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Courts: No Issue Preclusion Where Party Lacked Fair Opportunity to Litigate Issue That Had Been Decided Sua Sponte by Court in Prior Action

Thomas v. City of Philadelphia, No. 16-3156 (3d Cir. Mar. 16, 2017).

Under a Third Circuit ruling, the issue of whether the City received proper notice of an individual's bankruptcy is not precluded because it was addressed sua sponte by a prior bankruptcy court decision and the individual had not received a fair opportunity to litigate it.

In 2004 Milton Thomas underwent Chapter 13 bankruptcy, from which he emerged in 2009. Four years after receiving his discharge, in 2013, Thomas filed a claim in district court against Philadelphia (City) for trying to collect property taxes he owed the City from 1992 through 1996.

He argued the City violated the terms of his Chapter 13 Plan. The City argued that a previous decision by the Bankruptcy Court that the Confirmation Plan did not bind the City because Thomas failed to give the City notice under Local Bankruptcy Rules meant it could pursue the tax collection. The district court agreed with the City and dismissed Thomas's claim, thus allowing the City to continue pursuing the past due taxes. Thomas appealed.

The Third Circuit first noted that Philadelphia successfully argued in district court that claim preclusion prevented Thomas' case against, but changed tact in the Circuit Court and argued instead that issue preclusion applied. The Circuit agreed claim preclusion didn't apply and that the district court erred in applying it, but also held issue preclusion didn't apply. Issue preclusion applies when "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment."

The Circuit Court found two of these elements missing. For one, Thomas did not have a full and fair opportunity to litigate the notice issue because U.S. Bank (the City's assignor) argued that it was not a party to the bankruptcy and that only tax years 1998 and up were included in the bankruptcy discharge, leaving Thomas, according to the court, unable to foresee that the Bankruptcy Court would sua sponte raise the issue of notice, meaning he never got to litigate it. Second, the Circuit found that the Bankruptcy Court's ruling that there had been no proof for the taxes due from 1992-1996 in the original Bankruptcy Court proceeding and that those debts were therefore not part of the plan, were "independent and sufficient reasons" for denying Thomas' claims, meaning the notice holding was not essential to the previous decision. As a result, the Circuit vacated the district court opinion and remanded so it could decide anew whether the City was provided proper notice of the bankruptcy.

LINK

Drafting: Failure to Specify "Costs and Fees" in Offer of Judgment is Construed against Drafter; and are Added to "Plaintiffs' Claims for Relief"

Allen v. City of Grovetown, Nos. 16-11370, 16-11655 (11th Cir. Mar. 7, 2017).

Where defendants in a §1983 excessive force action made a Rule 68 Offer of Judgment in the amount of $100,000 "including all of Plaintiffs' claims for relief," but did not specify that the Offer also included plaintiffs' costs and legal fees, the ambiguity was construed against the drafters, meaning that the costs and fees were in addition to the $100,000.

Gloria Allen's son was killed in police custody in Grovetown, Georgia (City), prompting Allen to file a §1983 suit against the City and the individuals involved. Ultimately the City was dismissed from the case, but the individuals made a Federal Rule of Civil Procedure 68 Offer of Judgment that Allen and the rest of the plaintiffs (minor children of the deceased) accepted. In entering judgment according to Rule 68, the district court granted Allen's motion to assign fees to the defendants, despite their objections that the offer unambiguously included costs and fees in the amount of $100,000.

On appeal the Eleventh Circuit noted any ambiguity in a Rule 68 offer is construed against the drafter. Unlike a negotiation, such offers require a straight yes or no from the offeree. The offer here from the defendants was that "[p]ursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendants hereby offer to allow Judgment to be entered against them in this action in the amount of $100,000.00 (One Hundred Thousand Dollars and No/100), including all of Plaintiffs'

claims for relief." It was only in a later email that defendants noted they intended the offer to include costs and fees. The Circuit reviewed the common usage of the phrase "claims for relief" and determined it is ambiguous as to whether costs and fees are included in such a phrase, finding language in the federal rules that cut both ways. The Court refused to consider the email - extrinsic evidence - to clarify the meaning of the offer, holding using such evidence for a Rule 68 question would conflict with the Circuit's own rule of resolving ambiguity against the drafter.

LINK

Drafting: Lack of Comma in Maine Overtime Law Costs $10 Million

O'Connor v. Oakhurst Dairy, No. 16-1901 (1st Cir. Mar. 13, 2017).

