International Municipal Lawyers Association



e-News: Issue 2 January 26, 2017

In This Issue: 9 Cases & This Just In

ADA: County Not Required to Eliminate Essential Duties of Groundskeeper Job to Accommodate Disabled Worker

Courts: Federal Courts May Take Other Courts' Publicly Filed Records Concerning Matters that Bear Directly Upon the Disposition of a Case

Due Process: Lease Signed on the Basis of City's Faulty Legal Advice not Enforceable by Virtue of Misguided Advice

Firearms: Chicago's Restriction on Permissible Locations for Shooting Ranges is Invalidated

Jails: Failure to Provide Detainees Substitute Garments while Their Prison Uniforms are Laundered is Unconstitutional Punishment

Speech: Law Imposing Time Limits on Political Signs is Content-Based, Fails under Strict Scrutiny Analysis

Speech: Law Requiring Removal of Event-Related Signs within 30 Days After Event is Not Content-Based, Requires Only Intermediate Scrutiny

Speech: Restrictions Against Advertising Discount Prices on Alcohol are subject to Constitutional Challenge

Tribal Law: Crime in Land "Validly Set Apart for the Use of...Indians Under the Superintendence of the Government" Not Within Criminal Jurisdiction of State

THIS JUST IN: Two Trump Supporters Walk into a Bar

Click Here To Print This Issue

Quick Links

IMLA Website

Webinar Calendar

Municipal Jobs Board

Become a Member

Join The IMLA Community

ADA: County Not Required to Eliminate Essential Duties of Groundskeeper Job to Accommodate Disabled Worker

Bagwell v. Morgan County Commission, No. 15-15274 (11th Cir. Jan. 18, 2017).

Affirming the lower court, the Eleventh Circuit has found that a disabled claimant was not able to fulfill all the essential functions required of her as a park groundskeeper, and that the ADA did not necessitate the County's eliminating essential duties from her job description or taking extraordinary measures to provide her with an accommodation.

Katrina Bagwell worked as a groundskeeper for a park in Morgan County, Alabama. Bagwell has a disability that limits her ability to stand or walk for more than one third of the day, decreases her balance, and results in swelling in her right knee and limited mobility. Bagwell claimed both that not all the job functions for the groundskeeper job were "essential" as that term is used in the

Americans with Disabilities Act and that she was able to do them with reasonable accommodation. The lower court granted summary judgment in favor of the County, prompting Bagwell to appeal these two issues.

While Bagwell argued that not all the functions listed in the job description were *essential* because in practice the job entailed far fewer functions, the Eleventh Circuit disagreed, applying the rule that a "function may be essential because the position exists to perform that function, a limited number of employees can perform the function, or the function is highly specialized and requires expertise." Giving substantial weight to what the employer (the County) says is essential, the court found that what was listed as what was expected for the groundkeeper were the "essential" functions. Next, the court disagreed with Bagwell that there was reasonable accommodations that enabled her to perform the functions. Bagwell's primary argument here was that she could be accommodated by the assistance of an ATV and rotating between siting, walking and standing.

While the court agreed that reasonable accommodations could include a multitude of things - from job restructuring to part-time or modified work schedules to reassignment to a vacant position and acquiring or modifying equipment or devices - it found that the County was not required to remove a function or re-allocate job duties for Bagwell. The court found the job was to take care of a park, which included functions ranging from construction projects, to cleaning and outdoor tree work, to navigating wet and slippery outdoor surfaces, and that Bagwell could not consistently perform the tasks as needed since the duties shifted with the needs of the park at issue. Moreover, the court noted the grounds keeping staff were sometimes presented with novel maintenance issues that Bagwell could not perform at all, necessitating a different staff member do it or third-party be hired. This was more than the ADA required and the Circuit affirmed the lower court.

LINK

Courts: Federal Courts May Take Other Courts' Publicly Filed Records Concerning Matters that Bear Directly Upon the Disposition of a Case

Hodgson v. Farmington City, No. 16-4120 (10th Cir. Jan. 10, 2017).

The Tenth Circuit has affirmed a district court's use of other courts' publicly filed records documenting a city's actions and demolition of a deteriorated building.

Kia Lyn Fadel Hodgson and her family are trustees for Rock Manor Trust. They filed suit against Farmington City, Utah after the City demolished a structure on rock manor it deemed unsafe. The Fadels alleged constitutional and statutory civil rights violations and, after the case was dismissed, appealed to the Tenth Circuit.

