International Municipal Lawyers Association



e-News: Issue 24 December 14, 2017

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Employment: Despite Prima Facie Case of Lesser Pay for Greater Job Responsibilities, State's Dire Fiscal Status Justifies Reduced Salary

Lauderdale v. Illinois Department of Human Services, No. 16-3830 (7th Cir. Nov. 30, 2017).

Acknowledging that a state female superintendent who assumed additional responsibilities upon the retirement of a male executive was paid less that the retiring male, the Seventh Circuit has upheld the disparity based on a showing that the state's precarious fiscal condition required drastic belt-tightening.

Marybeth Lauderdale (Lauderdale) worked as superintendent for the Illinois School for the Deaf, during which she was paid a total of $88,048. Reggie Clinton (Clinton) was superintendent for the School for the Visually Impaired and was paid $121,116 per year. When Clinton retired and the state sought to combine the roles, paying just one superintendent, Lauderdale was offered the job and, after negotiations, was paid $106,500 for the job. Lauderdale filed a lawsuit alleging a violation of the Equal Pay Act based on the difference between what she was paid and what Clinton had been paid. The district court ruled against her, finding the difference was the result of

budget concerns and from applying the Illinois Pay Plan. Lauderdale appealed.

The Seventh Circuit began by setting out that the Equal Pay Act prohibits employers from discriminating between employees on the basis of sex and that establishing a prima facie case requires an employee demonstrate "a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." If the employee clears this hurdle, the burden shifts to the employer to evidence a neutral factor which actually accounts for the pay disparity. Given that Lauderdale took over Clinton's job and took on additional work to supervise a second school, the state conceded she made out a prima facie case.

Like the lower court, however, the Circuit found the state's evidence compelling. First was the fact that in making its decision the state did look to the Illinois Pay Plan for guidance about how much the new position commanded in terms of salary and showed it created a decision memorandum, as required by that plan. Second, the Circuit found that, even if the state did not strictly adhere to the Illinois Pay Plan, emails and documents showed Lauderdale's previous salary was a determining factor in setting her new salary and, it noted, it has repeatedly held this is a "legitimate factor other than sex." Finally, the Court found that emails also showed that budget concerns went above and beyond the normal status the factor plays in salary decisions - pointing out that Lauderdale herself, as well as other staff, had been required to take furlough days and were warned the schools may have to close entirely due to funding concerns. Ultimately it held that if "presented with this evidence, no reasonable juror could find that Lauderdale was paid less because of her sex." It affirmed the lower court.

LINK

Searches: Warrantless Search of Premises for Absent Probationer who Committed Violent Crime is Upheld over Objections of Occupant

Smith v. City of Santa Clara, No. 14-15103 (9th Cir. Nov. 30, 2017).

Cautioning that its opinion was limited by the facts at hand, the Ninth Circuit has upheld a lower court opinion denying relief to a mother who had objected to officers' warrantless search of her residence to locate her daughter, who was on probation and was suspected of committing a violent felony.

Justine Smith (Smith) was already on probation when officers believe she became involved in a vehicle theft, during which the owner was stabbed. Smith's status as a probationer specifically allowed for warrantless searches of her person and residence. As a result, officers went to Smith's reported residence to search for her. Smith's mother (Smith's Mother) answered the door and objected to the officers' entry without a search warrant. The officers entered the home anyway and ultimately also searched an adjacent duplex unit; Smith was not present at either location. Smith's Mother and minor granddaughter sued the City of Santa Clara (City) under § 1983, arguing the search violated their constitutional rights. The case went to trial and the jury found in the City's favor, prompting an appeal.

The heart of the case revolved around two Supreme Court decisions. First, the City argued that the search was lawful because the Supreme Court's *Knight* decision holds that officers may search a probationer's residence without a warrant if they have reasonable suspicion that the probationer subject to a search condition is engaged in criminal activity. On the other hand, Smith's Mother argued the Court's more recent *Randolph* rule, which found unlawful a warrantless search as to a co-occupant of a residence when the search is justified only by another occupant's consent to the search but the co-occupant is physically present and objects. Although Smith may

have been deemed to consent to the search by virtue of her status as a probationer, she was not present--Mrs. Smith was physically present and objected.

