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Employment: Board of Supervisors' Actions Reveal Retaliatory Animus in Termination of County Employee who Ran for Sheriff

Griggs v. Chickasaw County, No. 18-60401 (5th Cir. July 18, 2019).

Affirming a jury verdict, the Fifth Circuit holds that, where a Board of Supervisors openly suggested that a county employee running for sheriff drop out of the race and subsequently eliminated his position due to an alleged lack of finding, the employee could bring a *Monell*-based retaliation claim.

Lamon Griggs (Griggs) worked for 15 years as the Solid Waste Enforcement Officer for Chickasaw County, Mississippi (County), without any complaints about his job performance. He applied for grants each year to fund his work, and funds from the Mississippi Department of Environmental Quality (MDEQ) supported at least half of Griggs' salary. In 2015, Griggs decided to run for County Sheriff as an independent. He spoke with a member of the County's five-member Board of Supervisors about his campaign, who asked if Griggs was "going to pull out" of the sheriff race and told him that other supervisors wanted him to withdraw.

Shortly thereafter, the County Clerk shared with Griggs that funding for his program had not been received by the County. Griggs was asked to attend a subsequent Board of Supervisors meeting, where a supervisor stated, "I say we go ahead and just eliminate this program right now." Although the County Clerk advised that the County had another grant which could fund Griggs' position through the start of the year, the Board of Supervisors unanimously agreed to eliminate Griggs' position. A supervisor subsequently asked Griggs if he knew "what the Hatch Act is."

Griggs then applied for state unemployment benefits, stating that he had been "laid off," and sued the County, alleging that it had eliminated his position because of constitutionally protected political activity. The County moved for summary judgment, which the district court denied, and the case proceeded to jury trial. The jury returned a verdict in Griggs' favor, finding that Griggs proved by a preponderance of the evidence that his running for Sheriff was a motivating factor in his losing his position, and that the County failed to prove "by a preponderance of the evidence that it would have eliminated the position . . . regardless of whether or not [Griggs] ran for Sheriff."

On appeal, the County argued that Griggs' claim was: (1) barred by the Rooker-Feldman doctrine; (2) judicially estopped because Griggs selected that he was "laid off" in his application for unemployment benefits; and (3) precluded because Griggs failed to appeal the Board's decision under Mississippi law. The County further argued that Griggs' position was a policymaking position that gave the County greater latitude regarding his speech and shielded it from First Amendment liability.

The Fifth Circuit found no reversible error. First, the Rooker-Feldman doctrine was inapplicable. Rooker-Feldman is jurisdictional, and must be addressed as a preliminary matter. But the doctrine "directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments," and the Supreme Court has made clear that the Rooker-Feldman doctrine only applies to state judicial proceedings, not administrative or legislative proceedings. Because Griggs was challenging a decision of the Board of Supervisors, not the decision of a state court, the federal district court did not lack jurisdiction.

Second, also unavailing was the County's argument that Griggs' First Amendment retaliation claim was estopped because he had said he was "laid off" on his unemployment form, and didn't mention retaliation. While judicial estoppel is appropriate when "a party has asserted a position that is plainly inconsistent with a previously asserted position," that was not the case here. As the court saw it, the unemployment authorities had not asked whether Griggs engaged in protected speech, merely whether he was entitled to unemployment benefits.

The Circuit also disagreed with the County's stance that Griggs' failure to appeal the Board's decision in state court precluded his First Amendment claim under § 1983. "When federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies."

Finally, the Circuit disagreed with the County's argument that Griggs occupied a policymaker role. The County's goal in this regard related to the pleading requirements for retaliatory speech termination: To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action. Under the third prong of this test, the government's interests were accentuated if the terminated employee had occupied a policymaking role." As the Circuit put it, "This court 'more readily find[s] that the government's interests outweigh the employee's interests where the employee is a policymaker' for purposes of the First Amendment."

The County argued that Griggs' position, Solid Waste Enforcement Officer, was a policymaking role because Griggs "traveled and monitored 571 miles of county roads looking for illegal dumping;" "determined who to ticket for these dumping activities;" and "receive[d] calls from citizens who ma[d]e complaints which he investigate[d]." Furthermore, Griggs "was solely

responsible for applying for the grant to fund his program and salary and thus, he set the budget for the program." The court was unpersuaded--there was no evidence that Griggs created or implemented policy or that he had discretion in performing his duties that was not severely limited by a supervisor.

Griggs had sought municipal liability under *Monell*, requiring a showing of municipal policy. When the municipality's policymaker is a multimember board, "the separate actions of individual members of the Board are not sufficient to bind the Board as an entity." Noting that "where the evidence relates to individual members of a board, other circuits require proof that a majority of the multimember body had the requisite motive," the court looked to the actions of the individual supervisors. It found that at least three of the five supervisors acted with retaliatory motive. That evidence was legally sufficient to support the jury's verdict.

