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Equal Protection: Ordinance Prohibiting Women from Public Exposure of Breast Areas Survives Heightened Scrutiny

Free the Nipple v. City of Springfield, no.17-3467 (8th Cir. May 6, 2019).

Relying on its decision in a 2003 case, the Eighth Circuit has affirmed a Western District of Missouri grant of summary judgment to a city whose ordinance prohibits public exposure of a woman's nipple and areola-while imposing no such restriction on men, finding that the measure supports legitimate public safety, order and morals.

In March 2016, Springfield, Missouri (City) passed a new ordinance (Ordinance) following a protest by women who had expressed their displeasure with the City's existing indecency laws by convening on City streets nude from the waist up except for strategically placed strips of black tape. The Ordinance reads:

> (a) No person shall engage in or commit any act of indecent exposure or conduct in place open to public view.

(b) "Indecent exposure or conduct" shall include:

(1) The exposure of the male or female genitals, pubic area, or the female breast with less than a fully opaque covering of any part of the areola and nipple, or the showing of the covered male genitals in a discernibly turgid state.

(c) Exceptions.

(1) This section shall not prohibit performances of adult entertainment in compliance with section 10-7.

(2) This section shall not regulate nudity when the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Missouri Constitution.

(3) This section shall not prohibit a mother from breast-feeding her child or expressing breast milk in any public or private location where the mother and child are otherwise authorized to be.

Free the Nipple (FTN) sued on equal protection grounds, arguing that the Ordinance treats men and women differently-prohibiting only women from exposing their nipples in public. Each party moved for summary judgment. The district court held for the City, relying on the Eighth Circuit's decision in *Ways v. City of Lincoln*, 331 F.3d 596 (8th Cir. 2003), concluding that the gender-based classification was related to the City's legitimate interest in prohibiting nudity and promoting morality. FTN appealed, arguing that the district court erred by misapplying the heightened scrutiny standard.

The Eighth Circuit affirmed. It first noted that although no one had been arrested or prosecuted under the ordinance, FTN was claiming the Ordinance unconstitutional as applied, as well as on its face, while the City argued the challenge was facial only.

> "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings or disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). The important inquiry is whether the "claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." *Doe v. Reed*, 561 U.S. 186, 194 (2010). The relief FTN seeks-a declaration that the entire ordinance is unconstitutional-reaches beyond the particular circumstances of these plaintiffs. FTN's claim is facial."

The Circuit found that similar laws have withstood constitutional challenge "in the majority of courts"-which includes the Seventh and Fourth Circuits, but noted that a recent Tenth Circuit decision-*Free the Nipple v. City of Fort Collins,* 916 F.3d 792, 802-05 (10th Cir. 2019) held that FTN's equal protection challenge to a provision very similar to the Ordinance was likely to succeed on the merits.

The Eighth Circuit returned to its 2003 holding in *Ways v. City of :Lincoln*, where it had assumed, without deciding, that the ordinance was a gender-based classification, and applied heightened scrutiny, requiring the city to show that the "gender-based classification[ ] serve[s] 'important governmental objectives' and that the statute in question is 'substantially related to the achievement of those objectives.'" Here , the Ordinance was almost identical to the challenged provision in *Ways*. FTN pointed to various differences--the Ordinance does not contain an exception for children under the age of 12 like the ordinance in *Ways*, and exempts adult entertainment. And, unlike the challengers in *Ways*, FTN produced evidence suggesting there is no relevant difference between male and female nipples and that gender stereotypes motivated the discriminatory treatment. The Circuit found these arguments "unpersuasive." *Ways* had not turned on the evidence (or lack thereof) produced by the parties about the similarities or

differences between men and women's breasts, and *Ways*' equal protection analysis applied to the Ordinance.

Given that *Ways* was not distinguishable, "it controls this panel unless an intervening Supreme Court decision supersedes it." FTN pointed to *Lawrence v. Texas*, 539 U.S. 558 (2003) where the Supreme Court had stricken Texas's anti-sodomy law on Due Process grounds because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. After *Lawrence*, FTN contended, the City's interest in public morality could no longer justify the gender-based breast classification. "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . . ." (O'Connor, J., concurring). But the *Ways* court had recognized a number of important governmental interests and was not merely an exercise in enforcing the views of the public. This was equally true of the Ordinance here: "Springfield's ordinance is substantially related to its important governmental interests in promoting public decency and proscribing public nudity to protect morals, public order, health, and safety."

