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Employment: Jury's Assessment of *Reid* Factors and Determination of Plaintiff's Employment Status was not Prejudicial

Knight v. State University of New York at Stony Brook, No. 17-54-cv (2d Cir. Jan. 29, 2018).

The Second Circuit has found that a jury's assessment of factual questions surrounding a worker's employment--and application of those facts to determine the legal question as to whether an employment relationship was created-was reasonably within the parameters of a general verdict.

Anthony Knight (Knight), an African American, worked as an electrician and was a member of the International Brotherhood of Electrical Workers, Local 25 (Union). The Union had an arrangement with the State University of New York at Stony Brook (SUNY) under which it referred electricians to SUNY when the school needed to supplement its own workforce. Knight reported that racist graffiti had been inscribed on the wall of a restroom he used at the job site. He was subsequently terminated. Knight sued SUNY, alleging he was discriminated against based on race and retaliated against for reporting the graffiti. The case went to a jury trial and the judge submitted the issue of whether Knight was an employee of SUNY (a key factor in Knight's surviving a motion

to dismiss) to the jury.

The jury determined Knight was not an employee and Knight appealed, arguing the lower court improperly submitted that question of law to the jury.

Knight's appeal argument was short: that his status as an employee was a legal question to be determined only by the court after the jury had made relevant factual findings. The Circuit focused on the fact that district courts always have discretion to call for general verdicts, which are informed by instructions from the judge. The court determined that the jury had properly assessed the *Reid* factors which guide the determination of employee status. Those factors are:

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730,751-52 (1989).

Here, the court found that the jury's assessment of the *Reid* factors as applied to Knight's circumstances, and its determination, based on instructions from the court, that Knight was not an employee of SUNY, was not prejudicial to his case. It affirmed the lower court.

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Opioids: Revocation of Pill Mill Pharmacy's CSA Registration is not Arbitrary or Capricious

Jones Total Healthcare Pharmacy, LLC v. DEA, no. 16-17346 (11th Cir. Jan. 29, 2018).

In a small measure of victory on the war on opioid diversion, the Eleventh Circuit has upheld the DEA's revocation of a Fort Lauderdale pharmacy's authorization to dispense controlled substances.

Cherese Jones (Jones) graduated from Texas A&M University with a Doctor of Pharmacy degree in 2000 and worked in clinical and retail pharmacy positions before opening Jones Total Healthcare Pharmacy LLC (Jones Pharmacy) in Fort Lauderdale in February 2010.

Jones Pharmacy was registered with the Drug Enforcement Administration (DEA) to dispense substances controlled by the Controlled Substances Act, 21 U.S.C. § 801, *et seq* (CSA). In 2013, Jones sought to open a second entity, SND Healthcare LLC (SND), and submitted an application for registration to dispense controlled substances through that entity.

The CSA creates "a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *See Gonzales v. Raich*, 545 U.S. 1, 13, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). Pharmacies that dispense prescription medications that are controlled substances are required to obtain proper registration from the Attorney General (AG). *See* 21 U.S.C. §§ 822(a), 823(f); *Gonzales v. Oregon*, 546 U.S. 243, 250-51, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006). Under the CSA, the

responsibility for the proper prescribing and dispensing of controlled substances, which must be for "a legitimate medical purpose," is on the prescribing practitioner, "but a corresponding responsibility rests with the pharmacist who fills the prescription." 21 C.F.R. § 1306.04(a). Thus, pharmacists have a "corresponding responsibility" to refuse to fill prescriptions that are not issued for a legitimate medical purpose.

The AG has the authority to deny, revoke, or suspend registrations (s*ee* 21 U.S.C. §§ 823(f), 824(a)) and has delegated this authority to the DEA. When an existing registration is to be revoked, the DEA must serve an order to show cause giving the registrant an opportunity for a hearing before an Administrative Law Judge (ALJ). *See* 21 U.S.C. § 824(c).