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Licenses: False Statement Constitutes "Gross Violation" of Liquor Law, Justifying Revocation

The Mattheis Company v. Town of Jackson, 2019 WY 78 (WY July 23, 2019).

Affirming the state district court, the Wyoming Supreme Court concludes that a liquor licensee's knowing falsification about the duration of a tavern lease in order to fulfill statutory requirements is a gross violation of law and satisfies the requisites for revocation; the licensee is not exculpated because it had used outside counsel.

In 2007 the Mattheis Company (Company) obtained a liquor license from the Town of Jackson (Jackson) and began operating the Town Square Tavern (Tavern). Through 2016, the Company renewed its liquor license annually-nine times in total. In December 2016, the Company again applied for a one-year license, indicating on the application that it had exercised a five-year lease renewal. through March 2022.

The Town noticed that there was no such renewal on file, and that Town records indicated the Company's lease would expire in March 2017. Because Wyoming law requires that liquor license holders have valid leases permitting the sale of alcoholic beverages at their premises for the full term of a liquor license, the Town notified the Company that it would need to show proof of a lease through at least March 2018.

The Company retained a local attorney to negotiate a continued lease with the landlord. During the process, the Company "parked" the license in non-operational status at another location, as permitted under Wyoming law and authorized by the Town Council. The parties ultimately signed a one-year lease terminating March 2018-but the same day, they executed a "Modification of Lease Term" (Modification) that reduced the term to a seven-month period ending on October 31, 2017-sufficient to cover the Tavern's lucrative summer season.

The Company then applied to transfer the "parked" license back to the Tavern location, stating on the application that the lease expired on March 31, 2018. The two principals of the Company signed directly above the application provision: "NOTE: Please submit a copy of the lease with the application. W.S. 12-4-103(a)(iii) requires the lease be valid THROUGH the TERM OF THE LICENSE . . . ." (Emphasis in original). The application was notarized by the attorney hired to negotiate the lease, directly beneath the "Oath or Verification" section of the application, which stated: "Under penalty of perjury, and the possible revocation or cancellation of the license, I swear the above stated facts, are true and accurate." The Company submitted the application

attaching the one-year lease. It did not submit the Modification.

The Town approved the license transfer, and the Tavern conducted business through the summer of 2017. During that period, the landlord signed a new lease agreement with a local restaurateur, beginning after the Tavern lease expired on October 31, 2017. When the future tenant applied to the Town for a liquor license in August 2017, it provided the Modification indicating the early termination of the Tavern's lease.

The Town moved to revoke the Company's license. The Company asked for leniency, asserting they "had no idea that we were signing something that would jeopardize our business or our liquor license. We wouldn't knowingly sign documents with false information, nor would our attorney allow us to do so (and he in fact notarized all documents)." Litigation ensued. At trial, the Company admitted that its March 2017 application contained false information but argued that it had neither committed a "gross violation" of Wyoming law nor violated the law's "intent and purpose" because its mistake was not purposeful or flagrant and because it had acted under the advice of counsel. It also argued that the district court should suspend the license in lieu of revoking it, in part because other businesses that had committed liquor-license violations had not had their licenses revoked by the Town.

The district court held that the Company's misrepresentation "was a flagrant violation of the Wyoming liquor licensing statutes" and "not a careless act or a negligent oversight." The court was unpersuaded by the Company's explanation that it had relied on advice of counsel; it was "unable to find by a preponderance of the evidence" that the lawyer had advised the Company "that it was legal to provide false information on the license application." Moreover, it found that even if the Company had received that advice, it could not rely on it in good faith, given the principals' clear knowledge of the one-year lease requirement.

On appeal, the Wyoming Supreme Court affirmed. It again evaluated the Company's argument that it had not committed the requisite "gross violation" of law because the Town's history of enforcement demonstrated that a "gross violation" must be "very serious, repeated, and flagrant" and because other licensees had not suffered revocation in circumstances the Company considered comparable. "We hold the district court did not err in concluding that the Company committed a gross violation of Title 12 and correctly rejected the Company's advice-of-counsel defense."

The Wyoming Supreme Court further found that the district court had not abused its discretion in ordering revocation of the license as opposed to mere suspension. "While the Court has discretion to second-guess that decision and suspend the license, the Court cannot find that to be an appropriate consequence after having found that Mattheis Company was affirmatively aware of the licensing requirements and knowingly failed to comply by submitting a liquor license, application under oath, containing false information."