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NOTE: *The Tenth Circuit's Fort Collins case, cited above, was decided and remanded on February 15, 2019, and appears to make a strong case for FTN. It upholds the district court decision preliminarily enjoining the Fort Collins nudity law on equal protection grounds and finds that Fort Collins cannot even meet an intermediate scrutiny standard, let alone the heightened scrutiny analysis the Eighth Circuit applies here.*

The Tenth Circuit opinion in Free the Nipple v. City of Fort Collins may be accessed HERE.

Housing: Revocation of Landlord's License for Code Violations Is Not Basis for FHA Claim Alleging Disparate Impact on Tenants

Khan v. City of Minneapolis, no. 18-1654 (8th Cir. Apr. 30, 2019).

A Minneapolis landlord has been unsuccessful in asserting that, by revoking his licenses due to repeated code violations, the city had disproportionately impacted a class of tenants protected under the Fair Housing Act.

Landlord Mahmood Khan (Khan) had 43 rental-dwelling licenses in Minneapolis (City) that permitted him to rent homes to about 350 people. All but two of his tenants were protected class members under the Fair Housing Act (FHA), which prohibits making unavailable or denying a dwelling because of a person's "race, color, religion, sex, familial status, or national origin." See 42 U.S.C. § 3604(a).

Because of housing-code violations, the City revoked one of Khan's licenses in 2010 and another in 2014. Khan appealed each revocation, but each was upheld. The City then revoked Khan's remaining licenses under its ordinance that prohibits a person from holding a rental-dwelling license for five years if the City has revoked two or more licenses from that person.

After Khan appealed unsuccessfully in Minnesota forums, he brought his cause to federal court, asserting various claims against the City for revoking the licenses. On appeal to the Eighth Circuit, he abandoned all but a disparate-impact charge under the FHA, which challenges "practices having a disproportionately adverse effect on minorities without a justifiable rationale."

The Circuit did not find the FHA claim sustainable. While the Supreme Court has explicitly recognized that type of claim, it has cautioned that they are "properly limited" to the removal of

"artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* , 135 S. Ct. 2507, 2522 (2015). Moreover, the FHA "is not an instrument to force housing authorities to reorder their priorities" or to prevent them "from achieving legitimate objectives, such as ensuring compliance with health and safety codes." Id. at 2522, 2524.

The Eighth Circuit had confronted a similar circumstance before. After the Supreme Court established the ground rules for FHA disparate-impact claims, two Minneapolis landlords who rented primarily to members of protected classes had brought an FHA disparate impact against the City, alleging that its "heightened enforcement of housing and rental standards" had a disparate impact on the availability of housing for individuals protected under the FHA. In that case, *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), the Circuit had affirmed the district court's grant of judgment on the pleadings for the City, concluding that the landlords failed to point to an artificial, arbitrary, and unnecessary policy that an FHA disparate-impact claim could remedy.

The court found *Ellis* applicable. Although Khan argued that "[t]he years of fines, fees, penalties, hearings, condemnations, demolitions, and rental dwelling license revocations constitute a custom, practice, policy, or pattern of discrimination against racial minorities and other 'protected class' members" by the City, the Circuit found no such policy. Khan did not provide evidence documenting any actions he had allegedly taken based on the City's behavior which negatively affected any person protected by the FHA. Even the City's question about whether Khan inquired about prospective tenants' criminal records could not be characterized as an implicit directive that he not rent to such persons. And Khan failed to allege that the City instructed other landlords to rent to those with criminal records.

The district court's grant of judgment on the pleadings was affirmed.

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Jails: Inadequate Evidence for *Monell* Liability where Jailers Failed to Prevent Suicide of Pretrial Detainee

Garza v. City of Donna, No. 18-40044 (5th Cir. Apr. 30, 2019).

Despite indications that jail authorities were making signs designating their facility as a "Hilton" at the same time as a detainee was hanging himself, the evidence presented has been found inadequate to establish improper "conditions" at the jail or to constitute deliberate indifference sufficient for *Monell* liability.

In February 2016, Donna, Texas Police Department (DPD) officers responded to a 911 call from Veronica Garza stating her son Jose Garza (Garza) was intoxicated, arguing with his brother, and that she feared for his safety. Officers arrested Garza and transported him to DPD's holding facility where he was booked in the jail and placed in a cell. The officers did not take any mental-health precautions.

Garza later obscured the vision of the camera in his cell, which went unnoticed by the employee charged with monitoring the camera feed of the holding cells. Jailers on duty conducted a cell check at 8:10 AM then proceeded to make signs, allegedly under the direction of the police chief, reading "Welcome to Donna Hilton" and another with the logo of the Punisher, a comic book vigilante character. While occupied with creating these signs, the jailers missed that Garza hanged himself and this was not discovered until ICE arrived at 8:49 AM. Jailers heard Garza banging on the door and making noise, but it is disputed whether Garza was doing so to get their

attention.

