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Due Process: Sheriff's Duty to Provide Animal Shelter Director a "Name-Clearing" Hearing before Publishing Damaging Public Statements was Clearly Established

Johnston v. Borders, No. 17-10642 (11th Cir. Feb. 9, 2018).

A Florida Sheriff who published three separate accounts detailing the alleged complicity of a newly-hired animal shelter director in euthanizing dozens of cats and dogs needlessly, without giving her notice of a name-clearing hearing, could not assert that she had failed to exhaust her state remedies and could not escape Section 1983 litigation.

In August 2014 Jacquelyn Johnston (Johnston) was hired as the Director of the Lake County, Florida Sherriff's Office Animal Services Division. She began her job on October 1 and, according to her, was told by her supervisor (a major in the Sheriff's Office) to take her time learning Shelter policies and to defer questions to Jennifer Ferguson (Ferguson), the long-time kennel supervisor. One week later when Ferguson told her the Shelter was at capacity and animals waiting outside in dangerous conditions could not be admitted until space was available, Johnston responded by asking whether rescue organizations had been contacted as a last resort

(Ferguson said yes) and then told Ferguson to follow protocol and proceed as she would have prior to Johnston's arrival.

This resulted in Ferguson ordering twenty animals to be euthanized in one day, which the euthanasia technicians testified was run by Ferguson alone and was done so poorly that the technicians refused to comply. The public learned about it and outrage followed, leading the Lake County Sheriff Gary Borders (Sheriff) to fire Johnston immediately (on October 9) and put out three statements, each more damning than the last, and all squarely laying the responsibility on Johnston. This included the Sheriff saying "[s]ome of the animals were put down prematurely because the shelter was not yet at capacity even though Johnston gave the reason for euthanizing the animals as limited space. Johnston did not exhaust all the resources to save the animals and exercised bad judgment. [Sheriff] Borders wants the shelter to be as close to a no-kill shelter as possible. Because the killings happened on Johnston's watch, it was her responsibility." The story was covered nationwide, leading Johnston to suffer death threats and, in short, ending her career.

Johnston sued the Sheriff in both his individual and official capacity, alleging that he violated her Fourteenth Amendment rights by publishing false and stigmatizing statements in connection with her termination without giving her an opportunity to clear her name. The district court found that Johnston did not seek available state court remedies before bringing suit in federal court and dismissed her §1983 case.

The Circuit outlined the standard required of Johnston to establish that the Sheriff deprived her of a liberty interest. She had to prove: "(1) a false statement (2) of a stigmatizing nature (3) attending [her] discharge (4) made public (5) by [her] government employer (6) without a meaningful opportunity for employee name clearing." The court found, at least, some of the statements made by the Sheriff were false and stigmatizing, including that policy was not followed for the euthanasia performed under her short tenure and that the shelter space was not full (both contradicted by staff testimony). Stigmatization was not reasonably in dispute either. As for a meaningful opportunity to clear her name, the Sheriff argued it provided to the media, which published in full, a letter Johnston sent to the Sheriff defending herself. Johnston said this was not a name-clearing hearing and the Court noted curtly that the Sheriff "admitted that he did not know what a name clearing hearing was." The court held that sending letters did not count as such a "hearing."

As for adequate state remedies, here the Circuit flatly rejected the lower court ruling that remedies (certiorari and mandamus) had been were available. As for a writ of certiorari, it pointed out that since no name-clearing hearing took place, there was no record from which certiorari could be taken. As for a writ of mandamus, in Florida such relief is available "to enforce a clear legal right when a public official had an indisputable legal duty to perform the . . . action, and . . . no other adequate remedy [was] available." The Sheriff argued no violation occurred because *Johnston failed to enforce her right* to the name-clearing hearing. The court was having none of this, noting its *Buxton* opinion made clear that notice is required and it refused to "penalize Johnston for not knowing something our *Buxton* decision required Sheriff Borders to tell her."

The Sheriff's final escape lay in arguing he was entitled to qualified immunity from Johnston's § 1983 claim. The Court noted it already found a material dispute, leaving only the issue of whether the right was established. It found "several" of its opinions provided the Sheriff fair warning that his conduct was unconstitutional. Reversed and remanded.