In October 2014, the DEA issued an order to show cause proposing to revoke Jones Pharmacy's registration and to deny SND's application. The DEA alleged that, from February 2010 to July 2012, Jones Pharmacy "repeatedly failed to ensure that it filled only prescriptions issued for legitimate medical purposes within the usual course of professional practice." Jones Pharmacy, according to the order, repeatedly ignored "obvious and unresolvable red flags of diversion."

Jones requested a hearing, at which a DEA diversion investigator and a Pharmacy Inspector for the Florida Department of Health provided testimony. This included a review of over 100 prescriptions filled by Jones Pharmacy which contained "red flags"-indicia that the prescriptions were not issued for a legitimate medical purpose-including the following:

> (1) individuals traveling long distances to fill prescriptions; (2) prescriptions for drug "cocktails," known for their abuse potential, such as oxycodone and Xanax; (3) individuals who arrived together with identical or nearly identical prescriptions; (4) purported pain patients with prescriptions for immediate-release rather than long-acting narcotics; (5) cash purchases; and (6) doctors prescribing outside the scope of their usual practice.

The ALJ cited evidence that, of more than 3,000 controlled-substance prescriptions filled in the two year period, 99% were for immediate-release drugs, 89% were for "cocktail" drugs, and 93% were paid for in cash. These statistics were "unusually high compared to national averages." (For instance, the national average for cash sales between 2007 and 2011 was 6%). The ALJ also found that Jones Pharmacy's high markup on the price per pill-including 415 instances where the markup on the price per pill was over 1,000%-combined with the high rate of cash-based customers indicated diversion--"it elucidates a customer base willing to pay exorbitant prices for a drug the customer could otherwise purchase at a nearby pharmacy for much less."

The ALJ rejected Jones' contention that she was unaware of the concept of "red flags" and that she did not know or have reason to know that the prescriptions she filled were not written for a legitimate medical purpose. To the contrary, the ALJ concluded that "the concept of red flags has long been recognized as a reflection of the norms of the pharmacy profession."

Having found that the government met its burden of establishing a *prima facie* case that revocation of Jones Pharmacy's registration was in the public interest, the ALJ addressed whether she adduced sufficient evidence to show that she could be trusted with a registration going forward. A registrant must establish two things to rebut the government's *prima facie* face: (1) full acceptance of responsibility and (2) remedial measures so that such violations will not happen in the future. Based on Jones's testimony, the ALJ determined that she had not fully accepted responsibility for unlawful dispensing of controlled substances. Citing agency precedent holding that acceptance of responsibility is an independent and essential requirement for rebutting the government's *prima facie* case, the ALJ declined to address Jones Pharmacy's remedial efforts. The DEA Acting Administrator adopted the ALJ recommendation and declined the registrations.

Jones filed a petition for review to the Eleventh Circuit.

The Circuit may set aside the Acting Administrator's final decision if it is "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with the law," but "the arbitrary and capricious standard is exceedingly deferential." (citation omitted). The court may not substitute its judgment for that of the agency so long as its conclusions are rational and based on the evidence before it. The applicable standard is "substantial evidence"--less than a preponderance of the evidence, but rather such relevant evidence as a reasonable person would accept as adequate to support a conclusion.

Jones did not dispute that the government had met its initial burden of proving that Jones Pharmacy's registration was inconsistent with the public interest. She instead challenged as arbitrary and capricious the DEA's determination that Jones Pharmacy did not prove that it could be trusted with a registration notwithstanding the prior misconduct. And she contended that the DEA's choice of the most severe sanction-revocation-was inconsistent with prior agency decisions that either suspended or continued registrations despite more egregious misconduct.

The court addressed each of Jones' arguments. It found from her testimony substantial evidence to support the DEA's determination that she did not credibly accept full responsibility. For example, she had indicated on cross-examination that she did not understand that the law required her to make sure that prescriptions were issued for legitimate medical purposes before filling them. And she did not admit that Jones Pharmacy's past dispensing practices failed to comply with its legal obligations. Recognition of responsibility for past failures was a significant indicator of an applicant's propensity to comply with its responsibilities in the future, and Jones failed on that score. Importantly, the Circuit also held that the agency's refusal to consider Jones Pharmacy's remedial measures did not render its decision arbitrary or capricious in the circumstances of the case:

> Here, the DEA's refusal to consider Jones Pharmacy's remedial measures does not render the decision to revoke its registration arbitrary and capricious. The Acting Administrator explained that, based on the scope and duration of misconduct, Jones's failure to acknowledge that misconduct, and her testimony that she still does not understand the scope of a pharmacist's obligations under the CSA, he had no confidence that either entity owned or operated by Jones . . . would faithfully comply with the CSA.