After the discovery, two minutes passed before CPR commenced. Emergency services was called and then took over CPR and treatment. The medical technician was informed that CPR was performed, but was not given any other information, and he was unable to inform the hospital of any pertinent medical information. Garza was pronounced dead at the hospital at 9:12 AM.

Garza's estate and family brought a Section 1983 action alleging violation of the Due Process Clause in the time leading up to and immediately following Garza's suicide. Specifically, Garza's estate and family called into question the actions of the arresting and booking officers, the employee responsible for monitoring the cell's camera, the jailers on duty, the officers who began CPR but did not relay medical information to the EMT, and the police chief whose task to create the signs distracted the jailers on duty.

The district court rejected these proposed bases for municipal liability and granted summary judgment to the city.

The Fifth Circuit affirmed. Although Appellants argued that the signs, taken together, indicated an "official policy of prisoner mistreatment" or "official encouragement of intentional mistreatment of detainees," and should therefore s be categorized as a "condition" of the confinement to which Garza was subjected, the court found otherwise. Though the signs may have preoccupied the jailers to the detriment of their core duties, they constituted an "episodic-act," given that that conditions cases "are meant for restraints or impositions on inmates' lives" such as overcrowding, deprivation of phone or mail privileges, etc. "The signs do not operate as a continuing burden on inmate life as the aforementioned conditions do."

The court also held that the record did not support municipal liability for the remaining acts or omissions. The Appellants failed to provide evidence of a pattern of violations, therefore, the required theory was the single-incident method of demonstrating deliberate indifference, which, according to the Circuit, may be inferred, "only in narrow and extreme circumstances." The court held that Appellants failed to meet that burden in this case, pointing to a lack of evidence about the adequacy (or inadequacy) of training the officers received and a lack of records regarding the jail's operation and history which might showing recurring situations that threatened constitutional rights. The court also noted that there was no deliberate directive within the meaning of *Pembaur* because there was no evidence suggesting the police chief knew of Garza's presence in the jail, much less that the chief instructed the jailers to disregard Garza in favor of making/installing signs. The Circuit, while disagreeing with the district court's requirement that deliberate indifference cases must show "subjective intent" on the part of the municipal actor, nevertheless found in favor of the city.

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Ride-Sharing: New York City's Ordinance Requiring Ride-Share Drivers to be Paid $17 per Hour is Upheld

Tri-City LLC v. New York City Taxi and Limousine Commission, no. 151037 (Sup. Ct. N.Y. Co., Apr. 30, 2019).

A New York City ordinance implemented in February 2019 which requires that ride-share drivers receive at least $17.22 per hour has survived a challenge by Lyft.

In January 2015, there were approximately 12,500 ride share vehicles plying the avenues of New York City (City). By July 2017, there were 78,000 cars working with the four largest app

companies--Uber, Lyft, Via and June, clogging the streets and depressing drivers' income to subsistence levels. (In contrast, there are approximately 14,000 yellow cabs in the City). In August 2018, the City Council passed measures limiting the number of ride-share drivers authorized in the City and requiring the ride share companies to ensure that their drivers receive a wage at least equal to the $15 per hour mandated for other employers in the City.

The wage provisions, codified in Local Law 150, ultimately required that drivers receive at least $17.22 per hour to account for self-employment tax and other costs, and required voluminous individualized wage details from the app companies. They went into effect on February 1, 2019. Lyft immediately sued the City's Taxi and Limousine Commission (TLC), bringing an Article 78 proceeding for preliminary injunction and temporary restraining order to forestall implementation of the new rules. Among other things, Lyft asserted that the TLC's methodologies for ensuring minimum compensation-which appear to require that each individual trip meet specific dollars-per-hour and dollars-per-mile thresholds rather than allowing Lyft and the other app companies to average drivers' overall income on a weekly basis-were arbitrary and capricious and an abuse of discretion.

On April 30, 2019, the Supreme Court of New York County (Supreme Courts are New York's trial-level tribunals-the Court of Appeals is the state's ultimate arbiter) denied the motion for injunction and TRO, finding Rule 150 to be rationally related to legitimate governmental objectives. It seems inevitable that the app companies (including Uber, which is scheduled to go public tomorrow with a valuation of as much as $90 Billion and whose 9,000 drivers would make it the largest employer in New York City), will continue to litigate the issue.

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An article about the wage issue is also below. (In a related development, Uber is announcing today that it is setting aside $146 million to settle claims by thousands of drivers that the company improperly categorized them as independent contractors rather than employees, adding to tens of millions of dollars Uber has already paid drivers in California and Massachusetts earlier this year on the same issue.)