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NOTE: This case was argued by Lea Colasuonno, Jackson, Wyoming Acting Town Attorney and a former student of Chuck Thompson's at George Washington Law School. We salute Lea on her success.

Speech: Protestor Cannot be Barred from Private Road which Looks and Functions like a Public Thoroughfare

Brindley v. City of Memphis, No. 18-5753 (6th Cir. July 24, 2019).

Reversing the lower court, the Sixth Circuit applies Supreme Court guidance to find that a protestor should not have been prohibited from standing on a private road near a Planned Parenthood clinic where the road functioned as a public thoroughfare.

The Sixth Circuit's analysis in reversing a lower court's denial of preliminary injunction sought by a man who attempted to stand on a private road to protest a nearby Planned Parenthood facility is neatly summarized at the beginning of its opinion:

> The Supreme Court has long held that public streets are traditional public fora. And even when a street is privately owned, it remains a traditional public forum if it looks and functions like a public street. The roadway at issue here-which connects directly to a busy public thoroughfare, displays no sign of private ownership, and is used by the general public to access many nearby buildings, including the clinic, a gas station, a church, and a U.S. Immigration and Customs Enforcement (ICE) office-has all the trappings of a public street.

In May 2017, Planned Parenthood opened its Memphis clinic accessed by a private road known as "the Cove." As indicated in the above cited language, the Cove connects a public road to various commercial establishments and, except for having a street sign that is blue as opposed to white, bears no indication that it is private. John Brindley (Brindley) stood on the Cove and protested Planned Parenthood's presence. A Planned Parenthood employee met him outside, told him that the Cove was a private street, and asked him to leave. He refused, and a Memphis police officer, after consulting with his superiors, ultimately ordered him to move several hundred away from the clinic, to Sumner Avenue, a public thoroughfare.

Brindley sued Memphis, the Director of the Memphis Police Department, and the individual officer who had ordered him to move. He claimed that (1) his exclusion from the Cove violated his First Amendment rights because the Cove is a traditional public forum, and (2) the City of Memphis violated his due process rights by adopting an unconstitutionally vague "policy" of excluding certain speakers from traditional public fora. Shortly thereafter, Brindley sought a preliminary injunction requiring the Appellees to give him access to the Cove. The district court found that he had not demonstrated a strong likelihood of success on the merits and denied his motion.

On appeal, the Sixth Circuit vacated. It focused only on one element of the traditional three or four grounds for injunctive relief: "[I]n First Amendment cases, 'the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the [challenged action].'"

There was no dispute that Brindley's speech was protected by the First Amendment; the question was what level of scrutiny would apply to measures which impinged on that speech. That analysis turned on the legal character of the forum where Brindley was speaking. Courts recognize four types of fora: (1) the traditional public forum, (2) the designated public forum, (3) the limited public forum, and (4) the nonpublic forum. Restrictions on speech in traditional or designated public fora receive strict scrutiny, which means they must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that interest." Restrictions on speech in limited or nonpublic fora, however, need only be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral."

Two considerations guided the Circuit. First, Supreme Court has "repeatedly referred to public streets as the archetype of a traditional public forum." Second, a street does not lose its status as a traditional public forum simply because it is privately owned: "If the street looks and functions like a public street, then it is a traditional public forum regardless of who holds title to the street." While there are some very limited exceptions to this rule (for example, the Supreme Court has found that a sidewalk inside a military compound was a nonpublic forum, with unique considerations related to the military's "special interest" in regulating speech within the confines

of a military reservation), this was not such a case.

The Circuit easily found that the Cove was, for First Amendment purposes, a public forum, meaning that Brindley's injunction should not have been denied.

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Traffic: Red Light Camera Penalties are Civil, not Criminal, and do not Violate Due Process or other Constitutional Safeguards

Worthy v. City of Phenix City, No. 17-14718 (11th Cir. July 18, 2017).

Vacating the lower court finding that drivers challenging a red light camera program did not have standing, the Eleventh Circuit holds that, despite having standing, the drivers do not sufficiently allege First, Fifth, Sixth or Fourteenth Amendment claims.

In October 2012, after authorization from the Alabama legislature, Phenix City (City) passed an ordinance implementing a red-light cameras program. It contracted with Redflex Traffic Systems (Redflex), a private company specializing in red-light camera installation and operation. Subject to a few affirmative defenses, a motorist who receives a notice of violation under the City's red-light program is liable for a $100.00 civil penalty-but the incident is not reflected on the driver's driving record.

Drivers contesting the penalty must request an administrative hearing in writing. The hearing is before a nonjudicial hearing officer, and the City has the burden of proof by a preponderance of the evidence. Drivers found liable may appeal to the Circuit Court of Russell County, Alabama, upon payment of the standard circuit court filing fee of $279.00. On appeal, the circuit court sits as trier of law and fact, with the exception of the lower burden of proof, the enabling statute requires that the circuit court "use the procedures that apply to criminal convictions in municipal court." If the citation recipient prevails in circuit court, both the filing fee and the hearing costs are refunded.