Finally, the Circuit found the chosen sanction-refusal to register Jones' entities--was not arbitrary or capricious. The DEA's "choice of sanction is entitled to substantial deference." And "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law.'" Therefore the agency's sanctions will only be set aside if they represents a "flagrant departure" from agency policy and practice.

Here, Jones could not show that the other DEA's choice of sanction was unwarranted in law or without justification in fact. The DEA decisions she relied on were distinguishable because in each, the registrant had rebutted the government's case by, among other things, admitting fault or expressing remorse.

LINK

Search: Regulations Allowing State's Warrantless Searches of Precious Metals Dealers Records are Narrowly Tailored to Curb Illegal Market

Liberty Coins, LLC v. Goodman, No. 16-3735 (6th Cir. Jan. 22, 2018).

Rebuffing a challenge from an unlicensed precious metals dealer, the Sixth Circuit has upheld Ohio's requirement that dealers keep certain records of their transactions and submit them to warrantless searches--although provisions allowing wider warrantless

searches of all the dealers' business records were impermissibly broad.

Ohio has a Precious Metals Dealers Act, under which state agents and local law enforcement are empowered to inspect certain records, articles, and information kept by precious metals dealers without first obtaining a warrant. Liberty Coins, LLC (Liberty) deals in coins and never obtained a license as required by the law and, after receiving letters and communications from the state about not being licensed and then being required to turn over records, filed suit alleging the law was facially invalid under the First, Fourth, and Fourteenth Amendments. After the district court held four provisions dealing with warrantless searches were unconstitutional, the Fourth Amendment claim was the only one that survived to appeal at the Sixth Circuit.

The Circuit Court first determined that the precious metals industry is a closely regulated industry, using the three *Burger* factors - "(1) the pervasiveness and regularity of regulations governing an industry; (2) the duration of a particular regulatory scheme; and (3) whether other states have imposed similarly extensive regulatory requirements." Having made that initial determination, the Court delved into each of the four state law provisions in turn, applying *Burger's* next set of rules.

To determine whether warrantless searches were necessary, the Court applied *Burger's* three-part test to each of the four provisions at issue. The first part of *Burger*, however, was conceded by the parties - that the state has a substantial interest in regulating precious metals - leaving only two parts at issue: 1) "whether the warrantless searches are necessary to further the state's proffered interests and 2) whether the statutory provisions serve as adequate warrant substitutes." The first two provisions - § 4728.05(A), allowing the state to "investigate the business" of both licensees and non-licensees who deal in precious metals via free access to the books and papers of the businesses, and §4728.06, requiring licensees to maintain books and records in a form approved by the state - were deemed narrowly tailored to Ohio's interest in curbing the illegal market for precious metals. Specifically, the Circuit noted metals are "fluid and transitory" articles, making tracking stolen ones quite difficult, and making the laws at issue fruitful in furthering the government interest in curbing that activity.

The second set of laws - § 4728.07, requiring licensees to keep separate records for the benefit of local police departments and § 1301:8-6-03(D), providing the authority to inspect "at all times" the "books, forms, and records, and all other sources of information with regard to the business of [a] licensee" - did not fare so well. These, the Circuit agreed with the lower court, were both too broad and did not further the government's interest. The court noted that, under these regulations, the state can investigate the entire business (not just discrete information); the reason proffered by the state of ensuring compliance with the precious metals laws in general did not tell the Court why a *warrantless* search would be needed (rather than a warrant-based one). The lower court was thus partially affirmed and partially reversed.

LINK

Search: Section 1983 Challenge to DNA Swab after Acquittal is a Personal Injury Claim and Survives Original Claimant's Death-Allowing Estate to Attack Swab Policy

Crabbs v. Scott, No. 17-3854 (6th Cir. Jan. 22, 2018).

