it would have been good business practice to set the money aside, the contempt power is not meant to force businesses into good business practices." The plaintiffs only required the payments for the *class members* be escrowed, but failed to do the same for fees and counsel and the Circuit was wholly unwilling to allow the lower court to exercise contempt to make up for the error. The issue lay in the settlement agreement drafting coupled with the failure to require the settling party to escrow and/or get personal guarantees from defendants. Reversed and remanded.

LINK

Speech: Complaint by Teacher "Pursuant to" Job Function is Unprotected Speech and Does Not Support Retaliation Claim

Lyons v. Vought, no. 16-1062 (8th Cir. Nov. 22, 2017).

The Eighth Circuit has reversed a lower court's denial of qualified immunity to university officials who did not renew a lecturer's contract after he criticized the school's preferential treatment of student athletes, finding that the plaintiff's critique likely stemmed from a grading dispute within his own classroom and was "pursuant to" his job functions; complaining to the Chancellor, although outside the normal chain of command, did not protect his otherwise unprotected speech.

Henry Lyons (Lyons) worked as a part-time lecturer at the University of Missouri Kansas City (UMKC). In 2010 he gave a student athlete an "F" grade, which the student challenged through UMKC's appeal process. He was allowed to submit a second paper and, over the objections of Lyons, received a D+ through the actions of the UMKC Academic Standards Committee.

Lyons met with various UMKC administrators including its Chancellor to express concerns about preferential treatment of student athletes. He requested that UMKC undertake "a comprehensive investigation into the preferential treatment afforded to student athletes" but never heard back regarding his complaints. He was not offered a renewed contract for the following semester-a decision made in part by Wayne Vaught (Vaught), Interim Dean of the UMKC College of Arts and Sciences.

Lyons sued Vaught and another administrator, alleging retaliation for his criticism of UMKC's

preferential treatment of student athletes, violating his free speech rights as a public employee. To succeed, he had to prove that he engaged in activity protected by the First Amendment and that his protected conduct was a substantial or motivating factor in UMKC's decision to take the adverse employment action. The defendants moved to dismiss on grounds of qualified immunity because at the time of the alleged retaliation, "it was not clearly established that a teacher complaining about academic favoritism towards student athletes (which included one of Plaintiff's own students) was engaged in constitutionally protected speech."

The district court denied immunity, finding it clearly established "that a public employee had a First Amendment right to speak on matters of a public concern so long as that speech was not part of the employee's job duties." The lower court concluded Lyons' meeting with UMKC's Chancellor was not "part of" his job duties, that "academic improprieties involving interscholastic athletes is an issue of public concern," that that Eighth Circuit cases prior to *Garcetti* "clearly established that a public employee had a First Amendment right to speak on matters of a public concern so long as that speech was not *part of* the employee's job duties," (emphasis added) and that *Garcetti* had not changed that law.

The Eighth Circuit disagreed, and reversed-*Garcetti* had in fact changed the law, and would likely have required different outcomes in prior Circuit decisions. The lower court's verbiage, that only speech that is "part of" an employee's job duties is unprotected -- was phrased more narrowly than the governing standard in *Garcetti* -- speech that is "*pursuant to*" the employee's duties.

> At some point, Lyons's vigorous defense of his "F" grade after the Grade Appeal Committee and the Academic Standards Committee upheld the student's appeal arguably stopped being "part of" Lyons's duties as a part-time lecturer. But participating in the appeal process . . . was clearly "pursuant to" his grading duties . . . . Thus, "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." (*citation omitted*).

The central focus was whether it was clearly established that Lyons's meeting with the UMKC Chancellor was as a citizen, not as a part-time lecturer. The Circuit noted that if no student athlete had ever taken Lyons's course, or if his individual grading of student athletes had never been questioned, then his discussions with the Chancellor would be no different from another citizen raising the general issue. But merely going outside the normal chain of command did not convert unprotected speech into protected speech. Here, it was not clear whether Lyons's actions were based on dissatisfaction with the specifics of his own student's appeal outcome or were based on a broader public concern with the school's educational mission.

The defendants could reasonably conclude that Lyons spoke solely as an aggrieved lecturer in asking the Chancellor to investigate grading policies for student athletes, and qualified immunity was appropriate for the UMKC officials who did not renew his contract.

LINK

Taxation: Online Travel Agencies do not Owe Taxes to 13 Illinois Municipalities Because They do not "Own, Operate or Manage" Hotels, and do not "Rent" Hotel Rooms

Village of Bedford Park v. Expedia Inc., Nos. 16-3932 & 3944 (7th Cir. Nov. 22, 2017).