Thomas Worthy (Worthy) and other drivers received red-light citations. He requested and attended an administrative hearing. Though the hearing officer found Worthy liable for the violation, he did not appeal to circuit court because the filing fee exceeded the cost of the fine. Neither Worthy nor the other appellants paid their civil penalties and were subsequently pursued by collection agencies. They filed a federal lawsuit, alleging that the City policy violated their federal and state constitutional rights because it imposes penalties without providing constitutionally sufficient processes to challenge them. They demanded damages and sought to enjoin the red-light program.

The City and Redflex moved to dismiss, arguing that the appellants lacked standing to sue and that even if they had standing, they failed to state a viable claim for relief. The district court agreed that appellants lacked standing to challenge the red light procedures "because they cannot trace any injury to a process which they failed to utilize" and dismissed.

On appeal, the Eleventh Circuit reversed. It reviewed the requisites for standing. To bring suit in federal court, a plaintiff must show that (1) it suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) "there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision."

The Circuit found that appellants had standing to bring their damages claims, because they had alleged injury which was capable of remedy. But the court reached a different conclusion as to the demand for an injunction against further use of red-light cameras in the City. On this point, appellants did not have standing--they had not sufficiently alleged a substantial likelihood that they would suffer a future injury from the challenged program:

> To potentially receive another red-light citation pursuant to the ordinance, Appellants would first have to: (1) drive to Phenix City; (2) drive on a route that would take them through one of the intersections at which a red-light camera is operating; and (3) violate the ordinance by running a red light. And even if Appellants did that, they would not necessarily suffer a civil penalty. A Phenix City police officer would still have to decide to issue the citation, and even then, a driver still might not face a civil penalty if one of the affirmative defenses applies.

The court cited the consequences of a contrary conclusion: "The result would be to say: 'Want to challenge a state statute or local ordinance in federal court? All you have to do is live in (or at least close to) the jurisdiction in which the law or ordinance applies and allege that you may violate it.'"

The court then assessed appellants' larger claim-that the red-light scheme violated Constitutional due process protections. This required an analysis of whether the program was actually a criminal sanction in the guise of a civil penalty. "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." The legislative history of the enabling statute made it clear that the policy was always intended to be civil-only; no showing of scienter was required, the program did not provide for any possibility of criminal sanctions, the remedy was not punitive in nature and imposed only a modest fine, and the infraction had no impact on a driving record. "At bottom, it is clear that the Alabama legislature and Phenix City intended that the penalty imposed pursuant to the red-light-camera ordinance be civil."

This finding doomed most of appellants' Constitutional claims. Their arguments about Fifth Amendment (self-incrimination) and Sixth Amendment (confrontation of witnesses) did not apply in a civil context. Their claim that the program allowed imposition of a penalty without requiring proof beyond a reasonable doubt would only apply in a criminal setting. Their First Amendment claim that they had been divested of the right to petition the courts for redress of grievances was inapt because they had not taken advantage of the available appeals process.

Appellants also failed in terms of Fourteenth Amendment due process claims. The red-light policy was rationally related to the legitimate governmental purpose of enhancing public safety. And the appeals policy did not violate due process norms: a citation recipient did not have to pay anything to challenge the citation at an administrative hearing. And though it costs $279.00 to appeal to circuit court, that fee was refundable if the citation recipient ultimately prevailed. "Accordingly, the only potentially erroneous deprivation that must be suffered to invoke the procedures provided in the ordinance is a modest, temporary filing fee. This is not a significant private interest."

The Circuit found that the additional procedures appellants ostensibly sought-requiring that the City immediately provide a full judicial hearing, prove violations of the civil ordinance beyond a reasonable doubt, and not collect any fee to appeal-would place an enormous burden on the City and would "encourage frivolous appeals and dilatory tactics by citation recipients."

In sum, the Eleventh Circuit vacated the district court's order dismissing appellants' complaint, but the result was ultimately unchanged. Unlike the district court, it concluded that appellants had standing to challenge the City's red-light-camera ordinance. Because they alleged that they were injured when they received a civil penalty pursuant to the ordinance and because they challenged the constitutionality of the ordinance as a whole, they had standing to bring their claims for damages. But their underlying federal constitutional claims had to be dismissed because they

could not allege a violation of their constitutional rights. And they lacked standing to bring claims for injunctive relief because they had not sufficiently alleged a threat of future harm. "We instruct the district court on remand to enter an amended order of dismissal consistent with this opinion."

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