LINK

Employment: City's Response to Sexual Harassment Complaint Was

Exemplary; Rude Behavior by Colleagues did not Support Retaliatory Termination Claim

Patsalides v. City of Fort Pierce, No. 17-10020 (11th Cir. Feb. 6, 2018).

Where the City promptly investigated a female police officer's allegations of inappropriate behavior by a male colleague, subsequently terminating him, it was not liable for his actions, and where the City thereafter terminated the plaintiff due to her excessive absenteeism, such action could not be characterized as "retaliatory" merely because fellow officers had been discourteous to her.

Nicole Patsalides (Patsalides) began working for the City of Fort Pierce (City) as a police officer. She spent three months in training and it was during this time - and two weeks of being a patrol officer thereafter - that she said a male co-worker touched her repeatedly in ways that she considered inappropriate, and in general showed an undue interest in her. She reported the conduct to her supervisor and immediately the City began an investigation, placed him on administrative leave, and soon thereafter terminated him. The City was clear this was a result both of Patsalides' report and the officer's past conduct, for which he had been reprimanded. Patsalides alleged she then experienced retaliation from co-workers for her reporting and EEOC filing and that, ultimately, her firing for excessive absenteeism a year later was motivated by "the City's retaliatory desire to punish her for reporting" the co-worker's behavior. The district court granted summary judgment to the City and Patsalides appealed.

The thrust of Patsalides' appeal was that the record provided a basis to find the City liable for the officer's actions. The court began with a flattering review of the City's actions, resulting in it holding the lower court correctly did *not* find a basis to hold the City liable for the officer's conduct. It characterized the City's actions with regard to Patsalides' complaint - including placing the reported offender on administrative leave within three days - as "a model of proper employer responsiveness under Title VII." It then went on to characterize the City's previous actions with regard to this officer and complaints against him as "prompt and adequate." The officer had four complaints leveled against him for sexual misconduct between 1997 and 2013 and each time the City took graduated action, ranging from "written warnings to the officer, counseling him on proper conduct, or suspending him without pay on two different occasions, once for three days and once for five." The Circuit closed the analysis saying the "pattern of disciplinary action, whereby each new infraction was met with prompt and effective remedial measures and the imposition of increasingly severe punishment that ultimately culminated in the officer's termination, is entirely consistent with the City's obligations under Title VII."

The Circuit also agreed with the lower court's finding that no retaliation had occurred. Patsalides had been terminated after lengthy absences from work, and the allegedly retaliatory behavior she complained of, which largely consisted of rude remarks and social slights from fellow officers, was neither severe nor pervasive enough to create a retaliatory hostile work environment. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) ("An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.").

LINK

Employment: Supervisors' Disclosure to Co-Workers of Employee's PTSD Does Not Violate ADA Unless Based on Medical Records

Perez v. Denver Fire Department, No. 17-1128 (10th Cir. Feb. 7, 2018).

Upholding the trial court, the Tenth Circuit has held that Supervisors' disclosure of a firefighter's PTSD to fellow crew members did not violate the ADA where the plaintiff had made statements about his PTSD to his superiors and there was no evidence they relied on his medical records.

David Perez (Perez) was a marine veteran working for the Denver Fire Department (Department) when his crew had a tough day. It included responding to a fatally wounded child close to the age of Perez's child and a training session on tourniquet use that included images from combat operations in Iraq. Perez's supervisors knew he had PTSD from his eight years of active duty service and checked in with him. Perez said he would stay at work, but then decided to leave in the afternoon. He told his crew that the day made him emotional and that he was being treated at the VA, but says he does not recall telling the crew he had PTSD. His supervisors ultimately told the crew that Perez suffered from PTSD and he sued the Department, alleging disclosing his PTSD violated the ADA's prohibition on disclosure of confidential medical records. The district court ruled in favor of the Department and Perez appealed.

The ADA prohibits employers from "[d]isclos[ing] confidential information obtained through an authorized medical examination or inquiry . . . ." The district court held that Perez didn't provide any evidence that his supervisors relied on medical exams in revealing his PTSD, that the evidence did not indicate they used anything other than Perez's own statements - and inferences therefrom - to his crew. Perez hinged his appeal to the Circuit on arguing that the lower court failed to recognize that circumstantial evidence indicated the supervisor did so. The Circuit may well have agreed, but in searching the record it found Perez failed to present any of this circumstantial evidence to the lower court. Without any necessary admissible evidence before the lower court, the Circuit refused to hold it erroneously ruled for the Department and affirmed the lower court's summary judgment ruling.