The Ninth Circuit thus, as succinctly as possible, stated the question before it as: "Is a warrantless search of a residence that the police have probable cause to believe is the residence of a probationer, and that is otherwise reasonable as to the probationer, unreasonable as to a non-probationer occupant of the residence who is present at the time of the search and refuses to consent to the search?" After a thorough history of the two cases, the Circuit held that probation searches are *not* analyzed as consent searches, the former having to do with the totality of the circumstances (the probationer status being one) and the latter being an issue of whether or not a co-habitant present consents or objects to the search. Since *Randolph* created an exception to the consent rule, it had no application in the case at hand, which was squarely about probation.

Turning then to the facts established in the case for the totality of the circumstances analysis, the Circuit found that Smith's third-party rights were outweighed by the government's interest in locating a felony probationer (who already had a lower expectation of privacy) that officers had probable cause to believe stabbed someone in the course of a vehicle theft. In concluding its remarks, the Circuit stated thoroughly and clearly that its conclusion was limited to "the facts of this case," and that it had no opinion as to what would happen "in a case in which the police conduct a search-over the objection of a present and objecting co-occupant-of a probationer's residence who is on probation for offenses that are neither violent nor serious, and who is not suspected of involvement in a subsequent offense."

LINK

Speech: Montana Prohibition against Judicial Candidates' Use of Political Endorsements Serves Compelling Interest and is Narrowly Tailored

French v. Jones, no. 15-35990 (9th Cir. Dec. 7, 2017).

Efforts by a judicial candidate in Montana to strike the state's law prohibiting his use of political endorsements have failed; based on Supreme Court guidance, the Ninth Circuit upholds the lower court decision finding that such a law is narrowly tailored and is neither over-inclusive nor under-inclusive.

Montanans select their judges through nonpartisan popular elections. In an effort to keep those elections nonpartisan, Montana prohibits candidates from using political endorsements in their campaigns: "[A] judge or judicial candidate shall not . . . seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate . . . ." In 2014, Mark French (French) ran as a candidate for justice of the peace in Sanders County. The Sanders County Republican Central Committee endorsed his candidacy, and two prominent Republican officeholders were willing to consider doing so if French had asked. Afraid of violating the rule, French refrained from seeking or using these endorsements in his campaign. He ultimately lost the election, but intends to run again in 2018. He wants to use endorsements, and sued to invalidate the Montana rule on the grounds that it violates his First Amendment rights.

The district court rejected French's argument and entered summary judgment against him.

The Ninth Circuit affirmed. It recited that content-based restrictions on judicial-campaign speech are subject to strict scrutiny, requiring the government to show that "the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 340, (2010) (citation omitted). The Circuit reviewed the Supreme Court's treatment of

similar campaign speech restrictions in *White I* and *Williams-Yulee,* discerning "a clear shift in favor of state regulation." While *White I* had struck a restriction because the compelling state interest - judicial impartiality-was not adequately articulated, *Williams-Yulee* moderated that posture significantly.

In contrast to *White I*, the *Williams-Yulee* Court did not attempt to define precisely what judicial integrity or impartiality means. Instead, it emphasized that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse . . . .' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 1666 (quoting *The Federalist No. 78*, at 465). The Court found the Florida statute being challenged was neither over-inclusive nor under-inclusive and allowed the prohibition to stand.

On that basis, the Ninth Circuit upheld the restriction: "We hold that Montana has compelling interests in an impartial and independent judiciary. Rule 4.1(A)(7) is narrowly tailored to those interests because it strikes an appropriate balance between a candidate's speech and Montana's interest in an independent and impartial judiciary. French's arguments to the contrary are foreclosed by the Supreme Court's decision in *Williams-Yulee* . . . "

LINK

Speech: Prohibition against Religious Ads on Public Buses Does Not Violate First Amendment or RFRA

Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, No. 17-2554 (D. D.C. Dec. 8, 2017).

The District Court in Washington DC has upheld the policy of the City's public bus company against placing religious ads on its buses, finding that, as a limited public forum, the government has the right to impose reasonable restrictions on categories of speech so long as the policy does not discriminate among religious views.

The Archdiocese of Washington and Donald Cardinal Wuerl, Roman Catholic Archbishop of Washington (collectively Archdiocese) sought to place an advertisement on the exterior of buses operated by the Washington Metropolitan Area Transit Authority (WMATA) as part of the Archdiocese's "Find the Perfect Gift" Christmas campaign.