Reversing the district court, the First Circuit has sided with drivers who contend that the absence of a comma in a Maine overtime law means that their activity--the distribution of food products--is not exempt from overtime payments.

In 2014, truck drivers filed a class action against Maine's Oakhurst Dairy, seeking overtime pay going back more than four years. They had been working an average of 12 hours per week above their base of 40 hours, and contended that the overtime qualified for 1.5 times their normal hourly rate of $46 to $52 per hour.

Maine law requires that workers be paid 1.5 times their normal rate for each hour worked above 40 hours, but it carves out some exemptions. Under the law, for example, overtime is not paid for:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
> (1) Agricultural produce;
> (2) Meat and fish products; and
> (3) Perishable foods.

The crux of the dispute was the absence of a comma after the word "shipment." The dairy argued that "packing for shipment" and "distribution" were both exempt from overtime. But the drivers, who don't pack boxes, successfully argued that the missing comma meant that only "packing"-whether for shipment or distribution-was exempt from overtime; "distribution" itself was not exempt.

The 29-page decision took a laborious journey through grammatical minutiae and considered the use of gerunds as well as "asyndeton"-the practice followed by some writers of not using conjunctions in a collection of nouns, as discussed in a book on legal interpretation co-authored by Justice Antonin Scalia in 2012. It also noted that elsewhere in Maine's employment laws, "shipment" is clearly distinguished from "distribution."

(Ironically, the contested language followed the guidelines set forth in the *Maine Legislative Drafting Manual*, which explicitly directs that lawmakers not use the so-called Oxford comma, which follows "and" in a series: Instead of writing "trailers, semitrailers, and pole trailers," drafters should write "trailers, semitrailers and pole trailers.")

The decision is expected to garner the underpaid drivers some $10 million in overdue compensation.

LINK

As a *New York Times* article discussing the *Oakhurst* case notes, this is hardly the first time a comma has engendered litigation. In 2006, Rogers Communications of Toronto, Canada's largest cable television provider, and a telephone company in Atlantic Canada, Bell Aliant, came to blows over a comma in a contract's termination provision. Rogers claimed that it had contracted to use Aliant's telephone poles-for an initial, non-terminable, five-year period.

It relied on this sentence: "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

In this case, Rogers was doomed by the presence of the last comma after the word "terms." The court construed such placement as indicating that Aliant's right of termination was not limited to the expiry of five year terms, and could be exercised at any time on one year's prior written notice.

That single comma in the 14-page contract allowed Aliant to cancel the agreement early, costing Rogers roughly $900,000 in increased costs.

LINK

Due Process: Jailing of Indigent Arrestee Who Cannot Pay Bail Violates Due Process

Maurice Walker v. City of Calhoun, No. 16-10521 (11th Cir. Mar. 9, 2017).

The Eleventh Circuit has held that a Georgia city's policy of jailing arrestees who cannot afford bail pending appearance before a judge violates Due Process.

Maurice Walker was arrested for a pedestrian under the influence charge in Calhoun, Georgia (City) in 2015. In accordance with City policy - set forth in a standing bail order - since Walker could not pay the $160 bail immediately he was kept in jail until his initial appearance before a judge at which time he could seek release on his own recognizance. Such a hearing was not held for days. Walker asserted in a federal lawsuit thereafter that this procedure violates the Equal Protection Clause and the Due Process Clause by conditioning release on a person's ability to pay. Walker sought to preliminarily enjoin the City from jailing him and other similarly situated indigent arrestees without offering them release on an unsecured bond or their own recognizance. The district court issued a preliminary injunction, prompting Calhoun to appeal to the Eleventh Circuit.

The Eleventh Circuit skipped over the merits of the injunction, addressing the contents of it in this case instead. Fed. R. Civ. P. 65(d)(1) requires an order granting a preliminary injunction to "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail-and not by referring to the complaint or other document-the act or acts restrained or required." The court noted these rules are critical because they comport with Due Process, enabling the party enjoined to comply with the order. In this case the court noted the district court ordered Calhoun to "implement post-arrest procedures that comply with the Constitution, and . . . that, unless and until [the City] implements lawful post-arrest procedures, [the City] must release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures. [The City] may not continue to keep arrestees in its custody for any amount of time solely because the arrestees cannot afford a secured monetary bond."