The Circuit first recounted that the structure was originally built in 1959 as a barn and billboard advertising space, but had deteriorated overtime, such that by 2012 an assessment by the City under the Uniform Code for the Abatement of Dangerous Buildings found the entire structure unsafe and the fire department deemed it an attractive nuisance in addition to a fire and safety hazard. These findings led to the City's "Notice and Order to Repair or Demolish Building," and Rock Manor's refusal to comply, and thus ultimately the City's demolishing it in 2015 after decisions in the City's favor - including two administrative ones, and two appeals through the district court. The demolition included the City sending a bill to the Fadels to cover the cost of demolishing the building, which led to the Fadels $400,000 lawsuit against the City, the subject of this appeal.

The Circuit Court characterized the Fadels challenge this time as "a collateral attack on extended administrative and judicial processes in Utah's state and appellate courts" that lacked new meritorious arguments. Ultimately, it reviewed a single error issue with detail, finding that the lower court correctly accepted facts subject to judicial notice for the 12(b)(6) motion without converting the motion to dismiss to a summary judgment motion. The Court noted federal courts may take other court's publicly filed records into account concerning matters that bear directly upon the disposition of the case, and found here the lower court did so with regard to court records documenting the City's actions and ultimate authorization to demolish Rock Manor.

LINK

Due Process: Lease Signed on the Basis of City's Faulty Legal Advice not Enforceable by Virtue of Misguided Advice

The Pioneer Craft House, Inc. v. City of South Salt Lake, No. 16-4038 (10th Cir. Jan. 13, 2017).

City did not comply with local hearing requirement, making lease ultra vires and unenforceable.

In 2007 the City of South Salt Lake bought the Pioneer Craft House property and subsequently, in 2008, the Pioneer Craft House, Inc. entered into a lease agreement for the non-exclusive use of the facility at a rate of $1.00 per year. In 2012 the City locked Pioneer Inc. out of the facility and terminated the 2008 lease. This prompted Pioneer Inc. to enter into a new one-year lease with the City for the exclusive use of the facility at a higher monthly rate. The City elected not to renew this lease, prompting Pioneer Inc. to file a § 1983 suit against the City alleging the City violated its rights with the 2012 lockout and subsequent refusal to renew the 2008 lease.

The issue in the case was procedural but hinged on the merits. The district court dismissed Pioneer Inc.'s case, holding that the 2008 lease was entered into in violation of state law, meaning it was *ultras vires* and Pioneer Inc., therefore, never had a vested property interest in the facility and was deprived of an interest to vindicate under § 1983. Pioneer Inc. sought leave to amend their complaint, arguing that since the City's attorney advised the mayor and council that no public hearing was required, the City *intended* to violate the Utah state law, and therefore it should be given leave to amend the complaint with these facts and proceed. The Circuit agreed with the lower court, however, that these additional facts were insufficient to establish a protected property interest because a lease entered illegally on the basis of faulty legal advice does not make the lease enforceable by virtue of the misguided advice. The lower court therefore properly rejected the attempt to file an amended complaint.

LINK

Firearms: Chicago's Restriction on Permissible Locations for Shooting Ranges is Invalidated

Ezell v. City of Chicago, No. 14-3312 (7th Cir. Jan. 18, 2017).

In the latest of a long-standing series of cases litigating Chicago's attempts to regulate firearms, the Seventh Circuit affirmed a lower court decision invalidating one of the

city's ordinance which severely restricts the land available for firing ranges.

Under *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Seventh Circuit invalidated a Chicago ordinance prohibiting possession of handguns. In seeking to replace this ordinance, the city then established a regulatory regime that both required one hour of range training as a prerequisite to obtaining a permit to possess a handgun, and prohibited shooting ranges within the city. The first part of this case (*Ezell* I) arose in 2011 when the Seventh Circuit held that the shooting range ban was incompatible with the Second Amendment. Following this decision, Chicago replaced it with a plethora of regulations governing shooting ranges and litigation, again, ensued.

Here, a district judge invalidated a restriction allowing gun ranges only as special uses in manufacturing districts, but upheld two restrictions: 1) a prohibition against gun ranges within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and multiple other uses, and 2) a provision barring anyone under age 18 from entering a shooting range.

On appeal, the Seventh Circuit affirmed in part and reversed in part (ultimately invalidating all three ordinances in dispute). It noted that the manufacturing-district classification and the distancing rule together rendered only 2.2% of the city's total acreage to be theoretically available for use by shooting ranges. Consequently, no shooting range had yet to exist, which severely limited Chicagoans' Second Amendment right to maintain proficiency in firearm use. The court rejected the city's "speculative claims of harm to public health and safety" as inadequate to survive the heightened scrutiny that applies to burdens on Second Amendment rights. The Court also observed that the city could not adequately justify the "overbroad" age restriction; pointing out that one of the city's witnesses agreed that youth firearm instruction was prudent and can be conducted in a safe manner.