Where an Ohio sheriff would not release an arrestee who had been acquitted of felony charges until he obtained a DNA swab, the arrestee's resulting Fourth Amendment claim was for personal injury and could be asserted by his estate after his death.

In December 2010 Keith Crabbs (Crabbs) surrendered to the Franklin County Sheriff's Office

(Sheriff) for a charge of voluntary manslaughter. He was released on bond. His case proceeded to trial and during it Crabbs violated a release term and his bond was revoked. Thus, Crabbs was taken in to custody by the Sheriff, at which point Ohio's law requiring sheriffs to collect a DNA specimen of anybody "arrested on or after July 1, 2011, for a felony offense" kicked in and his cheek *should* have been swabbed. It never was, however, and Crabbs was acquitted at trial.

When the Sheriff refused to release him from jail after the acquittal until a DNA cheek-swab was taken, Crabbs filed a §1983 suit against the Sheriff alleging the DNA-collection hold policy, when applied to acquitted defendants, violated the Fourth Amendment. Crabbs died before the case concluded, prompting his mother and estate representative to step in in his place, but her motion was denied by the district court. It held the §1983 claim did not survive Crabbs' death.

The Sixth Circuit looked first to federal law to determine whether §1983 speaks to survivorship. It does not, and thus the Circuit followed Supreme Court guidance and referred to the law of the forum state - here Ohio - to import. Ohio does have a survivorship statute and it specifically provides survivorship for "causes of action for . . . injuries to the person." To determine whether a §1983 action is a personal injury action, it looked to precedent and found the Supreme Court holds just that. The Court neatly summed up its conclusion: "[Crabbs'] Fourth Amendment claim is a personal injury action under [Supreme Court precedent in the] *Wilson* and *Owens* [cases] and thus qualifies as a "cause[] of action for . . . injury to the person" under the Ohio statute and survives his death." Thus, his mother could step in, enabling the case to proceed.

It will no doubt will generate an interesting issue regarding Ohio's DNA-swab law and acquitted defendants.

LINK

Seizure: Although Disorderly Conduct Stop was not Justified, Subsequent Frisk was not Inherently Unlawful and was Justified under *Graham* Standards

Haze v. Kubicek, No. 17-1037 (7th Cir. Jan. 30, 2018).

A Milwaukee police officer's frisk of a man improperly ticketed for disorderly conduct was not unlawful-the search was governed by reasonableness under *Graham* and did not depend on the legitimacy of the initial disorderly stop.

Darrell Haze (Haze) was stopped and ticketed for disorderly conduct after a Bucks game outside the Bradley Center in Milwaukee, being frisked in the process. He fought the ticket and won the case, to filing suit against the officer at issue - Mark Kubicek (Kubicek). After the jury returned a split verdict-finding that the initial stop was unlawful but the officer did not use excessive force-Haze argued that it was fatally inconsistent. The district court rejected the argument, leading Haze to appeal.

The Seventh Circuit summarized Haze's argument as stating that "because a frisk pursuant to an unlawful stop is unlawful . . . it follows that any use of force pursuant to an unlawful stop-even *de minimis* force-is necessarily excessive and thus unreasonable under the Fourth Amendment." The Circuit disagreed. The court pointed out that the lawfulness of a stop is a separate and distinct question of law - subject to a distinct legal test - from the issue of whether, once detained, an officer employed excessive force against a person. The first question involves whether an officer had adequate suspicion to stop a person and the second inquiry focuses on the reasonableness of the force used as evaluated under the *Graham* factors and in light of the totality of the circumstances.

Thus, though both are subject to the reasonableness standard of the Fourth Amendment, the tests are independent and the jury legitimately found here that "although Kubicek lacked adequate suspicion to justify a temporary detention, whatever degree of force he later used as the encounter evolved was not excessive under all the circumstances." The lower court was affirmed.

LINK

Speech: Probation Officer's False Statements under Oath are not Protected Speech and are Fair Grounds for Termination

Jones v. Wilson County, No. 17-5615 (6th Cir. Jan. 24, 2018).