Expedia and other OTAs have again succeeded in avoiding taxation on their income

from acting as intermediaries linking customers to hotel rooms-the OTAs' business model was not captured in the wording of a group of Illinois municipalities' ordinances.

When facilitating hotel reservations, Online Travel Agencies (OTAs) use the "merchant model". Under that model, the hotel and the OTA enter into a contract by which the OTA agrees to display information about the hotel on the OTA's website, and the hotel agrees to provide reservations at a discounted room rate through that website. A hotel decides when to make reservations available to the OTAs, how many reservations to provide, and the room rate the hotel will charge.

Thirteen Illinois municipalities filed suit against various OTAs alleging taxes were not properly being remitted by the OTAs for hotel rentals in the municipalities. The district court granted summary judgement to the OTAs for all but one municipality, resulting in cross-appeals for summary judgment.

As for the analytic process, the Circuit agreed with the district court that each municipal tax ordinance was at issue and therefore each had to be evaluated. It thus divided the ordinances into three categories: "those that place the duty to collect and remit the tax on owners, operators, and managers of hotels or hotel rooms; those that apply to all persons engaged in the business of renting hotel rooms; and those that incorporate elements of both." As for the first category, the Circuit found it easy to agree with the lower court that summary judgment was appropriate against seven of the municipalities since the OTAs are simply not "owners, operators, [or] managers of hotels." While the Court conceded the OTAs engage in an *element* of running a hotel by reserving rooms for guests, it rejected the municipalities' argument that they "operate" hotels or rooms.

The next set of municipalities were a group of three that require taxes be paid by those "engaged in the business of renting" or "engaged in renting" hotel rooms. The district court found that since two of municipal ordinances *only taxed gross rental receipts* and each received the tax on the rental rate paid by the customer - just not on the fees associated with the OTA business itself - the taxes were paid properly. The standout was the town of Lombard where no such limit on gross rental receipts was codified, thus prompting the district court to rule in favor of Lombard. However, the Circuit reversed the lower court on the Lombard case, creatively holding that "[n]one of the ordinances define 'engaged in the business of renting' or 'engaged in renting.' To rent [according to Black's Law Dictionary] is '[t]o pay for the use of another's property.' Thus, renting implies ownership and granting possession of property-here, hotel rooms. As discussed, the OTAs do not own hotels or hotel rooms and they cannot independently grant consumers access to hotel rooms. Therefore, they cannot rent hotel rooms to customers."

As for the final group of three municipalities, those with hybrid ordinances that were slightly more complicated and varying, the Circuit boiled it down to relying on its logic above: "as the OTAs are neither engaged in the business of renting nor owners or operators of hotels, they have no obligations regardless of how these ordinances are interpreted." This was the case despite the fact that these ordinances required taxing "all persons engaged in the business of renting, leasing or letting rooms in a hotel or motel." All the municipalities therefore lost the cases.

LINK

Taxation: Reversal by Fifth Circuit--Online Travel Companies do not Owe $84 Million in Taxes to 173 Texas Municipalities

City of San Antonio v. Hotels.com, No. 16-50479 (5th Cir. Nov. 29, 2017).

In yet another chapter in the ongoing municipality vs. OTC saga, the Fifth Circuit has

reversed a lower court decision that would have allowed local governments to collect tax of more than $84 million on the service fees charged by OTCs on hotel rooms booked in 173 Texas municipalities.

In 1987, the Texas legislature authorized municipalities to "impose a tax on a person who . . . pays for the use or possession or for the right to the use or possession of a room that is in a hotel". Tex. Tax Code § 351.002(a). Pursuant to this enabling act, Texas municipalities enacted hotel occupancy tax ordinances, following either the language adopted in the Dallas Code or the San Antonio Code.

Dallas-type ordinances tax "the consideration paid by the occupant of the room to the hotel." "Consideration" is defined as "the cost of a room in a hotel", but does not include "the cost of any food served or personal services rendered . . . not related to cleaning and readying the room or space for occupancy." San Antonio-type ordinances tax "the consideration paid for a sleeping room", or "the total price of a sleeping room or sleeping facility" including "all goods and services provided by the hotel."

In 2008, the district court certified a class of 175 Texas municipalities "whose ordinances contain language that requires every person owning, operating, managing or *controlling* any hotel to collect and remit hotel occupancy taxes." After the class was certified, however, two cities opted out-this included Houston, which brought its own action against the OTCs.