The court found fault with this, beginning with the fact that the City was ordered to "comply with the Constitution," which it found as unenforceable as a command to "obey the law." Second, the order lacked a command that could be enforced since it failed to detail the acts actually restrained. Overall, it was too generalized, lacked the potential for review or enforcement, and thus the City's appeal was granted and the order vacated, sending the lower court back to the drawing table to craft an enforceable order.

LINK

Due Process: No "State Created Danger" Exception to *DeShaney* Where Social Worker and County Failed to Respond to Numerous Complaints Indicating Infant Was at Risk For Future Abuse

Fetterman v. Westmoreland County Children's Bureau, No. 16-1229 (3d Cir. Mar. 6, 2017).

Citing *DeShaney*, the Third Circuit has granted immunity to county and social worker in a child abuse case; the government's failure to respond to reports predicting likely *future* abuse based on in-home assessment of drug addicted parents was not enough to "shock the conscience."

In December 2011 Kayla Jo Fetterman gave birth to a daughter six weeks premature. The child was severely addicted to opiates due to her mother's drug use during pregnancy. Consequently, the hospital sent a social worker to do a safety check at the child's home, after which the social worker determined the child was at risk. Despite being advised of such, the Westmoreland County Children's Bureau (WCCB) took no action and the child was released to her parents. The child's grandmother, Vickie Joy Fetterman (Fetterman), as well as the child's pediatrician made numerous calls to WCCB about the situation and expressed concerns, but WCCB did not immediately check on the child again. On December 27 the child died from trauma. Fetterman filed suit against WCCB, but the district court determined Fetterman could not recover against WCCB under the Supreme Court's *DeShaney v. Winnebago County Department of Social Services*. Fetterman appealed, arguing *DeShaney* did not apply since WCCB's conduct constituted a state-created danger.

The Court began by summarizing *DeShaney* as a case wherein a municipal social services agency was sued by the mother of a child who was killed by an abusive father after numerous calls from her, the neighbors, and the child's doctor. Ultimately the Supreme Court held that "as a general matter, the Fourteenth Amendment imposes no affirmative obligation on states to intervene to protect private citizens from private violence." The narrow exception to this rule sought to be used by Fetterman is the state-created danger theory, under which a claim can lie when the state acts in a way that makes a person substantially more vulnerable to injury than the person would have been absent the state intervention. To make such a claim Fetterman had to show "(1) the harm suffered was foreseeable and fairly direct, (2) a state actor acted with a degree of culpability that "shocks the conscience", (3) the existence of a special relationship between the state and the victim, and (4) the affirmative use of authority in a way that created the danger or made the victim more vulnerable to danger." The Circuit agreed with the district court that WCCB's behavior did not shock the conscience, especially since in *DeShaney* the complaints were about actual abuse, where in this case the calls concerned the child being at risk of abuse. The Court closed by noting that it was "sympathetic to the horrible circumstances surrounding Fetterman's loss, [but was] not free to ignore clear, binding precedent from the Supreme Court of the United States even in such emotionally charged cases." It affirmed the lower court.

LINK

Immigration: County's Lack of Particularized Training Where U.S. Citizen Was Mistakenly Issued ICE Detainer Does Not Amount to Constitutional Violation

Mendoza v. Davis, No. 16-1807 (7th Cir. Feb. 21, 2017).

The Seventh Circuit has found no liability for County or ICE Officer that, due to an identity mix-up, detained a U.S. citizen for three days over a holiday weekend.

Ramon Mendoza Gallegos ("Ramon Mendoza"), a naturalized United States citizen, was pulled over by police officers on a Friday afternoon for having an obstructed view. He had neither a driver's license nor the vehicle's registration (he was driving his niece's car). Thereafter, he was arrested for driving with a revoked license as well as driving with an obstructed view and no proof of insurance and told by the officers that he would be taken to jail to be processed and then released.

During his intake process, Mendoza was asked a variety of questions to which he responded in English. When Mendoza was asked his city of birth, he indicated that he did not know. The deputy originally conducting the intake did not finish the form because his shift had ended; therefore, Mendoza's intake form was completed by a different deputy who stated on the form that Mendoza was not a United States citizen and that his language was Spanish despite the fact that the interview had been conducted entirely in English. Mendoza ultimately signed the completed intake form and later claimed that no officer involved with his arrest had asked him about his citizenship.

