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IMLA NEWS
Issue 5 – May 15, 2025

FEATURED CASE

Trial Court Bans on Protests Outside of Established Buffer Zone Vacated and Remanded to Determine if Ban was Narrowly Tailored

***Grant v. Trial Court of the Commonwealth of Massachusetts*, No. 25-1380 (1st Cir., May 9, 2025)**

An Order that bans all forms of protest in a buffer zone beyond courthouse grounds is not narrowly tailored to serve a significant governmental interest. However, the order may become narrowly tailored by including a specific mens rea requirement that the people protesting intend to interfere with the administration of justice.

Background:

In June 2022, Karen Reed was indicted for murder in Massachusetts. She pled not guilty and her original trial ended in a mistrial due to a non-unanimous jury verdict. Prosecutors decided to retry her case, which had attracted significant public attention, leading to demonstrators gathering near the Norfolk County courthouse. These protests were allegedly loud, had demonstrators shout at trial participants and the family of the victim, display materials that may have been entered into evidence, and intimidated witnesses. In response, the state court created a buffer zone around three sides of the courthouse that prevented demonstrations within 200 feet of the complex during the trial. This order was upheld by the Massachusetts Supreme Judicial Court after a challenge by the Plaintiff protesters.

Before the retrial commenced, the Commonwealth asked for a broader order further limiting the demonstrators who had been protesting on the sidewalks on the Northwest side of the courthouse as well. This revised order was granted on the basis that in order to have a fair trial and impartial jury the buffer zone must be expanded. The Commonwealth had submitted evidence that during the first trial people participating in the proceedings could hear the protesters outside the buffer zone, and a juror reported that the protesters could be heard even as the jury was deliberating. The Plaintiffs move for a preliminary injunction, which was denied, and appealed to the First Circuit.

Legal Questions:

1. Does the imposition of a buffer zone beyond courthouse grounds violate First Amendment rights of free speech and assembly?
2. Was the order that prevented all forms of protest in the extended buffer zone narrowly tailored to serve a significant government interest?

Holdings:

1. The imposition of a buffer zone that extends beyond courthouse grounds does not necessarily violate First Amendment rights of free speech and assembly.
2. The order that extended the buffer zone to the nearby street was not narrowly tailored to serve a significant government interest because it banned all forms of protest in the buffer zone, not just the protests that specifically attempted to disrupt court activities.

Analysis:

At oral argument Plaintiffs did not challenge the order as it pertained to the courthouse grounds, the pathways by which trial participants entered and exited the courthouse, or noisy protests. The Plaintiffs' challenge hinged on quiet, offsite demonstrations on public property, in areas and at times that do not interfere with trial participants' entrance into and exit from the courthouse, that do not interfere with the administration of justice, and that will not influence any trial participants in the discharge of their duties.

The First Circuit noted that the sidewalks where the Plaintiffs intended to demonstrate are "quintessential public forums" that can only be regulated if the order is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." The court looked to a Supreme Court case, *Cox v. State of Louisiana*, 379 U.S. 559 (1965) which decided the constitutionality of a Louisiana statute that made it a crime to picket near a courthouse with the intention of interfering with the administration of justice or influencing any judge, juror, witness, or court officer in the discharge of their duties. The statute in *Cox* had been upheld as narrowly tailored to serve a significant state interest.

The Circuit Court concluded that because the Louisiana statute included an explicit mens rea requirement targeting a specific type of speech that threatened the courts' functioning that was absent from the order issued by the lower court, it vacated the trial court order, and remanded to determine whether the lack of a mens rea requirement rendered the order insufficiently tailored.

The court also noted that the lower court could simply issue an amended order that includes a mens rea requirement and the matter would likely resolve itself given that the protesters had not challenged their ability to be noisy in their protests, and a quiet protest that does not disrupt court activities on the part of the protesters would be in compliance with the amended order.

This case underscores the need for specific language when drafting laws, orders, or ordinances that touch on First Amendment rights, and adds a tool in the toolbox of a drafter of any such law, order, or ordinance of a mens rea requirement that makes a statute limiting assembly more likely to be upheld.

Grant v. Trial Court of the Commonwealth of Massachusetts

SHORT SUMMARIES:

6th Circuit – Pretermination Hearing – Due Process

A long-time county employee was fired. Believing the termination unfair, the employee sued. The work environment apparently included some toxic interpersonal relationships and the employee considered that those relationships targeted him for dismissal including his rights of free speech, age, political affiliation among others. Employees in the workforce accused him of harassing them based on their sexual orientation, union membership and bullying in general. The county decided to terminate the employee. It conducted an investigation and eventually issued a pretermination notice and afforded him the opportunity for a post termination hearing. Upon termination, when the employee sued, he asserted various claims. The lower court found those claims wanting, but the panel concluded that despite agreeing with the lower court on all other claims reversed on whether the employee had received due process in his pretermination proceedings saying "All in all, though employers need not give notice of the charges with "exacting specificity," Devlin v. Kalm, 531 F. App'x 697, 708 (6th Cir. 2013), there is a material factual dispute about whether the interview gave Hieber sufficient notice of the charges and evidence against him or gave him "an opportunity to present his side of the story," Loudermill, 470 U.S. at 546."

Hieber v. Oakland County

9th Circuit – Attorney's Fees

Thanks and Aloha to Daniel Gluck, Deputy Corporation Counsel, Honolulu for passing along this Order from the 9th Circuit. Hawaii criminalized possession of butterfly knives (the "balisong" in the Philippines). These are knives that have a sharp blade enclosed on either side by covers that open at the base of the knife to form the handle of the knife. These are knives that can be easily concealed yet very lethal. People upset at the passage of this law sought relief from the courts arguing that their 2nd Amendment rights were impinged by the law. The lower court denied relief but the challenge proved successful with a 9th Circuit panel decision concluding the law violated the Plaintiffs' rights. A rehearing en banc was both requested and granted. Once granted, circuit practice vacates the panel decision pending a decision by the circuit en banc. During the pendency of the tortoise like speed of process of the judiciary, the legislature amended the law and the en banc court concluded the case was moot. The Plaintiffs sought attorneys' fees. These were denied because the Plaintiffs could not have been the "prevailing party" under the procedural facts of the case.

Teter vs. Lopez

9th Circuit – Inconsistent Verdicts – Excessive Force

This case involves the death of a person at the hands of sheriff's deputies during an arrest. The deputies, faced with a man who was threatening and under some obvious mind bending influences, tased him and attempted to restrain him. The restraint included keeping him prone as he continued to resist and buck and kick, until he stopped and died. The case went to trial and the jury awarded $1.5Million concluding that the officers did not use excessive force or violate the deceased

constitutional rights but were negligent under California law. The panel on appeal concluded that the verdicts were not inconsistent because California negligence law allowed for consideration of all the facts including those that might not be applicable under a Constitutional inquiry.

Alves V. County of Riverside

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