LINK

Environment: Maui's Wastewater Injection System Discharges into "Navigable Waters" and Requires NPDES Permit

Hawaii Wildlife Fund v. County of Maui, No. 15-17447 (9th Cir. Feb. 1, 2018).

Maui County's wastewater treatment system, which involves injecting wastewater into wells and allowing it to seep gradually through the soil towards the ocean, has been found to be a point-sourced discharge covered by the Clean Water Act, requiring a National Pollution Discharge Elimination (NPDES) Permit.

The County of Maui has been treating wastewater and then injecting into the groundwater, via four wells, since the 1970's. The County did not dispute that some of the effluent from the wells reaches the ocean - ultimately. A group of environmental groups filed suit alleging this activity violates the Clean Water Act because the County is discharging into the "navigable water" of the Pacific Ocean without a National Pollution Discharge Elimination System (NPDES) Permit. The district court agreed and granted summary judgment to the environmental groups, leading the County to appeal.

The Ninth Circuit began by reviewing that it agrees - which neither side disputed - that the injection wells are "point sources" under the Clean Water Act because they are "discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged . . . ." The County's argument on this issue centered on the fact that the discharges were *indirect:* the

treated sewage is discharged into the groundwater and *only after working its way through the ground* does the effluent get into the "navigable water" of the Pacific Ocean and therefore, the argument went, the injections were not subject to a NPDES permit. The Circuit disagreed firmly though, noting the wells "confine and contain effluent" and then discharge it into the ground. The fact that the discharge forces the water through an indirect path to the navigable waters, did not turn it into an indirect (e.g. non-point source) pollution source free from the NDPES requirement.

The County's second argument fared no better: that "its effluent injections are not discharges into navigable waters but disposals of pollutants into wells, and that the [Clean Water] Act categorically excludes well disposals from [NPDES] permitting." On this point the County noted the statute permits states to administer their own NPDES system and in doing so allows each to "control the disposal of pollutants into wells," and the County argued this meant that NPDES permitting requirements "do not apply at all to well disposals." The Circuit flatly rejected this interpretation, stating simply that the "County urges a construction that the statute on its face does not permit." In closing the Circuit characterized the case as one about "preventing the County from doing indirectly that which it cannot do directly," because under the Clean Water Act the County cannot "build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit . . . [and i]t cannot do so indirectly either to avoid CWA liability."

LINK

Privacy: Unauthorized Access of Medical Records by Governmental Actors Violates Due Process, Even Where Data Viewed is Innocuous

Hancock v. County of Rensselaer, no. 16-2888 (2d Cir. Feb. 9, 2018).

Vacating the lower court's grant of summary judgment to a New York county whose jail executives viewed employees' medical records without permission, the Second Circuit has confirmed that, in the absence of compelling necessity, the access of any medical records, regardless how trivial, implicates Due Process concerns.

New York's Rensselaer County Jail (Jail) relies on Samaritan Hospital (Samaritan) as the primary healthcare provider for Jail detainees and employees. To facilitate continuity of care, Samaritan provided a nurse employed at the Jail with electronic access to Samaritan's medical records, on three computers at the Jail through a password-protected system.

The employee signed a one-page clearly worded agreement stating that she would only use the system in a way that preserved patient confidentiality. It cautioned that "Federal law and regulations strictly limit the purposes for which patient information may be accessed and used," including "providing medical treatment to the patient." Any other use was prohibited without explicit permission.

The Jail employee had not been able to obtain separate passwords for other Jail nurses to use, so she taped her login information inside a drawer at her desk. Any person who knew where the password was kept could thus view any of Samaritan's medical records.

Various Jail employees later determined that their data had been accessed for non-medical purposes, without their consent. It appeared that Jail supervisors were attempting to research their records to confront their use of extended sick leave.