Citing *Lane*, the Sixth Circuit has upheld a lower court determination that a probation officer's false statement under oath was not protected under the First Amendment and could be grounds for job termination.

Rachel Jones (Jones) worked as a probation officer for Wilson County, Tennessee (County), a job that includes reporting to courts and answering questions about probationers under oath. In one such session, Jones allegedly did not tell the truth - as required - and was terminated. She filed suit alleging this violated her First Amendment rights. Her case was dismissed on the County's motion for summary judgment, leading Jones to appeal.

The Circuit set the tone for the case by setting forth that *Garcetti* controls questions of public employee statements being protected under the First Amendment, and that the "first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Jones claimed the lower court erred because "testimony in open court is always a matter of public concern," and thus it should have proceeded beyond this first step of *Garcetti.*

The Sixth Circuit rejected this theory by pointing to the Supreme Court's opinion in *Lane*. There the Court analyzed whether a plaintiff's sworn testimony that was made *outside* his job duties was speech as a citizen for First Amendment purposes. The Circuit reasoned that if Jones's argument were true the speech in *Lane* would have been a matter public concern and the Court would have forgone the long, winding investigation of "First Amendment protections as applied to an employee who gives testimony *related* to his employment but *outside* the scope of that employment." As for Jones' speech, the Court easily found that testifying in court was part of her job duties and the alleged false statements were thus made pursuant to employment, compelling her claim to fail. The lower court was affirmed.

LINK

Trials: Federal Court Cannot Review State Child Protective Actions which are now Moot; Later Factual Changes can be Evaluated at State Court

Milchtein v. Chisholm, No. 17-1420 (7th Cir. Jan. 29, 2018).

Affirming the result at the lower court, the Seventh Circuit has confirmed that parents

challenging Wisconsin protective proceedings regarding their now-adult children did not have a case cognizable in federal court; although not barred under *Rooker-Feldman*, the parents' current claim was essentially for a purely advisory opinion and any future claim based on their remaining minor children would not be justiciable in federal court under *Younger* abstention.

After the two oldest of Alexander and Esther Milchtein's (Milchteins) fifteen children refused to return home, they were placed in foster care by the Wisconsin state court system. The Michelsteins filed a federal lawsuit alleging the state officials violated their constitutional rights by either discriminating against or failing to accommodate their views of family organization and management under Orthodox Judaism. The district court found that, because the two children are now adults and the proceedings with respect to them are closed, the issue was moot.

On appeal, the Seventh Circuit handled the arguments raised by the Milchteins. They argued that the case is not moot because "the district court could have entered a declaratory judgment about the propriety of Wisconsin's actions, [and because] they still have twelve minor children, any of whom might run away and precipitate the same sort of controversy." The Circuit deemed the lower court's approach to the first issue under the *Rooker-Feldman* doctrineincorrect. Under that rule only the Supreme Court can review civil state court decisions and all other federal courts are to withhold analysis in such cases. However, here the Circuit pointed out that the Milchteins were not asking the court to alter the judgment of the state court, rather they sought a federal holding about the incorrectness of the state judgment (but not any relief). Therefore, *Rooker-Feldman* did not bar their suit: "The vital question . . . is whether the federal plaintiff seeks the alteration of a state court's judgment. The Milchteins do not, so the Rooker-Feldman doctrine does not block this suit."

However, the gist of the Milchtein's case was for an advisory opinion: "What does block [the suit] is the requirement of justiciability. The Milchteins want a federal judge to say where a state judge erred but not do anything about the errors. That is a naked request for an advisory opinion." To the extent that the Milchteins were not seeking an advisory opinion because they have more children and the process could repeat itself - it ran up against the *Younger* doctrine. *Younger* counsels that federal courts should not intervene in pending state prosecutions and has been extended to civil cases. For the Milchteins' case the Circuit summarized that if another child welfare case arose with another of their children, *Younger* dictates "a federal court should abstain and let the Milchteins present their constitutional arguments to the state officials."

The lower court's refusal to exercise jurisdiction was affirmed.

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