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Courts: Dismissal Proper where Plaintiff's Meager Attempts to Navigate HUD's Internal Processes did not Qualify as Exhaustion of Administrative Remedies and Statute of Limitations Had Run

George v. Easy Orange Housing Authority, No. 16-4269 (3d Cir. Apr. 24, 2017).

The Third Circuit has rejected a former NBA player's attempts to revive his suit against the East Orange Housing Authority over unsuccessful development plans.

In May 2007 ex-NBA player C. Tate George and his companies were selected to develop a property in East Orange, New Jersey. In November 2008, George learned that there was a tax lien on the property that threatened the development and that the East Orange Housing Authority, as well as the County Commission and the U.S. Department of Housing and Urban Development, all defendants in the case ultimately, knew about the lien but concealed it from him. The Housing Authority, and other County defendants, urged George to continue seeking to develop the property as planned and said they would resolve the lien issue; however, in February 2010 George was re-designated as the developer. George filed suit alleging he and his companies suffered financial losses as a result of the failure to disclose the tax lien. The district court

ultimately dismissed the claim against HUD for lack of jurisdiction and the case against all local government defendants for George's failure to timely file the suit.

The Third Circuit agreed with the district court that George's claim against HUD was fashioned as a tort claim, not a contract claim, meaning it had to be filed under the Federal Tort Claims Act and therefore required exhaustion of administrative remedies in HUD first. George's meager attempts to navigate HUD's internal administrative processes did not meet this standard and failed to give federal courts jurisdiction.

As for the local authorities, the Circuit delved into when the action "accrued." Ordinarily, this is when the wrongful conduct occurred. For George this was when he and his businesses were selected as the developers for the properties at issue (May 2007), because the defendants allegedly knew about the tax lien at that time. The Court was also willing to grant that, at latest, the potential date of accrual was November 2008 when George himself learned about the tax lien. As a result the statute of limitations period ran, at latest, to November 2014 based on the latter of the two potential accrual dates. George, however, did not file suit until February 2015, meaning the lower court's dismissal for failure to file timely was affirmed.

LINK

Damages: Claim for Damages Due to Clerk's Refusal to Issue Same-Sex Marriage License is Not Mooted by Revision of License Policy

Ermold v. Davis, No. 16-6412 (6th Cir. May 2, 2017).

Reversing and remanding, the Sixth Circuit has held that plaintiffs' claim for damages arising due to Kim Davis' refusal to issue a same-sex marriage license--even after *Obergefell*--was not mooted merely because Kentucky laws were changed to facilitate issuance of same-sex licenses and plaintiffs did receive such a license.

In June 2015, the Supreme Court held in *Obergefell* that Kentucky's definition of marriage as a union between one man and one woman violated the Fourteenth Amendment. That day, Kentucky's Governor ordered all Kentucky county clerks to begin issuing marriage licenses to same-sex couples. In July 2015, David Ermold and David Moore applied for a marriage license at the Rowan County Clerk's Office. Rowan County Clerk Kim Davis denied Ermold's and Moore's application, citing her personal religious beliefs.

Four days later, Ermold and Moore filed a § 1983 action against Davis individually and as Rowan County Clerk, alleging violation of their clearly established right to marry one another. Because a putative class action for declaratory and injunctive relief had already been filed against Davis, Ermold and Moore sought only damages.

Davis moved to dismiss, arguing that Ermold's and Moore's constitutional rights were not violated because they could have traveled to other Kentucky counties to be married. She claimed qualified immunity on the grounds that the plaintiffs had not pleaded a violation of a clearly established right.

In December 2015, Kentucky's Governor issued an Executive Order acknowledging that issuing same-sex marriage licenses caused a religious burden on some county clerks. That Order included a new form of marriage license deleting the name and signature of the county clerk and removing any language indicating formal authorization by the clerk.

In August 2016, the district court dismissed Ermold's and Moore's action on the grounds that

because marriage licenses were now being issued without incident, there no longer remained a case or controversy before the court.

The Sixth Circuit disagreed. The fact that plaintiffs had ultimately been issued a license, or that licenses were now being issued routinely to same-sex couples, did not eliminate the claim for their damages arising from a particularized harm occasioned by the clerk. The Appeals Court cited a broad span of precedents establishing that "Claims for damages are largely able to avoid mootness challenges."