In 2009, a jury in the class action determined that the OTCs "control" hotels, and in 2011 the district court held that the OTCs were liable to collect and remit taxes on the full amount paid by the customer-including the OTC service fee.

Meanwhile, Houston had pursued similar litigation in state court. The court in that case found that, "[u]nder the plain meaning of this [ordinance], the *cost of occupancy* [the scope of the tax base] is [the] amount for which three conditions are satisfied": (1) "the consideration at issue must have been paid or charged for the use or possession, or the right to use or possess, a hotel room"; (2) "the amount to be taxed must have been paid 'by the occupant of such room'", which includes "'through the means, work, or operations of' and 'in behalf of'"; and (3) "the amount to be taxed must have been paid 'to such hotel.'"

Under that construction, the OTCs' service fees were not part of the "cost of occupancy."

Citing the *Erie* doctrine, the OTCs moved to have the federal class action court apply Texas law as determined in the Houston case, but the district court declined, describing the Houston ordinance in question as sui generis. It then assessed the OTCs more than $55 million in unpaid taxes and accrued interest. The OTCs moved for a new trial but were rebuffed, and in 2016 the district court issued a final award amount, including newly-accrued taxes, interest and penalties, of more than $84 million.

The Fifth Circuit disagreed. It found the Houston ordinance to follow closely the wording used by the other municipalities. "We therefore must follow the *Houston* court's interpretation of 'cost of occupancy' unless we are persuaded the Texas Supreme Court would decide the matter differently. There is no reason to believe the Texas Supreme Court would do so."

The Circuit cited "an ancient pro-taxpayer presumption: The reach of an ambiguous tax statute must be construed 'strictly against the taxing authority and liberally for the taxpayer.'" Here, the ordinances in question, authorizing taxes on occupancy, were inadequately worded. "The hotel offers *occupancy* in exchange for payment of the invoiced discounted [room] rate. An OTC, on the other hand, does not have rooms or *occupancy*".

The cost of occupancy was only the discounted room rate paid to the hotel, and the OTCs service fees were not taxable.

LINK

Trials: Affirmative Defenses under ADA Must be Proven; Merely Alleging Defense Does not Support Judgment on the Pleadings

Hindel v. Husted, No. 17-3207 (6th Cir. Nov. 13, 2017).

Reversing the district court, the Sixth Circuit has held that a mere allegation by Ohio that a blind voter's requested modifications to the state's voting system would be a "fundamental alteration" did not constitute the necessary proof under the ADA, meaning that the lower court's grant of judgment on the pleadings was premature.

Shelbi Hindel (Hindel), along with the National Federation of the Blind, filed suit against Ohio's Secretary of State alleging the state's paper-ballot system for absentee voting discriminates against the blind in violation of Title II of the ADA because it obligates blind voters to seek the aid of a sighted person in order to vote absentee, depriving them of the ability to vote anonymously. Hindel sought an online absentee system, prompting Ohio to argue that such an accommodation would fundamentally alter Ohio's voting program. The district court agreed, granting judgment on the pleadings in favor of Ohio's Secretary of State. Hindel appealed.

The Sixth Circuit reversed. It agreed with Hindel's procedural argument, in which she argued the lower court erred in making a fact-specific determination on the pleadings alone instead of after discovery, expert testimony, an evidentiary hearing, or trial. The Circuit began by agreeing with Hindel that the state's defense - that the proposed change to absentee voting amounted to a "fundamental alteration" - was an affirmative defense to Hindel's proposed accommodation under the ADA.

The problem the Circuit found was that under the ADA "a public entity has the burden of *proving* that compliance with [the ADA] would result in [a fundamental] alteration." Thus, the lower court erred procedurally since when it ruled for Ohio, Hindel had only alleged discrimination and Ohio had only *alleged* the proposed solution of online absentee voting would amount to a fundamental alteration. Until such an affirmative defense is "*proven*" a court cannot grant judgment and thus cannot do so on the pleadings. The Circuit Court thus reversed and remanded the case back to the district court.

LINK

Trials: Lack of Access to Evidence Requires Reversal of Summary Judgment for County

Moore v. Shelby County, No. 17-5273 (6th Cir. Nov. 22, 2017).

Citing the lack of opportunity for the plaintiffs to conduct discovery in a case brought by an animal rights group against a county animal shelter, the Sixth Circuit has vacated summary judgment and remanded.