LINK

Jails: Failure to Provide Detainees Substitute Garments while Their Prison Uniforms are Laundered is Unconstitutional Punishment

Ingram v. Cole County, No. 16-1046 (8th Cir. Jan. 17, 2017).

The Eighth Circuit has reversed a district court ruling which had upheld the practice of a Missouri detention center whereby detainees were provide only one set of prison garments and had to use a sheet to cover themselves while their uniforms were being laundered twice per week, finding the practice to impermissibly punitive and not supported by a reasonable justification.

The Cole County, Missouri Detention Center (Jail) policy prohibits detainees from wearing their own clothes but only provides one set of clothing for inmates, which is not customary. Women's clothing is washed every four days and male detainees' clothing every two to three days. While the laundry is being done - usually overnight for about 7 hours - inmates are given a bed sheet to cover up. However, the Jail prohibits covering cell windows; without clothing, this leaves inmates exposed to staff, cellmates and other detainees. Moreover, sometimes guards of opposite genders return washed clothing to the detainees.

Three detainees filed suit alleging this practice violated their rights under the Eighth and Fourteenth Amendments to the United States Constitution and sought a restraining order and permanent injunction, as well as damages. After depositions and some discovery the district granted the Jail's motion to dismiss, finding the allegations "no more than a minimal deprivation."

The plaintiffs appealed and the Eighth Circuit reversed.

The Circuit noted that the Due Process Clause prohibits any punishment before sentencing, meaning the question was whether the detainees were being subjected to punishment in the constitutional sense of the term. The Court rejected that this was an Eighth Amendment case and identified it as "a pretrial detainee case under *Bell*. [Meaning . . .] if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment . . . ."

The Court thus looked at whether "going without clothing every few nights, while having a blanket and a bed sheet for cover, [was] more than a *de minimis* imposition." The Court highlighted that other cases about clothing - being allowed to wear only underwear for five days, spending 14 days in solitary with only undershorts and a mattress - turned on the purpose of the deprivation. The purpose here of the detainees being left without clothing at least twice per week was to do laundry, and found this was more than *de minimis.* The deciding factor for the Court was the frequency, as the Court put it "[e]ach deprivation is not exceedingly long, but the deprivations are repetitive and are expected to last the full duration of confinement." This led the Court to ask whether it was reasonably related to a legitimate government purpose which could justify it and the fact that the jail asserted none at all, leading to the ultimate conclusion that the policy "amount[ed] to unconstitutional punishment."

LINK

Speech: Law Imposing Time Limits on Political Signs is Content-Based, Fails under Strict Scrutiny Analysis

Auspro Enterprises, LP v. Texas Department of Transportation, no. 3-13-00375 cv (Tex. App. Dec. 8, 2016).

The Texas Court of Appeals, reversing a lower court, has found that provisions of the Texas Highway Beautification Act which limit roadside display of political signs to 90 days before and 10 days after an election violate the First Amendment based on *Reed*.

In July 2011, Auspro Enterprises, LP (Auspro) placed a sign supporting Ron Paul's 2012 presidential campaign on its property adjoining a state highway in Bee Cave, Texas. The Texas Department of Transportation (DOT) sent a letter to Auspro explaining that its sign was "illegal" because all outdoor signs must receive a permit and, although there is a specific exemption under DOT rules for political signs, the exemption only allows political signs to be displayed 90 days before and 10 days after an election.

Auspro failed to remove the sign, and DOT brought an enforcement action for injunctive relief and civil penalties. In response, Auspro asserted that the Texas Highway Beautification Act (Act) and DOT's implementation thereof violated Auspro's free speech rights under the U.S. and Texas constitutions. The district court held in DOT's favor, concluding that the Act and DOT's rules were not unconstitutional as applied to Auspro.
The Texas Court of Appeals reversed, based on *Reed*. It found that the Act was inherently content-based in applying different removal deadlines for event signs. It noted that, despite Justice Alito's concurrence in *Reed* to the effect that time restrictions for one-time events would not be considered content-based, Justice Kagan had stated that "of course" restrictions on one-time event signs would be facially content-based in light of the majority's decision because they would "single out specific subject matter for differential treatment."

