International Municipal Lawyers Association



e-News: Issue 5 March 1, 2018

Click Here To Print This Issue

Quick Links

IMLA Website
Webinar Calendar
Municipal Jobs Board
Become a Member
Join The IMLA Community

In This Issue: 6 Cases & This Just In

ADA: Employer Refusing Pregnant In-House Lawyer's Request to Work from Home for Ten Weeks Must Pay $92,000

Arbitration: Arbitral Tribunal Would Apply State's Two-Year Statute of Limitations; Plaintiff Not Deprived of any Constitutional Right

Employment: No Title VII Claim Unless Pleading Specifies that Termination was Due to Plaintiff's Inclusion in a Protected Class

Police: No False Arrest where Statements by Estranged Wife-Even if Fabricated-Were Relied on by Police in Taking Husband into Custody

Speech: Demeaning Email Sent by Municipal Utility District Director, but in Personal Capacity, is not "Under Color of State Law" for Section 1983 Purposes

Trials: Failure to Make Timely Filing Due to Unexpected Funeral Could Constitute "Good Cause," Allowing for Relief

THIS JUST IN: INDIANA SAFEGUARDS ITS RESIDENTS AGAINST THE DANGERS OF TATOOED EYEBALLS

ADA: Employer Refusing Pregnant In-House Lawyer's Request to Work from Home for Ten Weeks Must Pay $92,000

Mosby-Meachem v. Memphis Light, Gas & Water Division, No. 17-5483 (6th Cir. Feb. 21, 2018).

A Tennessee in-house attorney has been awarded $92,000 after her employer declined to accommodate her request to work from home for ten weeks due to pregnancy complications.

Andrea Mosby-Meachem (Mosby-Meachem) was an in-house attorney for the Memphis Light, Gas & Water Division (MLG&W) when she became pregnant and was ordered by her physician to bedrest for ten weeks due to complications. Her request to work from home during this time was denied and she filed suit alleging disability discrimination. She won a jury trial on the matter and was awarded $92,000, leading MLG&W to appeal to the Sixth Circuit seeking judgment as a matter of law or, if not that holding, in the alternative a new trial.

An Americans with Disabilities Act (Act) disability discrimination claim required Mosby-Meachem to show that "(1) she is disabled within the meaning of the Act; (2) she is otherwise

qualified for the position, with or without reasonable accommodation; (3) her employer knew or had reason to know about her disability; (4) she requested an accommodation; and (5) the employer failed to provide the necessary accommodation." MLG&W's argument was straightforward: the evidence admitted at trial, coupled with Sixth Circuit precedent, precluded a reasonable jury from finding that Mosby-Meachem was a qualified individual while on bedrest because in-person attendance was an essential function of her job. The Court recognized that "several pieces of evidence produced at trial" clearly supported MLG&W's position, including the list of job functions for an attorney, some of which--depositions, trying cases, and training employees--the Court accepted required in-person work performance.

The Circuit then turned the tables and recognized that Mosby-Meachem presented "sufficient evidence supporting a finding that she could perform all the essential functions of her job remotely for ten weeks," including testimony from other attorneys and outside counsel with whom she worked closely, and the fact that in the eight years she was in the job she had yet to try a case or take depositions.

Given the divergent evidence, the appeal hinged on the standard of review, which in this case provided substantial deference to the jury and its verdict. As for MLG&W's added assertion that binding precedent prevented the jury's verdict, the Circuit distinguished the cases supplied and affirmed the jury's finding that Mosby-Meachem was discriminated against.

LINK

Arbitration: Arbitral Tribunal Would Apply State's Two-Year Statute of Limitations; Plaintiff Not Deprived of any Constitutional Right

Hughey v. Southeastern Pennsylvania Transportation Authority, No. 17-2582 (3d Cir. Feb. 16, 2018).

A plaintiff cannot remove a state action to federal court-and is nevertheless bound by the state's statutes of limitation.