As the Archdiocese explained:

> The Find the Perfect Gift campaign is an important part of the Archdiocese's evangelization efforts. . . . The campaign seeks to invite the public to consider the spiritual meaning of Christmas, to consider celebrating Advent/Christmas by going to Mass at one of our parishes and/or joining in one of our many outreach programs that care for the most vulnerable and poor during Advent and beyond.

WMATA rejected the ads as inconsistent with its advertising guidelines (Guidelines), in particular, the Guideline prohibiting "[a]dvertisements that promote or oppose any religion, religious practice or belief."

The Archdiocese filed a five count complaint that asking that the Guideline be declared unconstitutional; because the advertising campaign is specifically tied to the liturgical season of

Advent, which has already begun, it moved for a temporary restraining order and preliminary injunction that would direct WMATA to immediately accept the advertisements.

The district court declined. Noting that emergency injunctive relief is an extraordinary remedy that may only be awarded based on a substantial showing that the plaintiff is likely to succeed on the merits of the claims, it found the applicable constitutional principles to be "quite clear."

While private religious speech is protected under the Free Speech Clause to the same degree as secular speech, that rule does not necessarily apply when government property has not been designated or made available for broad public use for communicative purposes. "Control over access to a nonpublic or limited forum may be based on the subject to be discussed as long as: the lines drawn are reasonable given the purpose of the forum involved, they do not favor one viewpoint over another, and they are consistently applied."

It is settled as a matter of law that the exterior of a bus is not a public forum open to anyone who wishes to address any topic. WMATA had determined not to accept advertisements related to potentially divisive topics such as politics or religion out of well-founded concerns for the safety of the public and WMATA employees and a desire to reduce vandalism and the administrative burden of reviewing proposed ads.

The Archdiocese tried unsuccessfully to characterize WMATA's action as depriving it of the right to express a sincerely held religious belief under RFRA. The court was unpersuaded:

> Neither the Guideline nor its application in this case interferes with plaintiff's right to practice its religion in any way, and it does not compel the Archdiocese to take any action that burdens its sincere religious convictions. The Guideline does not establish any preference for or against one religion over another, and it is neutral and generally applicable, and therefore, WMATA's decision in this case does not violate either the Constitution or RFRA.

The Archdiocese also argued that it was deprived of the opportunity to express its view of Christmas, while allowing other entities to express Christmas messages. The court found that the other complained-of advertisements were hardly comparable:

> [T]he ads heralding the opening of another CorePower Yoga fitness studio in Clarendon, Virginia ("Muscle + Mantra"), nor the ads soliciting contributions to the Salvation Army's Red Kettle effort ("Give Hope. Change Lives") "promote or oppose any religion." While the Salvation Army is a Christian organization, and its charitable efforts, like those of the Archdiocese and other religious organizations, may be motivated in some measure by religious beliefs, the ads it chose to display on the buses do not promote or advance religion.

Motion for restraining order denied.

LINK

Speech/Religion: CUP Wording Limiting Property's Use for Weddings is Overly Broad, But Homeowner is Not "Institution" under RLUIPA

Epona, LLC v. County of Ventura, No. 17-55472 (9th Cir. Dec. 7, 2017).

A California property owner may proceed with a First Amendment challenge to a Conditional Use Permit process which gives the county unbridled discretion to allow or

deny weddings on his property-but the Circuit was unwilling to allow the plaintiff also to fit within the parameters of RLUIPA, because he is not an "institution."

Michael Fowler is the sole member of Epona, LLC (Epona). He owns a 40-acre parcel in Ventura County, California (County) zoned for agricultural use and surrounded by either agriculturally-employed properties or those designated as open space. Fowler sought to use his acreage for up to 60 weddings a year. Such use is only allowed in the zone with a Conditional Use Permit (CUP) and his application for one was denied by the Planning Commission and, on appeal, that decision was affirmed by the Board of Supervisors. Epona filed a federal suit alleging, among other things, the CUP provision violated Epona's First Amendment rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court granted the County's motion to dismiss on both claims and Epona appealed.