The aggrieved employees sued, alleging violation of Due Process and the Computer Fraud Abuse Act (CFAA). The district court granted summary judgment to the Jail and Hospital, determining that the employees failed to state a claim under the CFAA and failed to show that

they had a constitutionally protected right to privacy in their medical records. The court read precedent as limiting the right to privacy in one's medical records only to those records that contain evidence of medical conditions that are both serious and stigmatizing. Because none of the plaintiffs had information in their histories that would expose them to discrimination and intolerance, none of them could establish violations of their Fourteenth Amendment rights.

On appeal, the Second Circuit affirmed the CFAA disposition-the CFAA requires either a showing of actual economic damage or an impairment in medical treatment. Here, the employees could show no economic loss, and their argument that unauthorized access to their medical records regarding time off would make them hesitant to seek care in the future was purely hypothetical.

However, the Circuit disagreed with the lower court on the issue of Due Process and privacy. It characterized the plaintiffs' claim as implicating the right to privacy in information about one's body. "In doing so, they successfully identify a constitutional right." The Circuit started with seminal discussions of the privacy right, invoking *Griswold*: "Many of these protections would have little practical effect without heightened suspicion of governmental intrusion into certain identity-defining areas of life. These areas of life have been found so important that, even when there is not a constitutionally enumerated right on point, due process requires state government act with special solicitude for this fundamental 'zone of privacy.' "

The individual right of privacy, however, is not absolute, and there may be times where the government has a legitimate interest in accessing and even publicizing medical records. When evaluating executive action that does not involve penological interests, the test is whether the action was so "arbitrary" as to "shock the conscience." The defendants had argued that no shock would occur, and no protection existed, for innocuous medical data. The Circuit begged to differ: "We have never held, in *Matson* or elsewhere, that only medical records documenting conditions of sufficient gravity and stigma may qualify for constitutional privacy protection. Unlike in the Fourth Amendment context, the substantive due process inquiry does not require an individual to establish the reasonability of their particular interest in privacy before any consideration of the government's interest becomes relevant."

Matson had dealt with a high school music teacher who claimed the need to take extensive time off due to fibromyalgia-but then worked at another job as an orchestra conductor. In that case, the teacher had already disclosed her relatively modest infirmity to the school, which was trying to enforce an important governmental campaign against fraud. Those factors were not present here:

> Because the district court treated the seriousness and stigma of each of Appellants' diagnoses as a threshold inquiry without considering other aspects of the individual privacy interest or the government's intent, we vacate this aspect of its judgment and remand it for reconsideration. . . .
>
> If Appellants' proffered explanation that Mahar maliciously looked at the records to aid in his enforcement of sick leave policies or to gain leverage over his employees is correct, that would likely shock our consciences. It would do so regardless of the contents of Appellants' medical records. It is exactly this type of abuse of state power that protecting the zone of privacy is meant to guard against.

The Circuit vacated the lower court's summary judgment order and remanded, requiring the lower court to consider whether the individual appellees were entitled to qualified immunity on the constitutional claim.

LINK

Search: Code Officer's Property Search did not Violate Occupant's Clearly Established Rights-But City's Policy May Trigger *Monell* Scrutiny

Estate of Leon Walker, Jr. v. Wallace, No. 17-1058 (8th Cir. Feb. 8, 2018).

Reversing the lower court, which had denied a St. Louis code enforcement officer's qualified immunity-based motion for summary judgment, the Eighth Circuit has found that the officer did not violate an occupant's clearly established constitutional rights when he searched a drug-bust property after getting the occupant's written consent, albeit under hazy voluntariness indicia. However, the Circuit called out the City's underlying search policy ("Project 87") as potentially violating *Monell.*

St. Louis has a program called "Project 87," under which police notify building inspectors of properties that constitute a "nuisance," which is defined as a code violation that "if not promptly corrected will constitute a fire hazard or a serious threat to the life, health or safety of the occupants of the building, structure, or portion thereof in which the violations occur." If a resident refuses to sign an inspection authorization form brought by the inspector, the house is condemned and an order to evacuate is immediately issued. In this case, a SWAT team raided a house to execute a search warrant on suspicion of illegal drug and gun possession. The detective involved testified that "it was police-department policy to request a Project 87 inspection routinely after a search warrant was executed," and he confirmed he "did not identify any potential 'nuisance' before he requested a Project 87 inspection" at the house.