The case was reversed and remanded.

Concurrence: Judge Siler, concurring, posited that the lower court may have meant to dismiss the case because Davis was protected by Kentucky's Religious Freedom Restoration Act-and called upon the implications of that statute for qualified immunity to be fully explored on remand.

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Personnel: At-Will Public Employee Not Entitled to Arbitration Under Union Contract, but May Have Property Interest via Collective Bargaining Agreement

Bailey-El v. Housing Authority of Baltimore City, No. 16-2140 (4th Cir. Apr. 27, 2017).

Vacating and remanding, the Fourth Circuit has directed the lower court to decide whether plaintiff's collective bargaining agreement provides a property interest in continued employment and whether he was deprived of due process when fired.

Ronald George Bailey-El worked for the Housing Authority of Baltimore City. He was fired, prompting him to claim he was deprived of due process. The district court held he was an at-will public employee and thus had no property interest in his job of which he could be deprived.

The Fourth Circuit noted Maryland law has a presumption of at-will employment, but that the presumption can be overcome when the parties negotiate different employment terms. The Court also noted however that the lower court did not specifically address Bailey-El's contention that he was entitled to an arbitration hearing under his union contract. It agreed he did not possess a property interest in the arbitration hearing itself based on Circuit precedent, but said he may well have had an interest in continued employment requiring post-termination process under his union contract - for example the contract itself may have required for-cause termination. As such, he may therefore have been entitled to a limited hearing prior to his termination. The Court concluded that the allegations in the complaint were not sufficiently developed to determine whether the process afforded Bailey-El was constitutionally adequate, meaning the lower court prematurely dismissed his procedural due process claim. It thus vacated and remanded the issue to the lower court to give Bailey-El an opportunity to clarify whether he had a property interest in his employment based on his collective bargaining agreement and, if he did, whether the process he was afforded was adequate in light of it.

LINK

Prisons: Remedial Actions to Eliminate Over-Detention, Even if not Fully Successful, Overcome Claims of Deliberate Indifference

Wharton v. Danberg, No. 16-1988 (3d Cir. Apr. 19, 2017).

Plaintiffs' over-detention claim was unsuccessful where they could not demonstrate that new record system and increased staff and resources amounted to deliberate indifference.

In 2008, the Delaware correctional system was recognized as having a comprehensive problem with handling inmate releases. A remedial measure- the Central Offender Records (COR) office - was implemented, along with increased staffing and resources, and a new computer system. Despite the changes, the system did not roll out perfectly; plaintiffs alleged the fixes didn't succeed and that Delaware still causes or allows the over-detention of thousands of inmates a year and that these over-detentions violate the Eighth Amendment. The district court denied the plaintiffs' class certification and granted the state and its various defendants summary judgment. Both decisions were challenged by plaintiffs at the Third Circuit.

The Circuit cited the three-part test for over-detention claims under the Eighth Amendment, including that a plaintiff must show: "(1) a prison official had knowledge of the prisoner's problem and thus of the risk that unwarranted punishment was being, or would be, inflicted; (2) the official either failed to act or took only ineffectual action under the circumstances, indicating that his response to the problem was a product of deliberate indifference to the prisoner's plight; and (3) a causal connection between the official's response to the problem and the unjustified detention." The Appeals Court agreed with the lower court's initial analysis that the first prong was obviously satisfied: "COR was created because [the Delaware Department of Corrections] was aware of what it believed to be an unacceptable level of over-detention in Delaware."

The second prong was the insurmountable stumbling block however for the plaintiffs. The record showed that the defendants - not to mention the entire state - took numerous steps to address the over-detention problem. A new record system was implemented, staff was increased, increased resources were funded, training was improved, and technology was upgraded. This made it impossible for the Appeals Court to find that the defendants were "deliberately indifferent" to the plaintiffs' plight. Despite this finding the Circuit took the analysis one step further than the lower court, noting that "ineffectual action . . . can also indicate deliberate indifference." While the Appeals Court theorized a variety of ways that a jury could find efforts to minimize over-detentions coexisted with long-term "festering" over-detention rooted in systemic policy and practice problems that amounted to an Eighth Amendment violation, it pointed out such theories required evidence to overcome summary judgment and that on this front the plaintiffs fell short. Simply put, the Court said "[t]he [plaintiffs] would need to show that Appellees' efforts to improve COR so obviously miss[ed] the mark that pursuing those efforts manifests disregard for the real problem and thereby amounts to deliberate indifference. Such evidence is absent from the record." Affirmed.