Upon completion of Mendoza's intake form, his paperwork went to booking clerks to input the data into the jail's computerized booking software and-per the jail's policy- the information was added to his records for several prior incarcerations at the same jail. Of the three prior incarceration records, all showed the same name, address, date of birth and place of birth (in Mexico); however, in one of the records, Mendoza had given a slightly different social security number. All three records indicated that his language was English and that he was a United States Citizen. One of the records also contained a note from ICE confirming his citizenship; however, this information was written on a portion of the booking information screen that was not normally accessed during standard booking procedures and was not available to all jail employees.

Because Mendoza's most recent signed intake form (incorrectly) indicated that he was not a U.S. citizen, the booking clerks contacted ICE. ICE had previously issued a memorandum to the County instructing them to contact ICE's toll-free number whenever the jail received inmates with a foreign birth place or any other reason that made the clerk uncertain of the arrestee's citizenship. Upon receiving Mendoza's information, ICE conducted a search of Mendoza's information, finding two files that matched the information given. Due to a database mix-up, Ramon Mendoza was mistaken for Ramon Mendoza-Gutierrez, an aggravated felon who had previously been removed from the United States. This mix-up resulted in ICE issuing a detainer for Mendoza.

Upon learning that he had been issued a detainer, Mendoza told county jail officials that he was a United States citizen. Mendoza's son had followed officers to the county jail after Mendoza had been arrested and also tried to explain that Mendoza was a United States citizen. Mendoza's wife also claimed to have come to the jail's 24-hour entrance at least three times over the course

of the weekend to provide jail officials with Mendoza's naturalization certificate and also claimed she spoke with someone over the intercom and showed the paperwork to the cameras in an effort to get her husband released. Eventually, she testified, she was allowed into a secure second room where she was told that they "had the guy [they] were looking for and he committed several crimes." She also claimed that nobody took or commented on the documents she tried to show them. County jail officials testified that, per their policy, if they had been presented paperwork, they would have directed the individual to ICE. Nobody in Mendoza's family ever directly contacted ICE.

After Mendoza had spent the weekend in jail, the ICE officer discovered that Mendoza's fingerprints did not match the prints of Mendoza-Gutierrez, the aggravated felon, and confirmed that the two Mendozas were not the same individual. The ICE detainer was cancelled within the forty-eight hour hold period and Mendoza was thereafter released from jail, bringing a *Bivens* and Section 1983 claim against the officers as well as the County. The district court granted summary judgement in favor of the County and found no constitutionally deficient policies or training. Mendoza appealed. The Seventh Circuit reviewed de novo and affirmed the district court.

In regards to the liability of the County, while the jail staff had no specific training, policies, or practices for handling ICE detainers, the Seventh Circuit agreed with the district court that ICE's memorandum requesting that clerks contact ICE's toll-free number in the event there was uncertainty as to an arrestee's citizenship was constitutionally sufficient. Further, even if the jail staff had not received training, policies or practices on how to handle ICE detainers, there had been no obvious need for training that could create a constitutional violation ("Here, the. . . County Jail honored ICE detainers for numerous years without any problems.") Further, the County's failure to follow up or cross-reference Mendoza's previous records was enough for an ordinary negligence claim but was not shocking enough to the conscience to be considered a Due Process violation.

LINK

Land Use: Individualized Differential Treatment in Local Government Land Sale Process Does Not Automatically Equal Protection Violation

Bag of Holdings, LLC v. City of Philadelphia, No. 16-1808 (3d Cir. Mar. 16, 2017).

The Third Circuit has upheld qualified immunity for a councilmember who operated Philadelphia's land sale process in a way that resulted in the sale of one-third of the lots in which Plaintiff was interested to friends and political contributors.

Between 2012 and 2014 Bag of Holdings, LLC (BOH) expressed interest in approximately twenty Philadelphia-owned lots that were for sale. Sale of city property in Philadelphia is regulated by city ordinance, which allows for several methods, including giving preference to a buyer who intends to use the land for a public purpose, determining the most qualified applicant, utilizing a competitive bidding process, or engaging in a direct sale. All of the lots BOH put expressions of interest in for were sold outside of the competitive bidding process and it was determined that seven of the lots were sold outside of this system directly to friends or political contributors of a city councilman. Further, some of the lots were sold below market value and without an appraisal - also required by city ordinance. BOH filed suit, alleging Councilman Kenyatta Johnson violated its rights under the Equal Protection Clause, to which the Councilman answered he was subject to qualified immunity. The district court agreed that the constitutional right Councilman Johnson allegedly violated was not clearly established, thus granting the immunity. BOH appealed.