The Texas court struck the challenged provisions of the Act:

> Like the Town of Gilbert's sign ordinance, the Texas Act and the related Department rules restrict speech in different ways based on the communicative content of the sign. For example, a sign advertising a presidential candidate's fundraising event at the site where the sign is displayed would be allowed at any time under the Texas Act, while a sign that merely expresses the view that one should vote for that same presidential candidate would be banned during all but the small window around an election. Likewise, and more to the point here, Auspro's election sign for Ron Paul is treated differently under the Department rules (promulgated under the Act) than are signs conveying other messages and ideas, including, for example, a sign by a nonprofit organization advertising an event by that organization. Under *Reed*'s framework, the Texas Act's outdoor-advertising regulations and associated Department rules are, on their face, content-based regulations of speech.

LINK

Speech: Law Requiring Removal of Event-Related Signs within 30 Days After Event is Not Content-Based, Requires Only Intermediate Scrutiny

Act Now to Stop War and End Racism Coalition v. District of Columbia, no. 12-1239 and 12-1240 (D.C. Cir. Jan. 24, 2016).

Reversing the district court, the D.C. Circuit has upheld a Washington D.C. sign regulation which allows signs to be affixed to lampposts for 180 days, provided that signs promoting an event must be removed within 30 days after the event, irrespective of the 180-day period. The court found that such a distinction was not content-based and did not require strict scrutiny analysis-and that the law was narrowly tailored and reasonably related to a municipal goal of reducing clutter.

The District of Columbia (District) regulates the manner in which members of the public may post signs on District lampposts. District law allows any sign to remain on a public lamppost for up to 180 days, except that signs relating to an event must be removed within 30 days after the event, even if the 180-day period has not yet expired.

Two nonprofit organizations, the Act Now to Stop War and End Racism Coalition (ANSWER) and the Muslim American Society Freedom Foundation (MASF), challenged the District sign-posting rule. MASF argued that the distinction between event-related signs and other signs was content-based but did not meet First Amendment strict scrutiny--and that, even if not content based, failed the intermediate scrutiny applicable to content-neutral time, place, and manner restrictions. Second, MASF contended that the District law delegated an impermissible degree of enforcement discretion to the District's inspectors, in violation of due process. It further challenged what it contended was strict liability for any violation of the sign-posting rule, which MASF argued contravened its speech and due process rights.

ANSWER, unlike MASF, was cited by the District for violations of the regulation. ANSWER sought damages under § 1983, contending that it did not violate the regulation and that citations were unconstitutional retaliation against it for its postering.

The district court granted summary judgment to MASF, invalidating the law on both First Amendment and due process grounds, but rejected MASF's strict-liability objection. The court also sanctioned the District for seeking discovery in the face of an order granting limited discovery to plaintiffs. The district court granted summary judgment to the District on ANSWER's section 1983 damages claim for lack of a *Monell*-based showing of a policy, custom, or practice of retaliatory enforcement. The District and the organizations cross-appealed.

The DC Circuit reversed, seeing no content-based restriction in the District law which would contravene *Reed*:

> We conclude that the regulation does not impose a content-based distinction because it regulates how long people may maintain event-related signs on public lampposts, not the content of the signs' messages. The "event-related" category is not itself content based. Under the intermediate First Amendment scrutiny that is therefore applicable, the rule is a reasonable time, place, and manner restriction. It is narrowly tailored to further a well-established, admittedly significant governmental interest in avoiding visual clutter. The regulation's definition of event-based signs also guides officials' enforcement discretion sufficiently to avoid facial invalidation on due process grounds. Accordingly, we reverse the grant of summary judgment in MASF's favor and remand for the district court to enter summary judgment for the District.

The Circuit also affirmed the district court's dismissal of ANSWER's § 1983 damages claim and MASF's claim that the District regulation imposed an impermissible system of strict liability.

LINK

Speech: Restrictions Against Advertising Discount Prices on Alcohol are subject to Constitutional Challenge

Missouri Broadcasters Association v. Lacy, No. 16-2006 (8th Cir. Jan. 19, 2017).

Reversing a dismissal at the district court, the Eighth Circuit has found that various Missouri regulations which limit alcohol advertising--including a prohibition on discount pricing from being advertised outside the establishment where the discounts are being offered-were not sufficiently correlated to a legitimate state interest and required constitutional analysis.