LINK

Remedies: City's Deduction of Daily Liquidated Damages from Payment Is Not "Abandonment" of Administrative Remedies

Balfour Beatty Infrastructure, Inc. v. Mayor and City Council of Baltimore, No. 16-1322 (4th Cir. Apr. 25, 2017).

Where a contractor failed to complete work on schedule, triggering the city's deduction of $40,000 per day from monthly payments, the contractor could not bring suit without first exhausting its administrative remedies-and could not allege that the city had "abandoned" its own administrative remedy processes.

Baltimore entered into two construction contracts with Balfour Beatty Infrastructure, Inc. to construct parts of a wastewater treatment system. Balfour was required to complete work by February 28, 2015 and failure to do so gave the City the right to assess liquidated damages for each day past the deadline by withholding a portion of its monthly payments. The contracts also included provisions for the resolution of claims and disputes, specifically that before filing in court, administrative remedies provided within Baltimore's government - in this case the Public Works Department administrative process - had to be exhausted.

Balfour failed to meet the deadline and Baltimore began deducting $40,000 per day from its monthly payments. Balfour sued in district court. Balfour alleged that by assessing liquidated damages without exhausting administrative remedies the City had "abandoned" its own administrative process, relieving Balfour of its obligation to undergo the administrative process. The district court disagreed, holding Balfour was required to exhaust its remedies before going to court. The single potential exception, that the "reviewing agency is palpably without jurisdiction" to adjudicate a party's claim, was rejected by the lower court.

Balfour's appeal argument about the single exception to administrative exhaustion fared no better in the Fourth Circuit than it did initially in the lower court. The Circuit found Balfour's position that it was relieved of its duty to exhaust administrative remedies because the Baltimore Public Works Department was "palpably without jurisdiction" showed a fundamental misunderstanding of this exception. In Maryland there is a strong preference for administrative exhaustion and the sole exception is for situations where a tribunal lacks the authority to rule on a party's dispute or to provide a remedy. The Court found this simply "has no application here" since neither party disputed that the contracts were public works contracts governed by the administrative manual of the Public Works Department or that the officials in that Department had the authority to hear and resolve claims from public works contracts.

Balfour argued that the City lacked authority to deduct liquidated damages from its payments to the company without first engaging in the administrative dispute resolution process, but, as the lower and Circuit Court held, that *is an entirely different issue going to the merits of the underlying dispute between the parties.* That issue - whether the City must exhaust administrative remedies before taking liquidated damages or not - is precisely the kind of interpretive question Maryland law requires be "determined by a final administrative decision and to be judicially reviewed only after the administrative remedy has been exhausted." The lower court holding was affirmed.

LINK

Search and Seizure: Infiltration into Protest Group Without Deterring Its Activities Does Not Violate First or Fourth Amendment

Panagagos v. Towery, Nos. 14-35598, 14-35816 (9th Cir. May 2, 2017).

The Ninth Circuit, affirming the lower court, has found that infiltration of a protest group by a civilian army employee did not deter the group's speech and therefore was not a First Amendment privacy violation, and a review of the group's open listserv was not an unconstitutional search.

Julianne Panagagos and numerous other defendants belonged to an organization called Port Militarization Resistance (PMR), generally described as a nonviolent protest organization devoted to protesting the shipment of arms from ports in Washington State to Afghanistan and Iraq. For two years between 2007 and 2009 a civilian army employee infiltrated the group and collected information that was ultimately passed on to local Tacoma and Olympia police departments that arrested and prosecuted them. Panagagos and her compatriots alleged the infiltration of PMR and subsequent use of information derived therefrom violated their fundamental First Amendment rights - specifically privacy - and their Fourth Amendment rights. The district court rejected the allegations and the Ninth Circuit affirmed.