BOH's claim rested on the Supreme Court's 2000 decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), in which the Court held a plaintiff could proceed on a "class of one" theory under the Equal Protection Clause where s/he "alleges that [he or] she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." BOH tried to convince the Third Circuit that this decision should be read broadly by arguing that it put a city councilman on notice that "operation of the City's land sale process in a way that resulted in the sale of one-third of the lots in which BOH was interested to friends and political contributors" would amount to a violation of the Equal Protection Clause. The Third Circuit was not so willing. It found that accepting such a theory would mean that the Circuit would be "required . . . to attribute to every reasonable official the knowledge that favorable treatment for political contributors in the context of a city land sale so clearly amounts to an equal protection violation that the question is beyond debate." Its conclusion was bolstered by the Supreme Court's own caution about *Olech* that not every instance of individualized differential treatment gives rise to an equal protection violation. With that in mind, the Circuit said it "has not found, any precedent clearly establishing that operation of a governmental land sale process which results in more favorable treatment for friends and political contributors amounts to an equal protection violation." It thus agreed with the lower court.

LINK

Speech: Fire Department Battalion Chief's Termination for Racist and Insubordinate Facebook Postings is Not Actionable

Grutzmacher v. Howard County, No. 15-2066 (4th Cir. Mar. 20, 2017).

Affirming the lower court, the Fourth Circuit has upheld the dismissal of a claim of retaliatory termination brought by a fire department battalion chief whose employment was severed after he repeatedly posted and "friended" messages which were racist and undermined the legitimacy of department management.

In 2012, the Howard County (Maryland) Fire Department (Department), reacting to a volunteer firefighter's posting to Facebook of a photograph depicting a lynching, issued its "Social Media Guidelines," prohibiting "posting or publishing any statements, endorsements, or other speech, information, images or personnel matters that could reasonably be interpreted to represent or undermine the views or positions of the Department. . . ." Department employees were barred "from posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission."

The Department also issued a "Code of Conduct" intended to ensure that members of the Department maintained "the highest level of integrity and ethical conduct both on and off duty," and prohibiting Department personnel from "intentionally engag[ing] in conduct, through actions or words, which are disrespectful to, or that otherwise undermines the authority of, a supervisor or the chain of command."

In 2013, Patrick Buker, a Department Battalion Chief, posted the following statement to his Facebook page while on-duty:

> My aide had an outstanding idea . . lets all kill someone with a liberal - then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal - its almost poetic.

Mark Grutzmacher (Grutzmacher), a county volunteer paramedic, soon replied:

> But ...was it an "assult liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh pick a black one, those are more "scary". Sorry had to perfect on a cool idea!

Buker "liked" Grutzmacher's comment and replied, "Lmfao! Too cool Mark Grutzmacher!"

Buker was contacted by the Department about his Facebook posts. He removed them, but soon posted the following:

> To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirley in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.

The Department subsequently moved Buker out of field operations to an administrative assignment. Three weeks later, Buker "liked" a post by a member of a Department-affiliated volunteer company, depicting an elderly woman with her middle finger raised and the caption "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE[.] I'LL POST WHATEVER THE F**K I WANT[.]"-and above the picture, the words "for you Chief."

The Department dismissed Plaintiff, asserting that his posts as well as "liking" others, violated the Department's Code of Conduct and Social Media Guidelines. The charging document cited the racial overtones of his postings, his failure to enforce Department policies and his "repeated insolence and insubordination."

In 2013, Buker brought a § 1983 action for reinstatement and damages. He alleged that the Department impermissibly retaliated against him for exercising his First Amendment rights. He also alleged that the Social Media Guidelines and Code of Conduct facially violated the First Amendment by restricting Department employees' ability to speak on matters of public concern.

The district court granted the Department summary judgment, finding that Buker's posts were unprotected speech because they were "capable of impeding the [Fire Department]'s ability to perform its duties efficiently." Furthermore, they did not amount to protected speech because Buker failed to show that he was speaking as a citizen on a matter of public concern. The district court's memorandum decision and order did not, however, address Buker's facial challenges.