In 2014 Debbie Hughey (Hughey) was aboard a Southeastern Pennsylvania Transportation Authority (SEPTA) bus that collided with a vehicle. More than three years later she filed suit in Pennsylvania state court, arguing the accident was caused by careless and negligent driving by both the SEPTA driver and the vehicle driver. The case was submitted to compulsory arbitration and Hughey won, but with an award of $0.00. She appealed to the Pennsylvania Supreme Court, an appeal still pending, and *also* alleged SEPTA violated her constitutional rights by requiring mandatory arbitration, depriving her of her due process and jury trial rights. Hughey removed the case to federal district court which dismissed it, holding it was barred by the statute of limitations. The Third Circuit agreed when Hughey appealed.

The Circuit began by highlighting that *Hughey sought to remove* her state case to federal court, meaning her first, and insurmountable, hurdle was that removal is a right held by defendants, not plaintiffs. The Circuit was thorough, however, and also noted that if the case had been removed, it would be barred by the statute of limitations since the §1983 statute of limitation is determined by the underlying state law claim. That time period is set at two years in Pennsylvania for personal injury claims, meaning the removal - even if it could occur - would be untimely. The Circuit flatly rejected Hughey's claim that the arbitration proceeding violated her right to due process and a jury trial, saying Hughey "provided only conclusory statements regarding the claimed violations and failed to provide any explanation as to why compulsory arbitration violated her rights."

LINK

Employment: No Title VII Claim Unless Pleading Specifies that Termination was Due to Plaintiff's Inclusion in a Protected Class

Winfrey v. City of Forrest Hills, No. 17-1604 (5th Cir. Feb.16, 2018).

A terminated police officer could not resuscitate his Title VII retaliation claim-which had initially failed to allege that he was discriminated against based on race-by subsequently submitting an affidavit to that effect.

Aldridge Winfrey (Winfrey) served as a police officer for Forrest Hills, Arkansas (City). He was terminated and alleged in a Title VII case that this was retaliation for "exercising his rights" with regard to officers, himself included, being underpaid by the police department. The district court dismissed the case, deeming Winfrey's claims insufficient to bring a Title VII case.

Winfrey's appeal to the Seventh Circuit was denied. The problem was the same as what the lower court identified and the City had focused on: Winfrey failed to plead that he engaged in "protected conduct," meaning the claim could not be filed under Title VII. Title VII's anti-retaliation section provides relief for only two things - "1) opposing any discrimination made unlawful by Title VII or 2) making a charge or participating in any manner in an investigation or proceeding under Title VII" - and only on the basis of the protected classes enumerated in the statute - "race, color, religion, sex, or national origin."

Winfrey had simply claimed that he was retaliated against for complaining about unfairness in compensation-as the Circuit Court described it, his attempted Title VII relief was "unmoored from these distinct classes" because he failed to allege his termination was the result of his participation in a protected category. The Circuit rejected that argument. Winfrey's belated efforts to re-cast his case with an affidavit proffered at the summary judgment stage claiming his dismissal was race-based, was rejected. It was too late in the case to bring a separate employment discrimination claim in the action and the Circuit characterized it as an "attempted surprise." His arguments that "public policy" should override his limited status as an at-will employee were equally unavailing. The Circuit affirmed the lower court.

LINK

Police: No False Arrest where Statements by Estranged Wife-Even if Fabricated-Were Relied on by Police in Taking Husband into Custody

Smith v. Angelo, No. 17-2389 (3d Cir. Feb. 16, 2018).

Police were justified in acting on an estranged wife's phony accusation that her husband had assaulted her, even though a check of his court-ordered GPS device would have shown that he was not at the scene.

On August 28, 2012 Tiffany Smith (Tiffany) received a Protection From Abuse Order against her ex-husband, Gordon Smith (Gordon). Later that day the police received a phone call that a woman was on the ground, naked, unresponsive, and bleeding. Officers responded and were told by the apparent victim - Tiffany - that her husband was the perpetrator. Gordon was on probation and wearing a GPS tracking device. Officers located him and took him to the police station,

where police determined Tiffany had staged the entire scene. Gordon was released within 90 minutes after being detained. Gordon filed a §1983 suit alleging false arrest and false imprisonment - both of which hinged on his argument that the officers lacked probable cause for his arrest. The district court granted summary judgment to the officers and the Delaware State Police.