The Ninth Circuit first tackled the district court's refusal to allow Epona to file a facial challenge - as opposed to an as applied challenge - to the County's CUP provisions under the First Amendment. The Court agreed with the general premise that facial challenges are disfavored, but pointed out that the Supreme Court allows facial challenges to prior restraints of protected speech for two reasons: "(1) [when] such restraints may have a chilling effect on protected speech because potential speakers may choose to self-censor rather than either acquire a license or risk sanction for speaking without one; and (2) where a regulation lacks clear standards for the issuance of a permit, [and thus] an as-applied challenge may fail to provide sufficient protection against content-based censorship."

Epona specifically challenged the CUP provision because it granted unbridled discretion to County permitting officials by way of lacking definite and objective standards. The Circuit agreed with Epona, noting the CUP contained seven conditions under which it would be granted if the applicant proved "to the satisfaction of the appropriate decision-making authority" that the proposed use was not "detrimental to the public interest," was "consistent with the intent" of the County zoning codes, was "compatible with existing and potential land uses in the general area," and the like. The Circuit found these standards were not defined elsewhere by any objective criteria and therefore did lack definite and specific standards, meaning Epona should have been able to bring a facial challenge. The Circuit reversed the lower court on the issue.

In order to bring an equal treatment claim under RLUIPA, "(1) there must be an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution, and (4) the regulation must treat the religious assembly or institution on less than equal terms with a nonreligious assembly or institution." Epona argued it did not need to be an institution or assembly to bring such a claim, a seemingly novel argument in the Ninth Circuit. The Circuit did not expound on the issue, but simply stated the language of all its decisions use the term "religious assembly or institution" and that such a holding was consistent with the Third, Fifth, and Eleventh Circuit holdings on the matter. It also rejected Epona's tangential argument that having Article III standing was sufficient to permit its claim under RLUIPA, flatly rejected this in one sentence noting Epona had to satisfy both Article III requirements and the elements of an equal treatment claim under the statute at issue - RLUIPA. It affirmed the lower court on this issue.

The Circuit vacated the lower court's denial of Epona's motion for preliminary injunction and remanded on the First Amendment claim.

LINK

Statutes: Two-Year Time Limit for False Imprisonment Filing Commences on Release from Incarceration, Not Bond Release

Brown v. Dart, No. 16-4179 (7th Cir. Dec. 5, 2017).

An Illinois inmate could not bring a false imprisonment claim against a sheriff and Cook County more than two years after he was physically released from incarceration-the fact that his liberty to leave the state continued for another month after release under the terms of his bond did not extend the statute of limitations.

At the sentencing of Milan James Brown (Brown) for a probation violation, the judge specifically stated he was to be released in September of 2013. In August 2013, however, the Cook County Jail told Brown he would not be released until March 2014. Brown filed a petition for a writ of habeas corpus in state court and it was heard in December, at which time the court determined he should have been released in September and immediately released him, on December 16, 2013, on $50,000 bond. The bond was released on January 17, 2014. Brown filed a §1983 complaint on December 30, 2015 against Cook County and the sheriff therein. The district court granted the defendants' motion for judgment on the pleadings, holding all the claims were time barred.

The sole issue surviving on appeal to the Seventh Circuit was whether Brown's § 1983 claim of false imprisonment was timely filed, and the Circuit affirmed the district court finding that it was not. §1983 time limits are set by state law and in Illinois such claims may be brought within two years after accruing. Slightly confusingly however, the *date of accrual* is determined by federal law, which for false imprisonment is the day the imprisonment ends. Brown was released on December 16, 2013 and therefore his filing on December 30, 2015 was time-barred.

Brown argued the time he spent on bond between December 16, 2013 and January 17, 2014 was also a restriction of his liberty that extended the deadline for being falsely "imprisoned." The Circuit disagreed, holding "imprisonment" is defined narrowly in the context of a constitutional deprivation, even though the Seventh Circuit, generally, has characterized the prohibition against leaving the state (a term of Brown's bond) as imprisonment. The lower court was affirmed.

LINK

Trials: Comity Prevents Federal Court from Considering Taxpayers' Section 1983 Claim Arising from County Taxation Dispute

Cosgriff v. County of Winnebago, No. 17-1396 (7th Cir. Dec. 1, 2017).

Upholding the district court, and in deference to the state, the Seventh Circuit has declined to hear a case brought by taxpayers who alleged that the county unconstitutionally retaliated against them by exponentially increasing their property tax valuation, finding that the taxpayers had adequate recourse within the state judicial framework.