Missouri enacted one statute and two regulations limiting advertising language for the alcohol business. Specifically the state prohibited advertising discount prices for alcohol outside the establishment where the discount was occurring, prohibited retailers from advertising prices below the retailers' actual costs, and passed a law specifying how distillers and wholesalers could promote the retailers selling their product. A non-profit amalgamation - the Missouri Broadcasters Association - filed suit alleging the law and regulations violated their First Amendment rights, because they "prohibit truthful, non-misleading commercial speech and restrict the free flow of truthful information to potential customers." The district court - without comment - granted a motion to dismiss for failing to state a claim. That promoted an appeal by the plaintiffs and the Eighth Circuit to reverse.

The Eighth Circuit looked to *Central Hudson's* holding for commercial speech regulation, noting the case "identified four considerations to determine the constitutionality of laws burdening commercial speech: "(1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest." Given that the defendants agreed the regulations did prohibit truthful, non-misleading speech and the plaintiffs conceded the state had a legitimate interest in responsible drinking, the Circuit was left with two outstanding *Central Hudson* elements to review.

As to whether the provisions directly advanced the state's interest, the court found the defendants pleaded sufficient facts to put this in question. In particular, the court pointed out that while there is a connection between advertising and increased alcohol demand and sales, that does not necessary mean the increased sales lead to irresponsible drinking (the stated interest). Moreover, the court found inconsistencies in the regulations that undermined the state's position, especially that one of the provisions explicitly exempted manufacturers of intoxicating liquor other than beer and wine from its ban on advertising rebate coupons.

The court also found the defendants sufficiently pleaded facts for the second outstanding element - whether the challenged restrictions were more extensive than necessary. The court identified reasonable alternatives Missouri could have enacted that would have been less intrusive to the defendant's First Amendment rights, citing limiting alcohol purchases by heavily taxing it and/or regulating alcohol or developing educational campaigns about the effects of alcohol. As a result, the court found the pleadings should have survived the motion to dismiss and reversed.

LINK

Tribal Law: Crime in Land "Validly Set Apart for the Use of . . . Indians Under the Superintendence of the Government" Not Within Criminal Jurisdiction of State

Hackford v. State of Utah, No. 15-4120 (10th Cir. Jan. 19, 2017).

A man cited for a traffic violation on former reservation land validly transferred to the federal government is liable under Utah state law.

On December 4, 2013 Richard Douglas Hackford was cited for a variety of traffic offenses on State Road 40 around Mile Post 44 in Wasatch County, Utah. Hackford responded to the citations by filing suit against Utah, arguing it had no authority over him because the incident took place in "Indian Country."

The Supreme Court has been clear that "Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian Country," meaning only the federal government or a Native American tribe may prosecute criminal cases in "Indian Country." The issue for the district - and the Tenth Circuit - was therefore whether the location of the traffic incident was or was not within Indian Country. In reviewing the case, the Court therefore noted that the Uintah Indian Reservation was first created by President Abraham Lincoln via an 1861 executive order. Between 1902 and 1905, however, federal policy shifted somewhat and instead of being contiguous the reservation lands were broken into "allotments" with "unallotted land" being added to existing federal forest reserves.

The specific spot where Hackford was cited, called the Strawberry Valley Project land, was taken out of the Uintah Indian Reservation in 1905 when President Roosevelt set it aside for a reservoir and paid the Ute Indians $1.25 per acre. All of these acts were, as required, ratified by Congress and this history has long been the subject of litigation in Utah, as Native Americans had sought to define the specific boundaries of the reservation and argued against disestablishment of the original reservation lands. However, a previous court case holding the Strawberry Valley Project land was disestablished was not appealed in 1983, leading the Tenth Circuit to affirm the lower court's ruling that Hackford was cited in a part of the *former* reservation and thus within Utah's jurisdiction, leaving him liable for the traffic citation.

LINK

THIS JUST IN: Two Trump Supporters Walk into a Bar...

Despite a fractious weekend in the nation's capital, there is still evidence of goodwill among our citizens. Witness the attached story in this morning's Express (a paper handed to Washington metro riders each day) recounting what happened on Sunday as two Trump supporters entered "Busboys and Poets," a favorite local DC restaurant named in honor of Langston Hughes.

Although the "blue" establishment was no doubt full of Women's March attendees and not necessarily a hospitable environment for "red" voters, the interaction between the two patrons and the 25-year old African-American waitress was beyond cordial. Leaving a $450 tip on a $72.60 bill, the diners wrote this note:

"We may come from different cultures and may disagree on certain issues, but if everyone would share their smile and kindness like your beautiful smile, our country will come together as one people. Not race. Not gender. Just American."

We live in an amazing country.

CLICK HERE to read the article.

IMLA

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