The Fourth Circuit repeated the time-honored rule that "probable cause exists as a matter of law if the evidence, viewed most favorably to the Plaintiff, reasonably would not support a contrary factual finding." The court then reviewed the facts within the officers' knowledge at the time of Gordon's arrest: that Tiffany identified Gordon as responsible for the attack, though she said two others actually committed the asault; that her mother confirmed Gordon threatened to kill Tiffany and his children in court that same day; and that Tiffany obtained the protective order against Gordon that day. As for the fact that Gordon was wearing a GPS and Gordon's allegation that the police *should have* checked the tracking device (which he argued would have shown he was not in the vicinity and would have exonerated him), the Circuit held that the "probable cause standard does not require officers to correctly resolve credibility determinations or conflicting evidence." It did not help that Tiffany claimed that the two men that attacked her did so at Gordon's behest - meaning he would not have been exonerated based on his location at the time of the attack. The lower court was affirmed.

LINK

Speech: Demeaning Email Sent by Municipal Utility District Director, but in Personal Capacity, is not "Under Color of State Law" for Section 1983 Purposes

Conner v. Castro, No. 17-50462 (5th Cir. Feb. 23, 2018).

Affirming the lower court's finding, the Fifth Circuit has declined to allow the subject of a demeaning email-sent to her employer by a Director of the local Municipal Utility-to be characterized as "under color of state law;" although the email grew out of a disagreement between the plaintiff and the city over plans to construct sidewalks in her neighborhood, it was sent in a personal capacity and the signature line referred to the sender's other employment without mentioning the Municipal Utility.

Madeleine Connor (Connor) is a resident of Lost Creek, Texas which was recently annexed into Austin. The Lost Creek Municipal Utility District was set up after annexation - a municipal entity - to construct sidewalks in the area. Connor played a couple roles: she was the president of the Lost Creek Neighborhood Association and was hired by a neighbor, in her capacity as an attorney, to file suit to enjoin construction of the sidewalks. After contentious meetings between the Municipal Utility District, the Neighborhood Association and Connor in her capacity as an attorney, she amended the filing to add herself as a plaintiff and sought damages under § 1983, alleging she was retaliated against for exercising her First Amendment rights. The case was initially brought in state court but, with the addition of the retaliation claim, was removed to federal court. After various procedural events, the sole issue that survived appeal to the Fifth Circuit was whether the actions Connor alleged were retaliatory could be attributed to the Municipal Utility District - i.e. were done "under color of state law." The district court held they were private actions and Connor challenged that holding.

The Fifth Circuit opinion recounted the unpleasant history of wrangling over the sidewalks, including Connor being "jeered, shouted down, booed, cat called, and laughed at for more than two hours during a neighborhood association meeting," and ultimately being recalled as the Neighborhood Association president. As to the issue of whether these acts of "retaliation" could

be attributed to the Municipal Utility District as a government entity, the Circuit found Connor's claim fell short. At issue was an email sent from the director of the Municipal Utility District to Connor's employer, Colonel Paladino, the executive director of the Texas Veterans Commission where Connor was the Interim General Counsel and being considered for appointment to General Counsel. The email stated that "Connors has made it her mission to drain the budget of the Lost Creek Limited District, a governmental entity engaged in facilitating the transition of Lost Creek recently annexed by the City of Austin," and characterized Connors as "a devious attorney with no morals, no credibility, and no integrity, who's [sic] goal to further cripple veterans and other disabled citizens as a manifestation of her Borderline Personality Disorder with histrionic features, and a vendetta against men as her former husband learned the hard way."

The Circuit made quick work of its deliberation, disagreeing with Connor's argument that because the email involved government issues it could be characterized as "under color of state law" for a §1983 case. Instead, the Circuit focused on the facts that 1) it was sent from a personal email, 2) signed by the author with his affiliation listed as the Austin Institute LLC (not the Municipal Utility District), and 3) that the author self identifies as simply "Chuck" and a "retired FBI executive" (not a director of a government entity). As such nothing in the email "supported any allegation that McCormick, [the director of the Municipal Utility District,] acted under color of state law, rather than as a private individual, when he sent it to Connor's employer." The lower court was affirmed.

LINK

Trials: Failure to Make Timely Filing Due to Unexpected Funeral Could Constitute "Good Cause," Allowing for Relief

Destra v. Demings, No. 17-10478 (11th Cir. Feb. 23, 2018).