In 2015, the Department revised its policies, eliminating many of the earlier version's prohibitions on private use of social media. It moved to dismiss Buker's facial challenge as moot, arguing that the revised policies did not contain the provisions he challenged as overbroad, void for vagueness, or prior restraints. That motion was granted.

On appeal, the Fourth Circuit affirmed. It cited Circuit precedent which had been built on the Supreme Court's holding in *Pickering*: "[T]he First Amendment does not protect public employees when their speech interests are outweighed by the government's interest in providing efficient and effective services to the public." And it applied the familiar three-part test: the plaintiff must show: (1) that he was a "public employee ... speaking as a citizen upon a matter of public concern [rather than] as an employee about a matter of personal interest;" (2) that his "interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public;" and (3) that his "speech was a substantial factor in the employer's termination decision."

While some of Buker's postings -asserting First Amendment rights or assailing liberals-were matters of public concern, his "like" of the image depicting an elderly woman raising her middle finger and entitled "for you Chief"-on the heels of the Department's investigation into Buker's

Facebook activity-"amounted to no more than an employee grievance not protected by the First Amendment."

This required analysis of whether Buker's interest in speaking upon the matters of public concern outweighed the Department's interest in providing effective and efficient services to the public.

> Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

The Circuit concluded that the Department's interest in efficiency and preventing disruption outweighed Buker's interest in speaking as he had about gun control and the Department's social media policy. His Facebook activity interfered with and impaired Department operations and discipline as well as working relationships within the Department-which are critical where collaboration is necessary to save lives.

Buker's Facebook activity also significantly conflicted with his responsibilities as a battalion chief and role model, and undermined the Department's public safety messaging. It was also overtly disrespectful of his superiors and the Department in general.

Based on this analysis, the Circuit affirmed dismissal of Buker's retaliation claim.

His facial invalidity claim also failed. The Circuit noted that "a defendant's 'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (citation omitted). Here, in addition to adopting a revised Social Media Policy and Code of Conduct, the Department's current Fire Chief submitted a sworn affidavit that, "[a]s head of the Fire Department, [he] fully intend[s] to operate under the newly issued [policies] and do[es] not intend to re-issue the original versions." That evidence warranted dismissal of Buker's facial claim.

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Trials: No Right for Non-Party Who Has Been Served Subpoena, Which Was Subsequently Withdrawn, to Intervene

Islamic Society of Basking Ridge v. Township of Bernard, No. 16-4414 (3d Cir. Mar. 8, 2017).

A non-party who spoke out against an application by a group to build a mosque and was served with a subpoena in the group's RLUIPA action, could not intervene in the action after the subpoena was withdrawn because he lacked a sufficient interest in the underlying litigation.

In March 2016 the Islamic Society of Basking Ridge filed suit against Bernard, New Jersey, asserting it violated federal and state law in denying a planning application for a mosque. Although not named in the suit, Michael Barth, a citizen who spoke out against the mosque, was served with a subpoena by the plaintiffs. As a result of that action--and only that action--he sought to intervene in the case for the "limited purpose" of filing a motion to dismiss for lack of standing under RLUIPA. The plaintiffs withdrew the subpoena and the district court denied Barth's motion

to intervene. He appealed.

The Third Circuit recited the law regarding a litigant's ability to intervene under FRCP 24(a)(2). That right exists only upon: "(1) a timely application for leave to intervene, (2) a sufficient interest in the underlying litigation, (3) a threat that the interest will be impaired or affected by the disposition of the underlying action, and (4) that the existing parties to the action do not adequately represent the prospective intervenor's interests."

Here the Circuit agreed with the district judge that Barth's interest was premised on a subpoena which had since been withdrawn, meaning any basis it could have provided for intervention had disappeared. Barth's argument that it was withdrawn "without prejudice" and thus could be reinitiated was not sufficient, as it was too speculative. Moreover, Barth's interest as a member of the public was too generalized to confer intervenor status under the Rule. Barth's contemporaneous application for permissive intervention - and the district court's denial of it - was also affirmed. Barth did not meet the requirement that he had "a claim or defense that shares with the main action a common question of law or fact" since his "now-extinguished" interest in challenging his subpoena shared no common facts or law with the question of whether Bernard violated the plaintiff's constitutional rights.

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IMLA

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