A resident of the house testified he was faced with a demand from Building Inspector Hershell Wallace (Wallace) to sign the consent-to-search form or the house would be "foreclose[d] or something was going to happen with the house. We would get put out, something like that;" he signed the authorization. He then sued under §1983, alleging Wallace unreasonably searched the house in violation of the Fourth Amendment. The district court denied Wallace's summary judgment motion, which was based on his insistence that he was entitled to qualified immunity, and Wallace appealed.

The Eighth Circuit reversed the district court. As is common in these cases, a holding that the law was not "clearly established" spared Wallace liability. The Court found fault with how broadly the lower court characterized the right at issue. The lower court focused on warrantless searches violating the Fourth Amendment when consent to search is *not* voluntary and that crediting the facts, as it must, from the plaintiff's point of view provided a reasonable basis for jurors to hold that the consent in this case may not have been voluntary. The Circuit criticized the lower court for not "identify[ing] any case applying these first principles in a context sufficiently similar to the situation in which Wallace found himself." The one case in St. Louis about a Project 87 search and the voluntariness of the consent to search provided was brushed aside by the court when it said "even if *Appel* . . . can somehow be made to say that the consent given in this case was involuntary, we still think that the plaintiffs have failed to demonstrate how every reasonable official in Wallace's shoes would have believed that he was violating the plaintiffs' rights." It reversed the lower court.

Notably, this was the only issue on appeal, but a concurring opinion by Circuit Judge Kelly was crafted specifically to "note that St. Louis's municipal liability is not before us on this appeal. . . . The remaining two claims seek to hold the City of St. Louis liable for an unconstitutional policy under *Monell* . . . . We express no opinion on the district court's denial of summary judgment on these *Monell* claims. And, because we grant Wallace qualified immunity based on a lack of clearly-established law, our ruling is not determinative of whether his employer is liable for effectuating an unconstitutional policy."

LINK

Speech: Winning Candidate's Termination of Challenger's Employment Based on Campaign Statements Violates First Amendment where no Workplace Disruption Occurred

Morgan v. Robinson, No. 17-1002 (8th Cir. Feb. 2, 2018).

A Nebraska Sheriff has been denied qualified immunity in an action brought by a subordinate who ran for office against the Sheriff, lost, and whose employment was then terminated. The losing candidate was speaking as a citizen on matters of public concern, and his statements did not cause disruption of the government's operations.

Donald Morgan (Morgan) ran against his boss Michael Robinson (Robinson), the incumbent sheriff, in a primary election in Washington County, Nebraska. Robinson won the election and promptly terminated Morgan's employment as a deputy with the Washington County Sheriff's Office, claiming statements he made during the campaign violated the department's rules of conduct. In the termination letter Sheriff Robinson went so far as to point out five statements specifically at issue. Morgan then filed a grievance under his labor contract and suit in district court, the latter action claiming his employer retaliated against him employee for exercising his First Amendment rights. The lower court mandated the grievance process proceed first - Morgan won and was reinstated - and then denied the Sheriff's qualified immunity motion. The Sheriff appealed.

The Eighth Circuit delved right in, noting the *Pickering-Connick* line of cases and subsequent doctrine control, under which "a government employee caus[es] workplace disruption by speaking as a citizen on a matter of public concern, followed by government action adversely affecting the employee's job." As the test requires the court looked to the "content, form, and context of a given statement" and spent little time doing so since the Sheriff conceded the speech was a matter of public concern. This would, simply put, have been difficult to deny given that the statements cited in the termination letter were from Morgan's campaign website, public speeches made as a candidate and candidate comments published in the newspaper. As for disruption of the office, the Sheriff faced a slightly elevated burden under *Connick* "given the relative strength of Morgan's showing that the statements were made in the public interest" and he was fired just six days after the election, leading him to rely on *prospective* rather than actual disruption to the office.

The court noted the Sheriff failed to show any real disruption at all from the speech, that the statements were extremely general in nature, and several of them were made a number of months prior to the election. Combining this with the Sheriff's own comments that Morgan's performance was always satisfactory, the Circuit ruled against him and held "that Morgan's speech is protected by the First Amendment and there [wa]s no need to resort to the *Pickering-Connick* balancing test." The lower court was affirmed.

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