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Self-Incrimination: Indiana Program Requiring Sex Offenders to Disclose Bad Acts or Face Further Incarceration Violates Fifth Amendment

Lacy v. Butts, No. 17-3256 (7th Cir. Apr. 25, 2019).

The Seventh Circuit has found that the Indiana Sex Offender Management and Monitoring Program (INSOMM), which requires sex offenders to disclose all their deviant sexual acts or risk denial of good-time credits, is an unconstitutional form of compelled self-incrimination.

Indiana requires all convicted sex offenders to complete the Indiana Sex Offender Management and Monitoring Program (INSOMM) before release. INSOMM requires participants to fill out a questionnaire that asks them to identify which illegal sexual acts they committed and how often they did so. Participants are placed in groups based on risk level, with higher risk levels requiring more hours of therapy. Before therapy sessions, participants must fill out workbooks that require them to describe all past acts of sexual violence and abuse in detail regardless of whether they were charged for those offenses.

INSOMM informs participants that they are not protected by immunity or confidentiality during any part of the program. Additionally, inmates cannot opt out of the program or any part of the program, and they are required to respond and fully answer all questions asked. If a counselor suspects a participant has been deceptive or less than forthcoming, the participant may be subject to a polygraph test at the discretion of the counselor. A participant is excused from admitting responsibility for an offense only if the examination indicates no deception and the counselors agree that the participant is being truthful.

If an inmate refuses to take a polygraph, denies offenses, gives answers deemed incomplete or dishonest, or otherwise fails the mandates of INSOMM, the inmate will receive a Class A or "Major Conduct disciplinary violation," the same class assigned to rape or assault on an officer. INSOMM counselors have the final say in whether an inmate's conduct merits disciplinary action. After a first offense, the inmate is denied the opportunity to accrue good-time credits which they would otherwise be entitled to by statute. Further violations will result in revocation of already acquired credits.

Donald Lacy (Lacy) filed a class action on behalf of Indiana inmates who have been punished in the manner stated above. The Seventh Circuit agreed with the district court, affirming that INSOMM's practice of revoking good time credits and denying the opportunity to earn such credits for the refusal of convicted sex offenders to admit their crimes is a violation of the Fifth Amendment's right to be free from compelled self-incrimination.

Whether the disclosures were testimonial in nature was not in dispute, therefore the court resolved whether the program calls for incriminating information, and whether participation is compelled within the meaning of Fifth Amendment jurisprudence.

I. Incrimination

The court determined that INSOMM's required disclosures give rise to a real and appreciable risk of prosecution. The extent of the information INSOMM requires coupled with the express warning that there is no immunity nor confidentiality was sufficient to demonstrate that Lacy and his class members risked future criminal investigation and prosecution. The ability to describe their actions in "general terms" was insufficient protection against incrimination given the program's requirement of providing detailed information.

Claiming the information is useless for prosecution did not make it so in the eyes of the court, given that the Fifth Amendment protects against disclosures the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. Additionally, the fact that no prosecutions had been initiated as a result of INSOMM was not determinative. It was the likelihood of prosecutions that matter and according to the court, that likelihood was significant.

II. Compulsion

The court held that denial of the opportunity to earn good-time credits and the revocation of credits already earned to induce program participants to disclose information was in fact compulsion of self-incrimination in contravention of the Fifth Amendment.

In the Supreme Court's plurality opinion in *McKune v Lile*, 536 U.S. 24 (2002) five justices joining in the judgment agreed that a longer term of incarceration is an impermissible penalty and when that imposition is automatic, it amounts to unconstitutional compulsion. According to the Seventh Circuit, "the distinction between a discretionary award of less time and the automatic deprivation of an earned sentence reduction is critical." The Seventh Circuit was careful to note that there was room to use parole revocation as a punishment depending on the circumstances, and that this case related to the length of time inmates would be incarcerated, not the conditions of confinement unlike *Lile* where conditions of confinement was at issue.

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THIS JUST IN-Colorado County Welcomes Challenge to State's New "Red Flag" Gun Removal Law

In an unfortunate proximity, time-wise, to yet another school shooting in Colorado, the leadership of El Paso County, Colorado announced last week that it intends to fight the "red flag" gun bill signed by Governor Jared Polis on April 12, 2019. While the County is not certain it can spend taxpayer dollars to confront the new law directly, and may file an amicus brief instead, it is openly welcoming a Second Amendment challenge by the Rocky Mountain Gun Owners.

The "red flag" extreme risk protection order bill allows law enforcement or a relative to petition a judge to take away an individual's guns if that individual is deemed a risk to himself or herself or others due to a mental crisis. Critics raise due process concerns as well as gun rights issues.

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