Vacating and remanding the district court which stricken officers' motion to dismiss due to their filing one day too late, the Eleventh Circuit has found sufficient grounds for a further review of the specifics surrounding the delay in filing-namely, that the officers were unexpectedly called upon to attend the funeral of a fellow deputy.

On May 15, 2014 Orange County, Florida sheriff's deputies arrested Cheler Destra (Destra) during a traffic stop. All the charges were subsequently dropped and Destra filed a §1983 suit against the officers alleging they violated his constitutional rights. The district court's scheduling order required that dispositive motions be filed by January 16, 2017. The defendant-officers filed their motion (seeking qualified immunity) on January 17, 2017 - one day late - leading the district court to strike the motion as untimely and, ultimately, to reject their motion for an extension of time, which they filed January 18, 2017. This required the deputies to appeal to the Eleventh Circuit for relief.

The Circuit began by noting that Fed. R. Civ. P. 6 addresses timeliness of filings, and wasted no time holding that the district court did not abuse its discretion in finding that the officers' motion was untimely. The officers argued that the court nevertheless had discretion to afford them relief under Fed. R. Civ. P. 16, on the grounds of "excusable neglect." The Circuit held that the proper standard was not "excusable neglect" but a more demanding "good cause" test: "Rule 16(b)'s good-cause standard 'precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'"

There were compelling reasons that the officers' filing was late: a fellow officer in their department had been killed in the line of duty on January 9, 2017. Their lawyer had initially planned to meet with them on Friday, January 13, 2017, but the funeral was then scheduled for that day. The

meeting was therefore moved to January 16, 2017-but the funeral had to be moved to that day due to the illness of the decedent's mother. The meeting, and the filing, thus occurred on the January 17.

The Circuit stated "We cannot discern from the existing record whether Defendants and their counsel exercised the diligence necessary to establish good cause for their delayed filing." It reviewed the competing facts it faced: on one hand the lawyer's choice to schedule a review of the summary judgment motion with the officers on January 13th when the motion was due the 16th, which was then cancelled because of the unexpected death of a fellow officer, did not necessarily indicate a lack of diligence on the party's part; on the hand, Destra accurately noted in his brief that the government failed to show any indication that counsel and the defendant-officers could not meet on January 11, 12, 14 or 15. It followed up by noting the lower court did not issue a thorough opinion with its ruling, it simply rejected the motion for an extension without comment.

The Circuit closed by noting how critical it is to resolve claims of qualified immunity *before* trial, vacating the lower court, and remanding the case for the district court to undertake further fact-finding to issue a reasoned decision. The Orange County officers thus have further facts to set forth and further briefings to undergo.

LINK

THIS JUST IN: INDIANA SAFEGUARDS ITS RESIDENTS AGAINST THE DANGERS OF TATOOED EYEBALLS

INDIANAPOLIS (AP) - Indiana could become the second state to effectively ban the unusual practice of tattooing eyeballs, after a committee on Monday unanimously backed a proposal whose sponsor calls it "the grossest bill of the session."

So begins an article in the Tuesday, February 26 issue of AP News, authored by Aileen Chuang.

The state's Republican Senator, John Ruckelshaus, acknowledges that he is not aware of any health-related issues that have arisen in Indiana from eyeball tattooing, which involves injecting ink into the eye to make the whites change color. However, he wants Indiana to join Oklahoma, which banned the procedure in 2009, to proactively avoid the "extremely dangerous" complications that could arise.

Ruckelshaus proposed prohibiting "scleral tattooing" after a flurry of news reports last fall about a Canadian model and body-modification enthusiast experiencing major complications after getting her eye permanently colored a shade of purple.

The bill would allow for fines of up to $10,000 per violation and authorize Indiana's Attorney General to investigate any possible violations.

LINK

Article Headline

Know your target audience. Who are your most important customers, clients or prospects, and why? Know what is important to them and address their needs in your newsletter each month. Include a photo to make your newsletter even more appealing.Insert a "read on" link at the bottom

of your article to drive traffic to your website. Links are tracked, allowing you to see which articles create the most interest for your readers.Link

---

IMLA

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