In 2013 Vicki Moore learned about "disturbing conditions" at the Shelby County Animal Shelter and formed the Shelby County Animal Care Coalition (Coalition). To investigate the claims of malnourished dogs, dirty cages, and dogs with chemical burns from unsanitary conditions and

unsafe cleaning practices she sought "to inspect and copy all images, graphic representations, and audio on the security camera system at the shelter" under the Kentucky Open Records Act (KORA). Months passed and the records were not provided.

After a dog fight broke out and several animals were injured the Coalition sought the records again, but when the Coalition was finally granted access to view and copy the videos and records they had all been deleted six days before. The Coalition first brought the issue to the Attorney General of Kentucky that indeed found the city shelter had "subverted the intent" of the KORA and raised "a significant records management issue," but did not violate the Act. The Coalition then filed suit against Shelby County, alleging state law claims under KORA, First Amendment retaliation, and supervisory liability under 42 U.S.C. § 1983. The district court granted the city's motion for summary judgment before discovery, prompting the Coalition to appeal.

The Sixth Circuit found that the Coalition was denied an opportunity for discovery given the city filed its motion for summary judgment eight days after the scheduling order. Even though this is allowed under the rules since a summary judgment motion can be made "at any time," it certainly counseled in favor of a finding that the plaintiff was ill-equipped to respond given the lack of any discovery having been accomplished.

The Circuit reminded the parties and lower court that "[a] summary judgment determination requires an inquiry into whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. [And therefore, c]ommon sense dictates that before a district court tests a party's evidence, the party should have the opportunity to develop and discover the evidence." Also importantly, the plaintiff was entirely prejudiced by the lack of discovery because she specifically sought evidence of a retaliatory motive against her and without discovery was unable to reply to the city's argument that the record deletion was nothing more than a record management issue. In conclusion, the Circuit was "left with the definite and firm conviction that the district court abused its discretion by granting summary judgment for Defendants" and it vacated the ruling.

LINK

Trials: Plaintiff not Required to Plead Facts Supporting Statutory Elements of Claim, But Must Provide Sufficient Allegations

Chapman v. Yellow Cab Cooperative, No. 17-1758 (7th Cir. Nov. 16, 2017).

Where the lower court incorrectly dismissed the plaintiff's FLSA complaint on the grounds that it did not discuss legal factors distinguishing an employee from an independent contractor, the Seventh Circuit recast the district court's order as one for a more definite statement.

Dennis Edwards (Edwards) owns a cab in Milwaukee. He has an agreement with Yellow Cab Cooperative (Yellow Cab) to refer rides to him. Edwards leased his cab to Parashu Giri (Giri), who - when he was not driving it - subleased the cab to Thomas Chapman (Chapman). Chapman never paid any dividends to Yellow Cab, rather he paid rent to Giri from his fares and tips, keeping the difference for himself.

Chapman filed suit against Yellow Cab under the Fair Labor Standards Act, arguing this tiered system made him an employee of Yellow Cab and he was illegally not being paid minimum wage. His suit was largely based on the fact that after he complained about his low wage, the president of Yellow Cab told Giri he was "fired," causing Giri to terminate the sublease. The district court

dismissed Chapman's complaint and directed him to file a new one, which he did. The second complaint landed on a different judge's desk, who ordered that Chapman "must provide more detailed and thorough allegations before the claim can be permitted to proceed," specifically noting that the complaint had to discuss all the "factors" relevant to the distinction between an employee and independent contractor. Chapman tried to comply again and, after deciding "Chapman's allegations, even construed liberally, do not address these factors," the judge dismissed his third attempt with prejudice. Chapman appealed.

The Seventh Circuit was brief but clear that to whatever extent the lower court required facts be pled, especially facts that specifically bore on statutory elements of a claim and on judicially established standards, it was erroneous. The federal standards are about "claims" being plausibly pled and not facts that correspond to specific elements of a legal standard. The Circuit conceded that, even if Yellow Cab's decisions somehow affected Chapman's income, his complaints didn't seem plausible given he does not have a relationship with Yellow Cab, but found the lower court *did not make that finding.* After setting this out, the Circuit, instead and somewhat graciously, interpreted the district court order as one under FRCP 12(e) - an order for a more definite statement.

Calling this "giving the district court the benefit of the doubt," the Circuit found Chapman did not respond to the "order" by providing additional, clarifying facts and therefore "disobeyed" it when he filed his third amended complaint. The Court noted Chapman's appellate brief included new allegations that made its plausibility stronger, but held the "place and time to make those allegations was in the district court," and therefore it affirmed the lower court.

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IMLA

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