A Roscoe Township (Township) employee entered the property of Kelly and Anita Cosgriff (Cosgriffs) to reassess the property value after they built a pool and during the visit a government employee was bit by their dog. The Township and the employee sued the Cosgriffs, prompting them to put up a "no trespassing" sign and launch a petition to encouraging other residents to notify the assessor and its employees not to trespass on their own property. The assessment of the Cosgriff property thereafter was 47.14% higher than the previous year, increasing the fair market value from $357,000 to $525,000, despite the Cosgriffs adding only a $50,000 pool. The Cosgriffs challenged the assessment at the Winnebago County (County) Board of Review and

won. They then sued the County in federal court via §1983, alleging the County acted unconstitutionally by increasing the property valuation in response to the Cosgriffs' speech about trespassing. The district court dismissed the case based on comity principles.

The Seventh Circuit noted that §1983 is quite broad and appears to give state taxpayers access to a federal cause of action, but that a closer look at constitutional principles undercuts that superficial appearance. The comity doctrine counsels federal courts to resist interfering or engaging with some cases that nonetheless fall within their jurisdiction to respect the legal sphere of states--and specifically the Supreme Court has recognized state taxation issues as squarely within the doctrine's realm. Congress recognized this principal as well, enshrining it in 28 U.S.C. § 1341, under which federal "district courts [are] not [to] enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had" in state court.

The Cosgriffs tried to argue around comity, so to speak, by saying their concerns were not with the tax itself, but with the County and individual defendant's unconstitutional actions. The Circuit considered this a "distinction without a difference." Furthermore, the Circuit was quick to point out that the Cosgriffs obtained relief through the appeals system in the state and that, had they not, this constitutional argument (and any others) could have been made at the state level, evidencing the precise "focus on the procedural sufficiency of state remedies, not their substantive outcomes" that exemplifies the comity doctrine. The Circuit affirmed the lower court.

LINK

Trials: Where Legislature Amends Voting Law during Appeal, Challenge to Nominating Convention Timing Dismissed as Moot

Libertarian Party of Arkansas v. Martin, No. 16-3794 (8th Cir. Nov. 30, 2017).

The Arkansas Libertarian Party succeeded in obtaining a declaratory judgment that the State's nominating convention timing policies were unconstitutional, but did not obtain an injunction; on appeal, the Arkansas General Assembly modified the timing provisions, greatly expanding the time in which new parties could get on the ballot. Declining to accept the Libertarians' argument that there was a possibility that the State could again revert to its earlier, more draconian timing policies, the Eighth Circuit dismissed on the grounds of mootness.

In Arkansas the ballot access scheme required new political parties to hold a nominating convention prior to the major parties' preferential primary election. The Libertarian Party of Arkansas (Libertarians) filed suit alleging the scheme violated the First and Fourteenth Amendments. When the district court granted declaratory relief, denied injunctive relief, denied the Arkansas Secretary of State's motion to reconsider, and awarded costs and attorney's fees to the Libertarians, the Arkansas Secretary of State appealed the case. While the appeal was pending, the Arkansas General Assembly amended its statute to allow new political parties to hold their nominating convention and submit their certificates of nomination at 12:00 p.m. on *the day of* the major parties' primary election, presenting the Eighth Circuit with the potentiality of a moot case on its hands.

The Libertarians argued the case was not moot, but the Eighth Circuit deemed it otherwise. First and foremost, the Circuit recited that mootness could infect any stage of a case and that actions seeking declaratory and/or injunctive relief are subject to dismissal "[w]hen a law has been

amended or repealed . . . unless the problems are capable of repetition yet evading review." The Libertarians' threshold argument was that the legislature's action did not moot the case since independent parties were still forced to hold their nominating party before the primary election in order to meet the 12:00pm deadline and, secondarily, that the previous requirements could be reenacted, making the entire issue capable of repetition. As for the first argument, the Circuit declined to review it on first impression - leaving it to the lower court should the Libertarians file a new suit. The latter argument met with succinct denial as well, in which the Circuit noted its agreement with the Fourth Circuit's precedent "that statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."

This meager exception - described as rare - was when there was virtual certitude that a law would be reenacted. Since no such facts were present in the case, the Circuit deemed the case moot and directed it be dismissed-but affirming the lower court's grant of $29,612 in attorney's fees and costs to the Libertarians.

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