The first allegation the Circuit took up was whether the infiltration of PMR's listserv - Oly22 - violated plaintiffs' right to privacy. The Court simply noted the listserv was available to and shared with third parties, meaning it was not protected under First Amendment privacy doctrines. In a similar vein, the Court held that the placement of a video camera two blocks from one of the plaintiff's homes on a public street did not violate privacy, as he had no expectation of privacy in that location. Third, on a slightly different tack, the plaintiffs argued their First Amendment speech rights were violated by the informant among them chilling their political speech. The Circuit pointed out that "no First Amendment violation exists where the informant conducts the investigation in good faith; i.e. not for the purpose of abridging the First Amendment freedoms and adhere[s] scrupulously to the scope of a defendant's invitation to participate in the organization." In this case, the plaintiffs failed to meet the burden of showing that the infiltration deterred or chilled their political speech and that deterrence was a *motivating* factor for the infiltration in the first place, thus it affirmed the lower court's holding.

As for the Fourth Amendment issue, the Court rejected a *Bivens* allegation regarding the undercover operation. Since "[u]ndercover operations, in which the agent is a so-called 'invited informer,' are not 'searches' under the Fourth Amendment," the Court held the civilian employee's initial infiltration and subsequent information collection once within the group could not have violated the Fourth Amendment.

LINK

Search and Seizure: Hotel's Demand that Occupant be Evicted Allows Warrantless Entry by Police-Even Where Police Provided the Information Leading to Eviction

United States v. Peoples, No. 16-2044 (8th Cir. Apr. 24, 2017).

Where a hotel, acting on information from police that illicit activities might be ongoing in a hotel room, orders police to evict the miscreant, the warrantless entry does not violate the Fourth Amendment.

The Crown Lodge on the outskirts of Kansas City has been ravaged by crime, prompting police to conduct undercover operations. In March 2015 they identified a stolen car there and followed a woman out of Room 114, after which they arrested her and learned a man remained in Room 114. An officer was dispatched to the Lodge to identify the man in the room, wherein he advised the manager of the criminal activity and was handed the keys to the room to "evict" the occupant. Simultaneously, he learned that the driver of the stolen car had a gun and ammunition with her and that she identified the man in Room 114 as "Dusty." The officer went to the room with this information and the key, knocked, got no response, entered the room, and found Dusty Peoples lying on the bed, with a loaded gun and narcotics nearby. Peoples was arrested and plead, under condition that he could challenge the search, to being a felon in possession of a firearm.

Peoples moved to suppress all the evidence, arguing it was the fruit of an illegal warrantless search of his hotel room. The magistrate denied the motion, holding "the management was justified in evicting the occupants of Room114 . . . [because] Missouri law allows a hotel to eject a person when the hotel operator reasonably believes that the person is using the premises for an unlawful purpose," and the district court adopted the analysis. Peoples appealed to the Eighth Circuit.

The Eighth Circuit began by noting, as both parties agreed, that Fourth Amendment rights extend to temporary dwellings like hotel rooms, but that "once a guest has been *justifiably* expelled, the guest is without standing to contest an officer's entry into his hotel room on Fourth Amendment grounds" since the dwelling then reverts to management. This justification may be founded in state law, meaning Missouri's law stating that a hotel operator "may eject a person from the hotel and notify the appropriate local law enforcement authorities [if] . . . [he or she] reasonably believes that the individual is using the premises for an unlawful purpose," is relevant. Peoples first argued that the police illegally tried to circumvent the warrant requirement through a private party by getting the manager to allow a search of the room, which the Supreme Court deemed a hotel owner/operator cannot do in *Stoner.* The Court disagreed with this, noting the police did not ask to search the room, but rather the operator told the police he wanted to man in Room 114 *evicted* after learning of illegal activity associated with the room.

Second, Peoples argued the initial police entry into Room 114 was unlawful because his eviction was neither "justified" nor "proper" under Missouri law since Missouri law cannot be read to authorize evictions of guests that result from police reports of illicit conduct to hotel management. The Court rejected this wholesale attack on whether the police, in general, can be relied on to provide information for hotel operator evictions, looking instead to the facts of the case and finding the police provided accurate information to the hotel, the manager of which then determined the occupant of Room 114 should be evicted from the premises. As a result, the Court upheld the lower court ruling and People's conviction.

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